David Stevens
Direct: 416.865.7783
E-mail: dstevens@airdberlis.com

October 18, 2024

BY EMAIL AND FILED VIA RESS

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Marconi:

Re: Enbridge Gas Inc. ("Enbridge Gas")
EB-2024-0078 – Motion to Review and Vary (the "Motion")
Submission of Enbridge Gas on the Integration Capital Issue

We represent Enbridge Gas.

As directed in the OEB's Decision on Threshold Question and Procedural Order No. 2, attached is the Submission of Enbridge Gas on the merits of the Integration Capital Issue. Also attached is the (updated) Motion Record.

Please let us know if you have any questions.

Yours truly,

AIRD & BERLIS LLP

David Stevens

c: Ian Richler, counsel to OEB
all parties in EB-2022-0200 / EB-2024-0078

EB-2024-0078

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc., pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 2024.

AND IN THE MATTER OF the OEB's Decision and Order dated December 21, 2023.

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedur*e of the Ontario Energy Board.

ENBRIDGE GAS INC.

Submissions on Motion to Review and Vary OEB's December 21, 2023 Decision in Phase 1 of Enbridge Gas Inc.'s Rebasing Application

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October 18, 2024

AIRD & BERLIS LLP

Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

David Stevens
(dstevens@airdberlis.com)

Tel: (416) 863-1500

OVERVIEW

1. In its Decision on Threshold Question dated October 8, 2024, the OEB found that Enbridge Gas Inc. ("**Enbridge Gas**" or the "**Company**") had met the review motion threshold and that the OEB would hear the "Integration Capital Issue" on its merits.

2. The portion of the OEB's December 21, 2023 Rebasing Phase 1 Decision with Reasons in EB-2022-0200 ("**Decision**") that denied inclusion of the $119 million of undepreciated capital costs for integration capital in 2024 rate base is incorrect as it relies on factual errors, and then fails to properly apply the OEB's own policies and principles.

3. The OEB's Decision on the Integration Capital Issue improperly interprets the evidence presented and relies on that improper interpretation to deny future recovery of the costs. This error is seen in two main ways:

   i. The OEB erroneously found that the main integration capital expenditures at issue were directed at property consolidation projects that were only needed because of integration. The OEB cited this as justification for why the Company and not ratepayers should absorb remaining costs. The OEB's finding is incorrect. The property consolidation projects were planned but did not proceed. The integration costs at issue do not include any amounts for property consolidation projects. The main integration capital expenditures were actually directed at information technology ("**IT**") projects that were needed regardless of integration.

   ii. The OEB found that Enbridge Gas had integration savings that exceeded costs and therefore it is fair to have the Company absorb the remaining costs. In fact, the Company's total integration costs exceeded savings by more than $100 million.

4. Ratepayers are receiving the full ongoing benefit of integration savings achieved during the deferred rebasing term (more than $85 million per year) in the new 2024 rates. Ratepayers are also receiving the ongoing benefit from the refreshed IT systems that the OEB found should be funded entirely by Enbridge Gas's shareholder. That is unfair, inconsistent with the OEB's own policies and unsupported by the reasoning in the OEB's Decision on the Integration Capital Issue.

5. Under the OEB's MAADs policies (as recently clarified), and under the OEB's "beneficiary pays" and "benefits follow costs" principles, it is proper that ratepayers pay for the remaining costs of the integration capital investments. This is very clear when the factual errors explained above are corrected.

6. Enbridge Gas requests that the OEB vary the Decision in relation to the Integration Capital Issue by approving the inclusion of the undepreciated integration capital costs in 2024 rate base, which would be a net amount of $91 million. This is the proper outcome from correcting the errors in the Decision.

7. Alternately, Enbridge Gas requests that the OEB direct a rehearing of the Integration Capital Issue by a differently constituted panel of the OEB.

THE OEB DECISION ON THE INTEGRATION CAPITAL ISSUE

8. The Integration Capital Issue arises from the portion of the OEB's Rebasing Phase 1 Decision addressing 2024 rate base, and in particular on the question of whether the undepreciated value of capital spending on integration projects should be included in the opening 2024 rate base.[1]

9. The OEB disallowed the inclusion of integration capital costs in rate base and found this to be consistent with the EB-2017-0306 "MAADs proceeding" that approved the amalgamation of Union Gas and Enbridge Gas Distribution ("**MAADs Decision**")[2]. The OEB stated that the MAADs Decision had concluded that a five year deferred rebasing term was sufficient for Enbridge Gas to recover its "transition costs". The OEB then found that Enbridge Gas had in fact found sufficient productivity savings over the deferred rebasing term to be able to pay for the $119 million of undepreciated integration capital costs.

10. The OEB agreed with Enbridge Gas that it is appropriate to consider the "benefits follow costs" principle when deciding who should pay for the integration capital costs (Enbridge shareholder or ratepayers). On this point, the OEB said that it "must consider the impetus for the specific costs incurred". The OEB referenced real estate consolidation projects by Enbridge Gas totaling over $200 million and concluded that the costs in question "would not have been incurred in the first place in the absence of amalgamation". The OEB therefore decided that it would be a windfall to Enbridge Gas to retain five years of amalgamation benefits and pass along these integration costs to ratepayers.

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[1] The OEB's findings on the Integration Capital Issues are found pages 71-76 of the Decision, Motion Record, Tab 2.
[2] Decision, page 74, Motion Record, Tab 3. The August 30, 2018 EB-2017-0306/0307 Decision and Order (the "**MAADs Decision**") is found at Tab 8(c) of the Motion Record.

11. The OEB's Decision on the Integration Capital Issue, which Enbridge Gas challenges as incorrect, has a material financial impact on Enbridge Gas. The effect of the OEB's Decision on the Integration Capital Issue is that Enbridge Gas must write off the full remaining amount of undepreciated integration capital costs. In its decision on the Phase 1 Rate Order, following submissions from parties, the OEB determined that the proper amount to be disallowed from rate base is $91 million.[3]

12. The write-off of integration capital expenditures reduces revenue requirement in 2024 by approximately $34 million and has a similar impact (subject to adjustment by the price cap mechanism) over the 2025-2028 IRM term.

13. The errors on the Integration Capital Issue have further material impacts that go beyond direct financial impacts to Enbridge Gas. For instance, they have the effect of constraining Enbridge Gas's ability to attract capital to invest in Ontario and making such investments less attractive than other opportunities.

THE DECISION ON THE THRESHOLD QUESTION

14. Enbridge Gas filed a Review Motion, which it subsequently amended and narrowed, seeking OEB review and variance of aspects of the Decision.

15. In Procedural Order No. 1, the OEB directed Enbridge Gas to file submissions about whether the matters raised in the Fresh as Amended Notice of Motion for Review pass the "threshold question" set out in the OEB's Rules of Practice and Procedure.

16. After hearing from Enbridge Gas and interested parties, the OEB determined that the Review Motion with respect to the Integration Capital Issue meets the threshold stating as follows:

> *The concerns raised by Enbridge Gas about the original panel's findings on the Integration Capital Issue should be heard on the merits. These concerns are not merely about how the original panel weighed the evidence or exercised its discretion. They include alleged factual errors that Enbridge Gas claims were material. To be clear, at this threshold stage, the review panel makes no findings on whether in fact the Decision included factual errors, or whether, in the absence of such alleged errors, the outcome on the Integration Capital Issue should have been different. Those are matters that can and should be addressed in a hearing on the merits.*[4]

[3] EB-2022-0200 Interim Rate Order, April 11, 2024, page 5, Motion Record, Tab 7.
[4] Decision on Threshold Question and Procedural Order No. 2, October 8, 2024, page 7.

17. The OEB directed Enbridge Gas to file submissions on the merits of the review of the Integration Capital Issue.

18. In the submissions that follow, Enbridge Gas sets out its position and argument. While the Company has chosen to reply to a small number of expected arguments that may be advanced by OEB staff and intervenors (based on the submissions filed for the determination of the "Threshold Question"), not all items already raised have been addressed. Enbridge Gas reserves the right, which it plans to exercise, to respond to all submissions received in oral or written reply (depending on the OEB's directions).

THE REVIEW MOTION STANDARD

19. Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* contemplates that a review motion may be granted where the OEB made a material and clearly identifiable error of fact, law or jurisdiction. The onus is on the moving party to raise a question as to the correctness of the order or decision.[5] For example, the moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature.[6] The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.[7]

20. Under Rules 40 and 43, it is clear that on a Review Motion, the OEB has the power to vary, suspend or cancel the decision at issue.

THE ERRORS IN THE DECISION

21. There is a strong basis to determine that the Decision is incorrect with respect to the Integration Capital Issue.

[5] EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4, Motion Record, Tab 5(a).
[6] NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review Decision with Reasons, May 22, 2007, pages. 17-18, Motion Record, Tab 5(b).
[7] Rules 42.01(a) and 43.01(d), Motion Record, Tab 4; see NGEIR Review Motion, pages 17-18, Motion Record, Tab 5(a).

(a) Overall Errors

22. Pursuant to section 36 of the *OEB Act*, the OEB has an obligation to set rates that are just and reasonable.

23. The term "just and reasonable" is a legal standard established and repeatedly confirmed by the Supreme Court of Canada for nearly one century. In *Ontario (Energy Board) v. Ontario Power Generation*[8], Justice Rothstein explained that this standard requires that the service provider recover its reasonable costs of service and earn a reasonable rate of return.

24. As a result of the errors of fact and law made by the OEB in relation to the Integration Capital Issue, the OEB failed to set rates that are just and reasonable.

25. Enbridge Gas invested substantial amounts of capital in projects that were called "integration capital" but which were investments like new customer information systems with long-lasting impacts that will benefit ratepayers for many years. The reason why these were called "integration" capital projects is because they involved EGD and Union rate zones at the same time (even where the projects were separately needed). Disallowing Enbridge Gas from including those costs in rate base means that the utility is not recovering its reasonable costs of service and is earning no return on those investments.

26. Moreover, the OEB has an obligation to provide reasons supporting the determinations set out in its decisions. The reasons must take account of the positions taken by parties and provide an explanation for the OEB's decisions.

27. The Supreme Court of Canada has consistently emphasised the importance of reasons, both to the parties to the proceeding, and to the public at large. In *R. v. Shepard*, the Court articulated both the external and internal importance of reasons. Externally, reasons allow the public to understand the "rules of conduct applicable to their future activities".[9] Internally, the requirement that a decision maker give reasons "concentrates the judicial mind on the difficulties that are present."[10]

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[8] *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, Motion Record, Tab 6(a).
[9] *R. v. Shepard*, 2002 SCC 26, para. 22, Motion Record, Tab 6(b).
[10] *Ibid*.

28. Where a decision has a right of appeal, the decision maker's reasons must be sufficient to allow a reviewing court or tribunal to understand the basis upon which the decision was made.[11] The failure to provide adequate reasons precludes meaningful review, and, in effect, deprives the parties of their right of appeal from the decision. This amounts to "an error in law and can result in a miscarriage of justice."[12]

29. While most of the law around the inadequacy of reasons has developed in the context of appeals from court decisions, the same principles apply in the context of administrative tribunals.[13] Indeed, reasons can be even more important in the administrative context. Reasons provide legitimacy to the decisions of administrative tribunals, and provide "justification, transparency and intelligibility" to the tribunal's decision.[14] As the Supreme Court of Canada wrote in *Vavilov*, where reasons are required, "they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts."[15]

30. The OEB's Decision disallowed the full remaining value of Enbridge Gas's undepreciated integration capital costs from being included in rate base.[16] In effect, the OEB ordered that Enbridge Gas must forever bear the cost consequences of investments made during the deferred rebasing term, even where those investments benefit ratepayers on an ongoing basis. This determination to disallow around $100 million in costs was made in a two page "Findings" section of the Decision.[17]

31. The OEB failed to address many key items in this overly brief "Findings" section and failed to meet the expected standard for reasons to be provided supporting a tribunal's decision. In particular, the OEB failed to provide reasons for its interpretation of OEB policies, failed to address material evidence or arguments adduced by Enbridge Gas and made findings without adequately explaining the evidentiary foundation and chain of reasoning in support of those findings. Each of these insufficiencies is a reviewable error that, at very least, supports a

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[11] *Farej v. Fellows*, 2022 ONCA 254, para. 44, Motion Record, Tab 6(c).
[12] *Ibid*.
[13] *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65, para. 79, Motion Record, Tab 6(d).
[14] *Ibid,* para. 81, Motion Record, Tab 6(d).
[15] *Ibid*.
[16] Decision, page 74, Motion Record, Tab 2.
[17] Decision, pages 74-76, Motion Record, Tab 2.

quashing of the aspects of the Decision for which the reasons were inadequate, and a rehearing.[18]

(b) Factual Errors Specific to the Integration Capital Issue

32. The OEB's findings within the Decision on the Integration Capital Issue total approximately two pages. More than half of that space is devoted to the two items where key factual errors were made.[19] The OEB itself relied heavily on these two factual errors in deciding not to allow recovery of integration capital costs.

33. The OEB's first key factual error is the finding that Enbridge Gas had spent most of the integration capital amounts on property consolidation projects required because of amalgamation. The OEB relied on that factual finding to mistakenly conclude that "the cost would not have been incurred in the first place in the absence of amalgamation":

> *The OEB agrees that benefits should follow costs, yet the OEB must also consider the impetus for the specific costs incurred. For example, CCC and SEC referenced the GTA East and West facilities at a total cost of $67.3 million submitting that real estate consolidation projects would not have been undertaken in the absence of the amalgamation. CCC and SEC also identified similar integration projects totaling $153.9 million. The ongoing use of those buildings may provide benefits to ratepayers, yet the cost would not have been incurred in the first place in the absence of amalgamation.*[20]
> [emphasis added]

34. As seen in the Decision, this was a key finding because the OEB relied on it to conclude that benefits followed the costs, such that the Decision is consistent with OEB policy.

35. The OEB's findings are factually incorrect. Enbridge Gas did not spend $153.9 million on real estate integration projects. In fact, Enbridge Gas did not spend any amount on real estate integration projects. That was set out in Enbridge Gas's updated evidence and in testimony

[18] *Farej v. Fellows*, 2022 ONCA 254, para. 43, Motion Record, Tab 6(c).
[19] Note that factual errors were also made in the OEB's observation (at page 75 of the Decision) that Enbridge Gas could have decided to depreciate the integration capital costs more quickly. Enbridge Gas would not have been allowed to make that type of unilateral decision to depreciate certain assets at a different rate from OEB-approved levels. If it did so, the revenue requirement impact would have needed to be removed (credited) from Enbridge Gas's financial results, with an offsetting debit to the Accounting Policy Changes Deferral Account for recovery from ratepayers.
[20] Decision pages 74-75, Motion Record, Tab 2.

at the hearing and in Argument in Chief.[21] Therefore, the amounts and projects considered by the OEB in deciding the "impetus for the specific costs incurred" are not actually part of the undepreciated integration capital costs that Enbridge Gas seeks to include in rate base.

36. The largest of Enbridge Gas's integration capital investments were driven by technology investments to update and align key IT systems. The projects to implement these updated systems had been planned before amalgamation. These investments would have been required in the absence of amalgamation, except that they would not have been done on a combined basis. Key areas where the work was done was in CIS systems (used for billing) and work and asset management systems (used for distribution operations). These are fundamentally important systems to support ordinary utility operations. The cost of upgrading the CIS systems on a combined basis was lower than would have been the case had the legacy utilities undertaken the needed upgrades on a stand-alone basis. All of this was explained in Enbridge Gas's testimony at the hearing[22], and highlighted in Argument in Chief.[23]

37. Other parties may argue that IT projects are no different from other integration projects, and that the OEB would have reached the same conclusion if the Decision had cited those IT projects rather than the real estate consolidation projects as the prime examples of integration capital spending.[24]

38. That is an unfounded position. The IT projects are fundamentally different from property consolidation projects.

39. Enbridge Gas's evidence established that the undepreciated integration capital investments that it seeks to include in rate base are comprised of projects that will continue to benefit ratepayers.[25] Almost without exception, these projects would have been required separately

[21] EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, Table 6, page 21, Motion Record, Tab 3(a) (reproduced at page 83 of the Enbridge Gas Argument in Chief); See also EB-2022-0200, 14Tr.145, Motion Record, Tab 3(b). A review of the SEC submission makes clear that these amounts relate to post-deferred rebasing projects that Enbridge Gas has planned but not undertaken - EB-2022-0200, SEC Final Argument, pages 57-58, Motion Record, Tab 3(d).
[22] EB-2022-0200, 14Tr.145-148, Motion Record, Tab 3(b).
[23] EB-2022-0200, Enbridge Gas Argument in Chief, pages 83-84, Motion Record, Tab 3(c).
[24] See intervenor submissions on EB-2024-0078 Threshold Question - CME Submission July 29, 2024, pages 16-17; SEC Submission July 29, 2024, pages 9-10.
[25] EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, pages 20-25 and Attachment #1, Motion Record, Tab 3(a); and EB-2022-0200, 14Tr.145-148, Motion Record, Tab 3(b).

by either or both of Enbridge Gas Distribution and Union Gas in the absence of amalgamation. However, because the projects were completed on a combined basis they were classified as "integration related".

40. As such, the evidence establishes that the incurred costs classified as "integration capital costs" relate to projects that would have been required with or without integration. Under the OEB's own analysis, the undepreciated portion of the costs for those projects should be recoverable from ratepayers.

41. The OEB's second key factual error is the finding that the integration savings achieved by Enbridge Gas during the deferred rebasing term exceed the capital costs spent by the Company on integration. The OEB justified its finding that the undepreciated capital costs are not recoverable by its determination that Enbridge Gas had integration savings that exceed the integration capital costs. Specifically, the OEB found that Enbridge Gas spent $252 million on capital integration costs during the deferred rebasing term, and that is smaller than the total expected integration savings of $327.6 million.[26]

42. This finding is incomplete and therefore factually wrong. The finding is also not based on submissions from any party at the original hearing.

43. The Company's actual integration capital costs were $189 million. However, the OEB's Decision did not take account of the Company's O&M costs associated with amalgamation over the deferred rebasing term, all of which ($280 million in total) were absorbed by Enbridge Gas without any supplementary recovery in rates.[27] Taken together, Enbridge Gas's total costs classified as integration-related during the deferred rebasing term total $439 million. This amount exceeds the $327.6 million in integration savings that Enbridge Gas achieved during the deferred rebasing term by more than $110 million.

44. The Decision is clear in finding that it's fair for Enbridge Gas to absorb the integration capital costs because its savings exceeded its expenses on integration.

> *Since the savings achieved as a result of amalgamation have exceeded the integration capital investments, with net savings being retained by Enbridge Gas during the deferred rebasing period, Enbridge Gas has not established*

[26] Decision, page 75, Motion Record, Tab 2.
[27] EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, page 17, Motion Record, Tab 3(a).

> *a reasonable basis to support its request to include any integration capital in the 2024 rate base.*[28]

45. One can reasonably assume that the OEB would come to a different conclusion when the facts are corrected. The effect of the OEB's uncorrected Decision is very material, as it requires Enbridge Gas to absorb the undepreciated capital costs, and further denies Enbridge Gas the opportunity to earn any return on those investments that will continue to serve and benefit ratepayers.

(c) OEB's misapplication of its own policies, based upon the incorrect factual findings

46. The OEB's decision on the Integration Capital Issue is not consistent with either the MAADs Decision or with the OEB's MAADs Handbook, nor is it consistent with the OEB's foundational policies of "benefits follow costs" and "beneficiary pays".[29] The OEB misapplied its own policies, driven in large part by the factual errors identified above.

(i) Inconsistency with OEB's MAADs Policies

47. The OEB says that its decision on the Integration Capital Issue is consistent with the MAADs Decision.[30] The OEB indicates that Enbridge Gas knew from the MAADs Decision that the utility shareholder would have to absorb its "transition costs" of the amalgamation[31], and that the OEB had already determined that was a reasonable requirement even within a five year deferred rebasing term (rather than the ten year term requested by the Company).

48. The MAADs Decision states that five years would be a reasonable opportunity for the applicants to recover their transition costs.[32] The MAADs Decision seems to be premised on the SEC estimate that the "cost of consolidation" would be $150 million.[33] This is much less than the more than $400 million of actual expenditures now classified as "integration costs". This is an indication that there is a difference between "transition costs" and what has been labeled as "integration costs".

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[28] Decision, page 76, Motion Record, Tab 2.
[29] The OEB's MAADs policy was originally set out in the January 19, 2016 Handbook to Electricity Distributor and Transmitter Consolidations ("**2016 MAADs Handbook**"), which is included at Tab 5(d) of the Motion Record.
[30] Decision, page 74, Motion Record, Tab 2.
[31] MAADs Decision, page 22, Motion Record, Tab 5(c).
[32] *Ibid*.
[33] MAADs Decision, page 20, Motion Record, Tab 5(c).

49. The amounts that the OEB has now disallowed go well beyond "transition costs". They include very large amounts related to projects that will continue to provide benefits to ratepayers for many years. The fact that these are not simply "transition costs" is seen by their magnitude. While the MAADs Decision was premised on the expectation that Enbridge Gas would absorb $150 million of transition costs, the actual experience was that capital costs of $189 million were expended[34], along with substantial O&M costs of around $250 million for integration[35]. Nowhere in the MAADs Decision is it expressly stated or implied that Enbridge Gas would absorb or fund more than $400 million of costs during a shortened deferred rebasing term, nor that Enbridge Gas would forever fund capital projects that benefit ratepayers on an ongoing basis.

50. In its Argument in Chief and Reply Argument on the Integration Capital Issue, Enbridge Gas also pointed to the fact that the OEB's own MAADs policy does not provide clear direction stating that all capital costs related to amalgamation are the shareholder's responsibility.[36] In its summary of the Integration Capital Issue in the Decision, the OEB notes this submission from the Company (and the responses from SEC and VECC)[37], but the OEB makes no mention of this point in its Findings on this issue. The OEB does not point to any guidance in the MAADs policy establishing that all capital costs of amalgamation must be forever borne by the utility. In fact, as described below, in June 2024 the OEB issued an updated MAADs Handbook that included "clarification" about the treatment of capital integration-related costs that are not fully depreciated at the time of rebasing.

51. Enbridge Gas repeats its position (not addressed in the OEB's Findings) that there is no inconsistency between OEB policy and the Company's position that long-lasting integration capital investments should be included in rate base and paid by ratepayers at rebasing. Enbridge Gas further repeats its position (also not addressed in the OEB's Findings) that a restrictive interpretation of MAADs policy to say that no integration capital costs are

[34] The integration capital costs are described in evidence at EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, pages 20-25 and Attachment #1, and summarized in Table 6 therein, Motion Record, Tab 3(a).
[35] The O&M costs related to integration are described in evidence at EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, pages 16-19, and summarized in Table 4 therein, Motion Record, Tab 3(a).
[36] EB-2022-0200, Enbridge Gas Argument in Chief, pages 86-88, Motion Record, Tab 3(c); and EB-2022-0200, Enbridge Gas Reply Argument, pages 74-76, Motion Record, Tab c(e).
[37] Decision, page 72, Motion Record, Tab 2.

recoverable will lead amalgamating utilities to delay capital projects that could be interpreted as "integration" because they benefit the full entity and thereby delay benefits to customers.[38]

52. There is no dispute that the expectation under the OEB's MAADs policy in the 2016 MAADs Handbook is that transaction and integration costs are "generally" for the account of the shareholder. However, the phrase "generally" must mean something different from "always". The OEB's Decision seems to recognize this by stating that it is appropriate to look at the "impetus" for the integration spending at issue. That the word "generally" does not mean "always" is now even more clear from the fact that the OEB has recently seen fit to expand on its MAADs Handbook guidance about treatment of amalgamation expenses to emphasize that it's important to look at the nature of the expense, to consider "*the nature of the expenditure and whether it would have occurred regardless of the consolidation*".[39]

53. The fact that the OEB's MAADs policy as set out in the 2016 MAADs Handbook is not clear on the point of whether all capital costs related to integration are payable by the shareholder or ratepayers is confirmed by the OEB Staff Discussion Paper filed in the OEB's EB-2023-0188 Evaluation of Policy on Utility Consolidations. In that Discussion Paper, OEB Staff noted that true "transition costs" may not be recoverable after rebasing, but notes that other long-lasting costs may properly be recoverable. OEB staff proposed that clarifying language be added to the MAADs Handbook, stating:

> *OEB staff proposes that language be included in the updated MAADs Handbook to state that, at the post-consolidation rebasing, all capital assets classified as part of the utility's "transition" costs (i.e., capitalized costs intended to integrate operations) which were invested in and put in-service since the consolidation will be subject to review, on a case-by-case basis. The nature of the expenditure and whether it would have occurred regardless of the consolidation will be reviewed, in addition to the typical review for need and prudence. The OEB will determine whether these capitalized costs should be included in the opening test year rate base, if applicable.*[40]

54. On June 18, 2024, the OEB issued its updated 2024 MAADs Handbook, taking into account OEB experience with MAADs applications, the OEB Staff Discussion Paper and other

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[38] EB-2022-0200, Enbridge Gas Argument in Chief, page 88, Motion Record, Tab c(c); and EB-2022-0200, Enbridge Gas Reply Argument, page 79, Motion Record, Tab c(e).
[38] Decision, page 72, Motion Record, Tab 2.
[39] MAADs Handbook (updated), June 18, 2024, page 14, Motion Record, Tab 5(g).
[40] EB-2023-0188 Evaluation of Policy on Utility Consolidations, OEB Staff Discussion Paper (February 8, 2024), pages 36-39, Motion Record, Tab 5(e).

stakeholder comments. Among other things, the updated MAADs Handbook includes several "clarifications", including one related to the "[t]reatment of capital assets classified as part of the utility's "transition" costs at the time of the post-consolidation rebasing".[41] The new version of the MAADs Handbook states as follows:

> *If a utility has capitalized any assets it has classified as part of the utility's "transition" costs (i.e., capitalized costs intended to integrate operations) these will be subject to review, on a case-by-case basis. The nature of the expenditure and whether it would have occurred regardless of the consolidation will be reviewed, in addition to the typical review for need and prudence. The OEB will determine whether it is appropriate to include the remaining book value of these capitalized costs in the opening test year rate base or whether there was an expectation that these costs be recovered through the consolidation savings.*[42]

55. These "clarifications" are not new OEB policy. They are instead guidance about what is meant by existing OEB policy. With that in mind, it's fair to conclude that the OEB's MAADs policy supports a finding that long-lasting capital investments on IT infrastructure that benefits ratepayers is eligible to be recovered on a go-forward basis after rebasing.

(ii) Failure to properly apply "benefits follow costs" and "beneficiary pays" policies

56. In its Argument in Chief and Reply Argument in the Phase 1 Rebasing hearing, Enbridge Gas argued that the undepreciated integration capital costs are properly included in rate base and recoverable from ratepayers under the OEB's foundational policies of "benefits follow costs" and "beneficiary pays".[43]

57. The OEB indicated in the Decision that it agrees that benefits should follow costs but it said that the OEB must consider the "impetus for the specific costs incurred".[44] The fair interpretation of the OEB's Decision is that if the costs were driven by amalgamation then the shareholder should pay, but if the costs were driven by system and business needs that exist regardless of integration, then ratepayers should pay.

58. As described above, the evidence establishes that the Company's integration capital costs that were actually incurred are costs for projects that would have been required with or without

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[41] EB-2023-0188 OEB Cover Letter re updated MAADs Handbook, June 17, 2024, Appendix A, page 1, Motion Record Tab 5(f).
[42] MAADs Handbook (updated), June 18, 2024, page 14, Motion Record, Tab 5(g).
[43] EB-2022-0200, Enbridge Gas Argument in Chief, pages 86-88, Motion Record, Tab 3(c).
[44] Decision, pages 74, Motion Record, Tab 2.

integration. Thus, under the OEB's own analysis, the undepreciated portion of the costs for those projects should be recoverable from ratepayers.

59. Had the OEB focused on the actual integration spending projects that Enbridge Gas undertook (such as IT projects), rather than on projects that were not undertaken (property consolidation), then the OEB would have come to a different conclusion about whether the integration capital amounts should be included in rate base.

60. There is no question that ratepayers will receive the benefit of integration savings and efficiencies after rebasing. The OEB agreed that ratepayers are benefiting from $86 million per year of integration savings on an ongoing basis after rebasing. As Enbridge Gas indicated in Reply Argument, fairness dictates that when customers get the enduring benefit of savings from integration, then customers should also pay for the post-rebasing portion of costs that supported that outcome.[45] The OEB did not address this position in its Findings.

61. In its Decision, the OEB did not mention, let alone meaningfully grapple with, Enbridge Gas's argument that customers should pay for integration capital under the "beneficiary pays" principle. Application of this principle would see the integration capital investments for asset improvements, such as IT systems, that serve customers included in rate base.[46]

62. The Company submits that the OEB's failure to properly apply its own policies to the facts of a case is akin to a legal error. The OEB should not only be expected to properly interpret the facts presented, but it should also be expected to follow and apply its own policies to those facts, especially where the policies in question are as fundamental as the OEB's guiding principles engaged in this motion.[47]

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[45] EB-2022-0200, Enbridge Gas Reply Argument, page 80, Motion Record, Tab 3(e). Indeed, as Enbridge Gas pointed out in its evidence, capital investments in IT infrastructure such as the CIS directly led to ongoing and sustainable cost savings passed to ratepayers at rebasing – EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, pages 9-10, Motion Record, Tab 3(a).

[46] For a recent reference to the "beneficiary pays" principle, see EB-2022-0024 Decision and Order, Phase 2 – July 6, 2023, page 23, Motion Record, Tab 5(j). – "The principle that beneficiaries pay for the costs of their benefits is important and relevant to this proceeding".

[47] In their Submissions made on the Threshold Question July 29, 2024 Submission, page 4), OEB staff say that there is no legal standard related to OEB policies, and therefore failure to apply such policies is not an error in law – see OEB staff Submission July 29, 2024, page 4. This is a troubling position to take. Effectively it negates the importance and predictive power of having OEB policies in the first place if OEB Commissioners are free to ignore or mis-apply such policies as they choose.

RELIEF SOUGHT

63. Taken separately or together, the errors set out above demonstrate that the OEB's decision on the Integration Capital Issue is incorrect, and improperly relies on errors of fact and misapplication of OEB policies.

64. It is fair to conclude that had the original panel of Commissioners properly considered the evidence and properly applied OEB policy, and written adequate and sufficient reasons, then the outcome of the Integration Capital Issue would have been different.

65. Enbridge Gas submits therefore that the panel considering this Review Motion should reverse the Decision and permit Enbridge Gas to include undepreciated integration capital costs in rate base. The reasoning in the original Decision supports this outcome once the factual errors are corrected. Specifically, once it is recognized that the integration capital expenditures at issue continue to benefit ratepayers then the OEB's "beneficiary pays" principle, and its MAADs policy, both dictate that these costs should be included in rate base. The fairness of this outcome is confirmed by recognizing that, in total, Enbridge Gas spent more on integration activities than it saved during the deferred rebasing term.

66. Enbridge Gas therefore respectfully requests that the Decision be adjusted to approve the inclusion of the undepreciated integration capital costs in 2024 rate base, which would be a net amount of $91 million.

67. In the event that there is a finding that the Decision contains errors, but the review panel is not prepared to substitute a new Decision as requested, then Enbridge Gas requests that that the OEB direct a rehearing of the Integration Capital Issue by a differently constituted panel of the OEB.

All of which is respectfully submitted this 18th day of October, 2024.

David Stevens, Aird & Berlis LLP
Counsel to Enbridge Gas

EB-2024-0078

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc., pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 2024.

AND IN THE MATTER OF the OEB's Decision and Order dated December 21, 2023.

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedur*e of the Ontario Energy Board.

MOTION RECORD OF ENBRIDGE GAS INC.

MOTION TO REVIEW AND VARY OEB'S DECEMBER 21, 2023 DECISION IN PHASE 1 OF ENBRIDGE GAS REBASING APPLICATION – INTEGRATION CAPITAL ISSUE

October 18, 2024

AIRD & BERLIS LLP

Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

David Stevens
(dstevens@airdberlis.com)

Tel: (416) 863-1500

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
27th Floor, 2300 Yonge Street
Toronto ON M4P 1E4
Tel: (416) 481-1967

AND TO: **ALL INTERVENORS IN EB-2024-0078**

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    (d) OEB's Handbook to Electricity Distributor and Transmitter Consolidations, January 19, 2016

    (e) EB-2023-0188 Evaluation of Policy on Utility Consolidations, OEB Staff Discussion Paper (February 8, 2024)

    (f) EB-2023-0188 OEB Cover Letter re updated MAADs Handbook, June 17, 2024

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    (a) *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44

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7. EB-2022-0200 Interim Rate Order, April 11, 2024

TAB 1

EB-2024-0078

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc., pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 2024.

AND IN THE MATTER OF the OEB's Decision and Order dated December 21, 2023.

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedur*e of the Ontario Energy Board.

FRESH AS AMENDED NOTICE OF MOTION

Enbridge Gas Inc. ("**Enbridge Gas**" or the "**Company**") will make a Motion to the Ontario Energy Board ("**OEB**") on a date and at a time to be determined by the OEB.

PROPOSED METHOD OF HEARING: Enbridge Gas proposes that the Motion be heard by way of an oral hearing.

THE MOTION IS FOR:

1. A review and variance of those portions of the Decision and Order in EB-2022-0200 dated December 21, 2023 (referred to herein as the "**Decision"**) in which the OEB determined the following issues (collectively referred to in this Motion as the "**Review Issues**"):

    i. The lengthening of the Average Useful Life of seven asset classes for depreciation purposes ("**Asset Lives Issue**"); and

    ii. The denial of the inclusion of undepreciated capital costs for integration capital in 2024 rate base ("**Integration Capital Issue**").

2. An Order that the Motion raises issues material enough to warrant a review of the Decision on the merits thus satisfying the "threshold test" in Rule 43.01 of the OEB's *Rules of Practice and Procedure* in relation to each of the Review Issues.

3. Variation of the Decision in relation to the Review Issues and approval of the relief requested by Enbridge Gas in the Application and its Reply Argument in relation to the Review Issues.

4. In the alternative to (3), an Order directing a rehearing of the Review Issues by a differently constituted panel of the OEB.

5. Such further and other Orders as Enbridge Gas may request and the OEB approves.

THE REVIEW MOTION STANDARD:

1. Rule 40.01 of the OEB's *Rules of Practice and Procedure* allows any person to bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

2. Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires that a notice of motion set out the grounds for the motion, which may include:

    i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction;

    ii. new facts that have arisen since the decision was issued that, had they been available at the time of the proceeding, could reasonably be expected to have resulted in a material change to the decision; or

    iii. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

3. The OEB has confirmed that this list of grounds is "not an exhaustive list". What is required is that the motion to review must raise a question as to the correctness of the order or decision.[1] The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made

[1] EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4.

inconsistent findings or something of a similar nature.[2] The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.[3]

THE GROUNDS FOR THE MOTION ARE:

Background

1. Enbridge Gas filed an application with the OEB on October 31, 2022 for an order or orders seeking approval for changes to the rates that Enbridge Gas charges for the sale, distribution, transportation and storage of natural gas effective January 1, 2024 (the "**Application**"). The Application also sought approval for an incentive rate-making mechanism ("**IRM**") for the years 2025 to 2028 and a number of additional approvals.

2. With the goal of receiving a decision from the OEB in respect of matters required for the purposes of setting rates for 2024, Enbridge Gas requested and the OEB issued Procedural Orders requiring the Application to be heard in phases.

3. The OEB issued the Decision on December 21, 2023. The Decision addressed each of the unsettled items in Phase 1 of the proceeding, addressing a total of 18 issues.

4. Enbridge Gas filed a Notice of Motion on January 29, 2024, seeking review and variance of five issues in the Decision. In this Fresh as Amended Notice of Motion, Enbridge Gas is limiting the request for review and variance to the two noted Review Issues. Explanation of this change is set out below.

The Errors in the Decision

5. There is a strong basis to determine that the Decision is incorrect with respect to the two Review Issues.

(a) Overall Errors

6. Pursuant to section 36 of the *Ontario Energy Board Act, 1998* ("**OEB Act**"), the OEB has an obligation to set rates that are just and reasonable.

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[2] NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pages 17-18.
[3] Rules 42.01(a) and 43.01(d); see also EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pages 17-18.

7. The term "just and reasonable" is a legal standard established and repeatedly confirmed by the Supreme Court of Canada for nearly one century. In *Ontario (Energy Board) v. Ontario Power Generation*[4], Justice Rothstein explained that this standard requires that the service provider recover its reasonable costs of service and earn a reasonable rate of return.

8. As a result of the errors of fact, law or jurisdiction made by the OEB in relation to the Review Issues, the OEB failed to set rates that are just and reasonable.

9. Moreover, the OEB has an obligation to provide reasons supporting the determinations set out in its decisions. The reasons must take account of the positions taken by parties and provide explanation for the OEB's decisions. In the case of each of the Review Issues, the OEB failed to provide reasons that meet the expected standard. In particular, the OEB failed to provide reasons for preferring certain evidence, failed to address material evidence adduced by Enbridge Gas and made findings without adequately explaining the evidentiary foundation and chain of reasoning in support of those findings. Each of these insufficiencies is a reviewable error.

(b) Asset Lives Issue

10. Depreciation expense is a component of just and reasonable rates. In the Application, Enbridge Gas sought approval for the Equal Life Group ("**ELG**") depreciation methodology and for a modest shortening of the average useful life of several asset classes. Both requests were made to reduce the risk of future stranded assets.

11. A key focus of the Decision is on the stranded asset risk that the OEB finds is created by the energy transition. Most of the Decision is premised on the OEB's determination that the energy transition is underway and the usual way of doing business is not sustainable. The OEB stated in the Decision:

> *Two important themes emerged during this proceeding:*
>
> *• climate change policy is driving an energy transition that gives rise to a stranded asset risk, and*
>
> *• the usual way of doing business is not sustainable*[5]*.*

[4] 2015 SCC 44.
[5] Decision, page 20.

12. Despite this, the OEB rejected the ELG methodology and imposed the "business as usual" Average Life Group ("**ALG**") methodology which does not accelerate depreciation. The Decision further approved average useful lives for use with seven asset classes that were longer than those proposed by the depreciation expert retained by Enbridge Gas, Concentric and, in the case of five asset classes, approved average useful lives at the extreme higher end of the existing approved ranges of average useful lives for Enbridge Gas Distribution and Union Gas or even longer lives. In rejecting the ELG Depreciation methodology and approving longer average useful lives for certain asset classes, the Decision appreciably increases the risk of stranded assets as compared to the Enbridge Gas proposals which took into consideration the risk of future stranded assets. While the Company will not pursue a review and variance of the OEB's rejection of the ELG depreciation methodology, the lengthening of the useful lives of seven significant asset classes is inconsistent with the Decision's clear concerns about the stranding of assets.

13. The seven asset classes which are the subject of this review motion and the resulting impacts on the depreciation expense approved in the Decision are set out in Table 1 below. As noted in Table 1, the total impact on the depreciation expense from the Decision's lengthening of the average useful lives of the seven asset classes is a decrease of approximately $46.2 million each year. This amount is clearly material, as is the increased risk of stranding of these assets classes.

Table 1

Summary of Depreciation Parameters

Line no.	Asset Account	Account Description	Previously Approved Parameters (1)	Concentric Proposed Parameters (1)	Intergroup/OEB Approved Parameters (2)	Intergroup/OEB Approved Annual Provision (4)	Annual Provision - Concentric Lives	Variance - Approved vs
			(a)	(b)	(c)	(d)	(e)	(f) = (e) - (d)
1	456	STORAGE - COMPRESSOR EQUIPMENT	EGD - 40-R2 UG - 35-R2.5	40-R4	44-R4	17,827,110	21,256,340	3,429,230
2	457	STORAGE - REGULATING AND MEASURING EQUIPMENT	EGD - 30-R1.5 UG - 30-R3	35-R3	40-R2.5	1,693,672	2,244,645	550,973
3	464	TRANSMISSION - EQUIPMENT	EGD - N/A UG - 50-R5	30-L0.5	50-S4	75,791	123,009	47,217
4	465	TRANSMISSION - MAINS	EGD - N/A UG - 55-R4	60-R4	70-R4	41,418,895	50,650,785	9,231,890
5	473.01	DISTRIBUTION PLANT - SERVICES - METAL	EGD - 45-L1.5 UG - 50-R1.5	40-S0.5	45-S1	25,017,533	29,719,429	4,701,897
6	475.21	DISTRIBUTION PLANT - MAINS - COATED & WRAPPED	EGD - 61-R3 UG - 55-R4	55-R3	61-R3	90,877,053	108,711,757	17,834,704
7	475.3	DISTRIBUTION PLANT - MAINS - PLASTIC	EGD - 65-R3 UG - 60-L2	60-R4	65-R3	75,909,415	86,353,221	10,443,806
8	Total					252,819,469	299,059,187	46,239,717

(1) Enbridge Gas Reply Argument, pages 221 & 222 and Table 3, page 224.
(2) Decision, Table 3, pages 84 & 85.
(3) EB-2010-0211, Exhibit D2, Foster and Associates Depreciation Study, Account 462, page 27.
(4) Enbridge Gas Draft Rate Order Response, Table 8, filed March 15, 2024.

14. In rendering the Decision in relation to the Asset Lives Issue, the OEB made reviewable errors by ignoring or disregarding its own entirely incompatible findings in relation to the risks of energy transition and in relation to a number of other issues including the customer revenue horizon, the capital budget and the appropriate depreciation methodology. Expressing concerns about the risk of stranded assets throughout the Decision and yet increasing the risk of stranded assets by increasing the average useful lives of certain material assets classes is a reviewable inconsistency.

15. The OEB made a reviewable error by failing to take into consideration the material negative impact on Enbridge Gas's business risk that will result from the approval of longer average useful lives than were proposed by Concentric and which are, in most cases, even longer than the average useful lives previously approved for Enbridge Gas Distribution and Union Gas. In the event that the energy transition results in a material number of customers leaving the system before the assets are fully depreciated, there is a risk that the remaining undepreciated assets will become a stranded cost on Enbridge Gas's regulatory accounting books. This risk arises because five of those asset classes for which depreciation was prolonged have significant remaining undepreciated costs. This does not result in just and reasonable rates.

16. The OEB made a reviewable error by failing to provide any reasons for rejecting the recommendations of Concentric and approving longer average useful lives which, in respect of five of the seven asset classes, are at either the extreme upper end of the existing approved ranges of average useful lives for Enbridge Gas Distribution and Union Gas or longer. In support of its approval for the lengthening of the useful lives of seven asset classes, the only reason given in the Decision is that the OEB "prefers" the analysis provided by the depreciation expert retained by OEB Staff, InterGroup, and supported by the depreciation expert retained by IGUA, Emrydia, during the oral hearing.

17. The OEB made further reviewable errors by relying upon the recommendations made by Intergroup in respect of the average useful lives of a number of asset classes, while taking no account of InterGroup's admission that it did not consider energy transition issues for the purposes of its recommendations. Emrydia similarly confirmed that it did not consider energy transition issues for the purposes of its recommendations. In contrast, Concentric specifically referenced energy transition considerations in its expert report and confirmed on numerous occasions in oral evidence that its recommendations were influenced by and reflective of

energy transition issues. In the circumstances, where the OEB expressly premised its Decision on energy transition risk, the inconsistent application of that factor amounts to an error.

18. The OEB made a further reviewable error by approving average useful lives at either the extreme upper end of the existing approved ranges of average useful lives or by lengthening the previously approved average useful life, which is wholly inconsistent with the following statement found at pages 82-83 of the Decision:

> *If the principle is that depreciation expense is recovered over the used and useful life of an asset, and the used and useful life of an asset is shortened as a result of ratepayers leaving the gas system so that assets are no longer used or become underutilized before they reach the end of their physical life, this needs to be addressed in the utility's depreciation policy … .*[6]

(c) Integration Capital Issue

19. The OEB disallowed the full remaining value of Enbridge Gas's undepreciated integration capital costs from being included in rate base. In its decision on the Phase 1 Rate Order, following submissions from the parties, the OEB determined that the proper amount to be disallowed from rate base is $91 million.[7] In effect, the OEB has ordered that Enbridge Gas must forever bear the cost consequences of investments made during the deferred rebasing term, even where those investments benefit customers on an ongoing basis.

20. The OEB's reasons determining that the integration capital costs shall not be included in rate base fail to meet the expected standard in terms of explanation, connection to the evidence and addressing positions advanced by Enbridge Gas.

21. The OEB's decision on the Integration Capital Issue contains reviewable errors because the OEB improperly applied the OEB's foundational "benefits follow costs" and "beneficiary pays" policies.

    i. The OEB agreed that customers are benefiting from $86 million per year of integration savings on an ongoing basis after rebasing. However, the integration capital costs are

[6] Decision, pages 82-83.
[7] EB-2022-0200 Interim Rate Order, April 11, 2024, page 5.

underpinning some of the benefit. Customers who receive the ongoing benefits of integration should pay for the costs after rebasing; and

ii. The OEB was correct in stating that when considering the "benefits follow costs principle", the OEB must consider the impetus for the specific cost incurred in considering whether the benefits are related to the costs. However, in conducting this analysis, the OEB failed to consider the actual integration capital costs that Enbridge Gas incurred and now seeks to include in rate base. The OEB failed to consider Enbridge Gas's evidence that 75% of the integration capital was focused on replacement of end-of-life IT systems that will benefit customers. Instead, the OEB made reference to real estate consolidation projects and other projects totaling $153.9 million, citing argument from SEC.[8] A review of the SEC submission makes clear that these amounts relate to projects that Enbridge Gas has planned but not undertaken.[9] The amounts and projects considered by the OEB are not part of the undepreciated integration capital costs.

22. The OEB committed a reviewable error in finding that the undepreciated capital costs are not recoverable because Enbridge Gas had integration savings that exceed its integration costs. This finding is unconnected to the OEB's Mergers, Amalgamations, Acquisitions and Divestitures ("**MAADs**") policies. It punishes Enbridge Gas for successful operation of its business. In any case, this finding is factually wrong when the impacts of the Company's operations and maintenance expenses related to integration are taken into account.

23. Finally, the OEB made a reviewable error in finding that Enbridge Gas could and should have chosen to depreciate the integration capital assets more quickly, to minimize the undepreciated costs at rebasing. Enbridge Gas is subject to the OEB's Uniform System of Accounts. The Company's depreciation rates are approved by the OEB and there was no opportunity for Enbridge Gas to seek approval of an alternate depreciation rate until the Application.

[8] Decision, page 74.
[9] SEC Final Argument, pages 57-58.

(d) Rules and Additional Grounds

24. Enbridge Gas relies upon Rules 7, 8, 12, 40, 41, 42 and 43 of the OEB's *Rules of Practice and Procedure*.

25. In addition to the specific grounds set out above, the grounds for this Motion also include such further grounds as counsel may advise and the OEB may permit. At this time, Enbridge Gas does not intend to rely on additional evidence beyond what is on the record from the Application, other than (as necessary) evidence from official Government sources about current amendments to the *OEB Act*.

The errors are material

26. Each of the errors described above has a material financial impact on Enbridge Gas.

27. At a high level, the disallowance of $91 million in integration capital requires a large write-off, which has an impact of approximately $34 million per year on revenue requirement in 2024, and a similar impact (subject to adjustment by the price cap mechanism) over the 2025-2028 IRM term. The use of the OEB-ordered asset lives reduces Enbridge Gas's depreciation expense by approximately $46.2 million in 2024 and a similar amount in subsequent years of the 2025-2028 IRM term. The revenue requirement impact is a reduction of approximately $61 million in 2024, with a similar impact (subject to adjustment by the price cap mechanism) over the 2025-2028 IRM term.

28. Additionally, the errors in the Decision will constrain Enbridge Gas's ability to attract capital to invest in Ontario. Each of these items make such investments relatively less attractive than other opportunities for Enbridge.

29. Furthermore, contrary to the OEB's repeatedly expressed concerns about stranded asset risks, the aspect of the Decision that approves longer average useful lives for certain asset classes appreciably increases the risk of stranded assets in comparison to the Enbridge Gas proposals which reduced the risk of future stranded assets.

Enbridge Gas satisfies the threshold test

30. Rule 43.01 of the OEB's *Rules of Practice and Procedures* states that "prior to proceeding to hear a motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider

a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits."

31. Each of the errors highlighted in this Notice of Motion raises material questions about the correctness of the Decision. Correcting the errors will materially impact the Decision. As such, Enbridge Gas satisfies the OEB's threshold test and the OEB should proceed to hear the Motion on its merits.

32. Should the OEB find it necessary to consider the threshold question, Enbridge Gas requests the opportunity to make written submissions.

The Fresh as Amended Review Motion

33. This Fresh as Amended Notice of Motion for Review and Variance sets out the two Review Issues that Enbridge Gas is pursuing – Asset Lives and Integration Capital. These are a small subset of the 18 issues determined in the Decision, and a significant narrowing from the Company's original request that the OEB review and vary the Decision in relation to five issues.

34. The reasons why Enbridge Gas is not pursuing several of the originally stated Review Issues are outlined below.

    i. Enbridge Gas requested that the OEB review and vary its decision to reduce the Residential and Small Volume Customer Revenue Horizon from 40 years to 0 years ("**Customer Revenue Horizon Issue**"). On February 22, 2024, the Government of Ontario introduced legislation (Bill 165) to amend the *OEB Act* to prescribe the revenue horizon that will apply, in relation to natural gas, for the determination of economic feasibility of new consumer connections, system expansions and calculations of contributions in aid of construction.[10] The legislation received Royal Assent on May 16, 2024. The provisions related to the revenue horizon will come into force upon later proclamation, presumably at the same time as a Regulation is issued prescribing the revenue horizon that will apply. The Minister of Energy has indicated that the prescribed revenue horizon for Enbridge Gas will be 40 years until it is revisited by the

[10] Bill 165, *Keeping Energy Costs Down Act, 2024*.

OEB at a later date.[11] This will effectively negate the OEB's Decision in relation to the Customer Revenue Horizon Issue and as a result (assuming that the expected Regulation is issued) Enbridge Gas no longer seeks review and variance of the Customer Revenue Horizon Issue.[12]

ii. Enbridge Gas requested that the OEB review and vary its decision to reduce the 2024 capital budget envelope by $250 million. At this time, with the 2024 year well underway and no decision on the review motion likely before late in the year, Enbridge Gas has determined that it will not challenge the capital budget reduction as any different direction would be difficult to implement. Additionally, in response to the OEB's direction in the Decision for Enbridge Gas to focus on asset life extensions, the Company has made a proposal in "Phase 2" of the Application (EB-2024-0111) for eligibility and treatment of qualifying asset life extension investments as being eligible for incremental capital module (**"ICM"**) treatment in appropriate circumstances. This proposal helps balance the challenges that Enbridge Gas will face under the reduced capital budget envelope.

iii. Enbridge Gas requested that the OEB review and vary its decision to set the deemed equity component of the Company's cost of capital at 38%, rather than the requested 42%. After the Notice of Motion was filed, the OEB initiated a new generic cost of capital proceeding (EB-2024-0063), "to consider the methodology for determining the values of the cost of capital parameters and deemed capital structure to be used to set rates for electricity transmitters, electricity distributors, natural gas utilities, and Ontario Power Generation Inc." Enbridge Gas has determined that it would be duplicative and inefficient to pursue its review of the OEB's deemed capital structure decision at the same time as the OEB is also considering that item in a separate and concurrent proceeding. Enbridge Gas will advance its position about the proper

[11] The Keeping Energy Costs Down Act | Ontario Newsroom.
[12] On February 12, 2024, the OEB issued a partial stay of the Phase 1 Decision, in relation to the Customer Revenue Horizon Issue. On April 26, 2024, the OEB issued a letter extending the partial stay until June 28, 2024, stating "In granting the Partial Stay, the OEB concluded that it would be inefficient to spend time on the Customer Revenue Horizon Issue pending legislation proposed by the Minister of Energy which could make this portion of the Enbridge Decision moot. This legislation (Bill 165) has now been tabled in the legislature and has been ordered for third reading. If passed, the legislation would enable regulations to be made on the Customer Revenue Horizon issue. The same reason for issuing the stay persists, therefore the OEB is extending the stay until June 28, 2024"."

deemed capital structure in the new generic proceeding and may assert that any determinations in that case be applied to Enbridge Gas rates and revenue requirement during the current IRM ratemaking term.

iv. Enbridge Gas requested that the OEB review and vary its Decision to reject the ELG depreciation methodology proposed by the Company and to instead order the use of the ALG depreciation methodology. The Company notes that the Decision requires Enbridge Gas, for its next rebasing application, to study options to ensure its depreciation policy addresses the risk of stranded asset costs and that these options must encompass all reasonable alternative approaches including the Units of Production approach. The Company is taking steps to respond to this directive. In light of this, the Company believes that it is more efficient to address the question of the preferred depreciation methodology from the perspective of the risk of stranded assets in the next rebasing application. This said, given the clear concern expressed by the OEB in the Decision about the risks of stranded assets, Enbridge Gas continues to seek a review and variance of the lengthening of the Average Useful Life of seven asset classes given that it increases the risk of asset stranding.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The EB-2022-0200 Decision and Order dated December 21, 2023;

2. The record of the EB-2022-0200 proceeding, including prefiled evidence, interrogatories, technical conference transcripts and undertaking responses, hearing transcripts, undertaking responses, arguments, submissions and OEB decision on the Interim Rate Order;

3. Enbridge Gas's submissions on this Motion and its Motion Record to be delivered in accordance with the OEB's directions; and

4. Such further and other materials as Enbridge Gas may provide and the OEB may permit.

Updated May 29, 2024

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

David Stevens (dstevens@airdberlis.com)
Dennis M. O'Leary (doleary@airdberlis.com)

Tel: (416) 863-1500

TO: **ONTARIO ENERGY BOARD**

P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4
Tel: (416) 481-1967
Fax: (416) 440-7636

AND TO: **ALL INTERVENORS IN EB-2022-0200**

TAB 2

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

DECISION AND ORDER

EB-2022-0200

ENBRIDGE GAS INC.

Enbridge Gas Inc. Application for 2024 Rates – Phase 1

BEFORE: **Patrick Moran**
Presiding Commissioner

Emad Elsayed
Commissioner

Allison Duff
Commissioner

December 21, 2023

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1 INTRODUCTION AND SUMMARY OF FINDINGS

Enbridge Gas Inc. (Enbridge Gas) filed an application with the Ontario Energy Board (OEB) under section 36 of the *Ontario Energy Board Act*, *1998* (OEB Act) seeking approval for changes to the rates that Enbridge Gas charges for natural gas distribution, transportation and storage, beginning January 1, 2024. Enbridge Gas also applied for approval of an incentive rate-making mechanism for the years 2025 to 2028.

This is the first cost of service rate application for Enbridge Gas since the OEB approved the amalgamation of Enbridge Gas Distribution Inc. and Union Gas Limited, effective January 1, 2019.[1]

In its application, Enbridge Gas proposed that the application be reviewed in phases. Accordingly, in Procedural Order No. 2, the OEB set out the issues list for the proceeding, dividing the review of the application into Phase 1 and Phase 2.

A settlement conference was held from May 29, 2023 to June 9, 2023 regarding the Phase 1 issues. Enbridge Gas filed a partial settlement proposal with the OEB on June 28, 2023. The OEB approved an updated settlement proposal filed on July 14, 2023 in a written decision issued on August 17, 2023.

An oral hearing on most of the remaining Phase 1 issues was held between July 13, 2023, and August 11, 2023, with the other unsettled issues going directly to written submissions. Enbridge Gas filed its argument-in-chief on August 18, 2023. OEB staff filed its submission on September 12, 2023, followed by intervenor submissions which were filed by September 22, 2023. Enbridge Gas filed its reply argument on October 11, 2023. This Decision and Order addresses the Phase 1 issues that went to oral hearing as well as those that were addressed in writing.

This Decision and Order is organized into three main sections: the energy transition, amalgamation and harmonization issues, and other issues. For reasons that follow, the OEB makes the following key determinations, for the purpose of establishing just and reasonable rates.

Energy Transition

The intersection of the energy transition and the approvals sought by Enbridge Gas was a major focus of this proceeding. The OEB makes the following key findings:

[1] EB-2017-0306 and EB-2017-0307.

1. The energy transition poses a risk that assets used to serve existing and new Enbridge Gas customers will become stranded because of the energy transition. Enbridge Gas has not provided an adequate assessment of this risk to demonstrate that its capital spending plan is prudent. The stranded asset risk affects all aspects of Enbridge Gas's system and its proposals for capital spending on system expansion and system renewal.

2. The OEB is reducing the overall proposed capital budget for 2024 by $250 million. Enbridge Gas is expected to utilize its project prioritization process to accommodate this envelope reduction. The current Asset Management Plan is not accepted as a basis to support the proposed capital investments.

3. For the proposed system expansion capital spending plan, the OEB has determined that for small volume customer connections, the revenue horizon that Enbridge Gas uses to determine the economic feasibility of new connections is to be reduced to zero, thus reducing stranded asset risk to zero, effective January 1, 2025. Projects under the current phase of the Natural Gas Expansion Program are excluded from this requirement.

4. For the proposed system renewal capital spending plan, the OEB has determined that Enbridge Gas needs to put more emphasis on monitoring, repairing and life extension of its system so that replacement projects are only implemented where absolutely necessary in order to address the stranded asset risk in that context.

5. To address the issue of stranded asset risk further, the OEB requires Enbridge Gas to carry out a risk assessment and to consider a range of risk mitigation measures, including:

    a. How Enbridge Gas would prune its existing system to avoid the replacement of assets

    b. What role Enbridge Gas's depreciation policy should play in reducing the stranded asset risk

    c. How Enbridge Gas will identify maintenance, repair and life extension alternatives to extend the life of existing assets instead of long-lived replacements that increase the stranded asset risk

6. Given the increased risk for Enbridge Gas's business due to the energy transition, partially offset by other factors resulting from amalgamation, the OEB approves an increase in Enbridge Gas's equity thickness from 36% to 38%.

Amalgamation and Harmonization Issues

Amalgamation issues were another major focus of this proceeding. It has been ten years since the legacy utilities, Union Gas and Enbridge Gas Distribution, last applied for cost of service rates. Approval of harmonization ratemaking proposals, accounting policies and recovery of integration costs was sought by Enbridge Gas. The OEB makes the following key findings:

7. The OEB is satisfied that the amalgamation produced savings that will be reflected in 2024 rates. Since Enbridge Gas was able to achieve and retain savings that exceeded its integration capital investments, the OEB denies Enbridge Gas's proposal to add $119 million of integration capital to its 2024 rate base.

8. The OEB denies Enbridge Gas's proposed recovery of $156 million of Pension and Other Post Employment Benefit expenses recorded in the Accounting Policy Changes Deferral Account related to the pre-2017 Union Gas unamortized actuarial gains/losses.

9. The OEB approves the proposed harmonized depreciation methodology, except for the capitalization of indirect overheads.

10. The OEB approves the Average Life Group depreciation procedure, the Traditional Method for net salvage calculations and updated asset life parameters to calculate depreciation expense.

11. The OEB approves the proposed overhead harmonization methodology, except for the capitalization of indirect overheads. The OEB does not approve the proposal to capitalize $292 million in 2024. Recognizing that a requirement to expense the entire $292 million in 2024 would have a large impact on 2024 rates, the OEB directs Enbridge Gas to expense $50 million of the indirect overhead amount in 2024, and capitalize the remainder. In subsequent years during the IRM term, Enbridge Gas shall reduce the capitalized amount by expensing a further $50 million in each year.

Other Issues

There were other issues in the proceeding, in addition to the energy transition and amalgamation and harmonization issues, as detailed in the approved Issues List. The OEB makes the following key findings:

12. The OEB approves the proposed levelized treatment for the Panhandle Regional Expansion Project and the establishment of the proposed deferral account.

13. The OEB accepts Enbridge Gas's proposed changes to the Natural Gas Vehicle program provided that it operates as an ancillary business activity on a fully allocated cost basis, and any losses are at Enbridge Gas's risk.

14. The OEB is not making any base rate adjustment related to Parkway Delivery Obligation costs for the 2019 to 2023 period, as some intervenors had proposed.

15. The OEB denies Enbridge Gas's proposed Volume Variance Account. The OEB approves a harmonized average use variance account based on the average use forecast methodology approved as part of the settlement proposal.

16. The OEB is not establishing an International Financial Reporting Standards Deferral Account at this time.

17. The OEB does not require an Earnings Sharing Mechanism for the 2024 Test Year.

18. The OEB approves the requested partial exemption to the Performance Measurement target metric for the Time to Reschedule a Missed Appointment from 100% to 98%. The OEB denies the requested partial exemption to the target metrics for the Call Answering Service Level and the Meter Reading Performance Measurement.

19. The OEB approves January 1, 2024 as the effective date for 2024 rates.

2 THE PROCESS

Enbridge Gas filed its rate application in two parts. Most of the evidence in support of the application was filed on October 31, 2022, and included evidence on the revenue requirement elements of the application and the incentive rate-making mechanism (IRM) proposal. The balance of the application was filed on November 30, 2022, and included evidence on cost allocation and rate design.

In its application, Enbridge Gas proposed that the case be heard in phases. The issues that needed to be determined to support January 1, 2024 rates could be determined in the first phase, and the remaining issues could be determined in a second phase of the same proceeding.

The OEB issued its Notice of Hearing on November 14, 2022. The deadline for applying for intervenor status was December 2, 2022. The following parties applied for intervenor status:

1. AnnaMaria Valastro
2. Association of Power Producers of Ontario (APPrO)
3. Atura Power
4. Building Owners and Managers Association (BOMA)
5. Canadian Biogas Association (CBA)
6. City of Kitchener
7. Canadian Manufacturers & Exporters (CME)
8. Coalition for Renewable Natural Gas (RNG Coalition)
9. Consumers Council of Canada (CCC)
10. Enercare Home and Commercial Services Limited Partnership
11. Energy Probe Research Foundation (Energy Probe)
12. Environmental Defence
13. Farhan Shah (Withdrew request on July 21/23)
14. Federation of Rental-housing Providers of Ontario (FRPO)
15. Ginoogaming First Nation (GFN)
16. Green Energy Coalition (GEC)
17. Independent Electricity System Operator (IESO)
18. Industrial Gas Users Association (IGUA)
19. Koch Canada Energy Services, LP
20. London Property Management Association (LPMA)
21. Marshall Garnick
22. Ontario Association of Physical Plant Administrators (OAPPA)
23. Ontario Greenhouse Vegetable Growers (OGVG)
24. Otter Creek Co-operative Homes Inc. (Otter Creek)

25. Pollution Probe
26. Quinte Manufacturers Association (QMA)
27. Russ Houldin
28. School Energy Coalition (SEC)
29. Six Nations Natural Gas Company Limited (SNNG)
30. Three Fires Group Inc. (Three Fires Group)
31. TransCanada PipeLines Limited
32. Unifor
33. Vulnerable Energy Consumers Coalition (VECC)

In Procedural Order No. 1 issued on December 16, 2022, the OEB approved a list of intervenors and granted cost eligibility to APPrO, BOMA, CBA, CME, CCC, Energy Probe, Environmental Defence, FRPO, GFN, GEC, IGUA, LPMA, OAPPA, OGVG, Otter Creek, Pollution Probe, QMA, SEC, Three Fires Group and VECC.

The OEB further determined that it was appropriate to hear the application in phases and developed a revised draft issues list based on a two-phase hearing. The OEB made provision for an issues conference to consider the draft issues list, the assignment of issues to each phase, as well as the timing to consider Phase 2 issues. The OEB also provided a procedural schedule for discovery of the evidence and a settlement conference.

An issues conference was held on January 9, 2023, with the objective of discussing the draft issues list and agreeing to a proposed issues list for the OEB's consideration. Enbridge Gas and intervenors agreed to most of the issues and the assignment of the issues to each phase of this proceeding. There were two proposed storage-related issues and a proposed issue related to the quality of data and methodologies for which consensus was not achieved.

In its Decision on Issues List & Expert Evidence and Procedural Order No. 2, the OEB approved a revised Issues List pushing some of the agreed Phase 1 issues to Phase 2 of this proceeding.[2] The OEB also approved specific intervenor requests to file evidence in the proceeding.

After Enbridge Gas responded to interrogatories, and an eight-day technical conference, a settlement conference was held from May 29, 2023 to June 9, 2023

[2] The approved Issues List is set out in the OEB's Decision on Issues List & Expert Evidence and Procedural Order No. 2, January 27, 2023.

regarding the Phase 1 issues. Enbridge Gas and 23 intervenors participated in the settlement conference.[3] The Parties reached a partial settlement on the Phase 1 issues.

Enbridge Gas filed a settlement proposal with the OEB on June 28, 2023 (updated on July 14, 2023). The Parties reached complete agreement on the following Phase 1 issues:

Issues List Category	Completely Settled Issues[4]
Overall	4
Volumes & Revenues	9-11
Operating Costs	19
Cost Allocation	24*
Rate Design	25-28*, 30
Deferral & Variance Accounts	31
Other	35-36, 39*

*The Parties agreed that issue 24 (cost allocation) and some / all of issues 25-28 (rate design) and issue 39 (storage space/deliverability methodology) should be deferred to a subsequent phase of the proceeding.

The Parties also reached partial agreement on the following Phase 1 issues:

Issues List Category	Partially Settled Issues
Rate Base	6
Operating Costs	12-14, 17-18
Cost of Capital	21
Rate Design	29
Deferral & Variance Accounts	32-33

No party objected to the issues or portions of issues identified as settled. As part of the settlement proposal, the parties agreed to address certain storage related issues, cost allocation and rate harmonization in a new Phase 3 of the proceeding.

OEB staff filed a submission on July 5, 2023 supporting the settlement proposal, subject to clarification regarding the dispute resolution process within the settlement reached for Issue 4.[5] In response to OEB staff's submission, Enbridge Gas filed an updated settlement proposal on July 14, 2023.

On the first day of the oral hearing, July 13, 2023, the hearing panel accepted the partial settlement proposal in principle and noted that a formal decision would be issued in due

[3] The full list of intervenors that participated in the settlement conference can be found in the Settlement Proposal, June 28, 2023 (Updated July 14, 2023), pp. 5-6.
[4] The issue numbers correspond with the approved Issues List.
[5] Issue 4 states, "Has Enbridge Gas appropriately considered the unique rights and concerns of Indigenous customers and rights holders in its application?"

course.[6] In a decision issued on August 17, 2023, the OEB approved the updated settlement proposal, and accepted the proposal to add a third phase to the proceeding.

An oral hearing on some of the unsettled issues in Phase 1 was held over 18 hearing days, between July 13, 2023, and August 11, 2023. At the oral hearing, the OEB amended the dates for the filing of Enbridge Gas's argument-in-chief, final arguments from intervenors and OEB staff and Enbridge Gas's reply.

Enbridge Gas filed its argument-in-chief on August 18, 2023. OEB staff filed its submission on September 12, 2023, followed by intervenor submissions filed by September 22, 2023. APPrO, BOMA, CCC, CME, City of Kitchener, Energy Probe, Environmental Defence, FRPO, GEC, GFN, IGUA, LPMA, OGVG, Pollution Probe, QMA, Russ Houldin, RNG Coalition, SEC, Three Fires Group and VECC filed written arguments for Phase 1 of this proceeding. Enbridge Gas filed its reply argument on October 11, 2023.

The OEB also considered approximately 385 letters of comment that expressed a range of concerns regarding the application and the OEB's process including:

- The OEB should not approve the proposed rate increase
- The proposed rate increase is unaffordable
- Inflation has increased the cost of living, specifically for those on fixed income
- Enbridge Gas should optimize costs and not request a rate increase
- Customers will have to reduce gas consumption in order to afford the bills
- Poor customer service – problems with reading meters and receiving e-bills on time
- Customers should not pay carbon charges
- Carbon charges should be explained clearly
- The OEB should review Enbridge Gas's spending strategies and the benefits that customers receive
- Require clarity from Enbridge Gas regarding rate increases
- Make the hearing and decision-making process accessible and inclusive
- Stop using fossil fuels – promote sustainable and clean energy sources
- Uncertainty regarding additional rate increases due to incentive rate-making mechanisms and other applications, along with uncertainty about Canada's future regarding greenhouse gas emissions reduction

[6] Oral Hearing Transcript, Vol. 1, July 13, 2023, p.1.

3 ENERGY TRANSITION RELATED ISSUES

3.1 Energy Transition

It has been ten years since the legacy utilities, Union Gas and Enbridge Gas Distribution, last applied for cost of service rates. This is the first cost of service proceeding for the amalgamated utility, Enbridge Gas, and the first OEB proceeding to consider a gas rates application in the context of the energy transition. The energy transition and how it impacts the future of the gas system was a major focus of this proceeding.

The exploration of the energy transition in the proceeding encompassed the impacts and changes to the energy system and the energy supply mix that result from efforts to reduce greenhouse gas emissions by reducing dependence on fossil fuels, along with the use of renewable natural gas, hydrogen, and carbon capture technologies, to combat climate change.

Enbridge Gas's Evidence – Energy Transition

Enbridge Gas filed evidence detailing its perspective and approach to energy transition,[7] including an Energy Transition Plan and a description of how the energy transition has been integrated into Enbridge Gas's business and planning processes. Enbridge Gas did not seek specific OEB approval of its Energy Transition Plan, clarifying that its approach to the energy transition informed proposals in several areas of its application.

Enbridge Gas identified key actions in relation to its energy transition planning:

- Conducting two energy transition studies to examine potential scenarios to reduce greenhouse gas emissions to net zero[8]
- Filing an Energy Transition Plan
- Identifying actions called "safe bets" to advance during the rebasing term[9]

[7] Exhibit 1, Tab 10.
[8] Net zero greenhouse gas emissions means that the net amount of greenhouse gas emissions emitted to the atmosphere must equal zero. This can be achieved through a combination of emissions reduction and emissions removal from the atmosphere (e.g., through carbon sequestration).
[9] Exhibit 1, Tab 10, Schedule 6.

- Incorporating energy transition assumptions into customer, volume, and demand forecasts[10]
- Bringing Integrated Resource Planning (IRP) into Enbridge Gas's asset management planning process
- Requesting an increase to Enbridge Gas's deemed equity ratio to address increased business risk associated with the energy transition
- Requesting approval for a change to the depreciation methodology which, in part, would mitigate energy transition-related stranded asset risk
- Potential changes to Enbridge Gas's customer connection policy due to the energy transition. These potential changes were not part of Enbridge Gas's filed Energy Transition Plan or evidence but were discussed during the oral hearing and addressed by Enbridge Gas in its Reply Argument.

Intervenor Evidence – Energy Transition

Evidence focused on energy transition related matters was filed by the following:

- Chris Neme of Energy Futures Group, commissioned by Environmental Defence and GEC, covering the following aspects of energy transition:
  - Technical options for decarbonizing fossil gas use
  - Approach to electrification in other independent decarbonization pathway studies
  - Practical reasons to expect electrification to dominate
  - Customer economics of electrification
  - Flaws in Enbridge Gas's vision of a hydrogen future
  - Protecting customers in the context of future decarbonization
- Dr. Asa Hopkins of Synapse Energy Economics Inc., commissioned by IGUA, focused primarily on energy transition-related business risk and capital structure.

[10] Exhibit 1, Tab 10, Schedule 4.

- Ian Jarvis and Gillian Henderson of Enerlife Consulting Inc., commissioned by BOMA, focused on considerations for energy transition related to the commercial buildings sector.

- Dr. Robert W. Howarth, Professor of Ecology and Environmental Biology at Cornell University, and Dr. Mark Jacobson, Professor of Civil and Environmental Engineering at Stanford University, commissioned by Environmental Defence, focused on blue hydrogen and its greenhouse gas emissions impact.

Provincial and Federal Greenhouse Gas Policy Considerations

The pace and shape of the energy transition is guided to a large degree by relevant provincial and federal policy, including greenhouse gas emissions reductions targets and available alternatives for customers.

The Government of Canada has committed to reducing greenhouse gas emissions by 40% below 2005 levels by 2030, and to net-zero emissions by 2050 through the *Canadian Net-Zero Emissions Accountability Act*. To reduce greenhouse gas emissions, the Government of Canada has implemented an escalating carbon price, increasing annually from $10/ tonne CO_2e (carbon dioxide equivalent) in 2018 and reaching $170/tonne CO_2e by 2030.[11] Canada has also established the Greener Homes Grant program that provides financial incentives for measures that reduce emissions, including insulation and window upgrades and cold climate heat pumps. This program is delivered in Ontario by Enbridge Gas with enhanced incentives under their OEB approved demand side management program.[12]

The Government of Ontario has committed to reducing greenhouse gas emissions by 30% below 2005 levels by 2030.[13,14] Ontario has identified several initiatives to achieve its target, including the continuation of demand side management programming for natural gas customers through 2030.[15] In 2022, Ontario implemented its Emissions Performance Standards program, replacing the federal Output Based Pricing System. The Ontario program is aligned with the minimum federal carbon price for the period

[11] *Greenhouse Gas Pollution Pricing Act,* S.C. 2018, c.12, s. 186, Schedule 4.
[12] EB-2021-0002, Schedule B.
[13] *Cap and Trade Cancellation Act, 2018,* S.O. 2018, c. 13, s. 3
[14] Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations A Made-in-Ontario Environment Plan*, November 29, 2018, ERO 013-4208, Environmental Registry of Ontario, at pp. 21-24.
[15] *Ontario Emissions Scenario as of March 25, 2022* (Ministry of the Environment, Conservation and Parks, Ontario's responsible and balanced approach to meeting the federal benchmark for the Emissions Performance Standards industrial emissions program for 2023-2030, April 11, 2022, ERO 019-5316, Environmental Registry of Ontario).

2023-2030.[16] Ontario established the Electrification and Energy Transition Panel (EETP) to provide advice on helping Ontario's economy prepare for electrification and the energy transition, and has also commissioned an independent study on cost-effective energy pathways.[17]

Energy Transition Pathways Studies and Routes to Net Zero

Enbridge Gas filed two energy transition studies, the Energy Transition Scenario Analysis by Posterity Group, and the Pathways to Net Zero Emissions for Ontario by Guidehouse (Guidehouse Pathways Study). Enbridge Gas indicated that it undertook these studies to understand the impact of energy transition and associated climate policies on Ontario's natural gas demand and Enbridge Gas's transmission, distribution, and storage system. These studies informed Enbridge Gas's demand forecast, vision of Ontario's energy sector, and energy transition plan.

The Energy Transition Scenario Analysis study modeled four future scenarios to understand the impacts of energy transition and the associated climate policies on natural gas demand in Enbridge Gas's distribution system.

The Guidehouse Pathways Study built upon the Energy Transition Scenario Analysis study, by taking the two scenarios most likely to achieve net zero by 2050, and comparing the cost of the two scenarios:

- A "Diversified Scenario" in which total energy provided by gaseous fuels increases between 2020 and 2050. Low and zero carbon gases and the gas delivery infrastructure are used in combination with end-use electrification to reduce greenhouse gas emissions in all sectors. Conventional natural gas is replaced by hydrogen, renewable natural gas and natural gas paired with carbon capture.

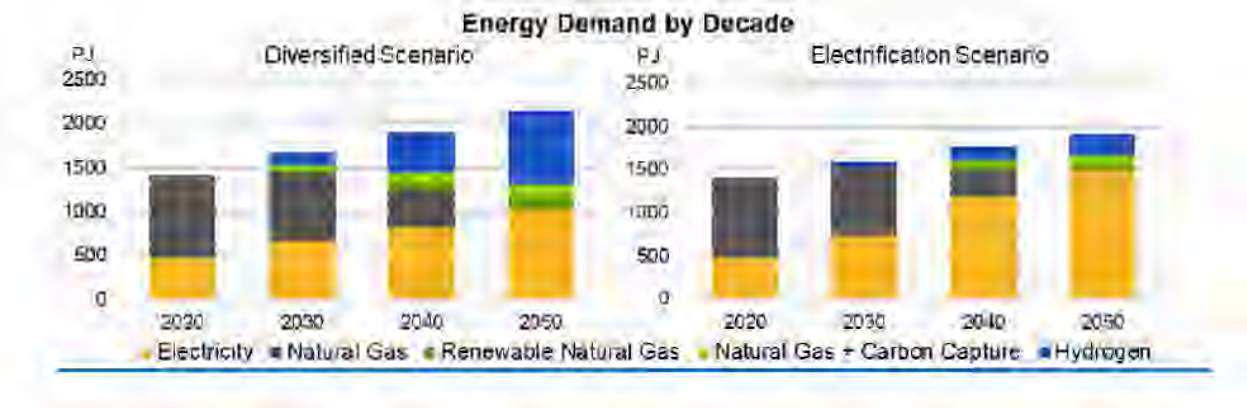
- An "Electrification Scenario" that focuses on electrification of all sectors, with low and zero carbon gas use limited to cases where no reasonable alternative energy source exists.

The Guidehouse Pathways Study filed with Enbridge Gas's application concluded that the Diversified Scenario is more cost-effective in terms of overall energy system costs between 2020 and 2050. The inputs in the Guidehouse Pathways Study were tested and discussed extensively in the interrogatory and technical conference phases of this proceeding. Guidehouse identified the need for corrections and other changes and subsequently filed an updated version of its study prior to the oral hearing phase. The

[16] Ministry of the Environment, Conservation and Parks, Emissions Performance Standards (EPS) program regulatory amendments for the 2023-2030 period, ERO-019-5769, .
[17] Exhibit J8.1, Attachment 1.

updated study forecasted a $41 billion cost advantage or a 6% cost difference between the Diversified and Electrification Scenarios, compared to the original version which forecasted a cost advantage of $181 billion.

Figure 1 – Comparison of the Two Scenarios[18]



Enbridge Gas indicated that the energy transition pathways studies were used to develop Enbridge Gas's vision for energy transition in Ontario, along with other inputs such as its own experience, a review of federal, provincial, and municipal climate policies, and stakeholder engagement.

Enbridge Gas noted that, based on the updated study, it "continues to believe and assert that the Guidehouse Pathways Study provides support for showing that a diversified approach to achieving greenhouse gas emission reductions targets is as plausible as electrification" and that the Guidehouse Pathways Study is "only one support for the OEB to be comfortable that there can be an important role for Enbridge Gas and its distribution system in a resilient, cost-effective, low-carbon energy future." [19]

Despite the updates, OEB staff, Environmental Defence, GEC, Pollution Probe and SEC continued to have concerns with the Guidehouse Pathways Study, and the degree to which its conclusions should be used as a basis for energy transition planning. BOMA, Three Fires Group and GFN raised concerns around the study's lack of granularity regarding the commercial sector, and northern and remote communities, respectively. GEC and SEC also expressed concern that Enbridge Gas was seeking to use the conclusions of the Guidehouse Pathways Study and Energy Transition Scenario Analysis to influence provincial policy in forums outside of this proceeding and asked the OEB to make a statement in its decision regarding the limitations of these studies.

[18] Exhibit KT 9.2, Figure ES-2.
[19] Enbridge Gas, Letter Re: *Update Re Guidehouse Pathways to Net Zero Emissions for Ontario report,* April 4, 2023,

Some parties continued to have methodological concerns following the Guidehouse Pathways Study update, specifically the study's use of a higher carbon price in the Electrification Scenario compared to the Diversified Scenario. Parties submitted that the use of common assumptions in both scenarios would affect the Guidehouse Pathways Study's key conclusion and make the Electrification scenario's cost lower than the Diversified scenario.[20]

Mr. Neme's evidence[21] questioned why a pathway to net zero would include a large role for low carbon gaseous fuels. Submissions from Environmental Defence, GEC, Pollution Probe and SEC raised the following concerns:

- Supply limitations that would prevent Enbridge Gas from sourcing large volumes of renewable natural gas
- Technical and economic challenges with using the gas distribution network to deliver 100% hydrogen or a high blend ratio, due to hydrogen's much lower energy density and different chemical and physical properties
- Technical performance, economic viability and market readiness of more efficient gas-fired space heating alternatives contrasted with cold climate electric heat pumps
- Concerns about lifecycle emissions associated with blue hydrogen[22]

Enbridge Gas, APPrO, CME and Energy Probe submitted that there are also significant concerns and uncertainties about a high-electrification future. Submissions questioned the ability of the electricity sector to build sufficient generation in the time needed to meet the significant increase in demand without compromising reliability, and the associated costs of generation, transmission, and distribution. GEC and SEC submitted that these concerns were overstated and were not comparable in magnitude to the challenges associated with a diversified pathway to net zero that included a large role for hydrogen and renewable natural gas.

Mr. Neme's evidence discussed how other independent decarbonization pathways studies forecasted higher levels of electrification than the Diversified Scenario in the Guidehouse Pathways Study. Another scenario analysis discussed in the proceeding was the recently released energy futures scenario analysis of the Canada Energy Regulator, *Canada's Energy Future 2023*. It was noted that in the net-zero scenarios

[20] Exhibit M9-GEC-ED, pp. 27-28.
[21] Exhibit M9-GEC-ED, chapter 6.
[22] Blue hydrogen is produced from methane and makes use of carbon capture to reduce emissions, as opposed to green hydrogen, which is produced directly from zero-carbon electricity.

used in that analysis, electric heat pumps were assumed to become the building heating technology of choice, with the scenarios showing a lower level of renewable natural gas and hydrogen use than in the Diversified Scenario in the Guidehouse Pathways Study.[23]

Enbridge Gas's Energy Transition Plan and Safe Bets

The Energy Transition Plan proposed specific actions for Enbridge Gas to move forward with during the rebasing term,[24] with the following objectives:

- Support an orderly energy transition in Ontario
- Provide cost-effective, secure, reliable, and resilient energy for customers during the transition to a low-carbon economy and once net-zero is achieved
- Maintain alignment with Ontario's energy objectives and with provincial and federal energy transition and climate change targets and policies

Enbridge Gas's vision was for a diversified pathway towards net zero for Ontario, but recognized alternate views on how the energy transition will occur. Given this uncertainty, Enbridge Gas proposed a list of safe bet actions:

- Maximizing energy efficiency through demand side management programs[25]
- Increasing the amount of renewable natural gas in the gas supply through a Low-Carbon Voluntary Program and supporting renewable natural gas upgrading
- Reducing greenhouse gas emissions from the industrial and transportation sectors via fuel switching and carbon capture and sequestration, including expansion of the Natural Gas Vehicle Program
- Integrating gas and electric system planning
- Supporting consumer choice and the energy transition journey, including:
    - Conducting a Hydrogen Blending Grid Study

[23] Exhibit K3.1, p. 49; Oral Hearing Transcript, Vol. 3, pp. 86-88.
[24] Exhibit 1, Tab 10, Schedule 6.
[25] Enbridge Gas's current approved DSM Plan runs through December 31, 2025. The OEB's Decision and Order on the DSM Plan (EB-2021-0002) requires Enbridge Gas to file an application seeking approval of a new multi-year DSM Plan from 2026 to 2030. The OEB expects that Enbridge Gas will have a decision on its next multi-year DSM plan prior to December 31, 2025.

- Implementing Phase 2 of Enbridge Gas's Low Carbon Energy Project (hydrogen blending)
- Establishing an Energy Transition Technology Fund
- Maintaining the gas system via Integrated Resource Planning and scope 1 & 2 emissions reductions[26]

Enbridge Gas also submitted that these safe bets (and Enbridge Gas's Energy Transition Plan as a whole) align with the Ontario Ministry of Energy's recent *Powering Ontario's Growth* report, although the Energy Transition Plan was developed prior to the release of this report.[27] Enbridge Gas indicated that the Ministry's report focused on consumer choice, affordability, coordinated energy planning, hybrid heating, energy efficiency, industrial decarbonization, and the use of low carbon fuels in the gas system.[28]

The only safe bet proposal for which approval is specifically requested in Phase 1 of this proceeding is the proposed expansion of the Natural Gas Vehicle Program.

Enbridge Gas is seeking approval for the Energy Transition Technology Fund and the Low-Carbon Voluntary Renewable Natural Gas Program in Phase 2. Spending for several additional safe bet proposals is included in Enbridge Gas's capital expenditures over the rebasing term, although approval of these individual projects is not specifically requested. These will also be examined in Phase 2.

Parties generally agreed that the safe bets proposed by Enbridge Gas as part of its Energy Transition Plan were modest in scope.

Parties noted that some of the safe bets are actions Enbridge Gas is already doing or required to do (energy efficiency, renewable natural gas injection, Integrated Resource Planning, scope 1 and 2 emissions reductions)

Some parties (APPrO, Energy Probe, LPMA, OGVG, QMA and VECC) were generally of the view that, given the uncertainty about future provincial policy direction and the role the gas system will play in the energy transition, Enbridge Gas's safe bets and level of activity on energy transition were appropriate at this time, at least for the purposes of

[26] Scope 1 & 2 emissions reductions involve reducing Enbridge Gas's direct and indirect emissions arising from its utility operations (e.g., reducing leaks, improving the efficiency of Enbridge Gas equipment), as distinct from emissions from Enbridge Gas's customers due to their natural gas use.
[27] Exhibit K1.5, *Powering Ontario's Growth: Ontario's Plan for a Clean Energy Future*
[28] Enbridge Gas, Argument-in-Chief, August 18, 2023, p. 41.

setting rates in this application. These parties indicated that the implications of the energy transition are likely to be modest during the rebasing term.

Some parties (particularly Environmental Defence, IGUA, SEC and Three Fires Group) suggested that there was a gap in Enbridge Gas's Energy Transition Plan due to the lack of a risk assessment associated with possible energy transition futures, including an analysis of the possible implications for Enbridge Gas's business and for its customers, and options to mitigate risks. For example, SEC submitted that "what the OEB should have seen in this application is a detailed review of the risks associated with the Energy Transition, and the possible responses of the utility to each of those risks, both to protect the shareholders and the ratepayers."[29] A risk assessment of the nature proposed by SEC would also consider whether Enbridge Gas's traditional business activities can be considered safe bets in light of the energy transition. For example, Environmental Defence submitted that "Enbridge has missed the most important safe bet – avoiding and deferring capital spending where possible."[30]

The energy transition evidence of Dr. Hopkins included an illustrative model assessing the financial implications for a gas distribution utility undergoing a strategic downsizing,[31] and recommended that Enbridge Gas be required to conduct a detailed business analysis along the lines of this model, to inform its capital and operational plans. Several parties (CCC, CME, Environmental Defence, IGUA, City of Kitchener, SEC, Three Fires Group and VECC) supported this recommendation from Dr. Hopkins as a basis for improving energy transition planning that would incorporate an assessment of energy transition risks. For example, IGUA submitted that Enbridge Gas should be directed to complete an analysis, such as that recommended by Dr. Hopkins, of how its operations can or should change in response to the energy transition, which would consider:[32]

- which customers are more likely to leave the system sooner rather than later, when, where and in what numbers
- which of Enbridge Gas's assets are more likely to be underutilized or stranded sooner rather than later and at what potential cost
- where should capital and operating costs be deployed to most effectively meet the demand for gas delivery services and take advantage of energy transition opportunities into the future

[29] SEC Submission, p.12.
[30] Environmental Defence Submission, p. 24.
[31] Exhibit M8, Attachment 4.
[32] IGUA Submission, p. 4.

- what regulatory mitigation tools may be most useful to address shareholder and customer risks

Three Fires Group and GFN submitted that the Energy Transition Plan had not adequately considered the impacts of the energy transition on remote and northern communities or on lower-income ratepayers.

In reply, Enbridge Gas indicated that it would target a revised Energy Transition Plan for its next rebasing application that it believed would be largely consistent with the recommendations of several intervenors and IGUA's expert, Dr. Hopkins. This would consist of a business analysis that informs Enbridge Gas's capital and operational plans, subject to available information, including:

- Creation of regional profiles (with analysis of customer data, alternative fuels, utility system and municipal plans)
- Development of regional pathways to net zero
- Modeling of different pathway scenarios by region and identifying risks and opportunities
- Considering impacts on the Asset Management Plan and other aspects of system planning

While Enbridge Gas agreed with the need to continue evolving its Energy Transition Plan, Enbridge Gas indicated that its specific proposals within this rebasing application, which were informed by energy transition considerations (e.g., capital expenditures, equity thickness and depreciation), are appropriate based on its current Energy Transition Plan. Many parties linked their submissions regarding Enbridge Gas's energy transition planning to Enbridge Gas's 2024 capital budget request and its proposal to increase equity thickness due to the energy transition.

Subsequent Procedural Steps on the Energy Transition

There was no consensus on the timing or appropriate procedural format of next steps on the energy transition. Enbridge Gas indicated that the appropriate time for review of an evolved Energy Transition Plan would be as part of its next rebasing application.

Some parties (APPrO, CCC[33], Energy Probe and LPMA) indicated that the energy transition issues should be re-examined once additional provincial policy direction, such as the Ontario government's response to the EETP report, on the energy transition has been provided. SEC noted that government policies will change many times over the lives of the assets that Enbridge Gas is investing in today, and submitted that if there is no government-mandated path to net zero, that does not mean that the status quo is the appropriate planning assumption.[34]

Procedurally, some parties (APPrO, GFN, LPMA and Three Fires Group) expressed a preference for considering the energy transition issues in the context of a generic hearing, likely involving the electricity sector as well, and potentially others with an interest in the energy transition issues, such as providers of other energy services, municipalities, and Indigenous communities.

Several other parties were of the view that the energy transition can be further considered in future Enbridge Gas applications, not a generic hearing, but that the next major Energy Transition Plan update (and review by the OEB) should likely not wait five years until Enbridge Gas's next scheduled rebasing. While recognizing that the rate term is intended to be addressed in Phase 2 of this proceeding, CCC, GEC and IGUA submitted that due to energy transition considerations, a shorter rate term may be more appropriate. SEC expressed a preference for a "planning pause" where timing of future steps on the energy transition is at Enbridge Gas's discretion. Under this proposed approach, rate base would be held steady at its current level for the time being (capital in-service additions equal to depreciation), but Enbridge Gas could apply to rebase at any time, once it has filed a more detailed Energy Transition Plan including an options analysis.

Enbridge Gas did not support the OEB convening a generic proceeding on the energy transition in advance of the next rebasing application, stating that this would likely not be as efficient or effective as a more business-led planning process.

Findings

The OEB concludes that Enbridge Gas's proposal is not responsive to the energy transition and increases the risk of stranded or underutilized assets, a risk that must be mitigated. In particular, Enbridge Gas has not met the onus to demonstrate that its

[33] CCC submitted that Enbridge Gas should be required to start analysis along the lines of that proposed by Dr. Hopkins and Energy Futures Group now, but that the ability to complete this analysis would be enhanced once the Government of Ontario's policy objectives were clearer.
[34] SEC Submission, p.11.

proposed capital spending plan, reflected in its Asset Management Plan, is prudent, and that it has accounted appropriately for the risk arising from the energy transition.

Two important themes emerged during this proceeding:

- climate change policy is driving an energy transition that gives rise to a stranded asset risk, and
- the usual way of doing business is not sustainable.

Enbridge Gas identified the energy transition as a source of increased business risk. Despite this, Enbridge Gas has proposed approximately $14 billion in capital expenditures for the 2023 to 2032 period (an average of $1.4 billion per year), based on a forecast that shows continued growth in natural gas peak demand, extending the historic trendline, with a very small impact from the energy transition. The actual capital spend for the prior five years (2018 to 2022) was $5.7 billion (average of $1.1 billion year). As OEB staff put it,

> Enbridge Gas expects to continue to add new customers and expand its rate base in what appears to be "business as usual."[35]

Enbridge Gas is entitled to recover through rates the reasonably incurred cost of operating and maintaining the gas distribution and transmission system and prudently incurred capital investments in that system, along with a fair return on that investment.

An essential component of prudent investment is the identification, management, and mitigation of risk. This includes the risk arising from the energy transition, the very risk that Enbridge Gas relies upon to justify an increase in its deemed equity thickness, which, if approved, would increase Enbridge Gas's return on its investment.

The energy transition is underway, underpinned by the totality of current government policy. The reality of the energy transition provides context for the OEB to understand the risks, mitigation of those risks, and potential cost consequences posed by Enbridge Gas's application.

The risk that arises from the energy transition results from gas customers leaving the gas system as they transition to electricity to meet energy needs previously met by natural gas. This departure gives rise to assets that are not fully depreciated but are no longer used and useful. This results in stranded asset costs that Enbridge Gas would seek to recover from the remaining gas customers. This in turn would increase rates for those gas customers, leading more customers to leave the gas system, potentially

[35] OEB staff Submission, p. 59.

leading to a continuing financial decline for the utility, often referred to as the utility death spiral.

In the face of the energy transition, Enbridge Gas bears the onus to demonstrate that its proposed capital spending plan, reflected in its Asset Management Plan, is prudent, having accounted appropriately for the risk arising from the energy transition.

The record is clear that Enbridge Gas has failed to do so. Enbridge Gas has taken the position that there is no stranded asset risk for the purposes of setting rates for 2024. This is not logical. The capital expansion proposed by Enbridge Gas for 2024 amounts to $1.47 billion and forms the basis for its proposed five-year rate term, with 2024 rates being adjusted annually for inflation, which would include a continuation of capital at a similar pace beyond 2024. This five-year period is part of the ten-year period covered by Enbridge Gas's Asset Management Plan, which contemplates a total capital expenditure of $14 billion over ten years. Based on Enbridge Gas's proposal, the depreciation expense for these assets would be recovered over 40 years or more,[36] with no meaningful consideration of:

- Ontario's policy objective to reduce greenhouse gas emissions by 30% below 2005 levels by 2030, which is seven years away;
- Canada's policy objective to achieve net zero carbon emissions by 2050, which is 27 years away, and
- The risk of assets becoming stranded or underutilized.

In light of this, the position taken by Enbridge Gas that there is no stranded asset risk in 2024 cannot stand. The assets Enbridge Gas proposes to add to rate base in 2024 would be depreciated over the next 40 years or more,[37] based on the physical asset life. The same would apply to the assets that Enbridge Gas plans to add in each of the following four years, as proposed in its application, and over the next ten years, as proposed in its Asset Management Plan. It is the 40-year horizon against which the stranded asset risk must be examined, not the five-year horizon of the requested rate term that Enbridge Gas urges the OEB to use.[38] When looked at through the 40-year lens, what Enbridge Gas proposes looks very much like business as usual and it is not sustainable.

[36] Exhibit J13.6.
[37] Exhibit J13.6.
[38] Enbridge Gas, Argument-in-Chief, p. 166.

Enbridge Gas's application engages the objectives the OEB is required to consider, in particular:

- Protecting the interests of consumers with respect to the price, reliability, and quality of gas service
- Facilitating the rational expansion of the gas system
- Facilitating the maintenance of a financially viable gas system industry

In the absence of:

- a meaningful assessment of the risk of stranded assets resulting from the proposed capital expansion, premised on the possibility of replacing natural gas with renewable natural gas, hydrogen and carbon capture abated natural gas,
- meaningful information about the associated system cost to implement those alternatives, let alone the commodity cost of those alternatives, and
- information as to the likelihood of any of the alternatives happening,

there is a completely insufficient evidentiary basis on which to:

- Ensure the interests of consumers regarding pricing are protected.
- Determine whether the proposed system expansion is rational.
- Determine whether Enbridge Gas will continue to be financially viable.

On the one hand, Enbridge Gas describes an increase in risk to justify an increase in the revenue it earns from its investment. On the other hand, it does not adjust its proposed capital spending to account for this risk. Enbridge Gas cannot have it both ways. It is this dissonance that leads the OEB to conclude that the proposed system expansion is not rational, and that Enbridge Gas has not established the prudence of its proposal. There is no ability to determine how the reliance on speculative long-term proposals relating to renewable natural gas, hydrogen and carbon capture will impact the cost of energy for ratepayers, let alone determine if such cost impacts would be reasonable. The OEB is left with the clear conclusion that the energy transition is underway, it creates a risk of stranded asset costs, and that Enbridge Gas has not addressed this in any meaningful way. The OEB is not satisfied that Enbridge Gas's proposal will not lead to an overbuilt, underutilized gas system in the face of the energy transition.

There are three important areas where the risk of stranded assets needs to be mitigated:

- system access or expansion capital spending
- system renewal capital spending
- depreciation policy

Enbridge Gas's system access and system renewal proposals give rise to similar risks of stranded assets since they both involve the addition of new assets to rate base. In the case of system access or expansion, new assets are used to connect new customers. In the case of system renewal, new assets are used to replace existing assets that are at their end of life, or in a condition that requires their replacement, to continue serving existing customers. If these assets are depreciated over an average of 40 years, and a material number of current customers leave the gas system as part of the energy transition, there is a risk that the remaining undepreciated assets will become a stranded cost on Enbridge Gas's regulatory accounting books.

Enbridge Gas's proposed depreciation policy determines how depreciation expense is recovered. Typically, depreciation expense should be recovered based on an asset's physical life, or its used and useful life, whichever is shorter.

If the depreciation expense was expected to be recovered over a period that ends up being longer than the asset is used and useful, this will give rise to stranded asset costs. In the context of the energy transition, the question is how this risk should be mitigated or avoided, and if the risk is realized, who should bear the stranded asset costs.

Each of these three areas (system access or expansion, system renewal, depreciation policy) are addressed separately.

3.2 Capital Expenditures

3.2.1 System Access or Expansion

Enbridge Gas requested approval of its harmonized customer connection policy, to replace the separate previous OEB-approved policies for the Enbridge Gas Distribution and Union rate zones.[39] Enbridge Gas's original proposal to harmonize the previous OEB-approved policies did not include significant changes from its previous customer

[39] Exhibit 1, Tab 15, Schedule 1.

connection policies, with the exception of a significantly higher Extra Length Charge (ELC) for Residential Infill Service Connections.[40]

The customer connection policy describes the approach Enbridge Gas uses to ensure that projects to connect new customers meet all financial compliance requirements and do not result in undue cross- subsidization between new and existing customers. The policy addresses connections for new customers that connect to Enbridge Gas's system from both system expansions where Enbridge Gas must build new mains (e.g., new subdivisions), and infills, where buildings along the line of an existing gas main that do not have gas service are connected.

The primary focus in this proceeding was on a specific aspect of Enbridge Gas's customer connection policy – the revenue horizon that Enbridge Gas uses to determine whether the cost of connecting a new customer will be financially feasible, and whether the new customer will need to pay a contribution toward the connection cost.

In the context of the energy transition, questions were raised as to whether the current 40-year revenue horizon for residential and small commercial customers in Enbridge Gas's customer connection policy remains appropriate, given the increasing likelihood over time that customers may leave the gas system prior to the end of that 40-year period, as greenhouse gas emission reduction policies continue to become more stringent to meet emissions reductions objectives, and as alternatives to natural gas service such as electric heat pumps become more prevalent. This raised the concern that continued use of the 40-year revenue horizon for new customer connections could result in a revenue shortfall posing a stranded asset risk. After the assets are constructed and the money is spent, the only remaining issue is who pays the cost. If this stranded asset risk materializes, the associated cost would either be recovered from remaining customers through rates or borne by Enbridge Gas. The OEB identified this as a matter of particular interest in this proceeding.[41]

Assessing Economic Feasibility of New Customer Connections

Enbridge Gas's customer connection policy is subject to the OEB's Guidelines for Assessing and Reporting on Natural Gas System Expansion in Ontario, which were created in a Report of the Board issued in 1998 (E.B.O. 188). E.B.O. 188 provides for a common analysis and reporting framework.

[40] Exhibit 8, Tab 3, Schedule 1. Other minor changes proposed by Enbridge Gas for the purpose of harmonizing differences in the previous policies for the Enbridge Gas Distribution rate zone and Union rate zones are listed in VECC Submission, p. 14. No party objected to these other minor changes.
[41] Procedural Order No. 6, June 23, 2023.

E.B.O. 188 sets an objective for rate-regulated natural gas distributors, including Enbridge Gas, that the Investment Portfolio of all a distributor's new distribution projects (both system expansion projects and infill customers attaching to existing mains) in each year shall be designed to achieve a Profitability Index (PI) greater than 1.0. In other words, the distribution revenues from new customers over a specified revenue horizon should exceed the costs of adding those new customers to the system, assuming that the customers remain connected to the system.

Enbridge Gas designs its customer connection policies to achieve this objective. Depending on the cost to Enbridge Gas to connect a customer, this may in some cases require customers to make an additional payment to bring a project PI up to 1.0. This can take several forms, such as:

- An upfront Contribution in Aid of Construction (CIAC);
- A temporary rate surcharge (Temporary Connection Surcharge/System Expansion Surcharge) on customer bills (for up to 40 years); or
- The ELC, applied to connections that are longer than the free service length, for infill customers only.

The upfront costs incurred by Enbridge Gas to connect new customers are substantial. Enbridge Gas estimated the average cost to connect a home in the Enbridge Gas Distribution rate zone to be $4,412 (weighted average of new construction and existing homes) which would take approximately 31 years to recover through distribution rates.[42] Connection costs for new construction system expansion projects are generally lower than for infill projects, due to economies of scale. The initial cost to Enbridge Gas for a 20 metre connection for an infill project is approximately $6,000.[43]

Connection costs have escalated sharply for Enbridge Gas in recent years, due to rising construction costs and additional costs related to municipal permit and restoration requirements.[44] The increase in costs resulted in the overall Investment Portfolio of Enbridge Gas (based on the customer connection policies in place at the time) failing to achieve a PI of 1.0 in the years 2021 to 2023; i.e., the cost of adding those customers is higher than the revenues that will be received in rates over the 40-year revenue horizon.[45]

[42] Exhibit JT 3.11 (updated).
[43] Exhibit 8, Tab 3, Schedule 1, p. 13, Figure 2.
[44] Exhibit 8, Tab 3, Schedule 1, pp. 12-13.
[45] Exhibit I.2.6-SEC-118.

Appropriate Revenue Horizon for Customer Connections

For both infill and system expansion projects, the economic analysis Enbridge Gas uses to assess the economic feasibility of projects is based on a maximum 40-year revenue horizon for residential and small commercial customers. For large volume customers, the revenue horizon is based on the distribution services contract term, up to a maximum of 20 years.

Enbridge Gas's customer connection policy also provides for a project specific revenue horizon when the project life cycle is determined to be shorter than the prescribed time horizons.

Enbridge Gas's costs to connect new customers are largely upfront costs, related to the initial work to physically connect the customer to the gas system. Revenues, on the other hand, are expected to be collected over the full revenue horizon through rates. If customers do not remain Enbridge Gas customers for the full revenue horizon, as a result of moving away from natural gas to electricity, there would be a revenue shortfall that would either be recovered from remaining customers or borne by the utility's shareholders. In other words, there is a risk of stranded asset costs which have not been fully paid for in rates.

All parties that made a specific submission on the appropriate revenue horizon for new customer connections expressed a preference for a shorter revenue horizon than the current 40-year horizon. Some parties submitted that this issue might be best addressed as part of a future generic proceeding.

Proposals for the appropriate revenue horizon ranged from zero years, i.e., a connecting customer would be responsible for the connection cost in its entirety upfront, to 30 years.

Parties favouring a very short or zero revenue horizon (GEC and Environmental Defence) noted the need to address the problem of split incentives between developers and final customers. GEC noted that new subdivisions account for approximately 80% of connections, and the choice to connect to gas is largely made by developers. GEC submitted that because most or all of the connection cost is currently borne in rates and not up front, developers are incented to connect to gas, even if the long-run costs to the connecting customer or other ratepayers, taking into account both energy costs and connection costs, end up being higher than if the customer had used electricity for heating.

GEC and Environmental Defence also commented on the approach to cost allocation between new and existing customers. Environmental Defence submitted that new

customers should pay for a share of existing Enbridge Gas assets in rate base that they benefit from (e.g., pre-existing upstream pipelines), not just the connection costs and system reinforcement costs associated with their connection, as is currently required under E.B.O. 188. Enbridge Gas and OEB staff both disagreed, submitting that the existing approach in E.B.O. 188 is intended to ensure that existing customers are made better off by new connections, and the associated cost should not be considered a cross-subsidy. Enbridge Gas further submitted that this is an enduring principle of E.B.O. 188 and a fundamental change to this principle would be better considered in a generic proceeding. OGVG noted that, in trying to avoid a cross-subsidy from existing customers to new customers, the OEB should be careful not to create a cross-subsidy in the opposite direction (from new customers to existing customers), which OGVG submitted would be the case if new customers were required to pay 100% of their connection costs.

Environmental Defence also noted that safely disconnecting the service line for a customer leaving the system has an approximate cost to Enbridge of $3,700 and that this cost needs to be taken into account in determining the appropriate revenue horizon.

Most other parties proposed a revenue horizon that was linked, to some extent, to the average length of time a customer is likely to remain on the system (which, if forecast perfectly, would result in a PI of 1.0, although, as noted by Environmental Defence, disconnection costs are not currently captured in this calculation). Due to the energy transition, parties were generally of the view that the average length of time a customer will remain on the system is likely less than 40 years and continued use of the 40-year revenue horizon would therefore result in stranded assets or cross-subsidization.

The expert evidence of Mr. Neme recommended using a revenue horizon of 15 years, as a way to reduce an upfront subsidy from existing customers to new customers, noting that the typical life of a new gas furnace is roughly 18 years, and suggesting that it is more likely that a customer will electrify at the time that they need to replace their heating system.[46] In his testimony, Mr. Neme also said that there is a reasonable case for reducing the revenue horizon to zero, which would eliminate the risk altogether.[47] SEC, FRPO and Pollution Probe supported a 15-year horizon on this basis in their submissions. CCC supported a 20-year horizon, while OEB staff submitted that

[46] Exhibit M9.GEC-Environmental Defence, p. 43.
[47] Oral Hearing Transcript, Vol. 6, p. 48.

choosing a revenue horizon close to, but slightly longer than, the initial life of space heating equipment (i.e., 20 years instead of 18) is appropriate.[48]

LPMA supported a reduction to the revenue horizon from 40 to 30 years. LPMA submitted that a larger reduction in the revenue horizon could not be justified at this time given the high connection costs it would impose on new customers and the lack of concrete government policy with respect to the energy transition.

In reply, Enbridge Gas indicated that it was willing to update its overall proposal for its customer connection policy, having considered the submissions of OEB staff and intervenors. Enbridge Gas proposed using a 30-year revenue horizon (as opposed to a 40-year revenue horizon), on an interim basis, effective January 1, 2025, applicable to both system expansions and infill customers. Enbridge Gas proposed a "blended revenue horizon" of 30 years, basing this on the assumption that perhaps half of new customers might leave the gas system at the end of life of their initial heating equipment, while the other half might remain.[49] Enbridge Gas also noted that this is close to the 31 years that it currently takes, on average, to recover the capital cost associated with connecting a typical residential customer to the distribution system.

Enbridge Gas also submitted that the OEB should initiate a generic proceeding (or rulemaking process) to complete a fuller review of whether further changes to gas distributor customer connection policies are appropriate, taking into account the energy transition, to be held in the next year or two.

For electricity distributors, the revenue horizon used for the economic feasibility analysis for customer connections is 25 years.[50] In addition, the customer connection horizon[51] (i.e., the time period the distributor uses to determine the expected number of customer connections that would be served by a system expansion) is five years for electricity system expansions, compared to ten years for the gas system expansions.

Some parties noted that it may be appropriate for the revenue horizon to be different for the gas and electricity distribution systems, as there may be differences between the systems that are relevant to setting the appropriate revenue horizon (e.g., stranded

[48] OEB staff noted that some customers will likely remain on the system after the initial life of their space heating equipment, while other customers may exit the system prior to the end of life of space heating equipment, particularly if these customers were not responsible for making the original request to connect to the gas system. OEB staff noted its belief that the first result is likely slightly more probable than the second. OEB staff Submission, p. 26.
[49] Enbridge Gas Reply Argument, p. 114.
[50] Parameters for the customer revenue horizon and customer connection horizon for the electricity system are specified in *Appendix B to the Distribution System Code: Methodology and Assumptions for An Offer to Connect Economic Evaluation*.
[51] Referred to as the customer attachment horizon in E.B.O. 188.

asset risk, technical life of new infrastructure). However, SEC submitted that there did not appear to be any reason why the customer connection horizon should differ between electricity and gas, and that a five-year connection horizon should also be used by Enbridge Gas in its customer connection policies. Enbridge Gas disagreed, noting that a longer period is necessary in some cases, as conversions to natural gas occur over time often based on the replacement of the customer's space heating equipment. Enbridge Gas also noted that the policy for electricity customer connections allows distributors to use a connection horizon longer than five years, if supported by an explanation to the OEB.

E.B.O. 188 Parameters and Appropriateness of Modification in this Proceeding

Distinct from the question of the appropriate length of the revenue horizon is the procedural question of whether the OEB should modify the revenue horizon (or other aspects of the customer connection policy that are derived from E.B.O. 188), in this rebasing proceeding, or whether this is best considered in a separate OEB initiative, perhaps through a generic proceeding. Parties reached different conclusions on this question.

In its argument-in-chief, Enbridge Gas noted that changes to the revenue horizon were not considered in Enbridge Gas's original application. Enbridge Gas raised concerns around process and the potential need to make related changes to the Gas Distribution Access Rule (GDAR),[52] which applies to all gas distributors regulated by the OEB, specifically:

- Whether there is a full and sufficient record in this proceeding to make changes to the long-standing principles and directions determined in E.B.O. 188.
- Whether changes to the customer attachment policy, which effectively amend E.B.O. 188, can be made without also changing GDAR. Section 2.2.2 of GDAR specifically directs gas utilities to follow the E.B.O. 188 guidelines in attaching customers.[53]

In reply, Enbridge Gas also submitted that, in its view, the OEB had the authority to change the revenue horizon in this proceeding, but that the OEB should not make a fundamental and permanent change to the revenue horizon (or other aspects of E.B.O. 188 and the GDAR) at this time. Therefore, Enbridge Gas proposed the adoption of a 30-year revenue horizon on an interim basis, until this issue (and other potential changes to E.B.O. 188) could be considered in a generic proceeding.

[52] Enbridge Gas, Argument-in-Chief, pp. 105-108.
[53] Section 2.2.2 of GDAR: "A rate-regulated gas distributor shall assess and report on expansion to its gas distribution system in accordance with the guidelines contained in the E.B.O. 188 Report".

Some parties (CCC, Energy Probe, LPMA and VECC) also expressed a preference for a separate generic proceeding that would review E.B.O. 188 and the relevant sections of GDAR, possibly combined with a review of the equivalent policies for the electricity system that are referenced in the electricity Distribution System Code. These parties noted that this would allow the OEB to consider all aspects of the policies regarding system expansion set out in E.B.O. 188, rather than addressing one component in isolation, and would provide an opportunity for stakeholders not participating in this rebasing proceeding that would be impacted by any change to E.B.O. 188 to participate. Enbridge Gas supported these submissions.

VECC further submitted that creating a new maximum revenue horizon would be a change to the policies of E.B.O. 188, and because E.B.O. 188 is incorporated into GDAR by reference, this would be a rule change, which has its own procedural requirements and must be made under the authority of the OEB's Chief Executive Officer.[54] Therefore, in VECC's view, the OEB cannot change the revenue horizon in this proceeding.

Other parties commenting on this procedural question did not specifically oppose the idea of a generic hearing but did conclude that the OEB had the authority to modify aspects of Enbridge Gas's customer connection policy including the revenue horizon in this proceeding. OEB staff submitted that Enbridge Gas's existing customer connection policies already include methodological approaches not described in E.B.O. 188 that reflect subsequent OEB decisions, that these changes were not accompanied by any amendments to GDAR, and that the requirement in GDAR should be read to include any subsequent updates to the methodologies approved in E.B.O. 188. Environmental Defence, GEC, and SEC submitted that the 40-year revenue horizon described in E.B.O. 188 (taking into account the language in both the full OEB decision on E.B.O. 188 as well as the appendix) should be interpreted as a maximum value, and therefore there is no conflict with E.B.O. 188 if the OEB mandates the use of a shorter revenue horizon. OEB staff and SEC also submitted that, should the OEB believe there is an inconsistency between any changes made to Enbridge Gas's customer connections policy and the relevant section (2.2.2) of GDAR, the OEB also has the authority to exempt Enbridge Gas from this section of GDAR. Enbridge Gas agreed with this submission.

Applicability of a Revenue Horizon Change to the Natural Gas Expansion Program

The Natural Gas Expansion Program (NGEP) is an Ontario government initiative that provides funding to Ontario natural gas distributors to support the expansion of natural gas to communities that are not currently connected to the gas system. NGEP funding

[54] VECC Submission, pp. 9-14.

acts in a manner similar to a CIAC and the amount of funding is designed to bring projects that would otherwise be uneconomic to a profitability index of 1.0 (i.e., make them economic under the OEB's test under E.B.O. 188), assuming a 40-year revenue horizon.[55] The eligible projects, and the amount of funding, are specifically set out in regulation.[56]

Enbridge Gas and OEB staff submitted that natural gas expansion projects already selected for government funding in Phase 2 of the NGEP should be subject to the existing 40-year revenue horizon, as those projects were selected and their eligibility for funding was determined on this basis. Enbridge Gas and OEB staff were in agreement that, should future phases of the NGEP be undertaken, then (absent direction from the Government of Ontario), these projects could be assessed using any revenue horizon that might be determined by the OEB in this rebasing proceeding. Environmental Defence agreed that any use of the previous revenue horizon should be limited to the specific projects already selected and named in regulation, but argued that Enbridge Gas should still be required to maintain an overall Investment Portfolio designed to achieve a PI of greater than 1.0 for all projects including the NGEP projects, as calculated with the new revenue horizon (e.g., by balancing out the NGEP projects with more profitable projects).[57] Enbridge Gas opposed this proposal, indicating that it penalizes Enbridge Gas for complying with the terms of the Government's NGEP.

Surcharge Mechanisms for New Construction

As noted earlier, Enbridge Gas's customer connection policy allows for several approaches to improve the economic feasibility of a project by requiring an additional customer contribution, if a project cannot achieve a PI of 1.0 without this contribution.

Enbridge Gas indicated that its unofficial approach has been to use the upfront CIAC instead of a rate surcharge (System Expansion Surcharge or Temporary Connection Surcharge) for system expansion projects that are for new developments, to ensure that these costs are paid by developers, and not passed onto customers through rates.[58] However, this is not part of Enbridge Gas's written customer connection policy.

Environmental Defence, GEC, and OEB staff submitted that Enbridge Gas should be required to use the CIAC approach for system expansion projects for new

[55] A System Expansion Surcharge is also used to bring the economic feasibility of these projects up to 1.0.
[56] O. Reg. 24/19: Expansion of Natural Gas Distribution Systems.
[57] Environmental Defence Submission, pp. 35-36.
[58] Technical Conference Transcript, Vol. 3, pp. 42-46.

developments,[59] as opposed to other methods such as the System Expansion Surcharge/Temporary Connection Surcharge. The primary rationale for these submissions was to partially address the split incentive problem between developers and final customers, such that the cost of connecting to the gas system would be borne initially by developers and brought into their economic decision-making process in their initial building design choices. OEB staff noted that this approach also reduces stranded asset risk (should a customer leave the system before the end of the revenue horizon) by recovering a higher share of costs upfront.

In reply, Enbridge Gas indicated that, if the OEB agrees with its proposal for interim implementation of a 30-year customer connection revenue horizon, Enbridge Gas could agree to refrain, on a similar interim basis, from offering the Temporary Connection Surcharge to developers of eligible new residential subdivisions. However, if the OEB requires a shorter revenue horizon, Enbridge Gas noted that it could not make that commitment, and that it may be appropriate to use the Temporary Connection Surcharge in some circumstances. Enbridge Gas submitted that there is insufficient evidence or basis for the OEB to effectively overrule, or at least rewrite, the relatively recent OEB decision[60] that set out the terms under which the Temporary Connection Surcharge can be offered.

Does the OEB have Jurisdiction to Change the Revenue Horizon?

Findings

While Enbridge Gas and some intervenors suggested that the question of the length of the revenue horizon should be deferred to a generic proceeding, no party other than VECC argued that the OEB lacked the jurisdiction to change the revenue horizon in this case.

The OEB does not agree with VECC. Although GDAR says in section 2.2.2 that “A rate-regulated gas distributor shall assess and report on expansion to its gas distribution system in accordance with the guidelines contained in the E.B.O. 188 Report,” it does not follow that shortening the revenue horizon requires an amendment to GDAR.

Changing the revenue horizon applied by Enbridge Gas does not conflict with E.B.O. 188. The OEB agrees with OEB staff, who argued that doing so would in fact be consistent with the fundamental principles of the economic feasibility approach used in

[59] This would not apply to NGEP-funded projects, which use a rate surcharge. These projects primarily serve existing buildings that would be converting to natural gas, but new developments within the project areas would also be subject to the rate surcharge.
[60] EB-2020-0094, Decision and Order, November 5, 2020; Decision and Order, December 4, 2020; Rate Order, January 7, 2021.

E.B.O. 188, which is designed to ensure that expansions are economically feasible and, in the words of one of the OEB's statutory objectives, "rational". As OEB staff pointed out, Enbridge Gas's current customer connection policies already include methodological approaches not described in E.B.O. 188, such as the System Expansion Surcharge, which were approved without an amendment to GDAR. And as some intervenors noted, while E.B.O. 188 itself establishes maximum revenue horizons (20 years for large volume customers and 40 years for others), shorter horizons are not proscribed.

For these reasons, the OEB finds that it has the jurisdiction to change the revenue horizon for Enbridge Gas in this proceeding. In any case, no party disputed that the OEB could exempt Enbridge Gas from GDAR.[61] For greater certainty on the jurisdictional question, the OEB exempts Enbridge Gas from section 2.2.2 of GDAR, but only to the extent required to give effect to the findings below on the revenue horizon.

That still leaves the question of whether this is the best proceeding to address the revenue horizon issue as it pertains to Enbridge Gas. The OEB finds that it is. There was extensive evidence and argument on this issue. Indeed, it became one of the focal points of Phase 1. Many parties pointed to the revenue horizon as a crucial tool for mitigating the risk of stranded assets and stranded costs – a risk that is increasing with the energy transition. Moreover, as elaborated below, the revenue horizon is inextricably linked to other ratemaking questions. It only makes sense to address these together, in this proceeding.

Should the Revenue Horizon for Small Volume Customers be Reduced?

Findings

The OEB finds that the revenue horizon should be reduced to address the risk of stranded assets resulting from the energy transition.

The Report of the Board in the E.B.O 188 proceeding, issued in 1998, established a requirement for gas utilities to carry out an economic assessment of new customer connections. For most customer connections, primarily connections for residential and small commercial customers, the economic assessment compares the capital cost of the connection facilities against the revenue that would be collected over a maximum of 40 years, based on the rates in effect at the time of the assessment. The 40-year period is referred to as the revenue horizon. If there is a revenue shortfall, the amount of the shortfall will be charged to the connecting customer, usually as a contribution in aid of

[61] Section 1.5.1 of GDAR provides that "The Board may grant an exemption to any provision of this Rule. An exemption may be made in whole or in part and may be subject to conditions or restrictions."

construction or CIAC. A similar economic assessment is carried out for large volume customers based on a maximum revenue horizon of 20 years.

Enbridge Gas has typically used the maximum 40-year revenue horizon for proposed new residential and small commercial connections. Despite Enbridge Gas's assertion that business as usual is not sustainable, Enbridge Gas's initial proposal to continue using a 40-year revenue horizon for residential and small commercial projects is very much business as usual and does not take into account the risk of stranded assets. Based on the assumption that new connection assets will be used and useful for at least 40 years, there is an implicit assumption that the new customers will remain connected to the gas system for that same period. In other words, it is assumed that none of these new customers will leave over the next 40 years. This is not a reasonable assumption.

The OEB is of the view that the revenue horizon needs to be shortened to address the risk of stranded assets resulting from the energy transition, to protect the interests of ratepayers and the utility in relation to prices, rational expansion of the gas system, and energy conservation and efficiency.

Under the current process, with a 40-year revenue horizon, developers generally do not have to contribute to the capital cost of gas service for the development, and where they do, it is generally small. For example, Enbridge Gas estimated the average cost to connect a home in the Enbridge Gas Distribution rate zone to be $4,412, based on the weighted average connection cost for new construction and existing homes, which would take approximately 31 years to recover through distribution rates.[62] For this example, using a 40-year revenue horizon would not result in a requirement for a developer to pay a contribution for an average connection, since it only takes 31 years to recover the cost. Enbridge Gas's proposal for a 30-year revenue horizon would simply amount to reflecting the current average time needed to recover connection costs and therefore, does not materially mitigate the stranded asset risk.

As a result of using the 40-year revenue horizon, virtually all developments end up including gas servicing, since the developer bears little or no cost to include gas servicing, has no responsibility for the energy bills to be paid by subsequent property owners, no exposure to the future stranded asset cost risk resulting from the energy transition, and therefore, no incentive to consider any of those impacts or alternatives that would avoid or reduce those impacts. Enbridge Gas's application implicitly assumes that this pattern will continue. This is the split incentive problem identified by Mr. Neme and by OEB staff and intervenors in their submissions. The developer makes the decision on how to service the development and the purchasers pay the energy bills.

[62] Exhibit JT 3.11 (updated).

In effect, the developer is making a choice that does not require the developer to consider the cost consequences that will be faced by the buyers of the properties sold by the developer. Enbridge Gas's forecast of new customer attachments is consistent with this default approach, assuming as it does that virtually every new housing development will include gas servicing. This approach increases investments by Enbridge Gas to be included in rate base and earn a return. However, it does not address the risk of stranding the cost of those investments, arising from the energy transition. Enbridge Gas takes the position that in the event of stranded asset costs, ratepayers should bear the risk. What Enbridge Gas means by this is that when ratepayers leave the gas system, and assets become underutilized, or no longer used or useful, it would still be entitled to recover any remaining undepreciated value for those assets and a return on the remaining undepreciated value from remaining ratepayers until those assets are fully depreciated. This is not an acceptable position in the face of Enbridge Gas's clear acknowledgement of the risk resulting from the energy transition, namely the risk of stranded assets and the associated cost. It is inconsistent with the rational development of the gas system and does not sufficiently protect gas customers. Acknowledging the existence of a risk and failing to take steps to avoid or mitigate that risk does not meet the prudence requirement that must be met for infrastructure investments if ratepayers are expected to pay for those investments through a depreciation expense, along with a return on those investments.

New construction offers a clear opportunity to reduce the risk of stranded asset costs.

The challenge is to establish the circumstances that will facilitate the ability of developers to make a more informed decision on how to proceed in the face of the energy transition and the associated risk of stranded asset costs that arises from the choice to include gas infrastructure to meet the energy requirements of new developments. The ability to make informed choices acts to protect the interests of the buyers of the developed properties.

Reducing the current 40-year revenue horizon means that developers are more likely to be required to pay a CIAC if they choose to include gas servicing in their development. When faced with this, a developer now has the opportunity to make an informed choice that will facilitate the rational expansion of the gas system and protect the interests of customers. This also serves to reduce the market distortion problem identified by Mr. Neme, during his testimony, and addressed by other intervenors and OEB staff in their submissions:

> MS. DUFF: I was hoping that you could perhaps elaborate on that and maybe identify the distortion or distortions that you were referring to.

> MR. NEME: Sure. Sure. I think this relates to the issue I was just talking about with Mr. Shepherd. If you are a builder building a new house or a new subdivision of houses, you are going to connect every single one of those houses to the electric grid. That is pretty much a given. You have a choice then of whether you are going to put a gas furnace with a central air conditioner into that home for heating and cooling purposes or whether you will a cold-climate air-source heat pump into that home for heating and cooling purposes. You have that choice.
>
> From a societal perspective, if you offer – there is a cost to society to connect that customer, if they go the gas route, to the gas system. If you offer a subsidy from existing gas ratepayers for some period of time to facilitate that gas connection or to reduce the cost to the builder of making the gas connection, you have distorted the decision, from an overall societal economics perspective, that the builder would otherwise have made between electricity and gas for heating or for other end uses. That is the point that I was trying to make.[63]

The smaller the revenue horizon that is used, the larger the required CIAC will be. The larger the CIAC is, the smaller the stranded asset cost risk will be.

Ontario has established a target to achieve at least 1.5 million new homes constructed by 2031 with a focus on affordable housing.[64] Affordable housing has two components – the cost to buy the home and the cost to operate the home. Both are important. A home may have what appears to be an affordable purchase price, but that price advantage is diminished if the cost to operate the home, including the home's energy costs, are higher than they need to be. The revenue horizon plays an important role in ensuring that both the purchase price and the energy costs to operate the home are as affordable as possible. Reducing the revenue horizon provides a developer with the opportunity to make an informed decision that takes into account both aspects of affordability. Every home requires space heating and cooling. This can be achieved with a gas furnace and an air conditioner which will require both gas and electricity service, or alternatively with a heat pump, which only requires electricity service. Similarly, domestic hot water can be provided through gas water heaters or electric solutions, which include electric resistance water heaters and electric heat pump water heaters.

When faced with a requirement to pay a CIAC, one choice is to pay the CIAC and include gas servicing along with electric servicing in the development. The payment of a CIAC will reduce the amount of capital that is added to rate base and therefore, reduce

[63] Oral Hearing Transcript Vol. 6, p. 167.
[64] *More Homes, Built Faster: Ontario's Housing Supply Action Plan 2022–2023*

the risk of stranded asset costs quantitatively. The CIAC will be a cost that the developer will seek to pass on in the price of the property. Those buyers would then be gas customers. The amount of investment by Enbridge Gas that would go into rate base would be reduced by the amount of the CIAC.

Since some of the capital cost of the gas infrastructure will have been covered by the CIAC paid by the developer and recovered by the developer through the purchase price of the property, standard postage stamp rates (which include a revenue requirement to recover the costs of previous customer connections that did not have to pay a CIAC based on the current 40-year revenue horizon) would result in cross-subsidization from new to existing customers. An approach would need to be adopted to avoid this (as discussed later) to ensure that these new gas customers would pay rates that reflect the fact that a CIAC had been paid.

The effect of choosing to include gas servicing and pay a CIAC would be to potentially increase the cost of housing by the amount of the CIAC while reducing the operating cost of the house through lower gas rates – largely a wash for homebuyers. Those homes would continue to emit greenhouse gases and would not be contributing to the achievement of government decarbonization goals. Finally, while there would be a reduction in the stranded asset cost risk as a result of the payment of the CIAC, some risk would still remain since the homeowners would still be able to transition to electric solutions for space heating and domestic water heating before the end of the useful life of the gas infrastructure built to serve them.

The other choice is to decide against gas servicing and avoid having to pay any CIAC, and only include electricity servicing in the development. In this scenario, the people who buy from the developer would not be gas customers. The effect of this choice would be to lower the cost of housing, depending on the capital cost differential between gas and electric equipment, by avoiding paying a CIAC for gas servicing, and lower the operating energy cost of the house[65] – a win for homebuyers and an outcome for developers that keeps them competitive on price in the housing market.

Enbridge Gas would not need to make any investment, and the stranded asset cost risk in this scenario would be zero.

In laying out its energy strategy, Ontario has identified a need for reliable electricity "especially as households increase their consumption to heat and cool their homes and power their vehicles."[66] This recognizes that households will be moving from natural gas to electricity to heat and cool their homes as the energy transition progresses, and the

[65] Exhibit M9-GEC-ED, pp. 22-24.
[66] Exhibit K1.5, *Powering Ontario's Growth*, p. 39.

need to factor this into electricity planning. This is important because it addresses the concern that electricity resources will be insufficient to meet growing demand. The reality is that there is a strategy and planning process to address this, which is described in detail in the Government of Ontario's *Powering Ontario's Growth* report, released on July 10, 2023.[67] The IESO has engaged in, and will continue to engage in, electricity demand forecasting and electricity procurement, all with the objective of ensuring that growing electricity demand for electric vehicles and home heating and cooling will be met. Similarly, electricity distributors will continue to forecast demand and plan for how to meet that demand,

Government policy at the federal, provincial and municipal level is focused on reducing reliance on fossil fuels, including gas, thereby decarbonizing the economy to address the existential threat posed by climate change. This policy direction includes support for electric heat pumps as an alternative to gas heating equipment. Examples are Canada's Greener Homes Grant retrofit program which is being delivered by Enbridge Gas in Ontario, and Enbridge Gas's own demand side management program, which provides enhancements to the retrofit incentives under the Greener Homes Grant program.[68] Enbridge Gas delivers these combined incentives in its Home Efficiency Rebate Plus (HER+) program. An Enbridge Gas customer can qualify for an incentive of up to $6500 for installing a heat pump under the HER+ program. There are also incentives for domestic hot water heat pumps. Ontario has implemented a Clean Home Heating Initiative that also provides retrofit support for homeowners in four communities to add an electric heat pump to their home to reduce greenhouse gas emissions.[69]

The retrofit cost to move from gas equipment to electric equipment is higher than installing electric equipment for both heating and cooling at the time a home is built, due to the possible need to address technical limitations related to the sizing of ductwork,[70] in addition to the sunk cost of gas equipment. Furthermore, the operating cost of a new all-electric house using a cold climate air source heat pump for space heating, is lower than a new gas and electricity serviced house.[71] While Enbridge Gas submitted that Mr. Neme's evidence regarding the customer economics of electrification relied on various assumptions, Enbridge Gas did not establish that these assumptions were unreasonable. To the contrary, Enbridge Gas relied on the unreasonable assumption that virtually all new homes would connect to the gas system and those new customers would remain connected to the gas system for at least 40 years, despite the energy transition.

[67] Exhibit K1.5, *Powering Ontario's Growth*, pp. 60-70.
[68] EB-2021-0002, Decision and Order, Schedule B.
[69] Exhibit K1.5, *Powering Ontario's Growth*, p. 27.
[70] Exhibit J11.5.
[71] Exhibit M9-GEC-Environmental Defence, pp. 22-24.

A reduced revenue horizon will allow a developer to make an informed decision on whether to include gas service in the development. While there is a logic to providing retrofit incentives for existing customers, the logic is less clear for new construction. Adding new customers to the gas system and then offering those same customers an incentive to replace their gas equipment works against the goal of reducing the risk of stranded assets. While Enbridge Gas has not provided a risk assessment of the impact of the energy transition, it did provide evidence for a scenario that assumes that 100,000 existing residential customers exit the gas system over a three-year period. The need to recover the stranded costs of these assets from remaining ratepayers (through accelerated depreciation) would result in an increase in the annual revenue requirement of $34 million.[72]

Enbridge Gas has not demonstrated that the 40-year revenue horizon is appropriate in light of the energy transition underway. Enbridge Gas acknowledges this in its reply argument. It proposes a 30-year revenue horizon on an interim basis, pending a separate proceeding to determine what the revenue horizon should be. The OEB is of the view that the record before it is more than sufficient to determine this issue and there is no benefit to deferring the issue to a subsequent proceeding.

Having considered the evidence and the objectives of protecting the interests of ratepayers and the utility in relation to prices, facilitating the rational expansion of the gas system, and promoting energy conservation and efficiency[73], the OEB finds that the revenue horizon needs to be shortened to address the risk of stranded assets resulting from the energy transition.

How much should the revenue horizon for small volume customers be shortened?

Findings

The OEB finds that zero is the optimal revenue horizon because this fully addresses the risk of stranded assets resulting from the energy transition for new connection projects as described below.

The parties and OEB staff have proposed a range of revenue horizons, from the 30 years proposed by Enbridge Gas, through the 20 years proposed by OEB staff, all the way to zero years proposed by GEC and Environmental Defence. The following considerations apply:

[72] Exhibit J18.5.
[73] OEB Act, s.2.

- The shorter the revenue horizon, the smaller the risk of stranded asset cost is, since part or all of the cost is being paid up front, or alternatively, is being avoided entirely by going with all electric servicing.
- The shorter the revenue horizon, the more likely it is that a developer will choose not to include gas service since the size of the CIAC is larger and will lead the developer to choose the most cost-effective servicing solution.
- If developments proceed without gas service, government decarbonization policy objectives are being met efficiently because new housing development is being optimized to meet energy supply needs through electricity solutions.
- If developments proceed with gas servicing, despite having to pay a CIAC, government decarbonization objectives will be met less efficiently since decarbonization measures would then require retrofit measures that typically cost more than including those measures as part of the original construction process. For example, a house that is initially optimized for gas heating may need further optimization to accommodate a switch to an electric heat pump, such as ductwork or electrical panel upgrades.[74]
- Retrofits frequently need incentive payments. Enbridge Gas's HER+ is an example. The HER+ incentive payments are funded by a combination of tax dollars and money collected through gas rates. These payments are not necessary when the decarbonization measures are part of the initial construction process because it avoids the need for a retrofit.

These considerations all militate in favour of a shorter revenue horizon.

The expert evidence of Mr. Neme, in his written report, recommended using a revenue horizon of 15 years, as a way to reduce an upfront subsidy from existing customers to new customers.[75] In his testimony, Mr. Neme also said that there is a reasonable case for reducing the revenue horizon to zero, which would eliminate the risk altogether.[76]

While parties provided various reasons to support their various proposals for changing the revenue horizon, it is clear that there is not a mathematical approach upon which to determine the issue. As Mr. Neme said in his evidence:

> MR. NEME: No, I disagree with that. I don't think there is a mathematical formula that will give you the answer of what is the right number of years. It is a question of two things: One, how do you judge the risk that

[74] Exhibit J11.5.
[75] Exhibit M9.GEC-ED, p. 43.
[76] Oral Hearing Transcript, Vol. 6, p. 48.

> customers may not be there for the entire duration of the revenue horizon time frame.
>
> Secondly – actually maybe three things. Secondly, what expectations from a policy perspective do you have about whether customers over and above paying for their cost of connection should have in terms of contributing to the cost of the rest of the system and, thirdly, to what extent as policymakers – I am now thinking of regulators-- do they think it is appropriate to essentially create a market distortion that influences builders on which type of fuel that should be used for a customer's space heating.
>
> Those are conceptual policy concepts – sorry for the redundancy of the word “conceptual" there – that are not something that can be resolved with a mathematical formula or a calculation.[77]

Mr. Neme’s evidence on what factors the OEB should consider is important, since these factors underpin to varying degrees the various revenue horizon options that were proposed. The primary consideration throughout this proceeding has been the risk of stranded assets resulting from the energy transition. The OEB’s finding of a zero revenue horizon fully addresses that risk for new connection projects. When a developer is faced with the full cost of including gas service in a development, that developer will be fully incented to choose the most cost effective, energy efficient choice in a manner that not only achieves efficiency in the cost of housing in a competitive market and lowers the operating cost of that housing, but also maximizes the contribution to achieving government decarbonization policy goals. It also eliminates the split incentive problem.

This issue does not lend itself well to an incremental approach. The various proposed reductions to the revenue horizon, other than the zero option, all include the split incentive problem to varying degrees, while the zero option avoids it completely.

The zero revenue horizon is the only option that provides the opportunity to make a fully informed decision on whether to include gas servicing. All the other proposals mute the price signal to varying degrees, while the zero option uses the full cost of the connection facilities. For example, a 20-year revenue horizon would generate a requirement for a CIAC of $1,774, less than one third of the connection cost.[78] The zero option provides

[77] Oral Hearing Transcript, Vol. 6, p. 46.
[78] Exhibit J11.1.

the full cost of the connection facilities, allowing for a fully informed decision to be made on whether to include gas servicing.

Finally, all the other proposals retain a residual stranded asset cost risk that increases as the length of the revenue horizon increases toward the 40 years currently used by Enbridge Gas. In the 20-year example, over two thirds of the connection cost would still have to be recovered over a period of 20 years, and all new customers would need to remain connected to the gas system for at least 20 years to avoid any stranded asset costs. Using a zero revenue horizon reduces the stranded asset cost risk to zero.

The OEB makes no determination of what choice a developer may actually make, if the revenue horizon is shortened to zero. It is not necessary to predict what choice a developer might make, since the objective in shortening the revenue horizon is to facilitate an informed choice, and the stranded asset cost risk is reduced to zero regardless of the actual choice made.

This change will apply to all new small commercial and residential developments, including infill projects. The OEB agrees with the submissions by Enbridge Gas and OEB staff that the new revenue horizon should not apply to the projects in the current phase of the NGEP under O. Reg. 24/19. The current approach for large volume customers was not an issue in the proceeding and remains unchanged.

In making this change, the OEB acknowledges the submission by Enbridge Gas that it has an informal practice of using the E.B.O. 188 analysis to avoid reliance on the System Expansion Surcharge and the Temporary Connection Surcharge when addressing the economic feasibility of a connection project. The OEB is of the view that this is the right approach to take and it will be mandatory with the new revenue horizon.

There were submissions from parties regarding the connection horizon under E.B.O. 188, which is currently ten years, compared to five years for electricity connection projects under the Distribution System Code. The connection horizon is the period used to establish the number of customers that will be connected in a project. Given that the OEB has determined that the revenue horizon will be reduced to zero, and requiring the full cost of new connections to be recovered if a developer chooses to include gas servicing, there is no need to address the connection horizon. Regardless of the length of the connection horizon, Enbridge Gas is required to provide the developer with the full cost of the connection facilities that may be required, so that the developer can make an informed decision about whether to proceed with gas servicing.

When Should the New Revenue Horizon be Implemented?

Enbridge Gas requested that the change take effect on January 1, 2025. Enbridge Gas noted that it requires substantial lead time to update systems and processes.[79]

OEB staff, GEC, and Environmental Defence submitted that any changes to the customer connection policy should take effect sooner (immediately following the OEB's decision or as of January 1, 2024, with the possible exception of changes related to infill customers).[80] OEB staff and GEC were concerned that any delay in implementation may lead to a large number of requests seeking connection agreements to be grandfathered under the old customer connection policy. Environmental Defence also noted the high connections related capital costs that would be put into rate base if changes to the policy are delayed until 2025.

Enbridge Gas submitted that more rapid implementation was not possible due to the complexity of the required system and process changes, and also indicated that it would need to provide notice to customers about changes to the customer connection policy, and that some of the changes that may be required will have to be reflected in Enbridge Gas's Conditions of Service. Enbridge Gas argued that it is required under GDAR[81] to provide advance public notice of any revisions to Customer Service Policies related to residential customers, and noted that in previous changes to GDAR, the OEB has set out a range of notice periods from four months to one year.

Enbridge Gas also proposed that customers who have requested service in writing, received commitments, and have been advised of whether there will be a requirement for a CIAC based on the current revenue horizon, for new connections prior to the date of any change to the customer connection policy should be subject to the existing rules. OEB staff agreed with this, but Environmental Defence argued that the proposed language around grandfathering was excessively broad, and should be limited to customers who had received a binding commitment as of September 1, 2023.

Findings

The OEB finds that January 1, 2025, is an appropriate implementation date. This would allow sufficient time for Enbridge Gas to adjust its processes and give a full year's notice to the development industry regarding the change to the revenue horizon to be used by Enbridge Gas.

[79] Exhibit J10.13.
[80] Environmental Defence Submission, p. 35, GEC Submission, pp. 32-33; OEB staff Submission, pp. 31-32.
[81] Section 8.5.1.

For new connections where a CIAC has been paid, there is an issue about whether those new customers will end up overpaying and cross-subsidizing existing customers, if they also pay the same postage stamp rates as everyone else.[82] This is an issue regardless of what revenue horizon is used but becomes more important the more the revenue horizon is reduced. This needs to be addressed to ensure rates are just and reasonable. Enbridge Gas, in its reply argument, expressed concern about the complexity of establishing a separate rate class for those customers for whom a CIAC has been paid.

A simpler approach, which is currently utilized by Enbridge Gas in other contexts, may be to establish a negative rate rider, reflecting the fact that a CIAC had been paid.[83] This allows Enbridge Gas to continue with postage stamp rates while ensuring that where the full connection cost has been paid through a CIAC, the purchasers of the new homes do not end up overpaying and cross-subsidizing existing customers. This will be addressed as part of the process to establish rates for 2025 in Phase 2 of this proceeding. To further avoid complexity, a postage stamp rate rider using the then current average connection cost to represent the CIAC paid could also be considered.

Enbridge Gas shall file a proposal for Phase 2 of this proceeding that will address the need to ensure that where the CIAC has been paid, the new connecting customers do not end up paying for the connection facilities a second time through postage stamp rates. Enbridge Gas may consider a rate class option or a rate rider option. Under the rate class option, the new customers would pay a lower rate that recognizes the payment of the CIAC. Under the rate rider option, the new customers would have a rate rider that, over time, refunds the amount of the CIAC that was paid, against the postage stamp rate.

The January 1, 2025 implementation date is not intended to allow an opportunity for introducing new projects that would not normally come forward in 2024 for a connection assessment to avoid the application of the new revenue horizon. Projects that are connecting to the gas system in 2024 will not be affected by the change to the revenue horizon. The new revenue horizon will apply to any proposed project that will be connecting to the gas system after December 31, 2024.

For projects connecting to the gas system in 2024 only, the OEB approves Enbridge Gas's harmonized customer connection policy as filed. For Phase 2 of this proceeding, Enbridge Gas is directed to file an updated customer connection policy, applicable to

[82] For example, Oral Hearing Transcript Vol. 6, pp. 117-119.
[83] For example, the OEB's Quarterly Rate Adjustment Mechanism process, and the Markham Hydrogen Pilot Project utilize rate riders.

projects connecting to the gas system after December 31, 2024, that is consistent with the OEB's findings.

The OEB will provide an opportunity to the development industry to make submissions on the implementation, as part of Phase 2 of this proceeding. This will allow the OEB to consider whether any changes to implementation are necessary. Enbridge Gas will be required to give appropriate notice of this. Direction regarding the form and service of the notice will be provided in due course.

Is There a Role for Exit Fees?

An exit fee (to be paid by customers if they leave the gas system prior to the full cost of their connection being recovered) could potentially reduce stranded asset risk. An exit fee policy could potentially include requiring new customers to provide financial assurance in support of the forecast revenue (as Enbridge Gas has indicated it uses on occasion for larger customers).[84]

Enbridge Gas did not make a proposal related to exit fees, and no party supported the use of exit fees as the primary tool (i.e., as opposed to modifying the revenue horizon) to address concerns about cross-subsidization and stranded asset risk. Mr. Neme noted that exit fees may reduce stranded asset risk, but are potentially problematic from an energy transition perspective, as they may introduce new barriers to customers exiting the gas system and electrifying, even if that turns out to be the least cost solution to meeting greenhouse gas reduction goals.[85]

OEB staff indicated that it sees merit in Enbridge Gas considering expanding the use of exit fees and recommended that Enbridge Gas be required to make a proposal on exit fees (including how exits from the distribution system could be tracked) in its next rebasing application.

In reply, Enbridge Gas indicated that it would make a proposal on exit fees (including how exits from the distribution system could be tracked) in its next rebasing application, noting that its proposal may not endorse exit fees, in which case an explanation for that position would be provided.

[84] Exhibit I.1.15-ED-84.
[85] Exhibit N.M9.Staff-1.

Findings

Since the revenue horizon will be reduced to zero, exit fees are unnecessary for new construction, since there will be no stranded asset cost risk for any connection facilities that have been fully paid for through a CIAC.

For existing customers who leave the gas system where their connection facilities are not fully depreciated, Enbridge Gas may wish to consider in Phase 3 of this proceeding what role, if any, might be played by exit fees, along with other regulatory options that could also address the risk of stranded assets.

Customer Information

Environmental Defence, OEB staff, Pollution Probe, and SEC all made submissions that would require Enbridge Gas to provide customers with factual or unbiased information regarding gas and non-gas options to meet their energy needs. The supporting rationale for these proposals was to facilitate more informed customer choice and reduce stranded asset risk (on the basis that customers who choose to connect to the gas system with a full understanding of other options are less likely to prematurely exit the system), and to support the OEB's objectives regarding consumer protection. These submissions noted examples where the information currently provided by Enbridge Gas to its customers on energy choices may be selective or incomplete.

OEB staff submitted that a new provision should be added to Enbridge Gas's customer connection policy, requiring Enbridge Gas to provide, upon receipt of customer connection requests (or in response to any contact regarding a new connection prior to a formal customer connection request), information to prospective customers on energy options in a manner and form approved (at least initially) by the OEB, as part of this proceeding. OEB staff provided additional suggestions as to what types of information could be required. Environmental Defence supported OEB staff's proposals, and also noted the need for Enbridge Gas to provide unbiased information in all of its communications with customers, recommending changes to Enbridge Gas's current online comparison calculator, and its bill inserts for existing customers. Pollution Probe made several additional proposals the OEB could consider to achieve the objective of ensuring that Ontario energy consumers receive objective, unbiased, best available information to support their energy choices.

In reply, Enbridge Gas indicated that it believes that the information it currently provides to customers meets the intent of OEB staff's recommendations while avoiding duplication with existing and better sources for such information. Enbridge Gas proposed making one minor modification (adding a statement to its marketing materials directing customers to consult an HVAC service provider regarding specific energy

options, building considerations and cost estimates that will be appropriate for their specific needs, and about electric-related costs). Enbridge Gas submitted that it would be extraordinary for the OEB to require Enbridge Gas to provide information about alternative technologies and programs it does not administer, at the cost of gas ratepayers, and noted a previous OEB decision,[86] where the OEB determined that Enbridge Gas would not be required to provide detailed assessments of alternative technologies such as solar and geothermal as part of its community expansion (NGEP) applications.

Findings

Since the new revenue horizon will not be implemented until January 1, 2025, this important question is best addressed as part of Phase 2. This will allow the OEB to consider any input that may be provided by representatives of the development industry that choose to participate along with the views of the other intervenors and Enbridge Gas.

There was discussion about the information that Enbridge Gas currently provides in its informational and marketing materials, including its website, about the cost of heating with other energy sources relative to gas and concerns were raised about its accuracy. It is important that customers are provided with accurate information by Enbridge Gas. A comparison between the cost of electric baseboard heating and the cost of using a high efficiency gas furnace is not helpful if that comparison is not clearly described. It is also not helpful for a customer who wants to understand how a cold climate air source heat pump or a geothermal heat pump compares to a gas furnace.

The OEB directs Enbridge Gas to review the energy comparison information currently on its website and printed materials to determine whether it fully discloses what is being compared and on what basis, and what assumptions are being used for the comparison. Enbridge Gas shall either update the information to correct any deficiencies or remove the information. As part of its updated evidence for Phase 2, Enbridge Gas shall provide a report on the review it undertook and the actions it took as a result of the review.

Cost Impacts of the New Revenue Horizon and Impacts to Capital Budget

The primary impact of using a shortened revenue horizon would be higher costs paid directly by many newly connecting customers and correspondingly lower capital costs to be included in rate base to support new customer connections, if the developer chooses to proceed with gas servicing. Enbridge Gas estimated the average CIAC that new

[86] EB 2016-0004, Decision and Order, November 17, 2016.

customers would need to pay under different revenue horizons, and the corresponding reduction in Enbridge Gas's customer connections capital budget (Table 1). Relative to a 40-year revenue horizon, the impact would range from an average CIAC of $645 and five-year capital budget reduction of $124 million using a 30-year revenue horizon, to an average CIAC of $4,428 and a five-year capital budget reduction of $853 million using a ten-year revenue horizon.

Table 1
Customer Connections Capital Expenditure Supported by Different Revenue Horizons[87]

Line No.	Revenue Horizon	2024	2025	2026	2027	2028	Total	Reduction vs. 40 Year Revenue Horizon	CIAC per Customer
	(Years)	($ millions)	($ millions)	($ millions)	($ millions)	($ millions)	($ millions)	($ millions)	
1	40	304	248	258	254	250	1,314		
2	30	229	227	239	241	253	1,190	124	645
3	25	210	208	219	221	235	1,094	220	1,140
4	20	188	185	196	198	205	972	342	1,774
5	15	146	144	153	154	159	757	557	2,890
6	10	89	88	93	95	96	460	853	4,428

Findings

Given that the new revenue horizon only applies to projects connecting on or after January 1, 2025, there is no impact to the 2024 capital budget. However, there will be an impact in 2025 and subsequent years that needs to be considered. The OEB is of the view that this is best addressed in Phase 2 of this proceeding, which will also consider the issue of incentive ratemaking mechanisms in the context of the energy transition.

Under the new revenue horizon, any developer that wants to include gas servicing will need to pay the full connection cost upfront. Regardless of whether a developer chooses to proceed with gas service and make the CIAC payment or chooses to avoid the cost and go with all electric servicing, there will be an impact to the capital budget in 2025. As part of the updated evidence that Enbridge Gas plans to file for Phase 2, the OEB directs Enbridge Gas to address how the reduction will be implemented during the proposed IRM term.

[87] Exhibit J11.1, Table 1. Connection costs associated with the Natural Gas Expansion Program projects are not included in this table.

Enbridge Gas has suggested that the new revenue horizon could have an impact on the Province's housing strategy. As discussed earlier, the extent to which there will be an impact and the extent to which that impact is positive or negative, will depend on the choices made by developers now that the split incentive problem has been addressed. The change to the revenue horizon facilitates the ability to make an informed choice about how to service a new development, including consideration of the affordability of new housing, not only from a capital cost perspective, but also from an operating cost perspective.

What is the Appropriate Extra Length Charge (ELC)?

Enbridge Gas proposed a harmonized service length threshold of 20 metres that would be provided free of charge for infill service connections, and an updated ELC of $159 per additional metre across all franchise areas, and requested approval of this charge. Enbridge Gas noted that the existing rates for the ELC had remained constant for many years, despite increases in construction costs, and required updating.[88] Enbridge Gas's proposal for the length of free service connection and the ELC was based on updated cost data. This analysis demonstrated that the distribution revenue from a typical residential customer can support the average cost of services below 20 metres, and that 75% of residential services are less than or equal to 20 metres, and thus would not need to pay an ELC.

Parties generally agreed that any change to the revenue horizon should also be used to determine the appropriate cost recovery charge for new infill connections. Enbridge Gas indicated that, should the revenue horizon be changed, it would examine whether to use a modified version of the ELC (likely with a higher per metre charge), or a different approach (such as a straight fixed charge, or a per metre charge that would apply to the entire service length).

Enbridge Gas indicated that it was open to providing an updated proposal for infill customers in a future phase of this proceeding, which could be implemented along with any other changes to the customer connection policy as of January 1, 2025. OEB staff and FRPO submitted that the OEB should approve Enbridge Gas's requested charge for the ELC ($159 per metre, beyond 20 metres) as of January 1, 2024, until an updated approach for infill customers is approved by the OEB. Enbridge Gas agreed.

VECC submitted that the requested charge for the ELC, being a significant increase over the previous charge, should not be approved without a full review of customer

[88] The current approved ELC is $32 per additional metre for the Enbridge Gas Distribution rate zone and $45 per additional metre for the Union rate zones. The Union rate zones also use a different service length threshold (30 m instead of 20 m). Exhibit 8, Tab 3, Schedule 1, p. 10.

connection policies. VECC proposed that the ELC be set at $100 per metre (beyond 20 metres), which Enbridge Gas disagreed with.

Findings

The OEB approves the proposed ELC of $159 per metre beyond the first 20 meters for use in 2024. In keeping with the new revenue horizon to be implemented in 2025, it is necessary for Enbridge Gas to propose a modified approach to infill connections, to be filed as part of its updated Phase 2 evidence.

The OEB accepts that Enbridge Gas did not meet a PI of 1.0 for the Investment Portfolio during certain years of the deferred rebasing term, for the reasons submitted by Enbridge Gas. Some parties argued that the 2023 customer connections capital proposed to be added to the 2024 rate base should be reduced by the forecast revenue shortfall. In reply, Enbridge Gas noted that apart from inflation and other related factors, the OEB's direction in the 2019 rates proceeding[89] that Enbridge Gas could not change its charges to connect infill customers was a significant contributor to the customer attachment portfolio being lower than 1.0 in 2023. The OEB recognizes that the inability to increase customer connection charges impacted the PI in 2023. Nothing further needs to be done to address this. The requirement to meet a PI of 1.0 remains in place going forward.

3.2.2 System Renewal

System renewal investments involve replacing or refurbishing system assets to extend the original service life of the assets and thereby maintain the ability of the system to provide customers with natural gas services. System renewal assets include compressor stations, distribution pipelines, distribution stations and utilization assets that regulate system pressure.

System renewal is the highest asset investment category at $2.9 billion for the 2024 to 2028 period in terms of in-service additions. Forecast capital expenditures for 2024 on system renewal projects is $530.6 million.[90]

Enbridge Gas did not identify any adequate steps in its application to mitigate the stranded asset risk for system renewal investments resulting from the energy transition.

Mr. Neme's evidence recommended that the OEB should require Enbridge Gas to explicitly assess the potential for repairing rather than replacing aging pipelines. Further, the OEB should direct Enbridge Gas to conduct an assessment of the risk that a new

[89] EB-2018-0305, Decision and Order, September 12, 2019, pp. 34-36.
[90] Exhibit I.2.6-SEC-113, p. 3, Updated July 6, 2023.

pipeline will be underutilized or stranded before the end of its physical life. The repair option to extend the life of an asset would offer the potential to prune the gas system so that the pipeline is no longer required in the context of future decarbonization pathways.

OEB staff submitted that Enbridge Gas should document how infrastructure repair options are considered in meeting system needs, and how the consideration of repair options relates to the IRP assessment process. In light of the energy transition and the goal to reduce the risk of stranded assets, OEB staff stressed the need to consider repair options. SEC supported Mr. Neme's evidence and OEB staff's submission.

FRPO submitted that asset management would be improved with incentives for Enbridge Gas tied to service life extension. In reply, Enbridge Gas indicated that it could share information on the utility's inspection and maintenance programs and viable infrastructure repair options (along with associated limitations), as part of project applications. Enbridge Gas did not specifically comment on how this would be connected to its IRP assessment. Enbridge Gas submitted that incentives associated with service life extension were premature and could have unintended consequences.

Enbridge Gas regarded the repair of assets to extend the useful life of the asset as the equivalent to a "run to failure" approach.

Findings

System renewal is comprised of all the activities required to maintain the reliability and safety of the existing gas system. These activities include monitoring the system, making necessary repairs to the system, and replacing sections of the system that are nearing the end of their physical life.

The stranded asset risk for replacement assets is the same as for system access assets. For example, the replacement of the connection assets in an existing residential subdivision is the same as installing connection facilities in a new subdivision, in terms of the risk of stranded asset costs. If the cost of those assets is recovered over an average of 40 years, there is a risk that customers in each of those subdivisions will leave the gas system because of the energy transition, before the cost of those assets has been completely recovered.

In section 3.2.1 of this Decision and Order, the stranded asset risk for new connections to the gas system was addressed by reducing the revenue horizon to be assumed for the economic feasibility analysis under E.B.O. 188. However, for existing assets, system renewal decisions are made on a safety and reliability basis and have not been subject to the economic feasibility requirements in E.B.O. 188.

The option of imposing a requirement for an E.B.O. 188 analysis with a reduced revenue horizon for system renewal assets was not the subject of evidence or submissions in Phase 1 of this proceeding.

System pruning, for example, converting a subdivision from gas to electricity for space and water heating, is another option. Under this option, existing gas customers would replace their gas equipment with electric equipment. This could be supported by an IRP solution, which would consider various alternatives to avoid the need to replace the facilities. The IRP process could offer alternatives through pilot projects for the OEB to consider, including incentives to be paid to the customers to defray the cost of replacing their gas equipment, or investment by the utility to cover the cost of the electric equipment to be recovered over time, with a return on that investment. This has been the subject of some discussion in Phase 1 of this proceeding.

A comprehensive IRP approach to renewal projects would include measuring the cost of the renewal project against the cost of the alternative of replacing gas equipment with electric equipment and to implement alternatives that defer or eliminate the need for the replacement project when they are economically feasible.

In Phase 2 of this proceeding, a key issue regarding Enbridge Gas's incentive ratemaking mechanism proposal is to determine how performance-based incentives could be used in the face of the energy transition. Phase 2 will provide an opportunity to examine ways in which Enbridge Gas could be provided with an incentive to implement economic alternatives to gas infrastructure replacement projects, including asset life extensions and system pruning, including replacing gas equipment with electric equipment. For the recovery of the cost of economic alternatives to gas infrastructure, how should the expense be treated for rate making purposes – expensed or capitalized? How should the cost be recovered – from all remaining ratepayers, or from the benefiting ratepayers who are exiting the gas system, or some combination? What form should incentives take – a ratepayer funded incentive payment or a return on the expenditure? An examination of these questions in Phase 2 will also assist the OEB in developing direction prior to the next rebasing application.

3.2.3 Overall Capital Budget

Enbridge Gas's updated proposed capital expenditure for the 2024 to 2028 period is $7.2 billion and $13.8 billion from 2023 to 2032. The projected annual spend ranges between $1.2 billion to $1.6 billion from 2023 to 2032. System Renewal and System

Access are Enbridge Gas's highest asset investment categories at $2.9 billion and $2.5 billion from 2024 to 2028, respectively.[91]

CCC and CME noted that in ten years from 2013, Enbridge Gas's capital budget has increased by 84% and rate base has increased by 105%.

Although Enbridge Gas referred to the energy transition risks in its Asset Management Plan, OEB staff submitted that the proposed expenditures do not reflect the risks related to the energy transition. OEB staff referenced the oral testimony of Enbridge Gas where it confirmed that it had not directly addressed energy transition risk and the related stranded asset risk in the Asset Management Plan.

APPrO was generally supportive of Enbridge Gas's proposed capital spending plan. However, APPrO suggested that some portion of the spending could be smoothed over a longer period. APPrO and CCC noted that Enbridge Gas's capital budget is "front-loaded" with the highest spending in the first two years (2024 and 2025). APPrO recommended that the OEB could use the average spending for the proposed rate term (2024 to 2028) to set the spending for 2024.

In reply, Enbridge Gas agreed that, to a certain extent, an optimized Asset Management Plan should strive for a levelized spend profile. However, Enbridge Gas noted that in reality, 2024 has been significantly impacted by the deferral of and cost increases to the Panhandle Regional Expansion project (PREP), deferral of the St. Laurent projects, increased renewable natural gas projects, timing of major real estate projects and Technology and Information Services (TIS) investments required to support rate harmonization. For these reasons, Enbridge Gas submitted that it cannot support a proposal to levelize capital expenditures over the five-year period.

OGVG submitted that Enbridge Gas's proposed updated capital budget of $1.47 billion for 2024 is consistent with historical spending over the 2013 to 2023 period, accounting for inflation and the fact that all materially large expansion and reinforcement projects have been subject to review by the OEB through leave to construct applications. OGVG further noted that a material increase in "other" spending is related to renewable natural gas and compressed natural gas stations that is new relative to historical years and directly recovered from customers requesting the service.

SEC and VECC submitted that the proposed spending has consistently increased over successive Asset Management Plans. In 2019, Enbridge Gas forecasted spending of $5 billion over the 2021 to 2025 period. The Asset Management Plan filed two years later saw the spending increase by more than $1.3 billion to $6.3 billion. In this application,

[91] Exhibit 2, Tab 6, Schedule 1, p. 37.

the forecast spending for the same period has increased to $6.9 billion.[92] SEC argued that Enbridge Gas had not demonstrated that there were any fundamental flaws in its previous Asset Management Plans that would require such a significant increase in spending over the same period in each subsequent version. It further noted that inflation alone is not an appropriate justification for the proposed increase in capital spending. SEC recommended that the OEB approve an in-service additions budget that maintains the rate base at existing levels each year, essentially in-service additions that equal the depreciation expense. Based on Enbridge Gas's proposed depreciation methodology, SEC noted that the 2024 in-service additions budget would be $878 million (excluding PREP).

In reply, Enbridge Gas argued that SEC's suggestion to cut capital additions to match depreciation expense is without merit and shows a flawed understanding of Enbridge Gas's core business. Enbridge Gas noted that the company has an obligation to maintain the safety and reliability of the distribution system. If SEC's proposed cuts were implemented, Enbridge Gas submitted that it would have to curtail all investments in gas infrastructure – growth, emission reduction, energy transition, as well as proactive replacements targeting future resource balancing and cost-effectiveness in the long run.

Environmental Defence noted that Enbridge Gas has proposed to spend over $7 billion in capital over the next five years and the level of spending far outstrips the amounts that customers will be paying through depreciation. Environmental Defence submitted that the spending plan will add $2 billion to the rate base which is in addition to the doubling of rate base over the past ten years. Environmental Defence considered the trend to be unsustainable and far too risky in light of the potential impacts of the energy transition on demand and revenue. Environmental Defence submitted that at a high level, the capital envelope should be reduced in a manner that achieves a declining rate base. However, Environmental Defence noted that the capital envelope should be large enough to ensure safety and reliability and if there is a funding gap, it could be addressed through accelerated depreciation.

Pollution Probe submitted that the Asset Management Plan process is largely arbitrary and based on Enbridge Gas staff and management decisions. Pollution Probe argued that Enbridge Gas had not credibly considered the non-gas options that are more cost effective than attaching to the gas system. Pollution Probe recommended that Enbridge Gas's proposed 2024 capital expenditures should be reduced from $1.47 billion to $1.1 billion.

[92] Updated forecasted spending is $7.2 billion as referred to in the findings.

CCC submitted that Enbridge Gas's base capital spending for 2023 and 2024 should not exceed its average historical base capital spend for the years 2018 to 2022 of $940 million. CCC proposed reductions of $39 million for 2023 and $254 million for 2024. This results in total capital expenditures of $1.39 billion in 2023 and $1.22 billion in 2024 (excluding PREP). CCC noted that approximately 40% of the investments in the updated capital plan are Value-Driven as opposed to Mandatory or Compliance (must-do capital projects).

In reply, Enbridge Gas submitted that customer connection costs during 2019 to 2021 averaged $209.9 million compared to $302.3 million forecast for 2024 due to cost pressures from higher inflation, supply chain issues and permitting challenges/costs. In addition, the meter exchange program needs to be accelerated to compensate for lower replacements during COVID-19. Enbridge Gas submitted that when these differences are factored in and added to the average spend of $1.2 billion across 2019 to 2021, the total is $1.46 billion which is in line with the 2024 Test Year forecast exclusive of PREP.

CME noted that many projects that were deemed necessary in the pre-filed evidence have been moved out of the capital spending plan in the Capital Update. CME submitted that the value framework is not transparent or robust enough to justify Enbridge Gas's capital spending plan. CME suggested that the capital spending for 2024 should be reduced by $400 million to $1.265 billion.[93] CME noted that the proposed amount would still give Enbridge Gas a higher capital budget than the actual spend for 2020 to 2022.

OEB staff also made submissions on specific capital expenditures and proposed reductions to certain items. OEB staff recommended reductions to customer connection costs for 2024 related to its proposed 20-year revenue horizon, reductions to system reinforcement costs, adjustments to the Selwyn Community Expansion project, reductions to spending related to compressor stations and integrity digs, and a levelized treatment for the St. Laurent projects. Overall, OEB staff proposed a total reduction of $271.5 million, from $1.47 billion to $1.2 billion.

LPMA made a similar submission focusing on specific expenditures and recommended that the forecasted capital expenditures for the 2024 Test Year should be reduced from $1.47 billion to $1.32 billion (a reduction of $143.7 million).

[93] CME has included PREP in its calculation: $1,470.3 million + $194.9 million = $1,665.2 million (as per Undertaking J13.14). Reducing $400 million from this number gives the recommended amount of $1.265 billion.

Information in Future Asset Management Plans

SEC noted that Enbridge Gas currently forecasts demand only out to ten years in its Asset Management Plan. Considering that some assets have physical lifespans of over 60 years, CCC and SEC submitted that Enbridge Gas should consider future underutilization risk due to the energy transition, just like other risks that are currently considered as part of its value framework.

Environmental Defence noted that Enbridge Gas uses a single ten-year demand forecast based on a single future demand scenario. Environmental Defence submitted that Enbridge Gas should be required to assess capital projects with at least three demand forecast scenarios reflecting a range of potential energy transition futures. Environmental Defence believed that neglecting to consider the possibility of a high electrification scenario through a demand sensitivity analysis could result in bad investment decisions and major cost/risk implications for ratepayers.

OEB staff recommended that Enbridge Gas review its energy transition assumptions in its load forecast on an annual basis and document how, if at all, these changes have impacted Enbridge Gas's Asset Management Plan. In reply, Enbridge Gas agreed that in future iterations of the Asset Management Plan and addendum, it could capture updated customer connection forecasts based on updated energy transition assumptions and present these as forecasted adjustments to capital requirements for customer connections. However, Enbridge Gas disagreed with Environmental Defence's suggestion to conduct multiple demand scenarios for every project. Enbridge Gas submitted that it does not have the information to identify revenue streams for certain segments of its system nor information to assess the probability analysis of revenue generation.

OEB staff further submitted that at the next rebasing, Enbridge Gas should be required to file an Asset Management Plan that establishes clear linkages between the energy transition and capital spending in all operating areas including a discussion on scenarios and probabilities of stranded assets.

In reply, Enbridge Gas acknowledged the concerns of OEB staff and intervenors about the financial risks tied to stranded assets. Enbridge Gas submitted that it will continue to monitor for clear, discrete, geographically based disconnection or demand reduction signals to help support asset level decision making and ensure that the approach taken is clearly documented in the Asset Management Plan filed with the next rebasing application.

Findings

As discussed previously, Enbridge Gas has not undertaken any meaningful assessment of the risk of stranded assets in relation to its Asset Management Plan supporting its 2024 capital spending proposal. As a result, Enbridge Gas has not identified any adequate steps it would take to mitigate the risk of stranded asset costs arising from system renewal.

Enbridge Gas has not established that its current approach to system renewal maximizes system monitoring for the purpose of repair and asset life extension over asset replacement, as contemplated in the St. Laurent Ottawa North Replacement Project decision.[94] The OEB's decision to deny the St. Laurent leave to construct application set an important precedent. In that decision, the OEB directed Enbridge Gas to assess other alternatives such as in-line inspection, repair and life extension. In that decision, the OEB also suggested that Enbridge Gas work collaboratively with stakeholders to proactively plan a course of action if and when pipeline replacement is required, including the pursuit of IRP alternatives.

Enbridge Gas's approach continues to favour asset age over asset condition for replacement decisions and does not satisfactorily address the OEB's concerns as identified in the St. Laurent decision.

Enbridge Gas needs to implement an approach that assesses asset condition and has as its objective the maximization of asset life. This does not constitute a "run to failure" policy but instead maximizes the value of an asset in providing service to ratepayers. Maximizing the life of existing assets is a prudent practice in general, but in this case, it also increases the ability to avoid capital investments that may not be needed because of the continuing energy transition, thereby reducing the risk of stranded asset costs.

Safe and reliable life extension delivers more value to ratepayers than premature asset replacement.

The OEB finds that the 2024 capital budget proposed by Enbridge Gas has not been justified and shall be reduced from the updated $1,470.3 million to $1,220.3 million, a reduction of $250 million or 17.0%.[95] The reasons for the reduction are summarized below.

[94] EB-2020-0293.
[95] Enbridge Gas Reply Argument, p. 167. This reduction is inclusive of Enbridge Gas's agreed to reduction of $1.5 million related to the Selwyn Community Expansion Project to reflect the revised (lower) net capital cost estimate for the project.

- The proposed capital expenditures for 2024 do not reflect the risk associated with the energy transition, more specifically the longer-term risk of under-utilized or stranded assets. The energy transition risk is not even explicitly mentioned in Enbridge Gas's corporate risk register.
- The proposed 2024 capital expenditure represents a significant increase compared to average historical spending. The average annual spending during the 2018 to 2022 period is $1,148.2 million. The proposed updated 2024 spending ($1,470.3 million) is $322.1 million (28%) higher than the 2018 to 2022 average actual spending. The approved 2024 capital expenditure in this proceeding ($1,220.3 million) is still higher than the average actual spending for the 2018 to 2022 period. In its evidence, Enbridge Gas considered $1.2 billion as a minimum constraint to safely operate and maintain the natural gas system, respond to demand growth, invest in low-carbon solutions and ensure on-going reliability and service to customers.[96]
- Enbridge Gas's Asset Management Plan projection for the period 2021 to 2025 in the current application ($7,235.1 million)[97] is significantly higher than the previous Asset Management Plan projection for the same period in the 2021 rate application ($6,297.2 million); an increase of $937.9 million or 14.9%.

The OEB's reduction of $250 million is an envelope reduction to the 2024 capital program and does not specify which projects are to be deferred or reduced to achieve that envelope reduction. Enbridge Gas has sufficient flexibility to re-prioritize its capital projects within its Asset Management Plan based on risk to accommodate the 2024 reduction and flatten the level of expenditure for future years. The OEB is reducing the system renewal budget envelope to motivate Enbridge Gas to improve its approach to integrity management, repair and life extension, so that only truly necessary replacement projects proceed.

Enbridge Gas is directed, in its next rebasing application, to file an Asset Management Plan that provides clear linkages between capital spending and the energy transition risk. The Asset Management Plan should address scenarios associated with the risk of under-utilized or stranded assets and possible mitigating measures. As discussed later in this Decision and Order, Enbridge Gas will also be required to determine whether to propose changes to its approach to depreciation to account for the impact of the energy transition, recognizing that a failure to act prudently in relation to the risk of stranded assets will have an impact on the ability to keep those assets in rate base.

[96] Exhibit 2, Tab 5, Schedule 1, p. 6.
[97] As per Exhibits J13.14 and J14.5.

Panhandle Regional Expansion Project (PREP)

Enbridge Gas proposed a levelized treatment for PREP and excluded the associated capital expenditures from the 2024 rate base. PREP is a significant project (forecasted in-service capital of $252 million for 2024).[98] Since the project has yet to receive leave to construct from the OEB, Enbridge Gas proposed to exclude the costs and incremental revenues that are attributable to the project's forecast 2024 in-service component from the 2024 revenue requirement. The treatment is similar to Incremental Capital Module (ICM) projects that were considered by the OEB during Enbridge Gas's deferred rebasing term (2019 to 2023).

Enbridge Gas proposed to calculate a separate unit rate based on the average of the five-year net revenue requirement. In the event that the OEB does not grant leave to construct, no adjustment to base rates will be required and Enbridge Gas will not implement the rate rider. Enbridge Gas proposed to establish an associated variance account, the PREP variance account, that would capture any variance between the project's actual net revenue requirement and the actual revenues collected through the average unit rate that would be in place over the IRM term.

OEB staff supported the proposed approach.

LPMA, SEC and CCC opposed the exclusion of PREP costs from the 2024 revenue requirement. LPMA submitted that if the proposed approach was approved, it would cost ratepayers in excess of $100 million over the 2024 to 2028 period. LPMA argued that Enbridge Gas is seeking to treat PREP as an ICM project in a cost of service proceeding, which is contrary to OEB policy. These intervenors stated that the reason that Enbridge Gas wants to exclude the PREP costs in 2024 rate base is that it results in a reduction to the 2024 revenue requirement of $14.4 million[99] and this reduced revenue requirement would persist for the remainder of the IRM term. CCC and SEC also noted that there are several other large projects forecasted to go into service in 2023 and 2024 and Enbridge Gas has not proposed a levelized treatment for these projects. CCC and SEC submitted that the appropriate rate treatment for PREP is to include the project in 2024 rate base with a variance account to capture the outcome in the scenario that the project is denied leave to construct or to track actual costs against forecast.

[98] Exhibit 2, Tab 5, Schedule 4, p. 10 – PREP capital expenditures of $34.3 million in 2022, $22.7 million in 2023 and $194.9 million in 2024.
[99] PREP has a negative revenue requirement in the first year (2024) due to tax benefits and the application of the half-year rule.

In reply, Enbridge Gas submitted that if the project is included in base rates and subsequently denied leave to construct, then it will cause $14 million in revenue sufficiency for 2024 (growing to about $75 million over the proposed IRM term), and this would unfairly benefit ratepayers.

Findings

The OEB accepts Enbridge Gas's proposed approach. PREP is one of the largest growth-driven investments ever undertaken by Enbridge Gas. In addition, Enbridge Gas has identified that there is uncertainty regarding the approval and timing of the project, referring to the contentious nature of the project and the risk that the OEB may not approve the project.[100]

The OEB considered two other options: the usual approach of including it in rate base or excluding it from rate base and subjecting it to a future ICM application. Considering the risk and uncertainty, it would be premature to determine rate treatment by including it in rate base. Given the materiality of the project cost, scope and timing, the OEB finds that Enbridge Gas's proposed approach is reasonable.

St. Laurent Phase 3 and Phase 4 Projects

The 2024 capital budget includes spending on the St. Laurent Phase 3 (NPS12/16), St. Laurent Phase 3 (Coventry/Cummings/St. Laurent) and St. Laurent Phase 4 (East/West) replacement projects (St. Laurent project). Total spending on the St. Laurent project is $223.4 million over the 2024 to 2026 period with $75.7 million of spending to be added to rate base in 2024 (Phase 3 in-service addition of $23.9 million + Phase 4 in-service addition of $51.8 million).[101]

In a previous OEB Decision on phases 3 and 4 of the St. Laurent project, the OEB denied Enbridge Gas's leave to construct application. The OEB determined that Enbridge Gas had not demonstrated that pipeline integrity was compromised, nor that pipeline replacement was required at that time.[102] OEB staff submitted that the OEB's denial of the St. Laurent leave to construct application creates some uncertainty with respect to the likelihood and timing of any future approval of the St. Laurent project. Accordingly, OEB staff recommended a levelized treatment for the St. Laurent project similar to PREP.

[100] Enbridge Gas Reply Argument, p. 192.
[101] Exhibit J13.21.
[102] EB-2020-0293, Decision and Order, May 3, 2022, p. 3.

LPMA opposed OEB staff's proposed treatment of the St. Laurent project. LPMA submitted that OEB staff's recommendation would result in ratepayers paying more, not only for 2024, but for all the incentive regulation years that follow. LPMA noted that including the St. Laurent project in 2024 rate base reduces the 2024 revenue requirement because the project has a sufficiency of $2 million in 2024. SEC opposed the proposed levelized rate treatment for the same reasons that apply to PREP.

In reply, Enbridge Gas agreed to the proposed levelized approach and to exclude $75.7 million in direct capital and overhead from the 2024 capital budget and removing the associated in-service additions from 2024 rate base. Enbridge Gas also agreed to establish an associated project variance account to capture any variance between the project's actual net revenue requirement and the revenues collected through the rate rider during the proposed IRM term.

Findings

The St. Laurent project is like most other capital projects and does not share the characteristics of PREP in terms of cost, scope and risk. The OEB accepts Enbridge Gas's original proposal of including it in rate base. No compelling basis has been established to justify deviation from the usual treatment of capital projects that are proposed to go into service in the Test Year.

3.3 Equity Thickness

Enbridge Gas's current deemed capital structure for the purposes of ratemaking is a ratio of 64% debt to 36% equity. In this Decision and Order, the equity component is referred to as the equity thickness.

In the OEB-approved settlement proposal, parties agreed to the as-filed debt rates and the use of the OEB's formula to determine the return on equity (ROE). The 2024 ROE was approved by the OEB and communicated through a letter issued October 31, 2023.[103] There was no settlement with respect to the deemed equity thickness for ratemaking purposes in this proceeding.

Enbridge Gas currently has a deemed equity thickness of 36% for ratemaking purposes, established on the basis that, at the time of the amalgamation between Enbridge Gas Distribution and Union Gas, the two predecessor utilities both had an approved deemed

[103] OEB Letter Re 2024 Cost of Capital Parameters, October 31, 2023.

equity thickness of 36%.[104] The equity thickness of 36% was originally established for the two predecessor utilities over ten years ago in their respective rebasing applications.[105]

Enbridge Gas's Evidence

Enbridge Gas proposed to increase its deemed equity thickness from 36% to 42%. This was supported by the evidence of its expert, Concentric.[106] Concentric concluded that the energy transition is the most important factor impacting Enbridge Gas's business risk since the cost of capital and business risk were last formally reviewed in 2012. For its quantitative analysis, Concentric relied primarily on an analysis of four comparator groups. Through a comparison of statistics of comparator groups of Canadian and U.S. holding companies and operating companies, Concentric concluded that Enbridge Gas's current deemed equity thickness is below that of the comparator groups and recommended a minimum equity thickness of 42%.

Enbridge Gas proposed to implement the increased equity thickness in steps starting with an increase to 38% effective January 1, 2024. Enbridge Gas proposed a further one percentage point increase in the equity thickness for each year from 2025 to 2028 to reach 42% deemed equity thickness in 2028.[107] If accepted, an increase to 38% in 2024 would increase the revenue requirement by $26.1 million and by approximately $80.6 million once the equity thickness reaches 42% in 2028. The total increase in revenue requirement over the proposed rate term (2024-2028) related to Enbridge Gas's proposed increase to equity thickness is $266.5 million.[108]

Intervenor and OEB staff Evidence

Evidence related to equity thickness and business risk was filed by the following:

- London Economics International LLC (LEI), on behalf of OEB staff, filed an independent analysis of Enbridge Gas's application and provide an independent opinion on the appropriateness of its capital structure proposal[109]

[104] EB-2017-0306, which was considered jointly by the OEB for the multi-year price cap plan proposed for the amalgamated entity ("Amalco", now known as Enbridge Gas Inc. (Enbridge Gas)). The plan was proposed for 2019-2028, but the OEB ultimately approved a five-year plan for 2019-2023.
[105] EB-2011-0354 for Enbridge Gas Distribution and EB-2011-0210 for Union Gas.
[106] Exhibit 5, Tab 3, Schedule 1, Attachment 1 (the Concentric Report).
[107] Enbridge Gas, Argument-in-Chief, pp. 212-233.
[108] Exhibit J9.1, 2024 amount of $26.1 million + $13.6 million annual increase to 2028.
[109] Exhibit M2, Recommendation for Appropriate Capital Structure for Enbridge Gas in its application for 2024 Rebasing and 2025-2028 Price Cap Plan.

- Dr. Sean Cleary, Professor of Finance at the Smith School of Business at Queen's University, on behalf of IGUA, filed an analysis of Enbridge Gas's evidence regarding the allowed equity ratio[110]

- Dr. Asa Hopkins of Synapse Energy Economics, on behalf of IGUA, filed an independent analysis of Enbridge Gas's business risk and capital structure[111]

LEI recommended an increase in the deemed equity thickness to 38% for 2024-2028 based on its analysis. LEI considered changes in Enbridge Gas's business risk since the amalgamation in 2019 as well as changes since the last cost of capital reviews for the predecessor utilities in 2012. LEI stated that the energy transition has increased Enbridge Gas's business risk, but the amalgamation operates to partially offset that increased risk when compared to 2012.

Dr. Cleary concluded that there was no increase in Enbridge Gas's business risk and recommended that there be no change from the current deemed equity thickness of 36%. Dr. Cleary's analysis considered the historical financial performance of Enbridge Gas and its predecessor utilities.

Dr. Hopkins concluded that Enbridge Gas's operational business risk had not changed appreciably between 2012 and the present given his assessment of the impacts of the energy transition on Enbridge Gas's financial metrics and business risk.[112] Dr. Hopkins further concluded that Enbridge Gas and Concentric had not adequately analyzed the energy transition impacts on Enbridge Gas's business.[113]

VECC recommended an increase in equity thickness to 37%. OEB staff, APPrO, Energy Probe, QMA and SEC recommended an increase of the deemed equity thickness to 38%. Other intervenors (CCC, CME, GEC, IGUA, City of Kitchener, LPMA, Pollution Probe, Russ Houldin, and Three Fires Group) submitted that Enbridge Gas's deemed equity thickness of 36% should remain unchanged.

VECC observed that none of the evidence in the proceeding used well-established cost of capital estimation methodologies, and the proceeding did not adequately consider countervailing risk factors that might mitigate risk. For example, VECC submitted that the proposed fixed rate structure, although mentioned in the expert reports, was not appropriately analyzed. Pending a full review of all aspects of Enbridge Gas's cost of

[110] Exhibit M6, Evidence of Dr. Sean Cleary.
[111] Exhibit M8, Evidence of Dr. Asa S. Hopkins on the Topic of Business Risk and Capital Structure.
[112] Dr. Hopkins was specifically qualified as an expert "on the future of electric and gas utility regulatory and business models and associated business risk in the context of deep building decarbonization objectives", not as an expert on cost of capital: Oral Hearing Transcript, Vol. 4, p. 152.
[113] Exhibit M8, On the Topic of Business Risk and Capital Structure, May 11, 2023, p. 5.

capital, VECC suggested that in the interim, the OEB could approve an increase to 37% equity thickness.

OEB staff and Energy Probe submitted that Enbridge Gas's deemed equity thickness should be increased from 36% to 38% for 2024, as recommended by LEI. QMA suggested a range between 38% and 42% with a gradual increase to manage the impact on rates.

OEB staff noted that LEI considered the 2019 amalgamation as the relevant starting point for assessing a change in Enbridge Gas's business risk, but also considered changes back to 2012 the last time the OEB formally reviewed and made determinations on the predecessor utilities' business risk and the commensurate equity thickness to ensure that the fair return standard was met. OEB staff noted that with amalgamation in 2019, Enbridge Gas became one of the largest natural gas distributors in North America and could avail itself of economies of scale and other productivity opportunities resulting from the larger and more contiguous service area post-amalgamation.

OEB staff accepted that the energy transition brings new pressures and risks. However, OEB staff submitted that it is not just the presence of these energy transition-related pressures but also the firm's ability to react to and prudently manage the risks that determines whether there has been a non-manageable increase in risk.

OEB staff submitted that Concentric's evidence was overly qualitative in nature. OEB staff submitted that the Canadian comparator groups were not good comparators due to size and other operational characteristics. OEB staff also criticized Concentric's use of simple unweighted averages. OEB staff argued that the evidence of LEI and Dr. Cleary was based on a better balance of qualitative and quantitative analyses.

APPrO submitted that until the province and the EETP provide clear guidance on the most cost-effective manner of implementing the energy transition, it is not clear that there is a material risk to Enbridge Gas's business. However, based on LEI's analysis, APPrO was willing to accept an equity thickness of 38% by 2028.

SEC acknowledged that there are clear risks related to the energy transition. SEC submitted that compensation in terms of a higher equity thickness is only appropriate if Enbridge Gas takes reasonable steps to mitigate those risks. However, SEC did support a 38% equity thickness if there is a substantial reduction in capital spending over the next five years.

LPMA and OGVG referenced Enbridge Gas's testimony that the energy transition is not expected to have a large material impact during the proposed rate term. LPMA

concluded that Enbridge Gas's business risk had not increased and recommended that the equity thickness should remain unchanged at 36%. However, if the OEB were to determine that Enbridge Gas's risk had increased, LPMA suggested an equity thickness of no more than 38%.

LPMA agreed with OEB staff's position that the amalgamation of Enbridge Gas Distribution and Union Gas had reduced the risk of Enbridge Gas since the last time the cost of capital was reviewed for the legacy utilities.

GEC and the City of Kitchener submitted that unless a comprehensive mitigation plan is implemented, Enbridge Gas's proposal to increase the equity thickness would be inappropriate.

CME and IGUA submitted that Enbridge Gas and Concentric have not demonstrated that the company is facing any near-term increase in its operational risks due to the energy transition. CME and IGUA noted that the credit rating agencies (DBRS and S&P) have given Enbridge Gas a stable outlook and have raised no specific concerns. Further, Enbridge Gas had no trouble attracting capital at a similar rate for "like risk" companies and meets the capital attraction standard.

IGUA argued that LEI's report examines only external factors and provides no Enbridge Gas specific analysis that could support a determination that Enbridge Gas's business risk has changed significantly beyond the ability of Enbridge Gas to manage it prudently.

IGUA submitted that pending Enbridge Gas completing additional analysis on identifying risks emerging from the energy transition and developing specific mitigation strategies to prudently respond to the risks, it would not be reasonable to allow Enbridge Gas to increase its equity thickness and increase customer costs by $260 million (over the proposed rate term).[114]

IGUA noted that increasing the equity thickness to 42% was tantamount to customers paying once to cover those unmitigated risks and then paying again when those unmitigated risks and associated costs crystallize. IGUA submitted that there should be no change made to the equity thickness.

Three Fires Group suggested that the OEB could issue a provisional approval concerning equity thickness pending the outcome of a generic OEB proceeding to review risks emerging from the energy transition.

[114] The correct amount is $266.5 million as noted earlier in this section.

In reply, Enbridge Gas argued that LEI's Canadian comparator peer group is "outdated" in light of a British Columbia Utilities Commission (BCUC) decision in its Generic Cost of Capital proceeding issued on September 5, 2023. In its decision, the BCUC increased the deemed equity thickness of FortisBC Energy Inc.'s (FEI) from 38.5% (set in 2016) to 45%.[115] Enbridge Gas documented that the updated data for FEI would increase the average for LEI's Canadian peer group to 40.5%.[116]

Enbridge Gas submitted that a detailed study of the energy transition impacts on Enbridge Gas, as recommended by Dr. Hopkins, is not required in order to determine whether the criteria of the fair return standard are satisfied.

Enbridge Gas argued that the quantitative analysis undertaken by both LEI and Dr. Cleary was flawed and incomplete; both reports lacked the depth and breadth of the work completed by Concentric. Enbridge Gas disagreed with intervenors that submitted that Enbridge Gas has no problems attracting capital. Enbridge Gas noted that the data shows that Enbridge Gas has borrowed at higher rates than many of its utility peers. Enbridge Gas further argued that the rating agencies, specifically S&P, have expressed concerns with Enbridge Gas's equity thickness and the evidence shows that the company's financial metrics have weakened over time.

Enbridge Gas submitted that Dr. Cleary's approach to measuring risk is overly narrow, focusing solely on Enbridge Gas's ability to earn its allowed return, the company's current and historic credit ratings, and historic and near-term projected credit metrics. Enbridge Gas argued that none of these measures are indicative of an equity investor's required return, which is forward looking and considers both near-term and long-term risks.

Enbridge Gas also dismissed the report and oral testimony of Dr. Hopkins. Enbridge Gas submitted that the BCUC decision regarding FEI, wherein the BCUC concluded that FEI's business risk increased as a result of the energy transition, was inconsistent with Dr. Hopkins's views that government policy and emission reduction targets do not present business and capital risks to Enbridge Gas.[117]

Enbridge Gas noted that LEI acknowledged that the OEB did not undertake a review of comparable investment standards including considering US comparators for the predecessor utilities in the 2012 proceedings. It was therefore incorrect, according to Enbridge Gas, to assume that the difference between equity thickness and ROE between Canadian and US companies was considered at all by the OEB. Enbridge Gas

[115] BCUC Decision and Order, G-236-23, Generic Cost of Capital Proceeding (Stage 1), September 5, 2023.
[116] Enbridge Gas Reply Argument, pp. 272-273.
[117] Enbridge Gas Reply Argument, p. 291.

submitted that LEI should have undertaken a more thorough analysis of comparable investment standards including analyzing reasons for differences in equity thickness. Enbridge Gas argued that had LEI given any consideration to the US comparators, it would have caused LEI to conclude that the increase in equity thickness should be materially higher than 38%. Furthermore, Enbridge Gas submitted that LEI did not give any reasons as to why the equity thickness of Ontario electric distribution utilities at 40% is or is not relevant to determine the equity thickness of Enbridge Gas. Enbridge Gas submitted that using LEI's approach (even with its flaws) and the revised customer weighted average for Canadian utilities, Enbridge Gas's equity thickness should be no less than 40.5%.

Findings

The OEB approves an increase in Enbridge Gas's equity thickness to 38%.

Enbridge Gas seeks to increase its deemed equity thickness from 36% to 42% based on the assertion that the energy transition has increased its business risk. The difficulty is that Enbridge Gas also took the position that the impact of the energy transition is very small over the same five-year period. Enbridge Gas provided no assessment of the risk from the energy transition, something that the Concentric witness agreed has been underway for some time.[118]

The energy transition is only one change in business risk since the legacy utility rates were last rebased. When these legacy utilities amalgamated, one of the largest natural gas distribution utilities in North America was created – the largest in Canada. The OEB finds the amalgamation in 2019 is a significant factor in assessing the change in business risk since then.

The OEB concludes that amalgamation has decreased business risk, as described by LEI, and will result in operational efficiencies and economies of scale, enabling Enbridge Gas to leverage its sheer size as a business and combined franchise area covering 98% of natural gas distribution in Ontario.

Enbridge Gas and other parties referred to regulatory decisions from other jurisdictions. As a general proposition, those decisions are of limited value given that they address the business risk of utilities in the context in those jurisdictions, including in relation to how the energy transition is seen to be playing out in those jurisdictions.

The OEB has also considered the evidence and resulting business risk associated with the energy transition. The OEB has also concluded that there is a risk of stranded

[118] Oral Hearing Transcript, Vol. 9, pp. 38-40.

assets arising from the energy transition and has taken some steps in this Decision and Order to mitigate that risk in relation to the system access capital expenditures and new connections. The OEB is also directing Enbridge Gas to carry out a risk assessment and to develop an approach to reducing the stranded asset risk in the context of system renewal, to be provided in its next rebasing application.

Considering both a decrease in business risk due to amalgamation, and an increase in business risk due to the energy transition, which is partially mitigated by this Decision and Order, the OEB concludes that there is a net increase in business risk that justifies a modest increase in the deemed equity thickness. The OEB is persuaded by the analysis of LEI and its recommended 38% equity thickness. Enbridge Gas has not met the onus to establish that its ultimate requested increase to 42% is reasonable. In the absence of the risk assessment evidence that Enbridge Gas is directed to develop for its next rebasing application, the OEB denies Enbridge Gas's request. The OEB approves an increase to the deemed equity thickness to 38% at this time. The approved increase in equity thickness will be applied to 2024 rates and will not be phased in.

4 AMALGAMATION AND HARMONIZATION ISSUES

In 2017, Enbridge Gas Distribution's corporate parent, Enbridge Inc., merged with Union Gas's corporate parent, Spectra Energy Corp. Both companies (Enbridge Gas Distribution and Union Gas) had been expected to file rebasing applications for 2019 rates.

Enbridge Gas Distribution and Union Gas filed an application with the OEB to amalgamate in November 2017 (MAADs application).[119] The applicants proposed a deferred rebasing period of ten years, pointing to a similar option available to electricity distributors in the OEB's *Handbook for Electricity Distributor and Transmitter Consolidations* (MAADs Handbook).[120]

The current rates application addresses some of the issues that emerged as a result of the amalgamation. This section deals with amalgamation issues, specifically:

a) whether ratepayers received benefits as a result of the amalgamation

b) whether ratepayers are responsible for integration costs incurred during the deferred rebasing period

c) how the balance in the Tax Variance Deferral Account (TVDA) that recorded the tax impacts of integration costs should be disposed of

d) the proposed harmonized depreciation methodology

e) the proposed capitalized overheads methodology

f) how to address overhead capitalization and Union Gas's pre-2017 Actuarial Losses in the Accounting Policy Changes Deferral Account (APCDA)

4.1 Benefits of amalgamation realized in context of a five-year deferred rebasing term

In the MAADs application, the capital investment required for the integration of systems and technology to support the amalgamation was estimated to be between $50 million and $250 million to deliver potential cost synergies of between $350 million and $750 million over ten years. In its decision, the OEB approved the amalgamation of the two

[119] Mergers, acquisitions, amalgamations and divestitures (MAADs).
[120] EB-2017-0306/0307.

legacy utilities effective January 1, 2019 with a deferred rebasing term of five years, not ten years as proposed.[121]

OEB staff noted that capital expenditures related to integration during the five-year deferred rebasing term were $252 million, at the top end of the range of the estimated investment identified in the MAADs application. The total cumulative savings over the deferred rebasing term is expected to be $327.6 million. The net savings were retained by Enbridge Gas during the five-year deferral period. Enbridge Gas submitted that annual integration synergies of $86 million demonstrate that amalgamation will provide ongoing benefits to customers. Beginning in 2024, these annual savings of $86 million would be reflected in rates.

However, OEB staff noted that operating and maintenance (O&M) costs have consistently increased from 2018 to 2024 as COVID-19 had a substantial impact on operations and costs during this period.

In its submission, QMA recognized the seamless switch to the amalgamated utility with the same level and quality of service as the legacy utilities.

Pollution Probe claimed that the customer benefits produced over the five-year deferral period were lower than expected. Although Enbridge Gas emphasized the $86 million of sustained efficiencies, Pollution Probe noted that O&M costs have consistently increased from 2018 to 2024, and finding small efficiencies in one area and then proposing higher costs elsewhere defeats the overall purpose of incentive regulation and recognizing amalgamation benefits.

VECC submitted that the claimed amalgamation savings are based on speculation of what costs would have been in the absence of certain initiatives. VECC questioned whether the claimed reductions could be attributed to amalgamation. VECC submitted that the savings are less than $18 million, not $86 million per year. Nevertheless, VECC agreed that customers do not appear to be worse off. VECC urged the OEB to ensure that Enbridge Gas does not receive significant consolidation benefits as a result of other proposals in this proceeding.

Findings

The evidence demonstrates that the amalgamation delivered benefits to Enbridge Gas during the deferred rebasing term which are being passed on to ratepayers in 2024. Although some intervenors argued that Enbridge Gas has overstated the savings due to amalgamation, no party submitted that ratepayers are worse off.

[121] EB-2017-0306/0307, Decision and Order, August 30, 2018, p. 22.

4.2 Recovery of Integration-Related Capital Costs

Enbridge Gas spent $189 million on integration capital projects during the deferred rebasing term, of which $70 million has already been depreciated. Enbridge Gas requested that the undepreciated net book value of $119 million be included in the opening 2024 rate base.

Enbridge Gas referenced the OEB's general principle of "benefits follow costs" and submitted that customers should pay the ongoing integration capital costs that will continue to benefit them after rebasing in 2024.

APPrO supported Enbridge Gas's proposal and submitted that the approved five-year deferred rebasing term was insufficient to recover integration related capital costs.

In its submission, OEB staff recommended an alternative to Enbridge Gas's proposal for the OEB's consideration. OEB staff referenced the OEB's MAADs policy which provides the opportunity for electricity distributors to defer rebasing for a period up to ten years following the closing of a consolidation transaction. This deferred rebasing period was intended to enable distributors to fully realize anticipated efficiency gains and retain achieved savings to help offset the costs of the consolidation.[122]

Since Enbridge Gas received only a five-year deferred rebasing period instead of ten years, OEB staff submitted that Enbridge Gas should be able to include 50% of the net book value of integration capital in the 2024 rate base. Accordingly, OEB staff recommended that Enbridge Gas should be permitted to include $59.5 million (50% of $119 million) in the 2024 rate base. Energy Probe, LPMA, and Pollution Probe supported OEB staff's recommendation.

While Energy Probe agreed that the MAADs Decision was clear that O&M costs of integration are not recoverable from utility ratepayers, the decision was silent on capital costs. Energy Probe agreed that integration assets are providing some benefit to ratepayers and accordingly supported the position of OEB staff that 50% of the undepreciated integration capital costs should be added to rate base given the "benefits follow costs" principle. According to LPMA, OEB staff's 50% recommendation recognizes that a portion of the expenditures were integration-related and not recoverable through rates and the remainder of the expenditures were operations-related and recoverable through rates.

[122] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, pp. 8-9.

Pollution Probe submitted that the OEB could consider OEB staff's recommendation but include a stretch efficiency amount built into the rebasing term to provide ratepayers with permanent efficiencies.

Some parties (CCC, CME, OGVG, SEC and VECC) submitted that the OEB should not approve the addition of the $119 million to 2024 rate base. These parties submitted that the five-year deferral period approved in MAADs Decision offered Enbridge Gas a reasonable opportunity to recover its transition costs. According to these parties, the OEB's MAADs policy is clear that incremental transaction and integration costs are not generally recoverable through rates. The MAADs policy states that the deferred rebasing period enables distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction. CME argued that it is not the length of time of the rebasing period that is relevant, but whether Enbridge Gas had a fair opportunity to realize anticipated efficiency gains and offset the cost of the transaction. CME submitted that Enbridge Gas has had that opportunity.

SEC stated that Enbridge Gas's focus on the MAADs policy's statement that integration costs are not "generally" recoverable is flawed. While SEC agreed that "generally" does imply that in some exceptional circumstances the OEB may allow recovery, there was nothing exceptional about Enbridge Gas incurring capital and O&M for supporting integration activities. SEC and VECC both argued that the OEB was well aware during the MAADs proceeding that Enbridge Gas was planning to spend on integration-related capital projects and all integration costs might not be recovered in the five-year period, but the OEB made no such carve-out to its policy when it approved the five-year deferred rebasing period. VECC argued that allowing full recovery of integration related costs ignores the MAADs Decision and nullifies its intent.

CCC, CME and SEC further noted that Enbridge Gas had cumulatively over-earned by $231.4 million between 2019-2022 which is more than sufficient to recover the remaining $119 million of undepreciated integration capital. CCC submitted that this was in addition to the over-earnings in the period prior to the merger (2014 to 2018). APPrO submitted that conflating Enbridge Gas's actual return on equity during the deferred rebasing period with its integration-related capital spending undermines basic regulatory principles.

SEC disagreed with Enbridge Gas's assertion that if the OEB does not allow the recovery of undepreciated integration capital it will have a "chilling impact on future amalgamations and on utilities committing appropriate capital resources to fully

recognize available amalgamation savings".[123] SEC submitted that Enbridge Gas's concerns relating to future amalgamations can be raised in the OEB's MAADs policy review and there is no reason to retroactively apply a new interpretation to benefit Enbridge Gas.

CCC and SEC examined the specific capital expenditures required to integrate the two legacy utilities. CCC and SEC referred to two real estate projects, the construction of the GTA East and West facilities at a total cost of $67.3 million, submitting that real estate consolidation projects are clear examples of projects that would not have been undertaken in the absence of the amalgamation. CCC and SEC also cited the Contract Market Harmonization project ($19.2 million) and the General Service Rebasing Changes project ($17.9 million) that are also driven by amalgamation and are required to implement rate harmonization. SEC also indicated that, at the oral hearing, Enbridge Gas noted that the London Facilities project ($49.5 million) was similar to the GTA East and West projects – all consolidation projects driven by the amalgamation. CCC and SEC submitted that the OEB should determine that the cost of none of these projects should be recoverable from ratepayers in line with the OEB's MAADs policy.

In reply, Enbridge Gas argued that there is no principled basis for OEB staff's 50% recommendation. Enbridge Gas submitted that it is not retaining 50% of the savings from the amalgamation; therefore, it should not absorb 50% of the remaining costs. Enbridge Gas argued that ratepayers are getting 100% of the ongoing benefits of the integration investments and it is appropriate that 100% of the undepreciated costs should be included in rate base.

Enbridge Gas further noted that the MAADs Handbook does not specifically address capital costs. According to Enbridge Gas, requiring a utility to absorb undepreciated capital costs of integration projects at the end of a deferred rebasing term changes how capital costs are recognized from a regulatory accounting perspective.

Enbridge Gas argued that there is no principled basis for relying on Enbridge Gas's return on equity as a reason that ratepayers can avoid paying for the ongoing cost of assets required to provide ongoing service. Enbridge Gas also noted that customer protection related to overearnings was established through the earnings sharing mechanism during the deferred rebasing term.

Enbridge Gas argued that if a utility is responsible for the undepreciated capital costs it will stop utilities from voluntarily electing a deferred rebasing term of less than ten years.

[123] Enbridge Gas Argument-in-Chief, p. 88.

Furthermore, such a direction would have a chilling effect on future amalgamations if a utility's cost obligations for anything referred to as "integration" continue indefinitely.

Enbridge Gas submitted that if it is not allowed to recover the undepreciated integration related capital costs, ratepayers would receive a windfall gain. Enbridge Gas argued that ratepayers would receive the use of integration assets for free at the same time as they receive all the future benefits accruing from integration. This would be an inappropriate departure from the OEB's "benefits follow costs" principle, according to Enbridge Gas.

Findings

The OEB disallows the addition of the undepreciated integration capital in the amount of $119 million to rate base. This amount shall not be recoverable from ratepayers. The OEB finds this to be consistent with the intent of the OEB's decision in the MAADs proceeding.

In the MAADs proceeding, Enbridge Gas requested a deferred rebasing period of ten years. The OEB in its decision granted a deferred rebasing term of five years and noted that "five years provides a reasonable opportunity for the applicants to recover their transition costs."[124] The OEB stated that the policy of permitting a deferred rebasing period of up to ten years was adopted to incent the consolidation of electricity distributors.

The OEB granted a deferred rebasing period of five years on the basis that the five years was a reasonable opportunity to recover transition costs. When hearing the MAADs application, the OEB was presented with evidence describing the nature of capital investments and the cost of those investments. After hearing that evidence, the panel clearly turned its mind to the five-year period as a reasonable opportunity to recover those costs during the five years against the savings that would be achieved and retained by the utility.

Enbridge Gas claimed that there is residual ratepayer value of the integration projects in 2024 and beyond. Enbridge Gas also raised the benefits follow costs principle. The OEB agrees that benefits should follow costs, yet the OEB must also consider the impetus for the specific costs incurred. For example, CCC and SEC referenced the GTA East and West facilities at a total cost of $67.3 million submitting that real estate consolidation projects would not have been undertaken in the absence of the amalgamation. CCC and SEC also identified similar integration projects totaling $153.9 million. The ongoing use of those buildings may provide benefits to ratepayers, yet the

[124] EB-2017-0306/0307, Decision and Order, August 30, 2018, p. 22.

cost would not have been incurred in the first place in the absence of amalgamation. The OEB rejects the assertion by Enbridge Gas that there is a windfall gain for customers. In this case, the benefits did follow the costs – Enbridge Gas made capital investments that yielded savings that exceeded the cost of those investments during the deferred rebasing period, savings that it got to keep. To allow some of that capital investment to now be added to the 2024 rate base, despite the MAADs Decision that concluded that a five-year deferral period would be sufficient to recover the cost of those investments with net savings to Enbridge Gas, which indeed occurred, would amount to a windfall to the utility.

Despite the five-year deferral period, Enbridge Gas chose to depreciate these integration capital assets beyond 2023, resulting in a net book value of $119 million on its regulatory accounting books. That was a choice made by Enbridge Gas. Had Enbridge Gas chosen to fully depreciate its integration capital assets during the deferral period, depreciation expenses would have been higher, and earnings would have been lower than actually recorded from 2019 to 2023, but the savings retained by Enbridge Gas during this period would still exceed the cost of that investment. Capital expenditures related to integration during the five-year deferred rebasing term were $252 million. Enbridge Gas indicated that it expected to achieve a total of $327.6 million in savings for the 2019 to 2023 period.[125]

Table 2 – Integration Savings as Achieved by Area

Line No.	Particulars ($ millions)	2018 Actual (a)	2020 Actual (b)	2021 Actual (c)	2022 Estimate (d)	2023 Bridge Year (e)
	O&M Savings					
1	Business Development & Regulatory	6.8	9.6	10.4	10.4	10.4
2	Customer Care	5.5	6.6	7.5	22.5	22.5
3	Distribution Operations	6.3	9.8	17.3	16.8	16.8
4	Energy Services	2.6	5.6	5.9	5.9	5.9
5	Engineering & STO	5.2	9.0	11.6	11.6	11.8
6	Central Functions	3.9	9.1	15.7	15.8	15.8
7	Other	2.0	2.7	2.8	2.8	2.8
8	Total Annual Savings	32.2	52.4	71.2	85.8	86.0

These savings are retained by Enbridge Gas and are more than sufficient to cover integration capital investments. The MAADs Decision has worked as intended, and in this case, five years were sufficient for Enbridge Gas to recover all transition and

[125] Exhibit 1, Tab 9, Schedule 1, p. 5.

integration-related costs. There is no basis to add any amount of the integration capital investment to the 2024 rate base.

Since the savings achieved as a result of amalgamation have exceeded the integration capital investments, with net savings being retained by Enbridge Gas during the deferred rebasing period, Enbridge Gas has not established a reasonable basis to support its request to include any integration capital in the 2024 rate base.

A few intervenors proposed that future integration projects should be funded by Enbridge Gas's shareholder. There may be additional costs incurred after 2024 for harmonization proposals that will be heard and decided in Phase 2 and Phase 3 of this proceeding. These would not be considered integration projects since the five-year deferral period has now ended.

4.3 Tax Variance Deferral Account

In the MAADs Decision, the OEB retained the Tax Variance Deferral Account (TVDA) for the Union Gas legacy areas and implemented it for the Enbridge Gas Distribution rate zone.[126] In Enbridge Gas's 2019 rates proceeding, the OEB required Enbridge Gas to follow the direction issued by the OEB in its July 25, 2019 letter.[127] In that letter, the OEB provided accounting direction to regulated utilities regarding Bill C-97. Bill C-97 provides for accelerated capital cost allowance (accelerated CCA) deductions for eligible capital assets acquired after November 20, 2018, also known as the Accelerated Investment Incentive. CCA is the portion of the capital cost of depreciable property that is deductible for tax purposes each year.

In its decision in Enbridge Gas's 2019 Deferral and Variance Account Disposition proceeding,[128] the OEB determined that 100% of the 2019 balances in the TVDA related to accelerated CCA were to be disposed as a credit (refund) to customers.

Enbridge Gas proposed to clear the forecast credit balance in the TVDA of $6.8 million plus interest costs of $0.5 million for a total of $7.3 million. The balance represents 100% of the accelerated CCA impacts resulting from integration capital additions which occurred from 2020 to 2023.

Since the credit balance in the TVDA relates to integration capital projects completed during the deferred rebasing term, Enbridge Gas submitted that the benefit of the credit

[126] EB-2017-0306/0307.
[127] OEB Letter Re: Accounting Direction Regarding Bill C-97 and Other Changes in Regulatory or Legislated Tax Rules for Capital Cost Allowance, July 25, 2019.
[128] EB-2020-0134.

balance should accrue to the party (ratepayers or utility) who will be paying for the undepreciated cost of the integration capital projects on a go-forward basis.

As OEB staff recommended that Enbridge Gas be permitted to add 50% of the net book value of integration capital to the 2024 rate base, OEB staff submitted that 50% of the forecast credit balance in the TVDA of $7.3 million (inclusive of interest) should be credited to ratepayers.

LPMA submitted that if all of the integration capital or a portion of it is included in rate base, then ratepayers should accordingly receive 100% of the balance in the TVDA or a portion of it as a credit.

FRPO and SEC opposed the inclusion of any integration capital in the 2024 rate base and accordingly submitted that the $7.3 million of accelerated CCA should benefit Enbridge Gas's shareholders.

In reply, Enbridge Gas submitted that if the OEB does not approve 100% of the inclusion of integration capital in the 2024 rate base, then Enbridge Gas's shareholders should receive a corresponding portion of the credit balance in the TVDA related to the disallowed recovery from customers.

Findings

Given the OEB's decision to deny the proposed inclusion of integration capital in the 2024 rate base, the entire balance related to integration capital projects in the TVDA shall be disposed of in favour of Enbridge Gas.

4.4 Depreciation Policy & Overhead Capitalization

4.4.1 Depreciation

Enbridge Gas proposed a harmonized 2024 depreciation expense of $879 million, representing an increase of $141.9 million from the forecasted 2024 depreciation expense of $734.1 million, using the previously OEB-approved depreciation methodologies and rates. The OEB-approved settlement proposal reduced the 2024 depreciation expense to $866.2 million.[129]

Enbridge Gas proposed to harmonize the depreciation methodologies and rates utilized by the legacy utilities of Enbridge Gas Distribution and Union Gas. In support of its proposed harmonized depreciation methodology, Enbridge Gas filed a study by Concentric Energy Advisors (Concentric) and requested approval for the following:

[129] Enbridge Gas Reply Argument, p. 202.

- **Account Harmonization**: the harmonization of certain former Enbridge Gas Distribution and Union Gas assets into common accounts

- **Harmonized Depreciation Procedure:** the use of the Equal Life Group (ELG) procedure for the amalgamated utility, in place of the Average Life Group (ALG) procedure previously used by Enbridge Gas Distribution and the Generation Arrangement procedure previously used by Union Gas

- **Harmonized Net Salvage Calculation:** the use of the Constant Dollar Net Salvage (CDNS) method at a credit-adjusted risk-free rate (CARF) of 3.75%. Enbridge Gas Distribution was previously approved to use the CDNS method and Union Gas was previously approved to use the Traditional Method

- **Updated Asset Life Parameters**: the use of asset life parameters/survivor curves and net salvage parameters recommended by Concentric in its 2021 depreciation study filed with the OEB after the amalgamation and subsequently updated in this proceeding

OEB staff presented expert evidence on depreciation by InterGroup Consultants Ltd. (InterGroup). IGUA presented expert evidence on depreciation by Emrydia Consulting Corporation (Emrydia).

InterGroup and Emrydia each assessed Concentric's evidence on Enbridge Gas's depreciation proposals and expressed their expert opinion in their respective reports. All depreciation related evidence was tested and compared through the interrogatory process and testimony at the oral hearing. The main areas in which these experts did not agree with Enbridge Gas and Concentric are as follows:

- **Depreciation Procedure**: Neither InterGroup nor Emrydia supported the proposed change to the ELG procedure. Both recommended the ALG procedure be used.

- **Asset Life Parameters:** InterGroup disagreed with Concentric's proposed asset life parameters for six accounts,[130] while Emrydia disagreed with Concentric's proposed asset life parameters for ten accounts, including two of the accounts addressed by InterGroup.[131]

[130] Exhibit M1, pp. 7-8.
[131] Exhibit M5, pp. 8-9.

- **Net Salvage:**

  - Net Salvage Method: InterGroup and Emrydia supported Concentric's use of the CDNS method. However, both experts took issue with Concentric's CDNS calculation.

  - Net Salvage Parameters: InterGroup and Emrydia each disagreed with Concentric's proposed net salvage parameters for six accounts.[132]

  - Net Salvage Discount Rate: Emrydia supported the use of the weighted average cost of capital (WACC) of 6.03%. InterGroup recommended a CARF of 4.88% updated from 3.75% as of July 25, 2023.[133]

During the oral phase of the proceeding, many depreciation-related scenarios were filed and the various recommendations of the three experts were compared. In all scenarios, the calculated 2024 depreciation expense excluded the impact of the OEB-approved settlement proposal.

In reply, Enbridge Gas provided the 2024 depreciation expense calculations comparing the $879.0 million proposed harmonized depreciation expense to possible 2024 expenses using various recommended depreciation procedures and asset life parameters from Concentric, OEB staff and IGUA. Table 3 set out in the Asset Life Parameters sub-section below, provides this comparison assuming Concentric's CDNS calculation and net salvage parameters, not OEB staff's or IGUA's recommendations.[134]

OEB staff submitted that the 2024 depreciation expense would be $727.6 million, based on InterGroup's recommendations (ALG, asset life parameters, its CDNS methodology, net salvage parameters), or $151.4 million lower than Enbridge Gas's proposed 2024 depreciation expense.

Depreciation Procedure

Submissions focused on the ELG and ALG depreciation procedures. The concept of adding an Economic Planning Horizon was raised, to set a terminal truncation date for assets and the depreciation expense so that assets would be fully recovered by the terminal date. Concentric, InterGroup and Emrydia agreed that an Economic Planning Horizon is not appropriate at this time.[135] The Units of Production depreciation procedure was also raised during the proceeding as an option for future consideration, a

[132] Exhibit M1, pp. 7-8.
[133] Exhibit J17.5.
[134] Enbridge Gas Reply Argument p. 203.
[135] Enbridge Gas, Argument-in-Chief, p. 198-199.

means to depreciate assets based on production volume rather than asset life. While many parties recommended the OEB consider Units of Production in the future, no expert witness proposed, and no party recommended, utilizing Units of Production at this time.

Enbridge Gas stated that the ELG procedure modestly accelerated depreciation expense as the 2024 depreciation expense under the ELG procedure is $83.4 million higher than the ALG procedure. Concentric testified that the use of the ELG procedure enhances the generational equity to all customers and is particularly appropriate given the energy transition issues. Concentric noted that the use of the ELG procedure is key to minimizing the risk of under-recovery of the capital assets and costs and decreasing the risk of stranded asset costs. Furthermore, Enbridge Gas stated that if there is a material risk of declining throughput in future years, a more accelerated recovery of depreciation should be undertaken.

Concentric indicated that the ELG procedure is recognized as the most precise procedure by depreciation authorities, using more complex mathematical calculations relative to the ALG procedure. Concentric claimed that the ELG procedure was the best available match to the historical procedures approved for Union Gas.

Enbridge Gas submitted that InterGroup and Emrydia did not identify any fault with the ELG procedure that would warrant not considering it. Enbridge Gas claimed that InterGroup and Emrydia also failed to appropriately include energy transition issues in their analysis.

OEB staff and IGUA submitted that while InterGroup and Emrydia considered energy transition issues to be real and present, the experts agreed that the ELG procedure itself was not designed to address energy transition issues. InterGroup and Emrydia indicated that neither ELG nor ALG were sufficiently nuanced to properly address energy transition concerns.

There was a wide range of views on whether the energy transition should be considered in the context of depreciation as summarized below:

- Energy transition should not be considered in this proceeding and the ALG procedure should be used. Accelerated depreciation may be appropriate in the future once further studies on depreciation considering the energy transition are completed

- Maintain the status quo until further studies on depreciation and the energy transition are completed

- The energy transition should be considered in this proceeding, and the ELG procedure should be used temporarily until further studies are completed

- There is no need to change the depreciation procedure as hybrid heat pumps, renewable natural gas, hydrogen and re-purposing of Enbridge Gas's assets will effectively mitigate any need for accelerated depreciation

Some parties (OEB staff, Energy Probe, LPMA, City of Kitchener, APPrO, CME, FRPO, VECC and IGUA) supported the use of the ALG procedure noting that ALG continues to be the most commonly used depreciation procedure in North America.[136] Specifically, IGUA submitted that increasing depreciation expense adds risk by creating more problems and inequities if based on untested assertions regarding generic future asset risk.[137] CME characterized ELG as a blunt instrument, front-loading depreciation for all asset classes in equal measure, without consideration of which assets will be more likely impacted by the energy transition.

IGUA submitted that ratemaking is not solely about mathematical purity. In the case of depreciation, for the past decade, the ALG procedure has resulted in the just and reasonable assignment of asset cost recovery. APPrO pointed to a recent decision by the Manitoba Public Utilities Board that rejected Manitoba Hydro's proposal to transition from ALG to ELG on the basis that ELG would result in unnecessarily high depreciation rates in the near term that are not just and reasonable.[138]

Three Fires Group and GFN recommended that the OEB make any order relating to depreciation interim pending the outcome of a generic proceeding on risks of climate change and the energy transition. OGVG proposed a hybrid procedure, applying ELG or ALG depending on whether the asset was distribution, storage, transmission or general plant. Pollution Probe submitted that the amortization period should be truncated to a maximum of 15 years for all new capital commissioned starting in 2024. GEC and Environmental Defence suggested the ELG procedure be used on an interim basis, until further study is completed on Units of Production. GEC stated that Units of Production would match depreciation expense to the value customers receive, and it can be adjusted as more information on the energy transition is known.

In reply, Enbridge Gas reiterated that there was a consensus among parties that energy transition is not a myth and that foundational changes to the natural gas distribution business are inevitable. Enbridge Gas claimed that ELG is a good first step towards addressing the energy transition and no party argued that ALG is a step towards

[136] OEB staff Submission, p. 78; APPrO Submission, p. 34.
[137] IGUA Submission, p. 35.
[138] Manitoba Public Utilities Board, Order No. 101/23, August 24, 2023, pp. 12-13.

addressing the energy transition. Furthermore, no party supported the notion that lowering depreciation rates was an appropriate response to the energy transition. In contrast, Enbridge Gas submitted that accelerating depreciation modestly at this time is appropriate. Enbridge Gas argued that if the status quo is continued or depreciation expense declines relative to the status quo, the impact on future ratepayers will almost certainly be an even higher depreciation expense than would be the case if the ELG procedure was approved. Enbridge Gas responded to submissions regarding other depreciation methodologies raised during the proceeding such as Economic Planning Horizon and Units of Production and characterized its proposed increase in depreciation expense as modest in comparison to the expense that would result from applying Economic Planning Horizon or the Units of Production procedures.

Enbridge Gas also noted that parties appeared to agree that a number of questions need to be considered and answered, such as the appropriate denominator for the Units of Production and the applicable dates and assets which should be subject to an Economic Planning Horizon.

Findings

The OEB approves the proposed harmonization of certain assets into common accounts. The OEB also approves the ALG depreciation procedure for the amalgamated utility. The OEB finds merit in maintaining some consistency in procedure among the legacy and harmonized utilities. The OEB previously approved ALG for the legacy Enbridge Gas Distribution and a Generation Arrangement for Union Gas. However, Concentric testified that it would be impossible to adopt Union Gas's Generation Arrangement as a harmonized procedure to be applied to the legacy Enbridge Gas Distribution's assets.

Starting from first principles, asset depreciation for the purpose of ratemaking is based on establishing a schedule for the recovery of depreciation expense that matches the used and useful life of an asset. Typically, depreciation expense is recovered based on the average life of a portfolio of assets. This reduces intergenerational inequity among ratepayers because they will always be paying for the depreciation expense for the assets that are used to provide them with service over the life of those assets.

Depreciation policy is already based on risk – each asset class captures the risk of failure of the assets to establish an average life for the class based on the engineering estimate of the useful life of those assets and the actual experience with those assets. Adding consideration of the risk of stranded asset costs arising from the energy transition is not a fundamental methodological change. If the principle is that depreciation expense is recovered over the used and useful life of an asset, and the used and useful life of an asset is shortened as a result of ratepayers leaving the gas

system so that assets are no longer used or become underutilized before they reach the end of their physical life, this needs to be addressed in the utility's depreciation policy (see for example, the Alberta Utility Commission's treatment of stranded asset risk.)[139]

This is a matter of prudence. It is not enough to say that if an investment was considered prudent when assets first went into rate base, then the utility is entitled to fully recover the depreciation expense regardless of whether the assets remain used and useful. The utility has an obligation to monitor and manage risk prudently.

Enbridge Gas has identified a risk of stranded asset costs due to the energy transition but has not assessed that risk, including whether to address it in its depreciation policy proposal.

The OEB will not approve Enbridge Gas's proposal to change its depreciation procedure at this time. While Enbridge Gas's proposal to change to the ELG methodology results in some acceleration in the recovery of the depreciation expense, the OEB does not accept the assertion that this proposal was responsive to the risk of stranded asset costs, since Enbridge Gas has not provided any meaningful assessment of that risk in its application. Further, the OEB is persuaded by the testimony of the InterGroup and Emrydia witnesses that neither the ELG nor ALG procedures were designed to address the energy transition risk.

Enbridge Gas needs to carry out a proper assessment of risk and determine the extent to which that risk should be addressed in its depreciation policy. Given that, this is not the time to change to a new methodology.

Currently there are two legacy methodologies, the ALG procedure used by Enbridge Gas Distribution and the Generation Arrangement procedure used by Union Gas. While the OEB is of the view that now is not the time to move to a new procedure, it is appropriate to harmonize the approach to be taken by Enbridge Gas on the basis of the ALG procedure.

[139] *FortisAlberta Inc v. Alberta (Utilities Commission),* 2015 ABCA 295.

Asset Life Parameters

The table below summarizes the accounts and recommendations on asset life parameters where the depreciation experts were not aligned.[140]

Table 3 – Proposed Asset Life Parameters

Asset Account Numbers and Description		Current Approved Parameters – EGD/Union	Concentric Proposed Parameters	OEB Staff Supported InterGroup Proposed Parameters (1)	IGUA Supported Emrydia Proposed Parameters (2)
456.00	UNDERGROUND STORAGE PLANT – COMPRESSOR EQUIPMENT	40-R2 (EGD) 35-R2.5 (Union)	40-R4	44-R4	44-R4(3)
457.00	UNDERGROUND STORAGE PLANT – REGULATING AND MEASURING EQUIPMENT	30-R1.5 (EGD) 30-R3 (Union)	35-R3	40-R2.5	40-R2.5(3)
464.00	TRANSMISSION – EQUIPMENT		30- L0.5 (50-S4 original proposed (8))	50-S4 (4)	
465.00	TRANSMISSION PLANT – MAINS	55-R4 (Union)	60-R4	70-R4	70-R4(3)
466.00	TRANSMISSION PLANT – COMPRESSOR EQUIPMENT	30-S3 (Union)	30-R4	Did not agree with Emrydia's proposal (6)	37-R4
472.35	DISTRIBUTION - STRUCTURES AND IMPROVEMENTS – MAINWAY		Truncation date of 2027 (2024original proposed (8))		Truncation date of 2028 (5)
473.01	DISTRIBUTION PLANT – SERVICES – METAL	45-L1.5 (EGD) 50-R1.5 (Union)	40-S0.5 (45-S1 original proposal (8))	45-S1 (4, 6)	50-L1
473.02	DISTRIBUTION PLANT – SERVICES – PLASTIC	45-L1.5 (EGD) 55-R3 (Union)	55-S3	Did not agree with Emrydia's proposal (6)	60-S3

[140] Enbridge Gas Reply Argument, p. 224; OEB staff Submission, p. 84; IGUA Submission, pp. 37-38.

474.00	DISTRIBUTION PLANT – REGULATORS	20-SQ (Union)	25-SQ	No opinion (6)	45-S1
475.21	DISTRIBUTION PLANT – MAINS – COATED & WRAPPED	61-R3 (EGD) 55-R4 (Union)	55-R3	61-R3 (70-R3 also considered)	65-R3 (IGUA noted 65 or 70 year life is more reasonable than 55 (7))
475.30	DISTRIBUTION PLANT – MAINS – PLASTIC	65-R3 (EGD) 60-L2 (Union)	60-R4	65-R3 (70-R4 also considered)	70-R2
478.00	DISTRIBUTION PLANT – METERS	15-S2.5 (EGD) 25-L1.5 (Union)	15-S2.5	15 years too short, 25 years too long (6)	25-L1.5

Notes:
1) OEB staff submission, p.84
2) IGUA submission, p.37-41
3) IGUA endorsed InterGroup's recommendations
4) OEB staff submission, p.86 – OEB staff did not support Concentric's revision for Account 464 and 473.01
5) Oral Hearing Transcript, Vol.18, p.70
6) Oral Hearing Transcript, Vol.17, pp.174, 177, 178
7) IGUA submission, p.39
8) Updated in the capital update

InterGroup estimated the impact of adopting ALG with its recommended asset life parameters would be a $79.4 million decrease to the $879 million proposed depreciation expense,[141] whereas Concentric estimated the impact to be a decrease of $110.1 million.[142] In its submission, OEB staff suggested that Concentric's recommended asset lives for these accounts may be shorter than InterGroup's because Concentric, in applying its judgement, factored in energy transition considerations.

IGUA estimated the impact of adopting ALG with its supported Emrydia and InterGroup's asset life parameters would be a $125 million decrease to the $879 million proposed depreciation expense,[143] whereas Concentric estimated the impact to be a decrease of $299.9 million.[144] OEB staff and IGUA argued that the InterGroup and

[141] OEB staff Submission, p. 85.
[142] Equal to proposed depreciation of $879 million minus depreciation using InterGroup's asset life parameters of $768.9 million (based on Enbridge Gas Reply Argument, p.203, Table 2 depreciation – OEB Staff Lives and Survivor Curves under ALG).
[143] IGUA submission, pp. 39-40.
[144] Equal to proposed depreciation of $879 million minus depreciation using IGUA's supported Emrydia and certain InterGroup asset life parameters of $579.1 million (based on Enbridge Gas Reply Argument, p.203, Table 2 depreciation – IGUA Lives and Survivor Curves under ALG).

Emrydia reports provided a detailed, specific and carefully reasoned analysis of the applicable underlying retirement data, peer analysis and reported management discussions, which formed the basis of their recommendations. When asked to compare recommendations during the oral hearing, Emrydia indicated that it generally agreed or accepted InterGroup's asset life parameter recommendations.[145]

LPMA and VECC supported InterGroup's proposed asset life parameters while SEC, CME, FRPO agreed with the submissions provided by IGUA.

In reply, Enbridge Gas argued that the asset lives and survivor curves recommended by InterGroup's and Emrydia would reduce the depreciation recovery significantly below current recovery based on the historical inputs. Enbridge Gas stated that some submissions were contradictory, arguing to lengthen average service lives despite the energy transition risk, showing that the positions taken by intervenors are driven solely by a desire to reduce depreciation expense and rates.

Enbridge Gas stated that in the event that the OEB directs a customer attachment revenue horizon that is shorter than 30 years, Enbridge Gas will need to consider the implications on depreciation because there will be a substantial mismatch in customer attachment revenue horizon and depreciation assumptions.

Findings

The OEB reviewed the 12 asset classes in question, considering the range of proposals for each asset class and the overall range of proposals for all 12 asset classes. While Enbridge Gas submitted that the recommendations made by Concentric included consideration of the energy transition, it is not clear what impact that had on Concentric's recommendations. Elsewhere in this Decision and Order, the OEB has identified the need for Enbridge Gas to carry out a proper assessment of risk and determine the extent to which that risk should be addressed in its depreciation policy. Enbridge Gas has been directed to address this and other stranded risk mitigation options in its next rebasing application.

The OEB prefers the analysis provided by InterGroup and Emrydia. The OEB approves the changes to the asset life parameters proposed by InterGroup in Table 3 and supported by Emrydia during the oral proceeding.

The OEB notes Enbridge Gas's concern regarding a potential mismatch in revenue horizons for system access calculations and depreciation assumptions. This mismatch

[145] N.M5.Staff-1. For Account 475.3 Distribution Mains – Plastics, Emrydia continues to prefer its own recommendation of Iowa curve 70-R2.

has existed since E.B.O. 188 was issued in 1998 because industrial and contract customers have used a shorter revenue horizon than small volume customers.

Depreciation assumptions for new customer connections for small volume customers will not be relevant under the zero revenue horizon that the OEB is requiring as of January 1, 2025, as the cost of these new connections will not go into rate base.

Net Salvage Methodology

Net salvage value, also referred to as site restoration costs, is the cost to remove, decommission and restore affected sites less amounts received for selling off remaining pieces. Concentric, InterGroup and Emrydia were supportive of maintaining the CDNS method for determining net salvage for the amalgamated utility, which was utilized by Enbridge Gas Distribution. Union Gas utilized the Traditional Method.

However, InterGroup and Emrydia raised concerns with the way Concentric calculated net salvage under CDNS.[146] In particular, both InterGroup and Emrydia indicated that there was double counting of inflation in Concentric's CDNS methodology. InterGroup also stated that there was an offsetting error where there was no accretion of the present value of the double inflated salvage amount.[147]

The CDNS method includes a discount rate that is used as an input. Concentric proposed a CARF rate of 3.75%, InterGroup proposed a CARF rate of 4.88% and Emrydia proposed the WACC of 6.03%.

OEB staff supported InterGroup's recommended calculation methodology of CDNS, the most updated CARF rate of 4.88% and InterGroup's net salvage parameters. OEB staff noted that while it agreed WACC may be appropriate in principle, the most current CARF rate of 4.48% would also be appropriate. Using the CARF of 4.48% and InterGroup's CDNS methodology and net salvage parameters resulted in a net salvage value of $54 million, which is relatively close to the forecasted site restoration costs of $55 million to $62 million for 2024.[148] OEB staff indicated that there was a $346 million surplus of net salvage that could be reduced during the rate-setting period.

However, OEB staff submitted that it would not be opposed to using the Traditional Method of determining net salvage as an alternative in conjunction with InterGroup's net salvage parameters if the OEB had concerns with the CDNS method. The Traditional Method estimates net salvage as a percentage of the original cost. It attempts to forecast "pay as you go" and evenly distributes the cost in nominal dollars, or the year of

[146] Oral Hearing Transcript, Vol. 18, pp. 11-13.
[147] Oral Hearing Transcript, Vol. 17, p. 180.
[148] OEB staff Submission, p. 93.

expenditure. OEB staff submitted that use of the Traditional Method would avoid mixing recommendations on various aspects of net salvage, which could lead to undesired results such as a net salvage accrual that is too low. LPMA, OGVG and VECC generally agreed with OEB staff's submission.

IGUA supported the use of InterGroup's CDNS calculation methodology. Alternatively, IGUA supported setting the 2024 net salvage provision to cover the net salvage forecast to be incurred in 2024. This approach would ensure that the net salvage accrual of approximately $1.6 billion to date would remain intact through 2024. IGUA recommended the CDNS discount rate be equal to WACC. IGUA added that using WACC as the discount rate reflects that the value to future customers for the net salvage contributions made by current customers, is the avoided Enbridge Gas rate base. SEC, FRPO and CME generally agreed with IGUA's submission on net salvage.

Table 4 – 2024 Depreciation Expense with Different Net Salvage Options[149]

	Enbridge Gas Asset Life Parameters		**OEB staff Asset Life Parameters**		**IGUA Asset Life Parameters**	
Net Salvage Options	**ELG**	**ALG**	**ELG**	**ALG**	**ELG**	**ALG**
CDNS @ 3.75% Concentric proposal	**$879.0 Proposed**	$795.6	$826.6	$768.9	$665.0	$579.1
CDNS @ 4.48% InterGroup proposal	n/a	n/a	$791.9	$711.4	$631.8	$550.6
CDNS @ 6.03% Emrydia proposal	n/a	n/a	$656.2	$668.3	$588.7	$513.6
Traditional Method	$1,034.1	$935.7	$979.7	$878.8	$745.6	$650.3

Enbridge Gas supported Concentrics's CDNS methodology as it has been approved and successfully used for years. Enbridge Gas argued that neither InterGroup nor Emrydia provided details or explained how InterGroup's CDNS method is correct and would arrive at the appropriate provision. In addition, Enbridge Gas noted that Concentric will be undertaking the final depreciation calculations following the issuance of the OEB's decision. Enbridge Gas questioned how Concentric can be called upon to credibly apply the methodologies used by InterGroup and Emrydia when the methodologies are foreign to it.

[149] Reproduced from Enbridge Gas Reply Argument, p. 203. The Reply Argument includes the details of the calculations.

Regarding the discount rate, Enbridge Gas noted that a 4.48% discount rate would reduce the net salvage recovery compared to 3.75%. Enbridge Gas submitted that using a 6.03% discount rate equal to the WACC greatly reduces the net salvage provision and penalizes future ratepayers to the benefit of current ratepayers.

Like OEB staff, Enbridge Gas also stated that it is not opposed to the Traditional Method utilized by the legacy Union Gas. The Traditional Method might be one means of ensuring that the actual net salvage provision is sufficient to cover forecast annual removal costs and to add to the future site restoration costs accrual balance.

Enbridge Gas submitted that the OEB should not assume that there is a forecast surplus of $346 million as referenced by OEB staff, as the ultimate costs required to complete future site restoration is not known.

Net Salvage Parameters
Net salvage is usually expressed as a negative value to reflect that it costs more to decommission and remove plant than what can be recovered by selling off residual pieces. In terms of the depreciation provision, a lower negative net salvage figure will generate a lower depreciation expense whereas a higher negative figure will generate a higher depreciation expense.

InterGroup proposed six net salvage parameters that were different than those proposed by Concentric. The net salvage parameters in question are shown in the table below.[150]

[150] Enbridge Gas Reply Argument, p. 251

Table 5 – Proposed Net Salvage Parameters

Asset Account Numbers and Description		Current Approved Parameters - EGD (CDNS)	Current Approved Parameters - Union (Traditional)	Concentric Proposed Parameters (Traditional)	Concentric Proposed Parameters (CDNS)	InterGroup Proposed Parameters (Traditional) (1)
465.00	TRANSMISSION PLANT - MAINS	N/A	(15%)	(25%)	(12%)	(15%)
466.00	TRANSMISSION PLANT - COMPRESSOR EQUIPMENT	N/A	(5%)	(10%)	(7%)	(5%)
467.00	TRANSMISSION PLANT - MEASURING AND REGULATING EQUIPMENT	N/A	(10%)	(25%)	(15%)	(10%)
473.02	DISTRIBUTION PLANT - SERVICES - PLASTIC	(22%)	(40%)	(50%)	(26%)	(40%)
475.21	DISTRIBUTION PLANT - MAINS - COATED & WRAPPED	(51%)	(60%)	(80%)	(42%)	(40%)
475.30	DISTRIBUTION PLANT - MAINS - PLASTIC	(38%)	(40%)	(80%)	(38%)	(25%)

Notes:
1) OEB staff submission, p.95

Enbridge Gas's proposed net salvage accrual is $96.3 million.[151] In its submission, OEB staff noted that using all of InterGroup's recommendations, net salvage under InterGroup's CDNS calculation method at a discount rate of 3.75% would result in a net salvage accrual of $59.8 million, or $54 million using a discount rate of 4.48%.[152] In reply, Enbridge Gas quantified the impact of InterGroup's recommendations to be a

[151] Enbridge Gas Reply Argument, p.251.
[152] OEB staff Submission p.96.

$80.7 million reduction to the net salvage provision, which would prevent Enbridge Gas from recovering the full amount of its forecast annual costs.

Enbridge Gas noted that Union Gas was approved to use the Traditional Method for net salvage and the net salvage parameter under the Traditional Method cannot be compared to that under the CDNS method. Enbridge Gas submitted that InterGroup's proposed net salvage parameters result in either a previously approved net salvage parameter being continued or a reduction in the net salvage parameter relative to the previously approved figures. Furthermore, Enbridge Gas stated that InterGroup's recommended net salvage parameters were expressed under the Traditional Method. To be compared to Concentric's net salvage parameters under CDNS, Enbridge Gas explained that InterGroup's recommended net salvage parameters would need to be converted and would reduce the net salvage recommended by InterGroup even further. Enbridge Gas also emphasized that if a discount rate higher than 3.75% is used for the CDNS method, there will be a further material reduction to the net salvage provision, which could result in inadequate recovery to cover annual removal costs and add nothing to the site restoration costs accrual balance.

Findings

The OEB approves the Traditional Method for calculating net salvage for the amalgamated utility. The Traditional Method was utilized by legacy Union Gas and all experts agreed upon the calculation, unlike the CDNS method, and considered the Traditional Method a reasonable alternative to the CDNS method used by Enbridge Gas.

In considering these previously approved methods, the OEB is of the view that the Traditional Method is appropriate for the amalgamated utility. It is comprehensive and it avoids the constant dollar calculations at issue for the CDNS method.

The OEB agrees with OEB staff's submission that the Traditional Method avoids mixing recommendations on various aspects of net salvage, which could lead to undesired results such as a net salvage accrual that is too low.

The OEB also approves InterGroup's proposed net salvage parameters in Table 5. The OEB notes that four of the six life parameters are the same as the legacy Union Gas, while the other two are higher (less negative). In contrast, all six life parameters proposed by Concentric are lower (more negative). The OEB prefers the stability of InterGroup's recommendations relative to the legacy rates, until the future studies and reporting discussed in the next section are filed by Enbridge Gas.

Future Studies and Reporting

Some parties (OEB staff, IGUA, LPMA and SEC) submitted that depreciation can be used as a tool to address the energy transition, referencing InterGroup and Emrydia's testimony that the depreciation procedure should be purposefully designed to address the energy transition.[153] Most parties (OEB staff, CCC, CME, Environmental Defence, FRPO, GEC, IGUA, City of Kitchener, LPMA and SEC) submitted that Enbridge Gas should be required to provide depreciation studies that consider the energy transition, including but not limited to an Economic Planning Horizon, Units of Production procedure, and assets most likely to be impacted by the energy transition as suggested by Dr. Hopkins.

Emrydia recommended that Enbridge Gas be directed to complete a study on the ten largest accounts to assess the appropriateness of net salvage parameters.[154] The objective would be to provide recent data by asset account type to refine Enbridge Gas's net salvage cost estimates in the future. Each depreciation witness was afforded the opportunity to propose ten accounts for such a study. IGUA and OEB staff supported the ten accounts proposed by InterGroup for the purposes of the study.

In reply, Enbridge Gas agreed to consider other depreciation methodologies such as Economic Planning Horizon and Units of Production, and to track and study ten accounts for net salvage costs for the purposes of its next rebasing application.

Findings

For its next rebasing application, Enbridge Gas is directed to study options to ensure its depreciation policy addresses the risk of stranded asset costs appropriately. These options must encompass all reasonable alternative approaches, including the Units of Production approach. Enbridge Gas shall determine whether to propose changes to its approach to depreciation to account for the impact of the energy transition, recognizing that a failure to act prudently in relation to the risk of stranded assets will have an impact on the ability to keep those assets in rate base.

The OEB directs Enbridge Gas to track and study the ten accounts proposed by InterGroup with respect to net salvage. The ten accounts are as follows:[155]

[153] SEC Submission, p. 95; OEB staff Submission, p. 76; City of Kitchener Submission, p. 7.
[154] IGUA Submission, p. 43.
[155] OEB staff Submission, p. 97.

- 473.01 Services Metal
- 473.02 Services Plastic
- 475.21 Mains Coated and Wrapped
- 475.3 Mains Plastic
- 477.00 Measuring and Regulating Equipment
- 465.00 Mains
- 466.00 Compressors
- 467.00 Measuring and Regulating Equipment
- 453.00 Wells
- 456.00 Compressors

Site Restoration Costs and Segregated Funds

To date, Enbridge Gas has accumulated net site restoration costs of $1.6 billion.[156] The $1.6 billion represents the presumed amount recovered in rates through depreciation, based on the salvage component applied to actual gross plant values which reduces rate base. Subsequent to these initial entries, gross plant values are adjusted to deduct actual removal and restoration costs.

Enbridge Gas explained that the $1.6 billion collected to date has been used for operations, which reduces the capital (both debt and equity) that needs to be raised. Enbridge Gas estimated that the lower rate base has resulted in customers saving approximately $1 billion between 2013 to 2022.[157] Enbridge Gas also records an unfunded regulatory liability associated with site restoration costs on its audited financial statements.[158] Based on Enbridge Gas's proposal, forecast net salvage accrual is $96.3 million for 2024.[159] Concentric estimated the cost to decommission all of Enbridge Gas's assets currently in service to be approximately $6.9 billion.

The OEB previously directed Enbridge Gas Distribution to examine the issue of whether a segregated fund should be established as a means of protecting ratepayers for site restoration costs recovered in rates.[160] In the current proceeding, Enbridge Gas maintained that the establishment of a segregated fund is not appropriate at this time. Enbridge Gas conducted a jurisdictional review and did not find any examples of utilities in North America that used a segregated fund. Enbridge Gas further noted that a segregated fund would be costly to set up and operate, and there would be many tax complications.

[156] Enbridge Gas, Argument-in-Chief, p. 185.
[157] Exhibit J17.10.
[158] Exhibit I.1.8-Staff 17.
[159] Exhibit J17.5, Table 1.
[160] EB-2012-0459, Decision with Reasons, July 17, 2014, p. 84.

No parties (and none of the depreciation experts) supported the establishment of a segregated fund in this proceeding. However, many parties submitted that the need for a segregated fund should be reassessed at Enbridge Gas's next rebasing.[161] IGUA's depreciation expert, Emrydia, suggested that if the status quo was maintained, then to increase transparency Enbridge Gas should be required to begin separately tracking and reporting annual changes in the net salvage liability.

Findings

The OEB is concerned with the lack of transparency associated with the $1.6 billion collected to date through rates. Currently, the OEB has no line of sight to the $1.6 billion balance and underlying calculations. The fact that money has been collected in rates for the purpose of site restoration but used for other purposes means that site restoration remains an unfunded liability and is recorded as such in the company's financial statements. In the context of the energy transition, this unfunded liability is even more of a concern.

While a segregated fund may not be necessary at this time, tracking and reporting to validate the $1.6 billion is overdue. The OEB is taking steps to address the unfunded liability.

The OEB approves the inclusion of site restoration costs in the revenue requirement for 2024. Enbridge Gas proposed $96.3 million, but this will need to be recalculated in light of other findings in this Decision and Order. The money that will be collected in rates starting in 2024 will be used to start funding the liability, rather than using it to offset other costs, as has been the practice to date. A tracking account could be established to record the amounts collected through rates and to track actual spending related to site restoration. Any excess amounts would be tracked in the account and not be used to offset other costs. Enbridge Gas shall address the details of its proposed approach in the draft rate order process, including investment of this money when it is not being used for site restoration.

To address the existing unfunded liability, the OEB directs Enbridge Gas to file evidence in Phase 2 indicating how the annual amounts are calculated and to provide a long-term forecast of the total funds required to pay for site restoration costs. The forecast may be aggregated for the amalgamated utility for 2025, with the expectation that further segmentation may be warranted based on the ten asset accounts to be tracked.

[161] OEB staff Submission, p.100; OGVG Submission, p.19; Environmental Defence Submission, p. 52.

4.5.2 Overhead Capitalization

Enbridge Gas requested approval for a harmonized overhead capitalization methodology to reflect the amalgamated operations of Enbridge Gas. Enbridge Gas implemented the harmonized overhead methodology effective January 1, 2020, and recorded the impact of the change in methodology in the Accounting Policy Changes Deferral Account (APCDA). The proposed harmonized overhead methodology and disposition of balances recorded in the APCDA are Phase 1 issues. Overhead capitalization implications for ICM applications will be considered in Phase 2 of this proceeding.

The proposed harmonized overhead method would allocate an overhead rate to plant assets, based on forecasted capital additions by asset class. Enbridge Gas stated that this approach was used by the legacy Union Gas and aligns capitalized overhead to asset classes and the projects they support in a given year. Enbridge Gas claimed its harmonized proposal was administratively practical and less costly than other alternatives. The indirect capitalization rate previously approved for Union Gas was 14.8%.[162]

In its application, Enbridge Gas proposed $310.5 million in capitalized overhead be included in the 2024 rate base based on a capitalization rate of 23.8%.[163] Enbridge Gas stated that the proposed methodology relative to the legacy approved methodologies would increase the capitalization rate from 22.7% to 23.8% and the capitalized overheads by $15.4 million in 2024.[164] Enbridge Gas believed this difference was simply a function of the accuracy of the proposed overhead capitalization methodology. As a result of the OEB-approved settlement proposal related to other issues, proposed capitalized overheads have been reduced from $310.5 million to $292 million.[165] Parties did not settle on a final capitalized overhead amount as it would be dependent on the unsettled issues of the harmonized overhead capitalization methodology and the capital budget for 2024.

Enbridge Gas stated that if the $310 million was not approved for inclusion in the approved capital budget, the difference would need to be added to O&M as an expense and when tax implications are included, this would increase the revenue requirement by $348 million.[166]

[162] EB-2018-0305, Undertaking JT1.7.
[163] Exhibit 2, Tab 4, Schedule 2, p. 17.
[164] Enbridge Gas, Argument-in-Chief, p. 128.
[165] Enbridge Gas, Argument-in-Chief, p. 118.
[166] Exhibit J16.3.

Enbridge Gas stated that overhead costs are costs that can be linked to the creation of capital but cannot be directly associated with any particular asset or project. The harmonized overhead capitalization methodology is predominantly based on historical methods approved by the OEB and uses four cost categories: Operations Costs, Business Costs, Shared Services Costs, and Pension and Benefits Costs. Each cost category has a cost driver applied, typically determined by the nature of the underlying cost relationship or linkage to capital activity. The only new form of cost causality proposed in the harmonized overhead capitalization methodology is the addition of geographic diversity, which was added to accommodate the scale of the amalgamated utility. Enbridge Gas retained Ernst & Young to review and provide recommendations on the development of its overhead capitalization policy.

Operations costs are allocated based on actual spend to determine the following year's budgeted overhead capitalization rate. As a result, the capitalized amount would not be expected to change based on a prospective update to the capital program. Enbridge Gas stated that O&M costs indirectly supporting capital projects would not respond immediately, even to a material shift in the capital program, given that most of the reductions would be expected to impact direct costs for these projects.

Parties took issue with two aspects of Enbridge Gas's proposed capitalization methodology, namely indirect costs and the capitalization rate.

Indirect Costs

OEB staff submitted that Enbridge Gas should be required to quantify, on a best-efforts basis, indirect costs that would not be eligible for capitalization without regulatory approval as per US Generally Accounted Accepted Principles (USGAAP). LPMA supported this requirement. OEB staff questioned as to why Enbridge Gas should be allowed to continue to capitalize indirect overheads just because it is allowed under USGAAP. OEB staff noted that the majority of the utilities regulated by the OEB have adopted modified International Financial Reporting Standards (MIFRS) and indirect overhead costs cannot be capitalized under MIFRS. OEB staff also noted that if Enbridge Gas is required to adopt IFRS in the near future, it would not be able to capitalize indirect costs. FRPO, Pollution Probe, SEC, VECC submitted that Enbridge Gas should not be allowed to capitalize indirect costs.

LPMA submitted that the OEB should approve Enbridge Gas's proposed overhead capitalization methodology as no other methodology has been sufficiently tested in this proceeding.

VECC stated that Enbridge Gas's practice is the exception to that of other regulated utilities in Ontario as Hydro One reports under USGAAP with a capitalization rate of 8%

to 9%. Pollution Probe submitted that expensing indirect overheads will avoid the bloating of capital with unrelated costs and reduce risks related to stranded asset costs.

In reply, Enbridge Gas submitted that while it is prepared to attempt on a best effort basis to provide a high-level estimate of direct costs included in the indirect overhead capitalization figure, the amount may not be sufficiently material to warrant the exercise.

Enbridge Gas acknowledged that it is temporarily reporting under USGAAP until the earlier of January 1, 2027, or when there is a rate-regulated standard issued by the International Accounting Standards Board. Until then, Enbridge Gas submitted that it should continue the practice of capitalizing indirect overheads for principled reasons.

Capitalization Rates

Enbridge Gas applies a derived capitalization rate to projects. The proposed harmonized rate is 23.8% for 2024.

OEB staff argued that the operation regions capitalization rate should be revised to a three-year rolling average that incorporates actual and forecast information. Currently, the rate is based only on the most recent year's actual spending at the time the budget is determined. For the purposes of setting 2024 rates, OEB staff suggested that the capitalization rate should reflect data from 2022, 2023 (actual and forecast) and 2024 as approved by the OEB, instead of only reflecting 2021 actuals. Further, if the OEB approved a revision to the proposed capitalization methodology, OEB staff suggested that the change should be reflected in the APCDA starting in 2020.

SEC submitted that Enbridge Gas should be required to adopt an overhead capitalization methodology that updates the rates throughout the year to better reflect the actual mix of capital and operations work, similar to Hydro One's methodology. SEC stated that too much of the proposed overhead capitalization methodology is based on historical spending, and not reflecting the costs incurred and the capital work undertaken.

Energy Probe argued that Enbridge Gas has not provided adequate evidence to justify its increase in capitalization of indirect overheads relative to the legacy utilities. Energy Probe submitted that the Ernst & Young study did not conclude that the proposed harmonization capitalization methodology was appropriate.

In reply, Enbridge Gas stated that the proposed capitalization rate for the operations cost component of the overhead capitalization methodology is 35%, which is a decrease from the capitalization rate generated by historical methods.

Enbridge Gas acknowledged that 2022 actuals are available now. It calculated the impact of using 2022 data or an average of 2021 and 2022 data to determine capitalization rates, and the impact is less than $1 million, which suggests that there is no real benefit in making the change proposed by OEB staff. Enbridge Gas claimed that it would be a “monumental exercise” to review and separate out comparable operations cost data from Enbridge Gas Distribution and Union Gas; therefore, any change should be applied on a prospective basis.

Enbridge Gas also noted that it is unable to determine what Hydro One’s process actually is. Enbridge Gas noted that it performs a monthly variance analysis on all applicable accounts, which allows for a reasonableness assessment in comparison to budget and considers the capitalization rate applied. Enbridge Gas stated that if Hydro One does the same monthly review, then its proposed overhead capitalization methodology already achieves the purported benefits of what SEC proposes.

Findings

The OEB approves the proposed overhead harmonization methodology, except for the capitalization of indirect overheads. The OEB does not approve the proposal to capitalize $292 million in 2024. However, the OEB recognizes that a requirement to expense the entire $292 million in 2024 would have a large impact on 2024 rates. Therefore, the OEB directs Enbridge Gas to expense $50 million of the indirect overhead amount in 2024, calculate the revenue requirement impact and capitalize the remaining $242 million. In subsequent years, during the IRM term, Enbridge Gas shall reduce the remaining capitalized amount by expensing a further $50 million in each year. For example, in 2025, Enbridge Gas will expense a further $50 million, reducing the capitalized amount of $242 million to $192 million.

In its next rebasing application, Enbridge Gas shall include its proposal to reduce any remaining capitalized indirect overhead balance to zero.

Enbridge Gas is temporarily reporting under USGAAP, which can only persist until the earlier of January 1, 2027, or a rate-regulated standard issued by the International Accounting Standards Board. It is only through an exception to USGAAP through ASC 980 that a regulator, such as the OEB, can allow the capitalization of indirect overheads. Otherwise, indirect costs must be expensed.

It is short sighted to continue the practice of capitalizing indirect overheads at the proposed level in the face of a transition to IFRS accounting, knowing the revenue requirement impact of expensing $292 million in the transition year, and the resulting rate shock to customers. Furthermore, continuing with the proposed capitalization rate amplifies the stranded asset risk.

An implementation plan is required to migrate the remaining $242 million balance of capitalized indirect overheads to O&M. As part of the IRM issue to be addressed in Phase 2 of this proceeding, Enbridge Gas shall file a proposal to reduce the capitalized indirect overhead balance by $50 million in each year of the IRM term and expense it as O&M. In that proposal, Enbridge Gas could consider a mechanism similar to the capital pass-through mechanism approved in Union Gas's last IRM framework.[167]

Other than the $242 million addressed above, Enbridge Gas is no longer permitted to capitalize any further indirect overheads. It would appear unfair to afford one energy distributor a competitive ratemaking advantage based on the option of reporting under USGAAP rather than MIFRS, where this option is not available to those utilities.

Further, the underlying cost in 2024 may decrease as Enbridge Gas rationalizes and sizes its indirect overhead functions to align with its pending updated Asset Management Plan. This Decision and Order may impact 2024 actual capital spending, including the 17.0% reduction in the proposed overall capital expenditure budget.

Capital Reduction Impact on Gross O&M

Energy Probe, Pollution Probe, SEC and VECC argued that if the OEB does not approve Enbridge Gas's proposed capital expenditures, there should be an adjustment to gross O&M. Energy Probe submitted that Enbridge Gas should find an equivalent amount of savings in its O&M expenditures. Pollution Probe submitted that there should be an adjustment to O&M: (i) related to costs that could be capitalized when Enbridge Gas starts to track these costs in alignment with accounting standards; (ii) for an expected decrease in capital work expected; and (iii) an efficiency factor related to improving indirect overheads. Pollution Probe stated that indirect overheads should also be reduced by a similar factor as that proposed to the capital budget for 2024. SEC stated that if Enbridge Gas expects to do less capital work than forecast, the costs that support that work should be reduced correspondingly, especially in the context of the energy transition. SEC stated that the relationship may not be perfectly linear, but it simply cannot be said that there is no relationship. SEC noted that this relationship exists for the costs of business units such as Major Projects, Engineering, Asset Management, System Improvement, Integrity & IMS, the Operational Group and even Shared Services to some extent.

LPMA acknowledged that the overhead capitalization amount would not be impacted in the event of a small change to capital expenditures. However, LPMA submitted that if the OEB makes significant reductions to the capital budget, it would be reasonable to

[167] EB-2013-0202, Settlement Agreement, July 31, 2013, pp. 29-35.

assume that there would be a material change to the overhead capitalization amount that is added to O&M.

For 2024, Enbridge Gas stated that it already has its existing complement of management and employees in place. Furthermore, while a material reduction in the capital budget for 2024 would likely lead to the cancellation of certain projects in 2024, this reduction would primarily be implemented by the avoidance or cancellation of third-party contractor expenses. Enbridge Gas further noted that it is foreseeable that a material decrease in the capital budget could correspondingly increase the demands for maintenance related activities that need to be undertaken by Enbridge Gas, using internal resources that would be expensed as opposed to capitalized. This supports the need to retain current staffing levels or perhaps even increase staffing levels. However, Enbridge Gas stated that should it no longer require the same complement of staff to support capital activities, it would result in severance and reorganizational costs which were not included in the O&M budget.

Findings

The OEB will not make any changes to gross O&M for 2024, which includes indirect overheads proposed to be capitalized. While the reduction in the 2024 capital budget should reduce 2024 O&M related to capital project support, the requirement for more emphasis on monitoring, maintenance and repair of assets would increase O&M requirements. The OEB has insufficient evidence to determine the extent to which these would offset one another, and in turn, determine to what extent any adjustment would be appropriate.

Capitalization Study

Some parties (LPMA, VECC, CCC, and SEC) submitted that Enbridge Gas should be required to do an independent review to investigate alternate capitalization methodologies used by other utilities in North America. Some of these parties noted that Ernst & Young was retained to assist in the development of Enbridge Gas's overhead capitalization methodology but did not provide an assessment of it.

In reply, Enbridge Gas submitted that while it is prepared to engage an independent third-party expert to undertake an assessment of its overhead capitalization methodology at the next rebasing, it does not believe there is any value in undertaking a benchmarking study as details and mechanics used by other utilities are generally not publicly available.

Findings

The OEB finds that, as a next step to better understand Enbridge Gas's overhead capitalization methodology, Enbridge Gas shall engage an independent third-party expert to undertake an assessment of its overhead capitalization methodology, to be filed as part of its next rebasing application.

4.5 Accounting Policy Changes Deferral Account

The APCDA was created in the MAADs proceeding to record the impact of accounting changes as a result of the amalgamation that impact the revenue requirement. In this proceeding, Enbridge Gas proposed to dispose of the forecast December 31, 2023 balance of a debit amount of $140.2 million in the APCDA, including forecast interest to December 31, 2023. The components of the $140.2 million balance in the account are shown in the table below.[168]

Table 6
Accounting Policy Changes Deferral Account

	$M
Pension and OPEB Expense – Unamortized Pre-2017 Actuarial Losses and Prior Service Costs	156.0
Amortized Gas Supply Storage and Transportation costs	62.1
Interest during construction	1.5
Capitalization vs. Expense	-11.7
Depreciation expense	-31.2
Overhead capitalization	-36.5
Net APCDA balance for disposition	**140.2**

As part of the 2019 Deferral Account Disposition proceeding (EB-2020-0134) settlement proposal, the intervenors and Enbridge Gas agreed to postpone the review, allocation and disposition of balances in the APCDA until the end of Enbridge Gas's current deferred rebasing term.[169]

[168] Enbridge Gas, Argument-in-Chief, p. 245.
[169] EB-2020-0134 Settlement Proposal, January 5, 2021, p. 10.

There were two items of dispute in this account. The first is related to the overhead capitalization methodology during the deferred rebasing term and the second item is Pension and Other Post Employment Benefit (OPEB) costs, specifically the former Union Gas's pre-2017 amortized actuarial gains/losses.

Overhead Capitalization

Since no balances accumulated during the deferred rebasing period were cleared, OEB staff submitted that if the OEB approves a change to Enbridge Gas's proposed overhead capitalization methodology, then the same methodology should be applied to the balances in the Overhead Capitalization line of the APCDA. OEB staff noted that Enbridge Gas's harmonized methodology was implemented in 2020 and the difference between the harmonized and historic methodologies have been recorded in the APCDA. If OEB staff's recommendation to calculate Operation Costs capitalization rates using a three-year rolling average was adopted, then OEB staff submitted that the same methodology should be reflected in calculating the balance of the APCDA starting in 2020. LPMA agreed with OEB staff's submission on this issue.

In reply, Enbridge Gas reiterated that its proposed overhead capitalization methodology was appropriate and therefore no changes with respect to overhead capitalization in the APCDA were required. Even if the overhead capitalization methodology was changed, Enbridge Gas argued that it would not be appropriate to apply changes to the overhead capitalization methodology on a retroactive basis, back to 2020, as suggested by OEB staff and LPMA. Enbridge Gas submitted that making changes retroactively seems to suggest that Enbridge Gas should have adopted the recommended approach at the time of harmonization of overhead capitalization policies even though the updated approach has nothing to do with harmonization.

Enbridge Gas further submitted that OEB staff and LPMA's argument is not consistent with the terms of the APCDA. The description of the APCDA, as noted in the MAADs Decision, is to record the impact of any accounting changes that affect revenue requirement, which are required as a result of the amalgamation of Enbridge Gas Distribution and Union Gas. Enbridge Gas submitted that it made changes to its overhead capitalization policy to harmonize approaches of Enbridge Gas Distribution and Union Gas. Enbridge Gas noted that the APCDA records the revenue requirement implications of the change during the time when the change has been in place.

Enbridge Gas argued that the changes proposed by OEB staff are incremental changes to the harmonized approach and these changes should not be considered to have been (or expected to have been) in place since 2020.

Findings

Given the OEB's decision on the harmonized overhead capitalization methodology, and the decision to require $50 million of indirect overhead costs to be expensed as O&M in 2024, Enbridge Gas, if necessary, shall adjust the balances in Table 6, for the purpose of clearing this account. The change in the OEB's exception to USGAAP ASC 980 will be applied on a go-forward basis starting in 2024. The OEB's longer-term objective is for all indirect overheads to be expensed annually as incurred.

Pre-2017 Union Unamortized Actuarial Gains/Losses

Within the APCDA, the Pension & OPEB expense balance of $156 million represents the remaining unamortized Union rate zone's pre-2017 pension and OPEB actuarial gains/losses.[170] Actuarial gains/losses arise from the difference between the actual and expected rate of return on plan assets for that period (funded pension plans) and from changes in actuarial assumptions used to determine the accrued benefit obligation, including discount rate, changes in headcount and salary inflation experience.[171] Actuarial gains/losses are amortized and included in pension and OPEB expense (i.e., net periodic benefit cost) when certain criteria are met.[172] Cumulative unamortized net actuarial gains and losses and prior service costs are presented as a component of Accumulated Other Comprehensive Income (AOCI) on the balance sheet (in the Consolidated Statements of Changes in Equity).[173]

Prior to amalgamation, both Union Gas and Enbridge Gas Distribution recovered the amortized portion of actuarial gains/losses as part of the forecast pension and OPEB expense on an accrual basis in base rates. In the current proceeding, the OEB-approved settlement proposal includes an agreement that the accrual-based pension and OPEB expense is included in the agreed upon 2024 O&M budget. Therefore, Enbridge Gas would recover the amortized actuarial gains/losses in 2024.[174]

For financial reporting purposes under USGAAP, Union Gas did not recognize a regulatory asset for its unamortized gains/losses but reflected it in AOCI.[175] Upon the amalgamation of Enbridge Inc. and Spectra Energy, there was no change to this treatment in Union Gas's 2018 financial statements. However, for Enbridge Inc.'s (the parent of Enbridge Gas) financial statements, pushdown accounting required Enbridge

[170] Enbridge Gas, Argument-in-Chief, p. 245.
[171] Exhibit 1, Tab 8, Schedule 1, Attachment 1, p.17 – Enbridge Gas 2020 audited financial statements.
[172] For example, when the cumulative unrecognized net actuarial gains and losses is in excess of 10% of the greater of accrued benefit obligation or the fair value of the plan assets, over the expected average remaining service life of the active employee group.
[173] Exhibit 1, Tab 8, Schedule 1, Attachment 1, p.17 – Enbridge Gas 2020 audited financial statements.
[174] Decision on Settlement Proposal, Aug. 17, 2023, Schedule A, Exhibit O1, Tab 1, Schedule 1, p. 32.
[175] Exhibit JT3.31, Attachment 1.

Inc. to write off Union Gas's unamortized actuarial gains/losses as of the 2017 acquisition date to goodwill because there was no identifiable asset (as Union Gas did not previously record a regulatory asset for its unamortized actuarial gains/losses in its financial statements) to allocate to the purchase price.[176] Subsequently, with the establishment of the APCDA,[177] the pre-2017 Union Gas unamortized gains/losses were transferred to Enbridge Gas's APCDA, a regulatory asset, in 2019. Accordingly, Enbridge Inc. reflected that regulatory asset in its 2019 financial statements.

OEB staff was not opposed to the proposed recovery of Union Gas's pre-2017 unamortized actuarial gains/losses. OEB staff submitted that the substance of the issue had not changed after the amalgamation and historically, both legacy utilities have recovered amortized actuarial gains/losses as part of their pension and OPEB expenses. However, OEB staff argued that the reduction should be equal to Union Gas's actual unamortized actuarial gains/losses for 2019 to 2023 net of the amortization that was embedded in base rates and already recovered for the same period. This would result in a reduction of $80.2 million. Accordingly, OEB staff submitted that Enbridge Gas should be allowed to recover $75.8 million from ratepayers ($156 million - $80.2 million). LPMA supported OEB staff's submission.

Some parties (CME, OGVG, SEC and VECC) opposed the recovery of the $156 million. SEC submitted that the price paid by Enbridge Inc. to acquire Spectra Energy, with an 11.5% premium to the then-current share price, implicitly considered Union Gas's pre-2017 actuarial losses. On the closing date of the transaction, Enbridge Inc. complied with the relevant USGAAP accounting standards and wrote off $250 million gross ($185 million net of deferred taxes) of Union Gas's pre-2017 actuarial losses, which previously resided in AOCI on its balance sheet. If $156 million is now approved for recovery, it would amount to a windfall gain for Enbridge Gas's shareholders, paid for by Enbridge Gas's ratepayers. According to SEC, it was the amalgamation of the parents (Enbridge Inc. and Spectra Energy) that necessitated the write-off, not the amalgamation between Enbridge Gas Distribution and Union Gas. SEC also argued that if ratepayers were required to pay the gross amounts, it would not be fair that Enbridge Gas gets the deferred tax benefit. SEC submitted that the remaining deferred tax balance should be applied against the balance in the APCDA before any amount is approved for recovery.

CME claimed that allowing Enbridge Gas to recover the actuarial losses in the APCDA would allow Enbridge Inc. to gain twice: first through a lower purchase price for Spectra Energy and second through a recovery from ratepayers. OGVG added that Enbridge Gas's shareholder has already been compensated for the value of the actuarial losses

[176] *Ibid.*
[177] APCDA was established in the Union Gas and Enbridge Gas Distribution MAADs Decision and Order EB-2017-0306/EB-2017-0307, August 30, 2018, amended September 17, 2018.

through the purchase price it paid for Union Gas and therefore it should not be allowed to recover Union Gas's pre-2017 actuarial losses in rates.

VECC noted that the establishment of the APCDA relates to the Union Gas pre-2017 actuarial losses and should be considered as a cost of amalgamation. Accordingly, the amount related to Union pre-2017 actuarial losses should not be recoverable from ratepayers.

In reply, Enbridge Gas maintained that the purchase price and valuation of shares did not involve a detailed review of the individual assets, liabilities, and equity balances of each of the Spectra Energy entities, including Union Gas. Enbridge Gas submitted that there is no conclusive evidence that the Union Gas pensionable receivable was accounted for in the purchase price.

Enbridge Gas maintained that the merger of Enbridge Inc. and Spectra Energy had no impact and the Union Gas pension receivable amount had always been recognized on the balance sheet. Union Gas continued to draw down the amount in a manner and quantum identical to the pre-amalgamation pension accounting basis.

Enbridge Gas also disputed intervenors' claims that recovery of the pre-2017 actuarial losses would be a windfall for Enbridge Gas. On the contrary, Enbridge Gas argued that ratepayers would receive a windfall if it is unable to recover the amount that is based on a mistaken theory that the amalgamation price extinguished the obligation of ratepayers. Enbridge Gas submitted that in the normal course of business, there is no debate that ratepayers pay towards a utility's pension costs (calculated on an accrual basis).

Enbridge Gas also disputed OEB staff's position that Union Gas's pre-2017 actuarial losses should be adjusted by amounts recovered through rates during the IRM term. Enbridge Gas argued that just because there was a specific amount included in Union Gas's 2013 base rates related to pension costs, the corresponding amount should notionally be applied to accrual-based pension costs each year.

As explained by Enbridge Gas's expert witness on pension plan design administration and reporting, Ben Ukonga from Mercer, the basis upon which Enbridge Gas has been amortizing amounts to drawdown the APCDA asset since 2017 is calculated by Mercer with the amortization amount updated annually by Mercer based on changes to Enbridge Gas's actuarial valuation. In accordance with the accounting standard,

cumulative unrecognized gains and losses are charged to the income statement each year through the net periodic benefit cost.[178]

According to Enbridge Gas, the argument to reduce Union Gas's pension receivable is not only at odds with the way that pension accounting is performed but is also at odds with the principles of incentive regulation where rates are decoupled from costs.

Enbridge Gas submitted that if the pension receivable balance is reduced, it would amount to retroactive ratemaking. The financial results for the years 2013 to 2022 are complete, and rates have been set and recovered for those years. Enbridge Gas argued that reaching back to recapture earnings from prior years is not fair or appropriate.

Regarding SEC's suggestion that the amount should be expressed as the net balance including the remaining deferred tax benefit, rather than as the gross amount, Enbridge Gas explained that amounts recovered through deferral accounts are typically settled on a gross basis.

Findings

The OEB denies Enbridge Gas's proposed recovery of $156 million of Pension & OPEB expenses as recorded in the APCDA for the pre-2017 Union unamortized actuarial gains/losses.

The OEB considered the sequence of events and in particular, the OEB's intent for the APCDA.

Prior to the Enbridge Inc. and Spectra Energy merger, Union Gas's unamortized actuarial gains and losses were recorded in AOCI in Union Gas and Spectra Energy's audited financial statements. Upon the merger, Enbridge Inc. was required to write off Union Gas's unamortized gains and losses to goodwill in accordance with ASC 805 – Business Combinations under USGAAP. Enbridge Gas stated that ASC 805 did not contemplate ASC 980 – Regulated Operations and Enbridge Inc. failed to recognize the amount as a regulatory asset. However, the recognition of a regulatory asset under ASC 980 relies on probable recovery and the disposition of the amount recorded in the APCDA is at the regulator's discretion. Furthermore, the pre-2017 Union Gas's unamortized actuarial gains and losses were not recorded as a deferred asset until 2018, after the amount had been included in goodwill as part of the prior transaction between the parent companies. The APCDA was subsequently established in 2019 during the MAADs proceeding. The amount in question was then transferred to the APCDA in Enbridge Gas's audited financial statements and identified as a regulatory

[178] Enbridge Gas Reply Argument, p. 320.

asset in Enbridge Inc.'s audited financial statements. This does not qualify as an accounting policy change that Enbridge Gas can rely on to record an amount that was written off as goodwill. Quite the opposite. Enbridge Gas submitted that it has consistently followed the methodology for determining accrual-based pension costs, underpinning Union Gas's 2013 OEB-approved rates to draw down the pension receivable balance each year for its Mercer actuarial valuation. This position was reiterated in its reply submission: "the methodology for determining the accrual based expense was employed consistently."[179]

The OEB finds that Enbridge Gas's $156 million entry in the APCDA was not consistent with the intent of the regulatory account. The OEB finds that the $156 million was not the result of an accounting policy change after January 1, 2019. The APCDA was not a subsequent opportunity for Enbridge Gas to recharacterize $156 million recorded as goodwill in 2018 as a regulatory asset in 2019. Further, goodwill should not have been included in a regulatory asset since goodwill is not recoverable in rates.

[179] Enbridge Gas Reply Argument, pp. 316-317.

5 OTHER ISSUES

5.1 Response to relevant OEB directions and commitments from previous proceedings

OEB staff submitted that Enbridge Gas appropriately responded to all relevant OEB directions and commitments made from previous proceedings as noted in Exhibit 1, Tab 13, Schedule 1 of the evidence. LPMA made a similar submission on this issue.

Pollution Probe raised the concern that Enbridge Gas is not implementing the OEB's IRP Decision and related IRP Framework as intended.[180] Pollution Probe recommended that the OEB consider options to ensure that the IRP technical working group is proactively included in all activities where IRP is considered. Pollution Probe further recommended that the OEB require Enbridge Gas to undertake a consolidated review by the IRP technical working group of all proposed projects requiring leave to construct and that Enbridge Gas must file the consolidated IRP technical working group comments with all leave to construct applications.

In reply, Enbridge Gas submitted that Pollution Probe's submissions regarding the work of the IRP technical working group were out of scope for this proceeding.

Findings

The OEB is satisfied that Enbridge Gas has appropriately responded to relevant OEB directions and commitments from previous proceedings. The OEB notes that concerns related to the IRP Framework may be addressed in Phase 2 of this proceeding, when the OEB considers the issue of incentive ratemaking mechanisms in the context of the energy transition.

5.2 Other Revenues

In the OEB-approved settlement proposal, parties agreed to Enbridge Gas's other revenue forecast, subject to two exceptions:

- There was no agreement on how Enbridge Gas's dispositions of property in 2024 and subsequent years should be included in the other revenue forecast
- There was no agreement on the appropriate treatment of the Natural Gas Vehicle Program

[180] EB-2020-0091, Decision and Order, Integrated Resource Planning Proposal, July 22, 2021.

The Natural Gas Vehicle Program was one of Enbridge Gas's safe bet actions, as indicated in the Energy Transition section of this Decision and Order.

5.2.1 Disposition of Property

Enbridge Gas's proposed forecast of other revenue excluded any forecast of property disposition gains or losses. Enbridge Gas submitted that land (but not buildings) associated with property dispositions are not depreciable assets for which ratepayers have borne a depreciation expense. As a result, sharing of the property disposition proceeds with ratepayers is not required by regulatory or legal principles. However, Enbridge Gas agreed to include proceeds from the sale of land that had been included in rate base as part of other income to be shared with ratepayers. Enbridge Gas indicated that the accounting would depend upon any earnings sharing framework to be addressed in Phase 2 of this proceeding.

Enbridge Gas noted that property dispositions are infrequent, uncertain, and not part of Enbridge Gas's normal course of business; therefore, no revenues from property dispositions should be included in the 2024 other revenue forecast. Enbridge Gas forecasted one disposition in 2024 with estimated capital proceeds of $6.3 million.[181]

OEB staff supported Enbridge Gas's proposal to not include any amounts related to property disposition gains or losses in its 2024 other revenues forecast. OEB staff agreed with Enbridge Gas that there is considerable uncertainty regarding the timing and proceeds related to any property sales. OEB staff recommended the establishment of a deferral account to track any proceeds from property sales over the course of any approved IRM rate term with any balances to be considered in the future. This would enable the nature of the individual properties and reasons for the sales to be explored. CCC, LPMA and SEC supported OEB staff's submission on this issue.

SEC noted that Enbridge Gas only referred to gains or losses allocated to accumulated depreciation but did not address the proceeds that are related to the net book value of the building. SEC submitted that the proceeds allocated to any buildings should be credited to depreciation unless Enbridge Gas also credits those amounts separately, not just from the rate base. Otherwise, SEC argued that ratepayers would inappropriately continue to pay for those assets through depreciation even though they have been sold.

SEC agreed that land is non-depreciable, but it is included in rate base. SEC noted that it would be unfair to ratepayers to pay for the cost of capital on the value of the land in rate base, if ratepayers do not share in any of the gains of disposition. SEC submitted that Enbridge Gas's proposal was unfair. Accordingly, SEC submitted that 100% of the

[181] Exhibit I.2.6-SEC-137, updated July 6, 2023.

proceeds from the disposition of buildings and 50% of the net gains (or losses) from the disposition of land should be credited to ratepayers. In the event that the land is replaced with other land to be used for utility purposes, 100% of the appreciation of value of the land should be credited to ratepayers.

In reply, Enbridge Gas argued that no deferral account is required to track and share proceeds from the sale of property. Enbridge Gas noted that for 2024, only one property is expected to be sold for approximately $6 million. In addition, it would require significant administrative effort to establish, record and review a deferral account for just a single year according to Enbridge Gas. Enbridge Gas noted that many of the OEB proceedings in which land-related proceeds have been shared with ratepayers have been determined by way of settlement rather than the OEB's direct determination.

For future years of the proposed IRM term (2025 to 2028), Enbridge Gas proposed that any gains/losses from property disposition would be subject to sharing with customers under any approved earnings sharing mechanism (ESM). Enbridge Gas noted that historically, property dispositions during the IRM term have been treated within the ESM calculation.

In the event that the OEB decides to establish a deferral account to track property dispositions for 2024 or for the full IRM term, Enbridge Gas submitted that property dispositions should be shared 50/50 between Enbridge Gas and ratepayers. Establishing a 50/50 allocation according to Enbridge Gas creates certainty and avoids future debates about the nature of a particular transaction.

Enbridge Gas further clarified that the sharing of gains/losses relates to land and not buildings. Enbridge Gas noted that ratepayers already receive 100% of the benefits from the disposition of buildings through the adjustment to accumulated depreciation.

Findings

The OEB approves the establishment of a deferral account to track any proceeds from property dispositions with the objective that non-depreciable property dispositions be shared 50/50 between Enbridge Gas and ratepayers, and 100% of the benefits from depreciable property dispositions continue to accrue to ratepayers.

There is OEB precedent for approving similar deferral accounts to capture property dispositions for other utilities during an IRM term.[182] The OEB agrees with OEB staff and intervenors that there is uncertainty around the timing and prices of property dispositions and the regulatory considerations may be unique to each property. This

[182] EB-2019-0022/EB-2019-0031, Decision and Rate Order, January 23, 2020, pp. 17-19.

deferral account for Enbridge Gas will capture all properties, land and buildings, that are expected to be sold during the IRM term.

The deferral account shall be established for the 2024 Test Year and will apply for the entire rate term that is approved by the OEB in Phase 2 of this proceeding. Enbridge Gas is required to file the draft accounting order for this deferral account along with the Phase 1 draft rate order. The draft accounting order should include Enbridge Gas's proposed methodology for disposing of any balances that accrue from non-depreciable and depreciable property. Given the SEC submission, the OEB wants to ensure 100% of the benefits from depreciable property dispositions accrue to ratepayers through adjustments to accumulated depreciation or entries to this new deferral account.

5.2.2 Natural Gas Vehicle Program

Enbridge Gas proposed to expand the current Natural Gas Vehicle (NGV) program to all Enbridge Gas's franchise areas as part of its ancillary business activities.

The NGV program is primarily active in the legacy Enbridge Gas Distribution franchise areas where it is now focused on the medium- and heavy-duty vehicle market. Enbridge Gas views natural gas as a bridge fuel until there are commercialized electric alternatives, if ever.[183]

The NGV program currently offers:

- compressed natural gas refueling station rentals
- compressed natural gas fuel cylinder and NGV refueling appliance rentals
- compressed natural gas tube trailer rentals (for off-pipe delivery and remote refueling stations)

Historically, when the NGV program underperformed, revenues were imputed to the program to avoid cross-subsidization of the program by ratepayers. However, the NGV program achieved the OEB's approved annual rate of return in 2014/2015 and has exceeded the required annual rate of return since that time.

Enbridge Gas proposed the following regulatory treatment for the NGV program:[184]

1. Continue the NGV program as an ancillary activity for the utility
2. Expand the NGV program to all Enbridge Gas franchise areas
3. Continue the current practice of setting a customer project specific charge that is

[183] Exhibit I.1.14.STAFF-42.
[184] Exhibit 1, Tab 14, Schedule 2, p. 1; Exhibit I.1.14-STAFF-43.

levelized and constant for each month of the contract term

4. Modify the current regulatory treatment to remove the requirement to impute revenue when the achieved annual rate of return does not meet or exceed the OEB-approved rate of return, such that the NGV program is funded solely by the monthly service fees charged to participating customers over the life of the program. To the extent that monthly service fees do not recover the costs to serve a particular NGV customer, the last payment of the rental contract would include a true-up between actual and forecast costs to serve that particular customer.
5. If a NGV program customer decides to exit the contract before the end of the term, the customer would pay a termination fee based on the aggregate of all internal and external costs up to and resulting from the termination
6. Enbridge Gas will report on the profitability of the NGV program at its 2028 rebasing and would support the requirement to file a report in 2026 on the performance of the NGV program under the proposed framework that sets out the annual revenue and costs (including the rate of return)

Enbridge Gas indicated that the NGV program is consistent with and complementary to the Government of Canada's Green Freight Program and Clean Fuel Regulation (CFR) as owners and operators of compressed natural gas refueling facilities can generate, trade and sell credits under the CFR.

OEB staff supported Enbridge Gas's proposed NGV program noting that the program design ensures that there is no ratepayer subsidy. OEB staff noted that the service charge will be based on a fully allocated basis and Enbridge Gas would apply credit and security terms consistent with its practices for large volume gas distribution customers. OEB staff also recommended Enbridge Gas file a report in 2026 that would enable a review of the program in light of other energy transition evolutions. FRPO supported OEB staff's 2026 report recommendation.

LPMA generally supported the continuation of the NGV program as part of the regulated operations subject to certain caveats. LPMA submitted that the OEB should direct Enbridge Gas to file an annual report detailing the revenues and costs including the rate of return on the NGV program to ensure that ratepayers are not subsidizing the program in any manner. LPMA noted that there are competitive markets for fuel cylinders, vehicle refueling appliances and tube trailers in Alberta, Quebec and British Columbia. LPMA suggested that the OEB should direct Enbridge Gas to investigate the potential for a competitive market for NGV services in Ontario and report back to the OEB as part of its next rebasing application as the continuation of the NGV program as a regulated business may be hampering the development of a competitive market in Ontario.

Many intervenors (CCC, Energy Probe, Environmental Defence, Pollution Probe and VECC) submitted that the OEB should reject Enbridge Gas's proposal to include the NGV program as part of the regulated business. CCC urged the OEB to ensure ratepayers were fully protected. Energy Probe referenced section 29(1) of the OEB Act that requires the OEB to refrain from exercising its power where there is competition sufficient to protect the public interest. Even if there is no competitive market currently as claimed by Enbridge Gas, Energy Probe argued that a competitive market can emerge given that there is money to be made in the NGV business. In addition, Energy Probe noted that NGV is not an essential service.

Energy Probe and VECC argued that Enbridge Gas's NGV activity is counter to the goal of eliminating or reducing the number of vehicles that use carbon-based fuels. VECC submitted that if the OEB approved the continuation of the program within the regulated utility then it should order an independent audit of the fully allocated costs to ensure no explicit or implicit subsidies.

Environmental Defence submitted that the OEB should deny Enbridge Gas's request to expand the NGV program to the legacy Union Gas rate zones and treat it as a utility activity unless Enbridge Gas commits to restrict it to the delivery of renewable natural gas to the heavy transportation sector.

In reply, Enbridge Gas submitted that annual reporting of the NGV program would be overly burdensome and unnecessary for such a limited activity. Parties will have an opportunity to ask interrogatories related to the NGV program in its annual IRM rate filings.

Enbridge Gas also noted that it is somewhat late for Energy Probe to refer to section 29(1) of the OEB Act in final submissions. Enbridge Gas submitted that Energy Probe had not presented any evidence to substantiate a claim of a competitive market for NGV services in Ontario. Enbridge Gas reiterated that there is no competitive market for the type of turnkey NGV and compressed natural gas related services that Enbridge Gas provides through the NGV program. Additionally, Enbridge Gas did not believe that its role is to stimulate or induce competition or to investigate reasons why there is no competition in Ontario within this market. Enbridge Gas further submitted that restricting the NGV program to only use renewable natural gas in the heavy transportation sector would significantly limit the ability of the program to contribute to greenhouse gas reduction initiatives across the entire transportation sector and support the growth of the NGV market. Enbridge Gas emphasized that the use of conventional natural gas in the transportation sector still provides significant environmental benefits compared to traditional gasoline and diesel fuels.

Findings

The OEB accepts Enbridge Gas's proposed changes to the NGV program. The OEB is prepared to accept the NGV program as an ancillary business activity, on the provision that it is operated on a fully allocated cost basis.

The NGV program has been operating since the mid-1980s in the former Enbridge Gas Distribution and Union Gas rate zones. Consistent with the OEB's Decision in E.B.R.O 495, the former Enbridge Gas Distribution had been operating the NGV program as an unregulated ancillary business. The program is subject to fully allocated costing for rate treatment purposes. The former Union Gas exited the NGV line of business in 2000 and only in 2019 started working with the City of Hamilton to provide natural gas for city transit vehicles.[185]

The NGV business has been operating as an ancillary activity. The NGV business is not an essential part of the distribution business and ratepayers should not be required to support it. The OEB finds that ratepayers should not assume any risk related to the transportation industry. If Enbridge Gas decides to continue the NGV program, it must be subject to fully allocated costs. While Enbridge Gas proposes that there will be a true-up in the last invoice under a customer's contract, this is not sufficient to prevent a cross-subsidy from ratepayers in the event that a customer does not complete its contract or fails to make any payment owing under the contract. The NGV program will be operated at Enbridge Gas's risk, including any shortfall or bad debt incurred by the program.

Enbridge Gas shall inform the OEB of its intent to expand the NGV program as proposed, as an ancillary activity operated on a fully allocated cost basis, as part of the draft rate order and provide a forecast of the fully allocated costs for 2024. Otherwise, without these additional safeguards, the NGV program is not approved as an activity within the regulated utility. In its reply submission, Enbridge Gas identified the implications if the NGV program is moved out of regulation. In particular, there would be a corresponding modest change to rate base, O&M and other revenue because the NGV program is currently forecast to produce a revenue sufficiency.

If Enbridge Gas elects to continue the NGV program on this basis, the OEB has the option of ordering an independent audit of Enbridge Gas's cost allocation to ensure no cross subsidization from ratepayers.

[185] Enbridge Gas, Argument-in-Chief, p. 266.

5.3 Historic Parkway Delivery Obligation Costs

In the OEB-approved settlement proposal, parties agreed with Enbridge Gas's proposed updated Parkway Delivery Obligation (PDO) Framework subject to certain modifications. Parties also agreed to defer the issue of Enbridge Gas's Parkway Delivery Commitment Incentive (PDCI) payment proposal to Phase 3 of this proceeding. However, the issue of PDO costs recovered from ratepayers during the deferred rebasing term (2019 to 2023) was not settled and was heard in Phase 1 of this proceeding.

In its 2013 rates proceeding,[186] Union Gas's direct purchase customers requested that Union Gas eliminate the PDO[187] and allow customers to deliver gas at Dawn because the cost to these customers to deliver gas at Parkway exceeded the delivery rate benefit of the PDO. In the 2014 rates proceeding,[188] Union Gas reached an agreement with intervenors on the PDO issue and the OEB approved the PDO Settlement Framework. The agreement establishes that the costs of reducing the PDO are borne by all customers of Union Gas. The guiding principle of the PDO Settlement Framework was to keep Union Gas whole rather than enhance or reduce its earnings over the IRM term.

Prior to the PDO Settlement Framework, Union Gas had 210 TJ/day of excess Dawn Parkway system capacity as noted in its 2013 cost of service application.

In the MAADs proceeding, the OEB determined that there was insufficient evidence to determine whether, as a result of the implementation of the PDO, ratepayers were overpaying for capacity on the Dawn Parkway system. The OEB directed Enbridge Gas to track actual costs and amounts recovered through rates related to the PDO during the 2019-2023 deferred rebasing period for review at its next rebasing proceeding.[189]

In the current proceeding, Enbridge Gas argued that the revenue generated from the sale of 210 TJ/day of excess Dawn Parkway system capacity should accrue to Enbridge Gas and be included in utility earnings. Enbridge Gas argued that if adjustments for the excess capacity had been incorporated in base rates from 2019 to 2023, it would not have been kept whole, contrary to the agreement in the PDO Settlement Framework. If the excess capacity was not used to reduce PDO, Enbridge Gas argued that the capacity would have been available to sell in the open market.

[186] EB-2011-0210.
[187] The PDO refers to an obligation for Union Gas's large volume direct purchase customers east of Dawn to deliver gas at Parkway.
[188] EB-2013-0365.
[189] EB-2017-0306/EB-2017-0307, Decision and Order, August 30, 2018, pp. 48-49.

Enbridge Gas provided the actual PDO costs and compared them to the PDO costs in rates. From 2019 to 2022, the variance in the total PDO costs was a revenue shortfall ranging from $0.73 million to $1.16 million.

OEB staff submitted that Enbridge Gas had not over collected for the PDO from ratepayers over the deferred rebasing period based on the tracking information.

OEB staff also referenced the 2013 rates decision where the OEB acknowledged the excess capacity on the Dawn Parkway system, yet did not establish a variance account to capture variances related to the long-term transportation revenue forecast. The PDO Settlement Framework was established after Union Gas's 2013 rates were set. OEB staff argued that Union Gas was not able to sell the excess capacity to third parties as a result of using the excess capacity to reduce the PDO. Union Gas did not rebase in 2019 and the underlying principles that were used to set 2013 rates continued in the 2019 to 2023 rate term, according to OEB staff.

LPMA and Energy Probe agreed with the OEB staff submission that given the Union Gas's 2013 rates decision and the PDO Settlement Framework, there was no over-earning or double recovery related to recovery of PDO costs during Enbridge Gas's IRM and deferred rebasing term.

FRPO argued that Enbridge Gas had enhanced earnings as a result of the implementation of the PDO during the deferred rebasing term and ratepayers were paying twice for the same capacity.

FRPO noted that during the IRM term (2014 to 2018), the former Union Gas used Dawn-Kirkwall capacity to facilitate the PDO shift as contemplated by the settlement agreement. The eventual amount shifted was increased to 200 TJ/day using the Dawn-Kirkwall capacity. FRPO further noted that Union Gas increased the Dawn-Parkway system capacity with facility builds in three successive years, 2015 to 2017, for which the cost of the builds was included in rates using the available capital pass-through mechanism in the IRM framework. FRPO submitted that the additional costs remained in rates throughout the IRM term of 2014 to 2018 while rates escalated due to additional capacity builds effectively enhancing return while reducing risk. FRPO agreed that ratepayers accepted the PDO Settlement Framework and thus the cost consequences through the term of the agreement which ended in 2018.

However, FRPO argued that in-franchise ratepayers should not be burdened with the ongoing overearnings that accrued during the deferred rebasing period. FRPO submitted that the 200 TJ/day of temporarily available Dawn-Kirkwall capacity should be removed from rates after 2018 and returned to in-franchise ratepayers as of January

1, 2019. FRPO calculated this amount to be $6.95 million on an annual basis for the deferred rebasing period (2019 to 2023).

CME and SEC agreed with FRPO that the OEB should make the necessary base rate adjustments to prevent double recovery starting January 1, 2019. While the double recovery was permissible through the Union Gas IRM period (2014-2018) according to the terms of the PDO Settlement Framework, CME and SEC argued that it became inappropriate as of December 31, 2018. SEC agreed with FPRO's calculated $6.95 million annual amount to be returned to ratepayers.

Although Enbridge Gas did not rebase in 2019, CME and SEC did not accept Enbridge Gas's argument that it was entitled to continue recouping from base rates the costs of the 210 TJ/day of excess capacity as well as through the revenue derived from the sale of that same capacity after December 31, 2018.

In reply, Enbridge Gas noted that no one took issue with the treatment of PDO/PDCI costs or the consistency with the intent of the PDO Settlement Framework. Enbridge Gas therefore submitted that it did not enhance earnings and there was no basis to make a base rate adjustment for the 2019 to 2023 PDO/PDCI costs.

Enbridge Gas further noted that the PDO Settlement Framework did not end on December 31, 2018. The provisions of the PDO Settlement Framework continued to be observed through the deferred rebasing term. Enbridge Gas argued that some intervenors were attempting to rewrite history.

Findings

The OEB does not approve any rate adjustment to the 2019 to 2023 period associated with PDO costs.

The PDO Framework was established as part of a settlement agreement in the 2014 Union Gas rates proceeding.[190] The OEB approved the amalgamation of Enbridge Gas Distribution and Union Gas in 2018 with a five-year deferral of rebasing. As a result, rebasing did not occur in 2019 as anticipated in the 2014 settlement agreement. The MAADs Decision required Enbridge Gas to track the revenue and costs related to the PDO, which Enbridge Gas has done.

The period in dispute is the 2019 to 2023 deferred rebasing period. Parties appear to accept the OEB approved rates in effect during Union Gas's IRM term as being consistent with the PDO Framework. Enbridge Gas continued under the assumption that the PDO Framework was still in place post amalgamation. The critical question is

[190] EB-2013-0365.

the effect of the MAADs Decision on base rates, obligations and the PDO Framework from 2019 to 2023.

The OEB finds that the MAADs Decision did not change the principles of the PDO Framework, and in the absence of an express termination of the PDO Framework, the existing arrangement continued post amalgamation. While some rates and charges were updated in the MAADs Decision, Enbridge Gas did not rebase its rates effective January 1, 2019. Since January 1, 2019, Enbridge Gas's tracking for the 2019 to 2022 period indicates there was a revenue shortfall every year. The OEB finds no evidence that Enbridge Gas over-earned as a result of the PDO arrangement.

Based on the evidence before it, the OEB is not satisfied that there is a justification to make a retroactive base rate adjustment for 2019 to 2023.

5.4 Dawn Parkway Capacity Turnback

Turnback arises when ex-franchise customers do not renew their contracts resulting in excess capacity on the Dawn Parkway system. The capacity would "turn back" to in-franchise customers by default through higher cost allocations associated with an underutilized system.

In the 2016 Dawn Parkway System Expansion Project proceeding,[191] parties expressed concern with the potential for substantial turnback on the Dawn Parkway system. The approved settlement agreement deferred the issue of Dawn Parkway system capacity turnback risk to the next rebasing application.

Enbridge Gas filed evidence in this proceeding that forecasts the system to remain fully contracted through to 2028 and considered turnback risk unlikely during the IRM term. Enbridge Gas did not seek any relief related to this issue.

The Dawn Parkway system is a 229 km gas transmission system that extends from the Dawn Hub to interconnections with TransCanada at Kirkwall and Parkway in Mississauga. The Dawn Hub is the largest integrated underground natural gas storage facility in Canada and is connected to most of North America's major supply basins. Enbridge Gas uses the Dawn Parkway system to deliver natural gas to in-franchise customers and to provide gas transportation services for ex-franchise customers.

[191] EB-2014-0261.

ICF International Inc., retained by Enbridge Gas to review the utilization forecast, concluded that the Dawn Parkway system is likely to remain contracted to 2034.[192]

FRPO filed a report by John Rosenkranz on the risk of Dawn Parkway system capacity turnback. In his report, Mr. Rosenkranz observed that while the likelihood that a large amount of Dawn Parkway system capacity would be turned back during the proposed IRM term may be small, the risk of turnback from utilities in New York and New England should not be ignored. These utilities in New York and New England contract on the Dawn-Parkway system with remaining terms of three years or less and have contracting alternatives. FRPO submitted that the main point of Mr. Rosenkranz's recommendation was that contract restructuring is a demand side IRP alternative that Enbridge Gas should consider before submitting a leave to construct application for future Dawn Parkway system expansion projects.

Even if the near-term risk of capacity turnback is low, Mr. Rosenkranz suggested Enbridge Gas implement measures to limit cost shifting between ex-franchise and in-franchise services such as including a buy-out option in reverse open seasons which would pay existing shippers to turn back capacity.

Enbridge Gas rejected Mr. Rosenkranz's proposal for a reverse open season with payments to shippers. Enbridge Gas submitted:

- there is no precedent for a similar approved mechanism in other jurisdictions
- shippers would not turn back capacity in the future without payment
- there is no mechanism to stop a shipper from receiving payment to exit one year and then bid for capacity the following year.

OEB staff and LPMA agreed with Enbridge Gas. OEB staff submitted that Mr. Rosenkranz's recommendations lacked analysis of how the buy-out option in a reverse open season would impact ratepayers.

LPMA submitted that the issue of turnback risk should be dealt with when Enbridge Gas brings forward an application to build a specific asset to meet an increase in demand.

CME and SEC submitted that a buy-out option could be beneficial to entities that accept the buy-out and other ratepayers could be better off.

[192] Exhibit 1, Tab 11, Schedule 1, Attachment 1, "Assessment of the Future Utilization of the Enbridge Gas Dawn to Parkway System", October 11, 2022.

SEC submitted that the OEB should require Enbridge Gas to consider the buy-out approach and bring it forward to the IRP technical working group. SEC further submitted that the best way to mitigate Dawn Parkway turnback risk is to avoid further expansion altogether.

In reply, Enbridge Gas submitted that the appropriate place to consider IRP measures to avoid, delay or downsize a future Dawn Parkway capacity expansion should be in the context of an actual project. Enbridge Gas maintained that mandating and defining a specific demand side IRP alternative is not necessary now.

Enbridge Gas further submitted that there are serious conceptual flaws with Mr. Rosenkranz's report; therefore, an investigation to implement a buy-out mechanism should not be a priority for Enbridge Gas or the IRP technical working group at this time.

In conclusion, Enbridge Gas reiterated that no OEB direction is required on the Dawn Parkway capacity buy-out option.

Findings

The OEB finds that although the risk of turnback is low in the IRM term, the risk of under-utilization or future stranded assets cannot be ignored given the energy transition. This is a known risk and it is Enbridge Gas's obligation to manage the risk to avoid adverse impacts for ratepayers.

Enbridge Gas has many tools at its disposal to manage the risk. Whenever Enbridge Gas is considering the need for an expansion of the Dawn to Parkway system, it shall consider contractual terms, and procedures for incentives or payments for turn back, along with the range of other IRP considerations, to avoid or defer the need for expansion.

5.5 Deferral and Variance Accounts

In the OEB-approved settlement proposal, parties agreed to Enbridge Gas's proposals with respect to the continuation, establishment or closure of many deferral and variance accounts with some agreed to changes. The unsettled accounts and those raised during Phase 1 of this proceeding relate to the:

- Volume Variance Account
- PREP Variance Account
- Short-term Storage and Other Balancing Services Account (Union rate zones)
- Change to IFRS Deferral Account
- TVDA

- APCDA
- OEB Directive Deferral Account

Findings on the TVDA and the APCDA have already been provided in sections 4.3 and 4.5 of this Decision and Order.

5.5.1 Volume Variance Account

Enbridge Gas proposed two existing accounts applicable to general service rate classes in different rate zones:

1. Enbridge Gas Distribution – Average Use True-up Variance Account
2. Union Gas – Normalized Average Consumption (NAC) Account

For the Enbridge Gas Distribution rate zone, an average use true-up variance account records the revenue impact, exclusive of gas costs, of differences between the forecasted average use per customer and the actual weather normalized average use experienced during the year.

For the Union rate zones, the NAC account records the impact to delivery and storage revenue and costs resulting from the difference between the target NAC per customer included in OEB-approved rates and the actual average consumption. experienced during the year.

Enbridge Gas proposed to close both existing variance accounts and establish a Volume Variance Account. The Volume Variance Account would record the revenue impact, exclusive of gas costs, of the volumetric variance between the volume forecast in rates and the actual average use per customer and weather experienced during the year. This new account would apply to general service rate classes in all rate zones.

Enbridge Gas stated that the Volume Variance Account would capture both average use and weather variances. It would reduce volumetric risk in a symmetric and revenue-neutral manner, providing smoothing and certainty for both customers and Enbridge Gas. In a year where the actual weather is colder than the OEB-approved normal, customers would receive the benefit of being refunded delivery charges. In a year where the actual weather is warmer than the OEB-approved normal, Enbridge Gas would be able to recover its delivery costs from customers.

Enbridge Gas's proposed Volume Variance Account would be in effect until its proposed rate design, a straight fixed variable with demand (SFVD), is considered in Phase 3 of this proceeding.

Environmental Defence supported the establishment of a Volume Variance Account as Enbridge Gas does not control the weather and cannot mitigate the risks it faces, rather than increase costs to customers through a higher equity thickness.

Many parties (CCC, CME, FRPO, LPMA, Pollution Probe, SEC and VECC), along with OEB staff, recommended that the OEB deny Enbridge Gas's proposed Volume Variance Account as proposed in Phase 1 of this proceeding.

OEB staff supported a single average use account that operates similarly to the existing accounts applied to all general service customers. OEB staff submitted that the existing accounts worked well for the legacy utilities and ratepayers. OEB staff argued that completely de-risking of cost recovery related to weather is not required and Enbridge Gas should accept the weather forecast risk. In a cost of service proceeding, rates are set on a forward Test Year basis, and there is forecast risk implicit to the ratemaking model.

CCC argued that it was ironic that Enbridge Gas was seeking a significant increase in its equity thickness at the same time that it was seeking to eliminate its weather risk.

CME rejected Enbridge Gas's justification that actual weather versus forecast has been roughly symmetrical since 2013. In CME's opinion, this was not a valid reason for approving an average use account that includes weather risk.

FRPO submitted that there is insufficient evidence on how the Volume Variance Account would be implemented to respect the intent of de-risking average use in an equitable manner.

LPMA submitted that Enbridge Gas is at risk for the forecast of capital costs, consumption volumes and operating costs that flow into the traditional cost of service approach and the OEB should not remove weather from that list. LPMA submitted that the inclusion of weather risk is tied to equity thickness and if the OEB approves the proposed Volume Variance Account, then it should take this risk reduction into account when determining the appropriate equity thickness for Enbridge Gas.

Pollution Probe submitted that certain conditions be required if the Volume Variance Account is approved, including an analysis of variances due to demand side management and the energy transition for a consolidated consideration of all factors.

SEC submitted that the OEB should only approve the proposed Volume Variance Account if it captures variance on a weather normalized basis, similar to the existing accounts of the legacy utilities.

VECC opposed the expansion of the current average use accounts to include weather risks. As rate design issues will be addressed in Phase 3 of this proceeding, it was premature to make a fundamental determination regarding the addition of weather risks to average use accounts.

In reply, Enbridge Gas submitted that it was appropriate that both the company and ratepayers have protection against the impacts of weather through the requested Volume Variance Account. Enbridge Gas reiterated that it had no control over the weather and the evidence shows that over time the impacts from weather are relatively symmetrical.

Enbridge Gas further submitted that if the OEB does not approve the Volume Variance Account as proposed, then it agreed with the position of intervenors and OEB staff that the OEB should approve a single account that is similar to the existing Enbridge Gas Distribution Average Use True-up Variance and Union Gas NAC accounts. Enbridge Gas submitted that the mechanics and detailed description of the account can be addressed through the draft rate order process.

In reply, Enbridge Gas disagreed that further reporting requirements are necessary as it already provides the factors influencing variances for existing accounts and it is not possible to include consideration of demand side management audit reports.

Findings

The OEB denies Enbridge Gas's proposed Volume Variance Account. The OEB finds that Enbridge Gas should continue to assume the weather forecast risk that is part of the cost of service ratemaking process. However, the OEB finds it efficient to establish a harmonized average use account applicable to all general service customers in all rate zones, based on the objectives of the current variance accounts utilized by the legacy utilities.

Enbridge Gas shall establish a harmonized average use variance account based on the average use forecast methodology approved as part of the settlement proposal. This new forecast methodology, as an input to the load forecast, should affect the entries to the harmonized variance account. Enbridge Gas is directed to file an accounting order as part of the draft rate order describing the methodology that will be used to determine average use and the entries that will be recorded in the variance account.

The OEB will reassess the need for this variance account in Phase 3 of this proceeding.

5.5.2 Panhandle Regional Expansion Project Variance Account

Enbridge Gas proposed to exclude the Panhandle Regional Expansion Project (PREP) from rate base in 2024 and instead establish a unique levelized ratemaking treatment during the IRM term. The OEB approved the exclusion of PREP from 2024 rate base in this Decision and Order. Enbridge Gas's proposed levelized ratemaking treatment included a new variance account, which is at issue in this section of the Decision and Order.

Similar to how ICM projects were treated during the deferred rebasing period, Enbridge Gas proposed to establish rate riders to be charged to customers when the PREP is placed in service, if it is approved. The proposed levelized ratemaking treatment included the approval average unit rates (rate riders) and an associated variance account, the PREP Variance Account. The new variance account would capture any variance between the project's actual net revenue requirement and the actual revenues collected through the rate riders in place over the proposed IRM term.

Enbridge Gas claimed that the variance account would ensure that it does not over- or under-recover costs from customers during the IRM term. Enbridge Gas proposed that any cumulative balance in the account would be reviewed and cleared at the next rebasing.

OEB staff supported Enbridge Gas's proposed approach for PREP and supported the establishment of the PREP variance account.

SEC, CCC, FRPO, LPMA, Pollution Probe and VECC did not support Enbridge Gas's proposed levelized approach for PREP and therefore, a PREP variance account was not a consideration.

SEC proposed the establishment of a generic leave to construct (LTC) variance account to capture the revenue requirement included in base rates for any 2024 in-service additions subject to LTC approvals that are denied. CCC also supported the establishment of an LTC variance account.

In reply, Enbridge Gas submitted that no supplementary variance account treatment is required for LTC project-related revenue requirement for any 2024 in-service additions apart from the PREP and St. Laurent variance accounts.

Findings

The OEB approves the establishment of a PREP variance account to record the variance between the project's actual net revenue requirement and the actual revenues

that would be collected through any rate rider that may be approved by the OEB. The PREP variance account would be in place over the approved rate term.

5.5.3 Short-term Storage and Other Balancing Services Deferral Account

The Short-term Storage and Other Balancing Services Deferral Account has been in place for the Union rate zones before and during the deferred rebasing term. The account records the actual net revenues for short-term storage and balancing services, less a 10% shareholder incentive to provide these services, and less the net revenue forecast for these services as approved by the OEB for ratemaking purposes.

Enbridge Gas indicated that it inadvertently failed to include a proposal to continue this account as part of the settlement proposal. Since storage-related issues will be determined in Phase 2 of this proceeding, Enbridge Gas argued that the existing account should be continued until a Phase 2 decision is issued. Accordingly, Enbridge Gas requested continuation of this account.

OEB staff, FRPO and LPMA supported the continuation of the Short-term Storage and Other Balancing Services Deferral Account.

Findings

The OEB finds that it is appropriate to continue the Short-term Storage and Other Balancing Service Deferral Account until the OEB makes a determination on gas storage issues in Phase 2 of this proceeding.

5.5.4 Change to IFRS Deferral Account

Enbridge Gas is currently reporting under USGAAP as it has obtained an exemption to report under International Financial Reporting Standards (IFRS). However, this exemption is temporary and is expected to end during the proposed IRM term.[193] OEB staff submitted that Enbridge Gas should be required to establish an account to record the revenue requirement impact from changing to IFRS, in the event that such a change were to occur during the proposed rate term. No other party made a submission on this issue.

In reply, Enbridge Gas agreed with OEB staff's proposal. Enbridge Gas submitted that the IFRS deferral account should also record incremental administrative and implementation costs from any transition to IFRS.

[193] The exemption provided by the Ontario and Alberta Securities Commissions ends at the earlier of: (i) January 1, 2027; (ii) Enbridge Gas no longer has rate regulated activities; or (iii) there is a rate-regulated standard issued by the International Accounting Standards Board (Ex 1/Tab 8/Schedule 2/Attachment 1).

Findings

The OEB will not establish an IFRS deferral account at this time. Although there is a possibility that Enbridge Gas could be required to transition to IFRS during the OEB-approved rate term, the OEB finds it is premature to establish this account. The details of such an account would depend on the timing and the scope of cost impacts arising from a transition to IFRS, all of which are uncertain. Materiality is one criterion for establishing a deferral account and the OEB has no basis to consider any potential balance material to Enbridge Gas.

Enbridge Gas has the option of requesting the appropriate accounting order in a future rates or deferral and variance account disposition proceeding when there is greater certainty regarding a possible transition to IFRS.

5.5.5 OEB Directive Deferral Account

In its reply argument, Enbridge Gas requested the establishment of a new OEB Directive Deferral Account to record the incremental costs incurred by Enbridge Gas to respond to OEB directives or requirements from this proceeding. This account would capture and defer the cost of OEB directives for studies and/or reports to address energy transition related issues, as well as required work to develop and implement updated internal processes during the IRM term.

Enbridge Gas submitted that none of these costs are in base rates as the O&M budget was settled.

Findings

The OEB denies Enbridge Gas's request for a new OEB Directive Deferral Account for 2024. This request was first raised in the reply argument with no opportunity for other parties to make submissions on this request. In addition, the proposed basis for this account has not been sufficiently defined. If Enbridge Gas expects to incur significant incremental costs resulting from OEB directives in this proceeding, a deferral account can be requested based on specific cost estimates, subject to meeting the OEB's criteria for establishing new deferral accounts.

5.6 Earnings Sharing Mechanism for 2024

Enbridge Gas did not propose an earnings sharing mechanism (ESM) for the 2024 Test Year. The OEB-approved Issues List included the issue of whether an ESM for the Test Year was appropriate. In its argument-in-chief, Enbridge Gas submitted that an ESM for the Test Year was not required. Enbridge Gas noted that the cost of service process

already affords sufficient protection for ratepayers because it involves an extensive review of all elements of its Test Year forecast.

OEB staff agreed with Enbridge Gas that additional customer protection through an ESM for 2024 was not required.

Some intervenors (CCC, FRPO, Pollution Probe, SEC, VECC) submitted that earnings sharing provides an important protection mechanism for ratepayers and should be approved by the OEB. CCC did not see any downside in requiring an ESM for 2024 and proposed an ESM that shares earnings with ratepayers on a 50:50 basis for all earnings 100 basis points above its approved ROE. FRPO argued that Enbridge Gas and its legacy utilities have had a long history of over-earnings relative to the OEB approved rate of return. Pollution Probe and VECC recommended that the OEB adopt 50:50 sharing for all earnings 150 basis points above OEB approved ROE for 2024.

LPMA submitted that an ESM will be required if the OEB approves either an increase in the equity thickness or approves a levelized treatment for PREP.

LPMA argued that if the OEB rewards the increased risk to Enbridge Gas related to the energy transition through raising the equity thickness, then Enbridge Gas would be granted additional revenues for risks that may not materialize during the proposed IRM term through 2028.

In addition, LPMA submitted that if the OEB determines that it is appropriate for Enbridge Gas to deviate from current practice with respect to PREP then the OEB should also deviate from the current practice of not establishing an ESM for the cost of service Test Year. In the event that the OEB establishes an ESM for the 2024 Test Year then LPMA suggested that the associated deferral account should be asymmetric so that only earnings above a dead-band would be refunded to ratepayers. LPMA submitted that the dead-band should be set at 150 basis points if the approved equity thickness is 39% or less, and 100 basis points if the approved equity thickness is above 39%.

SEC supported an ESM for 2024. SEC noted that the OEB has approved an ESM framework in all of the most recent Custom Incentive Ratemaking proceedings for other large utilities, where the first year is set on a cost of service basis. SEC suggested that the appropriate ESM methodology should be considered in Phase 2 of this proceeding.

In reply, Enbridge Gas submitted that additional protection through an ESM is not necessary to protect against over-earnings in a cost of service year. Enbridge Gas noted that it typically finds ways to operate efficiently and earn above its allowed rate of return and it believed that such an approach should be encouraged.

In the event that the OEB requires an ESM for 2024, Enbridge Gas proposed to continue the parameters that were in place for the deferred rebasing term (i.e. 50:50 sharing for all earnings 150 basis points above OEB approved ROE for 2024), and which is proposed to be continued into the next rate term.

Findings

The OEB finds that an ESM for the 2024 Test Year is not required. The OEB has conducted a thorough review of all Phase 1 issues in this application which included extensive discovery and an oral hearing to test the evidence. The OEB is confident that the rates resulting from this Decision and Order are reasonable and appropriately reflect the costs to serve customers. Additional protection through an ESM is not necessary. An ESM for the IRM term will be considered in Phase 2 of this proceeding.

5.7 Exemptions From Certain Performance Metrics

Enbridge Gas is required to meet certain performance metrics as outlined in section 7 of GDAR. Section 7.2.1 requires a gas distributor to observe and track its performance with respect to certain service quality requirements (SQR). Enbridge Gas requested a partial exemption under section 1.5.1 of GDAR beginning in January 2023.

The current performance standards with the requested modified measures are set out below:

- Call Answering Service Level (CASL) – request to modify to achieve 65% of calls reaching the general inquiry number answered within 30 seconds, on an annual basis, with a minimum monthly standard of 40%. The current annual metric is 75% with a minimum monthly standard of 40%.
- Time to Reschedule a Missed Appointment (TRMA) – request to modify to attempt to contact customers requiring a rescheduled appointment within one business day of the original appointment window 98% of the time. The current metric requires customers to be contacted to reschedule an appointment within two hours of the original appointment window 100% of the time.
- Meter Reading Performance Measurement (MRPM) – request to modify to achieve no more than 2% of meters with consecutive estimates for four months or more. The current target is 0.5% of meters.

Enbridge Gas requested that these exemptions be applicable from January 2023 until the OEB orders otherwise.[194]

[194] Enbridge Gas, Argument-in-Chief, p. 284.

In September 2022, Enbridge Gas provided the OEB with an Assurance of Voluntary Compliance, wherein it paid $250,000 in penalties to the OEB and made certain commitments with respect to meeting its CASL, Abandonment Rate and MRPM targets for 2022.[195]

In certain years, Enbridge Gas has not met four SQR metrics related to the CASL, TRMA, MRPM and Abandonment Rate and in 2021, Enbridge Gas did not achieve any of these four SQR metrics. Enbridge Gas stated that it continues to take all reasonable steps to achieve the SQR targets.

Table 7
CASL Actual Performance to Target (2019 to 2022)

Target	Actual	Actual	Actual	Actual
	2022	**2021**	**2020**	**2019**
75%	75.9%	64.3%	75.2%	79.0%

Enbridge Gas explained that the CASL was impacted in 2021 by increased call volumes due to COVID-19 and the consolidation of Enbridge Gas's two legacy utility customer information systems in July 2021 which introduced 1.6 million Union rate zone customers to the new systems. As a result of COVID-19, Enbridge Gas also experienced staffing shortages. Enbridge Gas stated that the majority of calls to the call centre are complex in nature as more customers are choosing to resolve non-complex matters through self-serve options.

Enbridge Gas's mitigation plans to improve performance on the CASL include: (a) implementing an augmented planning process to better assess and mitigate impacts from events with customer-facing impacts; (b) increasing staffing; (c) continuous improvement of digital channels; and (d) continuous improvement in response to customer surveys and internal reviews.

[195] EB-2022-0188, Enbridge Gas Assurance of Voluntary Compliance, September 12, 2022.

A summary of Enbridge Gas's historic TRMA performance is provided below:[196]

Table 8
TRMA Actual Performance to Target (2019 to 2022)

Target	Actual	Actual	Actual	Actual
	2022	2021	2020	2019
100%	93.8%	97.0%	97.3%	97.0%

Enbridge Gas explained that it experienced challenges meeting the TRMA metric and Enbridge Gas and its predecessors historically have not met the metric. Enbridge Gas stated that this is despite its ongoing efforts to try and improve the results, and that the 100% target is unreasonable and impractical as it does not account for factors like emergency response (e.g., redirecting technicians to emergency calls), human error (e.g., record keeping errors) or technical error (e.g., telecommunication outages). Neither Enbridge Gas nor the legacy utilities have ever met the TRMA metric.

Enbridge Gas's mitigation plans to improve performance on the TRMA include:[197] (a) aligning existing process for identifying attempts to reschedule appointments; (b) leveraging technology to add additional customer contact options; (c) enhancing reporting of results and corrective action processes; and (d) ongoing communication of process to reschedule appointments.

A summary of Enbridge Gas's historic MRPM performance is provided below:[198]

Table 9
MRPM Actual Performance to Target (2019 to 2022)

Target	Actual	Actual	Actual	Actual
	2022	2021	2020	2019
0.5%	4.1%	5.0%	4.4%	0.7%

Enbridge Gas explained that it experienced challenges meeting the MRPM metric since 2019 for several reasons including COVID-19 resulting in closed businesses, increased customer sensitivity to contact with meter readers, access issues during periods of

[196] EB-2023-0092, Exhibit G, Tab 1, Schedule 1.
[197] Enbridge Gas's mitigation plans aim to achieve a standard of 98% of customer appointments rescheduled within one business day for TRMA.
[198] EB-2023-0092, Exhibit G, Tab 1, Schedule 1.

lockdown, staffing issues attributable to quarantine/isolation periods and labour resource shortages.

Enbridge Gas also lost a key meter reading vendor in 2019 resulting in the need to onboard a new vendor. Meter reading vendors experienced hiring challenges with the attrition rate and level of absenteeism for meter reading personnel being the highest Enbridge Gas has experienced. Enbridge Gas also stated that 27 weather events in the 2020 to 2021 period limited the ability to safely access meters.

Enbridge Gas's mitigation plans to improve performance on the MRPM include: (a) working with meter reading vendors to increase hiring and conduct meter reading campaigns; (b) educating customers of the importance of meter reading and providing assistance to read their own meters; (c) customer outreach on arranging for meter reads and submitting customer meter reads; (d) field operations to support meter access; and (e) continuous improvement to support meter reading attainment and efficiency processes.

Enbridge Gas stated that the OEB should grant its request for a partial GDAR exemption for the CASL, TRMA and MRPM for the following reasons:

- The performance standards were established more than 15 years ago and are not reflective of current customer behaviours and expectations. For example, customer calls are more complex in nature as customers can use web-self-service options and chatbot features for less complex inquiries.
- There is a lack of alignment with the Distribution System Code performance standards:
    - The Rescheduling a Missed Appointment measure is an attempt to contact the customer prior to the appointment and an attempt to reschedule within one business day compared to the TRMA requirement to reschedule within two hours of the end of the original appointment.
    - The Telephone Accessibility measure requires 65% of calls answered in 30 seconds compared to the CASL requirement of 75% of calls answered in 30 seconds.
    - The Distribution System Code contains a force majeure provision that allows a utility to be relieved of obligations for events beyond its reasonable control and the GDAR does not.
- There are continuing impacts of external factors such as residual pandemic-related issues, labour market shortages, extreme weather events, global energy and climate change dynamics and the economic environment.

- Planned activities to align systems and meet industry standards (such as for cyber-security, Green Button and harmonization of rates and services) may impact metric performance.

OEB staff did not oppose Enbridge Gas's request for a partial exemption from GDAR performance measures related to the CASL, TRMA and MRPM for the 2024 calendar year. However, OEB staff submitted that the OEB should not grant a perpetual partial exemption from GDAR requirements. If Enbridge Gas believes that a partial exemption of GDAR beyond the calendar year 2024 is necessary, OEB staff suggested that this should be accomplished through a generic review of the SQR-related GDAR requirements for gas distributors.

As the power to create or amend natural gas rules (such as GDAR) rests with the OEB's Chief Executive Officer, OEB staff submitted that any request to amend GDAR should be dealt with outside of the current proceeding (and no determinations with respect to amendments to GDAR are appropriate in the current proceeding).

If the OEB agrees with OEB staff's position that any changes to the SQR-related targets are best addressed in a GDAR amendment-related process, OEB staff suggested that Issue 58[199] (to be heard in Phase 2 of this proceeding) can be limited to any scorecard additions, removals, or changes that are not set out in GDAR.

Many intervenors (BOMA, CCC, FRPO, LPMA, Pollution Probe, SEC and VECC) submitted that the OEB should reject Enbridge Gas's request for partial exemption from meeting GDAR performance measures.

BOMA opposed Enbridge Gas's request for a partial exemption from meeting the MRPM target with respect to commercial buildings. BOMA submitted that Enbridge Gas should be required to conclude its Advanced Metering Infrastructure pilots and develop its strategy, budget and implementation plan for commercial buildings by March 31, 2024. BOMA also submitted that Enbridge Gas should implement advanced metering for 20% of commercial buildings by the end of 2025, and for all commercial buildings by the end of 2026.

CCC, FRPO and SEC noted that in the MAADs proceeding, Enbridge Gas committed to generate savings without impacting reliability and service quality. As the OEB relied on these commitments when approving the amalgamation, the OEB should hold Enbridge Gas to its commitment.

[199] Are the proposed scorecard Performance Metrics and Measurement targets for the amalgamated utility appropriate?

In particular, CCC opposed an exemption from the MPRP and the CASL performance metric. CCC noted that the OEB and ratepayers expected that after the amalgamation, Enbridge Gas at a minimum would maintain and potentially enhance customer service levels. CCC stated that it was not appropriate to change the performance standards simply because Enbridge Gas is unable to meet them. CCC argued that COVID-19 and consolidation of the billing systems should not be an issue anymore and Enbridge Gas should be capable of meeting the metrics.

FRPO was “surprised and disappointed” by Enbridge Gas’s response to service quality issues that have arisen since amalgamation. Unbeknownst to FRPO, the OEB had engaged Enbridge Gas regarding these issues culminating in an Assurance of Voluntary Compliance. Further, FRPO criticized Enbridge Gas for requesting lower performance standards at the same time requesting recovery of integration capital spent to create the systems.

LPMA submitted that the value of the savings achieved through the merger has been reduced due to a deterioration in the levels of customer service. LPMA noted that these are customer-focused metrics and Enbridge Gas is essentially requesting a reduction to outcomes that impact ratepayers directly. LPMA submitted that any changes to performance levels should be done in the context of a full review of all metrics included within GDAR.

Pollution Probe argued that it is not in the public interest to grant such exemptions and that such exemptions would dilute performance rather than ensuring that a certain level of performance is maintained or improved.

SEC was specifically concerned with the request for a partial exemption from the MRPM performance target. SEC noted that the OEB had received several complaints from customers regarding estimated meter reads and large bills to catch up with actual consumption. SEC added that a number of its member schools have been negatively impacted by the high number of estimated bills, particularly in the former Union South rate zone. Increasing the existing target from 0.5% to 2.0% of meters with no read for four or more consecutive months would only exacerbate the problem of estimated bills and would provide relief to the company for poor performance. Accordingly, SEC submitted that the OEB should send a clear message to Enbridge Gas and deny the request to lower its service quality obligations.

VECC maintained that Enbridge Gas’s problems related to system integration and the COVID-19 pandemic should not be considered as sustainable reasons for not meeting certain metrics. VECC submitted that there should no temporary exemptions for performance metrics that were previously attainable by the legacy utilities, but which have not been met recently due to either cost reduction measures or the inability of

Enbridge Gas to successfully integrate its systems. In reply, Enbridge Gas dismissed the claims by some intervenors that its underperformance relative to certain SQRs were within its control or caused by mismanagement of integration activities. In fact, the main factors for not meeting the SQRs are unrelated to the amalgamation and were outside the control of Enbridge Gas.

Enbridge Gas reiterated that despite its best efforts to meet SQRs through comprehensive mitigation plans, there remain ongoing challenges. Enbridge Gas noted that the residual impacts of the COVID-19 pandemic are continuing with respect to the labour market, specifically with respect to meter reading providers and call centre staff. In addition, customers working from home has increased access problems for meter readers. Enbridge Gas rejected FRPO's "naïve" assertion that Enbridge Gas should overcome access issues through customer service measures. Enbridge Gas submitted that despite its best efforts, access issues continue to account for approximately 1-3% of the total MRPM. While the more pronounced impacts of the pandemic have passed, Enbridge Gas noted that it continues to experience the residual impacts and this is expected to continue for the next several months.

Enbridge Gas claimed that the predecessor utilities have been unable to meet the TRMA and the 100% SQR target has always been unrealistic.

Enbridge Gas opposed BOMA's submission reiterating that it is conducting pilots for Advanced Metering Infrastructure but will not be in a position to bring forward a proposal for any group of customers within the next several months. Enbridge Gas further clarified that it does not track MRPM for different group of customers or for commercial buildings.

Enbridge Gas agreed with LPMA that a full review of GDAR is required. However, Enbridge Gas submitted that it needs a partial exemption in the interim period, otherwise it will not be in compliance with the OEB's GDAR requirements.

Findings

The OEB approves the partial exemption request to change the TMRA target metric to 98%. The OEB denies the partial exemption requests to change the CASL and MRPM target metrics.

In principle, a TRMA metric based on meeting a target 100% of the time appears impractical. Enbridge Gas's performance over the last four years is close to meeting the requested 98%, except in 2022 where the actual performance was 93.8%. The OEB is satisfied that setting the metric at 98% is appropriate and will continue to drive

improvement in performance. The revised metric shall be in place until the OEB orders otherwise or until such time as the OEB conducts a review of GDAR SQR metrics.

The OEB denies the partial exemption request to change the CASL target metric to 65%. The OEB notes that Enbridge Gas has been able to meet the current metric of 75% over the last four years except in 2021, when COVID was a mitigating factor. There is no basis for changing this customer facing metric.

The OEB denies the exemption request to change the MRPM target to 2.0% of meters. The current target of 0.5% of meters is maintained.

The OEB regards meter reading as a fundamental customer service provided by a gas distributor that directly impacts customer billing. While COVID issues may have existed in 2020 and 2021, the OEB is not convinced that Enbridge Gas invested sufficiently in its customer services to address and rectify this meter reading problem. It is too late now to change the experience for those customers affected. The OEB received many letters of comment in this proceeding regarding billing issues experienced by customers and the personal implications.

The OEB has considered the customer impact. This metric is based on estimating four consecutive bills. The result could be an unexpectedly large bill when an actual meter read takes place. From a customer's perspective, this is an unacceptable outcome, especially as the commodity cost of gas and the delivery cost have increased in recent years. Enbridge Gas needs to improve its performance rather than seek to change the metric. It is imperative that customers have accurate bills to manage their expenses, assess their energy costs and manage their energy activities accordingly. Changing the metric to 2% would lock in the adverse performance levels that occurred in unusual circumstances. The OEB finds that there are no unusual circumstances persisting in 2023, beyond Enbridge Gas's control.

In addition, the OEB believes that the Advanced Metering Infrastructure pilot project is a positive step in managing this metric in the future. Enbridge Gas is required to provide an update on this pilot project in Phase 3 of this proceeding.

6 IMPLEMENTATION ISSUES

Enbridge Gas requested OEB approval for interim 2024 rates based on the OEB's Phase 1 decision, to be effective January 1, 2024, irrespective of the timing of the implementation date of the Rate Order. Since the application is proposed to be reviewed in phases, Phase 1 rates should be declared interim because they may be adjusted to reflect the full impacts of determinations made in Phase 2. The determinations made in Phase 3 regarding cost allocation and rate design and harmonized rates will be prospective and will not impact prior rates.[200]

Enbridge Gas submitted that it was appropriate for the company to recover the full-year impact of any revenue deficiency/sufficiency approved in Phase 1 of this proceeding effective January 1, 2024.

Most intervenors (CCC, FRPO, LPMA, SEC and VECC) that made a submission on this issue supported the applicant's request for an effective date of January 1, 2024.

OEB staff and VECC noted that the Enbridge Gas cost of service application is one of the largest and most complicated applications to come before the OEB. OEB staff and VECC further agreed that Enbridge Gas made all filings in a timely manner. OEB staff submitted that if a rate order is issued after January 1, 2024, Enbridge Gas should be permitted to recover the entire revenue deficiency/sufficiency for the 2024 Test Year and the calculation of this recovery can be included as part of the draft rate order process in Phase 1 of this proceeding.

LPMA supported Enbridge Gas's proposal with two caveats. Firstly, if rates cannot be implemented on January 1, 2024, LPMA submitted that Enbridge Gas should provide as part of the draft rate order, detailed information on how the revenue adjustment rider would be calculated and implemented (one time charge or over a specified number of months) as well as how the amounts are allocated to the different rate classes. Secondly, the OEB should direct Enbridge Gas to implement rates as quickly as possible and not wait for the next Quarterly Rate Adjustment Mechanism (QRAM) after January 1, 2024, which would be April 1, 2024. LPMA noted that the winter months are high consumption months and waiting longer than required would levy additional costs onto customers based on their historical consumption.

In reply, Enbridge Gas confirmed that the rate adjustment rider would be calculated to recover the variance between the current approved revenue and the approved 2024 revenue requirement from the effective date of January 1, 2024 to the implementation date. Enbridge Gas proposed the rate adjustment rider to be applied prospectively over

[200] Partial Settlement Proposal, June 28, 2023 (Updated July 14, 2023), footnote 6.

a period of time from the implementation date until the end of 2024 for both in-franchise general service and contract rate classes. Enbridge Gas further proposed a one-time adjustment for ex-franchise contract rate classes consistent with current practice. Enbridge Gas also confirmed that it will file detailed information as part of the draft rate order to allow the OEB and intervenors to verify the amounts and allocation of the amounts to all rate classes.

Agreeing with LPMA, Enbridge Gas proposed that it will implement the approved interim rates as soon as possible after approval, even where the implementation date is different from the implementation date of QRAMs.

Findings

The OEB accepts Enbridge Gas's proposal. The OEB finds that January 1, 2024 is the appropriate effective date for 2024 rates.

The OEB agrees with Enbridge Gas, intervenors and OEB staff that Enbridge Gas made all necessary filings in a timely manner in the current proceeding. Given that the rate order will not be issued until after December 31, 2023, the OEB finds that it is appropriate for Enbridge Gas to recover the entire variance between the current approved revenue and the approved 2024 revenue requirement from the effective date of January 1, 2024 to the implementation date.

The OEB also finds that the rate adjustment rider that will be designed to capture this variance will be applied prospectively over a period of time for both in-franchise general service and contract rate classes and as a one-time adjustment for ex-franchise contract rate classes. The OEB directs Enbridge Gas to file a detailed calculation for the rate adjustment rider in the draft rate order and propose a period of time over which the rate rider will be applied.

Further, the OEB accepts Enbridge Gas's proposal that the 2024 rates resulting from this Decision and Order, and as will be reflected in the Rate Order, will establish interim 2024 rates based on the OEB's Phase 1 Decision and Order. The OEB notes that the 2024 rates will be declared interim to reflect that the application is being reviewed in phases and the 2024 rates may be further adjusted as of January 1, 2024 to reflect the full impacts of determinations made in Phase 2 of this proceeding.

With respect to implementation timing for interim 2024 rates, the OEB agrees that these rates should be implemented as soon as possible after approval, even where the implementation date is different from the implementation date of the nearest QRAM proceeding.

The OEB notes that it issued a letter on October 4, 2023 directing that the Phase 2 evidence be filed in January 2024. Given the findings in the Decision and Order, the OEB will provide further guidance on the timing of Phase 2 evidence, as well as on the issues that it expects to be addressed in Phase 2, in due course.

7 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas shall file with the OEB, and forward to all intervenors a draft rate order attaching a proposed Rate Handbook reflecting the OEB's findings in this Decision and Order by **February 12, 2024**. The draft rate order shall include customer rate impacts and detailed supporting information showing the calculation of interim 2024 rates and the associated rate adjustment rider for the period from January 1, 2024 to the implementation date. Enbridge Gas should also propose the appropriate implementation date in its draft rate order.

2. The draft rate order shall also include draft accounting orders related to the deferral accounts established, revised or approved by the OEB in this proceeding which were not included in the settlement proposal of June 28, 2023 (as updated on July 14, 2023) and that are related to Phase 1 of this proceeding.

3. Enbridge Gas shall inform the OEB of its intent to expand the NGV program as proposed, as an ancillary activity operated on a fully allocated cost basis, and provide a forecast of the fully allocated costs for 2024 as part of the draft rate order.

4. Intervenors and OEB staff shall file any comments on the draft rate order with the OEB and forward them to Enbridge Gas on or before **February 26, 2024**.

5. Enbridge Gas shall file with the OEB and forward to the intervenors responses to any comments on its draft rate order on or before **March 11, 2024**.

6. Enbridge Gas's current approved rates as established in EB-2023-0330[201] will continue to apply on and after January 1, 2024, on an interim basis, until the rates approved in Phase 1 of this proceeding are implemented.

7. Enbridge Gas is exempted from section 2.2.2 of the Gas Distribution Access Rule to the extent necessary to give effect to the findings on the revenue horizon.

8. Enbridge Gas is granted a partial exemption from section 7.3.4.2 of the Gas Distribution Access Rule with respect to the Time to Reschedule a Missed Appointment service quality requirement. The target metric shall be 98% rather than 100%.

[201] EB-2023-0330, Decision and Rate Order, December 19, 2023.

9. For Phase 2 of this proceeding, Enbridge Gas shall:
    a. File an updated customer connection policy, applicable to projects connecting to the gas system after December 31, 2024, that is consistent with the OEB's findings in this Decision and Order.
    b. File a proposal that will address the need to ensure that where a contribution in aid of construction has been paid for connection facilities to serve small volume customers for a new connection made on or after January 1, 2025, the new connecting customers do not pay for the connection facilities a second time through postage stamp rates.
    c. File a proposal for a modified approach for connection charges for infill customers, consistent with the OEB's findings in this Decision and Order, to take effect January 1, 2025.
    d. Review the energy comparison information in its informational and marketing materials, including its website,
        i. to determine whether it fully discloses what is being compared and on what basis, and what assumptions are being used for the comparison
        ii. make any necessary corrections to the information, or remove it, and
        iii. file a report on the review it undertook and the actions it took as a result of the review.
    e. File a proposal on how the reduction to the capital budget will be implemented during the proposed IRM term to address the change to the revenue horizon.
    f. File a proposal to reduce the capitalized indirect overheads balance by $50 million in each year of the proposed IRM term and expense it as O&M, consistent with the OEB's findings in this Decision and Order.
    g. File evidence indicating how the annual amount for site restoration costs is calculated and to provide a long-term forecast of the total funds required to pay for site restoration costs.

10. For its next rebasing application, Enbridge Gas shall:
    a. File an Asset Management Plan that provides clear linkages between capital spending and energy transition risk. The Asset Management Plan should address scenarios associated with the risk of under-utilized or stranded assets and identify mitigating measures.
    b. File a report examining options to ensure its depreciation policy addresses the risk of stranded asset costs appropriately. These options must encompass all reasonable alternative approaches, including the Units of Production approach.

c. Track and study the ten accounts proposed by InterGroup with respect to net salvage and file a report on the results.

d. File a proposal to reduce any remaining capitalized indirect overheads to zero.

e. File an independent third-party expert study that assesses its overhead capitalization methodology.

f. Perform a risk assessment and develop a plan to reduce the stranded asset risk in the context of system renewal.

11. Enbridge Gas is required to provide an update on the Advanced Metering Infrastructure pilot project in Phase 3 of this proceeding.

How to File Materials

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

Please quote file number, **EB-2022-0200** 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.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto, December 21, 2023

ONTARIO ENERGY BOARD

Original Signed By

Patrick Moran
Presiding Commissioner

Original Signed By

Emad Elsayed
Commissioner

Original Signed By

Allison Duff
Commissioner (Concurring in Part)

8 DISSENT IN PART - COMMISSIONER DUFF

I do not support a zero-year revenue horizon for assessing the economics of small volume gas expansion customers. I do not find the evidentiary record supports this conclusion. The CIAC comparison table filed by Enbridge Gas did not even consider zero within the range of revenue horizon options. Zero is not a horizon. It is fundamentally inconsistent with the intent of E.B.O. 188 by requiring 100% of connection costs upfront as a payment, rather than a contribution in aid of construction. There was no mention of zero in E.B.O. 188 – yet a 20 to 30 year revenue horizon was considered.[202] To me, the risk of unintended consequences to Enbridge Gas, its customers and other stakeholders increases given the magnitude of this conclusive change.

The rationale provided in the majority decision to support zero is predicated on understanding considerations and circumstances facing developers. The rationale is conjecture as no developers intervened or filed evidence in this proceeding. In contrast, a recent OEB proceeding regarding a proposed housing development in Whitby included intervenor evidence, oral testimony and submission by the affected developer group, enabling the OEB to render a decision based on the evidence.[203]

A zero-year revenue horizon implies an indifference as to whether these developers decide to connect, or not connect, any gas expansion customers. Is the scenario of no-new-gas-connections, replaced by construction of all-electric developments, feasible? For example, would electricity generators, transmitters, distributors and the IESO be able to meet Ontario's energy demands in 2025? I don't know.

I find that a 20-year revenue horizon is appropriate for Enbridge Gas's small volume expansion customers, effective January 1, 2025. A reduction from the current 40 years to 20 years mitigates the risk of stranded asset costs resulting from switching away from natural gas as an energy source, thereby protecting existing customers. After 20 years, the risk should be fully mitigated by adding the contribution received upfront to the rate revenue received over 20 years from new customers. Any rate revenue received from these customers after year 20 would contribute to overall system costs. The 20-year revenue horizon would apply to new infill and expansion customers but not customers connected under the Natural Gas Expansion Program.[204]

[202] E.B.O. 188, Final Report of the Board, January 30, 1998, p. 15.
[203] EB-2022-0024, Decision and Order – Phase 2, July 6, 2023, pp. 17-25.
[204] O. Reg. 24/19: Expansion of Natural Gas Distribution Systems.

Mr. Neme recommended a 15-year revenue horizon in his evidence. This option was tested through the interrogatory and oral phases of the proceeding. I find his rationale compelling and equally applicable to 20 years, when the typical 18-year life of a new gas furnace is rounded up.[205] An 18-year gas furnace life is also used in estimating energy savings from Enbridge Gas's DSM programs.[206]

Phase 2 of this proceeding is the appropriate juncture to consider the ratemaking implications of this change for Enbridge Gas, its customers and other stakeholders. Prior to setting rates for the remainder of the proposed IRM term 2025-2028, the ratemaking implications of the 20-year revenue horizon must be considered, such as forecast customer numbers, throughput volumes, capital expenditures, and CIAC collections.

The CIAC comparison table filed by Enbridge Gas simplified the CIAC and total contribution calculations by making certain assumptions. I cannot rely on the table's $1,774 contribution per customer or total $185 million collection in 2025 associated with the 20-year revenue horizon scenario as definitive calculations. For example, one assumption is that system access capital expenditures and customer connections from 2024 to 2028 would proceed as forecast irrespective of a revenue horizon change. A deeper understanding of all inputs, assumptions and forecasts is needed, and Phase 2 of this proceeding provides the opportunity for that review.

Phase 3 of this proceeding is the appropriate juncture to consider whether there is undue cross subsidization between new and existing customers resulting from a 20-year revenue horizon, assuming no negative rate rider. The intent of E.B.O. 188 was to avoid undue cross subsidization. In deciding issues of cost allocation and rate design in Phase 3, the extent of cross subsidization must also be considered in the context of Enbridge Gas's harmonization proposal, in which four geographic rate zones are harmonized to one.

I find the change to 20 years to be a measured, incremental approach to risk mitigation, while also signaling a significant evolution to the OEB's approach. The implications of changing from 40 to 20 years would be assessed, enabling a change in course if necessary. Such an incremental approach to deal with energy transition risks is consistent with the OEB's recommendations to the EETP.[207]

[205] Exhibit M9, Evidence of Mr. Chris Neme. Energy Futures Group, p. 43.
[206] Incentives for high-efficiency furnaces are not included in the most recent DSM Framework (EB-2021-0002); however, the OEB's current natural gas DSM Technical Resource Manual uses 18 years as the measure life for a new furnace.
[207] Report of the OEB to the EETP, June 30, 2023, p. 12.

E.B.O. 188 established a maximum revenue horizon of 40 years. Applying 20 years for Enbridge Gas is within this maximum and preserves the provisions of a ten-year customer attachment horizon, a rolling project portfolio and the concept of a contribution. Also, a revenue horizon of 20 years could be applied uniformly to all small volume and large volume contract expansion customers.

In all other respects, I agree with Commissioners Moran and Elsayed.

Original Signed By

Allison Duff
Commissioner

TAB 3

TAB A

UTILITY CONSOLIDATION

TRINETTE LINDLEY, MANAGER UTILITY PORTFOLIO MANAGEMENT
DANIELLE DREVENY, MANAGER CAPITAL FINANCIAL PLANNING & ANALYSIS
TANYA FERGUSON, VICE PRESIDENT FINANCE & BUSINESS PARTNER

1. This evidence documents the integration activities and results of Enbridge Gas, the largest utility in Ontario to file a rebasing application with the OEB after operating under a deferred rebasing term. Notwithstanding the fact that the MAADs Decision[1] with a shortened 5-year term was followed by a period of significant global uncertainty, the utility aggressively delivered extensive integration benefits while continuing to deliver safe, reliable operations to 3.8 million customers. This evidence compiles both the quantitative and qualitative benefits achieved during the deferred rebasing term and the future cost treatment for the net book value of integration capital. Enbridge Gas vigorously sought out opportunities, over-achieving on the estimated savings in the MAADs Application[2]. Even with the 5-year term, Enbridge Gas invested in and delivered significant integration initiatives which result in sustainable savings to be passed on to customers at rebasing, with the net book value of these assets to be included in rate base. Integration benefits are broader than the quantitative savings achieved through aligned systems and programs that enable improvements for the same cost to customers, furthering the effectiveness as one utility. The fact that these complex, multi-faceted initiatives were delivered during the challenges of a global pandemic, further demonstrates Enbridge Gas's commitment to realizing the full benefits of integration. These ongoing benefits advance safe, reliable, and efficient business operations at

[1] EB-2017-0306/EB-2017-0307, OEB Decision and Order, August 30, 2018.
[2] EB-2017-0306/EB-2017-0307, Exhibit B, Tab 1, page 26, Table 4.

Enbridge Gas and strengthen its ability to respond to customer needs and market evolution in the future.

2. This evidence is organized as follows:
    1. Background: MAADs Application and OEB Decision
    2. Integration Achievements and Results (Benefits and Costs)
    3. Summary

1. Background: MAADs Application and OEB Decision

3. Prior to amalgamation, EGD and Union operated under successive Incentive Regulation (IR) frameworks for over 15 years. This paradigm left limited ability to continue to deliver incremental benefits as separate companies. Amalgamation provided an opportunity to deliver significant and sustainable benefits to current and future customers in Ontario and the synergies achieved and incorporated into rebasing demonstrate that customers are better off than they otherwise would have been had the utilities continued to operate as separate companies.

4. The MAADs Application[3] contemplated a 10-year term to enable the significant investments required to deliver estimated savings. Integration opportunities were anticipated in Customer Care, Distribution Work Management, Utility Shared Services, Storage and Transmission Operations, Management and Other functions. Table 1 notes the high-level ranges of savings and costs as filed in the MAADs Application, noting that there was no detailed planning, and planning would be completed upon receipt of the OEB's Decision.

[3] EB-2017-0306/EB-2017-0307.

Table 1
High Level Minimum and Maximum Cost and Savings Estimate
as filed in EB 2017-0306

Line No.	Particulars ($ millions)	Potential Capital Investment		Potential O&M Savings	
		Minimum	Maximum	Minimum	Maximum
1	Customer Service	25	110	120	250
2	Distribution Work Management	10	90	30	150
3	Shared Services	5	20	15	50
4	Storage & Transmission	5	10	15	50
5	Management Functions & Other	5	20	170	250
6	Total	50	250	350	750

Notes:
(1) Estimates as filed in EB-2017-0306.
(2) Filing contemplated 10 year deferred rebasing term.

5. As noted, the OEB Decision for the MAADs Application stipulated a 5-year term.[4] Enbridge Gas undertook significant investments during the rebasing term, in both O&M and capital, to deliver the anticipated savings. Enbridge Gas defined integration costs as one-time incremental costs required to deliver value for an opportunity or set of opportunities related to utility integration, and included items such as labour, consulting, and capital expenditures. Integration costs, both O&M and capital expenditures, were identified and managed separately throughout the deferred rebasing term. These investments were made to deliver the highest level of sustainable savings to customers, even as investments in the latter years of the term provide limited opportunity for Enbridge Gas to benefit from these investments as the sustained savings would be rebased at the end of the deferred rebasing term. At the time these savings are rebased to customers, so are the corresponding net book value of integration capital costs of those investments.

[4] EB-2017-0306/EB-2017-0307, OEB Decision and Order, August 30, 2018.

2. Integration Achievements and Results (Benefits and Costs)

6. Integration results were delivered through a portfolio of initiatives governed by senior leadership and enabled through a program office. The portfolio included initiatives for organizational restructuring, alignment of policies, processes, systems and procedures, integration of operating models, alignment for customers, and cost rationalization. Initiatives were prioritized based on strategic alignment, quantitative and qualitative benefits and costs, and customer impacts. While many initiatives delivered synergy savings, other initiatives were implemented to support safe, reliable, and effective operations, and were not driven by synergy savings. These initiatives leveraged the strong history of the utilities' experiences and delivered solutions to operate and manage risk, providing benefits to customers and stakeholders.

7. Enbridge Gas moved swiftly to deliver on integration activities upon receiving approval to amalgamate. Starting in 2019, Enbridge Gas tracked synergy savings and costs from integration initiatives in each area of accountability that were brought about under conditions made possible by amalgamation. Table 2 summarizes the savings by category to articulate the types of initiatives that delivered savings, and Table 3 by area of accountability to demonstrate where those corresponding savings were achieved.

Table 2
Integration Savings as Achieved by Category

Line No.	Particulars ($ millions)	2019 Actual	2020 Actual	2021 Actual	2022 Estimate	2023 Bridge Year
		(a)	(b)	(c)	(d)	(e)
1	Organizational Restructuring	25.1	41.8	54.8	54.8	54.8
2	Alignment for Customers	2.9	2.9	1.8	16.8	16.8
3	Policies, Programs, Processes & Procedures Alignment	1.7	3.4	4.0	4.1	4.3
4	Integration of Operating Models	-	0.1	5.7	5.2	5.2
5	Cost Rationalization	2.6	4.2	4.9	4.9	4.9
6	Total Annual Savings	32.3	52.4	71.2	85.8	86.0
7	Sustained Savings included in Rebasing					86.0

Table 3
Integration Savings as Achieved by Area

Line No.	Particulars ($ millions)	2019 Actual	2020 Actual	2021 Actual	2022 Estimate	2023 Bridge Year
		(a)	(b)	(c)	(d)	(e)
	O&M Savings					
1	Business Development & Regulatory	6.8	9.6	10.4	10.4	10.4
2	Customer Care	5.5	6.6	7.5	22.5	22.5
3	Distribution Operations	6.3	9.8	17.3	16.8	16.8
4	Energy Services	2.6	5.6	5.9	5.9	5.9
5	Engineering & STO	5.2	9.0	11.6	11.6	11.8
6	Central Functions	3.9	9.1	15.7	15.8	15.8
7	Other	2.0	2.7	2.8	2.8	2.8
8	Total Annual Savings	32.2	52.4	71.2	85.8	86.0

2.1. Organizational Restructuring

8. Organizational restructuring was the largest contributor to integration savings. The initial organizational restructuring was delivered by the end of first quarter in 2019

across all departmental areas to reduce duplication and align accountabilities. One of the first steps was to establish Enbridge Gas's new Executive Management Team and Senior Management Team to engage in planning for the complex initiatives anticipated. The layer-by-layer approach that followed to organizational restructuring reduced duplication and clarified accountabilities across the utility, setting in motion the significant efforts to deliver the integrated technology system solutions and process initiatives to move forward with amalgamation. In total, this rationalized structure delivered $25 million in savings in 2019 with the full year impact growing to over $34 million by 2020.

9. In addition to the initial restructuring in 2019 at the utility, Enbridge introduced a Voluntary Workforce Option (VWO) Program in 2020 which offered employees incentives for early retirement, part-time or job-sharing arrangements, leave of absence, or voluntary exits that contributed to compensation savings. While this was an Enbridge initiative in response to COVID-19, VWO served to facilitate synergy savings through changes in processes, and rationalization of programs with approximately 244 full-time equivalent (FTE) reductions at Enbridge Gas. VWO savings were realized in all departments and within Central Functions. Sustainable savings from VWO amounted to $7.4 million in 2020 and increased to $18.8 million annually starting 2021. These savings are reflected in the areas in which the savings were achieved. Please see Exhibit 4, Tab 4, Section 3 for more details on Enbridge Gas FTEs and employee compensation.

10. As a result of role rationalization in organizational restructuring efforts in 2019 and VWO in 2020, certain employees were re-deployed to work exclusively on integration projects with their corresponding costs captured in the projects. These

integration projects are expected to be complete by 2023, and as such, these project roles and related costs will no longer be required in 2024.

11. Integration benefits extended beyond quantitative synergy savings and delivered day to day benefits to further safety, reliability, and an aligned customer experience. Table 4 shares examples of these types of initiatives, with further descriptions in each area of accountability.

Table 4
Initiative Categories delivering Qualitative Benefits

Type of Initiative	Description of Benefits	Initiative Examples
Alignment of Policies, Programs, Processes and Procedures	Harmonized policies, programs, technical and business standards, processes and procedures, and technologies to conduct work and manage risks consistently supporting safe, reliable, and effective business operations for the utility.	Integrated Management System (IMS): with programs such as Emergency Response, Integrity, Damage Prevention Cost of Gas Automation Solution Quality Improvement Program EHS Training Program Integration
Alignment for our Customers	Alignment for customers for customer interactions and communications, with a focus on a consistent customer experience.	Website Integration Social Media, Brand Alignment General Service Rate and Service Harmonization Proposal Large Volume Operating Rules and Process Harmonization
Alignment of Asset Management Programs	Asset Management alignment for systems, programs, and processes with respect to managing the life cycle of capital assets.	Consolidated Asset Plans CopperLeaf C55 Implementation
Integration & Execution of Operating Models	Consistent delivery and operating models and how functional areas are structured to deliver services to stakeholders.	Distribution Operations Workflow Integration Storage & Transmission Work and Resource Strategy Distribution Operations Work Management Integration

2.2. Integration Benefits by Area of Accountability

12. The integration synergies listed in Table 2 and 3 and other qualitative benefits noted in Table 4 for each area of accountability are described in the following

paragraphs. As the utility established a new organizational structure, savings contemplated in the MAADs filing were delivered by the respective areas of accountability: Distribution Work Management integration efforts were delivered within Distribution Operations; Customer Care delivered foundational integration through a common Customer Information System; Storage and Transmission Operational synergies were delivered between Energy Services and Engineering and Storage and Transmission Operations. Utility Shared Services savings were delivered through Central Functions.

Business Development & Regulatory

13. In Business Development & Regulatory (BD&R), integration savings were realized in areas where services and processes were integrated. Savings were realized through restructuring alignment in 2019 which delivered $5.2 million in sustainable savings and VWO achieved $1.3 million in sustainable savings. BD&R also realized integration savings through a reduction of intervenor costs of $1.2 million as EGD and Union no longer require separate proceedings. The consolidation of membership and subscription services like the Canadian Gas Association and Ontario Energy Association also delivered $0.5 million in sustainable savings.

14. In addition to the financial savings, integration to a common website and social media accounts provided common platforms for customers and stakeholders to interact with Enbridge Gas in a consistent manner. The common media platforms enabled communications channels for emergency response, marketing campaigns, and awareness messages.

Customer Care

15. Customer Care restructuring alignment in 2019 delivered $2.7 million and VWO in 2020 delivered $2.9 million per year in sustainable savings. One of the most significant benefits of integration was achieved through the Customer Information System (CIS) consolidation which delivered $16.1 million in O&M savings starting in 2022. Implemented in July 2021, the creation of a common CIS served to align billing processes, deliver enhancements on a unified platform, and deliver savings through the decommissioning of Union's instance of the Banner CIS and the elimination of third-party contract costs. This integration initiative migrated 1.6 million customers to a single CIS on the SAP 4 HANA platform in use for EGD customers. This project also consolidated customers into one MyAccount system, one Interactive Voice Response (IVR) system, and a consolidated website. The project provided consistent processes and procedures for employees and customers, an enhanced user experience through efficient access to information, and a single integrated system to connect stakeholders across the organization. Stabilization for this complex system integration continued throughout 2022 with change management efforts including augmented staffing and enhanced training for staff and support teams, along with continued system enhancements in response to customer feedback.

16. In addition, the alignment of meter reading schedules across the utility from monthly readings to alternate-month readings delivered integration savings of $2.7 million in 2019 and 2020, subsequently reduced to $0.9 million in 2021 as a result of higher contract costs with a new vendor.

17. Within the contract rate market, harmonized rules for setting contract parameters and authorization of overrun, and common customer communication templates were established to create a more consistent customer experience across all rate

zones. These changes support future growth opportunities, while reducing the effort for contract renewals, and increasing the level of transparency for customers.

Distribution Operations

18. Distribution Operations restructuring alignment in 2019 delivered $6.4 million and VWO in 2020 delivered $1.7 million per year in sustainable savings. Savings were realized through a portfolio of integration initiatives undertaken to deliver consistent and efficient distribution work management practices across Enbridge Gas. Distribution work management includes the planning, scheduling, compliance, work management systems (WMS), WMS support, asset management, and support for overall work to maintain Enbridge Gas's assets across the utility. The Work Management initiative consolidated Work Management Centers from twelve centers to three. In addition to the consolidation, the strategy also aligned the organizational structure within the centers as well as harmonized processes and systems for Operations' front and back-end work functions that support planning, scheduling, execution, and analysis of field distribution maintenance work. The Work Management initiative resulted in approximately $1.9 million in savings starting in 2021.

19. To enable this harmonization and optimization of work management practices and supporting savings, Enbridge Gas undertook a multi-year, phased project to integrate the asset and work management system (AWS) onto a common platform, Maximo. Phase 1 was completed in July 2021 and delivered efficiencies through a common system and processes for planning work, and harmonized policies, processes, and procedures for distribution maintenance operations. The Phase 1 deployment created improved visibility of utility work orders across Enbridge Gas operations, streamlined reporting and decision-making opportunities, and

eliminated duplicate systems. In parallel with the harmonization of the Maximo asset and work management system, Distribution Operations field technicians and supporting staff were deployed with a consolidated technology solution, ClickSoftware Field Service Edge (FSE), for executing work in the field. The implementation of the field device impacted over 1,000 end users.

20. Distribution Operations also realized additional savings from lower FTEs due to the implementation of an integrated work and resource strategy. This comprehensive strategy established an aligned operating model for how internal and external field operations resources are managed to optimize Enbridge Gas's best-in-class safety, reliability, quality, customer, and cost performance. A significant component of this strategy was to align on the use of contractors for specific work activities. For regions in Union's previous franchise area, this meant shifting more day-to-day work to the Extended Alliance vendors. FTE, contractor, and burden savings were $2.7 million in 2021 and $2.2 million in annual sustainable savings thereafter.

21. Distribution Operations also achieved synergy savings through other initiatives including the fleet and garage strategy, and warehouse consolidation. Operations integrated the maintenance of fleet vehicles for EGD and Union through outsourcing. Implementing the fleet and garage strategy delivered $2.1 million of savings. Warehouse consolidation reduced the cost of maintaining multiple warehouses and a number of duplicate roles. Two locations were closed, and inventory was consolidated in the remaining five warehouses resulting in $0.3 million in sustained savings.

22. In addition, Distribution Operations delivered initiatives that produced $0.8 million in savings through integration that enabled further alignment, including adoption of a common emergency response process, and aligned emergency call handling

procedures. The expanded use of Alternate Locate Agreement (ALA) contracts improved locates efficiency and reduced locates costs by providing contractors more flexibility to manage locate requests within a larger time allotment.

23. As EGD and Union operated in distinct service areas, there was no fundamental overlap in the maintenance work orders generated, or volume of emergency calls, however the qualitative benefits of common processes, clear accountabilities, and consistent outreach delivers value to stakeholders and customers through common channels for delivery and response expectations. Through the implementation of a single Emergency Operations Centre and harmonized Incident Command protocols, the utility has common response structures supporting safety and reliability and predictability for stakeholders. Furthermore, by establishing a single Emergency Dispatch Centre aligning the receipt and dispatch of emergency calls, the Company continued to enhance the safety and reliability of operations.

24. Fundamental to safety and reliability, was establishing a common Damage Reduction Program building on the strong foundation of safety in each utility. This program represents the implementation of a collection of strategic, harmonized multi-year initiatives aimed at reducing third-party damages to GDS assets. Initiatives are centered on awareness, education, and partnerships, and advertising and marketing to ensure EGI effectively communicates and engages with contractors and homeowners. Additionally, technology and predictive analytics enable a more proactive approach to distribution protection measures and practices.

Energy Services

25. Energy Services restructuring alignment in 2019 delivered $4.7 million and 2020 VWO delivered $0.7 million in sustainable savings. Energy Services delivered early

synergies in 2019 through the centralization of the Gas Control and Nominations teams along with the Supervisory Control and Data Acquisition (SCADA) system. Prior to amalgamation, separate gas control centers were in operation, each using different scheduling systems and processes. This integration effort migrated EGD's control centre operations from Edmonton to a consolidated Enbridge Gas Control Centre in Chatham and the EGD assets into the SCADA system. The centralization of functions and consolidation of SCADA technology optimized operational costs by streamlining operational gas management across the system and aligning processes. Savings are included in the 2019 restructuring effort.

26. In early 2022, the Cost of Gas (COG) Project was implemented, delivering integrated processes into an automated utility gas purchase and financial reporting system in SAP for Energy Services and Finance. The integrated system and processes provide aligned automated functionality for gas inventory and financial reporting related to gas costs across Enbridge Gas, including contracting, purchasing, invoicing, and nominations. The benefits of this system are process consistency and accurate reporting and management of gas costs for Enbridge Gas.

Engineering and Storage and Transmission Operations (STO)

27. Engineering and STO restructuring efforts in 2019 delivered $6.6 million and VWO in 2020 contributed $2.9 million in sustainable savings. Within Engineering and STO, consolidation of separate meter shops and harmonization of accreditation audits contributed to $1.2 million savings starting in 2021 and provides a streamlined approach to effectively manage Enbridge Gas's metering asset life cycle. As well, harmonization of storage and transmission operations at the Dawn and Tecumseh locations identified opportunities to reduce duplication, and create optimal resourcing solutions leveraging internal employees, contractors, and

partner resources. An example of delivering consistency in processes and operating models was the transfer of corrosion survey accountabilities to the Distribution Protection team in Distribution Operations. The restructuring savings includes the harmonization of storage and transmission operations at Dawn and Tecumseh achieved through repurposing of roles to efficiently insource certain activities previously conducted by external service providers such as third-party observation for well drilling and inspection at Tecumseh.

28. Engineering also delivered a comprehensive Content Management Program (CMP), an initiative focused on harmonizing EGD and Union content, including standard operating practices and other technical and business-related processes and procedures. The CMP established standards for how content is stored, updated, and delivered throughout the Company. This consistency ensures documentation can be retrieved in a consistent format, resulting in consistency in accessing procedures, and updating and rolling out changes across the Company. These consistent standards were further used with the approximately 500 business process and procedures that were harmonized to support the safe and efficient delivery of work as part of the AWS and CIS implementations in 2021.

29. Harmonizing the Integrated Management System (IMS) for the Company was led by the Engineering department. This umbrella program harmonized the IMS governance and framework of the eight IMS management programs to meet requirements that support safe and reliable operations. Another initiative was delivered to align, integrate, and enhance the Quality Management Program, including implementing a single, consistent Operator Qualification Program, a Quality Assurance framework for the utility with aligned quality assurance checklists to support the evaluations of harmonized processes for Utilization, Operations (including Stations), Construction and Material Quality Assurance Programs for PE

Pipe, pressure reducing regulators, and Fusion Iron Heater Faces. In addition, a consistent Quality Material Equipment Report Program across Enbridge Gas was implemented.

30. Another integration milestone was a consolidated Asset Management Plan (AMP) for the Company, first filed with the OEB in October 2020. The AMP supports the financial planning and provides the basis for the long-range plan. Through this effort a consistent value-based decision-making framework was developed to standardize the approach to optimizing the investment portfolio based on cost, risk, and performance. The project required the establishment of a common AMP approach, processes, and procedures, including the corresponding tools that are used to support decision making.

Central Functions

31. Central Functions savings of $5.6 million were realized as a result of 2019 Restructuring and $9.1 million due to VWO. Throughout the deferred rebasing term, benefits were achieved in central functions by eliminating duplication of shared services and systems. This simplification further supports reliability through modernized, standardized systems and promotes customer and process alignment. Examples of simplified technology applications include the aligned Enbridge Gas website, CIS, Cost of Gas system, and AWS (Maximo). This technology rationalization also enabled common processes for customers and stakeholders in their experiences and interactions with Enbridge Gas.

32. Also, within Central Functions, an immediate opportunity was addressed to reduce leased real estate in Toronto where both utilities leased spaces for proximity to key stakeholders. Lease savings of $1 million were achieved starting in 2020 from locations that were no longer required following the consolidation of office spaces.

Summarized benefits of Utility Integration

33. Overall, the significant efforts undertaken by the Company throughout the deferred rebasing term are expected to deliver $86 million of annual sustained savings that will constitute savings to customers in the 2024 Test Year. In addition to the savings noted by area above, qualitative benefits were delivered as policies, programs, and systems were aligned furthering consistency and effectiveness across the utility benefiting customers, communities, and stakeholders.

2.3. Integration O&M Costs

34. To deliver the integration benefits and the savings to be passed on to customers at rebasing, O&M costs associated with integration were tracked separately over the deferred rebasing term. These costs will no longer be required beyond 2023 and were not reflected in rates during the deferred rebasing term, and as such were borne by the utility. Also included are severance costs associated with any FTE reductions brought about by restructuring. While many of the above initiatives achieved savings, some of the integration-related costs for business operations do not result in quantitative savings, however, they were fundamental to Enbridge Gas being able to deliver on integration while maintaining its safety and reliability commitments.

35. Integration initiatives have spanned all departments including Central Functions. The O&M costs largely represent dedicated FTEs and consultants working on aligning processes and procedures, harmonizing methodologies, and implementing common tools and systems. A number of these initiatives have contributed to the synergy savings referenced, with the savings sustained through the deferred rebasing term and beyond. As of the end of 2021, two-thirds of an expected $161 million of projected integration initiative costs over the 2019 to 2023 period has

been spent. Table 5 shows the integration costs by department, along with integration severance for the 2019 restructuring and 2020 VWO. By the end of 2023, significant progress on integration will be realized with benefits being passed on to customers and integration-related costs being eliminated.

Table 5
Integration O&M Costs Schedule by Area

Line No.	Particulars ($ millions)	2019 Actual (a)	2020 Actual (b)	2021 Actual (c)	2022 Estimate (d)	2023 Bridge Year (e)	Total (f)
	O&M Costs						
1	Business Development & Regulatory	-	0.3	0.9	0.4	0.5	2.1
2	Customer Care	2.0	14.0	13.8	0.4	0.5	30.8
3	Distribution Operations	2.6	18.0	21.9	22.7	10.9	76.2
4	Energy Services	0.7	1.0	0.5	0.6	0.6	3.3
5	Engineering & STO	1.6	8.3	6.9	8.9	6.2	31.9
6	Other Functions	3.2	4.8	5.8	2.2	0.9	16.9
7	Subtotal for O&M Integration Costs	10.2	46.4	49.8	35.2	19.5	161.1
8	Integration Severance	41.5	77.7				
9	Total Integration O&M Costs	51.7	124.1	49.8	35.2	19.5	280.3

36. Distribution Operations is expected to incur $76.2 million of integration costs over the deferred rebasing term. Consultant costs totaling $27.2 million and integration staff totaling $25.1 million comprise most of Distribution Operations' integration costs. Consultants have been tasked with providing subject matter expertise, industry best practices and project management for initiatives such as the Work & Resource Strategy, Work Management Initiative, and the Fleet Strategy, while integration staff have focused on policy, procedure, and system alignment. In addition, $16.1 million will have been spent by the end of 2023 on Asset and Work Management System (AWS) alignment initiatives, which bring together the management of frontline operational work, the scheduling and execution of field work, and customer interaction into an integrated, common set of platforms. Other

integration activities include $3.2 million to implement an outsourced model for meter work and $2.9 million to update EGD and Union pipeline markers to Enbridge Gas pipeline markers.

37. Engineering and STO is expected to incur $31.9 million of integration costs over the deferred rebasing term. The largest integration initiative led from this department incurred a cost of $16.5 million for the alignment of engineering policies and procedures through the Content Management Program. In the Storage and Transmission area, $4.7 million was spent to align storage training, documentation, and system policies and procedures. Other integration initiatives include $4.1 million for harmonizing the Integrated Management System (IMS) processes, and the alignment of Technical Training and Records policies and procedures, $2.7 million for system updates to include Union transmission pipelines into the Integrity Assessment Program, and $1.1 million for meter shop work and resource strategy which consolidated multiple meter shops and harmonized accreditation audits. The remaining costs incurred were primarily to consolidate programs including $.9 million for the integration of the asset plan and $.4 million consolidating the records management department.

38. Customer Care is expected to incur approximately $30.8 million in integration costs over the deferred rebasing term, primarily due to $27.5 million for CIS harmonization. These O&M costs included training, change management, stakeholder engagement, software, cloud, and data conversion costs required to enable the new system and processes. The project delivered a common system for Enbridge Gas, resulting in savings of approximately $15 million annually starting in 2022. Customer Care will also incur $2.1 million of integration staff costs supporting harmonization for customer care process and procedures over the deferred rebasing term which will not carry over into the 2024 Test Year.

39. Energy Services and BD&R are expected to incur $3.3 million and $2.1 million respectively, in integration costs over the deferred rebasing term. For Energy Services, integration staff in the Utility Portfolio Management (UPM) team have been providing oversight, tracking and support for all integration initiatives across the organization. For BD&R, integration initiatives are primarily Regulatory-related where $1.5 million will be spent on resources to develop harmonization proposals in preparation of the 2024 Rebasing Application. Costs in these areas support the coordination of multiple integration initiatives due to the inter-related changes across the portfolio.

40. Central Functions expect to incur $16.9 million in integration related costs with most spent as of 2021. These integration costs are primarily comprised of $10.3 million for Finance consultants leading process alignment initiatives such as the harmonized depreciation study, harmonized overhead capitalization methodology and unregulated storage allocation study; along with $4.4 million of Finance integration staff supporting integration activities such as alignment of financial data into a single source, alignment and consolidation of reporting and the development of harmonization proposals for rebasing application. Other integration costs include $2.1 million for supply chain harmonization, commercial contract renegotiations, and TIS alignment.

41. Severance costs related to integration were $41.5 million in 2019 and $77.7 million in 2020. In 2019, the severance costs are due to the initial Enbridge Gas organization restructuring and role rationalization. In 2020, the severance costs are due to the VWO program. No significant integration related severance costs were incurred in 2021, nor are any expected in 2022 and 2023. Please see Exhibit 4, Tab 4, Section 3 for more details on Enbridge Gas FTEs and employee compensation.

2.4. Integration Capital Expenditures and Inclusion in Rate Base

42. To deliver the benefits of integration, pillar system alignment was required to effectively manage business operations and customer interactions for over 3.8 million customers. Supporting multiple billing and work management systems with disparate processes and structures was not an effective way to deliver reliable, scalable, efficient service to customers, nor an effective way to maintain ongoing business operations. Investments throughout the deferred rebasing term brought the utility to common, modern, scalable platforms. These platforms provide foundations that deliver sustainable savings and ongoing benefits in common user experiences and practices across Enbridge Gas that will extend beyond the deferred rebasing term. Enbridge Gas expects to incur $189.0 million in capital expenditures related to integration efforts over the deferred rebasing term as set out in Table 6. This represents a reduction of approximately $63.2 million relative to Enbridge Gas's original forecast. The primary driver for the change in capital expenditures is the deferral of the GTA East and GTA West facility integration projects. Enbridge Gas is re-evaluating the costs and timing of the GTA East and West projects due to delays to the construction schedules and a forecasted increase in the construction costs for the facilities. /u /u /u /u /u /u /u

43. The revenue requirement to support these investments was not included in base rates, and as such was borne by the shareholder. The largest capital expenditures were in pillar technologies: one Customer Information System (CIS) and one Asset and Work Management (AWS) system. /u

44. By December 31, 2023, the residual net book value of the integration capital projects is forecasted to be $119 million. The associated impact reflected in the 2024 Test Year revenue requirement is $28 million, further details at paragraph 49. /u /u

A listing of the integration capital expenditures and descriptions is provided at Attachment 1. The CIS investments are included in Customer Care and the AWS investments are noted in Distribution Operations. /u

Table 6
Integration CapEx Investments Schedule

Line No.	Particulars ($ millions)	2019 Actual	2020 Actual	2021 Actual	2022 Actual	2023 Bridge Year	Total	
		(a)	(b)	(c)	(d)	(e)	(f)	
	CapEx							
1	Business Development & Regulatory		0.6	2.0			2.6	
2	Customer Care	6.7	27.7	32.0	0.8		67.3	/u
3	Distribution Operations	11.3	7.1	19.0	19.8	17.0	74.2	/u
4	Energy Services	3.6	3.7	8.0	5.6	3.0	23.9	/u
5	Engineering & STO		0.2	2.0	0.3		2.5	/u
6	Overheads	7.6	11.0				18.6	
7	Total Annual CapEx	29.1	50.4	63.0	26.5	20.0	189.0	/u
8	Net Book Value (included in rate base forecast)						119.0	/u

Notes:
(1) Distribution Ops: Work Mgmt. phases utility work, construction, meters, customer attachment /u
(2) CapEx is reflective of year spent /u
(3) Overheads are included at the project level starting in 2021 /u
(4) Associated impact of NBV reflected in the 2024 Test Year revenue requirement is $28 million /u

45. As noted, the largest investments in capital were driven by technology investments to align pillar applications, which started in 2019. Upon initiation, these projects assessed the current systems in place against business needs, the evolving technology landscape and security requirements, as well as evolving customer

expectations to determine the solutions to deliver on those requirements safely and reliably for Enbridge Gas. The decision to upgrade and migrate to existing systems provided significant benefits to customers, as implementing new systems would have been more expensive solutions.

46. As referenced in the savings section of this evidence, the CIS in Customer Care was a significant integration project for Enbridge Gas. The CIS in use prior to amalgamation were nearing end of life and migrating the UG Banner/ Enlogix CIS to the SAP S/4 HANA cloud application, mitigated sustainability issues and improved the reliability of the systems. The aligned CIS and complex interfaces to inter-related systems also enabled one common CIS platform and delivered a common brand and customer experience across Enbridge Gas. This foundational investment in the aligned billing system delivered synergy savings and served to modernize the system on which operational processes and customers continue to rely.

47. Another significant technology platform was delivered through the Asset and Work Management system implemented in Distribution Operations. The Asset and Work Management system enabled the efficient workload planning and execution in operations and set the stage for a scalable solution implemented through phases. This project initially migrated the service suite planning and dispatch application, along with related systems and processes in use at Union Gas pre-amalgamation into the Maximo system, creating alignment for utility maintenance work. This initiative expanded to a phased implementation leveraging system and processes for construction, meter shop, and planning for station operations. This integrated asset and work management system (Maximo) brought both companies onto a common platform with aligned policies, processes, and procedures for Distribution Operations, Customer Care, and Engineering while supporting Enbridge Gas's

goals in achieving safe, efficient, and reliable operations. These implementations included planning, execution, and reporting activities, as well as the implementation of a mobility solution for the field workforce. This aligned system is fundamental to work and asset management across the utility, enabling safe, reliable, and effective service to customers through work order management, asset reliability and emergency response.

48. In Energy Services, an investment in technology and an aligned, automated Cost of Gas Application delivered an integrated solution to purchase and contract, nominate, manage invoicing, manage credit requirements, and book gas costs and associated deferrals for financial and regulatory reporting, as well as inventory management across Enbridge Gas.

49. Enbridge Gas's expectation is that the net book value capital costs of the integration will be included in rate base in 2024 and be subject to recovery through rates going forward. These investments were made throughout the deferred rebasing term to deliver the highest level of sustainable savings and operational benefits. Much of the residual net book value of the PPE pertains to in-service additions in 2021, 2022, and 2023, which Enbridge Gas will not have had the opportunity to fully depreciate by the end of the approved 5-year deferred rebasing term.

50. Beginning in 2024, Enbridge Gas will reflect the impact of the efficiencies and cost savings resulting from the amalgamation in its going-forward rates. At the same time, it is appropriate that remaining costs from capital projects aimed at integration and delivering benefits should also be reflected in Enbridge Gas's rates. The expected annual synergy savings of $86 million resulting from all integration initiatives, net of $28 million in annual depreciation, based on proposed

depreciation rates pursuant to the depreciation study provided at Exhibit 4, Tab 5, Schedule 1, Attachment 1, taxes and carrying charges related to these projects will be passed on to customers during the next IR term and beyond, flowing through as a net reduction of $58 million to the revenue requirement in 2024. /u

51. This approach reflects the principle that benefits follow costs and is consistent with the fact that, under US GAAP, the costs of the amalgamation/ integration investments are expensed, as depreciation, over the period when they are providing value. These investments in complex systems have extended depreciation terms due to the life of the asset. These systems provide the foundation upon which business processes and customer experiences are built to deliver safe and reliable services to current and future customers. Considering that this value is credited to customers through rebasing, so too should the costs be charged to customers at that time. The capital investments made will continue to provide value and service to customers and establishing their continued rate base treatment and draw down through depreciation is consistent with how other utility assets are treated, and consistent with how GAAP requires assets to be treated. This treatment aligns the ongoing benefits for customers with the associated costs in rates.

3. Summary

52. At the end of 2023, with the end of the deferred rebasing term, Enbridge Gas will have completed the approved MAADs framework. Consistent with the commitments in the MAADs framework, the O&M costs incurred for integration activities are not included in proposed rates for 2024. The annual integration synergies of $86 million demonstrate the amalgamation of EGD and Union provides ongoing benefits to customers. As those savings are passed on to customers in 2024, it is appropriate

the corresponding net book value of integration costs of the assets used to provide continued safe and reliable services are included in rate base. This evidence compiled the view of the integration activities that were completed through the deferred rebasing term, which generated a net reduction of $58 million to the 2024 Test Year revenue requirement. /u

Capital Expenditures Integration Projects - Detailed Listing

Line No.	Particulars ($millions)	Project	In Service Date	2023 Total spend as at Dec 31 (a)	2023 Acc. Dep as at Dec 31 (b)	2023 NBV as at Dec 31 (c)	Project Description	
1	Customer Care	CIS Integration	July 2021	44.7	11.8	37.0	Integration to a common Customer Information Systems (CIS) resulting in the retirement of the UG Banner CIS, and required upgrade and migration to one SAP platform to ensure ongoing reliable operations.	
2	Operations	Asset & Work Management Systems (AWS)	July 2021 July 2022 Dec 2023	48.5	14.4	38.1	This project delivers the integrated Utility Asset & Work Management Systems (AWS) harmonizing work management systems for maintenance operations, construction, and customer attachment, and integrating to the Maximo system previously used by EGD. This project is executed in Phases: Phase 1: integration of work management systems to a common Maximo platform; Phase 2: integration of Construction, Attachment, and Meter Shop systems and processes for Maximo, GetConnected, and Customer Connections Work Suite; Phase 3: Align Station Operations for both EGD and Union to Maximo.	/u
3	Customer Care	CIS Integration - HANA	July 2020	15.5	6.1	11.7	This implementation is part of the CIS Integration Project, moving the EGD CIS information to the S4 HANA cloud application.	/u
4	Energy Services	RACOG	Nov 2023	2.3	0.0	2.3	Revenue and Gas Cost Financial Reporting Project (RACOG). Enable an integrated long-term solution for actual, budget, forecast and key regulatory reporting using consistent tools.	/u
5	Energy Services	Cost of Gas Replacement	Feb 2022	15.8	8.3	9.4	A single integrated Utility Gas Purchase and Financial Reporting automated solution is required to manage risks and ensure successful integration in Energy Services and Finance. The driver was to align processes and systems across Enbridge Gas to purchase and contract, nominate, manage credit requirements and track gas costs for financial reporting, inventory management, and deferrals for multiple rate zones.	/u

Capital Expenditures Integration Projects - Detailed Listing (Continued)

Line No.	Particulars ($millions)	Project	In Service Date	2023 Total spend as at Dec 31 (a)	2023 Acc. Dep as at Dec 31 (b)	2023 NBV as at Dec 31 (c)	Project Description	
6	Operations	Leak and Corrosion System Integration	Nov 2022	5.7	1.4	4.3	This project implements a unified solution to enable Leak and Corrosion Survey process integration between EGD and Union. The project delivers the technology solution that will support the integrated Corrosion and Leak survey processes by replacing the existing platforms (CSMS, LSMS, DNV-GL) and moving EGD and Union onto the same technology solution.	/u
7	Operations	Estimating & Forecasting Accuracy	Nov 2022	2.9	0.9	2.1	This project implements a harmonized capital project estimating tool (EcoSys) to provide consistent and reliable capital estimation, benchmarking, and resource planning through integrated processes and system. Future opportunities include adding capital forecasting and additional reporting functionality for GDS.	
8	Operations	ePackaging	Nov 2023	1.1	0.0	1.1	This project digitizes work packages and provide a single solution and process for accessing locates and permits information and other reference information (e.g. Site/Hazard assessment forms) to support efficient work management.	/u
9	Operations	Customer Attachment IVR	Nov 2022	0.8	0.3	0.5	This project is to harmonize IVR systems for both EGD and Union. This would include IVR for external customers/Builders/Heating contractors for customer attachment business function.	/u
10	Engineering	Meter Shop Consolidation	Dec 2021	1.9	0.1	1.8	This project consolidates the three existing Meter Shops (Chatham, North Bay and VPC) into two. Results in closure of the Meter Shop at VPC.	
11	Customer Care	IVR Enhancements and Consolidation	July 2021	2.9	2.0	1.3	This project is to enhance and consolidate the EGD and Union Interactive Voice Response (IVR) into a single Enbridge Gas IVR with the focus to increase the containment within the IVR and ultimately integrate call handling between the internal and external contact centers for Phase 2 go live of CIS - SAP S/4 HANA on cloud. Enables Enbridge Gas to deliver on a single consistent experience to customers and present Enbridge Gas as a single company.	

Capital Expenditures Integration Projects - Detailed Listing (Continued)

Line No.	Particulars ($millions)	Project	In Service Date	2023 Total spend as at Dec 31 (a)	2023 Acc. Dep as at Dec 31 (b)	2023 NBV as at Dec 31 (c)	Project Description	
12	Business Development	Website Integration	July 2021	2.8	1.8	1.2	This project integrates uniongas.com and enbridgegas.com to support the amalgamated utility. New website will use enbridgegas.com and implement enhancements to reflect combined utility business unit needs. This implementation includes content, functionality, infrastructure and processes.	
13	Operations	Emergency Solutions Harmonization	Nov 2022	2.1	0.6	1.5	The project delivers the technology solutions to support Enbridge Gas's integrated Emergency Response processes and amalgamation of dispatch centers by bringing both EGD and Union onto the same Interactive Voice Response and paging solutions.	/u
14	Operations	Locate Tracker Rollout to Union	Nov 2023	0.9	0.0	0.9	This project involves the roll-out a single application for the Locates Tracker functionality that EGD and Union will use to align their processes and procedures for ordering and tracking locates for internal dig work, supporting work management and damage prevention efforts.	/u
15	Customer Care	My Account Amalgamation	July 2021	2.2	1.5	1.0	This project will provide customers across Enbridge Gas with one My Account experience. This will be done in parallel with the CIS Integration project as UG customers migrate over to the Enbridge Gas My Account, maintaining a consistent and positive user experience.	
16	Operations	Harmonize Feasibility Tools	Nov 2023	1.0	0.0	1.0	This project supports the harmonized customer attachment process, and harmonizes the feasibility tool for EGD and Union. This will also provide automatic system archive capabilities for the feasibility analysis instead of needing to post on second SharePoint site. Results in the decommissioning of the Union and EGD models.	
17	Energy Services	PowerSpring LVB Integration	Jul 2023	2.0	0.2	1.8	The project supports the integration of business processes and applications to gather measurement data from field devices and ensures measurement integrity while facilitating large volume billing (LVB) accuracy.	/u
18	Operations	Dispatch Scheduling Harmonization	Nov 2022	0.4	0.1	0.3	This project integrates, harmonizes, and automates dispatch scheduling for both EGD and Union supporting work management.	/u
19	Operations	Locate Management Solution Harmonization	Nov 2023	0.7	0.0	0.7	This project is being executed to deliver the technology solution that will bring EGD and Union onto the same platform to support the integrated locate management processes. This solution will provide one source for all locate requests from Ontario One Call supporting damage prevention efforts at EGI.	

Capital Expenditures Integration Projects - Detailed Listing (Continued)

Line No.	Particulars ($millions)	Project	In Service Date	2023 Total spend as at Dec 31 (a)	2023 Acc. Dep as at Dec 31 (b)	2023 NBV as at Dec 31 (c)	Project Description	
20	Energy Services	Utility Weather & Demand Harmonization	Nov 2022	0.4	0.1	0.3	This project implements a reporting/statistical analysis solution for EGD data in support of the Utility Weather & Demand Harmonization Program. This new solution will mimic a current solution (Load vs Cold) in place for Union data.	/u
21	Operations	EGI Operations-Harmonized Field User Connectivity	Nov 2023	0.2	0.0	0.2	This project aligns the technology platform and technical support for remote connectivity for Enbridge Gas distribution operations field employees.	/u
22	Operations	Customer Connections	April 2020	0.5	0.3	0.2	This project supported the customer connections business processes with a unified solution and retirement of the duplicate systems while also delivering enhanced customer experience.	/u
23	Customer Care	Unionline Rebranding Project	May 2021	0.2	0.2	0.1	This project renames the existing Unionline application, including removing reference of Unionline and Union Gas from existing customer facing transactional system. This also includes contracts, invoices and reports accessed by customers through this platform.	
24	Operations	Alignment of Execution of Warning Tags	Nov 2022	0.2	0.0	0.2	This project implements an electronic warning tag solution integrating and automating processes to improve accuracy and efficiencies for the management of appliance warning tags..	/u
25	Operations	Customer Experience	Dec 2019	11.2	16.3	0.0	This project involved a full re-build of the MyEnbridge account management infrastructure, with the costs predominantly comprised of TIS hardware and software.	
26	Energy Services	SCADA and Gas Control Consolidation	Nov 2019	3.0	3.6	0.0	This project was to consolidate the utility control center operations in Chatham with migration to a single CygNet SCADA system.	
27	Business Development	Bill Print & Presentment	May 2020	0.1	0.0	0.0	This project moves the Union bill print processing and composition to Kubra resulting in a single bill image for Enbridge Gas customers.	
28	Overheads			18.6				/u
29	Total			189.0	70.0	119.0		/u

Note:
(1) Overheads shown at the project level effective 2021

TAB B

ONTARIO ENERGY BOARD

FILE NO.:	**EB-2022-0200**	**Enbridge Gas Inc.**

VOLUME:	**14**	
DATE:	**August 3, 2023**	
BEFORE:	**Patrick Moran**	**Presiding Commissioner**
	Allison Duff	**Commissioner**
	Emad Elsayed	**Commissioner**

MS. DUFF: I will read the transcript. My questions also were in particular focusing on the subsequent changes that we are expecting after this oral hearing. So that was also part of my question. But thank you for this clarification.

MR. STEVENS: Thank you.

MR. MORAN: Thank you, Mr. Stevens. I think that brings your presence here to an end; I am sure you are very happy about that. It has been a long session for you. We appreciate your contribution in the proceeding, and you are excused.

Mr. Stevens, we will take a brief break while you set up your next panel.

--- Recess taken at 2:25 p.m.

--- On resuming at 2:34 p.m.

MR. MORAN: Mr. Stevens, are you ready to introduce the next panel?

MR. STEVENS: I am, thank you.

MR. MORAN: Thank you.

MR. STEVENS: The next panel is panel 12, and they are here to speak about integration capital spending. Some of the members will be familiar to you. Starting closest to you is Trinette Lindley. Ms. Lindley is the Manager, Portfolio Management. Beside her is Tanya Ferguson, VP Finance. And, finally, Ms. Danielle Dreveny, Manager of Capital Finance Planning and Analysis, has had the good fortune of being able to continue to sit on a witness panel. So she is part of this witness panel, also.

I believe that both Ms. Ferguson and Ms. Dreveny have been affirmed, but Ms. Lindley has not.

MS. DUFF: We'll just do that now. Ms. Lindley, you are about to give evidence in this hearing. This Panel is dependent on you telling us the truth, and the law requires you to do so. Therefore, before you testify, I must ask you this: Do you solemnly promise this Panel that you will tell the truth, the whole truth, and nothing but the truth? And do you understand that breaking that promise would be an offence under our law? Thank you very much.

EGI PANEL 12 - INTEGRATION CAPITAL

Trinette Lindley,

Danielle Dreveny,

Tanya Ferguson; Affirmed.

EXAMINATION-IN-CHIEF BY MR. STEVENS:

MR. STEVENS: Thank you. The panel has some brief examination-in-chief before we turn over to your questions. In advance of today's appearance, we circulated a compendium with three or four documents in it that the witnesses may speak to in their opening remarks. Would we be able to mark that as an exhibit?

MR. MILLAR: That's K14.2.

EXHIBIT K14.2: PANEL 12 PRESENTATION.

MR. STEVENS: Thank you. First, starting with you, Ms. Dreveny. I understand that you have one correction to make to evidence that is relevant to this panel?

MS. DREVENY: Yes, I do. Thank you, Mr. Stevens.

In reviewing an undertaking earlier this week from

SEC, we realized that there was an error in the way some of the project costs were shown, related to integration, in Exhibit I.2.5-SEC-108. We had made updates to the real estate and integration rows as a result of the capital update and realized that one of the changes was reflected in the incorrect year. This relates to rows 7 and 13.

MR. STEVENS: Sorry, if we could just wait for a moment.

MS. DREVENY: Apologies. Ms. Monforton, can you please bring up the exhibit. Yes, it would be the attachment 1.

MR. STEVENS: Thank you.

MS. DREVENY: Thank you, very much. Sorry. I'll slow down and back up a step, Mr. Stevens.

So the change that we note for the years 2021 and 2022 actual. It relates to rows 7 and 13. And it is the shift of some of the real estate costs between the integration and real estate line items, in the amount of about $24.5 million.

MR. STEVENS: When you say "a shift", what is the overall impact?

MS. DREVENY: There is no overall impact in the totals. It is a change just between those two line items.

MR. MORAN: Ms. Dreveny, a shift in which direction?

MS. DREVENY: Oh, apologies. In 2021, it would be a reduction to the real estate and workplace services line of 24.5, and then an increase to the integration line item. And then, in 2022, it would be the opposite effect, so a

reduction to the integration line and then an increase to the real estate.

MR. STEVENS: So, in total, the integration capital number is unchanged?

MS. DREVENY: Between those two years, it is unchanged.

MR. STEVENS: Thank you.

As we are all aware, Enbridge filed a capital update in June, with further details in July. Can you speak briefly, Ms. Dreveny, to the key updates that were made to integration capital within the capital update.

MS. DREVENY: Yes, I can, thank you. The main, key update that was made to the integration capital evidence is the removal of the GTA East and GTA West investments in real estate. This impact the project costs and the in-service timing. The projects were revisited earlier this year.

As an overall impact to the evidence that was filed in October, this results in a $63 million decrease in the capital spend. So we had initially put forward $252 million; we've reduced that to $189 million. And then this would also have an impact on the resulting net book value. The decrease to that is $59 million, so a change from the $178 million initially proposed down to $119 million.

There's also a 6-million-dollar reduction in the revenue requirement, reducing that to $28 million.

So these updates have been reflected in Exhibit 1,

tab 9, schedule 1, most notably table 6, and then in Exhibit 1, tab 9, schedule 1, attachment 1, as per the updates filed in July.

MR. STEVENS: Thank you. Turning to you, Ms. Lindley. Can you talk a little bit about the key investments that Enbridge Gas made in integration capital over the deferred rebasing period.

MS. LINDLEY: Absolutely. Over the past five years, the largest investments in integration capital were largely in long-life pillar systems, technology systems, that benefitted day-to-day customers, but also our day-to-day business operations. In fact, 75 percent of the integration capital was focused on two key system; our CIS system, the customer integration system, and the AWM system, the asset work management system.

The benefits that are associated with the CIS system were realized in customer care and they are largely related to the elimination of the duplicate vendor system that was managed, but also gave a common platform for customer interaction; Chatbot, IVR, those types of things.

On the asset and work management side, that was a common, scalable platform that was implemented in phases, and it enabled the savings that were largely in distribution operations for the work and resource strategy initiative, which had consistency of contractor usage and also enabled the integration of the work management teams, which included the centre consolidation.

The benefits of those, as I mentioned, are in

distribution operations, both from an operational perspective but also from a financial perspective. But not only did those systems integrate the companies, they also extended the useful life of those assets and they also will benefit into the future.

So, with that, I think I'll expand on the compendium. And if you can scroll down, Ms. Monforton, I think one more page, you will see that those two systems were in the previous legacy Union Gas's asset plan to be replaced. They were targeted for end-of-life replacement or technology obsolescence at that time, and those are both listed.

So if I think you can scroll down to page 3, you will see a reference to the asset plan. Are we on the compendium, Ms. Monforton? Thank you, that's the page I'm looking for.

So I will call out three specific items. The key application, the Banner line, so the very first line, is the replacement of the Union Gas CIS system, and that was included in the asset plan at the time. You will also see something by the name of CARS, which is our construction application, which would have been replaced as part of the AWS project and integration. And, lastly, I'll use Service Suite, which is the very bottom line, just as an illustrative example of those systems that were replaced as part of integration.

The solution you can see, if you look at the right-hand side of the column, you can see what the totals were.

With respect to choosing an existing system as part of integration, it was a significantly cheaper solution than choosing to implement a net new system. So you will see -- I'll go back to the top line, for example -- the Banner example of $122 million. The implementation of the CIS system as part of integration was done for less than 50. So I just wanted to give some context, as you would say, about the integration capital and how that related to system that were in place in the legacy utilities.

MR. STEVENS: Thank you, Ms. Lindley. Finally, Ms. Ferguson, can you speak briefly about what Enbridge Gas is relying upon to support including the undepreciated value of integration capital in rate base going forward?

MS. FERGUSON: Yes. Thank you, Mr. Stevens. I'll move this over a little. The intent of the Board's MAADs policy and framework is to incent the delivery of efficiencies that are ultimately, that will ultimately benefit customers. It also allows for a 10-year deferred rebasing period to allow for the distributor in question to generate the synergies required to help offset the costs associated with integration.

In the company's MAADs filing in 2018, it requested a deferred rebasing period of 10 years, and at that time noted that anything less than 10 years would not be sufficient to recover the costs of integration. The forecasts provided in the MAADs application were high-level estimates of costs and synergies that did not have the benefit of detailed planning at that time. They had not

considered the implications of financial accounting guidelines, and, in particular, depreciation policies that are approved by the Board are capitalization policy for asset investments where the costs of the assets are expensed over the life of those assets through the form of depreciation. Nor did those fully consider the O&M related costs associated with the integration, such as severance costs, costs associated with the policy process procedure alignment, or the O&M-related costs tied to the capital investments.

Things like design of the system, data conversion, change management and training are all O&M-related costs related to those system integrations. The company has invested $350 million in the integration of the two legacy companies, which includes severance costs and the depreciation that the company has incurred through the deferred rebasing period.

Given that this capital investment that has occurred through the deferred rebasing period has been funded by the synergies generated by the integration and the system improvements made, it is appropriate from the company's perspective that the undepreciated capital remain that's remaining at the end of 2023 continues to be recovered through those synergies that were used to derive them.

MR. STEVENS: Thank you very much. With that, the panel is ready for questions.

MR. MORAN: Thank you, Mr. Stevens. SEC, Mr. Rubenstein.

CROSS-EXAMINATION BY MR. RUBENSTEIN:

MR. RUBENSTEIN: I know we've just begun. My friends made some corrections to their evidence, and I am struggling to get some of those numbers down specifically, and I have some questions on those tables that were included in my compendium, as well as I had noted some similar issues. I was wondering if we could -- I know it is only 2:45 -- take the break now so I could confer with them to get the right numbers so that the cross-examination is more focused and we don't spend time trying to work through a page of numbers here?

MR. MORAN: Yes, I think that would be fine. We'll come back at five after 3:00.

--- Recess taken at 2:47 p.m.

--- On resuming at 3:05 p.m.

MR. MORAN: Mr. Rubenstein, all set?

MR. RUBENSTEIN: Yes, thank you, very much. Good afternoon, panel. My name is Mark Rubenstein, and I am one of the counsel for the School Energy Coalition.

I have a compendium; I was wondering if we could mark that?

MR. MILLAR: K14.3.

EXHIBIT K14.3: SEC COMPENDIUM FOR PANEL 12.

MR. RUBENSTEIN: Thank you, very much.

Maybe we can start at page 9 of that compendium, and if we can go down to M? And as I understand it, integration capital are expenditures required to integrate Enbridge Gas Distribution and Union Gas onto common

systems, processes and facilities. Do I have that right?

MS. DREVENY: Yes, that is correct.

MR. RUBENSTEIN: So I take it, it is really the cost to bring the two legacy companies together?

MS. DREVENY: Yes.

MR. RUBENSTEIN: As I understand it, integration capital is a subset of broader integration costs which include OM&A costs that were similarly required to integrate the companies?

MS. DREVENY: Yes.

MR. RUBENSTEIN: If we could turn to page 16 of the compendium?

As I understand the evidence, at the time of filing the application, Enbridge had forecast to spend $252.2 -- sorry, $252.3 million on integration capital by the end of December 31, 2023?

MS. DREVENY: Yes. So here, is it shows $252.2 million. Right.

MR. RUBENSTEIN: So, yes?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And then if we flip to page 22, that number was revised in the capital update to $189 million, on integration capital. Correct?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: And those numbers are capital expenditures. Correct?

MS. DREVENY: Correct.

MR. RUBENSTEIN: And, as I understand your request

before the Board, you are seeking to put into 2024 opening rate base, the net book value of the assets, of the integration assets at the end of December 31, 2023?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: And that is the $119 million we see on line 8?

MS. DREVENY: Yes.

MR. RUBENSTEIN: Just so I am clear, net book value is based on the undepreciated additions, not capital expenditures. Correct?

MS. DREVENY: Correct.

MR. RUBENSTEIN: And this is where I get a bit confused with some of the numbers, so I am hoping you can help me through that. Maybe the best place to start is on page 33 of the compendium. This is a table; it is an attachment to Exhibit 191, attachment 1. It updated the capital update, which shows essentially a list of all the integration projects. Correct?

MS. DREVENY: Yes, that is correct.

MR. RUBENSTEIN: And we have in one column the total spend as of December 31, the next column we have the accumulated depreciation as of December 31 and then, in the third column, we have the net book value as of December 31?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And now, when I look at the "totals" column, I see the $189 million that we just talked about. Correct?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And I see an accumulated depreciation of $70 million.

MS. DREVENY: Yes.

MR. RUBENSTEIN: And then I get a net book value of $119 million. Right?

MS. DREVENY: Correct.

MR. RUBENSTEIN: And so that, as I see it, the net book value is calculated as the difference between the total spend and the accumulated depreciation. Correct?

MS. DREVENY: Yes.

MR. RUBENSTEIN: Well, can you help me understand that, since the total spend is on a capex basis?

MS. DREVENY: So the capital spend would cease as of December 31, and the assumption is that all the dollars that are spent during that time, all of the capital expenditures, would be equivalent to what the in service is.

MR. RUBENSTEIN: Sorry, just to be clear: In your view, the total capital expenditures equal the total in-service additions for a given year?

MS. DREVENY: At the end of the five years that we are showing for integration capital, all things being equal, what you have had as capital expenditures related to the projects would be equal to the final in service, assuming that all of those dollars went into service.

MR. RUBENSTEIN: So you are predicting by the end of 2023 there will be $189 million in in-service additions?

MS. DREVENY: Correct, as all the projects are

expected to be completed by December 31, 2023. There would be no carry-forward to 2024.

MR. RUBENSTEIN: And you would agree with me that the calculation of accumulated depreciation, which you are subtracting from the total spend, has a relationship to when the asset goes in service. Correct?

MS. DREVENY: Yes. The depreciation would commence once the project goes into service.

MR. RUBENSTEIN: So it is important to ensure that we get the in-service additions numbers and the accumulated depreciation numbers to mirror each other. Correct? The same timing, to get an accurate net book value at the end of December 31, 2023. Correct?

MS. DREVENY: I would agree with that.

MR. RUBENSTEIN: But if the column 1 is on a capex basis, and not in-service additions basis, isn't it a little apples and oranges we are comparing -- we are doing the calculation, here?

MS. DREVENY: Sorry, I guess in the presentation of this table, it is assumed to be one and the same. So the total value of what is spent, whether it is capital expenditures or the resulting in service, would be the same.

MR. RUBENSTEIN: No, I understand that, at the end. I think your view is at the end of December 31, there will be a 189-million-dollar difference?

MS. DREVENY: Right.

MR. RUBENSTEIN: But to calculate the accumulated

depreciation, how much depreciation occurs in every year, you need to know when that individual asset went in service. So you need to not -- you need to not know -- it's not about the capex at the end of the plan; you need to know the in-service addition at the specific time the asset goes in service. Correct?

MS. DREVENY: That is correct. So the underlying calculations for this table would take into account the expected in-service timing of those projects. And then it would start depreciating, and it would have a timetable over that five years, in order to calculate what the depreciation is.

MR. RUBENSTEIN: But the net book value here is a simple difference between total spend, which is a capex number, and accumulated depreciation, which is an in-service addition, which is based on in-service additions.

MS. DREVENY: This is just a simplified view, to take together the projects, what is expected to be spent, which would be the same as the in service, what the estimated accumulated depreciation will be for each of those projects at the end of December 31, 2023, and then what the remaining net book value is.

MR. RUBENSTEIN: So let me just be clear: Are you actually putting in or proposing to add to opening rate base, $119 million? Or is this just a simplified calculation; it is actually a different number?

MS. DREVENY: It would be the $119 million.

MR. RUBENSTEIN: All right. Well, I am a bit confused

by this. I was wondering then if you could -- I mean, you have heard the comments that I have made about the calculations, and this is -- are you able to provide/show that the accumulated depreciation for each of these numbers reflects proper calculation of when the individual components of each project actually go in service?

MS. DREVENY: Sorry, I think there may be an -- sorry, an IR response that could help, as it illustrates the timing and when the depreciation starts on each of these. Sorry, Mr. Rubenstein, I will look it up. Sorry, I am just looking for my reference: Exhibit I.1.9-VECC-3. And when you do, if we can scroll down to, I believe it is the response in Part C.

So, Mr. Rubenstein, this is a summarized view, because it is not at the individual project level. It is done at the -- I guess the functional area, so business development, customer care, et cetera. But this would show the schedule of when we expect the in service, as well as what the expected depreciation is. And then you can see in the total column that it ties out to the $189 million.

MR. RUBENSTEIN: All right. Could I ask you to turn to page 49 of the compendium.

And, as I understand the conversation, and we'll get back to this, is that, for the purposes of integration capital, let's just focus on that line item, 2021 should be $24.5 million higher and 2022 should be $24.5 million lower. Correct?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And that still gets us to our [audio dropout]. Now, the question I have is, when I add up the integration capital for those five years, I get $178.5 million.

MS. DREVENY: It's different in the presentation of this table because of the indirect overheads. In this view, for both 2019 and 2020, the capitalized overheads are shown as a separate line item, but there would be a component that is attributed to the integration, so that's why it does not reconcile. It would be the same effect if you were looking on a capital expenditure basis, as well.

MR. RUBENSTEIN: All right. Thank you very much. That is helpful clarification.

Can I go to page 3 of the compendium. This is from the pre-filed evidence. If we go to paragraph 6, Enbridge says:

> "Enbridge Gas received OEB approval to amalgamate in 2018 under the Mergers, Amalgamations, Acquisitions, and Divestitures (MAADs) decision with a five-year deferred rate rebasing term from 2029 to 2023. Integration capital which was required to amalgamate EGD and Union were incurred over the 2019 to 2023 period and included in the annual ESM filings. Integration capital projects were not eligible for determination of the annual incremental capital module amounts and were not recovered through base rates during the [audio dropout]."

Do you see that?

MS. DREVENY: Yes, I do.

MR. RUBENSTEIN: Now, you say specifically:

"Integration capital projects were not eligible under the determination of annual integration capital module amounts and were not recovered through base rates during the deferred rebasing term."

Do you see that specific part?

MS. DREVENY: Yes, I do.

MR. RUBENSTEIN: I'd like to break that down for a moment. When you say that integration capital projects were not eligible in the determination of the annual incremental capital module amounts, I understand what you are meaning is that it would have excluded -- integration capital projects were excluded from the calculation of the in-service capital budget forecast?

MS. DREVENY: That's correct.

MR. RUBENSTEIN: Which is used to determine the maximum eligible incremental capital amounts?

MS. DREVENY: Yes, that's correct.

MR. RUBENSTEIN: And my understanding is, reviewing the records in those proceedings and the OEB decision, even if you had included them, it would have made no impact on the amount of incremental capital you would have received. Am I right about that?

MS. DREVENY: Subject to check. I think I'd have to go back and see what the impact of what the in-service

would have been, but I don't think it would have had a huge bearing, no.

MR. RUBENSTEIN: Okay. And, if we go to the bottom of page 3, you say:

> "These amounts were not recovered through base rates during the deferred rebasing term."

Do you see that?

MS. DREVENY: Yes.

MR. RUBENSTEIN: What do you mean by that?

MS. DREVENY: Sorry, one moment please.

[Witness panel confers.]

MS. DREVENY: So I believe we answered an interrogatory on this topic, as well. It's not just the integration capital projects that would not have been recovered through base rates. Technically, any of our capital spend over 2019 to 2023 period is not recovered through base rate. It's all subject to approval for prudency through these proceedings.

MR. RUBENSTEIN: I think you are jumping a number of steps ahead. My question really is: What did you mean by this term? You wrote this. I don't understand what this means.

MS. DREVENY: I think the intent is that the spend over the IR term is at the shareholder's expense for integration.

MR. RUBENSTEIN: You would agree with me that integration capital projects were funded out of the revenue you received from rates?

MS. DREVENY: Sorry, one moment please.

[Witness panel confers.]

MS. DREVENY: I would not agree with that statement. So the spend was recovered through the synergies over the time period. That was the expectation.

MR. RUBENSTEIN: But the synergies, the calculation of those synergies you got, it's all ultimately synergies from the revenue you are receiving from rates. Correct? That's how you fund any of your work. You get money from rates and you fund work.

MS. FERGUSON: Yes, I don't think I would agree with that characterization. The shareholder funded the O&M and capital-related expenditures throughout the deferred rebasing period. None of it is recovered through rates. That's the purpose of this hearing today, this panel.

MR. RUBENSTEIN: Sorry, I want to separate when you say included in rates and funded from rates. Those are a little bit different. Included in rates, I agree that, you know, when your rates were set, the base rates were set in 2013 and, depending which program, these projects were not included. But the revenue from rates generally is how you fund your operations. Correct?

MS. FERGUSON: Generally, but not the integration capital, is where I was going.

MR. RUBENSTEIN: Would you agree with me that, with the exception of the ICM projects, which were specifically approved and had separate individual rate treatments, the rest of your capital additions that occurred during the

deferred rebasing are similarly not included in base rates?

MS. FERGUSON: Yes.

MS. DREVENY: Yes.

MR. RUBENSTEIN: And so, with the exception of the impact that may or may not occur regarding ICM, the integration capital projects and the recovery are no different than any of the non-ICM projects. Correct?

MS. DREVENY: I guess that's a fair characterization.

MR. RUBENSTEIN: Now, as I understand, you included integration capital costs in the DSM calculation? You explicitly say this in paragraph 3.

MS. DREVENY: Yes. No, we agree, sorry.

MR. RUBENSTEIN: And so it would have an effect on earnings. Correct?

MS. DREVENY: Yes, that's correct.

MR. RUBENSTEIN: Now, I assume you believe your treatment of integration capital costs in this application is consistent with the MAADs handbook and the OEB's decision?

MS. FERGUSON: Sorry, can you repeat that?

MR. RUBENSTEIN: I assume you believe your treatment of integration capital costs in this application, which is to put the undepreciated net book value in opening rate base, is consistent with the OEB's MAADs handbook and the MAADs decision.

MS. FERGUSON: I would say consistent with the intent of it, to drive synergies, ultimately, for customers and to allow -- sorry, I'll go back to what I kind of said in my

opening statements, which was, given that distributors were allowed to propose up to a 10-year deferred rebasing period, it was based on how long they deemed was necessary to recover the capital costs.

So I think the intent of it is for the distributor to recover, through synergies, their investment.

MR. RUBENSTEIN: But not the wording of the decision in the handbook?

MS. FERGUSON: Sorry, not the wording?

MR. RUBENSTEIN: Well, you made the distinction, when I asked you if it was consistent with the MAADs handbook and the MAADs decision in the Union Enbridge application, and you said that, well, it's the intent. And I'm saying: Is there a difference between the intent and the wording?

MS. FERGUSON: No.

MR. RUBENSTEIN: Can we go to page 40 of the compendium. This is from the MAADs handbook. Do you see that? It's an excerpt.

MS. DREVENY: Yes.

MR. RUBENSTEIN: Maybe we can go down to the last paragraph. In the first sentence, it says: "Incremental transaction and integration costs are generally," are not -- sorry. It says:

> "Incremental transaction and integration costs are not generally recoverable through rates."

Do you see that?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: And, since you are seeking to include

the net book value or undepreciated capital amounts at the end of 2023 and 2024 rates, I take it your view is that sentence really should be reading: Incremental transaction integration costs are not generally recoverable through rates after the deferred rebasing period or, sorry, before the deferred rebasing period is over?

MS. FERGUSON: No, the company's interpretation is that incremental transaction and integration costs are not generally. I think the company's interpretation of "generally" is that some circumstances may warrant it, and that's why we're here today.

MR. RUBENSTEIN: So, just to be clear, that's the company's position; it's that "generally" wording that says it should be applied a little bit differently for you?

MS. FERGUSON: Not necessarily for us, for circumstances in place with any amalgamation of utilities.

MR. RUBENSTEIN: So, if we flip to the next page of the handbook, at the top, it says:

> "This deferred rebasing period is intended to enable distributors to fully realize and anticipate efficiency gains from the transaction and retain achieved savings for a period of time to help offset the transaction costs."

Do you see that?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: And so you would agree with me that it's not even guaranteeing that the savings, the deferred rebasing period of time will offset the costs, correct?

MS. FERGUSON: Correct. I would say the language is not, does not guarantee, per se, but there is a trust in the regulatory process and the regulatory compact with benefits following costs that the company has undertaken this exercise to propose that the undepreciated capital goes into rate base at 2024.

MR. RUBENSTEIN: Could we turn to page 37 of the compendium. This is from the MAADs decision. And, you know, the previous sections relayed everyone's arguments on the question of the length of the deferred rebasing period, and, if we go down to the bottom of the page, the OEB's findings, the OEB says -- this is in the second sentence, in approving the five years, it says:

> "The OEB finds that the five years provides a reasonable opportunity for the Applicants to recover their transition costs."

Do you see that?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: And, in the next page, it explains why longer than five years in which the company had requested -- it requested 10 years -- were not appropriate in these circumstances; do you see that?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: All right.

MS. FERGUSON: It does further down say that the OEB has determined that 15 years is too long to go. I think part of the conversation was around the fact that both legacy entities had previously had a five-year incentive

term and then going into a 10-year incentive term would be too long.

MR. RUBENSTEIN: Would you agree with me at a high-level the difference from an operating expense and a capital expense is that, an operating expense, the entire cost is incurred in that year, it is spent, but, for a capital expense, it is recovered through depreciation over the life of the asset?

MS. FERGUSON: Agreed.

MR. RUBENSTEIN: As I'm aware, no integration-related O&M costs that are in the deferred rebasing term are being proposed to be recovered for ratepayers, in 2024. Do I have that right?

MS. FERGUSON: Agreed.

MR. RUBENSTEIN: But, as we discussed, integration capital additions incurred during the deferred rebasing period, the undepreciated component is being added to 2024 rate base and being recovered from customers, correct?

MS. FERGUSON: Correct, being recovered from the synergies that we're also getting back from customers.

MR. RUBENSTEIN: And so, if the integration activity is an O&M expense, customers don't pay for it going forward in 2024 rates, but, if the integration activity is a capital expense, they do pay for some of that in 2024 and going forward, correct?

MS. FERGUSON: That is our proposal, to continue to fund those capital investments through the expense of depreciation through the synergies that were given back in

2024.

MR. RUBENSTEIN: Do you give all the synergies that you achieved during the deferred rebasing period to customers?

MS. FERGUSON: The $86 million that was generated through the rebasing period was credited to customers in 2024.

MR. RUBENSTEIN: No, no, that's on a going-forward basis. I'm talking about those you achieved during the deferred rebasing period. Did you return that to customers?

MS. FERGUSON: That was used to fund the integration, the O&M- and capital-related expenses for the integration.

MR. RUBENSTEIN: Could we turn to page 42 of the compendium. This is a table that I prepared, which I provided to counsel, I believe, on Monday. As I understand -- and this is drawn from your application, you can see from the ESM calculations that you provide over the years that are on the record in this proceeding. In column 8, it shows the ROE above the OEB-approved amounts; do I have that correct? For each year, that's the correct amount?

MS. FERGUSON: There's a correction to be done for 2022.

MR. RUBENSTEIN: Please, what's --

MS. FERGUSON: Point 86.

MR. RUBENSTEIN: Point 86. And is the gross earnings above ROE incorrect, then, too?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: What's that number?

MS. FERGUSON: For? Well, 2021 is incorrect; it is 57.7. 2022 is incorrect; it is 64.4.

MR. RUBENSTEIN: And so the 208 number is what now?

MS. FERGUSON: Two-thirty -- just a second, 2-31.

MR. RUBENSTEIN: So, firstly, can I ask you as an undertaking to just provide the correction. You have the document and the spreadsheet, just make those corrections so we have it on [audio dropout]?

MS. FERGUSON: Yes.

MR. STEVENS: Yes, we can do that. So that's to provide a corrected version of the spreadsheet at page 42 of the SEC compendium, which is Exhibit K14.3.

MR. RUBENSTEIN: And, based on your -- sorry.

MR. MILLAR: J14.10.

UNDERTAKING J14.10: TO PROVIDE A CORRECTED VERSION OF THE SPREADSHEET AT PAGE 42 OF THE SEC COMPENDIUM, EXHIBIT K14.3.

MR. RUBENSTEIN: And so what based on your correction the information you [audio dropout]. What it shows is that, for the first four years of the rebasing period, 2019 to 2022, am I correct you earned a total of $231 million above the OEB-approved amounts?

MS. FERGUSON: That's correct.

MR. RUBENSTEIN: And, in 2023, we'll see what the [audio dropout].

MS. FERGUSON: It would be some other number when we have the 23 results. The only comment I have in looking at

this is that it is very difficult to interpret what the ROE performance is in each year, given that there was a variety of circumstances in play at the time.

I can say, too, because it is an incentive, we're in a incentive framework, it does allow for the utility to overearn, so to speak, through efficiencies and productivity that are ultimately given back to customers at the end. And, having been in an incentive framework for the preceding five years, that would have built up over time, in theory.

The only other thing I would comment is there is quite a bit of fluctuation in each year because these have weather in it, which does impact your ROE each year, and then there are also fluctuations. I think, from 2020 to 2022, you'd see a variety of impacts from Covid, I mean deferred work because of access issues, attrition, travel stoppage, all that, all those kinds of things.

So I think, if we were really going to isolate what the integration did, we'd probably have to look at the O&M and capital spend that is on the record in evidence and then the integration savings that were generated through that deferred rebasing period.

MR. RUBENSTEIN: Whatever reason between 2019 and 2022, you'd agree with me the company earned above the OEB-approved ROE of $231 million, correct?

MS. FERGUSON: I -- yes, correct.

MR. RUBENSTEIN: And you have a track history of this, so we don't know the amount, but likely you are going to

overearn again in 2023?

MS. FERGUSON: I'm not sure about that at this stage, to be honest.

MR. RUBENSTEIN: And, as I understand, because you've included -- this comes from your earnings sharing analysis -- it includes the O&M-integration costs, correct?

MS. FERGUSON: That would have been incurred in each year? Yes, it would.

MR. RUBENSTEIN: And it includes the depreciation and interest expenses of integration capital additions for those years?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: So...

MS. FERGUSON: Because the protect -- sorry, just one thing I was going to mention. Through the incentive rate framework, the protection for customers is the earnings sharing, so we would load all those synergies in and, should we reach that threshold, we would share.

MR. RUBENSTEIN: And so the company earns significantly above the OEB's approved ROE after consideration of integration costs. Correct?

MS. FERGUSON: Above. I am not sure I would agree with significant, but.

MR. RUBENSTEIN: Okay. Well, you would agree with me then they earned -- the company earned $231 million in earnings above the ROE after consideration of integration costs?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: And that $231 million of overearnings above the OEB-approved amount is still more than the $119 million in the undepreciated integration capital costs you are seeking to add to rate base in 2024. Correct?

MS. FERGUSON: Correct.

MR. RUBENSTEIN: So the company would still earn above the OEB approved amount if the OEB said that those costs could not be put into rate base. Correct?

MS. FERGUSON: Correct.

MR. RUBENSTEIN: And so when the OEB decision in the MAADs decision said that:

> "A five-year deferred rebasing period provides a reasonable opportunity for the Applicant to recover their transition costs."

They were right. You did, correct?

MS. FERGUSON: Sorry, repeat that?

MR. RUBENSTEIN: When the OEB said in the MAADs decision that we were just looking at, that the five-year deferred rebasing period provides a reasonable opportunity for the applicant to recover their transition costs, they were correct. They were right? You did it?

MS. FERGUSON: I think the decision was based on the estimates of integration costs and savings at the time; they were high-level estimates.

I would agree that the achieved ROE was above the allowed during the deferred rebasing period. But if you were to look specifically at the integration activity itself, and generating the savings to pay for the

integration of the two legacy utilities, if you were to do the math, you would see that the integration activity itself did not pay for itself during those five years.

MR. RUBENSTEIN: Well, you didn't rebase; you got to stay out, to defer rebasing. Correct?

MS. FERGUSON: Agreed, yes.

MR. RUBENSTEIN: And the outcome of that deferred rebasing was the company earned more than its -- the gross earnings above its ROE were sufficient to recover its integration costs, including the amounts you are seeking to put into rate base for 2024. Correct?

MS. FERGUSON: Correct.

MR. RUBENSTEIN: All right. If we could go to page 30 of the compendium? This is a list of the projects that you were talking about. And I think you discussed this in your examination.

As I look through them, a lot of them are -- I would say they are IT. They are primarily IT-related projects, the ones that you ended up doing. Correct?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: And you would agree with me that IT capital projects, probably more than any other category of capital projects, have a benefit of a significant tax shield in the first or second year they are put in service. Correct?

MS. DREVENY: I think that is correct. I don't have the numbers with me, but I know they are part of a higher CCA class.

MR. RUBENSTEIN: Yes. And this is because CCA for IT systems is very high, especially relative to the depreciation rates that the utility uses. Correct?

MS. DREVENY: I believe so, yes.

MR. RUBENSTEIN: And so the impact on net income from undertaking these projects is actually going to be a lot less than the amounts that have been depreciated already. Correct?

MS. DREVENY: Sorry, one moment, please. Apologies, Mr. Rubenstein, would you be able to repeat the question?

MR. RUBENSTEIN: Sure, if I can recall what my question was. No, it is okay; I found my place in my notes.

You would agree with me that the impact on net income from undertaking these costs is going to be a lot less than the amounts that have been depreciated already. Correct?

MS. DREVENY: I am not sure that I can speak to that.

MR. RUBENSTEIN: Can you provide by way of undertaking for each year, a net income impact of the integration capital projects?

MS. DREVENY: Yes, we can.

MR. MILLAR: J14.11.

UNDERTAKING J14.11: TO PROVIDE FOR TEACH YEAR A NET INCOME IMPACT OF THE INTEGRATION CAPITAL PROJECTS.

MR. RUBENSTEIN: Now, as I understand the capital update evidence, and you talked about this in your examination-in-chief, there was a decline in integration capital expenditures from the original application.

Correct?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: There was also a decline in the integration capital additions as compared to the application. Correct?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: I am just trying to figure out, based on some of our discussion, what the best page to look at is.

But as I understand one of the impacts from your -- from the discussion we had and the corrections you made -- so maybe we will go to page 49.

As I understand line 13, the difference is -- the difference, if we add up the five year, the correction -- there is no change in integration capital. It is just a change in $24.5 million, from 2021 and 2022. Correct? Net, there is no change in the integration capital dollars?

MS. DREVENY: Right.

MR. RUBENSTEIN: Can I ask you to go, and maybe you could help with this, if we go back to 48, this was the situation we were in before the capital update. I just want to compare the numbers, and this is simply on an in-service-additions basis.

What I see there, in line 7, is a real estate and workplace services number of $72 million? Do you see that?

MS. DREVENY: Yes, I do.

MR. RUBENSTEIN: And $58.8 million for 2022?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And then if we go to integration capital, we have $75.4 million and we have $67.4 million?

MS. DREVENY: Yes.

MR. RUBENSTEIN: Now if we flip over, and we go to the real estate category, that number is now $96.5 million and the $58.8 million; do you see that?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And I understand there is some changing in which year are those numbers. But as you can tell, there is a difference in -- there is a cumulative addition to those numbers over those two years; do I have that right?

MS. DREVENY: Yes, that is correct. There is a shift.

MR. RUBENSTEIN: Then if we do the same thing for the integration capital numbers, there is a reduction of $24.5 million?

MS. DREVENY: That is correct.

MR. RUBENSTEIN: So there was a reallocation of money from the integration capital line, for 2021 and 2022 --

MS. DREVENY: Yes.

MR. RUBENSTEIN: -- to the real estate and workplace services line. Do I have that right?

MS. DREVENY: Yes, you do.

MR. RUBENSTEIN: Can you explain that for me?

MS. DREVENY: Yes, I can. In 2021, there was a purchase of a parcel of land that was intended for the GTA West project. So we had treated that as integration capital under the expectation that the building would be

complete by December 31 of this year.

Earlier this year, there was a revisit of the project, and they determined to defer the timing of it as a reduction -- as a result of changes in scope in the construction cost.

Accordingly, when we were working through the capital updates, since we are no longer treating the GTA West project as integration, we changed the classification of the land purchase, as well.

MR. RUBENSTEIN: I just want to make sure for the purposes of where we are in this proceeding, since we have a settled issue and we have some unsettled issues, the relationship between those two. Because, after the settlement was filed, you refiled these tables. And it shows a movement of $24.5 million from an unsettled area into a settled area. So I just want to make sure I understand what you think has been approved or not approved.

You would agree with me that that $24.5 million that you shifted was not included in the settled numbers that occurred before. Correct?

MS. DREVENY: I would agree with that, yes, because the entire topic of integration capital was unsettled as part of that agreement.

MR. STEVENS: If I may, Mr. Rubenstein, my understanding is that the settled rate base as of the end of 2022 was based on the pre-capital update number. So this is a subsequent view.

MR. RUBENSTEIN: I'm just confirming that we are all on the same page. So now my question is what you're seeking now. Because, now that you've moved $24.5 million out of integration capital to another category, you are not seeking to now include that $24.5 million in rate base?

MR. STEVENS: The settlement of the rate base amount as of the end of 2022 is based on what was filed prior to the capital update, save and except any adjustments; I suppose not including the amounts that had been reflected at that point.

MR. RUBENSTEIN: Let me put it this way --

MR. STEVENS: As integration capital.

MR. RUBENSTEIN: Let me ask you: For the purposes of this Panel having to make a decision, is this $24.5 that reallocated still considered, for the purposes of the Board's approval, integration capital?

MS. DREVENY: No. So that 24.5 would be included in the opening rate base amount for 2024 now.

MR. RUBENSTEIN: I thought that was what we just agreed was not case, Mr. Stevens. Maybe you could take this by way of undertaking --

MS. DREVENY: We may need to take it away. We may need to take it away.

MR. STEVENS: I think, rather than have a three-direction discussion, it is best for us to advise in writing as to whether the $24.5 million that was moved into the real estate and workplace services line is being sought for inclusion in opening rate base in 2024.

MR. RUBENSTEIN: Thank you.

MR. MILLAR: J14.12.

UNDERTAKING J14.12: TO CONFIRM IN WRITING WHETHER THE $24.5 MILLION MOVED INTO THE REAL ESTATE AND WORKPLACE SERVICES LINE IS BEING SOUGHT FOR INCLUSION IN OPENING RATE BASE IN 2024.

MR. RUBENSTEIN: Now, as I understand, and you discussed this, the biggest changes at the two facilities, the GTA East and the GTA West projects, are being deferred from 2023 and -- I think they are both being moved to 2026. Is that correct?

MS. DREVENY: That's correct.

MR. RUBENSTEIN: And, if we go back to page 38 -- sorry, not page 38. Anyway, you don't need to pull up a table. You would agree with me that, and I think you mentioned this, it is no longer considered an integration capital project. Correct?

MS. DREVENY: Yes, I agree.

MR. RUBENSTEIN: So, if the work was to be done and in-serviced by the end of 2023, it was considered an integration project, capital project, which you defined as expenditures required to integrate Enbridge Gas and Union Gas under common system process facilities. But, if it is to be in service beginning in 2024, it is no longer an integration project. Do I have that correct?

MS. DREVENY: That's correct.

MR. RUBENSTEIN: And so it is no longer now considered a project required to integrate Enbridge Gas and Union Gas

under common systems processes and facilities?

MS. DREVENY: It will ultimately result in, I guess, the disposition or enclosure of three other facilities, in order to bring those employees into one common location.

MR. RUBENSTEIN: Sorry. So it was considered integration capital at the end of 2023; now, it's not?

MS. DREVENY: So, going forward past 2024, we no longer use the term "integration capital" for our projects.

MR. RUBENSTEIN: But it still is doing how you defined integration capital. Correct? It is still an expenditure required to integrate Enbridge Gas and Union Gas under common systems processes and, in this case, facilities. Correct?

MS. DREVENY: I guess I would offer that there will be other real estate projects that will be doing similar things, like the New London site. So that will result in the closure of, I believe, three other sites, as well, in order to consolidate those employees into one location.

MR. RUBENSTEIN: Can we turn to page 50 of the compendium. This is from project A to the AMP and this is a project called the Contract Market Harmonization. Do you see that?

MS. DREVENY: Yes.

MR. RUBENSTEIN: And I believe it was -- if we go to page 53, with the updated information, as I understand, this is line 36. It is going to cost about $19.2 million and go into service in 2026?

MS. DREVENY: Yes. I agree with that, based on this

table.

MR. RUBENSTEIN: And, as I understand, it's an -- as I read the information in the project summary, at a high level, it is about changing your systems to deal with rate harmonization of contract customers that are occurring as a result of rate harmonization. Do that have I correct?

MS. FERGUSON: It is, agreed.

MR. RUBENSTEIN: So that would be an expenditure required to integrate Enbridge Gas and Union Gas under common systems, processes, and facilities. Correct?

MS. FERGUSON: Not necessarily. If you are you are doing a rate structure change, it would require an IT project, so we view it as a normal course of business. Even federal carbon charge, anything like that where there is a structure change to the rates embedded in the system to bill customers, it would require a TIS-related project, and that's what this is recognizing.

MR. RUBENSTEIN: If there was no amalgamation, you would agree with me that you would not be harmonizing Enbridge and Union's contract customers' rates classes and rates. Correct?

MS. FERGUSON: Just one second.

[Witness panel confers.]

MS. FERGUSON: Sorry, I can't talk to what other rate changes are being made as part of that project. I recognize that it would harmonize rates between the two, but there may be something else in there that I can't talk to.

MR. RUBENSTEIN: And if it's about harmonizing the rates, you would agree with me that [audio dropout] the expenditure required to integrate Enbridge Gas and Union Gas onto common systems processes and facilities? Correct?

MS. FERGUSON: Yes.

MR. RUBENSTEIN: All right. And if we could go now to --

MS. LINDLEY: Could I just offer an addition to that. It was in response to the MAADs decision that the question was to come back with proposals for how those rates and services would be harmonized, and this is in relationship to the Board's request that we come back with proposals for how the rate and service harmonization would occur.

MR. RUBENSTEIN: Am I correct that rate harmonization, or coming back with a plan at your next rebasing, is actually in the MAADs handbook?

MS. FERGUSON: I'll just confer for one moment.

[Witness panel confers.]

MR. RUBENSTEIN: Maybe in the filing requirements. I don't exactly -- I don't want to spend this all reading the documents, but the idea that you have to bring a rate harmonization proposal was not something new at the time of the MAADs decision for Enbridge. Correct?

MS. LINDLEY: It was a specific directive in the decision.

MR. RUBENSTEIN: Sure. But the idea that you would have to do that was not something that totally took the company by surprise. Correct?

MS. LINDLEY: Oh, I see where you're headed. No, we were we were aware that that had to be done.

MR. RUBENSTEIN: All right. So you were aware that it had to be done. If we could go to page 51. This is a similar general rebasing changes project. Do you see that?

MS. LINDLEY: Yes.

MR. RUBENSTEIN: And I believe the cost, if we flip over to page 53, is about $17.9 million in-service in 2025?

MS. LINDLEY: Yes.

MR. RUBENSTEIN: And, similarly, it is an IT project with respect to harmonizing general service rates. Correct?

MS. FERGUSON: Correct.

MR. RUBENSTEIN: And you would agree with me that's an expenditure required to integrate Enbridge Gas Distribution and Union Gas common systems, processes, and facilities?

MS. FERGUSON: Correct.

MR. RUBENSTEIN: All right. Now, these are the ones that I could identify that meet that definition. Were there other projects beginning in 2024 through the AMP term -- or not the AMP term, sorry -- the USP term through 2028 that would similarly meet that definition. You mentioned the New London facilities. Are there any others?

MS. DREVENY: I think I'd have to look at -- so there is the London facility. We've got the two GTA projects as well as the TIS ones that you've identified. There aren't any other significant ones that come to mind, thinking back to what's in the USP, but that would be subject to check.

But one thing I would add is that, when we're talking about specifically those TIS-related projects, these are not projects that we could have undertaken prior to 24 rebasing, either, just to be clear on that.

MR. RUBENSTEIN: I wasn't saying you were. Can I ask by way of undertaking if you can provide a list of projects, the year they're being undertaken, and the cost for all projects that similarly are expenditures required to integrate Enbridge Gas Distribution under common systems processes and facilities?

MR. STEVENS: Yes, we can provide that undertaking.

MS. LINDLEY: Can I just have a moment to clarify and confer on one item before we move on?

[Witness panel confers.]

MS. DREVENY: Sorry, Mr. Rubenstein. If I can make one clarification, as well, because I did make reference to the London project, and I would like to add that, when we were talking about what would qualify as integration for our real estate projects, one of the caveats was that it would result in the consolidation of facilities that were across the old rate zones that we had, so GTA East and GTA West both would consolidate facilities from each of the prior rate zones versus something like London, where I don't believe that's the case. Sorry, I just want to offer that clarification as to why we deemed those integration versus anything else that's in here.

MR. RUBENSTEIN: Well, in the undertaking, I'm looking for projects that, if they had been done between --

essentially, if they'd been done between 2019 to 2023, they would have shown up in the integration capital line item. That's -- and I am using your definition of capital.

MS. DREVENY: Understood. I just want to clarify that, if we provide the undertaking and you don't see London, you don't ask the question why.

MR. RUBENSTEIN: Okay.

MR. MILLAR: Okay, I think the undertaking is J14.13.

UNDERTAKING J14.13: TO PROVIDE A LIST OF PROJECTS, THE YEAR THEY'RE BEING UNDERTAKEN, AND THE COST FOR ALL PROJECTS THAT SIMILARLY ARE EXPENDITURES REQUIRED TO INTEGRATE ENBRIDGE GAS DISTRIBUTION UNDER COMMON SYSTEMS PROCESSES AND FACILITIES.

MS. DUFF: Okay, I'm going to say something. Sorry. Mr. Rubenstein, as part of this, are you looking for also that this Panel will decide things about cost allocation, how many reference prices, how many gas -- like, many things could be simplified and harmonized as a result of this rebasing proceeding. Are you looking for those kinds of expenditures, too, capital projects? I don't -- I guess what brings in the question, what does integration, what defines an integration project, so I guess that's kind of what I'm -- I'm wondering if that's part of the confusion.

MR. RUBENSTEIN: I'm using their definition, so that's the easiest way I could look at it, is, if it's going to be in that, if we're going to have it in that line item before 2023, then I'd like to know what [audio dropout] using that same definition is.

MS. DUFF: I certainly don't want to complicate it anymore than it is already. Okay, thank you. I'll let the witnesses respond in the best way that they can.

MR. RUBENSTEIN: Just checking my notes, I apologize. Those are my questions. Thank you very much, panel, for your assistance.

MR. MORAN: Thank you, Mr. Rubenstein. Next is Energy Probe. Mr. Ladanyi, are you ready to proceed?

MR. LADANYI: Thank you, Sir. I wonder if the camera can find me. It couldn't find me yesterday. Still no sign of me on the screen.

MR. MORAN: Don't take it personally.

MR. LADANYI: I don't know. I'm getting worried. Anyway.

CROSS-EXAMINATION BY MR. LADANYI:

My name is Tom Ladanyi, and I am a consultant representing Energy Probe. Mr. Millar, can we have an exhibit number for the Energy Probe Panel 12 compendium?

MR. MILLAR: K1.4.

EXHIBIT K14.4: ENERGY PROBE COMPENDIUM FOR PANEL 12.

MR. LADANYI: Thank you. In my cross-examination, I plan to only deal with capital expenditures for the customer information [audio dropout]. First, can we turn to Exhibit 1, tab 9, schedule 1, page 22, paragraph 45. There we go. I guess we don't have the same paragraph 45. Page -- it looks different on mine. So we are Exhibit 1, tab 9, schedule 1, plus attachment, page 22. Keep going down. Perhaps the pages have changed. Yes, possibly this.

Yes, it is now part of paragraph 46. It says right here:

> "The CIS in use prior to amalgamation were nearing end of life and migrating to the UG --" is Union Gas "--Banner Logics CIS to the SAP S4 HANA cloud application mitigated sustainability issues and improved the ability of the system."

Do you see that?

MS. DREVENY: Yes, we do.

MR. LADANYI: So, as I read this, I'm assuming that Enbridge Gas Inc. Distribution customers were already on the SAP system, and Union Gas were on the Banner system; is that right?

MS. DREVENY: That's correct.

MR. LADANYI: Can you turn to Energy Probe compendium, and it is actually a series of interrogatories. The first interrogatory is EB-2021-0149, Exhibit I.CCC.3. Keep going to the next page, please. Yes, that one. Thank you. Go down to the response. In your response, you explain:

> "The first phase of the project involved the upgrade of existing software that was completed in mid-2020."

Now, were there upgrades both to Banner and SAP? Because they were both existing software, or there was no update to Banner.

MS. LINDLEY: No, the upgrade in reference to this is the upgrade of the legacy EGD system for SAP, for the SAP for HANA upgrade.

MR. LADANYI: And during that time -- by the way, how many customers were on the legacy Union Gas system?

MS. LINDLEY: Approximately -- I will just confirm with my notes, just to get the exact number.

MR. LADANYI: It doesn't have to be an accurate number.

MS. LINDLEY: Yes, it is 1.6 million customers that were on the Banner system.

MR. LADANYI: Thank you. And so, while this upgrade was going on on the SAP EGB system, these customers were continuing to be billed on the Banner system; is that right?

MS. LINDLEY: That is correct.

MR. LADANYI: And there were no issues about upgrades or no problem with it? Because I think earlier evidence that we saw just a few minutes ago showed that you already had been contemplating some upgrades of the Banner system, but essentially you stopped those and customers continued to be billed in 2020, at least, with the Banner system; is that right?

MS. LINDLEY: Yes, that's correct. In 2020, those customers were billed on the Banner system, and the reference that you made earlier was with respect to when that system would be approaching end of life. I think you're referring to my opening statement in that regard?

MR. LADANYI: Right. In the response here, you say that this first phase cost was $8.7 million; do you see that in the middle of that paragraph?

MS. LINDLEY: Yes, I do.

MR. LADANYI: So, at that time, during that proceeding, I was trying to differentiate between projects you would have done anyway and integration projects, and, at that time, my impression was that $8.7 million on Phase I was actually not part of integration. How did you account for $8.7 million?

MS. LINDLEY: Just confer to make sure I respond correctly.

MS. DREVENY: Sorry, Mr. Ladanyi. So the project that we are talking about here, the HANA upgrade, this is a project that was initially disallowed in the decision for 2019 rates. It was determined that it was premature, in light of the integration activities that the company was to undertake as a result of amalgamation.

So, based on that decision of it being disallowed, we treated the project costs as integration.

MR. LADANYI: Okay, so could you turn to Exhibit 2, tab 5 schedule 3, page 13, table 6?

So if I understand you correctly, that $8.7 million is in the 2020 column under "Integration capital", inside that $39.8 million. Do I have that right, line 13?

MS. LINDLEY: Yes. I believe it would be included there.

MR. LADANYI: Can we go back to CCC 3 that we were just at? In the middle of the paragraph, there is a sentence that says:

"Over the course of 2020, the integration work

was also carried out on detailed planning, system design and system build. Costs for the integration portion in 2020 amounted to about $5.6 million, while project costs amounted to $14.3 million. Additional staffing costs for CIS project support were $1.2 million, bringing the total 2020 CIS cost to $15.4 million."

Do you see that?

MS. DREVENY: Yes, I do.

MR. LADANYI: So if I understand those numbers correctly, in 2020, of the $15.4 million expenditures on CIS, $5.6 million was recorded in Enbridge accounts as integration costs, and the remaining $9.8 million is technology services? Do I have that right?

MS. DREVENY: No, I don't believe that's correct. I think it's a function of how the activities related to the projects are described, but the project in total was captured as integration.

MR. LADANYI: Well, it just says here -- you know, I look at the sentence and I have difficulty understanding what you are saying, because it says right here:

"Costs for the integration portion in 2020 amounted to $5.6 million."

MS. DREVENY: No, understood. I agree with what you see here, Mr. Ladanyi. I guess I apologize; I am not the one who authored this response, but I can speak to the projects themselves, and I can confirm that we did treat that project as integration capital.

MR. LADANYI: So this probably was -- this answer is not correct?

MS. DREVENY: I am just saying I didn't author it.

MS. FERGUSON: Probably it could have been worded a little better, but the $8.7 million was integration capital.

MR. LADANYI: So, as I understand the evidence, after amalgamation, it was decided that the new amalgamated company, Enbridge Gas Inc., would use SAP CIS and retire Banner; is that right?

MS. LINDLEY: Yes, that's correct.

MR. LADANYI: So when was Banner retired?

MS. LINDLEY: Banner was retired in 2021, when the replacement was -- when the Union Gas customers were migrated.

MR. LADANYI: So all the customers were migrated. The retirement, was there any charges made to integration capital for the cost of retirement of Banner? Or there were not?

MS. LINDLEY: You know, I will describe maybe a little bit about how that system worked. That system was a software service. Software is a service, so we paid for that system, versus as an asset. So when we received the benefits, when we stopped paying for that service for Banner.

MR. LADANYI: So it was like a monthly lease or something?

MS. LINDLEY: It was like a contract. Yes.

MR. LADANYI: Okay. Can we go back to the Energy Probe compendium and to Energy Probe interrogatories; this is EB-2021-0149, Exhibit I.EP.12.

And that interrogatory, possibly because I misunderstood your evidence, I asked the following question:

> "Please break out the line, CIS Phase I (HANA upgrade) shown in table 1, paragraph 7, into two separate lines with appropriate amounts shown in each column."

Unfortunately, I don't have that in my compendium and that is referring to exhibit H, page 3, paragraph 7 of your evidence in that case. And exhibit H by the way in that case was the evidence update. So I think I sent an email earlier, to Ms. Innis, about this. And I am hoping that I can bring it up.

MR. STEVENS: Mr. Ladanyi, is there something that you would like the witnesses to see? I am not sure whether they would have had the opportunity to know that you had sent the document along.

MR. LADANYI: No. I just -- like, because I am referring to that particular thing in the table, and I thought that would be useful to have a quick look at it. I mean, there is nothing particularly strange about that table. But if we -- they don't want to look at it, that's -- this is not a surprise; I sent this at lunchtime. So it is a --

MR. STEVENS: We have had a few things going on, Mr.

Ladanyi.

MR. LADANYI: Oh, yes. Well.

MR. STEVENS: I am reading the looks on the faces of the witnesses, and I think this is new to them. So if you would like to ask questions about this, I think they would need a moment to read it.

MR. LADANYI: No, I won't ask, I won't ask any questions. That was only because I am referring to it.

MR. STEVENS: I am sorry, if you are going to refer to it then --

MR. LADANYI: Not to --

MR. STEVENS: ...I am sorry --

MR. LADANYI: No, no -- sorry.

MR. STEVENS: -- the witnesses need a moment to read it.

MR. LADANYI: Well, if you like, I really was -- I am referring to in my interrogatory response, a question that I had asked before. And I thought that one might make it easier for them to understand what the question was. But if they don't want to refer to it, I am fine with that, too.

MR. STEVENS: Perhaps they can have a minute to read through it, and if -- I can't speak for them, whether they would like to refer to it or not.

So to be clear, Mr. Ladanyi, is it important for the witnesses to read both the interrogatory response in your compendium as well as the tax variance deferral account evidence that's on the screen?

MR. LADANYI: I think it might help them, but I had previously sent my compendium out and I thought that, perhaps, when I sent it out several days ago, they might check all the references and then the interrogatory, on their own. But, to assist the witnesses, I mentioned it now, and I sent it at lunchtime because I was concerned that they might not have looked it up.

MR. STEVENS: And if I may have a moment, please? I believe the witnesses are ready. It might be helpful, Mr. Ladanyi, if you could repeat the question that you have.

MR. LADANYI: Please. Yes, first on the screen, I we are showing paragraph 1. Can you scroll down to paragraph 7, please? Here is the table. Thank you.

Now, in my interrogatory question, which was on supplementary evidence that was filed in 0149, I asked, please break out the line, CIS Phase I HANA upgrade you can see there on the table, in paragraph 7, into two separate lines with appropriate amounts shown in each column, upgrade of existing software and integration work, detailed planning system design, and system build.

And you didn't actually do that. And I'm not going to read the response, but I'm wondering whether you can still break out the line, or whether it would be useful, or are you now claiming that, really, there is no difference between an upgrade of existing software and integration work, that it's all the same?

MS. DREVENY: I think, Mr. Ladanyi, going back to my previous comment, again, this was a project that was

disallowed as part of 2019 rates. So we did treat the entire project as integration. It built off the customer experience project and enabled the deployment of that roadmap, all of which was foundational to the CIS project. And I believe that, as a result of implementing all of this, there were benefits to both EGD and Union through integration and the use of the system.

MR. LADANYI: So if I were to ask to you to have an undertaking that will actually break these numbers out, could you do it?

[Witness panel confers.]

MR. STEVENS: To be clear, Mr. Ladanyi, are you asking for the numbers in the table at paragraph 7 of EB-2021-0149, Exhibit H, to be broken out between integration costs and non-integration costs?

MR. LADANYI: Right.

MS. DREVENY: I guess I would go back to my previous statement that we treated it all as integration.

MR. LADANYI: All right. So I misunderstood your evidence, in that case.

By the way, when you're looking at this table, you can see the CCA classes for different assets, and we'll get into that in a minute, but you'll see that the CIS are in class 50 and the CCA rate is 55 percent. Do you see that?

MS. DREVENY: I do.

MR. LADANYI: Thank you. So, during the deferred rebasing term which is just ending, the costs of completed capital projects were recorded on your books in planned

accounts as each project was placed in service, and you started recording depreciation expense and accumulated depreciation, and, for tax purposes, you started claiming capital cost allowance. And the annual revenue requirement was used in the calculation of earnings sharing at rebasing, which is the current proceeding; you are requesting OEB approval to include the net book value in rate base.

I'm talking about non-integration capital, everything else that you actually did during that deferred rebasing term.

MS. DREVENY: Yes.

MR. LADANYI: But you did not do that for integration capital. Is that right?

MS. DREVENY: I'm sorry, I'm not clear on the question.

MR. LADANYI: All right. Well, let me put it this way: Why did you treat integration capital differently?

MS. DREVENY: In regard to?

MR. LADANYI: Well, for example, not using it in the calculation for earnings sharing? I think you discussed this with Mr. Rubenstein.

MS. DREVENY: I'm sorry, I think we confirmed that it was included for purposes of earnings sharing.

MS. FERGUSON: It was.

MR. LADANYI: Integration capital? No, it was not.

MS. FERGUSON: For the purposes of earnings sharing, we included all the synergies and the associated cost of

integration, for earnings sharing through the deferred rebasing period.

MR. LADANYI: But I'm not -- when you are talking about synergies, are you talking about O&M and so on? What are you talking about now?

MS. FERGUSON: During the deferred rebasing period in the ESM filings in each year, we would have also included the integration-related costs and synergies in each year.

MR. LADANYI: But not --

MS. FERGUSON: To determine --

MR. LADANYI: Sorry, I understand that, but not the capital projects. You say you included the savings due to O&M, but not the cost of depreciation and CCA, and so on. You didn't include that.

MS. FERGUSON: Yes, I think we did. We did.

MR. STEVENS: If I may, Mr. Ladanyi, I think the reference may have been to the fact that Enbridge Gas did not include the capital costs of integration projects in the determination of the ICM threshold.

MS. FERGUSON: Right.

MR. LADANYI: All right. Okay, well this is actually interesting, because my understanding is completely different. So can we turn to EB-2022-0200, Exhibit I.2.5-CCC-45. And this interrogatory asks for various variance explanations. Let's go to page 3, please. If you go down a little bit lower to integration capital. Yes.

There is the explanation and it says:

"Integration capital is higher by $5.7 million

due to a CIS project reclassified to integration capital and higher spend for HANA and SCADA."

So this is speaking of -- these are variance explanations for 2019. Could you explain to me why some CIS costs were reclassified?

MS. DREVENY: Sorry, if I can just have a moment to look at the question in this IR to see what the comparison is. I think I have this in my list.

This is a variance analysis of, I think, what we had for capital budgets versus what the actuals were. Yes, the actuals versus forecast.

So, I think what may have been intended with that explanation is that, perhaps, when the budget was initially set, it was before that decision was received, and so we initially had the HANA project likely under the TIS category and then we reclassified it to integration capital. I think the same would have held true for customer experience.

The budget would have been put together prior to the decision. I think it's a function of timing, Mr. Ladanyi. It's a function of timing.

MR. LADANYI: Timing? You think it's only timing?

MS. DREVENY: Timing on the classification of the project from a base capital project to an integration capital project. That's what I'm meaning.

MR. LADANYI: So is this your normal procedure? You would look at all the capital expenditures and say, okay, this one goes in this basket, this one goes into the

integration basket? Or is there some kind of grey area between them and you have to kind of make some judgment about what is integration, what is not integration?

MS. DREVENY: No, but I believe, based on the initial application -- I'm going back to my memory, now -- but the initial application for 2019 rates would have had the HANA and customer experience projects included in base capital. They were subsequently disallowed or denied for inclusion for ICM purposes, and it is at that point that we reclassified them to integration capital.

MR. LADANYI: So, in the case of CIS, the expenditures were subject to accelerated CCA. If they were treated as non-integration capital, would the benefits of accelerated CCA have been shared with rate-payers in earnings sharing during the deferred rebasing period?

MS. FERGUSON: The benefits of accelerated CCA are actually sitting in the deferral account.

MR. LADANYI: Right now, but that was -- I'm talking about what your thinking was in 2020.

MS. FERGUSON: In 2020, I believe the company's position at that time was that, given that the integration capital was not being recovered at that point during the deferred rebasing period that the accelerated CCA associated with it, it would not be given back at that time, either.

MR. LADANYI: So it would be essentially credited to the shareholders?

MS. FERGUSON: Yes. It is a timing difference, but

yes.

MR. LADANYI: So how did your thinking change with the EB-2021-0149 decision?

MS. FERGUSON: I believe in that decision -- I haven't got it in front of me at the moment, but I believe in that decision we were asked by the Board to include it in the deferral account.

MR. LADANYI: So please turn to Exhibit 9, tab 2, schedule 1, attachment 1, page 1. There we are. Thank you. So please explain what is shown in line 13.

MS. DREVENY: My apologies, Mr. Ladanyi. I'm not sure any of us are able to answer this, but I believe the deferrals panel which is coming up on Tuesday may be able to address your question.

MR. LADANYI: I'm actually not scheduled to ask them. I thought you would ask them, but I might have to ask for some time to ask them a question. But can I suggest to you that these are revenue requirement amounts that include the return on rate base and accelerated CCA? Is that what it is?

MS. DREVENY: Again, apologies, I'm not familiar with this schedule. I can't speak to it.

MR. LADANYI: So, if I understand what you are asking in this proceeding is you are asking to put into rate base the $119 million that was discussed earlier and, in return, you are going to credit these amounts back to ratepayers; it's kind of like a quid pro quo, and, if the Board does not allow you to put $119 million net book value into rate

base, you are not going to give this money back to ratepayers. This is my understanding, but you can tell me what exactly it is that you are asking for.

MS. FERGUSON: Given that these are the accelerated CCA benefits tied to integration capital, I think, wherever integration capital goes, this goes with it.

MR. LADANYI: I'm interested to know what you will do if the OEB turns down your request. I'm specifically interested in accounting entries that you would have to make regarding the $119 million and these amounts.

MS. FERGUSON: What specifically --

MR. LADANYI: Accounting entries. I mean would there be -- let's -- I think the $119 million and these amounts are on the company's books, and the company being Enbridge Inc. --

MS. FERGUSON: Mm-hmm?

MR. LADANYI: -- and Gas Inc.

MS. FERGUSON: Oh, and Gas Inc., yes.

MR. LADANYI: But they are not in the rate base. They may -- so, if the Board says, yes, $119 million goes into rate base and this is given to the ratepayers, and what happens if the Board says, no? The $119 million goes where?

MS. FERGUSON: It would have to be written off.

MR. LADANYI: It would be -- excuse me?

MS. FERGUSON: It would have to be written off.

MR. LADANYI: "Written off," okay.

MS. FERGUSON: It is no longer an asset.

MR. LADANYI: So it would be written off against, let's say, Enbridge Gas Inc. earnings?

MS. FERGUSON: Yes.

MR. LADANYI: Okay. These are all my questions. Thank you, panel, Commissioners, and the court reporter.

MR. MORAN: Thank you, Mr. Ladanyi. Left on the schedule is FRPO, which I think you've got 15 minutes, if I understand it?

MR. QUINN: I believe so. I might be a little bit less with Mr. Rubenstein's help.

MR. MORAN: At this time of day, that would be great. And then all that is left would be some Panel questions to the extent we have any. Madam Reporter, are you okay to continue, to finish out this panel so that they don't hold over until next week?

Let me confer with my fellow Commissioners here see if they have any questions. All right. It looks like there are no panel questions. I'm assuming, Mr. Stevens, you probably won't have a lot of re-direct?

MR. STEVENS: Currently, I have one question. I recognize this is a great imposition on everybody. I will note that two out of our three witnesses are in Chatham and so would be coming back for a few minutes on Monday or Tuesday.

MR. MORAN: Right. So, Madam Court Reporter, can we hold on for 10 minutes based on Mr. Quinn's assurance that he doesn't need his full 15 and it looks like we will probably be ready to finish at that point? Thank you.

MR. QUINN: With the help of the witnesses, we can work towards that end. Thank you, and good afternoon, Commissioners and the Enbridge witness panel. I'm Dwayne Quinn on behalf of FRPO. I submitted a compendium last evening, and I would like to mark it as on a exhibit, although I may only use the second half.

MR. MILLAR: K14.5.

EXHIBIT K14.5: FRPO COMPENDIUM FOR PANEL 12.

CROSS-EXAMINATION BY MR. QUINN:

MR. QUINN: I'll let Ms. Monforton know that I am going to refer to the first part in evidence because of the different pagination and paragraphs associated with some evidence. So I'd like to turn up the most recent version of Exhibit 1, tab 9, schedule 1, please. If we could start at page 5, thank you.

So, as again, I say Mr. Rubenstein did a great job in covering the high-level stuff. I want clarification on a couple of matters in here. Table 2 is integration savings as achieved by category. The total is $86 million. Are these numbers in the table net of any operating costs that were used to achieve these savings?

MS. FERGUSON: No, they are not.

MR. QUINN: So these are the gross and net savings?

MS. FERGUSON: Those are the gross savings. Any of the costs associated with generating those savings are in table 5.

MR. QUINN: Okay. Well, let's move to table 5 because that was my next -- it's on page 17, and, knowing Ms.

Monforton, she'll get there before I do. Thank you. So, this is where your costs are now. You've got O&M integration costs and integration severance included in this table, for a grand total of $280 million, if that's correct?

MS. FERGUSON: Yes, it is.

MR. QUINN: Okay. Now, I'm working towards understanding this, and I think the last table is the capital table, which is on page 21. I was trying to put PCs together to reconcile back to your opening statement. So this is the integration capital now in this table, so it reflects all the capital and with the appropriate -- I see all these updates. They reconcile with the numbers that Mr. Rubenstein was going over with you previously?

MS. DREVENY: Yes.

MR. QUINN: Okay, thank you. So, Ms. Ferguson, in your opening remarks, you referred to -- and this isn't a direct quote, so please correct me, but you said something about the company investing $350 million in the integration. Can you -- first off, is that the gist of what you said in your opening statement?

MS. FERGUSON: Yes, that's what I said.

MR. QUINN: How did you obtain that number? When I put the pieces together, I struggled to get there.

MS. FERGUSON: So, if you look at table 6, we just -- we were just there. On page 17, the 280 million -- oh, sorry, table 5. She's much smarter than I am.

[Laughter.]

Table 5, the $280 million you just referred to were during the deferred rebasing period were the O&M-related costs that the company incurred to integrate the two legacy companies. If we added to that the depreciation, so --

MR. QUINN: Okay.

MS. FERGUSON: -- effectively your expense on the capital, it is that $70 million that's in attachment 1, page 4.

MR. QUINN: Okay. That's the plug that goes into the 350. Okay. That, now I understand. I was just trying to reconcile those numbers, so thank you for that clarification. I just want to make sure we are on the same page before we get to submissions. So, just moving down, then, in paragraph 45 at the bottom -- oh, sorry. This is -- we were on -- let's just move straight forward to page 22, which is the page following the capital table. If you can hold right there, Ms. Monforton, thank you. I read here:

> "The decision to upgrade and migrate to existing systems provided significant benefits to customers, as implementing new systems would have been more expensive solutions."

So I want to just quickly look at the benefit side of what we understand, on at least in terms of customer care or customer -- yes, the customer care category.

If we can turn then back to my compendium? If we could start on page 21?

And I am not going to, given the hour and given the

respect for the court reporter, especially, I am not going to you through a lot of detail. But you are familiar with the challenges that the company has experienced in terms of meter reading and billing over the last few years?

MS. FERGUSON: Yes, we are aware.

MR. QUINN: So, in 2021, and I think I will just even use this one here, and I won't even go through the other couple.

But what we have is a percentage of meters, if we can flip to -- I am sorry, your pagination is different than mine. Sorry, Ms. Monforton, that's -- I didn't clarify: page 21 at the bottom of my pages, is what I was referring to.

So we had asked about the percentage of meters with no read for four, six, nine or 12 months. And this was in our -- in the deferrals proceeding of 2022.

And on the next page, if we can flip to the top of the next page, Enbridge provided a table which shows the percentage of customers that had consecutive estimates for each of those periods that we had asked for. And I skipped over this, trying to be quick. But you are aware that the metric for performance of the Board as set for those categories is 0.5 percent?

MS. FERGUSON: Yes, we are aware.

MR. QUINN: Okay. There are other examples I was going to go through, with more time. I am going to just skip to the reality is, as ratepayer representatives were trying to work with the company on getting commitments to

improve the service, we were actually encouraged that the Board had taken this issue.

And if we can go to page 27 of our compendium, what we see is the -- sorry, 27, at the bottom of the page, I am sorry -- the assurance of voluntary compliance. It was entered into within a couple of weeks of the interrogatory responses.

My concern when I see this is, at that point, we have anticipated we are going to see improved performance. And obviously this compliance came with some expectations for that performance improvement.

But is it not true that the company has subsequently applied to have relief from criteria established by the Board in terms of customer meter reading and billing?

MR. STEVENS: I see that the witnesses are not particularly engaged in that particular item, Mr. Quinn. But yes, it is true that Enbridge Gas has, within this proceeding, sought both a temporary exemption from certain items as well as a request for the OEB to reconsider the appropriate SQR level for certain items on a go-forward basis.

MR. QUINN: Okay. And I think that is in the records; Staff had some IRs, and I am sorry if I am treading on your ground, Mr. Millar, but Staff had had some IRs earlier in the proceeding, so it is on the record.

But would you agree with me that ratepayer representatives are struggling with seeing these significant customer benefits that the company stated were

underlying its spending on these programs?

MR. STEVENS: To be fair, I know it is late in the day, but I don't know that we can comment on what ratepayer representatives are seeing --

MR. QUINN: Okay...

MR. STEVENS: -- or rather, what ratepayer representatives are struggling with. I mean, if your question is as to the company's continued improvement under these metrics, it may be that Ms. Ferguson is able to speak to it.

MS. FERGUSON: Sorry, repeat the question?

MR. QUINN: I am going to withdraw the question at this point. I understand that Mr. Stevens is trying to provide the best support to the witness panel.

Our challenge is we see what we see, and the numbers will speak for themselves. So I will say those are my questions, Mr. Chair.

MR. MORAN: Thank you, Mr. Quinn. Mr. Stevens, you indicated you had one topic?

MR. STEVENS: I have but one question.

MR. MORAN: One question.

MR. STEVENS: Thank you, for everybody's indulgence. Thank you, Madam Reporter. This is much appreciated.

RE-EXAMINATION BY MR. STEVENS:

Witnesses, in your discussion with Mr. Rubenstein, there was discussion around and you were, I think referring to different treatment of what might be categorized as integration projects in the years up to 2024 and after

2024.

And I don't think I heard you talk about this, so I was hoping you could just talk briefly about why the distinction of before 2024 and after 2024 is important?

MS. FERGUSON: I can touch on that. The distinction between the deferred rebasing period up to 2024 and after, was given that the MAADs framework and the MAADs decision allowed us to have the five years to integrate. And that's what we did; at that point we integrated. We targeted all the integration-related activities that we could during that five-year term to effectively bring the two utilities together.

We incurred costs, O&M and capital costs associated with it. Given the context of where we are today, had the company -- to be fair, had the company realized that that investment would go unrecovered, I am not so sure we would have made the same decision.

I think there was an anticipation of this regulatory compact that benefits follow costs, and there would be a reasonable assurance or expectation of recovery.

Beyond that, 2024 and on is viewed from the company's perspective as business as usual. There are systems where we are still using different -- situations where we are still using different systems. But at this point, we are not fast-tracking and trying to bring the two together. We are waiting for end of life for that solution and, at that point, we will bring the two together.

So we view that more as a business as usual, normal

course of business activity.

MR. STEVENS: Thank you.

MR. MORAN: Thank you, Mr. Stevens.

So with that, I want to thank the panel for their assistance on this matter, and you are excused from this panel.

We will adjourn until, I guess, Tuesday at 9:30, fresh from the long weekend. We will dive into variance accounts, and we will see you then. Have a good long weekend.

--- Whereupon the hearing adjourned at 4:44 p.m.

TAB C

B. Rate Base (Exhibit 2)

Rate Base

198. Issue 6 – Is the 2024 proposed rate base appropriate?

Consequences Of Settlement Proposal

199. The parties resolved most aspects of proposed 2024 rate base in the Settlement Proposal. Essentially, the rate base additions and value up to the end of 2022 is resolved, based on the Enbridge Gas filing at the time of the Settlement Proposal (before the Capital Update, filed June 16, 2023).[228] The one exception is that there is no resolution about whether integration capital costs should be included in opening rate base for 2024. There is also no resolution as to capital additions to rate base for 2023 and 2024.

200. The details are set out in the Settlement Proposal, at Issue 6:

> Parties accept the methodology presented by Enbridge Gas for the determination of working capital and rate base. Final forecast 2024 working capital amounts and rate base cannot be determined until other unresolved issues are determined.
>
> No items related to 2024 capital budget and associated rate base are settled. There is a partial settlement on the 2024 opening rate base.
>
> The only unsettled aspects related to 2024 opening rate base are: (i) the inclusion of Enbridge Gas's integration capital costs from the deferred rebasing term in opening rate base for 2024; and (ii) additions to 2024 opening rate base resulting from 2023 changes.
>
> Parties accept Enbridge Gas's rate base up to and including 2022, subject to, (i) agreement to remove the forecast residual net book values of the overspend on the WAMS project and 25% of the overspend on the Enbridge Gas Distribution GTA Reinforcement Project from opening rate base for 2024; and (ii) the appropriateness of including integration capital costs in rate base. Enbridge Gas estimates that the impact of removing the forecast residual net book values of the WAMS overspend and 25% of the GTA Project overspend from 2024 opening rate base is approximately $41 million, comprised of $6 million related to the WAMS project and $35 million related to the GTA Reinforcement Project.

[228] See Settlement Proposal, page 25 (Issue 6) – filed at Exhibit O1, Tab1, Schedule 1.

> Parties agree that Enbridge Gas will not include any amounts in 2024 opening rate base for the Dawn to Corunna project (approved in EB-2022-0086). Instead, the determination of the allowed recovery for, and method for recovery of, Dawn to Corunna project costs will be made in Phase 2 of this proceeding, including the issue of how much (if any) of the value of the project should be allocated to Enbridge Gas's non-utility operations. Parties agree that the impacts of the OEB's decision on the rate base treatment of the Dawn to Corunna project will be recoverable from customers as if it were included in the 2024 rate base and when final rates for 2024 are set following Phase 2 of this proceeding.
>
> …
>
> There is no agreement on appropriate treatment of the Natural Gas Vehicles (NGV) Program (Issue 34), and if different treatment of the NGV Program is ordered than proposed by Enbridge Gas, then corresponding changes may be necessary to 2024 opening rate base.[229]

201. The result is that there are four unsettled aspects to this issue, each of which are addressed in this Argument:
    a) Inclusion of integration capital in 2024 rate base;
    b) 2024 opening rate base amounts resulting from 2023 rate base additions;
    c) 2024 rate base amounts resulting from 2024 rate base additions; and
    d) Consequential changes to 2024 rate base from other determinations.

Outstanding Approvals Required

202. Enbridge Gas requests approval of its as-filed 2024 proposed rate base, including the impacts of the Capital Update, subject to three adjustments.[230] The three differences between what is filed in the Capital Update and what is requested for approval in Phase 1 of this proceeding are:
    a) Changes are made to 2024 opening rate base to reflect the agreement in the Settlement Proposal to remove approximately $41 million related to WAMS and GTA Project overspend;[231]
    b) The rate base value of the Dawn to Corunna project has been removed (on an interim basis), as this is being determined in Phase 2 of the proceeding

[229] Settlement Proposal, Issue 6, pages 24-25 – filed at Exhibit O1, Tab 1, Schedule 1.
[230] Exhibit 2, Tab 1, Schedule 1, pages 5-6.
[231] Settlement Proposal, Issue 6, pages 24-25 – filed at Exhibit O1, Tab 1, Schedule 1.

(after which time all or some of the value will be added back into 2024 rate base, depending on the OEB's determination); and

c) The land purchased for the GTA West REWS project ($24.5 million) is removed from 2024 rate base for rate making purposes.[232]

203. The Company notes that the basis for the Settlement Proposal was the property, plant and equipment values included in the 2022 Estimate rate base (evidence dated March 8, 2023), not the 2022 Actual rate base property, plant and equipment values that underpinned the Capital Update (evidence dated June 16, 2023, and July 6, 2023). This is noted in footnote 5, on page 24 of the Settlement Proposal. This footnote was included in the Settlement Proposal because the 2022 Estimate net property, plant and equipment rate base value, calculated on an average of monthly averages basis, was $20.3 million lower than the 2022 Actual net property, plant and equipment rate base value that underpinned the Capital Update.[233]

204. While the Settlement Proposal was based on the 2022 Estimate rate base values, the Company believes the 2022 Actual rate base values that underpinned the Capital Update should serve as the appropriate foundation for determining the 2024 rate base value (i.e. for which to add 2023 and 2024 capital activity), as they reflect actual 2022 capital activity (i.e. additions, retirements). Importantly, the 2022 Actual rate base values result in a lower 2022 ending net property, plant and equipment balance to be carried forward into 2023 and 2024, thus lowering the rate base values in each of those years, which benefits customers.

205. The ending 2022 Actual net property, plant and equipment balance of $14,895.0 million ($23,402.3 million gross plant less $8,507.3 accumulated depreciation) is $13.3 million lower than the 2022 Estimate net property, plant and equipment

[232] Exhibit J14.13.
[233] As seen at row 3 of Table 11 in the Capital Update evidence at Exhibit 2, Tab 5, Schedule 4, dated June 16, 2023.

balance of $14,908.3 million ($23,535.2 million gross plant less $8,626.9 accumulated depreciation).[234]

206. While the 2022 Actual net property, plant and equipment rate base value, calculated on an average of monthly averages basis is higher than the corresponding 2022 Estimate net property, plant and equipment rate base value, due to the timing of capital activity that occurred in 2022 actuals as compared to the activity forecast in the 2022 Estimate, it is the 2022 ending net property, plant and equipment balance carried forward that will impact 2023 and 2024 rate base values. As such, despite the higher average of monthly averages balance, the Company believes the 2022 Actual net property, plant and equipment balance reflected in the Capital Update, which is lower than the ending 2022 Estimate net property, plant, and equipment balance, is the appropriate foundation for determining 2023 and 2024 rate base values.

Revenue Requirement Implications for 2024

207. If Enbridge Gas's proposed 2024 rate base is approved as requested (including the Dawn to Corunna project), the revenue requirement will be similar to that filed as part of the Capital Update, filed June 16, 2023, but amended to reflect the implications of the Settlement Proposal.

208. If the OEB determines that amounts proposed for inclusion in 2024 rate base should be adjusted, that will impact the revenue requirement. However, the impact of such adjustments will depend on the magnitude of the adjustment and the timing of when

[234] The lower ending net property, plant and equipment balance contained in 2022 Actual rate base can be seen by comparing the ending 2022 gross property, plant and equipment and accumulated depreciation balances in Tables 1 (line 6, column d) and 2 (row 7, column d) of Exhibit 2, Tab 2, Schedule 1, filed July 6, 2023, which was filed in support of the Capital Update, versus the same tables and evidence, dated March 8, 2023, that supported the 2022 Estimate. It should also be noted that comparing the average of monthly averages gross property, plant and equipment and accumulated depreciation values, contained in row 7, column d) of Table 1 and row 8, column d) of Table 2, also illustrates the higher 2022 Actual net property, plant and equipment rate base value of $20.3 million noted in the prior paragraph.

the relevant item was forecast to be added to rate base. An item that was forecast to be added to rate base during the course of 2024 will only be partially effective from a cost of capital and depreciation perspective, and could result in other offsetting revenue requirement implications (such as to revenues and taxes), meaning that the rate base impact of its removal may be modest, and or may even increase revenue requirement depending on the size and timing of the offsetting items.

Evidence in Support

209. Enbridge Gas has filed detailed evidence about its rate base and capital budget. This evidence is found throughout Exhibit 2. Enbridge Gas has answered interrogatories about this evidence[235], and provided testimony at the Technical Conference[236], and answered undertakings[237] arising from that testimony and filed one ADR response.[238]

210. Enbridge Gas witnesses provided testimony about the outstanding aspects of this issue through three witness panels. The Customer Attachments witnesses (Panel 10) spoke about 2023 and 2024 customer additions capital.[239] The Capital Budget witnesses (Panel 11) spoke about the 2023 and 2024 capital budgets.[240] The Integration Capital witnesses (Panel 12) spoke about the integration capital amounts sought for inclusion in 2024 rate base.[241]

211. There is no intervenor evidence on this issue, except to the extent that intervenor evidence touches on the implications of the 2024 capital budget.

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[235] Exhibit I.2.
[236] 4 TC Tr.200-217, 5 TC Tr.5-203 and 6 TC Tr.1-48.
[237] Exhibits JT4.22-4.25, JT5.1-5.47 and JT6.1-6.5.
[238] Exhibit I.ADR.50.
[239] 10 Tr.76-205 and 11 Tr.2-90.
[240] 11 Tr.91-203, 12 Tr.1-118, 13 Tr.1-192 and 14 Tr.1-142.
[241] 14 Tr.143-208.

Overview

212. Enbridge Gas submits that no adjustments are required to the 2024 opening rate base, other than as already agreed through the Settlement Proposal.

213. There are only two aspects of the 2024 opening rate base that are unresolved – inclusion of integration capital amounts and 2023 rate base additions.[242]

214. Enbridge Gas submits that it is appropriate to include integration capital amounts in 2024 rate base. The total undepreciated integration capital amounts that Enbridge Gas proposes to include in 2024 rate base is $119 million.[243] Under the OEB's general principle of "benefits follow costs", it is appropriate that customers pay the ongoing costs of technology assets, in the form of depreciation, that will continue to benefit them after rebasing.

215. In its rebasing O&M cost forecasts, the Company has credited customers with substantial sustained operational savings from integration (of $86 million) that will benefit customers every year.[244] The capital projects that underlie the integration capital amounts will continue to benefit customers also. These capital projects are largely initiatives that needed to be completed by the EGD and/or Union in the absence of amalgamation. They are called "integration" because they involve combining activities or processes of the EGD and Union during the deferred rebasing term.[245] However, the projects fulfil functions that must be undertaken by any utility, whether it is stand-alone (like EGD and Union) or amalgamated (like Enbridge Gas).

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[242] Note that the rate base and revenue requirement implications of the Dawn to Corunna Project are being addressed in Phase 2.
[243] 14 Tr.155.
[244] See Exhibit 1, Tab 9, Schedule 1, page 5.
[245] Ibid, page 3.

216. While the OEB's MAADs policy indicates a general expectation that utilities will self-fund integration activities, it does not specifically speak to how long-lived capital asset costs should be treated. Additionally, the MAADs policy indicates that a utility may have a deferred rebasing term of up to ten years, in order to recover its costs of integration. Enbridge Gas only received a five-year deferred rebasing term. The Company could have decided to not pursue technology enhancements as the deferred rebasing term would have been insufficient to recover the depreciation through synergies given the life of the underlying assets. However, the Company recognized that this would have been inconsistent with the MAADs policy, which is intended to incent the delivery of benefits and would not have benefited customers, nor realized the value of integrating the utility.

217. Enbridge Gas recognized that the intent of the MAADs framework was to deliver efficiencies. By integrating technology platforms, Enbridge Gas was able to reduce costs, increase efficiency and as a result, deliver value to customers through the deferred rebasing term and beyond. Enbridge Gas believed that the regulatory principle of benefits follow costs would be maintained at rebasing and made necessary investments quickly, in the expectation that while it would shoulder the associated costs during the shorter deferred rebasing term, the remaining undepreciated capital costs would be paid by customers after rebasing.[246]

218. With one exception related to customer additions, Enbridge Gas is not aware of specific concerns from other parties about the proposed 2023 rate base additions included in 2024 rate base.[247]

219. The Company expects that parties may question whether the full amount of 2023 rate base additions related to customer additions should be included in 2024 rate

[246] Exhibit J14.13.
[247] Again, note that the treatment of the Dawn to Corunna Project is a Phase 2 issue.

base because of the fact that the overall profitability index (PI) of the 2023 customer additions portfolio is less than 1.0.

220. Enbridge Gas submits that it is appropriate for all rate base amounts related to 2023 customer additions to be included in 2024 rate base. Enbridge Gas has explained the cost pressures that it has faced in recent years related to customer additions, and the steps taken to remedy these items. Importantly, Enbridge Gas has maintained an overall PI of well above 1.0 for the years since it last rebased in 2013. This means that the total amount being included in 2024 rate base for customer additions capital from 2014 to 2023 is forecast to be more than fully recovered in rates, based on the feasibility tests in place at the time. On a forecast basis, Enbridge Gas would recover around $75 million more in revenues than the associated costs for customer additions over the 2014 to 2023 period. It is unfair to pick out one year in isolation and indicate that a portion of customer addition costs from that year should be disallowed.

221. To the extent that parties raise other concerns related to 2023 rate base additions, Enbridge Gas will respond in Reply Argument.

222. Enbridge Gas will address the 2024 capital budget under Issue 7. The Company acknowledges that changes from the as-filed 2024 capital budget will have implications for proposed 2024 rate base. Such implications will be addressed through the Rate Order process.[248]

[248] Changes that could result from the NGV issue, as well as from updates to relevant to working capital, will also be reflected through the Rate Order process. The implications of the OEB's Decision related to the inclusion of the Dawn to Corunna project in rate base will be reflected through the Phase 2 Rate Order process.

Integration Capital

223. The Company's evidence sets out the updated integration capital expenditures during the deferred rebasing term. These are summarized in Table 3 below.[249]

Table 3
Integration Capital Investments

Line No.	Particulars ($ millions)	2019 Actual	2020 Actual	2021 Actual	2022 Actual	2023 Bridge Year	Total
		(a)	(b)	(c)	(d)	(e)	(f)
	CapEx						
1	Business Development & Regulatory		0.6	2.0			2.6
2	Customer Care	6.7	27.7	32.0	0.8		67.3
3	Distribution Operations	11.3	7.1	19.0	19.8	17.0	74.2
4	Energy Services	3.6	3.7	8.0	5.6	3.0	23.9
5	Engineering & STO		0.2	2.0	0.3		2.5
6	Overheads	7.6	11.0				18.6
7	Total Annual CapEx	29.1	50.4	63.0	26.5	20.0	189.0
8	Net Book Value (included in rate base forecast)						119.0

Notes:
(1) Distribution Ops: Work Mgmt. phases utility work, construction, meters, customer attachment.
(2) CapEx is reflective of year spent.
(3) Overheads are included at the project level starting in 2021.
(4) Associated impact of NBV reflected in the 2024 Test Year revenue requirement is $28 million.

224. The largest integration capital expenditures were in "pillar technologies": one Customer Information System (CIS) and one Asset and Work Management (AWS) system. The CIS investments are included in Customer Care and the AWS investments are noted in Distribution Operations.[250]

[249] Exhibit 1, Tab 9, Schedule 1, Table 6, page 21.
[250] Exhibit 1, Tab 9, Schedule 1, pages 19-20.

225. Ms. Lindley provided details about these two projects in Examination in Chief for Panel 12:

> Over the past five years, the largest investments in integration capital were largely in long-life pillar systems, technology systems, that benefitted day-to-day customers, but also our day-to-day business operations. In fact, 75 percent of the integration capital was focused on two key system[s]; our CIS system, the customer [information][251]system, and the AWM system, the asset work management system.
>
> The benefits that are associated with the CIS system were realized in customer care and they are largely related to the elimination of the duplicate vendor system that was managed, but also gave a common platform for customer interaction; Chatbot, IVR, those types of things.
>
> On the asset and work management side, that was a common, scalable platform that was implemented in phases, and it enabled the savings that were largely in distribution operations for the work and resource strategy initiative, which had consistency of contractor usage and also enabled the integration of the work management teams, which included the centre consolidation.
>
> The benefits of those, as I mentioned, are in distribution operations, both from an operational perspective but also from a financial perspective. But not only did those systems integrate the companies, they also extended the useful life of those assets and they also will benefit into the future.[252]

226. Ms. Lindley further explained and provided references for the fact that these major projects (replacement of existing systems) were already planned by Union before amalgamation and included in the Union Asset Management Plan.[253] Thus, while the projects could be considered “integration” because they brought together applications for the amalgamated utility, they are also projects that would have been needed for Union as a standalone utility. Importantly, as Ms. Lindley explained, the projects were done for less cost than would have been the case within the standalone utility.[254]

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[251] Note that the text of the transcript mistakenly says “integration”.
[252] 14 Tr.146-147.
[253] 14 Tr.147-148. See also Exhibit K14.2, Enbridge Gas Compendium for Panel 12, which includes excerpts from Union AMPs for the Banner, CARs and Service Suite systems which were all replaced through integration capital projects.
[254] 14 Tr.148.

227. Beginning in 2024, Enbridge Gas will reflect the impact of the efficiencies and cost savings resulting from the amalgamation in its going-forward rates. The expected annual synergy savings of $86 million resulting from all integration initiatives are reflected in revenue requirement.[255] These are savings that repeat for customers each year going forward. To achieve these savings, Enbridge Gas funded the $280 million of integration O&M costs during the deferred rebasing term from synergy savings.[256]

228. During the deferred rebasing term, Enbridge Gas expended $189 million in integration capital, of which the $70 million cost depreciated during the deferred rebasing term was funded from synergy savings.[257] This is because during the deferred rebasing term, the Company must fund all planned capital expenditures up to the ICM threshold (which is what is funded by base rates) before having access to ICM funding, and this calculation does not take account of any amounts funded for the integration projects. In other words, during the deferred rebasing term, base rates fund business “as usual” needs while the Company is expected to fund the integration projects from savings achieved through efficiencies.[258]

229. Enbridge Gas submits that it is appropriate to include integration capital undepreciated amounts, totaling $119 million, in 2024 rate base to be subject to recovery through rates going forward. These investments were made throughout the deferred rebasing term to deliver the highest level of sustainable savings and operational benefits. As demonstrated in Exhibit J14.11, Enbridge Gas generated sufficient synergy savings to fund integration projects during the deferred rebasing term, but with no excess. The sustainable synergy savings are being reflected in

[255] Exhibit 1, Tab 9, Schedule 1, pages 4-5 and 16.
[256] Ibid pages 16-19. See Exhibit J14.11 which shows that synergy savings funded integration costs during the deferred rebasing term.
[257] 14 Tr.202-203. See Exhibit J14.11 which shows that synergy savings funded integration costs during the deferred rebasing term.
[258] This was discussed further in submissions in the 2020 ESM proceeding (EB-2021-0149) – see, for example, Enbridge Gas Reply Argument at page 5.

base rates starting in 2024, meaning that they will accrue to ratepayers, not the Company.

230. Much of the residual net book value of the projects pertains to in-service additions in 2021, 2022, and 2023, which Enbridge Gas will not have had the opportunity to fully depreciate by the end of the approved 5-year deferred rebasing term.[259] Enbridge Gas understands that the OEB decided that a 5-year deferred rebasing term was sufficient but notes that the evidence in the MAADs proceeding was that Amalco required a longer deferred rebasing term to recover these capital costs.[260]

231. In the O&M budgets in this case, the Company has credited customers with $86 million in sustained operational savings from integration that will benefit customers every year.[261] The projects that underlie the integration capital amounts will continue to benefit customers also and are largely projects that needed to be completed by the legacy utilities in the absence of amalgamation. Ms. Ferguson explained the Company's position in testimony:

> Given that this capital investment that has occurred through the deferred rebasing period has been funded by the synergies generated by the integration and the system improvements made, it is appropriate from the Company's perspective that the undepreciated capital remain that's remaining at the end of 2023 continues to be recovered through those synergies that were used to derive them.[262]

232. All of the foregoing is consistent with the OEB's MAADs policies, and with the overarching OEB principle that benefits follow costs.[263] The MAADs policies recognize that an amalgamated utility will absorb the costs of the transaction during

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[259] Exhibit 1, Tab 9, Schedule 1, page 23.
[260] See, for example, EB-2017-0306/0307, Exhibit J2.4.
[261] These savings are included in the pre-settlement O&M budget amounts.
[262] 14 Tr.149.
[263] In the Enbridge Gas 2020 Deferrals case (EB-2021-0149), the OEB indicated that "[a]ny interpretation of the MAADs policy by the OEB can be dealt with in the rebasing proceeding" – Decision and Order dated January 27, 2022, at page 10.

the deferred rebasing term, while also retaining corresponding efficiency benefits.[264] The MAADs policies further indicate that benefits from efficiencies and synergies are to be passed on to customers at rebasing.[265]

233. No mention is made in the MAADs policies of the rebasing treatment of remaining costs necessary to achieve the amalgamation efficiencies and synergies. Indeed, no mention at all is made of capital costs (which, unlike operating expenses are not all expensed at once such that there is nothing left over to consider at rebasing). There is no differentiation made as to types of costs (operating or capital) in the MAADs Handbook when the OEB indicates that "[i]ncremental transaction and integration costs are not generally recoverable through rates".[266] As explained by Ms. Ferguson in testimony, the word "generally" signals that some circumstances may warrant recovery of "integration" costs.[267] Enbridge Gas submits that the current circumstances warrant recovery, where the capital costs are not necessarily "incremental" (because they were already forecast by the legacy utilities on a standalone basis) and where the undepreciated capital costs support ongoing operational benefits to customers.

234. To Enbridge Gas's knowledge, this is the first OEB rebasing case following a MAADs approval for the amalgamation of two large utilities. Enbridge Gas is not aware of any rebasing case following a MAADs approval where the OEB has considered the treatment of undepreciated capital costs related to integration of the utilities. Interestingly, a review of past MAADs proceedings indicates that amalgamating utilities typically do not identify significant capital costs related to

[264] OEB Handbook to Electricity Distributor and Transmitter Consolidations, January 19, 2016, pages 11-12 (Deferred Rebasing); and Ratemaking Associated with Distributor Consolidation Report of the Board, July 23, 2007, page 4, section 2.2.1 (Time to Retain Savings to Offset Costs).
[265] OEB Handbook to Electricity Distributor and Transmitter Consolidations, pages 17-18 (Future Rate Structures); and Ratemaking Associated with Distributor Consolidation Report of the Board, page 7, section 2.2.2 (Net Impacts at Time of Rate Rebasing).
[266] OEB Handbook to Electricity Distributor and Transmitter Consolidations, page 8.
[267] 14 Tr.163.

integration. This highlights that the type of costs that Enbridge Gas has highlighted as “integration capital” costs are likely treated as business as usual by other amalgamating utilities and therefore subject to ordinary treatment where remaining undepreciated costs will be included in rate base post-rebasing.

235. Presumably, the OEB’s benefits follow costs and beneficiary pays principles should apply such that these costs are recoverable from customers. That is consistent with the fact that, under financial accounting rules, the costs of the integration investments are expensed, as depreciation, over the period when they are providing value. Considering that this value is credited to customers through rebasing, so too should the future/ongoing costs for assets that will continue to benefit customers be charged to customers on a go-forward basis starting at that time.[268]

236. The intervenor position (as indicated in opening statements) that Enbridge Gas should bear all integration costs for all time, even where those costs extend into the time when customers receive the advantages and savings from integration, is inconsistent with the benefits follow costs principle. If that approach is adopted by the OEB, it could have a chilling impact on future amalgamations and on utilities committing appropriate capital resources to fully recognize available amalgamation savings. It will also operate as a discouragement to amalgamating utilities to spend any amounts classified as “integration capital” during the deferred rebasing term even if that would benefit customers on an ongoing basis. All of this flies in the face of the Minister of Energy’s direction to the OEB to continue to encourage “optimal efficiency” of the distribution sector, which has been achieved in previous years through utility mergers/acquisitions.[269]

[268] Exhibit 1, Tab 9, Schedule 1, page 24.
[269] Minister of Energy Mandate Letter to the OEB, November 15, 2021, page 4. The Minister’s Letter of Direction for 2022 (October 21, 2022) again encourages the OEB to help LDCs pursue efficiencies through consolidation – see page 2.

237. Based on questions asked by SEC during examination of Panel 12 during the hearing, it appears that an argument may be advanced that Enbridge Gas earned enough over allowed return on equity (ROE) during the deferred rebasing term to fund the remaining integration capital.[270] That is not the test. There are many reasons that led to Enbridge Gas earning above OEB-approved ROE during the deferred rebasing term. There is no reason or evidence to support a conclusion that all of the Enbridge Gas earnings above allowed ROE were based on synergy savings. The Company's evidence is that synergy savings almost exactly funded integration costs, with virtually no resulting excess revenues.[271]

238. In any event, had Enbridge Gas chosen to defer some or all of the integration capital projects, then it would have earned more, and it would have included some projects in its future capital plans where they would be funded by customers. Enbridge Gas did not take that approach. It implemented these capital projects in a timely manner to benefit operations and customers as soon as practical.

239. Enbridge Gas does not want to presume the intervenor argument on this topic but may offer further submissions in its Reply Argument.

2023 Additions to 2024 Opening Rate Base

240. In the Capital Update, Enbridge Gas indicates that in-service additions in 2023 total $1,428.1 million.[272] This results in an approximate increase to rate base of $1,347.6 million in 2024.[273] These figures include $343.0 million related to the Dawn to Corunna project, which is to be addressed in Phase 2.[274] The amount of 2023 in-service additions requested to be included in 2024 rate base in Phase 1 is

[270] See, for example, 14 Tr.168.
[271] Exhibit J14.11.
[272] Exhibit 2, Tab 2, Schedule 1, page 3, line 3.
[273] See Exhibit J13.15, Attachment 1.
[274] See note 1 at Exhibit 2, Tab 1, Schedule 1, page 5.

TAB D

contributions from connecting customers as forecast capital costs increased.

3.2.4 While SEC has proposed capital reductions beginning in 2024 as a way to balance the short-term needs of the company with the Energy Transition risk identified, the same criticisms discussed below regarding its planning process, equally apply to the 2023 capital expenditures and in-service additions. If the OEB agrees with our approach to setting 2024 rates, then it could make similar reductions to the 2023 bridge year capital additions as well.

3.2.5 SEC also believes the OEB should require Enbridge to start seriously considering Energy Transition risk in its capital planning process. This is a necessary requirement to mitigate risks and to properly assess the reasonableness of those capital expenditures.

3.3 ***Integration Capital***

3.3.1 Enbridge seeks to include in its 2024 opening rate base $119M of integration capital.[148] The amount represents the undepreciated capital costs of integration capital additions as of the end of 2023.[149]

3.3.2 SEC submits the amounts should not be included in 2024 rate base. It is contrary both to the MAADs policy articulated in its MAADs Handbook[150] and to the decision approving the amalgamation of Enbridge Gas Distribution and Union Gas ("MAADs Decision").[151]

3.3.3 ***OEB Policy and MAADs Approval Are Clear That Integration Costs Are Not Recoverable.*** The OEB's MAADs Handbook is clear that "[i]ncremental transaction and integration costs are not generally recoverable through rates" [emphasis added].[152] In return, the OEB allows distributors to defer rebasing "to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction."[153] The MAADs Handbook does not restrict the period during which integration costs are not recoverable from ratepayers, nor their type.

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[148] Tr.14, p.152, 1-9-1, p.21 (K14.3, p.22)
[149] Tr.14, p.152, 1-9-1, p.21 (K14.3, p.22)
[150] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016
[151] *Decision and Order* (EB-2017-0306/307), August 30, 2018
[152] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p.8 (K14.3, p.40)
[153] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p.9 (K14.3, p.41)

3.3.4 A utility is allowed to defer rebasing to allow it to benefit not just from savings achieved as a result of the amalgamation, but also from any efficiencies gained during the previous and the deferred incentive regulation periods. This is a bedrock principle of the OEB's MAADs policy. For Enbridge, this was significant because both of its predecessor companies had over-earned in every single year since they last rebased.[154]

3.3.5 In the MAADs Decision the OEB references this as part of its approval of only a 5-year deferred basing period, commenting that "[d]uring the last rate setting frameworks, both Union Gas and Enbridge Gas earned more than the OEB-approved return as evidenced by the earnings sharing mechanisms for both utilities."[155] By deferring rebasing, "[c]ustomers will not benefit from any efficiency gains from this previous period until the end of the rebasing period."[156]

3.3.6 Enbridge did not rebase in 2019, and so did not need to pass on those efficiencies already gained for a further five years.

3.3.7 This is all to help offset the costs of the transaction, which the OEB does not guarantee will be sufficient. It is not, as Enbridge implies, that the integration costs are to be paid only from the specific integration savings.[157] Rather, it is the broader savings that are achieved by deferring rebasing.

3.3.8 In the MAADs Decision approving the merger between Enbridge Gas Distribution and Union Gas Ltd., the Board approved a deferred rebasing period for the new, combined Enbridge of five years, on the basis that it "provides a reasonable opportunity for the applicants to recover their transition costs."[158]

3.3.9 The OEB turned out to be correct. Five years was more than sufficient to recover its integration costs. The evidence is that at the end of 2022, year four of the five-year deferred rebasing period[159], Enbridge had cumulatively over-earned by $231.4M.[160] The amount is net of integration costs and savings during that period, none of which was required to be shared with customers.[161] If the OEB requires, consistent with OEB policy

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[154] 5.3-IGUA-30, Attachment 1
[155] *Decision and Order* (EB-2017-0306/307), August 30, 2018 p.23 (K14.3, p.38)
[156] *Decision and Order* (EB-2017-0306/307), August 30, 2018 p.23 (K14.3, p.38)
[157] Argument-in-Chief, para. 227
[158] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.22 (K14.3, p.37)
[159] Tr.14, p.169
[160] Undertaking J14.10, Attachment 1; Tr.14, p.168
[161] Undertaking J14.10, Attachment 1

and the MAADs Decision, the remaining $119M of undepreciated integration capital to be funded by Enbridge's shareholders, Enbridge would still have over-earned during the four-year period by over $112M.[162]

3.3.10 Enbridge, at the oral hearing and in its Argument-in-Chief, trots out several new arguments that were not mentioned in its written evidence to avoid the clear application of the OEB's policy and the MAADs decision.

3.3.11 First, it hangs its hat on the fact that the OEB was not unequivocal on the treatment of integration costs in the MAADs policy when it said that they "are not generally recoverable."[163] While the use of the term "generally" does signify that in some exceptional circumstances the OEB may allow recovery, integration-related capital costs like these are surely not that situation.

3.3.12 There is nothing exceptional about Enbridge incurring both capital and O&M costs, whether long-lived or otherwise. Integration capital costs are not unique, and the OEB, in the MAADs Handbook, was not blind to this fact. The filing requirements attached the MAADs Handbook explicitly require the identification of all incremental costs of the transaction and use as an example the purchase of new IT systems.[164]

3.3.13 The OEB was well aware during the Enbridge Gas Distribution/Union Gas MAADs proceeding that Enbridge was planning to spend amounts on integration-related capital costs[165] and made no such carve-out to its policy when it approved the five-year deferral period meant to allow it the opportunity to recover its transition costs.[166] In fact, in that MAADs proceeding, Enbridge's support for its proposed 10 year deferred rebasing period was based on the time it said it required to recover the total integration capital costs—not just the revenue requirement related to those costs during the deferred rebasing period.[167]

3.3.14 Second, Enbridge is also incorrect when it claims that denying recovery of the undepreciated integration capital costs would be inconsistent with the 'benefits follow

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[162] Tr.14, p.170

[163] Argument-in-Chief, para. 22

[164] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, Schedule 2 - Filing Requirements for Consolidation Applications, p.6

[165] See 1-9-1, p.3, Table 1 which shows the forecast capital investment costs that were provided in the MAADs proceeding.

[166] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.22 (K14.3, p.37)

[167] See for example, EB-2017-0306/0307, Reply Argument, para. 75-77; EB-2017-0306/0307, Exhibit B-1, p.26; EB-2017-0306/0307, Undertaking J2.4;

costs' principle.[168] Enbridge has not provided any evidence that the specific integration capital costs are the primary drivers of most of the integration savings. If anything, the evidence suggests otherwise. Most of the achieved savings, all of which are O&M costs[169], have nothing to do with integration-related capital projects.[170] They are related to things like organizational restructuring (e.g., reduction in headcount due to position redundancies) and the alignment of processes and procedures.[171]

3.3.15 Enbridge was granted the deferred rebasing period based on a set of 'rules' that allowed it to benefit, while having to bear all the integration costs. It would be grossly unfair for the OEB to now allow it to pass on a significant amount of integration costs to customers, especially after it has reaped those benefits.

3.3.16 The OEB should also be cautious of Enbridge's claims that it "credited" customers with $86M in savings from the integration in its 2024 O&M budget.[172] Enbridge has not actually credited customers with anything. The amount represents its calculation of annual savings achieved in 2023, based on various cost-saving measures. Essentially, it is an avoided cost analysis.[173] As the O&M budget has largely been settled, this claim was not subject to examination during the oral hearing and remains untested.

3.3.17 Third, for the first time during the oral hearing, Enbridge argued that some of the integration capital projects would have been necessary regardless of the amalgamation.[174]

3.3.18 At this stage, it is impossible to determine which projects would have been undertaken, as well as their scope and timing. What is known is that, until its examination-in-chief, Enbridge had never put forward this position. It had always maintained that integration capital consisted of "expenditures required to integrate EGD and Union onto common systems, processes, and facilities."[175] Furthermore, a review of the list of projects[176] reveals that many would not have needed to be completed either in the absence of the merger or within the time frame required by the merger. The latter category is particularly difficult to separate. Most of the integration capital projects are IT related,

[168] Argument-in-Chief, para. 236
[169] 1-9-1, p.25
[170] 1.9-CCC-25d; Undertaking JT 1.9, Attachment 1
[171] 1.9-CCC-25d, also see Attachment 1; Undertaking JT 1.9, Attachment 1
[172] Argument-in-Chief, para. 231
[173] See Undertaking JT 1.9
[174] Tr.14, p.147
[175] 2-5-3, p.18 (K14.3, p.8)
[176] 1-9-1, Attachment 1 (K14.3, p.30-33)

which generally have a shorter lifespan than other utility assets. Therefore, if Enbridge is merely undertaking IT work that it would have had to do a few years later as a result of the integration, then the replacement for that new IT system will also occur earlier than it would have otherwise.

3.3.19 Fourth, Enbridge argues that if the OEB does not allow the inclusion of undepreciated capital costs into the opening rate base, it will have "a chilling impact on future amalgamations and on utilities committing appropriate capital resources to fully recognize available amalgamation savings."[177] As it relates to the impact on future amalgamations, this is an issue that utilities can raise in the context of the OEB's announced MAADs policy review[178], not a reason to retroactively apply a new interpretation to benefit Enbridge. The merger was not driven by forecast savings and capital recovery policy; rather, it was the natural result of a decision made in 2017 by their conglomerate parent companies, Enbridge Inc. and Spectra Energy, to amalgamate.[179]

3.3.20 ***Enbridge Has Borne None of the Integration Capital Costs.*** Enbridge has not actually borne any of the costs of integration capital during the deferred rebasing period. When it claims that "integration capital was not recovered through base rates during the deferred rebasing term"[180], this is not actually correct. Like all of its other capital, excluding ICM projects which are individually approved and funded by a rate rider, it is funded from the revenue raised from base rates during the IRM period. Individual capital projects are not approved until they are sought to be added to the test year rate base.[181]

3.3.21 According to Enbridge's logic, no non-ICM capital costs are recovered through base rates during the IRM term. We know this is not true. Enbridge further tries to claim that these costs were funded from integration savings but has filed no evidence demonstrating that the integration spending was in any way connected or contingent on achieving any integration savings.[182] Regardless of how one views the matter, Enbridge has significantly over-earned, even after including integration costs in its earnings-sharing calculation to reduce earnings. Therefore, it cannot credibly claim that it shouldered any

[177] Argument-in-Chief, para. 236

[178] See OEB Letter, Re: Evaluation of Policy on Utility Consolidations Ontario Energy Board (EB-2023-0188), July 27 2023

[179] See Press Release: 'Enbridge and Spectra Energy to Combine to Create North America's Premier Energy Infrastructure Company with C$165 Billion Enterprise Value' (K15.2, p.18)

[180] 2-5-3, p.2-3 (K14.3, p.3-4)

[181] Tr.14, p.159

[182] Argument-in-Chief, para. 237

of the integration capital costs.

3.3.22 Enbridge is correct that it excluded integration capital from the calculation of the ICM materiality threshold[183], but based on SEC's review, this exclusion did not actually affect the amount of incremental funding it received.[184] At the very least, as Ms. Dreveny put it, "I don't think it would have had a huge bearing, no."[185]

3.3.23 ***OEB Staff's Proposal Contrary to MAADs Decision***. The OEB should also reject the OEB Staff submission that Enbridge be allowed to add 50% of the undepreciated integration capital costs to the rate base, on the basis that the MAADs policy was developed in the context of permitting a 10-year deferred rebasing period.[186] SEC submits that this entirely ignores the OEB's MAADs Decision when it approved the merger.

3.3.24 In the MAADs Decision, the OEB rejected Enbridge's argument for a 10-year deferred rebasing period and explicitly found that the 10-year deferred rebasing in the MAADs Handbook was adopted to incentivize the consolidation of electricity distributors. It stated that the situation for the merging gas utilities (Union Gas and Enbridge Gas) was very different.[187] In the specific context of the merger, the OEB approved a 5-year rebasing period, which it found would provide Enbridge a reasonable opportunity to recover its transition costs.[188] To allow the company to now recover 50% of the undepreciated capital related integration costs is directly contrary to the MAADs Decision.

3.3.25 ***Post-Deferred Rebasing Period Integration Capital Projects Similarly Not Recoverable.*** Starting in 2024, Enbridge has stopped categorizing expenses as integration capital, even though they meet its own definition of "expenditure required to integrate EGD and Union onto common systems, processes, and facilities."[189] SEC submits that capital expenses which are required to integrate the two former companies should be considered integration costs and should not be recoverable from ratepayers, regardless of when they were incurred—either during or after the deferred rebasing period.

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[183] 2-5-3, p.2 (K14.3, p.3); Tr.14, p.157-158; Argument-in-Chief, para. 228

[184] Enbridge had approved ICMs in EB-2018-0405, EB-2019-0194, EB-2020-0181, and EB-2021-0148

[185] Tr.14, p.158-159

[186] OEB Staff Submission, p.57

[187] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.23 (K14.3, p.38)

[188] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.22 (K14.3, p.37)

[189] 2-5-3, p.18 (K14.3, p.8)

3.3.26 Two of these projects, the construction of the GTA East and West facilities at a total cost of $67.3M[190], were deferred as part of the Capital Update from 2023 to 2026.[191] The deferral of those two projects was the reason the amount that Enbridge sought to add to the rate base in 2024 was reduced as part of the Capital Update.[192] The fact that they were deferred in time does not change the admitted driver of the project. Real estate consolidation projects are the clearest examples of projects that would never have been undertaken at all in the absence of the merger.

3.3.27 There are also other projects that meet the same definition[193], including the Contract Market Harmonization project ($19.2M) and the General Service Rebasing Changes project ($17.9M).[194] Enbridge admits that both projects are required to implement rate harmonization, which is only necessary as a result of the merger.[195] Without a merger, there would be no need to harmonize rate classes across what would otherwise be different utilities. While not mentioned in Undertaking J14.13, Ms. Dreveny stated during the oral hearing that the London Facilities project ($49.5M)[196] was similar to the GTA East and West projects, as they are all consolidation projects driven by the merger.[197]

3.3.28 Although none of the above projects are forecast to be in service in 2024, SEC submits that the OEB should make it clear to Enbridge now that these costs will never be recovered from customers, consistent with the MAADs Handbook and the MAADs Decision.

3.4 ***Capital Update***

3.4.1 Enbridge filed its application in late fall 2022, which included forecast capital spending beginning in 2023. Roughly half a year later, it filed its Capital Update, resulting in very significant changes to its AMP. This update was necessitated by changes in its capital plan that arose during the 2024 budget process.[198]

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[190] See 1-9-1, Attachment 1 (2022-10-31) Lines 1 and 5
[191] Tr.14, p.145, 177
[192] Tr.14, p.145
[193] Undertaking J14.13
[194] 2-6-2, Appendix A, p.61 (K14.3, p.53)
[195] Tr.14, p.180-181
[196] Tr.14, p.181
[197] 2-6-2, Appendix A, p.61 (K14.3, p.53)
[198] 2-5-2, p.1

TAB E

may require upgrades such as panel or service line upgrades, internal wiring upgrades (gas to electric range), and building envelope improvements.

142. EP pointed out a number of the same and some additional flaws in Mr. Neme's analysis and conclusions about heat pump cost effectiveness and electrification in general. These include a lack of information on various costs including the cost of operating a heat pump with electric resistance heating, air handler costs, costs of disconnecting from gas, and additional home insulation costs. EP also pointed out that Mr. Neme (and Dr. Hopkins) did not take into account the high population growth rate in Ontario and how that might impact energy use, and the impact of the growing rate of EV charging on the electricity distribution grid and electricity distribution rates.[158]

B. Rate Base (Exhibit 2)

Rate Base

143. Issue 6 – Is the 2024 proposed rate base appropriate?

Summary and Relief Sought

144. Enbridge Gas requests approval of its as-filed 2024 proposed rate base, including the impacts of the Capital Update, subject to three adjustments.[159]

145. The three differences between what is filed in the Capital Update and what is requested for approval in Phase 1 of this proceeding are:

[158] EP Submission, pages 7-8.
[159] See AIC, pages 76-77 and associated references. In AIC (pages 77-78), Enbridge Gas explained that the Capital Update (which is not reflected in the Settlement Proposal) differs from the original filing, because it uses actual 2022 closing rate base value, rather than an estimate. As described in AIC, this adjustment results in a reduction in 2024 rate base versus the original filing. No party objects to this approach, and it is supported by OEB staff (OEB staff Submission, page 55) and LPMA (LPMA Submission, pages 9-10).

a) Changes made to 2024 opening rate base to reflect the agreement in the Settlement Proposal to remove approximately $41 million related to WAMS and GTA project overspend;[160]

b) The rate base value of the Dawn to Corunna project has been removed (on an interim basis), as this is being determined in Phase 2 of the proceeding (after which time all or some of the value will be added back into 2024 rate base, depending on the OEB's determination); and

c) The land purchased for the GTA West REWS project ($24.5 million) is removed from 2024 rate base for rate making purposes.[161]

146. As explained in AIC[162], there are four unsettled aspects to this issue:

a) Inclusion of integration capital in 2024 rate base;

b) 2024 opening rate base amounts resulting from 2023 rate base additions;

c) 2024 rate base amounts resulting from 2024 rate base additions; and

d) Consequential changes to 2024 rate base from other determinations made by the OEB in this proceeding.

In this section of this Reply Argument, Enbridge Gas addresses items a) and b).

147. For the reasons already set out in AIC, Enbridge Gas submits that no further adjustments are required to the 2024 opening rate base beyond what is described above in paragraph 145.[163]

148. Enbridge Gas submits that it is appropriate to include integration capital amounts in 2024 rate base. The total undepreciated integration capital amounts that Enbridge Gas proposes to include in 2024 rate base is $119 million. Under the OEB's general principle of "benefits follow costs", it is appropriate that customers pay the ongoing costs of technology assets, in the form of depreciation, that will continue to benefit

[160] Settlement Proposal, Issue 6, pages 24-25 – filed at Exhibit O1, Tab 1, Schedule 1.
[161] Exhibit J14.13.
[162] AIC, page 76.
[163] See AIC, pages 75-95.

them after rebasing. This also fits with the OEB's "beneficiary pays" principle that applies to infrastructure projects.

149. The evidence establishes that important integration activities were swiftly implemented, and costs were prudently incurred, leading to sustained savings that Enbridge Gas is passing onto customers at rebasing. Importantly, many of these integration activities were projects that would have to be done individually by EGD and/or Union in the absence of amalgamation. However, because the projects were designed for the amalgamated utility, they are called "integration". These projects continue to be in service and will benefit customers well beyond rebasing. Enbridge Gas funded the projects using integration savings during the deferred rebasing term, and it is appropriate that customers fund the remaining costs of the projects using integration savings after rebasing.

150. The OEB's MAADs policy does not specifically state that a utility must absorb all capital costs that are even loosely related to a merger for all time. That outcome would imply that the MAADs policy actually changes how capital costs are recognized from a regulatory accounting perspective, such that they become a fixed period charge rather than costs recovered over the period when the associated assets provide service. If the MAADs policy intended such a different treatment, one would expect that to be stated clearly, whereas it is not mentioned at all. Such an outcome would be unfair in this case, resulting in a windfall to customers such that assets supporting ongoing service to customers are provided for free at the same time as customers receive the ongoing $86 million integration benefits reflected in the Company's cost base through this rebasing case.

151. An implication of interpreting the MAADs policy as requiring utilities to bear all capital costs of integration projects for all time is that utilities will not invest in such projects in the future during a deferred rebasing term. Otherwise, they will not have time to

recover the costs before benefits are transferred to customers at rebasing. Given that a utility can only complete so much work in the early years after amalgamation, this may lead to important work being delayed for many years.

152. The intervenor argument that Enbridge Gas "over earned" and therefore can afford to fund the remaining capital costs of integration projects is misguided. During an IR term (including a deferred rebasing term), revenues and costs are decoupled such that it is not proper to attribute overearnings to particular items. Integration savings are intended to fund integration costs. The evidence from Enbridge Gas is that its integration costs and savings during the deferred rebasing term were almost exactly equal.[164] Additionally, as explained in the Overview, the total amount of costs that intervenors argue can be funded by "overearnings" exceeds the actual overearnings by more than $100 million.

153. Enbridge Gas disputes that there is a proper basis for the OEB staff proposal[165] (supported by some intervenors) where Enbridge Gas would include only 50% of the remaining undepreciated integration capital included in rate base, with the other 50% being disallowed. There is no principled basis for this. Customers are getting 100% of the sustainable efficiency savings. Customers are getting 100% of the ongoing benefit of the investments. It is appropriate that 100% of the undepreciated costs be included in rate base.

154. Very few parties raised concerns with the Company's proposed 2023 rate base additions. Presumably, this signals that there is no strong and/or specific opposition. While some parties commented on the size of the 2023 capital forecast, the only specific item of concern noted is the $26.8 million forecast revenue shortfall

[164] See Exhibit J14.11.
[165] OEB staff Submission, pages 56-57.

associated with 2023 customer additions having a profitability index (PI) of less than 1.0.[166]

155. Enbridge Gas submits that it would be unfairly punitive to disallow a portion of 2023 customer attachment capital expenditures from being added to rate base in circumstances where the overall customer attachment capital being added to rate base benefits customers by many millions of dollars. Enbridge Gas provided explanation for its challenges in customer additions costs for 2023, including the fact that the Company was not permitted to update its cost recovery from infill customers.[167] The evidence establishes that the costs incurred were prudent and reasonable in the circumstances, and should be recoverable.

156. More generally, Enbridge Gas submits that the exercise of determining 2024 opening rate base is not aimed at evaluating the Company's 2023 budget as in a cost of service review, but rather it is a prudence review of the actual and forecast assets and projects being added to rate base. Other than in relation to customer additions capital, no party has raised any questions or concerns about particular 2023 expenditure items. There is no basis for an overall reduction to opening rate base, as argued by some parties.

157. Finally, Enbridge Gas acknowledges that its actual capital expenditures in recent years have varied from forecasts from time to time. Enbridge Gas agrees that 2024 opening rate base should reflect actual results. Therefore, the Company proposes that as part of the Phase 2 Rate Order process, it will report on and reflect the impact of changes between forecast and actual 2023 capital additions, and associated changes that impact rate base. Effectively, the update would be the same as performed for

[166] ED and SEC refer to a $26.5 million shortfall, which is the number that Mr. Elson suggested in cross-examination (13 Tr.17) – the actual number is $26.8 million, as set out in the updated response to SEC interrogatory 118, part a) – see Exhibit I.2.6-SEC-118, part a).
[167] See, for example, 11 Tr.100-103.

2022, as described in AIC.[168] This can be done at the same time as the approved rate base value of the Dawn to Corunna project is being reflected in rate base (and revenue requirement).

Submissions by Other Parties

158. On the topic of integration capital, OEB staff and many intervenors made submissions.

159. APPrO supports Enbridge Gas including the remaining undepreciated capital costs for integration-titled projects in rate base. Two main points are advanced. Enbridge Gas agrees with both.

160. First, APPrO points out that Enbridge Gas received a deferred rebasing term (5 years) that was only half of what was requested and what was required to recover capital costs of integration. On this point, APPrO notes as follows:

> If the OEB had approved a ten-year rebasing period, Enbridge would have fully recovered – in fact it would have more than recovered – these costs through operational savings that would not have gone to ratepayers. Instead, ratepayers are now receiving $86 million in annual savings as a result of capital expenditures that Enbridge has not been allowed to recover.[169]

161. Second, APPrO highlights that it is a red herring to say that Enbridge Gas earned above allowed ROE, and therefore can fund the remaining integration costs. As explained by APPrO, integration costs and ROE are two separate matters, noting that "[c]onflating Enbridge's ROE with its integration related capital spending – and the benefits this accrues for ratepayers – undermines basic regulatory principles."[170]

[168] See AIC, pages 77-78, and associated references from the Capital Update evidence.
[169] APPrO Submission, pages 25-26.
[170] Ibid, page 26.

162. OEB staff[171], along with EP[172], LPMA[173], QMA[174], and PP[175], support the OEB taking a middle-ground approach, under which Enbridge Gas would see 50% of the remaining undepreciated integration capital included in rate base, with the other 50% being disallowed. The rationale for this position is explained by OEB staff as being linked to the fact that Enbridge Gas received a 5 year deferred rebasing term, which is only half of the typical 10 year term that is contemplated in the OEB's MAADs policy.[176] In addition, EP and LPMA point to the fact that the integration capital projects are items that the legacy utilities would have had to complete in any event, and the resulting assets are continuing to provide benefit to customers.[177]

163. Six parties (CCC[178], CME[179], FRPO[180], OGVG[181], SEC[182] and VECC[183]) argue that none of the integration capital projects and undepreciated costs should be included in rate base. Two main arguments are advanced.

164. The first main argument is that the OEB's MAADs policy says that integration costs are not recoverable from ratepayers.[184] These parties argue that this policy is absolute and that it applies to capital expenditures (regardless of their nature) and that it applies even where the OEB orders a shortened deferred rebasing term. VECC and

[171] OEB staff Submission, pages 56-57.
[172] EP Submission, page 18.
[173] LPMA Submission, page 15.
[174] QMA Submission, page 3 (supportive of Enbridge Gas integration efforts) and page 7 (supportive of OEB staff Submission).
[175] PP Submission, page 43 – PP also argues for a "stretch efficiency amount" to be included if Enbridge Gas includes integration capital in rate base.
[176] OEB staff Submission, page 57.
[177] EP Submission, page 18; and LPMA Submission, page 15.
[178] CCC Submission, pages 22-23.
[179] CME Submission, pages 16-18.
[180] FRPO Submission, page 22.
[181] OGVG Submission, pages 14-15.
[182] SEC Submission, pages 52-58.
[183] VECC Submission, pages 15-17.
[184] See, for example, CME Submission, page 17.

SEC also indicate that the MAADs Decision makes clear that none of the integration costs are recoverable.[185]

165. The second main argument is that Enbridge Gas "over earned" during the deferred rebasing term, and that the remaining undepreciated capital costs can be funded from the overearnings.[186]

166. Three of these parties (CCC, SEC and VECC) go even further, and argue that where Enbridge Gas undertakes future projects that could be classified as "integration", then the Company should also fund those projects with no inclusion in rate base.[187]

167. A few other submissions were advanced by intervenors on the topic of integration capital. LPMA argues that Enbridge Gas could have set a depreciation approach for the integration capital that would result in it being fully depreciated at the end of the deferred rebasing term.[188] Several parties question whether Enbridge Gas is actually crediting customers with $86 million in integration savings on a go-forward basis.[189] SEC takes issue with whether Enbridge Gas bore the integration capital costs during the deferred rebasing term.[190]

168. Each of these items is addressed below.

169. All parties agree that the party who pays for integration capital projects (customers or the Company) should get the associated CCA benefit for the projects that is currently recorded in the TVDA. Parties further agree that this principle would apply

[185] VECC Submission, pages 16-17.
[186] See, for example, CCC Submission, page 22.
[187] CCC Submission, page 23; SEC Submission, pages 57-58; and VECC Submission, pages 16-17.
[188] LPMA Submission, page 15.
[189] See, for example, VECC Submission, page 15.
[190] SEC Submission, pages 56-57.

proportionally in the event that the OEB decided to include some but not all of the undepreciated integration capital in 2024 opening rate base. Enbridge Gas agrees.

170. Moving on from integration capital, only four parties made substantive submissions on any other aspect of 2023 capital additions.

171. ED and SEC argue that the 2023 customer connections capital proposed for 2024 opening rate base should be reduced by the forecast revenue shortfall for the 2023 customer additions portfolio ($26.8 million).[191] Those parties argue that Enbridge Gas could have avoided or mitigated this forecast shortfall by rerunning customer attachment feasibility analyses and seeking additional contributions from customers.

172. Each of CCC, LPMA and SEC raise questions about the overall size of the Company's 2023 capital forecast and argue that the OEB should take this into account when determining the amount of rate base additions for 2024 opening rate base.[192] Notably, no party points to any specific additional items that should be disallowed from being included in opening rate base. This is different from the specific items of disallowance from opening rate base noted in the Settlement Proposal (GTA project and WAMS), and in the ED/SEC Submission that some of the customer attachment capital should be disallowed.

173. Finally, CCC, LPMA and SEC each note that Enbridge Gas has been spending less on capital than forecast in some recent years. These parties point to 2023 as an example, noting that the Company is not on track to meet its forecast.[193] LPMA proposes that the OEB "should approve an asymmetric variance account to protect

[191] ED Submission, pages 39-41; and SEC Submission, pages 81-82. The $26.8 million number is found at the updated Exhibit I.2.6-SEC-118(a).
[192] CCC Submission, pages 24 and 30; LPMA Submission, page 16; and SEC Submission, page 52.
[193] CCC Submission, page 28; LPMA Submission, page 16; and SEC Submission, page 64.

ratepayers from paying for in-service capital additions that are forecast to take place in 2023 but do not actually occur."[194]

Enbridge Gas Response to Other Parties' Submissions

174. As noted, in this section of this Reply Argument, Enbridge Gas is addressing:
    a) Inclusion of integration capital in 2024 rate base; and
    b) 2024 opening rate base amounts resulting from 2023 rate base additions.

Inclusion of integration capital in 2024 rate base

175. While Enbridge Gas appreciates that many of the participants who filed submissions are supportive of Enbridge Gas including at least half of the undepreciated capital costs for integration capital in rate base, the Company maintains its position that all such costs are properly included in 2024 opening rate base.

176. Many parties seem to argue that the OEB's MAADs Handbook is prescriptive on this point. It is not.

177. The MAADs Handbook states, among other things, that "[i]ncremental transaction and integration costs are not generally recoverable through rates".[195] The inclusion of the word "generally" shows that there is discretion in the matter.

178. On a broader basis, the fact that the MAADs policy is not prescriptive can be seen in other ways.

[194] LPMA Submission, page 16.
[195] https://www.oeb.ca/oeb/_Documents/Regulatory/OEB_Handbook_Consolidation.pdf, January 19, 2016, (MAADs Handbook), page 8.

179. First, as an OEB policy, the MAADs Handbook is a guidance tool[196] rather than a hard and fast rule like a statute (such as the OEB Act) or regulation (such as the *Energy Consumer Protection Act* General Regulation[197]) or rule (such as GDAR) that must be strictly followed.

180. Second, the MAADs Handbook is very clear that a distributor is able to choose the length of the deferred rebasing term that it wishes, up to ten years:

> The extent of the deferred rebasing period is at the option of the distributor and no supporting evidence is required to justify the selection of the deferred rebasing period subject to the minimum requirements set out below. ….. The OEB will therefore require consolidating distributors to identify in their consolidation application the specific number of years for which they choose to defer.[198]

181. If the MAADs Handbook (or MAADs policy to the extent that is distinct) is prescriptive, then the OEB would not have had the ability to order that Enbridge Gas have only a five-year deferred rebasing term, despite having applied for ten years.

182. This is the first time that the OEB has considered rebasing of an amalgamated utility that incurred substantial capital costs classified as integration costs. The MAADs Handbook does not specifically address capital costs. No discussion is included around the fact that capital costs, unlike operating costs, are not expensed in the year incurred. Requiring a utility to absorb undepreciated capital costs of integration projects at the end of a deferred rebasing term changes how capital costs are recognized from a regulatory accounting perspective, such that they become a fixed period charge rather than costs recovered over the period when the associated assets

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[196] The MAADs Handbook states in the very first line (page 1) that "The Ontario Energy Board (OEB) has developed this Handbook to provide guidance to applicants and stakeholders on applications to the OEB for approval of distributor and transmitter consolidations and subsequent rate applications".
[197] Government of Ontario. (2022 July 1). O. Reg. 389/10: GENERAL. Energy Consumer Protection Act, 2010. https://www.ontario.ca/laws/regulation/100389
[198] MAADs Handbook, page 12.

provide service. If the MAADs policy intended such a different treatment, one would expect that to be stated clearly. Instead, this is not mentioned at all.

183. Enbridge Gas submits that the facts of this case support the inclusion of the remaining undepreciated capital costs described in evidence and summarized in AIC.[199] This is a scenario where it is appropriate for the OEB to depart from its guidance about what might "generally" happen.

184. The integration capital expenditures in question are not related to assets that are required only because of integration. Rather the assets are applications and facilities required for the Company's ordinary operations. The biggest of these assets are a Customer Information System and an Asset and Work Management System. Each is fundamentally important to Enbridge Gas serving its customers. They are referred to as "integration" related assets because the nature of the assets has been impacted by the fact that they will serve the amalgamated utility rather than the individual predecessor utilities. Importantly, these investments were included in previous Union Asset Plans as normal course of business operations investments that would have to be made.[200] As explained by Ms. Lindley: "[t]hey were targeted for end-of-life replacement or technology obsolescence at that time".[201]

185. Enbridge Gas's evidence is that the actual replacement costs for the TIS systems were lower than had been forecast, and the decision to upgrade and migrate to a combined system was less expensive than a replacement of the Union system.[202]

186. SEC suggests that the Company's statements that the integration projects are comprised of work and assets required regardless of amalgamation was advanced for

[199] See AIC, pages 83-89, and associated references.
[200] See Exhibit K14.2, pages 3-5. See also 14 Tr.147-148.
[201] 14 Tr.147.
[202] 14 Tr.148, and Exhibit 1, Tab 9, Schedule 1, page 22.

the first time at the Oral Hearing.[203] That is not the case – this is noted in pre-filed evidence[204]. The same facts were highlighted by Enbridge Gas in the 2020 DVA proceeding, when clearance of the TVDA balance related to integration projects was considered.[205] In any case, the evidence on this topic was highlighted at the outset of the integration capital panel's testimony[206], such that it could be tested and discussed through cross-examination.

187. Enbridge Gas does not agree with the submission from VECC and others that the MAADs Decision is determinative that integration capital costs are not recoverable at rebasing.[207] In the MAADs Decision, the OEB simply stated that "five years provides a reasonable opportunity for the applicants to recover their transition costs."[208] No definition was provided around "transition costs", and whether that included long-lived replacement assets. There was no specific consideration of the capital costs required for systems and assets that continue to be required but are being replaced on a consolidated basis (and thus referred to as "integration" projects). There was also no consideration of the evidence in the MAADs case that Enbridge Gas would require 10 years to recover all capital costs[209] – five years would not be enough. This is what APPrO describes in its submission.[210]

188. In other parts of their submissions, intervenors accuse Enbridge Gas of seeking a "windfall" in aspects of the Company's requested relief in this case.[211] The Company

[203] SEC Submission, page 54.
[204] Exhibit 1, Tab 9, Schedule 9, pages 21-22 and Exhibit 1, Tab 9, Schedule 9, Attachment 1.
[205] EB-2021-0149 Reply Argument, December 6, 2021, pages 3-4.
[206] 14 Tr.146-148.
[207] See, for example, VECC Submission, page 16.
[208] EB-2017-0306/EB-2017-0307, Decision and Order, August 30, 2018, page 22.
[209] EB-2017-0306/EB-2017-0307, Exhibit C.STAFF.4.
[210] APPrO Submission, pages 25-26.
[211] See, for example, CME Submission, page 48; OGVG Submission, page 16; and SEC Submission, page 106.

submits customers would receive a windfall if the undepreciated capital costs for integration-related projects are disallowed from inclusion in 2024 rate base.

189. Enbridge Gas will have funded the cost of the integration-related projects from 2019 to 2023 (it is not disputed that the Company spent $189 million and only seeks to include $119 million in 2024 rate base, nor is it disputed that Enbridge Gas did not receive any incremental funding for these projects). Then, the Company will have passed on sustainable integration-related benefits of $86 million per year to customers starting in 2024.[212] In return, Enbridge Gas says that it is reasonable for customers to pay for the remaining cost of the integration capital assets on a go-forward basis. There is no dispute that customers will continue to benefit from those assets, given their central importance to the Company's operations.

190. The position of intervenors that no amount should be included in rate base for integration capital projects would see customers receive the use of those assets for free, at the same time as customers receive all the future benefits accruing from integration. That is a windfall gain. It is an inappropriate departure from the OEB's "benefits follow costs" and "beneficiary pays" principles.

191. As described in AIC, Enbridge Gas acted responsibly during the deferred rebasing term to pursue projects that would benefit operations and customers.[213] The evidence establishes that important integration activities were swiftly implemented, and costs were prudently incurred, leading to sustained savings that Enbridge Gas is passing onto customers at rebasing. That being said, Enbridge Gas could not implement all integration capital projects in the first year of deferred rebasing, which would be

[212] While it is true that this sustainable integration benefit number has not been tested, that is because all parties were able to agree that an O&M budget reflecting integration benefits was reasonable. If there were great concerns that Enbridge Gas had failed to pass along appropriate integration benefits then presumably O&M would not have been settled.
[213] AIC, page 81.

required if the goal was to depreciate the projects as much as possible before rebasing. Investments in complex projects were made quickly but had to accommodate the required time to plan for such investments, and the capacity of the organization to accommodate a finite amount of change to interwoven foundational systems and processes. There is also a limit on the amount of change that the Company's customers can absorb in a short period of time.

192. By integrating technology platforms, Enbridge Gas was able to reduce costs, increase efficiency and as a result, deliver value to customers through the deferred rebasing term and beyond. Enbridge Gas believed that the regulatory principle of benefits follow costs would be maintained at rebasing and made necessary investments quickly, in the expectation that while it would shoulder the associated costs during the shorter deferred rebasing term, the remaining undepreciated capital costs would be recovered from ongoing integration savings credited to customers at rebasing.

193. The Company could have delayed investments until after the deferred rebasing term and might have done so if it knew that remaining costs would become unrecoverable, but that would not have met the expectations of the OEB and customers. As mentioned in AIC, a finding that a utility is responsible for the undepreciated costs of integration capital spending after a reduced deferred rebasing term could have a "chilling effect".[214] Presumably, that will stop other utilities from voluntarily electing any deferred rebasing term less than 10 years. Additionally, it could lead to amalgamated utilities deferring or avoiding capital spending that might be classified as "integration", notwithstanding that such spending would benefit customers.

194. Enbridge Gas disputes that there is a proper basis for the OEB staff proposal (supported by several intervenors) where Enbridge Gas would include only 50% of the

[214] AIC, page 88.

remaining undepreciated integration capital included in rate base, with the other 50% being disallowed. There is no principled basis for this.

195. All of the integration savings to date have been used to fund the integration costs to date. As of January 1, 2024, customers are getting 100% of the sustainable efficiency savings on a go-forward basis. Enbridge Gas is not retaining 50% of the savings from the amalgamation. It should not absorb 50% of the remaining costs. Customers are getting 100% of the ongoing benefit of the integration investments. It is appropriate that 100% of the undepreciated costs be included in rate base.

196. The suggestion from SEC that there is no direct link between integration capital spending and integration savings now being credited to customers[215] is misguided. The updates to processes and systems enabled the workforce reductions that were a main driver of integration savings. In any case, no party argues that the integration capital spending or projects were unnecessary. Enbridge Gas submits that fairness dictates that where customers get the enduring benefit of savings from integration, then customers should also pay for the post-rebasing portion of costs that supported that outcome. That is the OEB's benefits follow costs principle.

197. As noted above, several parties argue that Enbridge Gas can fund the undepreciated integration capital from "overearnings" during the deferred rebasing term. Enbridge Gas addressed this in AIC.[216] The Company funded integration costs from integration savings during the deferred rebasing term[217] – that is what the OEB expects. Also, contrary to the assertions from SEC, the "overearnings" during the deferred rebasing term referenced by parties in argument do include the impacts of integration spending

[215] SEC Submission, page 55.
[216] AIC, page 89.
[217] Exhibit J14.11.

and savings.[218] All such items were part of the annual utility results and related ESM calculations.

198. There is no principled reason for finding that because Enbridge Gas earned more than allowed ROE during the deferred rebasing term, customers can avoid having to pay the ongoing costs of assets required to provide ongoing service. Enbridge Gas might have underearned (making this argument inapplicable), but due to efficient operations it did not. In any event, the regulatory treatment and customer protection related to overearnings established by the OEB is the ESM that was in place during the deferred rebasing term. Enbridge Gas did not earn above the ESM threshold in any year of the deferred rebasing term. Moreover, as explained in the Overview, the total amount of costs that intervenors argue can be funded by "overearnings" exceeds the overearnings by more than $100 million.

199. In response to LPMA's Submission that Enbridge Gas could have depreciated the integration capital assets more quickly, the Company has two responses.

200. First, this is not permitted under applicable accounting rules. During the deferred rebasing term, Enbridge Gas adopted, where it could, harmonized accounting policies related to depreciation; however, this did not include harmonization of depreciation/amortization rates. Updates to these rates required OEB approval – that is what is being advanced in this proceeding[219]. If Enbridge Gas had depreciated its in-service assets in a manner that deviated from its policies, this would have required the impacts of such to flow through the Accounting Policy Changes Deferral Account (APCDA). This is counterintuitive to LPMA's suggestion.

[218] This is confirmed in an exchange between Mr. Rubenstein and Ms. Ferguson at 14 Tr.169.
[219] See Exhibit 4, Tab 5, Schedule 1.

201. Second, even if this approach was permitted, it would not fit with the timing or nature of investments. Some of the integration capital was spent in 2023[220] – that would imply a one-year depreciation term, or simply expensing the cost. More importantly though, all the assets associated with the integration capital continue to be used and useful in providing service to customers. The Company would be ignoring that reality if it was to write the assets down to zero prematurely.[221]

202. Enbridge Gas takes great exception to the argument that future projects that could be considered to be "integration" should also be funded by its shareholder. That argument posits that even after the Company has passed on the sustainable efficiency gains from integration to customers, future projects are the Company's financial obligation. This is clearly offside of the OEB's benefits follow costs principle. It is also not addressed in the MAADs Handbook. And it would certainly have a chilling effect on future amalgamations if it was found that a utility's cost obligations for anything referred to as "integration" continue indefinitely.

203. In any event, Enbridge Gas submits that it is not necessary, or even appropriate, for the OEB in this case to give direction to (or speculate) about the future treatment of future projects that will not be part of rate base until 2029.[222] No determination on this point is relevant to the setting of 2024 rates. Indeed, without knowing the timing, costs, and details of future projects, it would not be appropriate or reasonable to make any findings.

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[220] See AIC, Table 3, page 83.

[221] Enbridge Gas notes that the question of whether integration capital projects would be funded by customers or the Company after rebasing was considered in the 2020 DVA proceeding (EB-2021-0149) – in the decision in that case, the OEB deferred any determination, stating that "Any interpretation of the MAADs policy by the OEB can be dealt with in the rebasing proceeding" (Decision and Order, January 27, 2022, page 10). Given this direction, it would make no sense for Enbridge Gas to pre-emptively determine that assets would not be included in 2024 rate base.

[222] Enbridge Gas notes that one of the projects mentioned by CCC and SEC is a consolidation of properties in London. Given that London is nowhere close to the boundary of the Union and EGD rate zones, the Company does not understand how this could be seen as integration-related, under any definition. Ms. Dreveny clarified in her testimony that this project would never be classified as "integration" – 14 Tr.182.

204. In conclusion on the topic of integration capital, Enbridge Gas submits that it is fair and appropriate that all remaining undepreciated costs be included in 2024 opening rate base.

2024 opening rate base amounts resulting from 2023 rate base additions

205. Enbridge Gas submits that no adjustments are necessary or appropriate for 2024 opening rate base, to address the unsettled issue of 2023 capital additions (beyond integration capital).

206. In AIC, Enbridge Gas anticipated that some parties might note that the PI for 2023 customer additions is below 1.0 and argue for a disallowance of some costs. The Company set out its preliminary submissions as to why no disallowance of 2023 customer additions rate base is appropriate or necessary.[223] Despite Enbridge Gas having specifically raised this item as a potential issue, only two parties (ED and SEC) made any submissions in response. Those two parties argue that the 2024 rate base additions associated with 2023 customer connections capital should be reduced by the forecast revenue shortfall for the 2023 customer additions portfolio ($26.8 million). No other party, or OEB staff, made any mention of this item or argued for any disallowance.

207. In evidence, including testimony at the Oral Hearing, Enbridge Gas provided explanation for its challenges in customer additions costs for 2023.[224] A main challenge is the recent increases to a wide array of costs associated with customer connections, including labour, municipal and conservation authority permitting, materials, supply chain disruptions, enhanced sewer safety program costs, municipal

[223] AIC, pages 90-95.
[224] The Company's evidence is summarized at pages 90-93 of AIC – the supporting evidentiary reference provide more detail.

TAB 4

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding to which the motion relates must first obtain the leave of the OEB by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served on all parties to the proceeding to which the motion relates within 20 calendar days of the date of the order or decision that is the subject of the motion.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the implementation of the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the OEB may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Powers of the OEB

41.01 The OEB may at any time initiate a review of one of its decisions or orders, and may confirm, vary, suspend or cancel the order or decision.

41.02 The OEB may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in one of its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

(a) set out the grounds for the motion, which grounds must be one or more of the following:

i. the OEB made a material and clearly identifiable error of fact, law or

jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law;

ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or

iii. facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order;

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

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

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

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

(f) set out the specific relief requested.

43. The Threshold Question and Determinations

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

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

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

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

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

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

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

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

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

TAB 5

TAB A

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

DECISION ON MOTION TO REVIEW AND VARY

EB-2016-0005

CITY OF HAMILTON

BEFORE: Cathy Spoel
Presiding Member

Ken Quesnelle
Member and Vice-Chair

Christine Long
Member

March 3, 2016

1 INTRODUCTION AND SUMMARY

Horizon Utilities Corporation (Horizon) is the electricity distributor that serves approximately 245,000 customers in the City of Hamilton (City) and the City of St. Catharines. The City is Horizon's majority shareholder. The City is Horizon's largest customer in the street lighting class. Horizon filed a second year update to its Custom Incentive Regulation (Custom IR) application for approval of distribution rates for 2016 (EB-2015-0075). As a result of the installation of more efficient bulbs in the City's street lights, the electricity demand profile (also known as a load profile) of the street lighting class had changed. In its decision on the application, the Ontario Energy Board (OEB) did not approve Horizon's request to update the load profile of the street lighting class in the cost allocation model, as it found that there is no advantage to selective updating of the load profile for only one rate class.

The City filed a motion to review and vary the OEB's decision in EB-2015-0075 on the basis that the OEB erred in its decision not to approve the updating of the street lighting class load profile in the cost allocation model, and that by doing so it failed to implement provincial government policies on conservation.

The OEB finds the City has not demonstrated any identifiable error in the EB-2015-0075 decision and denies the motion at the threshold stage.

2 BACKGROUND

Horizon, a licensed distributor of electricity, filed a Custom IR application with the OEB on April 17, 2014 under section 78 of the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that it charges for electricity distribution, to be effective January 1, 2015 and for each following year through to December 31, 2019. The OEB assigned the application file number EB-2014-0002.

The OEB accepted a partial settlement agreement between Horizon and the intervenors in that proceeding, and held an oral hearing on the issues of rate design and cost allocation. On December 11, 2014, the OEB issued its Decision and Order on the Custom IR application, which stated that "[i]n the event that there is direction from the Board with respect to a new policy concerning the methodology for cost allocation related to street lighting which is applicable to Horizon, the Board is of the view that the Settlement Agreement provides that Horizon will adjust street lighting rates accordingly".[1]

On June 5, 2015, the OEB issued a new cost allocation policy for street lighting, which required the implementation of a street lighting adjustment factor (SLAF) and narrowed the range for the revenue to cost (R/C) ratio for the street lighting class to 80%-120%.[2]

On August 12, 2015, Horizon filed its first annual update to its five-year Custom IR (Annual Update) for rates to be effective January 1, 2016. The OEB assigned the application file number EB-2015-0075. The application included a number of adjustments and changes due to the implementation of the OEB's new policy for street lighting.

In its Annual Update, Horizon requested approval of revisions to its cost allocation model to include the SLAF, an update to the street lighting load profile to reflect the reduction in load due to conversion to light-emitting diodes (LED) and an adjustment to the R/C ratio for the street lighting class to 100%. The OEB issued its decision on Horizon's Annual Update on December 10, 2015. It accepted Horizon's update for the SLAF, and OEB staff's recommendation that implementation of the R/C ratio of 100% for street lighting class should be phased in, starting with a move to 120% for 2016. The OEB did not accept Horizon's proposal to update the street lighting load profile.

[1] EB-2014-0002, Decision and Order, December 11, 2014, p. 13
[2] New Cost Allocation Policy for Street Lighting Class, EB-2012-0383, June 12, 2015

In rejecting Horizon's proposal to update the street lighting load profile, the OEB stated that while the use of up-to-date data is preferable, there is no advantage to selective updating. Until data that is more accurate is available for all rate classes, Horizon must continue to use the existing load profiles for purposes of its cost allocation model.

3 MOTION TO REVIEW AND VARY

On December 22, 2015, the City filed a Motion to Review and Vary (Motion) the OEB's Decision and Order dated December 10, 2015 for EB-2015-0075 (Decision and Order). The OEB has assigned the Motion file number EB-2016-0005. The Motion requested that OEB review and vary the part of the Decision and Order dealing with the load profile used for the street lighting class in Horizon's cost allocation model.

Rule 42.01(a) of the OEB's Rules of Practice and Procedure (Rules) provides the grounds upon which a motion to review and vary may be made to the OEB:

> Every notice of motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> i. error in fact;
> ii. change in circumstances;
> iii. new facts that have arisen;
> iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The OEB recognizes that the list of grounds noted above is not an exhaustive list. However, the grounds supporting a motion to review must raise a question as to the correctness of the order or decision.

Under Rule 43.01 of the Rules, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. The purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised that a review could result in the OEB varying, cancelling, or suspending the decision.

In the OEB's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review. The threshold test is not met when a party simply seeks to reargue the case.

3.1 The City's Motion

The City's Motion alleges that as a result of the OEB's Decision and Order, the City and its residents will not benefit from the LED conversion program until Horizon's next rebasing year, which is scheduled for 2020.[3] Further, the City argues that the provincial government's policy on conservation, as set out in the Long-Term Energy Plan, states that the government's agencies are to put conservation first in their planning, approval and procurement processes. The City submits that the OEB erred by failing to implement provincial government policies on conservation and, in particular, the Province's "Conservation First" policy, and that the OEB also erred by failing to comply with directives issued to it by the Minister of Energy with respect to the Province's conservation and demand management policies.

Findings

The OEB finds that the City has not demonstrated any identifiable error in the EB-2015-0075 decision and therefore the OEB finds it appropriate to deny the motion at the threshold stage.

The Report of the Board: Review of the Board's Cost Allocation Policy for Unmetered Loads, states "[d]istributors should update unmetered load and consumption data for billing purposes that reflects energy efficiency improvements or other changes when those changes can be supported by evidence presented by unmetered load customers. It will be the responsibility of the unmetered load customer to provide the information to the distributor. The updated consumption data should be used by distributors for billing unmetered loads once it is validated by the distributor."[4]

[3] EB-2016-0005, Notice of Motion to Review and Vary, 2015, 1222, p. 2
[4] EB-2012-0383, Report of the Board: Review of the Board's Cost Allocation Policy for Unmetered Loads, December 19, 2013, p. 12

In keeping with this requirement, the City has provided Horizon with the updated information for the converted street lights, which will now be used for billing purposes. As a result, the monthly bill to the City from Horizon for electricity will be reduced in a number of ways:

1. As a result of the reduced energy consumption, the commodity charge and all other energy based charges will be reduced.
2. As a result of the reduction in peak kWs, the distribution and transmission charges will be reduced.

In addition to the above, the City's bill has decreased due to the implementation of the SLAF in the cost allocation model and subsequent reduction in the R/C ratio as shown below[5]:

	Revenues collected from the City for the street lighting class	Reduction in costs paid by the City	Costs	R/C Ratio
Implementation of SLAF only	$2.7M		$1.8M	153%
Implementation of SLAF and movement of R/C to 120%	$2.2M	($0.5M)	$1.8M	120%

As the City is being billed using the updated billing determinants and is receiving the benefits of the LED conversion program noted above, the Decision and Order is not contrary to the province's conservation objectives. As all consumers of electricity are encouraged to implement conservation programs, all rate classes' load profiles may change as a result of undertaking such programs. Selective updating would benefit the street lighting rate class but would do so at the expense of other rate classes. This in turn might negate some of the impact of those rate classes' conservation efforts. The OEB does not agree that provincial policies require the OEB to selectively update load profiles of some rate classes to the detriment of others. The OEB is of the view that

[5] EB-2015-0075, 2016 Cost Allocation Model_20151216, Tab O1 Revenue to Cost

provincial government policies on conservation are reflected within the Decision and Order and finds that there is no identifiable error which puts in doubt the correctness of the Decision and Order. The OEB is also of the view that the issue raised is not one that could result in the OEB varying, cancelling or suspending its Decision and Order. As such, the OEB does not find that the threshold test has been met. The Motion is denied.

DATED at Toronto, March 3, 2016

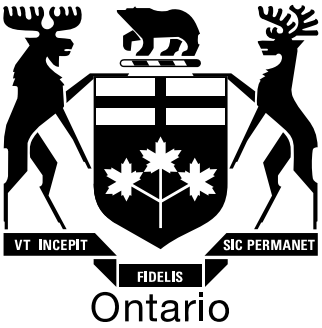
ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

TAB B

Ontario Energy Board
Commission de l'Énergie de l'Ontario



EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedur*e.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, …

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms…"

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference…"

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,…, make orders for (a) the exchange of documents, …"

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out … any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;…" While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words “may include” in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board’s rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word “shall”.

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be “special”. Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

Section D: Board Process

IGUA's grounds for review included the following alleged errors in the process used by the panel:

1. The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers,
2. In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its decision with respect to forbearance.

In particular, IGUA argued that the process adopted by the Board was flawed as it did not adhere to traditional notions of the adversarial process. IGUA's position was that a "contested rates and pricing proceeding between utilities and their ratepayers" is required to be conducted by the Board as if it were litigation between the parties as it is fundamentally an issue between them as to what the rates should be.

In IGUA's view, the Board departed from appropriate practice at the prehearing stage by

- Setting the agenda based on its priorities
- Defining the issues without input from the parties
- Directing the utilities to file evidence pertaining to some of the issues identified by the Board
- Directing that settlement discussions take place on all issues except storage regulation
- Directing all parties to file their evidence at the same time rather than dividing them by interest and having them file evidence in support of and then opposed to the issues identified by the Board

IGUA's largest area of concern however was that once evidence had been filed, "the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute". IGUA's overriding complaint is that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

IGUA argued that once a dispute became clear as between the utilities and the ratepayers the Board had to "stay out of the arena" and allow these parties to determine how to present and argue the case, in effect constraining the Board to choose between the cases put forward by the various parties.

Examples of the alleged behaviour objected to by IGUA include:

- The Board advising the parties that it had retained its own expert, but then not filing a report from this expert nor having him made available for cross examination.
- Board members posing questions which indicated that they were searching for a forbearance solution to the Storage Regulation issues, but not asking questions about the ability of the existing regulatory regime to address the concerns which the Board raised.
- The Board advising BP Canada, a party to the hearing, that it wished to hear evidence from it on certain issues and providing a list of questions in advance – at the time counsel for ratepayer interests objected to the question as "rather leading".
- Counsel for the Board hearing team taking a position in argument adverse in interest to the evidence it had led.

Counsel for Board Staff argued that IGUA's complaints ignore critical differences between the Board and the courts and they confuse the role of the hearing panel with the roles of staff counsel in Board proceedings.

Counsel for Board Staff argued that the Board is not a court of record. It is a highly specialized tribunal that has a strong and important policy-making function. The Board is entitled to commence or initiate proceedings in its own right. It is not required to sit passively as an independent adjudicator and wait for parties to initiate proceedings before it, nor is the Board required to play a purely passive adjudicative role during the course of proceedings once they have been commenced, and particularly once they have been commenced at the instigation of the Board itself.

Counsel for Board Staff also argued that hearing panels of the Board are fully entitled to ask probing questions of witnesses who appear before them, and there is nothing whatsoever untoward about doing so.

The other parties largely supported the position of Board Staff.

Findings

At a minimum, the Board is required to comply with the provisions of the SPPA and the *Ontario Energy Board Act, 1998* ("OEB Act"). The SPPA provides parties with certain procedural rights, none of which IGUA has alleged has been disregarded by the Board in this case:

- Parties must be given reasonable notice of the hearing (s 6)
- Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)
- Parties have the right to counsel (s 10)
- Parties have the right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))

- Parties are entitled to notice of the decision (s 18)

- The tribunal must compile a record of the proceeding (s 20)

Beyond these basic requirements, the SPPA specifically allows tribunals to require parties to participate in various other procedures. With respect to prehearing conferences, section 5.3 of the SPPA provides that a tribunal may direct parties to participate in a prehearing conference to consider the settlement of any or all of the issues.

Section 19(4) of the OEB Act specifically allows the Board to determine matters on its own motion:

> The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise, shall determine any matter that under this Act or the regulations it may upon an application determine, and in so doing the Board has and may exercise the same powers as upon an application.

Section 21 of the OEB Act provides that:

> The Board may at any time, on its own motion and without a hearing, give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

Therefore as well as the power to initiate proceedings, the Board is also given the statutory right to require the preparation of evidence incidental to the exercise of its powers.

While the Board accepts IGUA's argument that in a hearing under Section 36 of the OEB Act it has the jurisdiction to hear and determine all questions of law and fact, it does not agree with IGUA's characterization of the limits on its exercise of this adjudicative function.

As the Board has an over-riding responsibility to make its decisions in the public interest the parties cannot have the final word in determining the nature of the dispute and the options open to the Board. The Board is not required to accept the position of any of the parties, provided that its process is transparent and open and the parties have a fair opportunity to exercise their rights under the SPPA.

IGUA cited several authorities in support of its argument. The Board found them of little assistance as they arose in quite different contexts, generally that of civil disputes between the parties. That is not the context within which the Board operates. We are not judges in civil disputes and the Board's mandate is much broader than determining rights between the parties.

With respect to the specific allegations made by IGUA, the Board's findings follow.

The Board was fully entitled to issue a notice of proceeding on its own motion in December of 2005 and to delineate the issues it expected the parties and the intervenors to address in the proceeding.

Pursuant to the Board's settlement guidelines and the SPPA, the Board is entitled to exclude from the ambit of a settlement conference particular issues that it believes should be heard in full in the hearing which is what the hearing panel did in this case. This is another example of an area where the Board's practice is fundamentally different from that of the courts.

The Board is fully entitled under its Rules to develop procedural orders to meet the needs of any particular proceeding and there is nothing in the Rules or the SPPA which would restrict it from directing all parties to file their evidence simultaneously. This does

not in any way impede the parties from exercising their statutory rights to have access to the evidence and to cross-examine witnesses.

In a proceeding initiated by the Board, as this one was, where there is no applicant, this procedure is an appropriate one.

With respect to the expert witness retained by Board Staff, Section 14 of the OEB Act expressly permits the Board "to appoint persons having technical or special knowledge to assist the Board." As there is no suggestion that the Board's expert played a role in the deliberations of the hearing panel or that the hearing panel relied in any way on the advice of the expert, there is nothing improper arising out of his retainer. Experts consulted by Board Staff are in the same position as staff and are not required to file evidence, or to submit to questioning by any of the parties.

The Board also finds that IGUA's complaints that the NGEIR panel members asked questions of witnesses, which IGUA complains indicated that they were searching for a forbearance solution to the storage regulation issue, are without merit. Adjudicators are entitled to ask probing questions of witnesses who testify before them, including leading questions. The fact that questions are asked or not asked does not mean that the panel has made up its mind one way or the other on an issue.

The Board also finds that the NGEIR panel was fully entitled as a result of the powers granted in section 21 of the OEB Act to act as it did in putting questions to a witness from BP Canada. It is also not an unusual occurrence for the Board to agree to hear evidence in camera, where there is confidential or sensitive commercial information involved.

The Board also finds no error in the fact that counsel for the Board hearing team made final argument in which she took a position adverse to the expert evidence that the Board hearing team led. The Board hearing team is entitled to take whatever position it chooses based on the evidence that was adduced during the hearing and nothing that Board hearing counsel did could possibly ground a complaint of breaches of the rules of

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

The joint factum of CCC and VECC and the factum of the IGUA both allege that the original NGEIR panel erred in misinterpreting or overreaching in respect of its jurisdiction under section 29 of the OEB Act.

In particular, the CCC/VECC factum states as follows at paragraph 8:

> 8. The moving parties submit that the NGEIR Decision raises the following issues:
>
> (i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;
>
> (ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

In its factum, IGUA alleged that the Board had no jurisdiction to conduct what IGUA characterized as the Board's "own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers". (IGUA factum par. 84(a))

IGUA also alleged that:

> …the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance. (IGUA factum par. 84(b))

In addition to these general submissions by CCC/VECC and IGUA about the NGEIR panel's interpretation of its jurisdiction under Section 29, these parties also argued specifically that the NGEIR panel exceeded its jurisdiction under Section 29 by restructuring the storage businesses of Union and Enbridge. They asserted that the power to restructure the storage business comes under section 36 of the legislation. (Tr. Vol. 1, pp. 28 and 56-57)

Findings

The NGEIR panel's interpretation and application of section 29 is central to the NGEIR Decision. The NGEIR Decision therefore deals extensively with the question of the legal test to be applied under section 29, the analytical framework for assessing whether the natural gas market is competitive and finally, the assessment of market power in the natural gas sector in Ontario.

The starting point for the NGEIR Decision is the Board's interpretation of section 29 which is set out in Chapter 3 of the Decision and reads as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest

In Chapter 3 of the NGEIR Decision, the NGEIR panel discussed the statutory test to be used in the assessment of competition in the storage market and applies the analytical framework mandated by that statutory test. In particular, the panel reviews the history of section 29 and of the concept of forbearance and light-handed regulation.

The NGEIR panel's review of Section 29 is described at two levels. The first is the assessment of competition, which is done by applying the market power tests, and the second is the relationship between competition and the public interest.

The NGEIR panel interprets “competition” within section 29 at page 24 of the NGEIR Decision as follows:

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of “competition sufficient to protect the public interest”; what economists refer to as a “workably competitive” market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products “is or will be” subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

The NGEIR panel further interprets its mandate at page 44 as follows:

> …Section 29 says that the Board shall make a determination to refrain “in whole or part” which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

The NGEIR panel then proceeds to assess the “level of competition” using the market power tests and finds the storage market in Ontario is subject to “workable competition”.

Following this, it then addresses the question of whether the level of competition is sufficient to protect the public interest. In so doing, the panel addresses what should be

encompassed in its consideration of the public interest in the context of the assessing competition as follows:

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and

conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with

the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error

associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "… the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "…reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

In particular, Chapter 2 is described at page 5 of the decision as "…an overview of gas storage in Ontario today – the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of

storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities'' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s.

29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "…the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act…" In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

- Identification of the product market.
- Identification of the geographic market.
- Calculation of market share and market concentration measures.
- An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

- The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.
- The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

- The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore

determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence

or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive, and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of

the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the

> cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.
>
> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that,

> at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

Later in the decision at page 82, the decision states:

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-

> franchise needs when determining the “utility asset” portion of Union’s current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs.”

The NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

> The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a

windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect

to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this

reason, the Board has determined that the threshold test has not been met and it will not order a review of the NGEIR Decision as it pertains to the issue of the division of the utilities assets or the sharing of the margin realized from the sale of natural gas storage to ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

In the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the

Settlement Proposal, Enbridge's Rate 316 provides an allocation of base level deliverability storage at rolled in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlement Proposal indicates that generators are entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates.

Findings

In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR panel took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. It appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.

With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

The Board further noted:

> The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review

panel of the Board could decide that the decision or order should be varied (by way of clarification or otherwise), cancelled or suspended.

Section M: Aggregate Excess Method of Allocating Storage

In the NGEIR proceeding, Union had proposed the "aggregate excess" method in allocating storage to its customers. The aggregate excess method is the difference between the amount of gas a customer is expected to use in the 151-day winter period and the amount that would be consumed in that period based on the customer's average daily consumption over the entire year. Kitchener had proposed two alternative methodologies. The NGEIR Decision approved Union's proposal.

Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued that there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153)

and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing requirements of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

The Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly considers the fact that Kitchener's aggregate excess amount is 10.6% lower than its current contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

In view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

The Board Orders That:

> The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

Section O: Cost Awards

The eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on both Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

Union and Enbridge will have until June 19, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

The party whose cost claim was objected to will have until June 26, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on both Union and Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

_____

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

_____

Paul Vlahos
Member

Original signed by

_____

Cathy Spoel
Member

TAB C

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

DECISION AND ORDER

EB-2017-0306 AND EB-2017-0307

UNION GAS LIMITED
AND
ENBRIDGE GAS DISTRIBUTION INC.

Enbridge Gas Distribution Inc. and Union Gas Limited Application for Amalgamation and Rate-Setting Mechanism

BEFORE: **Lynne Anderson**
Presiding Member

Christine Long
Vice-Chair and Member

Cathy Spoel
Member

August 30, 2018

Amended on September 17, 2018

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APPENDIX A 59

1 INTRODUCTION AND SUMMARY OF FINDINGS

Enbridge Gas Distribution Inc. (Enbridge Gas) and Union Gas Limited (Union Gas), jointly referred to as the applicants, filed an application dated November 2, 2017 with the Ontario Energy Board (OEB) under section 43(1) of the *Ontario Energy Board Act, 1998* (the Act), for approval to effect the amalgamation of Enbridge Gas and Union Gas into a single company referred to as Amalco. On November 23, 2017, the applicants filed another application with the OEB under section 36 of the Act for approval of a rate setting mechanism for the proposed Amalco, effective January 1, 2019.

Enbridge Gas is a rate-regulated gas distribution, storage and transmission company serving over 2.1 million residential, commercial and industrial customers in 121 franchise areas of central and eastern Ontario, including the Greater Toronto Area (GTA), the Niagara Peninsula, Ottawa, Brockville, Peterborough and Barrie. Its head office is in the City of Toronto and it has approximately 2,100 employees. Enbridge Gas currently operates under a five-year Custom Incentive Rate-setting (IR) framework approved by the OEB and ending in 2018.[1]

Union Gas is a rate-regulated natural gas storage, transmission and distribution company serving about 1.5 million residential, commercial and industrial customers in over 400 communities across northern, southwestern and eastern Ontario. Its head office is in the Municipality of Chatham-Kent and it has approximately 2,300 employees. Union Gas currently operates under a five-year price cap Incentive Rate-setting Mechanism (IRM) approved by the OEB and ending in 2018.[2]

The applicants have been under common ownership since February 27, 2017 when Enbridge Gas' corporate parent, Enbridge Inc., merged with Union Gas' corporate parent, Spectra Energy Corp. Both companies (Enbridge Gas and Union Gas) were expected to file rebasing applications for 2019 rates. However, the companies have proposed to merge and defer rebasing until 2029.

The applicants prepared their applications on the basis of the OEB's Handbook to Electricity Distributor and Transmitter Consolidations (MAADs Handbook), which provides guidance on applications for mergers, acquisitions, amalgamations and divestitures (MAADs). Accordingly, the applicants proposed a deferred rebasing period

[1] EB-2012-0459
[2] EB-2013-0202

of ten years and a rate-setting framework based on the Price Cap Incentive rate-setting (Price Cap IR) option.[3]

The applicants proposed an issues list that was based on their position that the OEB's MAADs policy framework applied in its entirety to these applications. The intervenors filed an alternative issues list that framed the issues on the basis that the application of specific aspects of the MAADs policy was a matter for argument, and that the MAADs policy did not necessarily apply in its entirety to this transaction.

The OEB heard written submissions on the issues list. OEB staff and intervenors argued that not all elements of the MAADs Handbook applied to the gas distributors, as the policy was adopted to incent consolidation within the electricity sector in Ontario. The OEB's decision on the issues list [4] accepted the intervenors' and OEB staff's argument. The OEB found that there is no reference to the gas distributors in the MAADs Handbook and that parties would not be restricted from questioning the applicability of the policies to this transaction. The OEB also decided that it would apply the "no harm" test to assess the proposed amalgamation.

The OEB also decided to combine the amalgamation and rate-setting framework applications as they were inter-related, and doing so would lead to procedural efficiencies.

For reasons that follow, the OEB has made the following key determinations:

1. The request for amalgamation meets the "no harm" test. The OEB grants leave to the applicants to amalgamate Enbridge Gas and Union Gas under section 43(1) of the *Ontario Energy Board Act, 1998*, into a single company, subject to the conditions set out herein.

2. The OEB approves a deferred rebasing period of five years.

3. The OEB approves an annual rate change during the deferred rebasing period based on a price cap index (PCI), where PCI growth is driven by an inflation factor using GDP IPI FDD, less a productivity factor of zero and a stretch factor of 0.3%.

4. The OEB approves an asymmetrical earnings sharing mechanism during the deferred rebasing period that will be implemented from year one and share

[3] Handbook to Electricity Distributor and Transmitter Consolidations, January 19, 2016, page 12 – consolidating distributor can chose a deferred rebasing period of 10 years with no supporting evidence.
[4] Decision and Procedural Order No. 3, March 1, 2018.

earnings on a 50/50 basis between the applicants and ratepayers for all earnings in excess of 150 basis points over the OEB-approved return on equity.

5. The OEB approves the use of an Incremental Capital Module during the deferred rebasing period, the details of which are outlined in Section 5.5.
6. The OEB accepts the use of the proposed Y factors, with the exception of the Cap-and-Trade costs to be addressed in a separate proceeding; additional direction has been provided on the proposed Normalized Average Consumption/Average Use true up.
7. The Z-factor materiality threshold will be set at $5.5 million on a revenue requirement basis.
8. The OEB accepts the proposed base rate adjustments.
9. Amalco is required to file a cost allocation study in 2019 for the legacy Union Gas service area to take into account certain major capital projects.
10. During the deferred rebasing period, Amalco will continue to purchase market-based storage services to meet the needs of legacy Enbridge Gas in-franchise customers.

2 THE APPLICATION

The applicants filed two applications, one requesting the amalgamation and a deferred rebasing period of ten years[5] and the other requesting a ratemaking framework based on Price Cap IR.[6] As noted earlier, the OEB combined the two applications.

The applicants argued that the proposed amalgamation meets the “no harm” test and that the merger would have a positive effect on the attainment of the OEB’s statutory objectives. In financial terms, the applicants estimated the cumulative benefit to customers of amalgamation to be $410 million over the deferred rebasing period. This benefit represents the difference between the costs of two utilities operating separately under a Custom IR for a period of two five-year terms (for a total of ten years) and an amalgamated utility.

The amalgamation involves a conversion of Enbridge Gas and Union Gas shares into shares of Amalco, with no change of control.

In line with the MAADs policy framework, the applicants proposed a ten year deferred rebasing period opting to rebase in 2029. The applicants submitted that a ten year deferred rebasing period was necessary to allow Amalco to integrate and have sufficient time to make the capital and system investments necessary to generate integration synergies across the combined Enbridge Gas and Union Gas operations.

In a second application, the applicants requested a rate setting mechanism for the period 2019 to 2028 with the following parameters:

1 An annual rate change calculation using a price cap index (PCI), where PCI growth is driven by an inflation factor, less a productivity factor of zero, and no stretch factor.

2 The duration of the rate-setting mechanism would be ten years (the deferred rebasing period).

3 The framework would continue to pass-through routine gas commodity and upstream transportation costs, demand side management cost changes, lost revenue adjustment mechanism changes for the contract market, normalized average consumption/average use, and Cap-and-Trade costs.

4 The ability to address material changes in costs associated with unforeseen events outside of the control of management (Z-factor). The applicants initially proposed a

[5] EB-2017-0306.
[6] EB-2017-0307.

materiality threshold of $1.0 million, consistent with the threshold for electricity distributors, but proposed a revised materiality threshold of $5.5 million in their reply submission.

The applicants also applied for the following approvals:

1. Recovery through rates for qualifying incremental capital investments through the OEB's Incremental Capital Module (ICM):
    a. based on separate materiality threshold calculations using rate base and depreciation expense last approved by the OEB in 2013 rates for Union Gas and 2018 rates for Enbridge Gas; and
    b. using incremental cost of capital to calculate the revenue requirement to fund incremental capital investment:
        i. 64/36 debt to equity ratio;
        ii. incremental cost of long-term debt issued; and
        iii. allowed return on equity (ROE) based on OEB's cost of capital formula for the year the investment is placed in service.
2. An adjustment (increase) of $17.4 million pre-tax ($12.8 million after-tax) to Union's 2018 OEB-approved revenue reflecting the full amortization of the accumulated deferred tax balance at the end of 2018.
3. An adjustment (decrease) of $4.9 million to Enbridge Gas' 2018 OEB-approved revenue reflecting the completion of the smoothing of costs related to Enbridge Gas' Customer Information System and customer care forecast costs.
4. The continuation of certain existing deferral and variance accounts and the dis-continuation of others.
5. Recovery of $6.5 million related to certain pension and Other Post-Employment Benefits (OPEB) costs associated with amendments to the *Pension Benefits Act* legislation that was not recovered in the Enbridge Gas 2018 rates proceeding.[7] This Bill has now received Royal Assent and the applicants are seeking recovery of this amount in 2019 rates.
6. For purposes of setting 2019 rates and beyond, the applicants proposed to remove $11.2 million in tax deductions that are currently embedded in Enbridge Gas' 2018

[7] EB-2017-0307.

revenue requirement because there is no longer any ongoing Site Restoration Costs (SRC) refund and therefore the associated tax deductions will no longer be available in years following 2018.

The following parties were approved as intervenors in the proceeding:

- Association of Power Producers of Ontario (APPrO)
- Building Owners and Managers Association Toronto (BOMA)
- Canadian Manufacturers and Exporters (CME)
- City of Kitchener (Kitchener)
- Consumers Council of Canada (CCC)
- ÉNERGIR L.P.
- Energy Probe Research Foundation (Energy Probe)
- Federation of Rental-housing Providers of Ontario (FRPO)
- Independent Electricity System Operator
- Industrial Gas Users Association (IGUA)
- Just Energy Ontario L.P.
- London Property Management Association (LPMA)
- Municipality of Chatham-Kent
- National Grid
- Ontario Association of Physical Plant Administrators (OAPPA)
- Ontario Greenhouse Vegetable Growers (OGVG)
- Ontario Petroleum Institute
- Ontario Power Generation Inc.
- Rover Pipeline LLC
- Six Nations Natural Gas Company Limited
- School Energy Coalition (SEC)
- TransCanada PipeLines Limited (TransCanada)
- Unifor
- Vulnerable Energy Consumers Coalition (VECC)

3 THE PROCESS

The OEB issued a Notice of Hearing on December 1, 2017 for both applications. In Procedural Order No. 1 issued on December 22, 2017, the OEB approved a list of intervenors and scheduled an Issues Conference, an Issues Day and a discovery process.

An Issues Conference was held on January 15, 2018 for the MAADs application and on January 22, 2018 for the rate-setting application, with the objective of developing a proposed issues list for presentation to the OEB. However, there was no consensus on the issues list proposed by the applicants. The parties did agree on the addition of three issues that were proposed by the Municipality of Chatham-Kent.

The OEB issued Procedural Order No. 2 on January 16[8]and January 23, 2018[9] cancelling the Issues Day for both proceedings and scheduled a written process for filing submissions on the draft issues list. The applicants filed their argument-in-chief on January 19 and 26, 2018 with respect to both issues lists.

Intervenors and OEB staff filed their submissions on the issue lists on January 26 (MAADs Application) and February 2, 2018 (Rate-setting Mechanism Application). In Decision and Procedural Order No. 3 issued on March 1, 2018, the OEB determined that the OEB's MAADs policy framework for electricity distributors would not apply in its entirety to these applications. The OEB also combined the two proceedings to make the process more efficient and provided a final Issues List for the combined proceeding. The OEB also provided for a written discovery process (interrogatories), a technical conference, filing of intervenor evidence and interrogatories on that evidence, and scheduled an oral hearing.

In Procedural Order No. 5, the OEB required that all parties who wished to cross-examine at the oral hearing file their initial positions on certain key matters in advance of the oral hearing.

An oral hearing was held in May 2018. The applicants filed their argument-in-chief on June 1, 2018 followed by final arguments of all parties on June 15, 2018 and the applicants' reply argument on June 29, 2018.

The OEB received eight letters of comment that expressed a range of concerns about the amalgamation including:

[8] EB-2017-0306
[9] EB-2017-0307

- the effect on jobs and services
- rate increases and ensuring the savings and benefits flow to customers
- the length of the proposed deferred rebasing period
- the mechanism proposed for setting rates
- the location of the monitoring and control of the natural gas system

The OEB considered these comments as it assessed the applicants' proposals.

4 DECISION ON AMALGAMATION

4.1 No Harm Test

In Decision and Procedural Order No. 3, the OEB determined that it would apply the "no harm" test in this proceeding to determine if the applicants' leave to amalgamate should be granted. In the assessment of consolidation transactions in the electricity sector, the OEB has consistently applied the "no harm" test since 2005.[10] The no harm test considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives. Where a proposed transaction is determined to have a positive or neutral effect on the attainment of these objectives, the OEB will approve the application. The OEB has applied the no harm test in assessing this application.

The OEB's statutory objectives for the gas sector are set out in section 2 of the Act:

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers.

Most of the intervenors and OEB staff suggested that the OEB should approve the amalgamation of Enbridge Gas and Union Gas under section 43 of the Act. IGUA submitted that utility shareholders should be free to structure their utility operations as they see fit, as long as ratepayer interests are not unduly compromised. CCC noted that the amalgamation will provide significant and sustainable benefits to current and future ratepayers in Ontario.[11] Kitchener did not take a position on this issue. Unifor, the union

[10] Decision of the OEB in combined proceeding RP-2005-0018/EB-2005-0234/-0254/-0257, August 31, 2005.
[11] CCC Submission, page 2.

representing many of the employees at both Enbridge Gas and Union Gas, submitted that the OEB should dismiss the application absent the applicants providing financial forecasts containing verifiable information regarding ratepayer savings and the means to achieve them.

OEB Findings

The OEB concludes that the amalgamation meets the no harm test. The OEB therefore grants leave to the applicants to amalgamate Enbridge Gas and Union Gas into a single company subject to the conditions set out herein.

In determining that the amalgamation meets the no harm test, the OEB has focused on the objectives that are of most direct relevance to the impact of the proposed transaction; namely, reliability and quality of gas service, financial viability and price.

4.2 Reliability and Quality of Gas Service

The applicants have committed that Amalco will continue to maintain the safety, reliability and quality of service to Enbridge Gas and Union Gas customers, both in-franchise and ex-franchise. Amalco will continue to be subject to, and will report on, all existing Service Quality Requirements (SQRs) applicable to gas utilities. The applicants have also proposed a scorecard that will report on a variety of metrics.

None of the parties except Unifor argued that the reliability and quality of service will be adversely impacted as a result of the proposed amalgamation. Unifor observed that as the proposed amalgamation will require significant restructuring, the quality and reliability of service is likely to be affected during the transition. Unifor argued that the efficiencies proposed by the applicants will inevitably result in the elimination of staff and that the applicants had not provided a plan as to how they intend to maintain the reliability and quality of service in light of staffing reductions. Unifor therefore submitted that the no harm test had not been satisfied and the application should be dismissed.[12]

The applicants took the position that the proposed amalgamation meets the no harm test and that arguments to the contrary should be disregarded.

[12] Unifor submission, pages 4-5.

OEB Findings

The OEB is satisfied that the proposed transaction will not lead to any adverse impact with respect to the reliability and quality of service, and the OEB finds that the no harm test is met in this regard.

The OEB accepts the applicants' position that efficiencies can be gained without compromising the ability of Amalco to maintain currents levels of reliability and quality of service. Furthermore, the new gas utility will be subject to the same requirements under the OEB's Gas Distribution Access Rules (GDAR).

4.3 Financial Viability

The application notes that the proposed amalgamation is not expected to have an impact on the financial viability of Amalco as it is a conversion of Enbridge Gas and Union Gas shares into shares of Amalco, with no change of control.

None of the intervenors took issue with this position nor did any express concerns about the impact of this transaction on the financial viability of the gas industry in Ontario.

OEB Findings

The OEB finds that the proposed sale transaction meets the no harm test with respect to financial viability of the gas industry.

4.4 Price

With respect to price, the applicants claimed that the proposed amalgamation will provide greater benefits to customers than continued stand-alone operations of Enbridge Gas and Union Gas. Their comparison of the status quo, that is the annual revenue requirement of Enbridge Gas and Union Gas operating individually under Custom IR during the ten-year proposed deferred rebasing period, to the revenue of Amalco operating as an amalgamated entity under Price Cap IR, showed a cumulative benefit of $410 million over the deferred rebasing period.

This claim was disputed by a number of intervenors who argued that the claimed benefit has not been substantiated and is not credible. SEC argued that the $410 million benefit is an illusion because the applicants' "straw man" calculation is dramatically

overstated.[13] SEC argued that the applicants did not provide details such as capital continuity tables and year-by-year OM&A budgets to substantiate their claim. Despite this, SEC observed that the "no harm" test with respect to amalgamation had been met, as it does not require the demonstration of benefits. However, SEC argued that the applicants' rate setting proposal and rebasing period were not just and reasonable.

In reply, the applicants said that it was not possible to file detailed evidence of the impacts of the stand-alone scenario in the amalgamation application. However, the applicants argued that they had developed a reasonable basis for comparison. In support of their position, the applicants relied on the OEB's decision in the Alectra proceeding,[14] in which the OEB found that the cost estimates provided by the consolidating entities were a sufficiently accurate basis for its analysis.[15]

Other intervenors such as VECC, APPrO, CME, OGVG, LPMA and IGUA submitted that apart from the rate proposal and deferred rebasing period, the applicants had met the no harm test.

In general, the intervenors and OEB staff agreed that the merger of the two utilities will increase productivity and benefit ratepayers in the long-term. Unifor was the only exception. Unifor submitted that the applicants had not demonstrated that the costs to serve acquired customers would be no higher than they otherwise would have been.[16] Accordingly, Unifor claimed that the applicants failed to meet the no harm test.

OEB Findings

The OEB finds that the proposed amalgamation meets the no harm test in relation to price given the rate framework approved by the OEB in this Decision. The OEB is satisfied that the amalgamation will result in underlying costs of service that are no greater than they would have been for the separate companies.

4.5 Conditions of Approval

Agreement with Chatham-Kent

Under the Undertakings provided by Union Gas and related parties to the Lieutenant Governor in Council (Union Undertakings), which took effect in 1999, Union Gas is

[13] SEC submission page 21, 2.4.21.
[14] Decision and Order, EB-2016-0025/EB-2016-0360, page 12.
[15] Applicants Reply, page 13, paras 37 and 38.
[16] Unifor submission, page 2.

required to maintain its head office in the Municipality of Chatham-Kent (Chatham-Kent or the Municipality). The parties to the Union Undertakings are released from the requirements upon the amalgamation of Union Gas and Enbridge Gas because Westcoast Energy will no longer hold more than 50% of voting securities in Union Gas.

The applicants made four commitments to Chatham-Kent in a March 7, 2018 letter with respect to their presence in the Municipality. The applicants propose that those commitments be adopted by the OEB as conditions of approval for the amalgamation as follows:

1. Amalco shall ensure that during the deferred rebasing period any employment impacts resulting from the amalgamation will be managed on a roughly proportionate basis between the Municipality of Chatham-Kent and the City of Toronto;

2. To the extent that Centres of Excellence are created in either the Municipality of Chatham-Kent or the City of Toronto, the Centres of Excellence shall reflect a range of skills and compensation levels, including leadership roles;

3. Employment within the Municipality of Chatham-Kent shall reflect a mixture of entry, middle and senior level roles; and

4. Amalco will commit to a process of regular communication and engagement with the Municipality of Chatham-Kent in respect of the amalgamation and its related impacts and opportunities.

The Municipality says these conditions are critical to the economic health of Chatham-Kent, which has suffered significant job losses as a result of, among other things, the erosion of its manufacturing sector. According to the Municipality, Union Gas is the largest private sector employer in Chatham-Kent. The Municipality submitted that the conditions would continue a decades-old commitment on the part of the government, the OEB and the owners of Union Gas to protect the interests of Chatham-Kent. Chatham-Kent was of the opinion that the OEB has the authority to continue that commitment.

In its submission, OEB staff explained that although the OEB has the jurisdiction to include the conditions jointly requested by the applicants and the Municipality, OEB staff had some concerns about doing so, namely: (1) the conditions are not necessary, as the evidence suggests that the applicants will maintain a significant presence in the Municipality despite the lapsing of the Union Undertakings; (2) the conditions might even be seen as frustrating the Government of Ontario’s policy intent, as it was the Government that agreed to the expiry clause in the Union Undertakings; and (3) the OEB is above all an economic regulator, and might one day, if Amalco applied to reduce

its presence in the Municipality, find itself having to arbitrate a situation which may require the weighing of interests that are outside its core expertise.

Aside from the Municipality, the only intervenor to make submissions on this issue was LPMA, who expressed the general concern that any conditions that may be attached to the OEB's approval of the merger might lead to higher costs and/or lower savings.

In their reply submission, the applicants supported Chatham-Kent's submission, and added that, in light of the OEB's historical role as overseer of the Union Undertakings, it would be appropriate for the OEB to fill the gap that will be created upon the expiry of the Union Undertakings by approving the requested conditions.

OEB Findings

The OEB approves the proposed conditions of approval during the deferred rebasing period to provide a period of transition following the release of Union Gas from the provisions of the Union Undertakings.

Section 4.1 of the current Union Undertakings states that "The head office of Union shall remain in the Municipality of Chatham-Kent". The parties to the Union Undertakings would be released from this requirement following the amalgamation. The applicants made four commitments to Chatham-Kent in their March 7, 2018 letter with regard to the presence that Amalco will maintain in Chatham-Kent in the event that the amalgamation is approved. The OEB agrees that the commitments made by the applicants are reasonable and will not lead to unreasonable costs to Amalco during the deferred rebasing period.

In its Argument in Chief, the applicants stated that a transition is appropriate rather than an abrupt end to the provisions of the Union Undertakings. The OEB agrees that it is appropriate to have the conditions of approval in place during the deferred rebasing period to provide this period of transition. While only the first of the four proposed conditions referred to the deferred rebasing period, the OEB finds it appropriate to have the same transition period for all of the conditions.

The OEB has the authority to impose such conditions as it considers proper.[17] Conditions 1) and 3) above are reasonably consistent with the intent of the Union Undertaking and therefore are appropriate during the deferred rebasing period. While condition 2) related to Centres of Excellence may appear to be broader in scope, the OEB notes that it does not require Amalco to establish such Centres of Excellence.

[17] Section 23 of the Act.

Condition 4) commits Amalco to regular communication and engagement with Chatham-Kent. The OEB expects Amalco to maintain strong stakeholder relations with all of its stakeholders, therefore, this condition is reasonable.

5 DECISION ON RATE FRAMEWORK

Section 2 outlines the rate framework that the applicants proposed in their application. This proposal includes a Price Cap IR that adjusts rates on an annual basis using an inflation factor, a productivity factor of zero and no stretch factor. The proposed duration of the rate-setting mechanism is ten years.

The proposed framework includes Y factors to pass through routine gas commodity and upstream transportation costs, demand side management cost changes, lost revenue adjustment mechanism changes for the contract market, normalized average consumption/average use, and Cap-and-Trade costs.

The applicants also proposed a Z-factor to recover costs related to unforeseen events outside of the control of management. The application sought a materiality threshold of $1.0 million. In its reply argument, the applicants revised the requested materiality threshold to $5.5 million.

The applicants also applied to recover qualifying capital investments through the OEB's Incremental Capital Module (ICM) methodology, and for certain base rate adjustments for 2019 rates.

5.1 Rate Framework Policies

In preparing their application, the applicants followed the MAADs Handbook. The applicants' view was that the MAADs Handbook applied to gas distributors and transmitters as well as to electricity distributors and transmitters. Many other parties disagreed, arguing that the MAADs Handbook only applied to the electricity sector, and that different considerations and policies were appropriate in the gas context.

The OEB heard submissions on this issue and issued a decision with Procedural Order No. 3. The OEB determined that, although it provided useful guidance, the policies of the MAADs Handbook did not automatically apply to the gas sector:

> The OEB does not agree with the arguments of the applicants and accepts the position of intervenors and OEB staff that all aspects of the MAADs Handbook do not automatically apply to natural gas. The MAADs Handbook does not specifically reference natural gas and there is no specific guidance in the Handbook as to how gas mergers should proceed. The OEB is of the view that issues such as the deferral period and earnings sharing mechanism are legitimate areas of inquiry and are not

> predetermined in this case. The OEB may find that the MAADs Handbook applies in part or in whole, but this does not preclude parties from arguing for or against the applicability of specific elements of the MAADs Handbook, with the exception of the applicability of the no harm test.[18]

In light of this decision, the applicants argued that this application was consistent with the overall policies of the OEB, and that in particular the policies of the MAADs Handbook were appropriate for this application.[19] Other parties disagreed.

OEB Findings

The MAADs Handbook was developed for the consolidation of electricity distributors and transmitters, with the focus on electricity distributors. The policies were developed to incent the consolidation of electricity distributors. At the time the MAADs Handbook was issued, there were more than 70 electricity distributors and only three gas distributors.

The OEB agrees that the principles and objectives established in the Renewed Regulatory Framework (RRF)[20] apply to all utilities, e.g. an outcomes based approach, but there are many ways that these outcomes can be achieved without an amalgamation. As noted in Decision and Procedural Order No. 3, the OEB's MAADs policies do not automatically apply to the gas utilities. They must be tested to ensure that they are reasonable given the different circumstances of the gas utilities.

The OEB finds that it is appropriate to allow the applicants to defer rebasing for five years and to adopt a Price Cap IR rate-setting mechanism during this deferred period. Price Cap IR is a well-established mechanism for the OEB, and Union Gas has been on a version of this mechanism since 2014. Details of the approved rate-setting framework are discussed in the following sections.

[18] Decision and Procedural Order No. 3, March 1, 2018, p. 6.
[19] See, for example, the applicants' reply argument, pp. 3-9.
[20] Report of the Board - Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach, page 11, October 18, 2012 and Handbook for Utility Rate Applications, October 13, 2016.

5.2 Deferred Rebasing Period

The applicants proposed a deferred rebasing period of ten years. In support of their request, the applicants referred to the MAADs Handbook which allows consolidating distributors to select a maximum deferral period of ten years with no supporting evidence to justify the selected deferral period. The applicants maintain that a ten-year deferred rebasing period is necessary to undertake a large and complex integration and to deliver significant integration savings and synergies to ratepayers on rebasing.

With the exception of the Municipality of Chatham-Kent, none of the other parties supported a ten-year deferred rebasing period. The Municipality of Chatham-Kent noted that the rebasing period was necessary to allow the area of Chatham-Kent to adjust to any loss of employment as a result of the amalgamation.

A number of intervenors and OEB staff raised issues related to a long deferral period. These included that:

- A full examination of the two utilities' costs was last undertaken in 2012 and 2013. Decoupling revenues from costs for 15 years is not appropriate and contrary to good regulatory practice.
- The election of the ten-year deferred rebasing period in the MAADs Handbook was intended to promote consolidation in the electricity sector in Ontario and to allow consolidating utilities to recover transaction and integration costs. There was no mention of natural gas in the MAADs Handbook, and as there are only three natural gas utilities in the Province, there was no need to incent consolidation in the natural gas sector.

SEC argued that the applicants' claim that they needed time to complete integration and realize savings was not supported by the evidence, and there is therefore no rationale for a ten year deferred rebasing period. SEC noted that the total cost of consolidation is expected to be $150 million, and in the first year, the costs exceed the achieved savings by $8 million as per the applicants' evidence.[21] By the end of 2020, the costs are expected to exceed the shortfall by only $4 million, after which point the cumulative savings exceed the costs for the duration of the deferred rebasing period. SEC further noted that this calculation excluded the $5.2 million in annual savings already achieved by the end of 2017 as a result of combining certain activities of Enbridge Gas and Union Gas.[22] SEC further noted that the consolidation does not involve substantial transaction costs, as they are both already owned by the same parent company.

[21] EB-2017-0306, Exhibit B, Tab 1, Attachment 12.
[22] Transcript Volume 1, pages 67-68.

SEC also disagreed that it was appropriate for the applicants to deduct $410 million in stated benefits from the savings calculation in order to earn the allowed ROE. This approach pushes the net benefits to Amalco until the later years (at year eight of the ten-year deferred rebasing period). SEC argued that this approach is based on the assumption that the expected savings of $680 million as a result of the amalgamation over the ten-year period and the standalone assumptions used to calculate the $410 million ratepayer benefit are reasonable. SEC submitted that neither of these assertions is credible.[23] A number of other intervenors (APPrO, FRPO, CCC, LPMA and CME) agreed with SEC.

Intervenors and OEB staff also raised concerns about cost allocation and the true-up of average consumption. They submitted that there are existing inequities with respect to the allocation of costs that need to be corrected. Although Union Gas has agreed to review costs allocated to the Panhandle Reinforcement project, intervenors and OEB staff argued that to make selected adjustments for certain assets now while leaving other adjustments until 2029 would not be fair to the overall customer base. Energy Probe argued that the lengthy period between rebasing and the many cost allocation issues will create rates that would no longer be considered just and reasonable.[24] In reply argument, the applicants proposed to prepare cost allocation studies for each of the years 2022 and 2026 using OEB-approved methodologies, and indicated their willingness to consider changes to cost allocation with the expectation that there would be no impact on the revenue requirement.

The City of Kitchener (Kitchener) noted that its transportation demand charge has increased by 92% over a five-year period. If a ten-year deferred rebasing period was approved, Kitchener would not be able to resolve its cost allocation issues, and the significant rate increases associated with some recent large infrastructure projects of Union Gas would be included in Kitchener's rates for a further ten years.

OEB staff noted that the average use model for Enbridge Gas had a structural break in 2016 and such issues would only be examined at rebasing, and that a ten-year deferred rebasing period was therefore not appropriate.

As a result, a number of intervenors requested immediate rebasing (SEC, FRPO, CCC, LPMA, IGUA, Energy Probe, Kitchener, BOMA and APPrO) and argued that the OEB should require Amalco to file a rebasing application for 2021 rates. They suggested that in the meantime, the two utilities could continue with their respective IR plans or Enbridge Gas could adopt the Price Cap IR of Union Gas.

[23] SEC submission, pages 20-21.
[24] Energy Probe submission, page 3.

In support of immediate rebasing, several intervenors cited the Settlement Agreement in Union Gas' IRM Framework Application[25] which required Union Gas to file a cost-of-service filing in 2019 regardless of whether Union Gas applies to set rates for 2019 on a cost-of-service basis.

Intervenors noted that Enbridge Gas made an equivalent commitment in the oral hearing of its Custom IR application.[26] Intervenors (SEC, IGUA, APPrO and Kitchener) submitted that the utilities should not be allowed to renege on those commitments. The applicants disagreed with this interpretation of the Settlement Agreement and argued that it does not state when Union Gas will rebase but what Union Gas will do when it does rebase. The applicants argued that until the OEB has determined when rebasing will occur, it is not possible to conclude that Union Gas' agreement to prepare a full cost of service had been triggered. The applicants also argued that Enbridge Gas' evidence in its proceeding was given in the context of the Union Gas Settlement Agreement and was based on the expectation that the two utilities would continue to operate individually rather than in the context of a proposed amalgamation.[27]

In response to the suggestion of immediate rebasing, the applicants argued that the recommended approach was contrary to OEB policies that focus on incentives, outcome and performance. The applicants cited one of the key principles of the RRF, which refers to strong incentives to enhance utility performance.[28]

Alternatively, if the OEB was considering a deferred rebasing period, a majority of intervenors suggested a maximum deferred rebasing period of five years, although some argued for four or six years. OEB staff noted that the majority of Amalco's integration would be completed by 2024 and the utility would be in a position to file a rebasing application for 2025 rates.[29] In reply, the applicants emphasized the need for a ten-year deferral period as that is what they require to complete the amalgamation thoughtfully, thoroughly and effectively.

OEB Findings

The OEB approves a deferred rebasing period of five years. The next rebasing application will therefore be expected for 2024 rates. The OEB finds that five years provides a reasonable opportunity for the applicants to recover their transition costs.

[25] EB-2013-0202.
[26] EB-2012-0459.
[27] Applicants Reply, pages 33-34, paras 97-99
[28] Ibid, para 86.
[29] OEB staff submission, page 9

The OEB's policy of permitting a deferred rebasing period of up to ten years was adopted to incent the consolidation of electricity distributors.

For the gas utilities, Union Gas last rebased for 2013 and Enbridge Gas last rebased through a Custom IR application with a term from 2014 to 2018. To allow a further ten years before rebasing would result in 15 years without a rebasing application. During the last rate setting frameworks, both Union Gas and Enbridge Gas earned more than the OEB-approved return as evidenced by the earnings sharing mechanisms for both utilities. Customers will not benefit from any efficiency gains from this previous period until the end of the rebasing period.

The OEB agrees that the RRF is focused on the delivery of outcomes. These are assessed in part through the use of benchmarks which have been developed and applied for several years in the electricity distribution sector. In the absence of benchmarking on which to assess the performance of the applicants, and the resulting outcomes for their customers, the OEB has determined that 15 years is too long to go without a full review of their costs.

The OEB finds the wording in the Settlement Agreement for Union Gas' IRM Framework is not clear with respect to the rate-setting for 2019, though the wording implies there was an expectation that Union Gas would rebase its rates for 2019. The OEB is granting a five year deferred rebasing period consistent with its historic practice for other MAADs applications, and therefore is not requiring Union Gas to rebase for 2019.

The Settlement Agreement also required Union Gas to file costs at the time of rebasing. The OEB notes that the applicants did file significant historic and forecast costs as part of this application. Furthermore, in this Decision there are several findings that require the filing of costs as follows:

- As discussed in Section 5.9, the OEB is requiring Amalco to file a cost allocation study in 2019 to reflect the costs of certain large projects.
- Section 5.5 requires Amalco to file a consolidated utility system plan to support any application for an ICM for 2021 rates and beyond.
- Amalco is required to track the actual costs and amounts recovered through rates related to the Parkway Delivery Obligation during the deferred rebasing period, as discussed in Section 6.1.

5.3 Price Cap Adjustment

Inflation Factor

In its rate-setting application, the applicants proposed to use the quarterly Gross Domestic Product Implicit Price Index Final Domestic Demand (GDP IPI FDD) Canada index as the inflation factor. OEB staff submitted that the use of the GDP IPI FDD is acceptable, but stated a preference for a two-factor IPI that uses labour and non-labour inflation weighted by their contribution to costs, the approach currently used in the electricity sector in Ontario. OEB staff submitted that adoption of a two-factor IPI would ensure more consistency between natural gas and electricity sectors. In an undertaking response,[30] the applicants provided a comparison of the inflation factor using GDP IPI FDD and using both GDP IPI FDD and AWE (70/30 weighted). OEB staff agreed that the difference between the two methodologies was not material.

OGVG submitted that the OEB should use the two-factor IPI methodology consistent with that used for the electricity distributor, as using different methodologies for natural gas utilities and electric utilities had not been justified. OGVG further submitted that the ratio of capital and labour in the two-factor IPI should be customized for Amalco using Union Gas' and Enbridge Gas' ratio between labour and capital, as opposed to using the ratio adopted for electricity distributors.[31]

A number of intervenors such as SEC, BOMA, CCC, LPMA and CME supported using the GDP IPI FDD as the sole measure as it is a simpler approach.

In the event that the OEB determined that the price cap mechanism should use the GDP-IPI FDD as the sole inflation measure, OEB staff suggested that the manner in which the inflation change is measured be based on calendar year-over-year change, rather than the mid-year calculation currently used by natural gas distributors. This would make calculation and verification against Statistics Canada numbers easier. In reply, the applicants agreed.

In reply, the applicants expressed a preference for using the GDP IPI FDD but were willing to accept a two-factor IPI if the OEB considered that consistency between natural gas and electric utilities was important.

[30] Undertaking Response J5.2.
[31] OGVG submission, page 17.

OEB Findings

The OEB accepts the applicants' proposal to use GDP-IPI FDD for the inflation factor. This inflation factor has been adopted by the gas utilities in the past, and the applicants provided details that the GDP-IPI FDD and the two-factor inflation factor applied to electricity distributors have not been materially different since 1993.[32] The OEB accepts OEB staff's argument that verification of the inflation factor is easier if it is based on the calendar year-over-year change, therefore this proposal is adopted.

Productivity Factor

The applicants proposed that the annual rate escalation be determined by a price cap index where PCI growth is driven by an inflation factor, less a productivity factor of zero and no stretch factor. In support of their proposal with respect to the productivity and stretch factor, the applicants submitted a report prepared by Dr. Jeff D. Makholm of National Economic Research Associates Inc. (NERA). OEB staff filed evidence of Dr. Mark Lowry of Pacific Economics Group Research LLC (PEG) titled "IRM Framework for the Proposed Merger of Enbridge and Union Gas". The study examined the nature of productivity research and its role in IRM design. The study also critiqued NERA's productivity research and provided an alternate productivity and stretch factor.

Both expert reports recommended the same base productivity factor of zero. However, OEB staff and CME criticized the methodology adopted by NERA. OEB staff and CME noted that NERA'S approach of using the "One Hoss Shay" method to measure capital cost does not recognize any deterioration of productive capability as opposed to PEG's recommendation of using a geometric decay method. CME further submitted that use of sales volume as opposed to customer numbers as an output measure artificially decreases the productivity results and was inappropriate and inapplicable to the applicants. Nevertheless, most intervenors and OEB staff agreed that the base productivity factor should be zero.

The applicants submitted that the OEB need not embark on a consideration of methodological issues when the outcome of both approaches is the same.

OEB Findings

The OEB accepts the applicants' proposal for a productivity factor of 0% during the deferred rebasing period. There were two expert reports filed in evidence in this

[32] Based on response to Undertaking J5.2.

proceeding on the productivity factor; one from NERA for the applicants and another from PEG for OEB staff. While the approach to determining an appropriate productivity factor differed, both experts recommended a productivity factor of 0%. Considering that the experts' recommendation is the same, the OEB will not opine on the merits of the methodology adopted in the reports.

Stretch Factor

The applicants asserted that a stretch factor would not be appropriate as the applicants' productivity growth is in line with the economy as a whole and an economy-wide inflation is appropriate for setting rates during the deferred rebasing period. Further, the applicants expect to experience increasing cost pressures, depreciation increases, and interest rate increases that would put pressure on Amalco's earnings over the deferred rebasing period. The applicants relied on the expert evidence of NERA, which also concluded that a stretch factor of zero was appropriate. NERA argued that stretch factors may be warranted in a transition period between cost-of-service and IRM regimes, but not where IRM is firmly in place as it is with both Enbridge Gas and Union Gas.

PEG argued that a stretch factor of 0.3% was appropriate. PEG noted that it was difficult to assess the appropriate stretch factor, as the stretch factor is ordinarily determined using benchmarking analysis, and the applicants had not conducted a thorough benchmarking analysis for this application. Based on the data that it had available, PEG concluded that Union Gas was perhaps slightly more efficient than average, and Enbridge Gas slightly less. Using the OEB's policies for the electricity sector as a guide, PEG therefore placed Amalco in the "middle" cohort, and recommended a corresponding stretch factor of 0.3%.

Most interveners and OEB staff supported a stretch factor of at least 0.3%, and largely relied on the work of PEG. OEB staff argued that the OEB's longstanding practice and policy was to apply a stretch factor, both in the electricity and gas sectors. OEB staff further noted that the Rate Handbook is also clear that both gas and electric utilities should have a stretch factor under a price cap plan. They also disagreed with NERA that a stretch factor cannot be employed beyond the initial transition to incentive regulation, and referred to the OEB's RRF which provides for a stretch factor in subsequent IRM plans.

CME, OGVG and OEB staff identified the absence of benchmarking evidence as one of the main concerns with adopting a stretch factor of zero. LPMA and SEC noted in their submissions that over the 2014 to 2017 period, the average over-earnings of Union Gas was more than 57 basis points over the OEB allowed ROE and for Enbridge Gas, it was

more than 83 basis points. Accordingly, they submitted that the stretch factor should be 60% of the inflation factor, the same as is currently used in Union Gas' IRM plan.

In reply, the applicants argued that a balanced earnings sharing mechanism with a zero stretch factor will deliver the best outcome for customers. The applicants asserted that there is no policy direction from the OEB that a stretch factor cannot be zero; in fact, there are electricity distributors with a zero stretch factor. The applicants estimate that with a 0.3% stretch factor, Amalco would need to find additional savings of $410 million, and with a 0.6% stretch factor, Amalco would earn significantly below allowed ROE. The applicants also argued that lack of benchmarking should not be a factor as a total cost benchmarking study has never been done for gas distributors in Ontario, and the benchmark work in Alberta was acknowledged by Dr. Lowry as experimental.[33]

OEB Findings

The OEB finds that a stretch factor of 0.3% is appropriate during the deferred rebasing period.

In the absence of benchmarking evidence, the OEB is setting a stretch factor that is the mid-range of the stretch factors established for electricity distributors (0% to 0.6%). This is also the stretch factor approved in the decision for the hydroelectric generation business of Ontario Power Generation (OPG), where the OEB noted that it expects improved benchmarking going forward.[34] The mid-range is the stretch factor for an average performer. Without benchmarking, there is no clear evidence on the performance of either Enbridge Gas or Union Gas. As stated by Dr. Lowry: "There is certainly no evidence that they are a bad performer, but no evidence that they're good".[35]

A key objective of the OEB's incentive regulation is to drive improvements in cost efficiency. This would have been an expectation regardless of the amalgamation. The amalgamation provides additional opportunities to generate cost savings, and the applicants have proposed a number of initiatives for this purpose. The stretch factor provides incentive to find further efficiency improvements beyond those proposed.

[33] Applicants' reply, page 47, para. 141.
[34] OEB Decision and Order EB-2016-0152, December 28, 2017
[35] Transcript Volume 4, page 164

When Amalco next seeks to set its stretch factor following the next rebasing application, the OEB will require Amalco to file benchmarking studies to support the assignment of a stretch factor.

5.4 Earnings Sharing Mechanism

The applicants have proposed an earnings sharing mechanism (ESM) in accordance with the MAADs Handbook. Accordingly, the ESM was proposed to start in year six of the ten-year deferred rebasing period. If in any calendar year from 2024 to 2028, the actual utility ROE is greater than 300 basis points above the allowed ROE, the excess earnings above 300 basis points would be shared 50/50 between the ratepayers and the shareholders.

Most intervenors who made submissions on ESM opposed the applicants' proposal. Intervenors and OEB staff submitted that the proposed ESM was beneficial to the shareholder and would not allow ratepayers to share in the savings. Some intervenors argued that the large deadband would essentially never be triggered. However, VECC accepted the proposed ESM if the deferred rebasing period was four years. For a longer deferred rebasing period, VECC proposed a sliding scale with respect to the proportion of sharing and threshold, which would benefit shareholders in the initial years and ratepayers in the latter part of the deferral period.

LPMA and CCC suggested an asymmetric ESM that begins in the first year of the deferred rebasing term with a deadband of 20 basis points. All earnings above that level would be shared equally between the shareholder and ratepayers. The approach was considered fair to both ratepayers and shareholder. SEC and CME proposed a similar ESM but with a deadband of 100 basis points.

OGVG submitted that the applicants had not demonstrated superior benchmarking performance to warrant a more rewarding ESM.[36] OGVG suggested adopting the current Union ESM that sets a deadband of 100 basis points with sharing of 50/50 with ratepayers beyond the threshold and 90/10 in favour of ratepayers beyond the 200 basis points threshold. OEB staff made a similar suggestion but recommended implementing the ESM from year four of a proposed six-year deferral period. OEB staff noted that the ESM policy in the Rate Handbook applies to electricity distributors and submitted that the applicants had not supplemented their original arguments to explain the basis for requesting the proposed ESM.[37]

[36] OGVG submission, page 23.
[37] OEB Staff submission, page 10.

LPMA and OGVG further submitted that the earnings sharing should be based on weather normalized actual earnings, as it is these earnings, and not weather actual earnings, that will reflect the impact of efficiency gains, synergies, and other cost reduction measures achieved as a result of amalgamation.[38]

In reply, the applicants agreed that an ESM is the appropriate tool to achieve the objective of customer protection during the deferred rebasing period. The applicants submitted that determining an appropriate threshold for the ESM is important for Amalco to pursue deep and sustainable savings. The applicants suggested that if the OEB was concerned about additional customer protection, a balanced ESM over the ten-year deferred rebasing period with a zero stretch factor will deliver the best outcomes for customers.

OEB Findings

The OEB approves an asymmetrical earnings sharing mechanism that will share earnings on a 50/50 basis between Amalco and its customers for all earnings in excess of 150 basis points from the OEB-approved return on equity.

Both Enbridge Gas and Union Gas have had earnings sharing mechanisms as fundamental components of their rate setting frameworks for many years. This is distinct from electricity distributors for which earnings sharing mechanisms have generally only been applicable for an amalgamation or acquisition. For this reason, the earnings sharing mechanism will be in effect from year one of the deferred rebasing period.

The earnings sharing mechanism under Union Gas' current IRM framework shares earnings on a 50/50 basis above 100 basis points and on a 90/10 basis above 200 basis points. The 150 basis points for the new earnings sharing mechanism is mid-way between the two existing thresholds, and results in a reasonable and simpler mechanism.

As proposed by the applicants, the earnings sharing mechanism will be on an actual basis (earnings not normalized for weather). Using actual earnings is a simpler approach to assessing the earnings that will be shared and it aligns the amount to be shared with customers with the actual earnings of Amalco each year.

[38] LPMA submission, page 28.

5.5 Incremental Capital Module

The applicants have requested an ICM for the proposed ten-year Price Cap IR deferred rebasing period as allowed for in the MAADs Handbook. The ICM is a regulatory tool that allows for recovery of the revenue requirement for qualifying material and incremental capital additions, beyond what is funded through approved rates. Recovery is provided for through rate riders, which allow base rates to continue to be adjusted through the approved PCI formula.

The ICM policy and mechanism was first developed for the 3rd Generation IRM for electricity distributors,[39] and then was revised through reviews in 2014 and 2015 (collectively referred to as the ICM Reports).[40]

The applicants proposed to comply with the OEB's ICM policy with one exception – they proposed to use current long term debt and the current OEB issued ROE for determining the revenue requirement of any approved qualifying ICM project, instead of the current approved debt and ROE rates from the last rebasing.[41]

Testing of the evidence through interrogatories and during the Technical Conference and the oral hearing indicated that there were other areas where the applicants' ICM proposal deviated from OEB policy, as discussed in the submissions of OEB staff and some intervenors.

The applicants' rate-setting proposal would allow the majority of the capital costs in excess of the ICM materiality threshold to qualify for ICM treatment during the deferred rebasing period.

OEB staff and certain intervenors submitted that this was a misreading of the OEB policy. The OEB ACM[42]/ICM policy per the ICM Reports define ICM/ACM projects as being discrete, incremental, necessary, material, and not part of typical annual capital programs. The ICM is not a guaranteed recovery for amounts above the materiality threshold. OEB staff and other intervenors submitted that the applicants' proposal was not consistent with the OEB's ICM policy as documented in the ICM Reports and as articulated in decisions.

[39] EB-2007-0673.
[40] *Report of the Board: New Policy Options for the Funding of Capital Investments: The Advanced Capital Module (EB-2014-0219)*, September 18, 2014 and *Report of the OEB: New Policy Options for the Funding of Capital Investments - Supplemental Report (EB-2014-0219)*, January 22, 2016.
[41] EB-2017-0307, Exhibit B/Tab 1/pp.15-16.
[42] Advanced Capital Module

While the applicants acknowledged these considerations at the Technical Conference,[43] they maintained that the majority of incremental capital additions will be afforded ICM treatment. This was particularly evident in the stand-alone versus amalgamated scenarios detailed in response to an interrogatory by FRPO,[44] and to subsequent analyses based on it, including Undertaking J4.2 (assuming a 0.3% stretch factor).

A review of FRPO interrogatory 11 showed that the applicants assumed that most of the forecasted capital expenditures exceeding the materiality threshold would be afforded ICM treatment. In the case of Enbridge Gas, all capital expenditures above the materiality threshold were assumed to qualify for ICM treatment in every year except 2019, where a small amount of about $19 million is excluded. For Union Gas, there were amounts in most years where ICM funding was not expected, but, still, most capital expenditures exceeding the materiality threshold were assumed to qualify for recovery through the ICM over the proposed term plan.

Several intervenors submitted that the applicants' proposed ICM treatment was similar to the capital pass-through mechanism that is currently in place for Union Gas, and that the applicants' proposal was too favourable to Amalco and its shareholders. Accordingly, SEC, LPMA, CCC and OGVG proposed that the ICM be denied and that the capital pass-through mechanism, which is used in Union Gas' current Price Cap plan and is familiar to the utility and stakeholders, be used during the deferred rebasing period. LPMA submitted that the capital pass-through mechanism has worked well in the current Union Gas IR plan and it appropriately leaves the risk of recovery of the actual revenue requirement with the utility.

BOMA noted that the applicants' proposal to use Union Gas' 2013 rate base numbers to calculate the ICM threshold for legacy Union customers creates an artificially low materiality criteria, and a larger ICM capacity.

OEB staff supported the use of the ICM, but submitted that it should be treated the same way as in the electricity sector, both for electricity distributors and as available to OPG under the recently approved hydroelectric generation price cap plan.[45] OEB staff, LPMA and some other parties opposed the applicants' proposal that the updated cost of capital be used for each ICM.

While supporting the capital pass-through, if the ICM was adopted, LPMA submitted that the 10% deadband for the materiality threshold calculation should be replaced by a

[43] Technical Conference Transcript, Vol. 3 (April 2, 2018), p. 152/l. 5 to p. 159/l. 11.
[44] Exhibit C.FRPO.11.
[45] EB-2016-0152

40% deadband.[46] In their reply argument, the applicants opposed this on the basis that this proposal was not tested on the record.

Some intervenors also raised the concern that the applicants do not have detailed five-year capital plans analogous to the Distribution System Plans (DSPs) that electricity distributors are required to prepare and file. DSPs allow for identification of individual capital projects and provide background for a utility's planned level of capital expenditures on a short- to mid-term horizon allowing the OEB to understand what is "normal" and what is incremental capital spending. OEB staff and some intervenors argued that the applicants need Utility System Plans (USPs)[47] to support proposed ICM applications. At the oral hearing, the applicants stated that they plan to file separate USPs as part of their 2019 rate application and to file a single asset management plan as quickly as possible.[48]

OEB Findings

The OEB approves an ICM as discussed in this section. The OEB finds that it is appropriate to have a mechanism for the funding of incremental capital. Both Enbridge Gas and Union Gas had mechanisms for the funding of capital in their last rate frameworks; Enbridge Gas through is Custom IR forecast and Union Gas through its capital pass-through mechanism.

The OEB disagrees with the characterization of the ICM as a Y-Factor. Y-Factors have been defined as a mechanism for "passing through" certain costs. The ICM is a funding mechanism for significant, incremental and discrete capital projects for which a utility is granted rate recovery in advance of its next rebasing application. The ICM is not a capital pass-through mechanism.

The ICM policy for electricity distributors states that: "Any incremental capital amounts approved for recovery must fit within the total eligible incremental capital amount" and "must clearly have a significant influence on the operation of the distributor". The OEB has not established a project specific materiality threshold for electricity distributors to define "significant influence", and this has been determined on a case-by-case basis for other proceedings.[49] For greater regulatory certainty, the OEB has determined that, for

[46] LPMA submission (June 15, 2018), p. 32.
[47] A Utility System Plan for gas utilities is analogous to a Distribution System Plan for electricity distributors.
[48] Transcript, Vol. 1, (May 3, 2018) REDACTED, p.95/l. 11 to p. 96/l. 12.
[49] e.g., Decision and Order EB-2014-0116 (Toronto Hydro-Electric System Limited), December 29, 2015, section 3.4, and Decision and Order EB-2017-0024 (Alectra Utilities Corporation), April 5, 2018, section 4.5.

Amalco, any individual project for which ICM funding is sought must have an in-service capital addition of at least $10 million. This will reduce the chance that any proposed ICM project will be found not to be significant to Amalco's operations.

The OEB approves the proposed formula for calculating the materiality threshold for the ICM, including the 10% deadband. This formula is the same one used for the ICM for electricity distributors.

The eligible incremental capital amount will be determined using the OEB's ICM formula and each gas utility's rate base and depreciation, i.e. calculated individually for both Union Gas and Enbridge Gas. This is consistent with the policy for electricity distributors.

The OEB agrees with intervenors who noted that, through Union Gas' capital pass-through mechanism, significant capital additions have been funded through rates during the past IRM term. The rate base and depreciation associated with projects that were found eligible for capital pass-through treatment during the IRM term, shall be added to the 2013 OEB-approved rate base and depreciation in determining the eligible incremental capital amount for Union Gas' service territory.

For Enbridge Gas, the rate base and depreciation to be used in the formula shall be the 2018 OEB-approved amounts from the most recent Custom IR update decision. [50]

The OEB does not agree with the applicant's proposal to deviate from the ICM policy by using updated cost of capital parameters. The cost of capital parameters for the ICM funding will be the most recent OEB-approved for each of the Union Gas and Enbridge Gas legacy service areas.

Consistent with the ICM policy for electricity distributors, rate riders for any ICM would be determined as part of the rate proceeding in which the ICM is approved. The rate riders continue until the next rebasing application. In that rebasing application, the OEB will review the spending against plan to determine if any true-up is warranted.

The cost allocation for the ICM rate riders will generally be based on the most recent OEB-approved cost allocation. The OEB would consider an alternative cost allocation proposal filed with the ICM request if the nature of the capital project was such that cost causality was distinctly different from what underpins the OEB-approved cost allocation.

The applicants have indicated that they plan to file separate USPs as part of their 2019 rate application and to file a consolidated asset management plan as quickly as possible. The OEB finds it reasonable that a consolidated USP will not be available for

[50] EB-2017-0086

2019 and 2020 rates, but expects the applicants to file separate USPs as planned. The OEB also expects that a consolidated USP will be filed for any ICM request for 2021 rates and beyond.

5.6 Y-Factors

Y factors are costs associated with specific items that are subject to deferral account treatment and passed through to customers without any price cap adjustment. The applicants propose to treat the following costs as Y factors:

1. Cost of gas and upstream transportation (in accordance with current QRAM treatment)
2. Demand Side Management (DSM) costs (in accordance with current DSM treatment)
3. Lost Revenue Adjustment Mechanism (LRAM; for the contract market)
4. Normalized Average Consumption/Average Use (the Applicants propose to continue to adjust rates annually to reflect the declining trend in use)
5. Cap-and-Trade (costs will be filed in future proceedings)
6. Capital investments that qualify for ICM treatment

The only submissions were on the applicants' proposal to true up Normalized Average Consumption (NAC) / Average Use (AU) on an annual basis to reflect the declining trend in average use. At the oral hearing, the applicants explained that the objective of the NAC and AU deferral accounts was not to reduce the weather risk. Since the load is weather normalized the deferral account essentially captures decline in average use not related to weather.[51]

OEB staff submitted that a structural break occurred in the average use models of Enbridge Gas in 2016 resulting in a significant difference between the actual normalized average use and the forecast average use.[52] OEB staff noted that the average use and load forecasting model had not been revised or reviewed since 2012 for both Enbridge Gas and Union Gas. However, OEB staff agreed with the continuation of the NAC/AU deferral accounts for now on the condition that Amalco be required to file a proposed

[51] Transcript, Volume 5, pages 21-24, May 18, 2018.
[52] Staff submission, page 8 and response to Energy Probe IR#7, EB-2017-0102.

approach to discontinue the NAC/AU deferral and variance account at rebasing. OEB staff had no concerns with the other Y factors proposed by the applicants.

CCC, LPMA, Energy Probe and VECC submitted that the two average use accounts of Union Gas and Enbridge Gas should be discontinued and reviewed at rebasing. CCC maintained that the utilities have continually been shielded from declines in average use without any corresponding reductions in the cost of capital.[53] LPMA submitted that the lost revenue adjustment mechanism (LRAM) should be expanded to include the lost revenue associated with DSM programs for general service customers. LPMA submitted that Union Gas had agreed to file a study assessing the continued appropriateness of the NAC methodology but has not done so. VECC questioned the different treatment between natural gas and electric utilities. Natural gas utilities are protected against declines in gas consumption due to reasons other than DSM programs while electric utilities are offered no protection against general declines in consumption. VECC suggested that the OEB should convene a proceeding to examine the issue of NAC/DSM to ensure it adheres to the same principles as electricity LRAM/CDM.[54]

At the hearing, the applicants explained that if they are not permitted to recover declines in average use, there would not be any motivation for the utilities to aggressively pursue conservation initiatives. However, the applicants noted that they do intend to review the approach to NAC/AU. In reply, the applicants proposed that Amalco will consult with stakeholders to work towards a single, revenue-neutral approach to NAC/AU for a future rate application.

OEB Findings

The OEB approves the Y factors as proposed by the applicants, with the exception of the ICM discussed in the previous section and the Cap-and-Trade costs. The treatment of Cap-and-Trade costs will be addressed in a separate proceeding.

In its argument-in-chief, the applicants proposed that Amalco consult with stakeholders to work towards a single, revenue-neutral approach to NAC/AU for a future rate application. Given the shortened deferred rebasing period, the OEB requires the applicants to develop a proposal to be filed with its next rebasing application. This should include a proposal for an LRAM mechanism that includes general service

[53] CCC submission, page 14.
[54] VECC submission, page 18.

customers. If Amalco proposes to continue using the NAC/AU, it must file evidence in support of that approach.

5.7 Z-factor

The applicants proposed a Z-factor to deal with costs that are outside the control of management and represent costs that are related to a non-routine event and clearly outside of the base upon which rates are derived. The applicants initially proposed using a materiality threshold of $1.0 million for Amalco during the deferred rebasing period, which is in line with the threshold for electricity distributors in Ontario.

Intervenors who made submissions did not agree with the proposed threshold. VECC and OEB staff noted that there are Z-factors in place for both utilities (Enbridge Gas – $1.5 million and Union Gas – $4 million) under their current rate setting plans. OEB staff submitted that both utilities have been able to manage within their respective thresholds. VECC submitted that the threshold should be at least $5.5 million, which is the total of current thresholds for Enbridge Gas and Union Gas. OEB staff suggested OPG's materiality threshold of $10 million as the basis for determining an appropriate threshold. As such, Amalco's threshold should be $7.5 million in proportion to the revenue requirement of Amalco and OPG. At the same time, a number of intervenors recommended a threshold of $10 million in line with the threshold for OPG. LPMA submitted that the current threshold for Union Gas is $4.0 million and therefore a threshold between $8 million and $10 million for Amalco was appropriate.

OEB staff further submitted that Amalco should not be able to claim a rise in borrowing costs as a Z-factor. OEB staff noted that Amalco's treasury function resided at Enbridge Inc. and Amalco's debt costs would be impacted by the credit rating of Enbridge Inc. OEB staff maintained that if there is any downgrade in Enbridge Inc.'s credit rating, the cost of borrowing could increase significantly and this could adversely impact the ratepayers of Amalco. OEB staff submitted that the cost of borrowing is clearly within the control of management and does not qualify to be a Z-factor. OGVG raised a similar concern.

In reply, the applicants submitted that the comparison made to OPG for purposes of determining Amalco's Z-factor materiality threshold was not appropriate and that OPG was an entirely different entity than a gas distributor. However, the applicants agreed that Amalco's threshold should not be lower than the current thresholds of Enbridge Gas and Union Gas. Accordingly, the applicants agreed that the Z-factor materiality threshold for Amalco should be equal to the combined threshold for Enbridge Gas and Union Gas, which is $5.5 million. With respect to the cost of borrowing qualifying as a Z-

factor, the applicants submitted that the OEB does not need to determine in this proceeding what types of costs might qualify for Z-factor treatment.[55]

OEB Findings

The OEB approves the inclusion of a Z-factor mechanism in the rate-setting framework for costs that meet all of the four criteria set out below. A material claim is defined by any cost resulting in a revenue requirement impact in excess of a materiality threshold of $5.5 million. This is the sum of the current Z-factor thresholds for Union Gas ($4 million) and Enbridge Gas ($1.5 million).

The criteria for the Z-factor will be as established by the OEB in Enbridge Gas' Custom IR decision as follows:[56]

(i) Causation: The cost increase or decrease, or a significant portion of it, must be demonstrably linked to an unexpected, non-routine event.

(ii) Materiality: The cost at issue must be an increase or decrease from amounts included within the Allowed Revenue amounts upon which rates were derived. The cost increase or decrease must meet a materiality threshold, in that its effect on the gas utility's revenue requirement in a fiscal year must be equal to or greater than $5.5 million.

(iii) Management Control: The cause of the cost increase or decrease must be: (a) not reasonably within the control of utility management; and (b) a cause that utility management could not reasonably control or prevent through the exercise of due diligence.

(iv) Prudence: The cost subject to an increase or decrease must have been prudently incurred.

Given the criteria, the OEB agrees with the applicants that it is not necessary to make a ruling on whether any particular type of cost, such as the cost of debt, is eligible for a Z-factor. It will be up to Amalco to file evidence on how all of the criteria have been met.

[55] Applicant reply, pages 52-53, para. 157.
[56] EB-2012-0459 Decision with Reasons pages 19 and 20.

5.8 Base Rate Adjustments

The applicants have proposed to make four adjustments to base rates:

1. Union Gas Deferred Tax Drawdown

   The applicants propose to increase Union Gas' 2018 OEB-approved revenue by $17.4 million pre-tax ($12.8 million after-tax) to recognize the accumulated deferred tax balance. This amount represents the difference between the credit to ratepayers included in 2018 rates, and the accumulated deferred tax balance at the end of 2018 of zero. Since the balance is zero, Union Gas has proposed to remove the benefit from rates.

2. Enbridge Gas CIS and Customer Care Costs

   The applicants propose to decrease Enbridge Gas' 2018 OEB-approved revenue by $4.9 million to recognize the approved customer information system (CIS) and customer care cost level of $126.2 million rather than the $131.1 million in 2018 OEB-approved rates.

3. Enbridge Gas Pension and OPEB Costs

   In the 2018 Rate Adjustment proceeding,[57] the OEB did not permit Enbridge Gas to include certain pension and Other Post-Employment Benefits (OPEB) costs in rates. The costs were associated with amendments to the *Pension Benefits Act* legislation and the OEB did not allow cost recovery as the Bill had not yet been formally passed. Parties agreed in the revised settlement proposal that Enbridge Gas would recover the actual amount of its pension and OPEB costs and related revenue requirement in 2018 through amounts to be recorded in the Post-Retirement True-Up Variance Account (PTUVA). On December 14 2017, Bill 177 received Royal Assent. Therefore, Enbridge Gas is proposing to adjust its 2018 OEB-approved revenue requirement by $6.5 million (increase) to account for the impact of amendments to the *Pension Benefits Act* legislation.

4. Enbridge Gas Tax Deduction related to SRC Refund

   In Enbridge Gas' Custom IR proceeding (2014-2018),[58] the OEB approved a revised methodology for determining the net salvage percentages to be used by Enbridge Gas in the calculation of its depreciation rates, called the Constant Dollar Net Salvage (CDNS) approach. In addition to approving this new

[57] EB-2017-0307.
[58] EB-2012-0459.

approach, the OEB also approved a proposal to return to ratepayers, through a rate rider (Rider D), certain amounts that had been recovered through past depreciation rates based on the traditional method for determining net salvage percentages. The 2018 revenue requirement approved in the Custom IR proceeding included $11.2 million in expected tax deductions arising from the SRC refund payments to ratepayers. The applicants have proposed to remove the $11.2 million in tax deductions that are currently embedded in Enbridge Gas' approved 2018 revenue requirement because there is no longer any ongoing SRC refund and therefore the associated tax deductions will no longer be available in years following 2018.

OEB staff, BOMA, LPMA, SEC and CCC had no objection to the proposed adjustments.

SEC and CCC suggested additional base rate adjustments and submitted that the revenue requirement of the two merging utilities should be reduced by the grossed-up value of their 2018 earnings in excess of the 2018 allowed ROE for each of the utilities. SEC submitted that the 2017 over-earnings could be used as a proxy and adjusted later against 2018 over-earnings.

LPMA submitted that the OEB should reduce the 2018 revenue requirement by $23 million for Enbridge Gas and $11.3 million for Union Gas. LPMA argued that in the absence of rebasing, it is only through these base rate adjustments that ratepayers can receive the benefits that should be passed through to them at the end of an IR plan term and before the beginning of the next IR plan.[59]

In reply, the applicants disagreed with base rate adjustments related to over-earnings. According to the applicants, without rebasing there is no way of knowing the extent to which earnings of Enbridge Gas and Union Gas over the period 2014-2018 reflect efficiencies and savings that carry forward into 2019. The applicants argued that such adjustments would be arbitrary considering that there was evidence that certain drivers such as tax deductions cannot be presumed to carry forward into 2019.

OEB Findings

The OEB approves the four proposed base rate adjustments outlined above. No parties argued against these adjustments. The OEB will not make additional base rate adjustments as proposed by some intervenors. Absent rebasing, it is not clear what the

[59] LPMA submission, page 16.

drivers of the over-earnings are and whether they will be sustainable during the deferred rebasing period. Furthermore, a requirement to rebase certain elements upon an amalgamation would be contrary to the purpose of a deferred rebasing period.

5.9 Cost Allocation and Rate Design

Cost Allocation

The applicants have not proposed any changes to cost allocation as part of this application. However, at the hearing, the applicants noted that they intend to propose cost allocation changes to the Panhandle and St. Clair system in the next rate application.

OEB staff argued that discrete cost allocation changes were not appropriate in the absence of a comprehensive cost allocation study. Intervenors such as OGVG, LPMA and CCC agreed. OGVG noted that the OEB has repeatedly rejected requests to consider cost allocation changes for isolated projects outside of a comprehensive system-wide cost allocation study.[60]

APPrO, Kitchener and IGUA submitted that Union Gas should be directed to undertake a new cost allocation study immediately to resolve known issues including transportation rates and the over-allocation of costs to power generators and other large customers as a result of the Panhandle Reinforcement project. These intervenors argued that it was unacceptable that significant cost allocation inequities be allowed to continue for another ten years. They noted that the OEB has stated its expectation that these costs would be addressed prior to Union Gas entering into another Price Cap IR in 2019.

SEC argued that cost allocation and rate design issues warrant the applicants filing for early rebasing.

In reply, the applicants reiterated the commitment to complete a cost allocation study for each of the years 2022 and 2026 using OEB-approved methodologies. Each of the cost allocation studies would be subject to a consultative process with intervenors. The applicants noted that it expects Amalco to be kept whole with respect to its revenue forecast for any prospective shifting of costs between rate classes as a result of the cost allocation study.[61]

[60] OGVG submission, page 13, Decision in EB-2016-0186 and EB-2017-0087.
[61] Reply submission, page 23.

TransCanada raised a cost allocation/rate design issue that impacts its C1 rate. In the Union Gas proceeding to modify the C1 rate schedule, the OEB approved the C1 Dawn to Dawn-TCPL transportation rate based on Dawn transmission compression related costs and recovery of costs associated with the capital investment.[62] The OEB approved the two-part rate design outlined above as well as Union Gas' request to recover the entire capital costs over a five-year term matching TransCanada's initial underlying contract. The contract is up for renewal at the end of October 2018 and TransCanada submitted that the specific assets are fully depreciated and the rate should be significantly lower than currently charged. TransCanada noted that Union Gas is currently recovering $547,000 of capital-related costs in rates that is already recovered. TransCanada submitted that the remedy to the situation is simple and does not require a change in cost allocation. TransCanada submitted that the OEB could reduce the revenue requirement of the C1 Dawn to Dawn TCPL service and this would not have any consequences for other shippers as the asset is fully depreciated. Union Gas' two-part rate design further facilitates the removal of costs from the Amalco revenue requirement.[63]

OEB Findings

Amalco is expected to prepare and file a comprehensive cost allocation proposal to be filed with its next rebasing application following the five year deferred rebasing period.

However, the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair systems. The OEB therefore requires Amalco to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.

[62] EB-2010-0207
[63] TCPL submission, pages 1 and 2.

Rate Design

SEC argued that Amalco's plan to adjust annual rates could result in some customers, including schools, experiencing larger than average increases. SEC and LPMA submitted that any rate formula should be applied equally to each component of distribution rates, including monthly charges, volumetric charges at each band level and storage charges.[64]

In reply, the applicants clarified that any proposal for rate changes will have to be approved by the OEB. The applicants noted that they are seeking approval of a price-setting framework and any proposals as to how rates would be set will be made in subsequent proceedings.

OEB Findings

The bill impacts provided in this proceeding assumed that the fixed monthly charge would remain constant and rate adjustments would be applied to the variable charges.[65] The applicants stated that this approach is not their rate design proposal, and that a rate design proposal would be filed as part of the 2019 rate application. The OEB accepts the applicants' approach of proposing its rate design in the 2019 rate application, and will not determine in this proceeding the appropriate approach to rate design. However, the OEB notes that the bill impacts provided in this proceeding showed that the approach of applying all rate increases to the variable rate resulted in material bill impacts to certain customers. Any proposal for rate design must address this issue.

5.10 Rate Harmonization

The MAADs Handbook notes that electricity distributors are expected to propose rate structures and rate harmonization plans following consolidation at the time of rebasing. They are not required to file details of their rate-setting plans, including any proposals for rate harmonization, as part of the application for consolidation.[66]

Consistent with this approach for electricity distributors, the applicants have not filed a plan to harmonize rates. At the oral hearing, the applicants indicated that Amalco would consider harmonization of rates over the deferred rebasing period, and to the extent that

[64] SEC submission, pages 50-51.
[65] Transcript Volume 6, page 8
[66] Handbook to Electricity Distributor and Transmitter Consolidations, Page 17, January 19, 2016.

rates can be harmonized, Amalco would bring forward a proposal for consideration of the OEB.[67]

OEB staff and OGVG accepted the position of the applicants but OEB staff recommended that the applicants seriously consider rate harmonization for the Enbridge Gas Greater Toronto Area franchise and Union Gas south at the time of rebasing. VECC expressed similar views. LPMA submitted that rate harmonization can only be reviewed after Amalco has harmonized all other aspects of its operations and definitely not during the deferred rebasing period. SEC submitted that Amalco should be required to provide at the time of rebasing a detailed analysis of rate harmonization options and their impacts as well as the utility's preferred approach.

In reply, the applicants stated that they could bring forward a study regarding harmonization at the five-year mark that would be the subject of stakeholder consultation. This would allow parties to provide input prior to the harmonization proposal at rebasing.

OEB Findings

Amalco shall file a proposal for rate harmonization in its next rebasing application. This is not a requirement to harmonize rates, it is a requirement to file a proposal about harmonization. This is consistent with the approach for electricity distributors, and most parties agreed that harmonization should be considered with the next rebasing application.

As part of this proposal for rate harmonization, Amalco is required to file a proposal with respect to the use of excess natural gas storage from the Union Gas territory as discussed in Section 6.

5.11 Off-Ramp

The applicants have not proposed an off-ramp. In the RRF, the OEB determined that each rate-setting method will include a trigger mechanism with an annual ROE deadband of +/- 300 basis points.[68] When a distributor performs outside of the earnings deadband, a regulatory review may be initiated.

[67] Oral Hearing Transcript, Volume 3, page 66, May 14, 2018.
[68] RRF, page 11.

In response to an interrogatory, the applicants clarified that they had not proposed an off-ramp as they had selected a deferred rebasing period of ten years and included the earnings sharing mechanism as directed by the OEB in the MAADs Handbook.[69]

OEB Findings

While the applicants have not proposed an off-ramp, the OEB is adopting during the deferred rebasing period the off-ramp as described for electricity distributors in the RRF. This is consistent with the MAADs Handbook. If non weather normalized earnings during the deferred rebasing period are outside of +/- 300 basis points from the OEB-approved ROE, a regulatory review may be triggered. This is to ensure an additional level of protection for both customers and Amalco. This regulatory review may be undertaken administratively by the OEB as part of the OEB's ongoing performance monitoring of utilities.

5.12 Deferral and Variance Accounts

The Rate-Setting Mechanism application includes a list of deferral and variance accounts that the applicants propose be continued and a list of those whose closure is requested.

OEB staff had no concerns with the continuation of the accounts proposed by the applicants but disagreed with the closure of two deferral accounts.

With respect to the closure of Enbridge Gas' Earnings Sharing Mechanism Deferral Account (ESMDA), OEB staff submitted that Amalco must use a variance account to track sharing amounts that may be generated during the deferred rebasing period for both legacy utilities. This is the typical approach used for tracking prior period balances. OEB staff's proposed approach would require Amalco to create a new Earnings Sharing Deferral Account for the new entity.

With respect to the Post-Retirement True-Up Variance Account (PTUVA), OEB staff submitted that it should remain in operation until at least the end of 2019 as there is a smoothing mechanism currently in place. If the balance in the account (either debit or credit) is greater than $5 million, the incremental amount (beyond $5 million) is carried forward into a future year. Accordingly, OEB staff submitted that the account should remain open until such time that any residual balance in the account is disposed of.

[69] Response to OEB Staff IR#20

The applicants proposed to close Union Gas' Tax Variance Deferral Account (TVDA). The TVDA captures 50% of the difference between the actual tax rates and the approved tax rates included in rates resulting from, among other things, changes to federal and/or provincial tax legislation. The applicants have instead proposed that any significant changes in taxes occurring during the deferred rebasing period that are outside of management's control will be addressed through the Z factor. OEB staff submitted that Union Gas' TVDA should not be closed and should continue to capture any tax variances resulting from factors such as changes in federal and/or provincial tax legislation during the deferred rebasing period. OEB staff further submitted that Enbridge Gas should open an equivalent TVDA to be used for the same purpose. OEB staff noted that Z-factor adjustments are subject to threshold restrictions and therefore would not address tax variances below the threshold.

LPMA, CCC and Energy Probe submitted that NAC/AU deferral accounts should be discontinued. Energy Probe submitted that the request to continue more than 50 deferral accounts is concerning from a regulatory efficiency perspective and transfers risk to ratepayers.

In reply, the applicants agreed with OEB staff to keep the PTUVA account open in case there is a residual balance. However, the applicants disagreed with the continuation of the tax variance account (TVDA) as it only captures variances in HST input tax credits, the calculation of which will become increasingly complex through the amalgamation.

OEB Findings

The OEB accepts the applicants' proposal for the accounts that will be continued, with the exception of the Cap-and-Trade deferral and variance accounts which will be addressed in a separate proceeding. The other accounts were previously approved by the OEB and the underlying issues that resulted in the establishment of these accounts still remain.

The OEB accepts the applicants' proposal for the accounts that will be discontinued, with the exception of the PTUVA and TVDA. The OEB can assess whether the PTUVA should be discontinued in a subsequent rate application once it is clear there is no residual balance.

With respect to the TVDA, the OEB agrees that the applicants can cease recording the impact of the introduction of HST. The effort to track this is at odds with the materiality of the balances being recorded. However, the OEB will keep the TVDA but expand its applicability to record the impact of any tax rate changes for both Enbridge Gas and Union Gas legacy areas, i.e. all of Amalco.

Having approved an ESM, the OEB agrees with the submission of OEB staff that the ESM amount (50% of the earnings in excess of 150 basis points above the OEB-approved ROE) should be recorded in an Earnings Sharing Deferral Account. The OEB is therefore establishing this account. The account will record the ratepayer share of utility earnings that result from the application of the earnings sharing mechanism as determined in this Decision. The calculation of the utility return for earnings sharing purposes will include all revenues that would otherwise be included in earnings and only those exemptions (whether operating or capital) that would otherwise be allowed from earnings within a cost of service application.

5.13 Changes to Accounting Policies

Amalco will report under USGAAP financial standards. During the deferred rebasing period, the applicants expect to change accounting policies and practices as part of the implementation of an integrated accounting system, including changes in the calculation of depreciation rates and its cost capitalization policy. In its argument-in-chief, the applicants proposed that Amalco provide annual reporting to the OEB with regard to the financial impacts of accounting changes until all changes due to harmonization have been implemented. When all changes have been implemented, Amalco proposed to report to the OEB on the net financial impact of the changes and to put forward a proposed treatment of any material net impact. LPMA supported the proposed approach.

OEB staff submitted that the applicants each be required to open a new deferral account that captures the revenue requirement impacts associated with the integration of their accounting policies and practices during the deferred rebasing period. The balances in the accounts should be subject to an OEB prudence review and may be brought forward for disposition at the applicants' next rebasing application.

OGVG and LPMA agreed that the impact of these changes should be tracked in a deferral account.

In reply, the applicants disagreed with the suggestion of establishing a deferral account to capture impacts of the integration of accounting policies and practices. The applicants submitted that it was unnecessary and inappropriate to make a determination regarding the establishment of such accounts at this time.

OEB Findings

The OEB is establishing a deferral account to record the impact of any accounting changes required as a result of the amalgamation that affect revenue requirement. The OEB is not determining the approach to disposition of this account at this time. Amalco should propose an approach to disposition of any balances in its application for 2020 rates.

It is not known at this point whether the impact of any accounting changes will be material, but there is the potential for a material balance. The deferral account will ensure the balance is recorded for review by the OEB. If the balance in the deferral account turns out not to be material, the OEB can then determine whether the account should be closed.

6 TRANSPORTATION AND STORAGE

The OEB has determined that issues raised with respect to review of the Natural Gas Electricity Interface Review (NGEIR) decision[70] and the Storage and Transportation Access Rule (STAR) are outside of the scope of this proceeding. However, as considerable hearing time was devoted to these important issues, the OEB has included a summary of the discussion of these topics, and other background issues in Appendix A. The Findings for this section relate only to two issues:

- The Parkway Delivery Obligation (PDO)
- The treatment of excess storage from the Union Gas legacy system

6.1 Parkway Delivery Obligation

In the 2013 rates proceeding,[71] Union Gas' large volume direct purchase customers requested that Union Gas eliminate the Parkway Delivery Obligation (PDO) and allow customers to deliver gas at Dawn in place of Parkway because the cost to these customers to maintain the obligation exceeded the delivery rate benefit of the obligation. Union Gas' large volume direct purchase customers east of Dawn have an obligation to deliver gas at Parkway (the Parkway Delivery Obligation). The main issue was that Union Gas needed the gas at Parkway and not Dawn, and had planned its gas supply on that basis. In Union Gas' 2014 rates application,[72] the OEB approved a framework for the reduction of the PDO. This approved framework resulted from an agreement between Union Gas and the parties on the PDO issue. As a result of that agreement, Union Gas recovered in rates each year an estimated amount representing the capacity that it could move from Dawn to Parkway based on availability. The estimated foregone revenue as a result of using the transportation capacity to move the needed gas from Dawn to Parkway was recovered from ratepayers.

FRPO noted that the settlement agreement for PDO explicitly intended to keep Union Gas whole through the IRM period. However, FRPO argued that Union Gas has enhanced earnings as a result of the implementation of the PDO and ratepayers are paying twice for the same capacity. Union Gas charged ratepayers for the temporarily

[70] EB-2005-0551, NGEIR Decision with Reasons, November 7, 2006, page 74 and 83.
[71] EB-2011-0210.
[72] EB-2013-0365.

available capacity at an incremental cost to facilitate the PDO reduction. In addition, Union Gas has expanded the Dawn-Parkway system, which has further expanded surplus capacity, the costs of which are already recovered in rates. FRPO claimed that there is an equivalent of 200 TJ of Dawn-Parkway capacity that ratepayers are now paying in rates representing PDO reduction costs. Since the amount is less than the 210 TJ of original surplus, FRPO argued that ratepayers are paying twice for the 200 TJ. Accordingly, FRPO submitted that the ratepayer contribution of $9.7 million in rates representing PDO costs should be removed as a base rate adjustment for Union South customers.

Alternatively, if the OEB was of the opinion that there is insufficient evidence to make such a determination, FRPO submitted that the OEB should order the applicants to file sufficient evidence detailing the costs and recoveries of the Dawn-Parkway system throughout the deferred rebasing period to justify the continuing inclusion of PDO reduction costs. LPMA supported the position of FRPO on the PDO issue.

In reply, the applicants rejected FRPO's claim that ratepayers are paying twice. The applicants submitted that the PDO has been eliminated in precisely the manner contemplated and agreed to by the parties in the PDO settlement agreement. The implementation of the PDO has resulted in in-franchise customers requiring firm Dawn-Parkway capacity on design day that is incremental to the original allocation of Dawn-Parkway costs from the 2013 OEB approved cost allocation methodology. The applicants maintained that in-franchise ratepayers are paying for costs not previously allocated to them; they are not paying twice as claimed by FRPO.

The applicants also rejected the notion that there is surplus or excess capacity. The applicants noted that they are at risk for any surplus capacity as the revenue of that forecast is built into rates. If the applicants fail to meet the forecast, they bear the loss.

OEB Findings

The OEB has determined that there is insufficient evidence to determine whether, as a result of the implementation of the PDO, ratepayers are paying twice for the same capacity. The OEB requires Amalco to track actual costs and amounts recovered through rates related to the PDO during the deferred rebasing period. The OEB at the time of rebasing will review the costs and amounts recovered through rates to ensure that ratepayers are not paying twice for the required capacity and the legacy Union Gas is not enhancing earnings contrary to the intent of the PDO settlement agreement.

6.2 Storage

In the NGEIR proceeding,[73] the OEB determined that 100 PJ of Union Gas' existing storage capacity and all of Enbridge Gas' storage capacity of 99.4 PJ would be allocated to meet the needs of in-franchise customers at cost-based rates. While Enbridge Gas has insufficient storage to meet the needs of its in-franchise customers, Union Gas has excess storage. Enbridge Gas therefore purchases storage services from Union Gas at market-based rates. Union Gas' in-franchise customers typically use around 93 PJs annually with the balance being sold as short-term storage. The net revenues from short-term storage and load balancing transactions are shared 90:10 to the benefit of ratepayers.

OEB staff argued that upon amalgamation, Enbridge Gas customers should receive the benefit of Union Gas' excess utility storage. In an undertaking response, the applicants provided a hypothetical analysis of the net benefit to Enbridge Gas customers if market-based storage was replaced with cost based excess utility storage space from Union Gas from 2013 to 2017.[74] The analysis revealed that the net benefit to Enbridge Gas customers would have outweighed the forgone net benefit to Union Gas customers as a result of not receiving revenues from the sale of excess utility storage. OEB staff argued that there should not be any distinction between Enbridge Gas and Union Gas in-franchise customers; all in-franchise customers of Amalco should have access to utility storage that has been allocated to in-franchise customers as per the NGEIR Decision.

LPMA opposed the position of OEB staff on this issue. LPMA submitted that any change in the excess utility storage space and the net revenues generated from it, would result in harm to Union Gas ratepayers as they currently receive a net benefit in rates of $4.5 million a year. In addition, if Union Gas customers require more capacity in the future, LPMA submitted that Union Gas would have to obtain additional capacity at market-base rates, rather than use the cost-based storage that was specifically set aside for their future use in the NGEIR decision.[75]

The applicants in reply supported LPMA's submission on the issue of allocating excess utility storage of Union Gas to customers of Enbridge Gas noting that it does not meet the no harm test.

[73] EB-2005-0551, NGEIR Decision with Reasons, November 7, 2006, page 74 and 83.
[74] Undertaking JT2.12.
[75] LPMA submission, page 13.

OEB Findings

During the deferred rebasing period, the OEB accepts the applicants' proposal to continue to purchase market-based storage services to meet the needs of legacy Enbridge Gas in-franchise customers. Amalco is required to file a proposal, with its rate harmonization plan discussed in Section 5, for the ongoing approach to the use of excess natural gas storage from the legacy Union Gas service territory to meet the storage needs of the legacy Enbridge Gas in-franchise customers. This will ensure that legacy Union Gas customers continue to benefit from the sale of market-based storage until issues of rate harmonization are considered.

7 MONITORING PERFORMANCE AND RATES PROCESS

7.1 Scorecard

The applicants proposed a single scorecard for Amalco to measure and monitor performance over the deferred rebasing period. The proposed scorecard is modelled after the electricity distributors' scorecard and includes measures for customer focus, operational effectiveness, public policy responsiveness and financial performance.[76] The scorecard metrics include a combination of existing metrics, Service Quality Requirements (SQRs) and best practice metrics. The applicants maintain that the use of existing SQRs would help ensure that Amalco's progress can be compared relative to its predecessors.

VECC noted that the proposed scorecard has no means of gauging customer satisfaction with either rate structures or the rates themselves and therefore does not allow the OEB to monitor customer satisfaction with the amalgamation.

LPMA commented that approval of the proposed scorecard in this proceeding should not prevent any party from bringing forward changes or additions to the proposed scorecard during the deferred rebasing period in a future proceeding. LPMA suggested that the OEB consider, as a customer protection measure, penalties applicable to Amalco if it fails to meet the standards on any of the items included in the scorecard.[77]

OEB staff noted that, while Amalco intends to track the electricity distributors' scorecard in terms of safety, reliability, customer focus and financial performance, it has not proposed to track cost control in the scorecard as is done for the electricity distributors. OEB staff submitted that the proposed scorecard should also track cost control measures during the deferred rebasing period (e.g., total cost per customer and total cost per km of distribution pipeline). In addition, OEB staff recommended that the scorecard also track net savings on an annual basis.

In reply argument, the applicants accepted that cost per customer information could be included in the proposed scorecard as a cost control metric. However, the applicants expressed concerns about what tracking "net savings" means and how it might be accomplished.

[76] Report of the Board – Performance Measurement for Electricity Distributors: A Scorecard Approach, March 5, 2014.
[77] LPMA submission, page 37.

OEB Findings

The OEB accepts the scorecard proposed by the applicants, with the inclusion of the measures on total cost per customer and total cost per km of distribution pipeline as proposed by OEB staff. The OEB notes that it can amend the scorecard through revisions to GDAR if different or additional reporting is determined to be required.

7.2 Unaccounted For Gas

In the 2016 Earnings Sharing Mechanism proceeding,[78] Enbridge Gas agreed to review potential metering issues that might be contributing to Unaccounted for Gas (UAF), and to report on that review. In the Enbridge Gas 2018 rates amended settlement proposal, Enbridge Gas agreed to continue this review and report on the progress in the 2019 rate-setting application.[79]

However, in response to an interrogatory, the applicants noted that the issue of UAF would be addressed in the 2029 rebasing proceeding and not in 2019. [80] The applicants were of the opinion that this issue is best considered and dependent on a comprehensive review within the eventual amalgamated entity and structure. In its submission, OEB staff did not see any convincing reason to delay the review until 2029.

OEB Findings

The OEB considers the issue of Unaccounted for Gas (UAF) important and requires Amalco to file a report on this issue for both the Union Gas and Enbridge Gas service areas by December 31, 2019.

7.3 Stakeholder Meetings

The applicants proposed to jointly host a funded stakeholder meeting every other year starting in 2019 to review such things as financial results, market conditions, capital projects, customer engagement, integration activities and gas supply planning.

[78] EB-2016-0142
[79] Amended Settlement Proposal, Enbridge Gas Distribution Inc. 2018 Rate Adjustment, Schedule 1, page 13, December 6, 2017
[80] OEB Staff IR# 59(a).

APPrO, CME and OEB staff suggested that annual stakeholder meetings would be more appropriate and useful.

In reply argument, the applicants accepted the suggestion of annual stakeholder meetings if the OEB finds merit in them.

OEB Findings

The OEB will not order Amalco to have annual stakeholder meetings. Consistent with the OEB's approach to customer engagement, the utility should determine the best approach to engage stakeholders. The OEB notes that stakeholder meetings held during the previous rate-setting terms have been informative and have assisted in providing both the OEB and stakeholders on both historic and prospective issues.

7.4 Rates Process

In terms of the annual rate setting process during the deferred rebasing period, the applicants proposed to file any required applications (including a draft rate order) no later than September 30 each year such that a final rate order can be issued by December 15 of that year for implementation by January 1 the following year.[81]

LPMA expressed concern that some applications may be complex and require extra lead-time.

The applicants further noted that the OEB should not be prescriptive about filing dates.

OEB Findings

The OEB is not determining the process for rates applications as part of this proceeding. This is generally not a matter that is adjudicated.

[81] EB-2017-0307, Application, Exhibit B-1, page 26.

8 IMPLEMENTATION ISSUES

At the oral hearing, the applicants indicated that the decision to proceed with amalgamation will depend on the rate framework that is approved by the OEB.[82] SEC submitted that this is unusual and once the OEB establishes the rate rules, the applicants should live with them. SEC maintained that the applicants should not be allowed to keep coming back to the OEB with different proposals until they get a decision they like. However, SEC did agree that in this case, the applicants do have the right not to proceed with the amalgamation. SEC further noted that in its opinion virtually all of the savings as a result of the proposed amalgamation are available regardless of whether the applicants decide to amalgamate or not. If the OEB approves a rate framework on the basis of amalgamation, SEC expected the OEB to implement rates on that basis regardless of whether the applicants proceed with amalgamation. SEC submitted that the OEB should inform the applicants that unless there is a successful review or appeal, the OEB expects their decision on rates to be respected and implemented.[83]

LPMA submitted that the OEB should not let the implied threat of not amalgamating post the decision of the OEB influence the decision on any of the issues in the proceeding.

The applicants in reply denied that the decision to proceed with the amalgamation depends on whether they like the OEB's decision at the conclusion of the proceeding. However, the applicants clarified that if the OEB issues a decision that makes significant changes to the applicants' proposal, then the applicants would consider their plans for amalgamation in view of the decision.

OEB Findings

If the applicants determine that they will not proceed with the amalgamation, the OEB expects both Union Gas and Enbridge Gas to file rebasing applications, either cost of service or Custom IR, as soon as possible. The leave to amalgamate will expire 18 months from the date of this Decision and Order. If the determination not to proceed with the amalgamation is made before this expiry, the applicants are expected to notify the OEB.

[82] Transcript, Vol. 1, page 12.
[83] SEC submission, pages 8-9.

9 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas Distribution Inc. and Union Gas Limited are granted leave to amalgamate to form Amalco.
2. The applicants shall promptly notify the OEB of the completion of the amalgamation.
3. The leave granted in paragraph 1 shall expire 18 months from the date of this Decision and Order.
4. The deferred rebasing period shall be five years.
5. During the deferred rebasing period, Amalco shall adopt the rate setting framework as determined in this Decision and Order.
6. During the deferred rebasing period:
    a. Amalco shall ensure that any employment impacts resulting from the amalgamation will be managed on a roughly proportionate basis between the Municipality of Chatham-Kent and the City of Toronto;
    b. To the extent that Centres of Excellence are created in either the Municipality of Chatham-Kent or the City of Toronto, the Centres of Excellence shall reflect a range of skills and compensation levels, including leadership roles;
    c. Employment within the Municipality of Chatham-Kent shall reflect a mixture of entry, middle and senior level roles; and
    d. Amalco will commit to a process of regular communication and engagement with the Municipality of Chatham-Kent in respect of the amalgamation and its related impacts and opportunities.
7. The applicants shall file with the OEB and deliver to the intervenors, draft accounting orders related to the deferral and variance accounts set up or approved by the OEB in this Decision and Order by **September 10, 2018**. This includes the Amalco Earnings Sharing Mechanism Deferral Account, Amalco Tax Variance Deferral Account and Amalco Accounting Policy Change Deferral Account effective January 1, 2019.

8. The OEB approves the continuation of deferral and variance accounts as proposed in the application, with the exception of the Cap-and-Trade deferral and variance accounts which will be dealt with in a separate proceeding.

9. The following deferral and variance accounts will be eliminated effective December 31, 2018:

   Enbridge Gas

179-16	Customer Care CIS Rate Smoothing Deferral Account
179-34	Constant Dollar Net Salvage Adjustment Deferral Account
179-96	Relocations Mains Variance Account
179-98	Replacement Mains Variance Account
179-58	Earnings Sharing Mechanism Deferral Account

   Union Gas

179-120	CGAAP to IFRS Conversion Costs
179-134	Tax Variance Deferral Account (replaced by new Amalco account)

10. Intervenors and OEB staff shall file any comments on the draft accounting orders with the OEB and forward them to the applicants on or before **September 18, 2018**.

11. The applicants shall file with the OEB and forward to the intervenors responses to any comments on its draft accounting orders on or before **September 24, 2018**.

12. Cost eligible intervenors shall file their cost claims with the OEB and the applicants on or before **September 27, 2018**.

13. The applicants shall file with the OEB and forward to intervenors any objections to the claimed costs by **October 5, 2018**.

14. Intervenors shall file with the OEB and forward to the applicants any responses to any objections for cost claims by **October 12, 2018**.

15. The applicants shall pay the OEB’s costs incidental to this proceeding upon receipt of the OEB’s invoice.

DATED at Toronto, August 30, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

Submissions Related to Transportation and Storage

Transportation

The applicants' evidence on gas supply focused on the status of the existing contracts between Enbridge Gas and Union Gas. Enbridge Gas relies on long-term contracts with Union Gas for transportation and storage of natural gas to meet the gas supply requirements of customers in Enbridge Gas' franchise areas. Transportation services are provided at regulated rates and storage services are provided at market prices. The cost consequences of these contracts are passed through to customers in rates. The applicants noted that despite the fact that the contracts will cease to have effect upon amalgamation, Amalco plans to treat current contractual arrangements as continuing services for the existing terms of the pre-amalgamation contracts.

The applicants confirmed that there is no difference in the costs allocated to the Enbridge Gas rate zone as a result of treating Enbridge Gas as an in-franchise customer (as opposed to a M12 ex-franchise customer). In other words, the amalgamation would not impact transportation costs for Enbridge Gas customers. None of the parties expressed any concerns with respect to the transportation contracts. However, APPrO and TransCanada did express concerns with the allocation of transportation capacity and how other customers of Amalco would be treated versus the legacy Enbridge Gas customers with respect to the awarding of transportation capacity.

TransCanada noted that Enbridge Gas' shift from ex-franchise to in-franchise as a result of amalgamation would represent a significant change in the Dawn Parkway system. Using 2017/2018 volumes, TransCanada estimated that in-franchise use of the Dawn-Parkway system will rise from 28% to 66% as a result of the movement of Enbridge Gas volumes from ex-franchise to in-franchise. TransCanada submitted that the change in the use of the system should result in a review of service attributes to ensure fair competition, fair and equal access, non-discrimination, and adherence with the principles of user-pay/cost causation.[84]

TransCanada noted that currently in-franchise customers are able to adjust volumes on a firm basis throughout the day, whereas C1 and M12 (ex-franchise) transportation customers may only adjust their nominations on an interruptible basis. Secondly, if it is uneconomic to expand facilities to fully accommodate the entirety of a capacity expansion requested by shippers, Amalco's in-franchise customer needs would not be subject to proration, whereas all ex-franchise bids would be prorated on remaining capacity. TransCanada submitted that C1 and M12 shippers face discrimination in the provision of transportation service due to the free no-notice service option and preferential access to expansion capacity provided to Amalco in-franchise transportation

[84] TransCanada submission, page 3.

customers. Accordingly, TransCanada submitted that the OEB should direct the applicants to allocate costs incurred in the provision of higher quality in-franchise service to in-franchise customers and further direct the applicants to allow ex-franchise customers the right to contract for a M12 service with similar attributes to those provided to in-franchise customers (for example, an M12 no-notice service).[85]

The applicants in reply noted that with respect to nominations, M12 and C1 shippers have the ability to nominate all of their firm transportation capacity on the timely window to ensure it is scheduled. With respect to the prioritization of service, the applicants submitted that in-franchise needs and M12 firm needs are at the same priority level and this would not change with amalgamation. The applicants further added that if parties need access to firm intraday increases to timely window nomination, they can contract for all day firm service that is rate-regulated. With respect to expansion capacity and concerns of capacity proration, the applicants noted that Amalco would continue to award bids based on highest economic value as Union Gas does today, with longer term needs driving higher net present value. Available capacity would continue to be provided on a first-come, first-served basis.

Storage Transportation and Access Rule

As noted earlier, Enbridge Gas does not have sufficient storage to meet the needs of its in-franchise customers while Union Gas has excess storage that is not rate-regulated. Post amalgamation, Amalco would continue to purchase market-based storage services to meet the needs of legacy Enbridge Gas in-franchise customers. Since Amalco is one of the parties that can provide storage services, it would be purchasing storage at market-based rates from itself. In order to ensure an unbiased storage procurement process, Amalco has proposed that it would conduct a blind request for proposals through an independent third party for storage capacity. At the oral hearing, the applicants confirmed that if Amalco purchased market-based storage from itself, the contract would be publicly reported on its website in accordance with the Storage and Transportation Access Rule (STAR).[86] OEB staff was satisfied with the proposed approach.

However, FRPO expressed concerns with respect to the transparency of storage and transportation transactions. FRPO submitted that it would be beneficial to view past indices and future contracts as it would provide a better picture of the storage market. Given that STAR is a decade old and the markets would change with the creation of

[85] Ibid., pages 4-5.
[86] Transcript, Volume 3, Page 118, May 14, 2018.

one major Ontario utility, FRPO submitted that a review of STAR was in the public interest. LPMA submitted that the OEB should have a consultative process where any impacts of the merger on OEB policies, rules or orders could be discussed.

The applicants in reply submitted there was no reason to review STAR at this time. The applicants have committed to post the design day Dawn-Parkway system capacity required for Union North, Union South and Enbridge Gas zones on an aggregated basis on its website as part of the Index of Transportation Customers.

Other Storage Issues

CME noted that Enbridge Gas purchases market based storage for their customers and Union Gas still has excess cost-based regulated storage. Considering that the NGEIR decision did not envision the amalgamation of Enbridge Gas and Union Gas, CME submitted that the OEB should review the allocation and regulation of natural gas storage in Ontario when Amalco rebases. BOMA expressed similar views suggesting an independent expert study, the terms of reference for which should be agreed between Amalco and intervenors. The study would assess options and make recommendations to rationalize gas storage and transportation that would also include an assessment of the NGEIR decision.[87] CCC and VECC made similar submissions. Energy Probe submitted that the OEB should either consider having one pool of regulated storage, move it all to market-based rates or re-open the NGEIR decision.[88]

With respect to revisiting the policy decisions made in NGEIR, the applicants submitted that there was no reason to revisit NGEIR in light of the proposed amalgamation. In the NGEIR decision, the OEB determined that the storage market is sufficiently competitive within the geographic market identified by the OEB. In fact, the analysis of Charles River Associates has found that the competitive market for storage is similar to, or potentially larger than the competitive market region identified by the OEB in the NGEIR decision.[89]

[87] BOMA submission, page 20.
[88] Energy Probe submission, page 14.
[89] Reply submission, page 61, para 183.

TAB D

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

Handbook to Electricity Distributor and Transmitter Consolidations

January 19, 2016

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1. Introduction

The Ontario Energy Board (OEB) has developed this Handbook to provide guidance to applicants and stakeholders on applications to the OEB for approval of distributor and transmitter consolidations and subsequent rate applications. This Handbook uses the term consolidation to be inclusive of mergers, acquisitions, amalgamations and divestitures (MAADs).

The Commission on the Reform of Ontario's Public Services, the Distribution Sector Review Panel and the Premiers Advisory Council on Government Assets have all recommended a reduction in the number of local distribution companies in Ontario and have endorsed consolidation. According to these reports, consolidation can increase efficiency in the electricity distribution sector through the creation of economies of scale and/or contiguity. Consolidation permits a larger scale of operation with the result that customers can be served at a lower per customer cost. Consolidations that eliminate geographical boundaries between distribution areas result in a more efficient distribution system.

Consolidation also enables distributors to address challenges in an evolving electricity industry. This includes new technology requirements to meet customer expectations, changing dynamics in the electricity sector with the growth of distributed energy resources and to undertake asset renewal. Distributors will need considerable additional investment to meet these challenges and consolidation generally offers larger utilities better access to capital markets, with lower financing costs.

Distributors are also expected to meet public policy goals relating to electricity conservation and demand management, implementation of a smart grid, and promotion of the use and generation of electricity from renewable energy sources. Delivering on these public policy goals will require innovation and internal capabilities that may be more cost effective for larger distributors to develop or retain.

The OEB recognizes that there is a growing interest in and support for consolidation. The OEB has a statutory obligation to review and approve consolidation transactions where they are in the public interest. In discharging its mandate, the OEB is committed to reducing regulatory barriers to consolidation. In order to facilitate both a thorough and timely review of requests for approval of transactions, in this Handbook the OEB provides guidance on the process for review of an application, the information the OEB expects to receive in support, and the approach it will take in assessing the merits of the consolidation in meeting the public interest.

Recent OEB policies and decisions on consolidation applications have already established a number of principles to create a more predictable regulatory environment for applicants. This Handbook will provide further clarity to applicants, investors, shareholders, and other stakeholders. The Handbook also discusses the rate-making policies associated with consolidations and sets out the timing of when such matters will be considered by the OEB.

While the Handbook is applicable to both electricity distributors and transmitters, most of the OEB's policies and prior OEB decisions have related to distributors. Transmitters should consider the intent of the Handbook and make appropriate modifications as needed to reflect differences in transmitter consolidations.

2. The OEB Authority and Review Process

This section describes the OEB's legal authority in approving consolidation applications and clarifies how the OEB reviews these applications.

The OEB legislative authority

OEB approval is required for consolidation transactions described under section 86 of the *Ontario Energy Board Act, 1998* (OEB Act). (For ease of reference, Section 86 is reproduced in Schedule 1 of this Handbook.) Briefly, these transactions are as follows:

- A distributor or transmitter sells or otherwise disposes of its distribution or transmission system as an entirety or substantially as an entirety to another distributor
- A distributor or transmitter sells a part of a distribution or transmission system that is necessary in serving the public
- A distributor or transmitter amalgamates with another distributor or transmitter
- A person acquires voting securities of a transmitter or distributor or acquires control of a corporation with voting shares

Section 86(2) relating to voting securities does not, however, apply to the acquisition or sale of shares in Hydro One, a company created by the Crown under section 50(1) of the *Electricity Act, 1998*, which is explicitly exempt under section 86(2.1) from the conditions stipulated in section 86(2).

The Application Review Process

This Handbook applies specifically to applications under sections 86(1)(a) and (c) and sections 86(2)(a) and (b) of the OEB Act, which are processed through the OEB's adjudicative review process. Sections 86(1)(a) and (c) of the OEB Act relate to asset sales and amalgamations. Section 86(2) of the OEB Act relates to voting securities. To assist applicants, the OEB has developed Filing Requirements in Schedule 2 of this Handbook which set out the information that needs to be provided in an application. These Filing Requirements replace the form entitled **Application Form for Applications under Section 86 of the OEB Act** that was previously posted on the OEB's website.

Applications filed under section 86(1)(b) of the OEB Act are generally processed through the OEB's administrative review process, typically without a hearing. These applications generally include the sale of smaller scale distribution or transmission assets from one distributor or transmitter to another, or to a large consumer who is served by the same assets. For these applications, applicants may continue using the form entitled **Application Form for Applications under Section 86(1)(b) of the OEB Act** that is posted on the OEB's website, (http://www.ontarioenergyboard.ca/OEB/Industry/Rules+and+Requirements/Rules+Codes+Guidelines+and+Forms#maad).

The OEB may elect to process a section 86(1)(b) application under its adjudicative review process if the OEB considers that certain aspects of an application could affect service to the public and/or have a material effect on rates. This will be determined once the application is filed with the OEB. In those circumstances, this Handbook will be applicable. Applicants who are of the view that their transaction is material should use this Handbook to inform their application.

3. The OEB Test

The No Harm Test

In reviewing an application by a distributor for approval of a consolidation transaction, the OEB has, and will continue, to apply its "no harm test". The "no harm" test was first

established by the OEB in 2005 through an adjudicative proceeding (the Combined Proceeding).[1]

The "no harm" test considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives, as set out in section 1 of the OEB Act. The OEB will consider whether the "no harm" test is satisfied based on an assessment of the cumulative effect of the transaction on the attainment of its statutory objectives. If the proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application.

The OEB's objectives under section 1 of the OEB Act are:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
    1.1 To promote the education of consumers.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.

4. The OEB Assessment of the Application

This section sets out how the OEB applies the "no harm" test within the context of the performance-based regulatory framework, the Renewed Regulatory Framework for Electricity Distributors[2] (RRFE). This framework was established by the OEB in 2012 to

[1] Combined Proceeding Decision - OEB File No. RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257

[2] Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach

ensure that regulated distribution companies operate efficiently, cost effectively and deliver outcomes valued by its customers.

The Renewed Regulatory Framework

Ongoing performance improvement and performance monitoring are underlying principles of the RRFE. The OEB's oversight of utility performance relies on the establishment of performance standards to be met by distributors, ongoing reporting to the OEB by distributors, and ongoing monitoring of distributor achievement against these standards by the OEB.

An electricity distributor is required, as a condition of its licence, to provide information about its distribution business. Metrics are used by the OEB to assess a distributor's services, such as frequency of power outages, financial performance and costs per customer. The OEB uses this information to monitor an individual distributor's performance and to compare performance across the sector. The OEB also has a robust audit and compliance program to test the accuracy of reporting by distributors.

As part of the regulatory framework, distributors are expected to achieve certain outcomes that provide value for money for customers. One of these outcomes is operational effectiveness, which requires continuous improvement in productivity and cost performance by distributors and that utilities deliver on system reliability and quality objectives. The OEB uses processes to hold all utilities to a high standard of efficiency and effectiveness.

The OEB has a proactive performance monitoring framework that inherently protects electricity customers from harm related to service quality and reliability and has established the mechanisms to intervene if corrective action is warranted. The OEB will be informed by the metrics that are used to evaluate a distributor's performance in assessing a proposed consolidation transaction.

All of these measures are in place to ensure that distributors meet expectations regardless of their corporate structure or ownership. The OEB assesses applications for consolidation within the context of this regulatory framework.

The No Harm Test

The “no harm” test assesses whether the proposed transaction will have an adverse effect on the attainment of the OEB’s statutory objectives. While the OEB has broad statutory objectives, in applying the “no harm” test, the OEB has primarily focused its review on impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector. The OEB considers this to be an appropriate approach, given the performance-based regulatory framework under which all regulated distributors are required to operate and the OEB’s existing performance monitoring framework.

The OEB has implemented a number of instruments, such as codes and licences that ensure regulated utilities continue to meet their obligations with respect to the OEB’s statutory objectives relating to conservation and demand management, implementation of smart grid and the use and generation of electricity from renewable resources. With these tools and the ongoing performance monitoring previously discussed, the OEB is satisfied that the attainment of these objectives will not be adversely effected by a consolidation and the “no harm” test will be met following a consolidation. There is no need or merit in further detailed review as part of the OEB’s consideration of the consolidation transaction.

Scope of the Review

The factors that the OEB will consider in detail in reviewing a proposed transaction are as follows:

Objective 1 – Protect consumers with respect to price and the adequacy, reliability and quality of electricity service

Price

A simple comparison of current rates between consolidating distributors does not reveal the potential for lower cost service delivery. These entities may have dissimilar service territories, each with a different customer mix resulting in differing rate class structure characteristics. For these reasons, the OEB will assess the underlying cost structures of the consolidating utilities. As distribution rates are based on a distributor’s current and projected costs, it is important for the OEB to consider the impact of a transaction on the cost structure of consolidating entities both now and in the future, particularly if there

appear to be significant differences in the size or demographics of consolidating distributors. A key expectation of the RRFE is continuous improvement in productivity and cost performance by distributors. The OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers.

Consistent with recent decisions,[3] the OEB will not consider temporary rate decreases proposed by applicants, and other such temporary provisions, to be demonstrative of "no harm" as they are not supported by, or reflective of the underlying cost structures of the entities involved and may not be sustainable or beneficial in the long term. In reviewing a transaction the OEB must consider the long term effect of the consolidation on customers and the financial sustainability of the sector.

To demonstrate "no harm", applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been. While the rate implications to all customers will be considered, for an acquisition, the primary consideration will be the expected impact on customers of the acquired utility.

Adequacy, reliability and quality of electricity service

In considering the impact of a proposed transaction on the quality and reliability of electricity service, and whether the "no harm" test has been met, the OEB will be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard.

The OEB's *Report of the Board: Electricity Distribution Systems Reliability Measures and Expectations*, issued on August 25, 2015 sets out the OEB's expectations on the level of reliability performance by distributors. In the Report, the OEB noted that continuous improvement will be demonstrated by a distributor's ability to deliver improved reliability performance without an increase in costs, or to maintain the same level of performance at a reduced cost.

Under the OEB's regulatory framework, utilities are expected to deliver continuous improvement for both reliability and service quality performance to benefit customers. This continuous improvement is expected to continue after a consolidation and will continue to be monitored for the consolidated entity under the same established requirements.

[3] Hydro One Inc./Norfolk Power Distribution Inc. – OEB File No. EB-2013-0196/EB-2013-0187/EB-2013-0198
Hydro One Inc./Haldimand County Hydro Inc. – OEB File No. EB-2014-0244

Objective 2 – Promote economic efficiency and cost effectiveness and to facilitate the maintenance of a financially viable electricity industry

The impact that the proposed transaction will have on economic efficiency and cost effectiveness (in the distribution or transmission of electricity) will be assessed based on the applicant's identification of the various aspects of utility operations where it expects sustained operational efficiencies, both quantitative and qualitative.

The impact of a proposed transaction on the acquiring utility's financial viability for an acquisition, or on the financial viability of the consolidated entity in the case of a merger will also be assessed. The OEB's primary considerations in this regard are:

- The effect of the purchase price, including any premium paid above the historic (book) value of the assets involved
- The financing of incremental costs (transaction and integration costs) to implement the consolidation transaction

In the Combined Proceeding decision, the OEB made it clear that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company. This remains the relevant test. While there may not be a premium involved with mergers, the OEB will nevertheless consider the financial viability of the newly consolidated entity.

Electricity distribution rates are currently based on a return on the historic value of the assets. If a premium has been paid above the historic value, this premium is not recoverable through distribution rates and no return can be earned on the premium. A shareholder may recover the premium over time through savings generated from efficiencies of the consolidated entity. In considering the appropriateness of purchase price or the quantum of the premium that has been offered, only the effect of the purchase price on the underlying cost structures and financial viability of the regulated utilities will be reviewed. Specifically, the OEB will test the financial ratios and borrowing capacity of the resulting entity, as the improvement in financial strength is one of the expected underlying benefits of consolidation.

Incremental transaction and integration costs are not generally recoverable through rates. Distributors have indicated that these costs are significant and that recovery of these costs can be a barrier to consolidation. To address distributors' concerns, the OEB issued a report on March 26, 2015 titled "*Rate-making Associated with Distributor Consolidation*" (2015 Report). In this report, the OEB has provided the opportunity for distributors to defer rebasing for a period up to ten years following the closing of a

consolidation transaction. This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction.

*****

The OEB considers that certain aspects of a consolidation transaction are not relevant in assessing whether the transaction is in the public interest, either because they are out of scope, or because the OEB has other approaches and instruments for ensuring that statutory objectives will be met. Accordingly, the OEB will not require applicants to file evidence on the following matters as part of a consolidation application.

1. Deliberations, activities, and documents leading up to the final transaction agreement

As set out in the Combined Proceeding decision, and confirmed in recent decisions,[4] the question for the OEB is neither the why nor the how of the proposed transaction. The application of the "no harm" test is limited to the effect of the proposed transaction before the OEB when considered in light of the OEB's statutory objectives.

The OEB determined in the Combined Proceeding decision that it is not the OEB's role to determine whether another transaction, whether real or potential, can have a more positive effect than the transaction that has been placed before the OEB. Accordingly, the OEB will not consider, whether a purchasing or selling utility could have achieved a better transaction than that being put forward for approval in the application.

Also as set out in the Combined Proceeding decision, the OEB will not consider issues relating to the overall merits or rationale for applicants' consolidation plans nor the negotiating strategies or positions of the parties to the transaction. The OEB will not consider issues relating to the extent of the due diligence, the degree of public consultation or public disclosure by the parties leading up to the filing of the transaction with the OEB.

Applicants and stakeholders should not file any of the following types of information as they are not considered relevant to the proceeding:

- Draft share purchase agreements and other draft confidential agreements and documents utilized in the course of the negotiation process

[4] Hydro One Inc./Norfolk Power Distribution Inc. Decision and Order and Procedural Order No. 8 – OEB File No. EB-2013-0196/EB-2013-0187/EB-2013-0198
Hydro One Inc./Woodstock Hydro Services Inc. Decision and Procedural Order No. 4 – OEB File No. EB-2014-0213

- Negotiating strategies or conduct of the parties involved in the transaction
- Details of public consultation prior to the filing of the application

2. *Implementing public policy requirements for promoting conservation, facilitating a smart grid and promoting renewable energy sources*

As previously discussed, the OEB's performance-based regulation, which includes performance monitoring and reporting based on standards, combined with the regulatory instruments of codes and licences, establishes a framework for success in achieving public policy requirements. A utility that does not meet established performance expectations is subject to corrective action by the OEB. Given these means for ensuring that public policy objectives are met by all regulated entities, the OEB is satisfied that the "no harm" test will be met for these objectives following a consolidation and there is no need or merit in further detailed consideration as part of a consolidation transaction. For these reasons, no evidence is required to be filed for these issues.

3. *Prices not related to a utility's own costs*

The OEB's review is limited to the components of the distribution business and the costs and services directly under a distributor's control. For example, one of the mandates of a distributor is to pass-through certain wholesale market and commodity related costs to customers. These costs are passed through and not part of a utility's underlying costs to serve its customers. Accordingly, the prices of these services are not considered by the OEB in its review of a consolidation application.

5. Rate-Making Considerations Associated with Consolidation Applications

The OEB's policies on rate-making matters associated with consolidation in the electricity distribution sector are set out in two reports of the OEB. The first report titled "*Rate-making Associated with Distributor Consolidation*" issued on July 23, 2007 (2007 Report) was supplemented by the 2015 Report, issued under the same name, as previously indicated.[5]

This section of the Handbook consolidates information that is provided in these two reports and identifies the key rate-making considerations expected to arise in

[5] Report of the Board: Rate-Making Associated with Distributor Consolidation, March 26, 2015

consolidation transactions. Applicants are, however, encouraged to review both reports in preparing their applications for both the consolidation transaction and subsequent rate application.

Rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation e.g. a temporary rate reduction. Rate-setting for the consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB. The OEB's review of a utility's revenue requirement, and the establishment of distribution rates paid by customers, occurs through an open, fair, transparent and robust process ensuring the protection of customers.

Rate-Setting Policies

The rate making considerations relating to consolidation that applicants and parties need to be aware of are:

- Deferred Rebasing
- Early Termination of Pre-Consolidation Rate-Setting term
- Early Termination or Extension of Deferred Rebasing Period
- Rate Setting During Deferred Rebasing Period
- Off Ramp
- Earnings Sharing Mechanism
- Incremental Capital Investments During Deferred Rebasing Period
- Future Rate Structures
- Deferral and Variance Accounts

Deferred Rebasing

The setting of rates for a consolidated entity using a cost of service methodology or a Custom Incentive Rate-setting method (both referred to in this document as rebasing of rates) involves a detailed assessment by the OEB of a utility's underlying costs. A consolidated entity is required to file a separate application with the OEB under Section 78 of the OEB Act for a rebasing of its rates. This typically takes place at some point in time following the OEB's approval of a consolidation.

To encourage consolidations, the OEB has introduced policies that provide consolidating distributors with an opportunity to offset transaction costs with any

achieved savings. The 2015 Report permits consolidating distributors to defer rebasing for up to ten years from the closing of the transaction. The 2015 Report also states that consolidating entities deferring rebasing for up to five years may do so under the policies established in the 2007 Report.[6] The extent of the deferred rebasing period is at the option of the distributor and no supporting evidence is required to justify the selection of the deferred rebasing period subject to the minimum requirements set out below.

While the OEB has determined that allowing a longer deferred rebasing period is appropriate to incent consolidation, there must be an appropriate balance between the incentives provided to utilities and the protection provided to customers. The OEB will therefore require consolidating distributors to identify in their consolidation application the specific number of years for which they choose to defer. It is not sufficient for applicants to state that they will defer rebasing for up to 10 years. Distributors must select a definitive timeframe for the deferred rebasing period. This will allow the OEB to assess any proposed departure from this stated plan.

In addition, distributors cannot select a deferred rebasing period that is shorter than the shortest remaining term of one of the consolidating distributors. Therefore, a consolidated entity can only rebase when:

i) The selected deferred rebasing period has expired, and
ii) At least one rate-setting term of one of the consolidating entities has also expired.

Early Termination of Pre-Consolidation Rate-setting Term

At the time distributors first enter into a consolidation transaction, consolidating distributors may be on any one of the rate setting mechanisms and may not necessarily be using the same rate-setting mechanism or have the same termination dates.

A consolidated entity may apply to the OEB to rebase its rates as a consolidated entity through a cost of service or Custom IR application following the expiry of the original rate-setting term of at least one of the consolidating entities and once the selected deferred rebasing period has concluded. If, however, a consolidated entity wishes to rebase its rates prior to the end of the pre-consolidation rate-setting term of the distributor that has the earliest termination date, the consolidated entity must demonstrate the need for this “early rebasing” as part of the early rebasing application.

[6] Report of the Board on Rate-making Associated with Distributor Consolidation, July 23, 2007

The OEB established its approach to early rebasing in a letter dated April 20, 2010 and reiterated it in the RRFE. The OEB expects a distributor that seeks to have its rates rebased earlier than scheduled to clearly demonstrate why early rebasing is required and why and how the distributor cannot adequately manage its resources and financial needs during the remaining years of its current rate term.

Early Termination or Extension of Selected Deferred Rebasing Period

The OEB considers that consolidations can provide for greater efficiencies and benefits to customers and is committed to reducing regulatory barriers to consolidations. The OEB has allowed for a deferred rebasing period to eliminate one of the identified barriers to consolidations. The OEB remains of the view that having consolidating entities operate as one entity as soon as possible after the transaction is in the best interest of consumers. That being said, when a consolidating entity has opted for a deferred rebasing period, it has committed to a plan based on the circumstances of the consolidation. For this reason, if the consolidated entity seeks to amend the deferred rebasing period, the OEB will need to understand whether any change to the proposed rebasing timeframe is in the best interest of customers.

Distributors who subsequently request a shorter deferred rebasing period than the one that has been selected (and where at least one of the pre-consolidation rate-setting plans has expired) will be required to file rationale to support the need to amend the previously selected deferred rebasing period. Similarly, a consolidated entity having selected a deferred rebasing period less than 10 years, that seeks to extend its selected deferred rebasing period must explain why this is required.

Rate Setting during Deferred Rebasing Period

Under the OEB's RRFE, there are three rate-setting options: Price Cap Incentive Rate-Setting (Price Cap IR or PCIR), Custom Incentive Rate-Setting (Custom IR or CIR) and Annual Incentive Rate-Setting Index (Annual IR Index or AIRI). The term of the Price Cap IR and Custom IR options is normally five years. The Annual IR Index option has no specific term.

Consolidating distributors may be on any one of the rate-setting mechanisms and may not necessarily be using the same rate-setting mechanism or have the same termination dates. The 2015 Report clarified how rates will be set for a distributor who

is a party to a consolidation transaction during any deferred rebasing period after the distributor's original incentive rate-setting plan has concluded:

- A distributor on Price Cap IR, whose plan expires, would continue to have its rates based on the Price Cap IR adjustment mechanism during the remainder of the deferred rebasing period.
- A distributor on Custom IR, whose plan expires, would move to having rates based on the Price Cap IR adjustment mechanism during the remainder of the deferred rebasing period.
- A distributor on the Annual IR Index will continue to have rates based on the Annual IR Index, until it selects a different rate-setting option.

Table 1 below illustrates six potential scenarios for rate-setting during the deferred rebasing period, assuming the consolidation of two distributors. The table also sets out the conditions that must be met by a consolidated entity that elects to rebase its rates. While Table 1 is intended to illustrate a situation of two consolidating distributors, the OEB is aware that future consolidations may involve several consolidating distributors as well as the possibility of multiple successive consolidation transactions by a single consolidated entity. For unique circumstances, the OEB may need to assess the rate-setting proposals on a case by case basis.

Table 1 - Rate-Setting Options During the Deferred Rebasing Period

Going in Rates
As of the date of the closing of the transaction. Assumes two distributors.

	Both on PCIR	One on PCIR and one on CIR	Both on CIR
Deferral Period	Continue with current plans for chosen deferred rebasing period.	LDC on PCIR continues on current plan for chosen deferred rebasing period and LDC on CIR moves to PCIR for the remaining years of chosen deferred rebasing period, following the expiration of the CIR term.	Continue with current plans. Once each term expires, each LDC will move to PCIR for the remaining years of the chosen deferred rebasing period.
	OR	OR	OR
Rebasing Options	Rebase as a consolidated entity following the expiration of one of the entities' term and once the selected deferred rebasing period has concluded.	LDC on PCIR continues on current plan. If its term expires in advance of the expiration of the other LDC's CIR term the consolidated entity may rebase once the selected deferred rebasing period has concluded.	Continue with current plans. Once the earlier of the two terms expires the consolidated entity may rebase once the selected deferred rebasing period has concluded.
		OR	
		If the term for the LDC on CIR expires first, the consolidated entity may rebase following the expiration of the CIR term and once the selected deferred rebasing period has concluded.	
	One on PCIR and one on AIRI	**Both on AIRI**	**One on AIRI and one on CIR**
Deferral Period	Continue with current plans for chosen deferred rebasing period.	Continue with current plans for chosen deferred rebasing period.	LDC on AIRI continues on current plan for chosen deferred rebasing period and LDC on CIR moves to PCIR for the remaining years of chosen deferred rebasing period, following the expiration of the CIR term.
	OR	OR	OR
Rebasing Options	Consolidated entity may rebase once the selected deferred rebasing period has concluded.	Consolidated entity may rebase once the selected deferred rebasing period has concluded.	Consolidated entity may rebase once the selected deferred rebasing period has concluded.

Off Ramp

As set out in the OEB's RRFE, each incentive rate-setting method includes an annual return on equity (ROE) dead band of ±300 basis points. When a distributor performs outside of this earnings dead band, a regulatory review may be initiated by the OEB. The OEB requires consistent, meaningful and timely reporting to effectively monitor utility performance and determine if expected outcomes are being achieved. The OEB's performance monitoring framework allows the OEB to take corrective action if required, including the possible termination of the distributor's rate-setting method and requiring the distributor to have its rates rebased.

The dead band of ±300 basis points on ROE continues to apply to utilities who have deferred rebasing due to consolidation. For utilities who defer rebasing up to five years, the OEB may initiate a regulatory review if the earnings are outside of the dead band. For utilities deferring rebasing beyond five years, an earnings sharing mechanism is required above ±300 basis points as discussed in the next section.

Earning Sharing Mechanism (ESM)

Consolidating entities that propose to defer rebasing beyond five years, must implement an ESM for the period beyond five years.[7] The ESM is designed to protect customers and ensure that they share in any increased benefits from consolidation during the deferred rebasing period.

In the 2015 Report, the OEB determined that under the ESM, excess earnings are shared with consumers on a 50:50 basis for all earnings that are more than 300 basis points above the consolidated entity's annual ROE. Earnings will be assessed each year once audited financial results are available and excess earnings beyond 300 basis points will be shared with customers annually. No evidence is required in support of an ESM that follows the form set out in the 2015 Report.

There are numerous types and structures of consolidation transactions, and there can be significant differences between utilities involved in a transaction. The ESM as set out in the 2015 Report may not achieve the intended objective of customer protection for all types of consolidation proposals. For these cases, applicants are invited to propose an ESM that better achieves the objective of protecting customer interests during the

[7] Report of the Board: Rate-Making Associated with Distributor Consolidation, March 26, 2015, p.6

deferred rebasing period. For example, a large distributor that acquires a small distributor may demonstrate the objective of consumer protection by proposing an ESM where excess earnings will accrue only to the benefit of the customers of the acquired distributor.

Incremental Capital Investments during Deferred Rebasing Period

The Incremental Capital Module (ICM) is an additional rate-setting mechanism under the Price Cap IR option to allow adjustment to rates for discrete capital projects. The details of the mechanism are described in the *Report of the Board: New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, issued on September 18, 2014 and a supplemental report with further enhancements will be issued in January 2016.

The ICM is now available for any prudent discrete capital project that fits within an incremental capital budget envelope, not just expenditures that were unanticipated or unplanned. To encourage consolidation, the 2015 Report extended the availability of the ICM for consolidating distributors that are on Annual IR Index, thereby providing consolidating distributors with the ability to finance capital investments during the deferral period without being required to rebase earlier than planned.

The 2015 Report sets out that a distributor who is in the midst of the Custom IR plan at the time of the transaction and who consolidates with an entity operating under a Price Cap IR or an Annual IR Index may only apply for an ICM for investments incremental to its Custom IR plan. The rules that apply to a specific rate-setting method continue to apply even following a consolidation of distributors. To be specific, an ICM would not be available for the rates in the service area for which the Custom IR plan term applies until the term of the Custom IR ends and Price Cap IR applies. Materiality thresholds for the ICM will be calculated based on the individual distributors' accounts and not that of the consolidated entity.

Future Rate Structures

A consolidated entity is expected to propose rate structures and rate harmonization plans following consolidation at the time it files its rebasing application. Distributors are not required to file details of their rate-setting plans, including any proposals for rate harmonization, as part of the application for consolidation. These issues will be addressed at the time of rate rebasing of the consolidated entity.

A rate harmonization plan can propose the approach and timeline for harmonizing rate classes or provide rationale for why certain rate classes should not be harmonized based on underlying differences in cost structures and drivers. For acquisitions, distributors can propose plans that place acquired customers into an existing rate class or into a new rate class. However, the OEB expects that whichever option is adopted, rates will reflect the cost to serve the acquired customers, including the anticipated productivity gains resulting from consolidation.

Deferral and Variance Accounts

Where a transmitter or distributor has accumulated balances in a deferral or variance account, the question of who should pay for, or receive credits from the clearance of these balances is relevant to the consolidation only if it affects the financial viability of the acquiring utility or consolidated entity. A decision on the actual clearance of deferral or variance accounts would be part of a rate application, not an application seeking approval for consolidation.

INDEX: Schedule 1 – Relevant Sections of the OEB Act

Section 86 of the OEB Act

Change in ownership or control of systems

86. (1) No transmitter or distributor, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of its transmission or distribution system that is necessary in serving the public; or

(c) amalgamate with any other corporation. 2003, c. 3, s. 55 (1).

Same

(1.1) Subsection (1) does not apply with respect to a disposition of securities of a transmitter or distributor or of a corporation that owns securities in a transmitter or distributor. 2002, c. 1, Sched. B, s. 9 (1).

Acquisition of share control

(2) No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 10 per cent of the voting securities of the transmitter or distributor; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 10 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, s. 86 (2).

INDEX: Schedule 2 – Filing Requirements for Consolidation Applications

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

Ontario Energy Board

Filing Requirements
For
Consolidation Applications

January 19, 2016

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Filing Requirements for Consolidation Applications

1. Introduction

Completeness and Accuracy of an Application

These filing requirements provide direction to applicants in preparing a consolidation application. It is expected that applicants will file applications consistent with the filing requirements. Applications must be accurate, and information and data presented must be consistent throughout the application. If an application does not meet all of these requirements, or if there are inconsistencies identified in the information or data presented, the OEB may put the application in abeyance, unless satisfactory justification for missing or inconsistent information has been provided or until revised satisfactory evidence is filed. If circumstances warrant, the OEB may require an applicant to file evidence in addition to what is identified in the filing requirements. An applicant should only file information that is relevant to the OEB's statutory objectives in relation to electricity. Applicants should refer to the Handbook on the OEB's expectations and approach to reviewing consolidation applications.

Certification of Evidence

An application filed with the OEB must include a certification by a senior officer of the applicant that the evidence filed is accurate, consistent and complete to the best of his or her knowledge.

Updating an Application

When material changes or updates to an application or other evidence are necessary, a thorough explanation of the changes must be provided, along with revisions to the affected evidence and related schedules. This process is contemplated in Rule 11.02 of the *Rules of Practice and Procedure* (the Rules). When changes or updates are contemplated in later stages of a proceeding, updates should only be done if there is a material change to the evidence already before the OEB. Rule 11.03 states that any such updates should clearly indicate the date of the revision and the part(s) revised.

Interrogatories

Interrogatories are an important part of the process of clarifying and testing evidence, however they must focus on issues that are relevant to the OEB's decision. Excessive interrogatories introduce inefficiency into the application process. The OEB advises applicants to consider the clarity, completeness and accuracy of their evidence and refer to the Handbook for what will be considered or not in order to reduce the need for interrogatories. The OEB also advises parties to carefully consider the relevance and materiality of information before requesting it through interrogatories. Parties must consult Rules 26 and 27 of the OEB's *Rules of Practice and Procedure*, April 24, 2014 revision, for additional information on the filing of interrogatories and responses and matters related to such filings.

Confidential Information

The OEB relies on full and complete disclosure of all relevant material in order to ensure that its decisions are well-informed. The OEB's expectation is that applicants will make every effort to file material contained in an application publicly and completely, and without redactions in order to ensure the transparency of the review process. The OEB's Rules and the *Practice Direction on Confidential Filings* (the Practice Direction) allow for applicants and other parties to request that certain evidence be treated as confidential. Where such a request is made, parties are expected to review and follow the Practice Direction. This includes assessment of the relevance of any requested document prior to filing it with the OEB and requesting confidential treatment. There is no requirement or expectation on applicants to file documents that are out of scope of the areas the OEB has determined are relevant to its consideration of a consolidation application as defined in the Handbook.

2. Information Required of Applicants

The OEB expects an application for consolidation to have the following components:

2.1 Exhibit A: The Index

	Content	Described in
Exhibit A	Index	2.1
Exhibit B	The Application	2.2
	Administrative	2.2.1
	Description of the Business of the Parties to the Transaction	2.2.2
	Description of the Transaction	2.2.3
	Impact of transaction on the OEB's statutory objectives	2.2.4
	Rate considerations for consolidation applications	2.2.5
	Other Related Matters	2.2.6

2.2 Exhibit B: The Application

2.2.1 Administrative

This section must include the formal signed application, which must incorporate the following:

- Legal name of the applicant or applicants
- Details of the authorized representative of the applicant/s, including the name, phone and fax numbers, and email and delivery addresses
- Legal name of the other party or parties to the transaction, if not an applicant
- Details of the authorized representative of the other party or parties to the transaction, including the name, phone and fax numbers, and email and delivery addresses
- Brief description of the nature of the transaction for which approval of the OEB is sought by the applicant or applicants

2.2.2 Description of the Business of the Parties to the Transaction

This section of the application requires the applicant to provide the following information on the parties to the proposed transaction:

- Describe the business of each of the parties to the proposed transaction, including each of their electricity sector affiliates engaged in, or providing goods or services to anyone engaged in, the generation, transmission, distribution or retailing of electricity.

- Describe the geographic territory served by each of the parties to the proposed transaction, including each of their affiliates, if applicable, noting whether service area boundaries are contiguous or if not the relative distance between service boundaries.

- Describe the customers, including the number of customers in each class, served by each of the parties to the proposed transaction.

- Describe the proposed geographic service area of each of the parties after completion of the proposed transaction.

- Provide a corporate chart describing the relationship between each of the parties to the proposed transaction and each of their respective affiliates.

- If the proposed transaction involves the consolidation of two or more distributors, please indicate the current net metering thresholds of the utilities involved in the proposed transaction. The OEB will, in the absence of exceptional circumstances, add together the kW threshold amounts allocated to the individual utilities and assign the sum to the new or remaining utility. Applicants must indicate if there are any special circumstances that may warrant the OEB using a different methodology to determine the net metering threshold for the new or remaining utility.

2.2.3 Description of the Proposed Transaction

This section of the application requires the applicant to provide the following:

- Provide a detailed description of the proposed transaction.
- Provide a clear statement on the leave being sought by the applicant, referencing the particular section or sections of the *Ontario Energy Board Act, 1998*.
- Provide details of the consideration (e.g. cash, assets, shares) to be given and received by each of the parties to the proposed transaction.
- Provide all final legal documents to be used to implement the proposed transaction.
- Provide a copy of appropriate resolutions by parties such as parent companies, municipal council/s, or any other entities that are required to approve a proposed transaction confirming that all these parties have approved the proposed transaction.

2.2.4 Impact of the Proposed Transaction

In reviewing an application, the OEB will apply the no harm test as outlined in the Handbook. Applicants are required to provide the following evidence to demonstrate the impact of the proposed transaction with respect to the OEB's first two statutory objectives.

Objective 1 – Protect consumers with respect to prices and the adequacy, reliability and quality of electricity service

- Indicate the impact the proposed transaction will have on consumers with respect to prices and the adequacy, reliability and quality of electricity service.
- Provide a year over year comparative cost structure analysis for the proposed transaction, comparing the costs of the utilities post transaction and in the absence of the transaction.

- Provide a comparison of the OM&A cost per customer per year between the consolidating distributors.

- Confirm whether the proposed transaction will cause a change of control of any of the transmission or distribution system assets, at any time, during or by the end of the transaction.

- Describe how the distribution or transmission systems within the service areas will be operated.

Objective 2 – Promote economic efficiency and cost effectiveness and to facilitate the maintenance of a financially viable electricity industry

- Indicate the impact that the proposed transaction will have on economic efficiency and cost effectiveness (in the distribution or transmission of electricity), identifying the various aspects of utility operations where the applicant expects sustained operational efficiencies (both quantitative and qualitative).

- Identify all incremental costs that the parties to the proposed transaction expect to incur which may include incremental transaction costs (e.g. legal, regulatory), incremental merged costs (e.g. employee severances), and incremental on-going costs (e.g. purchase and maintenance of new IT systems). Explain how the consolidated entity intends to finance these costs.

- Provide a valuation of any assets or shares that will be transferred in the proposed transaction. Describe how this value was determined.

- If the price paid as part of the proposed transaction is more than the book value of the assets of the selling utility, provide details as to why this price will not have an adverse effect on the financial viability of the acquiring utility.

- Provide details of the financing of the proposed transaction.

- Provide financial statements (including balance sheet, income statement, and cash flow statement) of the parties to the proposed transaction for the past two most recent years.

- Provide pro forma financial statements for each of the parties (or if an amalgamation, the consolidated entity) for the first full year following the

completion of the proposed transaction.

2.2.5 Rate considerations for consolidation applications

Applicants are required to provide the information with respect to the following rate making considerations relating to consolidation:

- Indicate a specific deferred rate rebasing period that has been chosen.
- For deferred rebasing periods greater than five years:
    - Confirm that the ESM will be as required by the 2015 Report and the Handbook
    - If the applicant's proposed ESM is different from the ESM set out in the 2015 Report, the applicant must provide evidence to demonstrate the benefit to the customers of the acquired distributor

2.2.6 Other Related Matters

Applicants have, in previous consolidation applications, made the following additional requests to the OEB which have formed part of the OEB's determination of a consolidation application:

a) Implementation of new or the extension of existing rate riders
b) Transfer of rate order and licence
c) Licence amendment and cancellation
d) Approval to continue to track costs to the deferral and variance accounts currently approved by the OEB
e) Approval to use different accounting standards for financial reporting following the closing of the proposed transaction

Applicants are required to provide justification for these types of requests and for any other requests for which a determination is being sought from the OEB as part of a consolidation application.

- End of document –

TAB E

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

Ontario

February 8, 2024

OEB Staff Discussion Paper

Evaluation of Policy on Utility Consolidations

EB-2023-0188

2300 Yonge Street, 27th floor, P.O. Box 2319, Toronto, ON, M4P 1E4
2300, rue Yonge, 27e étage, C.P. 2319, Toronto (Ontario) M4P 1E4

T 416-481-1967 1-888-632-6273
F 416-440-7656 **OEB.ca**

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Overview

On July 27, 2023, the Ontario Energy Board (OEB) issued a letter launching a consultation to engage stakeholders to review and update the OEB's *Handbook to Electricity Distributor and Transmitter Consolidations* (MAADs Handbook), and associated *Filing Requirements for Consolidation Applications*.[1] The OEB's letter noted that the focus of the consultation is on electricity distribution-related consolidations.[2] The OEB advised that the review will leverage experience to-date of the OEB's approximately 20 consolidation-related decisions issued since the original MAADs Handbook was published in 2016, and is expected to identify and address any continuing barriers to consolidation, while ensuring customers are protected. The consultation is also expected to address recommendations related to consolidations as outlined in the Auditor General of Ontario's Value for Money audit report, *Ontario Energy Board: Electricity Oversight and Consumer Protection* (AG Audit Report).[3]

The July 2023 letter stated that it was anticipated that OEB staff would meet with a sample size of utilities on a one-on-one basis, and intervenor input would be sought through a small group meeting. Among other matters, OEB staff sought to gain insights on experiences in filing and participating in consolidation application(s), as applicable, and to provide stakeholders with an opportunity to comment on elements of the OEB's current MAADs Handbook and filing requirements for consolidation applications.[4]

During August and September 2023, OEB staff held a total of nine meetings with utilities and intervenors to receive initial feedback.[5] After having received initial feedback from distributors and intervenors, OEB staff worked to consolidate that feedback and develop proposals for broader consultation. Most proposals outlined in this OEB Staff Discussion Paper result from consideration of that feedback.

[1] *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016. The MAADs Handbook uses the term consolidation to be inclusive of mergers, acquisitions, amalgamations and divestitures. Schedule 2 of the MAADs Handbook contains the Filing Requirements for Consolidation Applications.
[2] The OEB's letter noted the review will not consider the applicability of the MAADs Handbook to natural gas consolidation applications at this time.
[3] Office of the Auditor General - Value for Money Audit: *Ontario Energy Board: Electricity Oversight and Consumer Protection*, recommendation 11, pp. 43-44
[4] OEB Letter, p. 3
[5] OEB staff held one-on-one meetings with two "small" utilities, two "medium" utilities, two "large" utilities, and two utilities that have not consolidated. OEB staff met with five intervenors as part of a group meeting. One intervenor group was not available for the scheduled meeting. As such, summarized comments should be interpreted as viewpoints heard from those utilities and intervenors with whom OEB staff met.

There are currently 58 rate-regulated distributors in Ontario with the smallest serving about 315 customers, and the largest about 1.4 million customers. OEB staff is of the view that there will be emerging challenges faced within the energy sector posed by net zero carbon initiatives such as increased use of electric vehicles and other electrification initiatives, challenges related to cybersecurity, the need for resiliency in the face of climate change, management of distributed energy resources, considerations of distribution system operator models, and other changes as the energy sector evolves. These initiatives will pose challenges and may require utilities to increase their service capabilities. While consolidation is not the only way to meet these challenges, enhancing utility capabilities may be better addressed through the economies of scale resulting from further consolidation in the electricity sector. It is with this perspective that OEB staff has formed its recommendations.

Overall, OEB staff are not proposing any major changes to the MAADs Handbook and/or filing requirements for consolidation applications. Meetings with stakeholders did not identify any significant barriers to consolidation or major gaps in consumer protection from existing OEB policies. The proposals staff are making, summarized below, are primarily related to areas of clarification on current policy, evolving certain language, and additional detail required as part of MAADs applications. Net new requirements to address the recommendations outlined in the AG Audit Report have been proposed. Supporting discussion for each proposal follows.

No Harm Test
• The “no harm” test should continue but be clarified.   ○ Clarify that in assessing “no harm”, both quantitative (e.g., cost) and qualitative information (e.g., reliability and resilience) included in the application will be weighed in consideration of the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the attainment of the OEB’s objectives. • The OEB’s objectives have been amended since the issuance of the MAADs handbook and should be updated.
Cost Structures
• Update filing requirements to outline the information that should be provided for underlying comparative cost structure analysis (i.e., revenue requirement analysis).

• Forecast revenue requirement both under consolidation and under the status-quo scenario of the predecessor utilities remaining as stand-alone utilities should be provided.
  ○ Analysis should include information for each year of the elected deferred rebasing period and include the post-consolidation rebasing year.
  ○ Assumptions used in these forecasts should be documented (e.g., inflation, productivity, cost of service adjustments, evolving energy sector, expected Incremental Capital Module requests, if applicable, etc.).

• Addition of language to address evolving energy sector.   ○ The OEB will take into consideration evidence which highlights expected impacts to cost structures from an evolving energy sector relative to the status quo, with detailed supporting rationale. Further, the OEB reminds applicants that the OEB will weigh both the quantitative and qualitative impacts of a proposed transaction and consider the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the attainment of the OEB's objectives.
• At the time of the post-consolidation rebasing application, the consolidated entity should file a similar revenue requirement analysis (as above) based on updated actuals to that point in time (and including forecasts for the bridge year (the last year of the deferred rebasing) and the rebasing test year on a best-efforts basis. • A comparison and discussion of the MAADs application forecasts versus those filed in the post-consolidation rebasing application should be provided.
Deferred Rebasing Period
• Maintain option to select a definitive timeframe for the deferred rebasing period of up to 10-years (maximum).
• Applicants should identify the rate year in which rebased rates would be effective in the consolidated utility's rebasing application.

• Update language in current MAADs Handbook in the section "Early Termination or Extension of Selected Deferred Rebasing Period"
  ○ During the deferred rebasing period, specifically after year four, a consolidated entity may apply to the OEB for rebasing for the consolidated entity.
  ○ A consolidated entity that seeks to rebase earlier than its elected deferral period should inform the OEB of its intent and provide sufficient reason for the request.
  ○ A consolidated entity having selected a deferred rebasing period less than 10 years, may seek to extend its selected deferred rebasing period. However, the OEB notes that despite the ability for consolidated entities to extend the deferred rebasing period, a consolidated entity having selected a deferred rebasing period less

than 10 years, that seeks to extend its selected deferred rebasing period (up to a maximum of ten years) must file supporting, compelling rationale why this is required. The OEB will consider the reasons and information provided, including other relevant factors such as the distributor's financial and service quality performance.

• Treatment of deferral periods in the event of successive consolidations by the same entity should be reviewed and addressed on a case-specific basis.
  ○ Confirm the remaining deferral period for the previously consolidated entity.
  ○ Identify the elected number of years for the deferred rebasing period (maximum 10 years) for the utility being consolidated into the previously consolidated entity and identify what rate year that rebased rates would be effective for (in other words, for the most recent utility being acquired or merged into the previously consolidated entity).
  ○ Identify the proposed timing for rebasing of the new consolidated entity.
  ○ If the applicants seek to extend the elected deferred rebasing period of the previously consolidated entity (if the originally elected period was less than ten years), the onus will be on the applicant(s) to justify the need for, and benefits of, any requested extension to the current deferral period.

Future Rate Structures
• Plans for future rate structures (e.g., anticipated new rate classes, explanation of cost allocation beyond the deferred rebasing period) can be discussed if supportive of "no harm" claim. However, there should **not** be a requirement to do so.
• While details of any rate harmonization plan are not required in a consolidation application, a statement indicating whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so, should be included. Where the utility does intend to harmonize rates, a brief description of the plan should also be provided.
Performance Metrics & Reporting
• Consolidated entities which elect to defer rebasing for more than five years (i.e., 6-10 years), should file a mid-term report detailing progress to-date on the steps taken towards integration. OEB staff's proposed minimum requirements for this mid-term report are set out in its Performance Metrics & Reporting discussion. • In the first rebasing application for a consolidated utility, updates to this information should be provided including for any period not covered by the initial mid-term report.

• Any reporting requirements on any conditions of approval and/or the maintenance of records during the deferred rebasing period should be up to the discretion of and should be considered by the OEB panel assigned to each consolidation application. • OEB staff's view is that the OEB should determine an appropriate level and frequency of reporting on these matters during deferred rebasing periods.
• Reliability Metrics: Applicants that have voluntarily filed feeder level information historically leading up to the consolidation application, are expected to provide a listing of feeder reliability by rate zone (i.e. for the predecessor utilities) for the most recently completed historical years available, up to five years. • For utilities that have not historically reported feeder level information voluntarily, OEB staff recommends encouraging these utilities to include such data in the consolidation application for the most recently completed historical years leading up to the consolidation application, up to five years, if feeder-level reliability information is available. • Following approval of a consolidation application, if feeder-level reliability information is available, and if at least one of the pre-consolidation utilities has been reporting feeder level reliability information historically for at least one of the legacy rate zones, the OEB should require the consolidated utility to continue reporting this data for any available rate zone, and identify the rate zone for each feeder during the deferred rebasing period. • The OEB can consider how to address circumstances in which applicants cannot provide feeder-level reliability information for any rate zone on a case-by-case basis.
• Service Quality Metrics: The current practice of reporting service quality metrics on a consolidated basis post-consolidation should continue.
Cost Recovery Treatment for Transaction, Transition, Integration Costs
• Approach to deal with exceptions for the recovery of transaction and transition costs should be dealt with on a case-by-case basis (maintain status quo).   ○ Add wording to MAADs Handbook noting that if an applicant considers that it has unique circumstances which may warrant recovery of transaction and/or transition costs, evidence should be brought forth in the consolidation application for the OEB's consideration.
• Use of consistent wording throughout MAADs Handbook and filing requirements for consolidation applications – "transition" costs instead of "integration" costs.

• Add language in the updated MAADs Handbook to state that at the post-consolidation rebasing, all capital assets classified as part of the utility's "transition" costs (i.e., capitalized costs intended to integrate operations) which were invested in and put in-service since the consolidation will be subject to review, on a case-by-case basis. The nature of the expenditure and whether it would have occurred regardless of the consolidation will be reviewed, in addition to the typical review for need and prudence. The OEB will determine whether they should be included in the opening test year rate base, if applicable.
Incremental Capital Funding Availability to Consolidated Utilities
• In consolidation applications, document any expected future Incremental Capital Module (ICM) requests during the deferred rebasing period, and provide any details, as available.
• Update MAADs Handbook to reflect OEB correspondence issued since January 2016 regarding ICM funding availability during the deferred rebasing period for consolidated utilities.
• Add wording to MAADs Handbook stating that if, during its deferred rebasing period, a consolidated utility finds that it has significant capital needs not easily accommodated by an ICM, it should consider rebasing.
• Seek input on whether the OEB should implement any changes to the inflation rate(s) used in calculating the materiality threshold for incremental capital funding prior to the OEB considering the ICM policy in its entirety as part of a separate consultation, given that inflation is only one component of the calculation. • If a change is proposed, what inflation rate(s) should be used.
Accounting Matters
<u>Timing of Disposition (Group 2 Deferral and Variance Accounts (DVAs))</u> • If deferred rebasing period > 5 years, applicant(s) should provide a plan to bring in Group 2 DVAs for potential disposition. • Balances should be requested for disposition if material at that time. • If the deferred rebasing period < 5 years, applicant(s) would still have the flexibility of requesting Group 2 DVAs for disposition, if warranted and supported.
<u>Accounting Policy Changes</u> • Require applicant(s) to establish an account to capture impact of accounting policy changes post-consolidation. Require explanation if the account is not needed. • Establish accounting order in the MAADs proceeding, with the effective date being the close of the transaction date. • The account should track the revenue requirement impact of accounting policy changes and should not be limited to recording the rate base impact.

- Upon completion of the utilities' assessment of accounting policy changes, utilities may propose to close the account, if the impact is not material.
- Materiality should be based on the materiality for the predecessor utility whose accounting policies are changed and be disposed to the customers of the predecessor utility that underwent accounting policy changes.

Tracking of DVAs (Group 1 and Group 2)

- Group 1: encourage utilities to consolidate accounts as soon as practicable, but this is dependent on items such as data from various systems (e.g., billing system).
- Group 2: utilities should provide a proposal in the MAADs application on whether the accounts are proposed to continue on a legacy rate zone basis or a consolidated basis, with supporting rationale.

Earnings Sharing Mechanism (ESM)

Mechanics of ESM

- ESM should be established for a deferred rebasing period longer than five years.
- ESM should be determined on a calendar-year basis.
- Deemed consolidated ROE calculated based on the approved ROE percentages for each utility from their last rebasing application, weighted by the deemed equity component of rate base of each utility in their last rebasing application.
- Establish accounting order in the MAADs proceeding, with effective date when the MAADs transaction closes.
- Clarify ESM to include all transactions and transition costs as well as savings.

Performance Standards

- Following the issuance of an updated MAADs Handbook, the OEB should undertake a review of the section 86 performance standards for timelines of MAADs proceedings.
- OEB staff invites comments on what criteria may allow an application to be processed under shorter versus a longer timeframe.

Other

Z-Factor – Materiality Threshold Calculation

- Add section in the MAADs Handbook related to Z-Factor materiality thresholds for consolidated utilities:
  - Adjusting a distributor's revenue requirement to set the materiality threshold may be appropriate when predecessor utilities, or a consolidated utility's rate zones, have not rebased for more than five years. When it is apparent from the dates of the last OEB-approved revenue requirement that there has likely been a significant change, the OEB finds it reasonable to adjust the materiality threshold to recognize the likelihood of such change. Specifically, the cumulative impact of IRM rate adjustments and growth in demand (customers,

kWh and kW), should be reflected in the applicant's calculation of its materiality threshold. If an applicant does not believe such adjustments are warranted, it should provide justification.
Recovery of Incremental Operations, Maintenance & Administration (OM&A) • For incremental OM&A expenses not related to a qualifying ICM request – no need for new means of recovery, as existing tools (Z-factors, DVAs) are well-established. • For incremental funding for OM&A that is directly tied to a qualifying ICM request, stakeholders may raise this issue at the time the OEB undertakes its consultative process to review its ICM policy.   ○ OEB staff is not proposing any change in this regard for consolidating utilities in the updated MAADs Handbook.
Timing of New MAADs Filing Requirements • Applicants should strive to reflect any updated filing requirements, to the extent possible, in their applications. For any updates not adopted, applicants should include an explanation as to why. • New reporting requirements arising out of the Auditor General Audit Report should be applicable and required in all cases going forward.
Pro forma Financials • Add to current requirement to provide assumptions/explanations, methodology used to forecast amounts in pro-forma financial statements.
OEB Act Objectives • Update OEB Act references to reflect most up-to-date language. • In applying the "no harm" test, the OEB's primary focus on impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector remains appropriate.
Licence Application • Clarify that the licence application requests are to be included as part of the consolidation application; licensing matters will only be completed if the proposed consolidation is approved and when the utility informs the OEB that an approved consolidation is completed (i.e., per existing procedure for associated licensing changes).

OEB Policy Documents on Rate-Making Associated with Distributor Consolidation

OEB approval is required for electricity-related consolidation transactions described under section 86 of the *Ontario Energy Board Act, 1998*.[6]

The OEB's current policies on rate-making matters associated with consolidation in the electricity distribution sector are set out in two reports. The first report titled *Rate-making Associated with Distributor Consolidation*[7] issued on July 23, 2007 (2007 Report) was supplemented by a 2015 Report with the same name.[8] The OEB subsequently issued its MAADs Handbook which provides guidance to applicants and stakeholders on applications to the OEB for approval of electricity distributor and transmitter consolidations.[9] The MAADs Handbook consolidates information that is provided in the two reports noted above and identifies the key rate-making considerations expected to arise in consolidation transactions.[10] Subsequently, the OEB issued letters updating capital funding option availability for consolidating utilities. Recent OEB decisions on specific consolidations and rate applications during deferred rebasing periods also provided guidance on MAADs-related matters.

The updated MAADs Handbook resulting from this consultation will replace the OEB's current policies on rate-making matters associated with consolidation in the electricity distribution sector as set out currently in two reports of the OEB, as well as the current MAADs Handbook.[11]

What We Heard and OEB Staff Proposals

OEB staff has summarized the major overarching themes heard from stakeholders below.

[6] *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B
[7] EB-2007-0028, *Report of the Board on Rate-Making Associated with Distributor Consolidation,* July 23, 2007
[8] EB-2014-0138, *Report of the Board on Rate-Making Associated with Distributor Consolidation*, March 26, 2015
[9] MAADs Handbook, January 19, 2016
[10] The MAADs Handbook notes that applicants are encouraged to review both reports (i.e., the 2007 Report and the 2015 Report) in preparing their applications for both the consolidation transaction and subsequent rate application.
[11] As part of any final version of the MAADs Handbook and/or filing requirements for consolidation applications resulting from this consultation, OEB staff notes that there may be language that has been superseded by other OEB-issued correspondence which requires updating. These more administrative updates may not be covered as part of this Discussion Paper.

Some utilities expressed a view that further consolidation is needed and beneficial, while other utilities are less certain. Some are concerned about the prospects for acquisitions of smaller and non-contiguous utilities, and the risk of inheriting a utility that may need significant capital and operating cost infusion to be able to cope with increasing technological requirements and challenges.

Discussions with stakeholders revealed that most believe that the OEB's existing consolidation policies, and the regulatory process to seek approval for a consolidation, do not create disincentives to pursue a consolidation. Some intervenors commented that the OEB's current policies have created a favorable environment for utilities to pursue mergers (for example, the option to defer rebasing for up to ten years, and the availability of incremental capital funding through the ICM mechanism). A common theme among stakeholders was that barriers or obstacles to consolidation relate to external factors, and not to the OEB's consolidation policies or application process.

Most believe the "no harm" test should continue, but perhaps be clarified. Many utilities commented that qualitative (and not just quantitative) benefits of a proposed consolidation are important and should be considered by the OEB in assessing whether to approve a proposed transaction.

Many utilities expressed support for a deferred rebasing period of up to ten years, but several also recognized that the sector is currently at a crossroads (e.g., electrification, energy transition). There will be impacts on costs and underlying cost structures, but at this time, those impacts are unknown. As such, a few utilities suggested the need for more flexibility to rebase sooner. Intervenors commented that the option to elect a deferral as long as ten years should be reassessed given increased cost pressures going forward.

Several utilities commented that prospective changes to rates that could result from but which are not integral to the consolidation agreement should be outside the scope of a MAADs application. It was noted that rates are impacted not just by the underlying cost structures of utilities, but can change over time as a result of shifting load patterns, load shapes, etc. As such, rates are a matter that generally should be best addressed when the consolidated entity rebases.

Overall, OEB staff observed a common theme of desiring flexibility in the consolidation policy on accounting matters to recognize different circumstances of various utility consolidations.

In preparation for the launch of this consultation, OEB staff undertook an introspective review informed mainly by experiences from previous MAADs proceedings and by rate applications involving consolidated utilities. OEB staff also reviewed the current language included in the MAADs Handbook and filing requirements for consolidation applications. This review formed the basis for the issues to be considered in discussions with external stakeholders in one-on-one meetings. Material used during the meetings with stakeholders can be found on the OEB's Engage with Us page for this consultation.

While the presentation materials formed the basis for the scoping of issues with stakeholders at each meeting, discussions with stakeholders were not limited to only those topics and questions. During the one-on-one meetings, stakeholders were invited to discuss any issues or key areas of concern to them related to the MAADs policy. Generally, the common and/or main comments heard in the stakeholder meetings related to the topics identified by OEB staff in the meeting material (but not necessarily the exact questions posed). Further, while OEB staff and stakeholders discussed the large majority of topics, not all topics were covered in all meetings.

"No Harm" Test

Most stakeholders supported maintaining the "no harm" test.[12] However, based on comments heard, clarification of what satisfying the "no harm" test means would be beneficial.

One intervenor pointed to the OEB's decision in a recent consolidation application and commented that it should become the OEB's policy for consolidation transactions. In that decision, the OEB required that the acquiring utility's shareholder absorb any costs above a status quo "goalpost".[13]

Many utilities commented that more qualitative aspects of proposed consolidations need to be considered by the OEB in supporting the "no harm" test. For example, a utility noted that historically an assessment of "no harm" has focused on a review of underlying cost structures but explained that underlying costs may increase but result in improved outcomes (e.g., better service quality and reliability over time). Another utility

[12] The "no harm" test was established by the OEB in 2005 - OEB File No. RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257, Combined Proceeding Decision, August 31, 2005

[13] EB-2018-0270, Hydro One Networks Inc. and Orillia Power Distribution Corporation: The Applicants committed to ensuring that the total costs collected from acquired Orillia Power customers will remain between the "goalposts" of the projected year 11 residual cost-to serve and Orillia Power's year 11 status quo revenue requirement. The projected Orillia Power year 11 revenue requirement (without consolidation) represents the "upper goalpost"; Hydro One's residual cost to serve Orillia Power customers (with consolidation) represents the "lower goalpost". The difference between the two goalposts is equivalent to the cost savings of each proposed transaction. The OEB found that if the fully allocated revenue requirement for the new year 11 Orillia Power rate classes is higher than the year 11 status quo forecast of Hydro One, these excess costs shall be borne by the shareholder and not by the ratepayers.

commented that the manner in which the newly consolidated entity can provide better services, for example, with expanded expertise and resources that the predecessor utilities may not have had access to, should be considered. In other words, improved distributor capability should be a consideration in addition to cost impacts.

One intervenor commented that the MAADs Handbook should be updated to reflect the OEB's updated statutory objectives as set out in section 1 of the OEB Act.

OEB Staff Discussion

OEB staff supports the continuation of the "no harm" test in assessing proposed consolidations and sees no reason at this time for the OEB to move away from its stated position with regard to the no harm test that, "in the context of share acquisition and amalgamation applications, it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act."[14]

The "no harm" test considers whether a proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives, as set out in section 1 of the OEB Act. **OEB staff agrees that the updated version of the MAADs Handbook resulting from this consultative process should reflect the OEB's updated objectives**. More details are provided in the OEB Act Language section of this Discussion Paper.

OEB staff acknowledges that "to demonstrate 'no harm', the requirement of applicants to show that there is a reasonable expectation based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been"[15], has largely looked at the effect of the proposed transaction on underlying cost structures and, in some instances, rates. OEB staff notes that consideration of a proposed consolidation's cost structures is important as these ultimately translate into rates that will be borne by ratepayers. However, OEB staff does not view the OEB's current assessment of "no harm" to exclude consideration of the non-financial impacts that the applicants in an amalgamation, or acquirer in an acquisition, foresee. Examples could include improvements to service quality, reliability, resiliency, technological advancements or enhanced utility capabilities. OEB staff notes that intended non-cost benefits and possibly associated investments are frequently documented by the applicant utilities and are explored in MAADs applications.

[14] OEB File No. RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257, Combined Proceeding Decision, August 31, 2005, p. 6
[15] MAADs Handbook, p. 7

OEB staff points to two specific references in the current MAADs Handbook in support of its view that the OEB's current assessment of "no harm" does not exclude the consideration of non-financial impacts of a proposed consolidation or acquisition.

> The OEB considers whether the "no harm" test is met based on an assessment of the **cumulative** effect of the transaction on the attainment of the OEB's statutory objectives.[16] **[Emphasis added]**

And,

> The impact that the proposed transaction will have on economic efficiency and cost effectiveness (in the distribution or transmission of electricity) will be assessed based on the applicant's identification of the various aspects of utility operations where it expects sustained operational efficiencies, both quantitative and **qualitative**.[17] [**Emphasis added]**

OEB staff understands the excerpts above to mean that the OEB will assess not only the expected quantitative benefits of a proposed transaction, but also the expected qualitative benefits, to determine whether, overall, there will be "no harm" to customers. **OEB staff proposes the MAADs Handbook be updated to include language which clarifies that both quantitative (e.g., cost), and qualitative information (e.g., reliability and resilience) included in the application will be weighed in consideration of the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the attainment of the OEB's objectives.** Further that the definition of the "no harm test" is not a colloquial understanding of "no harm" but is based on the tests laid out in the MAADs policy.

OEB staff does not agree that the MAADs policy should adopt the OEB's decision which required that the acquiring utility's shareholder absorb any costs above a status quo "goalpost". By their very nature, there will be unique circumstances to each proposed consolidation before the OEB. If an applicant wishes to put forth its own proposals or mechanisms in its application to support its evidence of "no harm", it may and should do so. Similarly, OEB staff and intervenors may propose specific considerations for the OEB as part of consolidation applications, as warranted. In determining whether to approve a consolidation transaction, OEB panels of Commissioners can avail themselves of different mechanisms and requirements of applicants depending on the specifics of the case. This holds true both at the time of considering whether to approve or deny a consolidation transaction, and when the consolidated entity rebases.

[16] Ibid, p. 4
[17] Ibid, p.8

Consolidation applications, by their very nature, are based on best available forecasts at the time. At the time of the consolidated entity's rebasing application, the OEB assesses the rate-setting aspects of the consolidation to determine whether they are satisfactory. OEB staff is of the view that there should be flexibility in the MAADs policy to account for different circumstances and different utility consolidations.

Cost Structures

The OEB uses the term "cost structures" in the MAADs Handbook. One of the filing requirements for consolidation applications notes that an applicant is to provide a "year over year comparative cost structure analysis."[18]

OEB staff notes that the term "cost structure" is not defined in the MAADs Handbook or filing requirements for consolidation applications, and there may be differing views respecting the interpretation of cost structure. OEB staff sought input on what interviewed utilities and intervenors understood by it, and whether it could be better explained.

Most utilities and intervenors recognized revenue requirement as a suitable statistic for comparisons between the proposed consolidation and the "status quo" stand-alone scenario when detailing cost structure analyses. One party raised the question of whether a MAADs application is an initial test of "no harm" to customers, followed by a review at rebasing to determine if that is the case (i.e., should the status quo versus consolidated analysis be assessed at the time of the MAADs application, and at the time of the post-consolidation rebasing). Many utilities raised concerns about the difficulty of preparing forecasts for the deferred rebasing period, particularly if it extends to ten years, given the changing environment in which utilities operate. Many commented that the unknown effects of the energy transition on cost structures and on the operation of utilities will make status quo forecasting more difficult.

OEB Staff Discussion

As noted in the MAADs Handbook:

> A simple comparison of current rates between consolidating distributors does not reveal the potential for lower cost service delivery. These entities may have dissimilar service territories, each with a different customer mix resulting in differing rate class structure characteristics. For these reasons, the OEB will assess the underlying cost structures of the consolidating utilities.[19]

[18] Filing Requirements for Consolidation Applications, January 19, 2016, p. 5
[19] MAADs Handbook, p. 6

The issue which arises is that a simple comparison of rates before and after consolidation may not be an accurate comparison between predecessor utilities involved in a proposed consolidation. Current rates for different utilities may reflect differences in business environments, different customer mixes, choices for cost allocators and for rate design (not only recently, but also reflecting past cost allocation and rate design choices), as well as (for example) host or embedded distributor relationships, and deemed high-voltage distribution assets. OEB staff notes that this applies not only for comparisons of different utilities' rate applications, but, in the context of a consolidation application, how to compare the predecessor utilities versus what might occur (at the next rebasing or later) if a proposed consolidation is approved.

As such, OEB staff concurs that revenue requirement is a suitable statistic for doing "cost structure" comparisons between the proposed consolidating utilities and the "status quo" stand-alone scenario. However, utilities should be encouraged to augment this information with other cost-related analyses that they may have done in support of the proposed consolidation.

OEB staff proposes that as part of a consolidation application, applicants be required to provide a revenue requirement analysis showing the expected revenue requirement both under consolidation, and under the status quo scenarios for the duration of the elected deferred rebasing period, and the post-consolidation rebasing year. While OEB staff believes the current wording in the MAADs Handbook referencing cost structures should remain, the filing requirement which states that applicants are to "Provide a year over year comparative cost structure analysis for the proposed transaction, comparing the costs of the utilities post transaction and in the absence of the transaction"[20] should change to "Provide a year over year comparative revenue requirement analysis for the proposed transaction, comparing the costs of the utilities post-transaction and in the absence of the transaction for the duration of the deferred rebasing period, up to and including the post-rebasing year". For the post-consolidation rebasing year, the utility should include the forecast net savings that would flow to ratepayers at that time. The expected revenue requirement for the post-consolidation rebasing year is needed as the consolidated utility will be coming off the Incentive Rate-setting Mechanism (IRM) adjustment period and the OEB will need to see what the expected costs for the consolidation and the expected savings at rebasing are.

[20] Filing Requirements for Consolidation Applications, p. 6

OEB staff has provided, below, an example of a revenue requirement analysis for a merger between two utilities which elect a ten-year deferred rebasing period.[21] Depending on the type of consolidation, the tables may need to be adapted by applicants as required.

Assumptions

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
Customer Growth (%) - Utility 1											
Customer Growth (%) - Utility 2											
Inflation (%)											
Stretch Factor on a Standalone Basis (%) – Utility 1											
Stretch Factor on a Standalone Basis (%) – Utility 2											
Stretch Factor on a Consolidated Basis (%) – Rate Zone 1											
Stretch Factor on a Consolidated Basis (%) – Rate Zone 2											

[21] Many components of the example provided were sourced from the interrogatory response to SEC-9 in the application by Kitchener-Wilmot Hydro Inc. and Waterloo North Hydro Inc. for leave to amalgamate (EB-2022-0006).

Revenue Requirement – Standalone

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
	Budget	**IRM**	**IRM**	**COS**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**	**IRM**	**IRM**
Utility 1											
	Budget	**IRM**	**IRM**	**IRM**	**COS**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**	**IRM**
Utility 2											
Standalone Total – Utility 1 + Utility 2											

Revenue Requirement – Merged

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
	Budget	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**
Rate Zone 1											
	Budget	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**
Rate Zone 2											
Merged Total											

Note: Year 11 = rebasing year under the merged scenario.

OEB staff notes that some past applications have provided this type of analysis, while others have not. Further, in instances where this information has been provided, the details, and level of those details, has not been consistent. Intervenors commented that applicants should document the assumptions used to determine their forecasts. **OEB staff agrees. Applicants should document their reasonable assumptions about inflation and productivity adjustments, and what would be normal expected cost of service revenue requirement adjustments at normally scheduled rebasing years during the deferred rebasing period.[22] Utilities should also document any assumptions made related to the impact of an evolving energy sector. Further, if the utilities have reasonable expectations of any ICMs or other cost recovery mechanisms, both in terms of timing and in quanta (i.e., revenue requirement), they should reflect that in both the consolidated and stand-alone scenarios, or otherwise provide adequate explanation.**

[22] In general, utilities would base their forecasts of these hypothetical rebasings based on past experience, but also informed by information on current inflation, interest rate and market returns, and cost trends of the utility that the utility uses to generate its forecasts.

Clarity in what should be provided, and consistency in how it is presented, should reduce any potential barriers for applicants, potentially minimize interrogatories, and assist OEB staff, intervenors, and the OEB in assessing a proposed transaction.

As noted above, some utilities raised concerns about preparing forecasts for the deferred rebasing period, particularly given the changing environment (e.g., energy transition). OEB staff understands this and recognizes that these are forecasts of what might be expected, and that the confidence interval may expand exponentially the further out information is forecast. However, an OEB panel of Commissioners deciding whether to approve or deny the proposed MAADs transaction requires reasonable forecasts on which to base its decision. As noted above, utilities should document any assumptions made related the impact of an evolving energy sector. OEB staff considers that this important financial information is needed at the time of the MAADs application to demonstrate one key aspect of satisfaction of the "no harm" test, as noted above.

The current MAADs Handbook states,

> To demonstrate "no harm", applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been.[23]

As stated previously, OEB staff is of the view that the energy sector will be evolving. This will pose challenges for all utilities and may require increased capabilities. An increase in capabilities may impact a utility's cost structure. **OEB staff proposes the following paragraph be added to the updated MAADs Handbook**:

> The OEB will take into consideration evidence which highlights expected impacts to cost structures from an evolving energy sector relative to the status quo, with detailed supporting rationale. Further, the OEB reminds applicants that the OEB will weigh both the quantitative and qualitative impacts of a proposed transaction and consider the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the attainment of the OEB's objectives.

With respect to the question of whether the status quo stand-alone versus consolidated analysis is to be used at the time of the MAADs application or at the time of the post-consolidation rebasing of the consolidated entity, OEB staff's opinion is that it should be a requirement in both applications.

[23] MAADs Handbook, p. 7

In the MAADs application, this analysis is useful evidence that is informative to the OEB panel and other parties regarding the satisfaction of the “no harm” test based on current information, and has been used as such in recent MAADs applications.

OEB staff proposes that at the time of the post-consolidation rebasing application, the consolidated entity should file a similar revenue requirement analysis as detailed above (i.e., under both the status quo stand-alone scenario and consolidated scenario), but based on actual information, as available, to that point in time on a best-efforts basis. This would, of necessity, include forecasts for the bridge year (the last year of the deferred rebasing) and the rebasing test year.

At the time of the consolidated entity’s rebasing application, OEB staff would expect a simple comparison of the analyses filed in the rebasing application to those filed in the MAADs application. Documentation on differences in actual inflation and stretch factors, growth, unanticipated needed investments, and other matters as required, from what was forecast at the time of the MAADs, or details of additional actual costs (e.g., ICMs or Z-factors) may suffice.

This type of variance analysis may help to understand differences from the forecasts provided at the time of the MAADs, and which were considered by the OEB panel deciding the MAADs case. Further, it will assist in providing a comparison of the consolidated utilities’ expected revenue requirement at the time of the MAADs application, and that proposed for the rebasing year. The variance analysis may also help to answer questions such as, have there been cost efficiencies, and how big are they relative to the revenue requirement? Have there been realized savings (that are now to be shared with ratepayers) – in other words, has the consolidation been a success compared to what would have prevailed in the status quo? Have there been changes within the energy sector that have affected cost forecasts?

The OEB panel deciding on a subsequent rate application can take that evidence into consideration in its decision of what revenue requirement and rates to approve at rebasing.

However, for reasons explained above, OEB staff believes that all parties should be reasonable in such testing of these data. As noted previously, consolidation applications, by their very nature, are based on best available forecasts at the time, and the confidence interval expands exponentially the further out information is forecast. It is understood that the environment in which utilities operate may have evolved from the time of the MAADs application to the rebasing application. The intent of providing forecasts with associated assumptions as part of the consolidation application, and then

updating those forecasts at rebasing, will assist the utility, the OEB and other stakeholders in understanding what may have changed during the deferred rebasing period. This, in turn, will aid in parties' and the OEB's assessment of the reasonableness of the consolidated entities' revenue requirement at the time of the rebasing application.

Deferred Rebasing Period

To encourage consolidations, the OEB has introduced policies that provide consolidating distributors with an opportunity to offset transaction costs with any achieved savings. With the 2015 Report, the OEB permitted consolidating distributors to defer rebasing for up to ten years from the closing of the transaction. The OEB requires consolidating distributors to identify in their consolidation application the specific number of years for which they choose to defer rebasing (up to a maximum of ten years). No supporting evidence is required to justify the selection.

Key takeaways from the meetings held with utilities and intervenors are as follows:

- Most utilities view the option to elect up to ten years to defer rebasing as an incentive to consolidate.
- While most utilities appreciate the choice to be able to elect a deferred rebasing period of up to ten years, there was some sentiment that electing a deferral period of ten years may not be practical going forward as electrification, energy transition, distributed energy resources, and other technological challenges yet to emerge, evolve, and may pose investment challenges to a utility deferring rebasing for a lengthy period.
- A couple of utilities noted that greater flexibility in the ability to change their initially chosen deferred rebasing period (generally to a shorter deferral and earlier rebasing) would be beneficial.
- Intervenors viewed ten years as too long to defer rebasing when considering increasing cost pressures going forward, and the loosening of access to incremental capital through the OEB's ICM policy, both of which put upward pressure on rates.
- Regarding the potential circumstance where a consolidation occurs during a rebasing deferral period from a prior consolidation, one utility noted the length of the subsequent deferral should be decided on a case-by-case basis, while another utility commented that, if "no harm" can be demonstrated, a subsequent ten-year deferral should be permitted by the OEB.

OEB Staff Discussion

OEB staff proposes that the OEB's current policy, which permits consolidating distributors to elect to defer rebasing for up to ten years from the closing of the transaction, and that no supporting evidence is required to justify the selection, should be maintained.

To-date, the OEB has yet to adjudicate on a rebasing application following consolidation in which a ten-year deferred rebasing period had been elected. In OEB staff's view, it is premature at this time to limit rebasing to less than ten years until greater experience is gained by utilities, other stakeholders and the OEB.

The OEB's current policy aims to strike an appropriate balance between the incentives provided to utilities and the protection provided to customers. OEB staff is of the view that the current policy provides distributors with the flexibility to manage their own, unique circumstances.

To provide additional certainty to the consolidated utility, the OEB and other stakeholders, **OEB staff also recommends that the applicants specifically identify the rate year that rebased rates would be effective in the consolidated utility's rebasing application**.[24]

In response to matters raised regarding emerging issues such as electrification, distributed energy resources, and other matters related to an evolving energy sector which may materialize at a faster pace, implying that a ten-year deferral period may increasingly become non-viable, OEB staff reiterates that the current MAADs Handbook allows utilities to seek early termination (or extension) of its selected deferred rebasing period.

The MAADs Handbook, under the section entitled "Early Termination or Extension of Selected Deferred Rebasing Period", states that:

> The OEB considers that consolidations can provide for greater efficiencies and benefits to customers and is committed to reducing regulatory barriers to consolidations. The OEB has allowed for a deferred rebasing period to eliminate one of the identified barriers to consolidations. The OEB remains of the view that having consolidating entities operate as one entity as soon as possible after the transaction is in the best interest of consumers. That being said, when a consolidating entity has opted for a deferred rebasing period, it has committed to

[24] For example, for a consolidation that is completed sometime in 2024, with a five-year deferral period, the applicants should indicate whether rebased rates would be effective for 2028 or 2029.

> a plan based on the circumstances of the consolidation. For this reason, if the consolidated entity seeks to amend the deferred rebasing period, the OEB will need to understand whether any change to the proposed rebasing timeframe is in the best interest of customers.
>
> Distributors who subsequently request a shorter deferred rebasing period than the one that has been selected (and where at least one of the pre-consolidation rate-setting plans has expired) will be required to file rationale to support the need to amend the previously selected deferred rebasing period. Similarly, a consolidated entity having selected a deferred rebasing period less than 10 years, that seeks to extend its selected deferred rebasing period must explain why this is required.[25]

OEB staff is of the view that utilities may view the language in the current MAADs Handbook to be rigid in the context of the election of the deferred rebasing period. **OEB staff proposes that the excerpt above in the MAADs Handbook change to the following:**

> The OEB considers that consolidations can provide for greater efficiencies and benefits to customers and is committed to reducing regulatory barriers to consolidations. The OEB remains of the view that having consolidating entities operate as one entity as soon as possible after the transaction is in the best interest of consumers.
>
> During the deferred rebasing period, specifically after year four, a consolidated entity may apply to the OEB for rebasing for the consolidated entity.[26] The consolidated entity application will allow the OEB to establish rates that reflect the efficiencies from the consolidation transaction.
>
> A consolidated entity that seeks to rebase earlier than its elected deferral period should inform the OEB of its intent and provide sufficient reason for the request.
>
> A consolidated entity having selected a deferred rebasing period less than 10 years, may seek to extend its selected deferred rebasing period. However, the OEB notes that despite the ability for consolidated entities to extend the deferred rebasing period, a consolidated entity having selected a deferred rebasing period less than 10 years, that seeks to extend its selected deferred rebasing period (up

[25] MAADs Handbook, p. 13
[26] Based on the assumption that the last rebasing year was the year prior to the first full year of consolidation, “after year four” would align with the OEB’s five-year rate plan if a utility chose to rebase in the first year it had an opportunity to do so.

> to a maximum of 10 years) must file supporting, compelling rationale why this is required. The OEB will consider the reasons and information provided, including other relevant factors such as the distributor's financial and service quality performance.

OEB staff's proposals are based on the understanding that, at the time of a MAADs application, a utility may not have foresight into potential financial and/or operational issues that may arise in running the newly consolidated entity. The operating environment of utilities can change, and most likely will, over time for numerous reasons.

Multiple Transactions

Since the issuance of the MAADs Handbook, the matter of multiple transactions (i.e., the potential circumstance where a consolidation occurs during a deferred rebasing period from a prior consolidation of one of the applicant utilities) arose in the consolidation application filed by Alectra Utilities Corporation and Guelph Hydro Electric Systems Inc.[27] The OEB's Decision stated:

> The Applicants correctly point out that "[t]he Handbook does not specifically consider the circumstances where a consolidation occurs during a rebasing deferral period from a prior consolidation". Therefore, the OEB finds that even though a ten-year deferred rate rebasing period (i.e., 2019 to 2028 inclusive) raises potential conflicts with some of the other principles underlying the OEB's consolidation policy, it was reasonable for the Applicants to rely upon the policy, and it would be inappropriate for the OEB to impose another deferral period. The OEB therefore approves the Applicants' deferred rate rebasing proposal as filed.[28]

OEB staff is of the view that it is challenging for the OEB to be prescriptive in its policy with respect to the appropriate length of the deferred rebasing period in the case of multiple transactions given differences in how long each respective consolidation may take to recover transaction and transition costs.

OEB staff agrees that the issue should be dealt with on a case-by-case basis. Each transaction may offer the potential for different kinds of benefits that vary in nature and timing. Scenarios involving multiple transactions should be considered based on their own circumstances.

[27] EB-2018-0014
[28] Ibid, Decision and Order, October 18, 2018, p. 14

OEB staff proposes that the MAADs Handbook and filing requirements include language to indicate that, in the event of consecutive consolidations by the same distributor, applicants should:

- **Confirm the remaining deferral period for the previously consolidated entity.**
- **Identify the elected number of years for the deferred rebasing period (maximum 10 years) for the utility being consolidated into the previously consolidated entity and identify for what rate year that rebased rates would be effective (in other words, for the most recent utility being acquired or merged into the previously consolidated entity).**
- **Identify the proposed timing for rebasing of the new consolidated entity.**
- **If the applicants seek to extend the elected deferred rebasing period of the previously consolidated entity (if the originally elected period was less than ten years), the onus will be on the applicant(s) to justify the need for, and benefits of, any requested extension to the current deferral period.**

While some flexibility should be afforded where a consolidated entity in a deferred rebasing period enters a further consolidation transaction before the end of the initial deferral period, OEB staff is of the view that it should be limited. Of key importance, in OEB staff's view, is removing the potential circumstance of the deferral of rebasing indefinitely.

OEB staff believes that the last bullet point above allows the OEB to rationalize successive MAADs transactions involving one utility deferring rebasing for a longer period than originally contemplated (but only if the original deferral period elected was less than ten years), and assesses the impacts of potentially retaining savings on a continuing basis for shareholders rather than sharing those savings with ratepayers. It also commits the utility to explaining why further delays in reviews of costs, operations, and rates of a consolidated utility and its predecessor utilities by the OEB is in the public interest.

Future Rate Structures

The MAADs Handbook states "Distributors are not required to file details of their rate-setting plans, including any proposals for rate harmonization, as part of the application for consolidation. These issues will be addressed at the time of rate rebasing of the consolidated entity".[29]

[29] MAADs Handbook, p. 17

Certain issues relating to future rate structures have, however, been discussed in some consolidation applications. Accordingly, OEB staff sought feedback from utilities and intervenors regarding the relevance of such details in assessing a consolidation application.

- A few utilities noted future rate structures should not be discussed in a consolidation application. An entity is in a better position to develop options in the future.
- Several utilities noted that a general overview of future rate structures may be provided, if helpful to the OEB.
- Some intervenors correlated the idea of future rate structures to the "no harm" test and noted that if what is meant by the "no harm" test is to assess if consumers are no worse off than they otherwise would be, addressing future rate structures in a consolidation application is fundamental.

OEB Staff Discussion

OEB staff proposes that the MAADs Handbook and filing requirements for consolidation applications be updated to state that, if an applicant wishes to discuss its preliminary plans for future rate structures (e.g., anticipated new rate classes, explanation of cost allocation beyond the deferred rebasing period) of the consolidated entity in support of its claim that "no harm" would result from the approval of a transaction, it may do so. However, there should <u>not</u> be a requirement to do so.

In developing its proposal, OEB staff considered the OEB's decision in Hydro One Inc.'s application for approval of its purchase all of the issued and outstanding shares of Orillia Power Distribution Corporation.[30] In that decision, the OEB reiterated that although the MAADs Handbook states that "rate setting" following a consolidation will not be considered as part of a section 86 application, that does not mean the OEB will not consider the costs that acquired customers will have to pay following an acquisition (both in the short term and the long term). The OEB went on to state that it would have been reasonable to see a forecast of costs to serve acquired customers beyond the ten-year deferral period, and an explanation of the general methodology of how costs would be allocated after the deferral period. The OEB did recognize that any forecast cost structures and cost allocation would include various assumptions and could not be expected to be 100% accurate for what would apply at the time of the future rebasing.[31]

[30] EB-2016-0276
[31] Ibid, Decision and Order, April 12, 2018, pp. 11-13

OEB staff notes consideration of costs in the future may not only be applicable in acquisition cases, but also in mergers between two utilities. In any merger scenario, it is understood that one of the merging entities may have a higher distribution revenue per customer than the other.[32] In some cases the difference is not significant, while in others it may be. OEB staff recognizes that distribution revenue-per-customer differences between utilities are often indicative of differences in distribution rates, but there can be other factors that contribute to differences in distribution revenues per customer.[33] Consideration and discussion in a consolidation application of how these matters may be addressed at the time of a rebasing application may help assist the OEB in its assessment of the application with respect to the "no harm" test.

OEB staff believes the addition of the option for an applicant to discuss its preliminary plans for future rate structures:

- supports the idea that MAADs applications should be flexible; and
- recognizes that different transaction types may require different information to support the transaction's claim of "no harm".

Further, OEB staff highlights that the OEB does not necessarily preclude this from happening now. The current Chapter 2 Filing Requirements indicate that for a distributor filing an application to rebase following a consolidation, it must detail the efficacy of any rate plan confirmed as part of a MAADs application.[34]

Rate Harmonization

OEB staff proposes that the MAADs Handbook and filing requirements for consolidation applications be updated to include language indicating that while details of any rate harmonization plan are not required in a consolidation application, a statement indicating whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so, should be included. Where the utility does intend to harmonize rates, a brief description of the plan should also be provided.

In its 2007 Report, the OEB stated:

[32] Distribution revenue per customer has sometimes been assessed in MAADs applications, as a proxy for rates or other "cost structures" for distribution services. In combining fixed and variable charges, it can provide a more aggregate proxy for meaningful comparisons between utilities or rate zones, but may not cover all drivers.
[33] For example, differences in customer mix, high voltage assets deemed as distribution assets for one utility, host/embedded and high voltage charges, etc.
[34] Filing Requirements for Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, December 15, 2022, p. 16

> Currently, the filing requirements applicable to MAADs transactions ask parties to indicate in their application whether they intend to undertake a rate harmonization process after the proposed transaction is completed and, if they do, to provide a description of the plan. The Board does not intend to eliminate that requirement, as this can be informative as to the intentions of the consolidated entity. However, the issue of rate harmonization in the context of a consolidation transaction is better examined at the time of rebasing, because this is when the consolidated entity will apply for its combined revenue requirement.[35]

OEB staff believes the language in the current MAADs Handbook should be updated to align with the 2007 Report. OEB staff supports requiring this information as it may serve as a signal to the OEB, ratepayers, and intervenors that potential issues to be decided at the time of next rebasing have been considered by parties to a transaction.

OEB staff believes it is equally important that, if the OEB adopts OEB staff's proposals under this section, the MAADs Handbook explicitly state that any plans for future rate structures or rate harmonization discussed in a MAADs application should be viewed as preliminary plans, and are not seen as being exhaustive or binding, unless otherwise decided by an OEB panel based on the specific approvals sought as part of the proposed consolidation transaction. Further, the intent of providing high-level information with respect to future rate structures and/or rate harmonization plans as part of a MAADs application is not to conflate section 78 (i.e., rates) matters, that are appropriately considered at the time of a rebasing application, with section 86 matters.

Performance Metrics & Reporting

The AG Audit Report made specific recommendations to the OEB related to consolidations.[36] The AG Audit Report states:

> To protect electricity customers from negative impacts of Local Distribution Company (LDC) consolidations, and to facilitate the maintenance of a cost-effective and economically efficient electricity distribution sector, we recommend that the Ontario Energy Board:
>
> - implement effective and timely monitoring of post-consolidation activities during deferred rebasing periods to obtain periodic status updates from LDCs on steps taken toward integration and to verify that consolidated entities are adhering to approval conditions for consolidations and maintaining necessary records; and

[35] 2007 Report, p. 7
[36] Office of the Auditor General - Value for Money Audit: *Ontario Energy Board: Electricity Oversight and Consumer Protection*, November 2022, pp. 41-44

- require acquired and merged entities to continue to report on key performance measures (for example, reliability metrics) separate from the consolidated entities during deferred rebasing periods to create greater transparency.[37]

OEB staff discussed the AG Audit Report recommendations with meeting participants.

- Most utilities questioned the intended use of the information by the OEB during deferred rebasing periods. Many also questioned whether there will be potential consequences if forecast savings are not met or exceeded.
- At least four utilities interviewed commented that the idea of requiring more reporting, and reporting separately may not only be a disincentive to pursue mergers, but also may have the unintended impact of undoing or minimizing efficiencies of consolidation.
- Several utilities said the OEB should leverage data resulting from the OEB's Reliability and Power Quality Review (RPQR) consultation for reliability metrics.[38]
- Several intervenors noted that reporting on service quality and reliability by predecessor utility throughout the term of the plan is important. Further, it would be helpful to report on the realized costs, benefits, and savings during deferral periods.
    - One intervenor specifically commented that forecast savings and costs are put forth as evidence in MAADs applications to support an applicant's position that approval of a proposed transaction would satisfy one aspect of the "no harm" test. As such tracking actual results against these forecasts should be a requirement.
    - One intervenor commented that reporting of specific initiatives implemented as promised versus those not implemented should be provided.

OEB Staff Discussion

In OEB staff's view, there are two main areas discussed in the AG Audit Report for the OEB's consideration – monitoring of post-consolidation activities and separate reporting on key performance measures.

[37] Ibid, pp. 43-44
[38] The RPQR consultation is expected to develop a comprehensive regulatory framework for reliability and power quality in the Ontario electricity sector. The initial phase of the RPQR focuses on enhancing and improving the reliability data reporting by electricity distributors. The second phase aims to enhance distributors' accountability by gathering data on loss of supply events and increase transparency by collecting customer-specific reliability information.

Monitoring of Post-Consolidation Activities

The AG Audit Report concluded that the OEB's existing framework does not include standardized monitoring of post-consolidation activities before the end of the deferred rebasing period. Further, monitoring is important to confirm that after consolidation, utilities are adhering to any conditions of approval set by the OEB and that post-consolidation integration activities are progressing as planned to generate long-term value for customers.[39]

OEB staff's view is that the monitoring of post-consolidation activities before the end of the deferred rebasing period is warranted and can be beneficial. Monitoring of post-consolidation activities may:

- Provide greater transparency to customers.
- Provide a forum for the utility to tell its consolidation "story" – for example, information on integration progress and efficiencies gained.
- Provide transparency on any obstacles faced by the utility in reaching its targets.
- Provide other interested parties which may be considering consolidation with information and guidance about potential areas and the quantum of savings that could be realized through consolidation.
- Align with other types of approvals that typically carry with them conditions such as leave to construct applications that typically require post-project reporting.

While OEB staff believes a certain level of monitoring of post-consolidation activities should be required, OEB staff is cognizant of the potential burden of imposing additional requirements on consolidated entities. An appropriate balance must be struck between the regulatory and financial requirements of utilities with increased transparency for customers and other stakeholders.

One of the filing requirements for consolidation applications states,

> Identify the impact that the proposed transaction will have on the economic efficiency and cost effectiveness (in the distribution or transmission of electricity), identifying the various aspects of utility operations where the applicant expects sustained operational efficiencies (both quantitative and qualitative).[40]

Applicants in consolidation applications have filed evidence which includes activities where efficiencies are expected to be achieved. A scan of recent MAADs applications highlights the following examples:

- Optimization and reduction of staffing levels (through retirements and attrition)
- Reduction in corporate governance costs

[39] AG Audit Report, pp. 41-42
[40] Filing Requirements for Consolidation Applications, p. 5

- Reduction in information technology costs (e.g., hardware and software maintenance fees)
- Reduction in regulatory costs and audits
- Elimination of duplicate third-party administrative services (e.g., legal, auditing, consulting services)

While the information provided is not binding (unless expressly noted otherwise by an OEB panel), the forecasts and expected areas of efficiencies are an indication of what the consolidated utilities (or acquiring utility) think could be achieved. The information provided is also, in part, what is used by the OEB to reach its decision on a consolidation application and serves as the starting point for the OEB panel considering the first rate rebasing application post-consolidation.

OEB staff proposes that, for new consolidation applications approved going forward, for an entity which elects to defer rebasing as a result of consolidation for more than five years (i.e., 6-10 years), a mid-term report should be filed detailing the progress to date on the steps it has taken towards integration. At a minimum, the progress to date on the various activities where efficiencies were expected, the savings associated with those efficiencies, a qualitative discussion on enhanced reliability and service quality as a consolidated distributor and the progress towards the recovery of transaction and transition costs should be documented and discussed. The mid-term report should also provide a discussion on the potential obstacles seen by the utility in reaching its targets going forward.[41] **In the first rebasing application for a consolidated utility, updates to this information should be provided including for any period not covered by the initial mid-term report.**

OEB staff understands that a utility requires sufficient time to achieve savings and efficiency gains, and these will not begin to be realized until the transaction is completed, and the new entity has begun to operate. The savings are also likely to change over time as the utility begins to better understand its operating needs and environment. Further, transaction and transition costs of a MAADs transaction can continue for several years following the completion of the transaction. OEB staff believes that requiring a mid-term report if the elected deferral period is greater than five years strikes a reasonable balance between the burden of additional reporting during the deferral period, and increased transparency for customers and other stakeholders.

With respect to the AG Audit Report recommendation that the OEB should be verifying that distributors are adhering to conditions of approval and maintaining necessary

[41] This mid-term report can be filed on the record of the MAADs proceeding as a post-hearing filing.

records, OEB staff generally agrees, but believes it is challenging to be prescriptive with a requirement which would apply in all cases. Conditions of approval, the verification of adherence to those conditions, and requirements to maintain certain records during a deferred rebasing period, can differ widely from application to application, based on what is proposed by the utility or stakeholders, and on what is decided by the OEB panel hearing the case. What may make sense in one case may not make sense in another. **As such, OEB staff proposes that any reporting requirements on adherence to any conditions of approval and/or the maintenance of records during the deferred rebasing period should be considered by, and established at the discretion of, the panel of OEB Commissioners assigned to decide each consolidation application. OEB staff is of the view that the OEB should determine an appropriate level, and frequency, of reporting on these matters from applicants during deferred rebasing periods, by the OEB panel considering the application.**

Separate Reporting on Key Performance Measures

The AG Audit Report concluded that:

> … reporting performance at the consolidated level may not provide customers with adequate insight into the service quality and reliability of the local distribution networks that directly support them. It would also make it difficult to assess whether the projected benefits have materialized post-consolidation.[42]

Currently, post-consolidation, most *Reporting and Record-keeping Requirements* (RRR) information is filed with the OEB on a consolidated basis.[43] The MAADs Handbook states that having consolidated entities operate as one entity as soon as possible after the transaction is in the best interest of consumers.[44] Further, the OEB has previously opined on the issue of separate reporting. In that case, the OEB stated that it "…does not require, nor encourage reporting on a "separate" utility basis. Rather the expectation of the OEB is that LDC Co shall report in accordance with the requirements of its licence."[45]

The MAADs Handbook states:

> In considering the impact of a proposed transaction on the quality and reliability of electricity service, and whether the "no harm" test has been met, the OEB will

[42] AG Audit Report, p. 43
[43] There are a few instances where filing by rate zone is either mandatory, or an option. For example, customer numbers (reporting by rate zone is mandatory), energy consumption and demand (reporting by rate zone is mandatory), and Group 1 deferral and variance account balances (reporting by rate zone is optional).
[44] MAADs Handbook, p. 13
[45] EB-2016-0025/EB-2016-0360, Decision and Order, December 8, 2016, p. 26

> be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard.
> …
> Under the OEB's regulatory framework, utilities are expected to deliver continuous improvement for both reliability and service quality performance to benefit customers. This continuous improvement is expected to continue after a consolidation and will continue to be monitored for the consolidated entity under the same established requirements.[46]

Reliability Metrics

As outlined previously, the AG Audit Report recommended that the OEB require acquired and merged entities to continue to report on key performance measures (for example, reliability metrics) separate from the consolidated entities during deferred rebasing periods to create greater transparency.

The OEB's scorecards for utilities[47] currently provide reliability metrics for the System Average Interruption Duration Index (SAIDI) and the System Average Interruption Frequency Index (SAIFI). These measures are provided for each year for each distributor. In the event of consolidation, SAIDI and SAIFI statistics are provided at the consolidated distributor level, and not by rate zone.

For purposes of this MAADs consultation and MAADs policy going forward, and to address the recommendation of the Auditor General, OEB staff sees value in being able to make comparisons between rate zones for a consolidated utility during the deferred rebasing period. However, OEB staff recognizes that this should be done in a way that does not establish a barrier to system integration between merged utilities and does not pose a significant increase in administration. This rate zone level information will help the OEB assess whether the consolidated utility's ratepayers are experiencing continuous improvement in reliability.

On January 30, 2024, as part of its ongoing RPQR consultations, the OEB implemented new reporting by electricity distributors to improve customer awareness of reliability. Specifically, the OEB established voluntary reporting by distributors on reliability data at the distribution feeder level and expects this information will be supportive in building customer awareness and understanding of reliability of their distribution service.[48] OEB

[46] MAADs Handbook, p. 7
[47] Utility scorecards track and show comprehensive performance information for each electricity utility in Ontario, over a range of time and for a specific year.
[48] EB-2021-0307, OEB Letter, Implementing Voluntary Feeder-Level Reliability Reporting, January 30, 2024

staff notes that the RPQR working group has discussed the implementation of a requirement for feeder-level reporting.[49]

OEB staff proposes that the MAADs filing requirements for consolidation applications be updated to include feeder level information if available. Specifically, applicants that have voluntarily filed feeder level information historically leading up to the consolidation application, are expected to provide a listing of feeder reliability by rate zone (i.e. for the predecessor utilities) for the most recently completed historical years available, up to five years. Alternatively, the OEB could place this information on the record of a consolidation application if it has been filed through RRRs. For utilities that have not historically reported feeder level information voluntarily, OEB staff recommends encouraging these utilities to include such data in the consolidation application for the most recently completed historical years leading up to the consolidation application, up to five years, if feeder-level reliability information is available.

Following approval of a consolidation application, OEB staff is of the view that if feeder-level reliability information is available, and if at least one of the pre-consolidation utilities has been reporting feeder level reliability information historically for at least one of the legacy rate zones, the OEB should require the consolidated utility to continue reporting this data for any available rate zone, and identify the rate zone for each feeder during the deferred rebasing period.

The OEB can consider how to address circumstances in which applicants cannot provide feeder-level reliability information for any rate zone on a case-by-case basis.

OEB staff recognizes that as time passes and utilities work to integrate systems between merged utilities (where possible), particular feeders may serve different rate zones or even multiple rates zones. This can be addressed through qualitative explanations.

Service Quality Metrics

With respect to whether service quality metrics should be reported separately (i.e., by rate zone) post-consolidation, utilities commented that service quality metrics should continue to be reported on a consolidated basis.

Generally, utilities suggested that the benefit of reporting separately versus the incremental costs of tracking these data points needs to be considered. An example

[49] See RPQR Consultation Engage with Us webpage, Working Group Meeting Material #16, Slide 18

provided was that it would not be efficient for a consolidated utility to have a centralized call center, but track customer calls by rate zone. The synergies of consolidation would be impacted by maintaining two sets of reporting mechanisms.

Most intervenors noted that reporting on service quality by predecessor utility throughout the term of the plan is important. This would assist parties at the time of the consolidated entity's rebasing application to determine if any degradation in the metrics occurred, post-consolidation.

OEB staff believes that, in most situations, the potential cost of tracking and reporting on service quality metrics by rate zone post-consolidation outweighs the potential benefits. OEB staff agrees that there would be an inherent level of inefficiency in tracking results separately given that, typically, distributors in a deferred rebasing period due to consolidation are working toward centralizing functions to potentially achieve efficiencies. These efficiencies/savings are expected to be passed on to customers at the time of the consolidated entity's rebasing application.

OEB staff notes that the OEB establishes industry targets for certain measures in the scorecard. Section 7 of the OEB's *Distribution System Code* sets the minimum conditions that a distributor must meet in carrying out its obligations to distribute electricity under its licence with respect to service quality requirements.[50] Each distributor, regardless of consolidation, is expected to meet these targets. The OEB uses scorecards to, among other uses, help monitor an individual utility's performance and determine if corrective action is needed.

As stated in the MAADs Handbook,

> The OEB has a proactive performance monitoring framework that inherently protects electricity customers from harm related to service quality and reliability and has established the mechanisms to intervene if corrective action is warranted. The OEB will be informed by the metrics that are used to evaluate a distributor's performance in assessing a proposed consolidation transaction.
>
> All of these measures are in place to ensure that distributors meet expectations regardless of their corporate structure or ownership.[51]

And,

[50] Distribution System Code, August 2, 2023.
[51] MAADs Handbook, p. 5

> Under the OEB's regulatory framework, utilities are expected to deliver continuous improvement for both reliability and service quality performance to benefit customers. This continuous improvement is expected to continue after a consolidation and will continue to be monitored for the consolidated entity under the same established requirements.[52]

Further, OEB staff also believes that it may be difficult for consolidated distributors to determine if any decrease in achieved results are because of the consolidation or because of some other factor.

For the reasons above, **OEB staff proposes that the current practice of consolidated distributors reporting service quality metrics on a consolidated basis post-consolidation continue.** Moreover, OEB staff reiterates a component of its proposal for the filing of a mid-term report under the sub-section *Monitoring of Post-Consolidation Activities*. This proposal stipulates that a qualitative discussion on enhanced service quality as a consolidated distributor overall should be included as part of the mid-term report for those distributors which elect a deferred rebasing period of more than five years. Further, any updates to this information should be provided in the first rebasing application for the consolidated utility, including for any period not covered by the initial mid-term report.

Cost Recovery Treatment for Transaction, Transition/Integration Costs

The OEB's policies regarding recovery of costs associated with MAADs applications were established beginning in the early 2000s and have been consistently maintained and applied since then.

OEB staff notes that, during the interviews, intervenors highlighted the issue of the inclusion of integration capital costs at rebasing as discussed in the current Enbridge Gas proceeding.[53] The OEB issued its decision on Enbridge Gas' application on the Phase 1 on natural gas distribution rates effective January 1, 2024.[54]

The OEB's policy is that "incremental transaction and integration costs are not generally recoverable through rates". Consolidation proposals are primarily a business decision of management of utilities involved and affected ratepayers have little, if any, input or control into the proposed transaction.

[52] Ibid, p. 7
[53] EB-2022-0200, Enbridge Gas Inc. for 2024-2028 rate plan, and specifically in the Phase 1 of the case to established rebased gas distribution rates for January 1, 2024.
[54] EB-2022-0200, Decision and Order, December 21, 2023.

OEB staff raised the issue during stakeholder meetings of whether additional direction on transaction costs is required in the MAADs Handbook. The consensus heard was that these exceptions should be dealt with on a case-by-case basis.

An intervenor also highlighted that the MAADs Handbook and filing requirements for consolidation applications should be consistent in the language used in relation to MAADs-related costs. The words “transaction costs”, “transition costs”, and “integration costs” seem to be used interchangeably, and clarity and/or consistency should be provided in the updated MAADs Handbook.

OEB Staff Discussion

While the general policy is that incremental transaction and integration costs are not generally recoverable through rates, exceptions have been approved. For example, in the application for approval for Dubreuil Lumber Inc. to sell its distribution system to Algoma Power Inc., the OEB agreed with Algoma that as this is a unique circumstance, it is appropriate to allow Algoma to recover its reasonable transaction and integration costs.[55]

OEB staff believes that the approach to deal with exceptions on a case-by-case basis, based on the circumstances and where adequately supported, should continue. If an applicant considers that it has unique circumstances which may warrant recovery of transaction and/or transition costs, evidence should be brought forth in the consolidation application for OEB consideration.

What are MAADs-related Costs?

MAADs policies and filing requirements have not defined MAADs-related costs over the years. In OEB staff’s view, MAADs related costs are defined as the following:

- Transaction costs are costs incurred that are directly attributable to the development of the proposed MAADs transaction and its execution. Specifically, transaction costs would include the following:
    - Business development and project planning costs to develop the proposed transaction;
    - Costs for negotiation of the proposed transaction, including due diligence reviews, negotiation, contract drafting, legal review, accounting advice and review, dealings and filings with securities regulators, any public information, consultations and surveys. This would include any internal costs directly attributable to the negotiation process, but also any external costs for consultants and external legal, accounting and other assistance.

[55] EB-2018-0271, Decision and Order, p. 23

- Costs for the preparation of and filing of the MAADs application, and the utility's regulatory costs for the processing of the application (at least to the extent that these costs are incremental to normal regulatory costs recovered through rates). These regulatory costs also include the OEB's own costs (i.e., Notice, translation, transcription in technical conferences or oral hearings) and any approved cost awards for eligible intervenors related to the application.
- Assuming approval of the MAADs transaction, there will also be costs incurred to close the approved transaction. These include (for example) legal and accounting costs, fees for incorporation, licensing fees, branding, and bank fees.

These transaction costs are one-time costs and are classified as operating expenses.

- Transition costs are costs that are attributable to the consolidation, and often are related to being able to operationalize efficiencies that the consolidation enables.
  - One example would be the costs of severance packages offered to some employees of one or more of the involved utilities related to labour savings. Another example may be IT system integration costs.
  - Sometimes these transition costs may be apparent at the time of the closing of the MAADs, but in many cases transition costs may occur for some limited period after consolidation as the management of the newly consolidated utility gains experience with the changed business and opportunities are identified.
  - These costs may occur for some time, but they are also expected to be time-limited and temporary. At some point, further efforts to execute operational savings should be considered "normal business" operations of the consolidated utility, and not transitional costs and efficiencies.

Beginning in the 2015 Report, and the consultation process leading to it, there were references to integration costs:[56]

> Distributors explained that the transition and integration costs of a MAADs transaction, although largely incurred upfront can continue for two to four years following the completion of the transaction. Whereas efficiency gains and savings resulting from the transaction will not start to be realized until the transaction is completed, and the new entity has begun to operate. Distributors indicated that given the nature and timing of these costs and savings, ***annual net benefits (****[reductions or savings in]* ***operational costs less transition and integration costs)*** are in many cases negative during the first two to four years. Therefore, it may take

[56] 2015 Report, p. 5

> anywhere from six to ten years to reach a break-even point, where the cumulative savings exceed the cumulative acquisition and integration costs. [Emphasis added]

There is no definition of integration costs, or how they are distinguished from transition costs. OEB staff views the two terms synonymously and proposes to revert to transition costs.

OEB staff notes that the term “integration costs” was introduced in the 2015 Report, without a clear understanding of what these were. As noted earlier, OEB staff proposes to revert to older wording of transition costs. Transaction and transition costs have been more commonly used and are probably better understood by the OEB, utilities and other stakeholders. OEB staff has provided discussion earlier on what types of costs are commonly encountered as transaction and transition costs in MAADs application. The list is not exhaustive, and OEB staff notes that the categorization is not definitive; different utilities may document similar costs as transaction or transition costs depending on their circumstances.

OEB staff notes that transaction and transition costs have generally been treated as expensed costs since 1999, and most utilities have adhered to this in recent consolidation applications. However, the topic of “integration capital” costs, or capitalization of integration costs has arisen.

Since capitalized costs are for assets that are longer lived, and many, especially major, assets invested in by utilities have longer lives – even exceeding the maximum deferred rebasing term length of ten years – this raises issues of what is recoverable during the deferred rebasing period versus what is recoverable at the next rebasing (and going forward to the end of the asset’s useful life).

OEB staff proposes that recovery of transaction and transition costs related to the consolidation should not be recoverable in most circumstances. There are exceptions where the unique circumstances of a proposed consolidation warrant approval of such cost recovery; this is discussed earlier.

Since expensed transition and transaction costs are temporary and time-limited, it is presumed that they will not be a consideration at the next rebasing (and that they were recovered through savings achieved during the deferred rebasing period).

OEB staff proposes that language be included in the updated MAADs Handbook to state that, at the post-consolidation rebasing, all capital assets classified as part of the utility's "transition" costs (i.e., capitalized costs intended to integrate operations) which were invested in and put in-service since the consolidation will be subject to review, on a case-by-case basis. The nature of the expenditure and whether it would have occurred regardless of the consolidation will be reviewed, in addition to the typical review for need and prudence. The OEB will determine whether these capitalized costs should be included in the opening test year rate base, if applicable.

Incremental Capital Funding Availability to Consolidated Utilities

Over the course of discussions with meeting participants, OEB staff heard several other comments on the topic of ICM availability during MAADs deferral periods. Some key takeaways include:

- Applicants should identify any known future ICMs as part of the consolidation application.
- Concerns with respect to certainty to access to capital, if required, during deferred rebasing.
- Criticism with how current ICM policy is being interpreted and applied, and that the ICM policy needs to be reviewed.

OEB Staff Discussion

OEB staff agrees that an additional filing requirement should be added to require applicants to note any known or reasonably anticipated future ICMs in a consolidation application. A description of the nature of the project and expected timing should also be provided. This additional information will assist in OEB staff's, intervenor's, and the OEB's assessment of the revenue requirement analysis that is being proposed to be made a requirement (see Cost Structures section of this document).

OEB staff proposes that the MAADs Handbook should be updated to reflect the stand-alone correspondence issued by the OEB regarding ICM availability since the issuance of the 2016 MAADs Handbook.[57]

[57] For example, the OEB's February 2022 letter provided additional flexibility for electricity distributors which have selected an extended deferred rebasing period (beyond five years) under the OEB's current MAADs policy, to apply for incremental capital funding for an annual capital program during the extended rebasing period (i.e., years six to ten of their deferral period) if they can demonstrate certain criteria.

OEB staff also proposes that language should be added to the MAADs Handbook to note that if, during its deferred rebasing period, a consolidated utility finds that it has significant capital needs not easily accommodated by an ICM, it should consider rebasing. As noted previously, OEB staff understands that, at the time of a MAADs application, a utility may not have foresight into potential financial and/or operational issues that may arise in running the newly consolidated entity. The operating environment of utilities can change, and most likely will, over time for numerous reasons. OEB staff's proposed additional language here relates to the discussion under the Deferred Rebasing Period section of this Discussion Paper where OEB staff is proposing additional language to signal the OEB's openness for utilities to request for an early termination of their elected deferred rebasing period.

ICM Policy

OEB staff seeks input on what inflation rate(s) should be used in the materiality threshold formulas for incremental capital funding for reasons discussed below.

The ICM was introduced as part of 3rd Generation IRM in 2008, beginning with 2009 rates.[58] The ICM was introduced to provide for needed incremental capital funding during the price cap IRM period, i.e., without triggering the need to rebase early.

In 2014 and 2015, the ICM policy was reviewed based on the experience in ICM applications and decisions to that time, and on the new *Renewed Regulatory Framework for Electricity* introduced in 2012. The 2014 and 2015 reviews resulted in two Reports of the Board, issued in September 2014 and January 2016.[59] A key change in the 2016 Report was a revision to the ICM Materiality Threshold to better reflect the longer time between rebasing, including for consolidating utilities, as the original formula assumed only one year of rate adjustments since rebasing.

The original materiality threshold and the revised materiality threshold formulae use the current IPI to proxy annual inflation adjustments for rates since rebasing. Historically, this did not create major concerns, in part due to short periods between rebasing applications. The same can be said even with longer periods between rebasing applications - while fluctuations were experienced, inflation measures were consistently around the 2% target from 2006 through to the first year of the COVID-19 pandemic.

This started to change as inflation started to rise rapidly by mid-2021 as the world started to recover after the first year of the COVID-19 pandemic. The OEB-issued IPIs

[58] EB-2007-0673*, Report of the Board on 3rd Generation IRM*, July 15, 2007 and *Supplemental Report of the Board on 3rd Generation IRM*, September 17, 2008.
[59] EB-2014-0219*, Report of the Board on New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, September 18, 2014 and *Report of the OEB On New Policy Options for the Funding of Capital Investments: Supplemental Report*, January 22, 2016

for 2022-2024 demonstrate the persistence of higher inflation than has been experienced since the 1990s:

2022. 3.3%
2023. 3.7%
2024. 4.8% (5.4% for electricity transmitters)

Since the IPI is based on (lagged) historical data, current data indicates that central bank interest rate hikes and quantitative tightening measures are bringing inflation down, but the decrease in inflation is slow and resilient, and the path to returning to the Bank of Canada's 2% target may take time.

The OEB uses the current IPI as a proxy for all years since the last rebasing, for administrative simplicity. The ICM formula was intended to be as mechanistic as possible given its inclusion in incremental rate-setting mechanism (IRM) applications. However, as inflation increases, the current formula overestimates what is funded or fundable in price cap-adjusted rates; as inflation decreases the reverse situation will occur.

The current MAADs policy requires that the ICM materiality threshold be calculated separately for each rate zone. OEB staff proposes no change to this. Further, OEB staff notes that, in many instances, the materiality threshold will be different for each rate zone, as the last rebasing year for each predecessor utility may be different.

OEB staff is seeking comments on whether the OEB should implement any changes to the inflation rate(s) used in calculating the materiality threshold for incremental capital funding prior to the OEB considering the ICM policy in its entirety as part of a separate consultation, given that inflation is only one component of the calculation. If a change is proposed, what inflation rate(s) should be used. OEB staff is seeking comments on these matters to assist the OEB in determining how to proceed.

Accounting Matters

The current MAADs Handbook specifies that disposition of deferral and variance account (DVAs) is only relevant to the consolidation if it affects the financial viability of the acquiring utility or consolidated entity.[60] It further states that an account disposition request should be addressed in rate applications and not in the MAADs proceeding. However, various issues relating to DVAs have arisen in past MAADs proceedings or subsequent rate applications that may benefit from upfront clarity during the MAADs proceedings. These issues have related to the disposition timing of Group 2 DVAs, how

[60] MAADs Handbook, p. 18

certain DVAs are to be tracked going forward (i.e., on a consolidated or rate zone basis), the need for the establishment of an account to record the impact of accounting policy changes, and tax matters.

Disposition Timing

The common theme in feedback from utilities and intervenors relating to DVAs is to allow utilities to have flexibility in their disposition of DVAs. Stakeholders generally saw the benefit of disposing Group 2 DVAs during the deferred rebasing period if significant balances have accumulated. Intervenors noted that the longer the period until disposition, the higher the likelihood that the knowledge for the legacy balances is no longer available. A utility noted that depending on whether the total Group 2 account balances is a refund to or recovery from ratepayers, disposition of total Group 2 accounts may be able to help mitigate bill impacts if required. However, stakeholders were also mindful that this could result in increased work and administrative processes if Group 2 DVAs were to be brought forth for disposition in IRM applications and required a prudence review process.

Tracking of Accounts

With regard to tracking DVAs on a rate zone or consolidated basis post-MAADs transaction, stakeholders also noted that there should be flexibility. Utilities generally suggested that consolidating accounts would assist in achieving efficiencies. Utilities noted that for Group 1 accounts, the decision to consolidate Group 1 accounts often depends on the harmonization of certain systems (e.g., billing systems) of the merged utilities. For Group 2 accounts, the specific nature of the account may need to be considered when determining whether the account should be tracked on a rate zone or consolidated basis following the MAADs transaction (e.g., an account may apply only to specific group of customers).

Accounting Policy Changes Deferral Account

Utilities saw merit in establishing a consistent approach to this account which addresses accounting policy changes following the MAADs transaction. Utilities noted that it would be helpful to provide clarification on whether an Accounting Policy Changes Deferral Account is required and the mechanics of the account. One utility stated that materiality should also be a consideration when determining whether an account is required. Intervenors were of the view that there should be an expectation that utilities bring forth accounting policy changes to the extent possible in the MAADs application. The onus is on the utility to discuss whether an account is required.

Tax Matters

Tax matters have arisen in some MAADs proceedings.[61] Utilities stated that tax matters should be included in a MAADs application on an as-needed basis if there is a ratepayer impact.

OEB Staff Discussion

Disposition Timing

In accordance with the *Electricity Distributors' Deferral and Variance Account Review Initiative* (EDDVAR), Group 1 DVAs are reviewed and subject to disposition if they meet a pre-set threshold during the IRM term.[62] This practice continues during the deferred rebasing period for utilities that underwent a MAADs transaction. Group 2 accounts require a prudence review and are subject to disposition in a rebasing rate application, which is typically every five years.[63]

As deferred rebasing periods may be up to ten years, Group 2 account balances for the predecessor utilities that have consolidated may not be disposed of for ten or more years. Significant balances may accumulate in these accounts during this period and could lead to intergenerational inequity concerns and/or result in large bill impacts on disposition. Earlier and/or frequent disposition of Group 2 accounts post-consolidation would address this concern. However, this needs to be balanced with the costs of required prudence reviews in IRM rate applications which contain Group 2 dispositions requests.

OEB staff sees a benefit in allowing utilities the flexibility to propose disposition based on their specific circumstances. **OEB staff proposes that if the deferred rebasing period is longer than five years, utilities should provide a plan to bring in Group 2 accounts for potential disposition (e.g., at the mid-point of the deferred rebasing period) to mitigate intergenerational inequity. Balances should be requested for disposition if they are material at that time. If the deferred rebasing period is less than five years, OEB staff notes that utilities would still have the flexibility of requesting disposition of Group 2 account balances, if warranted and supported.**

Tracking of Accounts

OEB staff recognizes that utilities may gain efficiencies by tracking accounts on a consolidated basis, rather than a rate zone basis. Given the nature of the Group 1

[61] EB-2018-0242, Decision and Order, Peterborough Distribution Inc., Peterborough Utilities Services Inc., Hydro One Networks Inc., and 1937680 Ontario Inc., April 30, 2020, p.44 & 45
[62] EB-2008-0046, Report of the OEB on Electricity Distributors' Deferral and Variance Account Review Initiative (EDDVAR), July 31, 2009, p.10
[63] Ibid, pp. 6 & 13

accounts and the reliance on data from various systems (e.g., billing system), OEB staff agrees that it would be practical and efficient for utilities to consolidate the Group 1 accounts. Therefore, for Group 1 accounts, **OEB staff proposes to encourage utilities to consolidate the accounts as soon as it is practical.**

For Group 2 accounts, OEB staff is of the view that the nature of some legacy accounts will most likely warrant tracking on a rate zone basis for purposes of cost causality. Tracking accounts on a rate zone basis will enable those accounts to be disposed to the group of customers that contributed to the balance of those accounts. However, there could also be some accounts where tracking on a rate zone basis may not be warranted post-MAADs transaction.[64] **Therefore, OEB staff proposes that utilities be required to provide a proposal in their MAADs applications on which Group 2 accounts are to be tracked on a legacy rate zone basis or consolidated basis going forward, with supporting rationale.**

Accounting Policy Changes

OEB staff acknowledges that at the time of the MAADs application, utilities may not have had the opportunity to identify and assess the accounting policy changes required. However, these changes may be material and could result in a refund to, or recovery from, ratepayers. Therefore, **OEB staff proposes that in all MAADs applications, a consolidated utility will be required to establish an account to record the impact of accounting policy changes, effective at the transaction's closing date, unless the predecessor utilities provide sufficient justification as to why such an account is not needed.**

The account will serve to symmetrically protect both the consolidated utility and ratepayers. The account should record the revenue requirement impact of accounting policy changes and should not be limited to recording the rate base impact as there could be significant impacts from revenue requirement elements beyond rate base. OEB staff agrees that materiality should be a consideration for the continued tracking of amounts in this account so that the cost of maintaining the account does not outweigh the benefit. **OEB staff proposes that once the consolidated utility has completed its assessment of accounting policy changes required, the consolidated utility may propose to close the account in the next IRM application where an audited balance in this account is available, if the impacts of the accounting policy changes are not material. In such cases, OEB staff suggests that no disposition would be required. OEB staff proposes that materiality be based on the**

[64] For example, Account 1522 – Pension & OPEB Forecast Accrual vs. Cash Payment Differential Carrying charges, Account 1508 – Other Regulatory Assets, Sub-account Green Button Initiative Costs may be tracked on a consolidated basis.

materiality for the predecessor utility whose accounting policies are changed and be disposed to the customers of the predecessor utility that underwent accounting policy changes.

Although OEB staff notes that there are precedents where materiality was based on the consolidated utility (rather than the predecessor utility), OEB staff supports materiality to be established based on the predecessor utility, given that it is the predecessor utility that is being specifically impacted by the accounting policy changes.[65]

OEB staff further proposes that an accounting order should be established in the MAADs proceeding, with the effective date on the close of the transaction date. Consistent with the filing requirements for cost of service applications, the accounting order must include a description of the mechanics of the account, and provide examples of general journal entries, and the proposed account duration.[66] The distributor must also file evidence demonstrating how the eligibility criteria of causation, materiality, and prudence have been met.

Earnings Sharing Mechanisms (ESM)

In the 2015 Report, the OEB extended the deferred rebasing period up to ten years, considering the length of time in which consolidated utilities may require to reach a break-even point where cumulative savings exceed the cumulative acquisition and integration costs.[67] However, the 2015 Report also noted that there were concerns that extending the deferral period will provide an opportunity for shareholders to retain more savings than those necessary to recover costs, which may result in a windfall for shareholders at the expense of ratepayers.[68] Therefore, the OEB established the requirement for an ESM to address that ratepayer concern. The OEB stated that the sharing provides for shareholders to continue to recover transaction costs while ensuring customers of the consolidated entity benefit from the efficiencies and savings the new distributor has achieved.[69]

[65] EB-2021-0280, Decision and Order, Brantford Power Inc. and Energy + Inc. MAADs, March 17, 2022, p. 17, EB-2022-0006, Decision and Order, Kitchener-Wilmot Hydro Inc. Waterloo North Hydro Inc. MAADs, June 28, 2022. p. 33
[66] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, pp. 66 & 67
[67] As discussed in the section titled Cost Recovery Treatment for Transaction, Transition/Integration Costs, OEB staff considers that the term integration is synonymous with transition and will revert to the older term of transition costs.
[68] 2015 Report, p. 6
[69] 2015 Report, p. 7

The 2015 Report also set out the form of the ESM, specifically that it would be consistent with the OEB's incentive rate-setting policy where a regulatory review may be initiated if a distributor's annual reports show performance outside of the +/- 300 basis points earnings dead band.[70] Furthermore, the 2015 Report indicates that excess earnings are to be shared with consumers on a 50:50 basis for all earnings that are more than 300 basis points above the allowed ROE. The MAADs Handbook further clarified that earnings will be assessed each year once audited financial results are available and excess earnings beyond 300 basis points will be shared with customers annually.[71]

The MAADs Handbook stated that no evidence is required in support of an ESM that follows the form set out in the 2015 Report. The MAADs Handbook also noted that applicants are invited to propose an alternative ESM that better achieves the objective of protecting customer interests during the deferred rebasing period.

During the stakeholder meetings, intervenors recommended clarifying the rationale for the ESM: whether the purpose was to share benefits generated from the MAADs transaction or to protect ratepayers' interests from any negative consequences resulting from a lengthy deferred rebasing period. One utility noted that the rationale for the ESM made sense, but depending on the circumstances of the specific consolidated utility, five years may not be a sufficient period to recover integration and transaction costs. Another utility suggested that an ESM may deter utilities from pursuing MAADs. Stakeholders also commented that there should be flexibility in how ESMs should be calculated or the ability to propose another type of mechanism that could achieve the same objective as intended for the ESM.

The mechanics of ESMs have been discussed in MAADs proceedings and subsequent rate applications. Stakeholders agree that there would be a benefit in clarifying some of the mechanics for the ESM. In particular, stakeholders preferred the ESM be calculated on an annual calendar-year basis and include all transaction/integration costs as well as savings in the ESM calculation. Stakeholders also supported ESM amounts be disposed in a rebasing application.

OEB Staff Discussion

OEB staff supports the intent of the ESM which is to protect ratepayers and notes that the details for the ESM as noted in the 2015 Report and the MAADs Handbook remain valid. To address intervenor concerns regarding the purpose of the ESM, OEB staff

[70] 2015 Report, pp. 6 & 7
[71] MAADs Handbook, p. 16

supports the OEB's previous statement that the sharing (as per an ESM) provides for shareholders to continue to recover transaction costs, while ensuring customers of the consolidated entity will benefit from the efficiencies and savings the new distributor has achieved.[72]

In OEB staff's view, an ESM, which shares excess earnings between shareholders and ratepayers, balances the opportunity for the consolidated utility to accrue some net savings to the shareholder while still protecting ratepayer interest. **OEB staff continues to support the rationale for an ESM as stated in the current MAADs policies and the requirement to establish an ESM for a deferred rebasing period longer than five years.**

With regard to the form of the ESM, the 2015 Report established the default ESM to be 50:50 sharing for all earnings that are more than 300 basis points above the consolidated entity's allowed ROE.[73] OEB staff notes that the 300-basis point band is a well-established tool that the OEB has used for various purposes for many years. As noted in the MAADs Handbook, it is consistent with the incentive rate-setting policy for off-ramps.[74] It is used in the means test for advanced capital modules/incremental capital modules, and the means test for recovery of balances recorded in Account 1509 - Impacts Arising from the COVID-19 Emergency.[75] In addition, OEB staff sees merit in using a default ESM approach as a starting point because using a consistent initial approach for all consolidated utilities can lead to regulatory efficiencies. **OEB staff supports the continued form of ESM as set out in the MAADs Handbook as the default method, including the 50:50 sharing for all earnings that are more than 300 basis points above the consolidated entity's allowed ROE**.

Though OEB staff supports a default form of ESM, OEB staff also supports the flexibility for utilities to propose an alternative ESM as contemplated in the MAADs Handbook. The MAADs Handbook indicated that the ESM as set out in the 2015 Report may not achieve the intended objective of customer protection for all types of consolidation proposals.[76] For these cases, applicants were invited to propose an ESM that better achieves the objective of protecting customer interests during the deferred rebasing period.

[72] 2015 Report, p. 7
[73] 2015 Report, p. 6 & 7
[74] MAADs Handbook p. 16
[75] Report of the OEB, *New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, September 18, 2014, p.15 (EB-2014-0219), and *Report of the OEB, Regulatory Treatment of Impacts Arising from the COVID-19 Emergency,* p.15 (EB-2020-0133)
[76] MAADs Handbook, p. 16

OEB staff notes that the stakeholders agreed with flexibility in ESMs. One utility commented that net savings may not arise until later than the 6th year of a longer-term rebasing deferral. OEB staff is of the view that in such a scenario, the applicant may propose an ESM that better suits its circumstances with a supporting rationale. For example, the proposed ESM may commence in a later year but share a higher portion of earnings with ratepayers. OEB staff considered whether alternative mechanisms beyond an ESM should also be considered, but concluded that an ESM is the most effective tool to protect ratepayers.

The MAADs Handbook stated earnings will be assessed each year once audited financial results are available and excess earnings beyond 300 basis points will be shared with customers annually.[77] In OEB staff's view, regulatory efficiencies can be gained if any excess earnings recorded in an ESM account are requested for disposition in the consolidated utility's next rebasing application instead of annually. An ESM account is a Group 2 account - requesting the disposition of the ESM account at rebasing would be consistent with the OEB's disposition policy for Group 2 accounts.[78] A prudence review of the account for all years of the ESM can be reviewed together at the time of the rebasing application, rather than being reviewed annually in an IRM rate application, which is intended to be a mechanistic process. Furthermore, the results of the ESM calculation can be considered along with any other MAADs consideration required at the time of the next rebasing application. If the audited ESM balances covering all appliable years of the rate term are not available at the time of the next rebasing application, then OEB staff recommends that this outstanding balance(s) shall be brought forward for disposition in the subsequent IRM application(s) following the next rebasing application.

OEB staff agrees with stakeholders that the ESM should be calculated on an annual calendar-year basis and include all transactions/integration costs, as well as savings, in the ESM calculation. OEB staff is of the view that an annual ESM calculation, rather than a cumulative ESM calculation would be appropriate for ESM balances that are requested for disposition at rebasing.

OEB staff is of the view that utilities would need to provide an update of the annual audited ESM balance in each of their IRM or Custom IR Update applications for all applicable years of the rate term.

[77] MAADs Handbook, p. 16
[78] EB-2008-0046, *Report of the OEB, on Electricity Distributors' Deferral and Variance Account Review Initiative* (EDDVAR), July 31, 2009, p.13

Many consolidations close on dates that are not at calendar year end. Calculating ESMs on a calendar-year basis, regardless of when the MAADs transaction closed, would be efficient and practical as the data required would align with the consolidated utility's financial reporting period. The data would also have the benefit of being audited accordingly.

OEB staff proposes that for purposes of ESM calculations, calendar year data is used regardless of the actual closing data of the consolidation. If a MAADs transaction closes prior to June 30 in a given year, the ESM should be applied starting at January 1 of the same calendar year. Similarly, if the MAADs transaction closes after June 30 in a given year, the ESM should be applied starting at January 1 of the subsequent calendar year. For example, if the ESM is effective starting in year six of the deferred rebasing period and the MAADs transaction closed on March 30, the ESM would be calculated starting January 1 of year six. On the other hand, if the MAADs transaction closed August 1, the ESM would be calculated starting January 1 of year seven.

With regard to transition and transaction costs, to the extent they continue to be incurred in the years the ESM is calculated, **OEB staff proposes that that they be included in the ESM calculation for the years ESM is calculated**. This symmetrical treatment allows for ratepayer protection while acknowledging utility costs.

At the time of consolidation, the consolidating utilities may also have differing deemed ROEs. **The most appropriate way to determine a deemed ROE for the purposes of the ESM calculations for the consolidated entity would be to weight the approved ROEs for each utility from their last rebasing application, by the deemed equity component of the rate base of each utility in their last rebasing application.** OEB staff notes that the OEB has approved this approach in prior cases and does not see any reason to deviate from this approach.[79]

OEB staff further proposes that an accounting order should be established in the MAADs proceeding, with the effective date when the MAADs transaction closes, as discussed in more detail above. OEB staff believes that there would be greater regulatory efficiencies in establishing the ESM account in the MAADs proceeding, rather than revisiting the issue and establishing the account in a subsequent rate application prior to the effective date of the ESM.

[79] EB-2021-0280, Decision and Order, Brantford Power Inc. and Energy + Inc. MAADs, March 17, 2022, p. 13, EB-2022-0006, Decision and Order, Kitchener-Wilmot Hydro Inc. Waterloo North Hydro Inc. MAADs, June 28, 2022, p. 21

Consistent with the filing requirements for cost of service applications, the accounting order must include a description of the mechanics of the account, and provide examples of general journal entries, and the proposed account duration.[80] The distributor must also file evidence demonstrating how the eligibility criteria of causation, materiality, and prudence have been met.

Performance Standards for MAADs Applications

The procedural process of MAADs applications was reviewed with stakeholders at the one-on-one meetings.

No major concerns with the OEB's processes with respect to consolidation applications were noted by participants. OEB staff heard from one utility that if an application seems straightforward – for example a proposed consolidation where one utility is already operating another utility – the OEB could perhaps consider a more streamlined proceeding.

In terms of performance standards for processing a consolidation application, one utility noted that getting a timely decision is of utmost importance, and a level of certainty around decision timing is beneficial. Intervenors generally commented that the OEB processes MAADs applications relatively efficiently and would not want to see reduced procedural involvement.

At this time, OEB staff is not proposing any changes to the OEB's performance standard for section 86 (change of ownership or control of utilities and assets) applications for electricity distributors based on the comments heard from participants.[81]

OEB staff does note however that the current performance standards for section 86 applications are determined by hearing type (i.e., oral or written). For other application types the OEB has adopted performance standards based on the complexity of the application. Upon the conclusion of this consultation, the OEB may wish to consider whether application complexity influences processing and time required for review, which may not necessarily relate to the type of hearing. **OEB staff suggest the OEB undertake a review to align the section 86 performance standards with changes to other application types by converting from a written versus oral hearing structure to a short form versus complex structure, following the issuance of the updated MAADs Handbook.**

[80] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, p. 66 & 67
[81] See OEB webpage Performance Standards for Processing Applications

OEB staff invites comments on what criteria stakeholders believe may allow an application to be processed under shorter versus a longer timeframe.

Other

Meetings with utilities and intervenors brought to OEB staff's attention other matters which do not expressly fall into one of the categories discussed above. Further, one topic discussed below (Z-Factor – Materiality Threshold Calculation) was not raised by stakeholders during meetings with OEB staff, however, OEB staff is of the view that it would be beneficial to provide guidance in the MAADs Handbook with respect to how the OEB may consider the materiality of Z-Factor requests by consolidated utilities. Currently, the MAADs Handbook does not address this matter.

OEB staff provides its discussion and proposal on each topic in turn.

Z-Factor – Materiality Threshold Calculation

Z-factors are intended to provide for unforeseen events outside of management's control, and are a common feature of IR plans. In general, the cost to a distributor of these events must be material and its cost causation clear.[82] The OEB-defined materiality threshold for a Z-factor claim as set out in the *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors* is:

- $50 thousand for distributors with a distribution revenue requirement less than or equal to $10 million;
- 0.5% of distribution revenue requirement for distributors with a revenue requirement greater than $10 million and less than or equal to $200 million; and
- $1 million for distributors with a distribution revenue requirement of more than $200 million.[83]

OEB staff proposes a new section related to Z-Factor materiality thresholds for consolidated utilities be added to updated MAADs Handbook outlining the following:

> Adjusting a distributor's revenue requirement to set the materiality threshold may be appropriate when predecessor utilities, or a consolidated utility's rate zones, have not rebased for more than five years. When it is apparent from the dates of the last OEB-approved revenue requirement that there has likely been a significant change, the OEB finds it reasonable to adjust the materiality threshold

[82] *Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors*, July 14, 2008, p. 34
[83] Ibid, Appendix, p. 5. The threshold must be met on an individual event basis to be eligible for potential recovery.

> to recognize the likelihood of such change.[84] Specifically, the cumulative impact of IRM rate adjustments and growth in demand (customers, kWh and kW), should be reflected in the applicant's calculation of its materiality threshold. If an applicant does not believe such adjustments are warranted, it should provide justification.

OEB staff believes it is appropriate that consideration should be given in determining the appropriate materiality threshold for Z-factor applications when a predecessor utility has not rebased in more than five years.

Incremental Operations, Maintenance & Administration

One utility expressed interest in having incremental OM&A considered in the ICM or something akin to an ICM.

OEB staff views the potential for recovery of incremental OM&A as being confined to two distinct situations.

First is the situation of incremental funding for OM&A that is directly tied to a qualifying ICM request. There may be examples of situations where a qualifying ICM results in operating costs that the utility previously did not have. An example of this is where a utility builds a high voltage transformer station that is deemed a distribution asset but where the utility now must have high voltage-qualified staff for controlling and maintaining the high voltage equipment that it did not have previously. **OEB staff is of the view that stakeholders may raise this issue at the time the OEB undertakes its consultative process to review its ICM policy. Therefore, OEB staff is not proposing any change in this regard for consolidating utilities in the updated MAADs Handbook.**

The second situation is for incremental funding for OM&A unrelated to a qualifying ICM request. In this case, OEB staff sees no need for new tools beyond existing mechanisms already well-established by the OEB (i.e., Z-factors and DVAs). **OEB staff considers that these existing mechanisms are adequate for dealing with the potential funding of incremental OM&A needs, as appropriate, that may fall outside of what is currently being recovered through a utility's IRM-adjusted rates.** If consolidating utilities anticipate that there is additional risk for OM&A expense needs, the utility should take this into account when considering the length of the deferred rebasing period it elects.

[84] EB-2022-0317, Decision and Order, June 15, 2023, p. 16

Timing of New MAADs Filing Requirements

One utility commented that negotiation discussions may be occurring based on the OEB's current consolidation policies, and it will be important to consider the timing of applicability of any new requirements for MAADs applications.

If the OEB decides to adopt the changes proposed by OEB staff, given that the breadth of changes being proposed do not materially diverge from the OEB's current consolidation policies, **OEB staff believes that applicants should strive to reflect any updated filing requirements, to the extent possible, in their applications. For any updates not adopted (for consolidation transactions negotiated under the current Handbook), applicants should include an explanation as to why as part of the application. However, new reporting requirements arising out of the AG Audit Report should be applicable and required in all cases going forward (i.e., for future consolidations approved post-issuance of the updated MAADs Handbook).**

For certainty, OEB staff proposes that any consolidation applications filed one year or later from the issuance of the MAADs Handbook as finalized by the OEB as a result of this consultative process should comply with all applicable policies in the updated MAADs Handbook. Further, any rate applications filed during the deferred rebasing period or at the first rebasing application after consolidation, and one year or more from the issuance of the final MAADs Handbook, should comply with the policies in the updated MAADs Handbook. Any deviations from the updated policies or filing requirements should be documented with supporting reasons.

Pro Forma Financial Statements

The current filing requirements for consolidation applications state that applicants must "provide pro forma financial statements for each of the parties (or if an amalgamation, the consolidated entity) for the first full year following the completion of the proposed transaction."[85] The material provided to meeting participants questioned whether any additional requirements relating to pro forma financials for the first full year following consolidation should be required (e.g., provide relevant assumptions, show consolidation costs and savings separately).

One utility and intervenors commented that applicants should provide relevant assumptions/explanations used in pro-forma financial statements.

OEB staff proposes that an additional requirement be added to the existing filing requirements for consolidation applications that applicants should provide

[85] MAADs Handbook, p. 6 & 7

assumptions/explanations used in the pro forma financials, as well as the methodology used to forecast amounts. OEB staff notes this will increase clarity for the OEB and other stakeholders, while potentially reducing the number of interrogatories to applicants.

OEB Act Language

Section 1 of the OEB Act has been updated since the issuance of the MAADs Handbook. One intervenor commented that the MAADs Handbook should be updated to reflect the current language. **OEB staff agrees that all applicable references should be updated.** Further, the OEB should confirm which objectives are the focus in assessing a MAADs transaction.

The OEB's objectives under section 1 of the OEB Act that are outlined in the current MAADs Handbook are:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
   1.1 To promote the education of consumers.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities.[86]

The OEB's revised objectives in the OEB Act since the issuance of the MAADs Handbook, are:

1. To inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

[86] MAADs Handbook, p. 4

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate innovation in the electricity sector.[87]

The current MAADs Handbook states:

> …in applying the "no harm" test, the OEB has primarily focused its review on impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector. The OEB considers this to be an appropriate approach, given the performance-based regulatory framework under which all regulated distributors are required to operate and the OEB's existing performance monitoring framework."[88]

The current MAADs Handbook confirmed that the OEB was satisfied that the attainment of the previous objectives 3, 4 and 5 will not be adversely affected by a consolidation. given the instruments implemented by the OEB that ensure regulated utilities continue to meet their obligations. As such, no further detailed review as part of the OEB's consideration of the consolidation transaction was required.

OEB staff believes it continues to be appropriate that the OEB's focus is on the objectives that are most directly relevant to the impact of the proposed transaction, namely, price, reliability and quality of electricity service to customers, as well as the cost-effectiveness, economic efficiency and financial viability of the electricity distribution sector.

With respect to the revised objective of the OEB to facilitate innovation in the electricity sector, the OEB's 2023-2026 Business Plan highlights that the OEB will deliver on the strategic goal to facilitate innovation by implementing programs and activities to drive the actions from the OEB's strategic plan.[89] Given the OEB's work to facilitate innovation in the electricity sector broadly, OEB staff does not consider that the attainment of this objective will be adversely effected by a consolidation. In fact, it may be the case that consolidation can help facilitate innovation by enabling distributors to address challenges in an evolving electricity industry through increased access to resources (human, capital, operating etc.).

[87] Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B
[88] MAADs Handbook, p. 6
[89] OEB 2023-2026 Business Plan, pp. 40-45

While OEB staff proposes that the focus in assessing MAADs transactions does not change from current practice, this does not preclude applicants from detailing in their applications how the proposed consolidation would facilitate innovation in the electricity sector generally.

Licence Application

The filing requirements for consolidation applications outline additional requests made to the OEB in previous consolidation applications which have formed part of the OEB's determination of a consolidation application. A licence amendment and cancellation, for example, is one of those matters.[90]

As part of the meetings held in this consultation, one utility commented that it should be made clear that a licence application for the newly consolidated entity should be included as part of a consolidation application.

OEB findings on consolidation applications since the issuance of the MAADs Handbook have addressed licence-related matters. OEB staff agrees that the licence application should be considered by the OEB concurrently with the request for leave to amalgamate. OEB staff's position is based on the OEB's findings that a request for leave to amalgamate cannot be granted in the absence of a related license application.[91] OEB staff notes that licensing matters will only be completed if the proposed consolidation is approved and when the utility informs the OEB that an approved consolidation is completed (i.e., per existing procedure for associated licensing changes).

OEB staff proposes the language in the filing requirements for consolidation applications be updated to make it clear that licence applications should be included as part of consolidation applications.

Conclusion

Generally, in considering updates to the MAADs Handbook and filing requirements for consolidation applications, OEB staff placed importance on areas for modification that, if addressed, should:

- ✓ Support OEB decision making.
- ✓ Increase clarity and certainty of expectations for applicants.
- ✓ Increase regulatory efficiency.

[90] Filing Requirements for Consolidation Applications, p. 7
[91] EB-2016-0025, Enersource Hydro Mississauga Inc., Horizon Utilities Corporation & Powerstream Inc. MAADs Application, Oral Hearing Transcript Volume 4, p. 65

At the same time, OEB staff has also had to consider the needs and expectations for the OEB, as well as the needs and expectations of other stakeholders for information to be able to assess the impacts of consolidation in the Ontario electricity sector to deliver benefits for the sector as a whole; individual firms and their shareholders; and ratepayers, and that benefits are reasonably distributed to all impacted parties. The recommendations in the November 2022 AG Audit Report are a clear example, but was not the only consideration.

OEB staff has considered emerging and evolving issues such as energy transition, technological advancement, and climate change to name a few, and recognizes that utilities' operations and activities, including consolidation, do not occur in a vacuum. These provide challenges and opportunities which consolidating utilities must deal with while transitioning their operations as a result of a consolidation. However, this situation is not new. In the nearly 25 years since energy restructuring in Ontario, with the enactment of Bill 35 on April 1, 1999, consolidations have occurred under similar significant changes, such as rate unbundling, incorporation and preparation for market readiness and market opening (1999-2002), smart meters (2008-2013), and the Renewed Regulatory Framework (started in 2012).

In OEB staff's assessment, recommendations and proposals are informed by the feedback received from interviewed utilities and intervenors, as well as OEB staff's own learnings from sector reviews and from decisions and other documents in many MAADs cases, particularly those since 2015.

OEB staff's proposals attempt to make the MAADs Handbook clearer and more current, while maintaining a balance of ensuring regulatory efficiency and effectiveness to facilitate rational consolidation in the Ontario electricity sector.

OEB staff thanks those utilities and intervenors that have provided feedback to date, and looks forward to comments from remaining stakeholders.

TAB F

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

BY EMAIL AND WEB POSTING

June 18, 2024

TO: All Licensed Electricity Distributors and Transmitters
All Intervenors in Electricity Distribution and Transmission Cost of Service Proceedings for 2024 and 2025 Rates
All Participants in Consultation Process EB-2023-0188
All Other Interested Parties

RE: Evaluation of Policy on Utility Consolidations
Ontario Energy Board File No. EB-2023-0188

Today, the Ontario Energy Board (OEB) issued its *Handbook to Electricity Distributor and Transmitter Consolidations: Rate-making Considerations and Filing Requirements for Consolidation Applications* (2024 MAADs Handbook).[1] With several years of experience hearing MAADs applications, and following recommendations from the Auditor General of Ontario's Value for Money audit report, *Ontario Energy Board: Electricity Oversight and Consumer Protection* (OAGO Audit Report), the OEB has worked with the sector to review and improve its policy on utility consolidations. The sector will find the application of the updated policies will create a more predictable regulatory environment for applicants that are considering consolidation, thereby facilitating planning and decision-making. Further, updated requirements pertaining to post-consolidation monitoring and reporting will provide greater transparency during deferred rebasing periods associated with consolidations. The 2024 MAADs Handbook is available on the OEB's rules, codes and requirements webpage associated with MAADs and on the OEB's Engage with Us webpage.[2]

The 2024 MAADs Handbook is applicable to both electricity distributors and transmitters filing consolidation applications under applicable sections of the *Ontario Energy Board Act, 1998* (OEB Act) as of January 1, 2025 or later.[3] For distributors, if an application

[1] The Handbook uses the term consolidation to be inclusive of mergers, acquisitions, amalgamations and divestitures (MAADs). The Filing Requirements for Consolidation Applications are included in Schedule 2.
[2] See Consultation Documents section of the Engage with Us webpage associated with this consultation.
[3] The Handbook applies specifically to applications under sections 86(1)(a) and (c) and sections 86(2)(a) and (b) of the OEB Act.

has any aspect not conforming to these requirements, deviations should be documented with supporting reasons. The focus of many policies in the MAADs Handbook is electricity distributors, therefore, transmitters should consider the intent of those policies and make appropriate modifications as needed to reflect differences with transmitter consolidations, including considering and proposing post-consolidation monitoring and reporting.

Background

On July 27, 2023, the OEB issued a letter launching a consultation to engage stakeholders to review and update the OEB's 2016 Handbook to Electricity Distributor and Transmitter Consolidations (2016 MAADs Handbook) and associated *Filing Requirements for Consolidation Applications*. The review was expected to leverage the OEB's experience to date with consolidation-related decisions, identify and address any continuing barriers to consolidation while ensuring that customers are protected, and consider whether there are areas of the consolidation policy that may benefit from modification or guidance. The consultation was also expected to address the recommendations related to consolidations as outlined in the OAGO Audit Report.

During August and September 2023, OEB staff held a total of nine meetings with distributors and intervenors.[4] Stakeholders were provided with the opportunity to discuss any issues or key areas of concern related to the MAADs policy.[5] Discussions with stakeholders did not identify any significant barriers to consolidation or major gaps in consumer protection from existing OEB policies.

In February 2024, the OEB posted an OEB Staff Discussion Paper (Discussion Paper) for comment. The Discussion Paper, among other matters, summarized key comments received from stakeholders on several consolidation-related topics and, outlined proposals for changes to the 2016 MAADs Handbook and associated Filing Requirements. The proposals primarily related to areas of clarification on current policy and additional detail required as part of consolidation applications. New requirements to address the recommendations outlined in the OAGO Audit Report were also proposed. The OEB received written comments on the Discussion Paper from nine parties.

2024 MAADs Handbook

The 2024 MAADs Handbook reflects the OEB's consideration of the comments received from stakeholders as summarized in the Discussion Paper, the proposals contained in the Discussion Paper and the comments received in response. The 2024 MAADs

[4] Intervenors represent various consumer groups.
[5] EB-2023-0188, OEB Staff Discussion Paper: Evaluation of Policy on Utility Consolidations, February 8, 2024, p. 11: While presentation materials prepared by OEB staff formed the basis for the scoping of issues with stakeholders at each meeting, discussions with stakeholders were not limited to only those topics and questions.

Handbook also reflects past letters issued by the OEB on the availability of capital funding options for consolidating utilities, and other guidance based on OEB decisions on MAADs-related matters since the issuance of the 2016 MAADs Handbook.

The OEB has made further changes to the 2024 MAADs Handbook where appropriate. The 2024 MAADs Handbook replaces the OEB's current policies on consolidation as set out in two reports of the OEB as well as the 2016 MAADs Handbook.[6] A list of substantive changes and/or clarifications are listed in Schedule A of this letter.

Comments and OEB Approach

The following discussion summarizes comments received on the Discussion Paper on certain topics. The way in which those comments have been reflected in the 2024 MAADs Handbook is also discussed. The discussion below is not exhaustive of all comments received or of all comments reflected in the 2024 MAADs Handbook. All written comments can be viewed on the OEB website.

"No Harm" Test

Generally, there were no issues with proposed language to clarify that both quantitative and qualitative information included in the application will be considered in each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the matters prescribed in the OEB's objectives.

Intervenors generally were of the view that it must be made clear that the OEB will consider the "No Harm" Test when approving the transaction and at the time of rebasing of the consolidated utility. The principle that the OEB has an ongoing duty to ensure customers are not harmed by a transaction should be set out in the MAADs policy. If "harm" occurs in the end, it should be eliminated or, if necessary, borne by the utility's shareholders.

OEB Policy and Rationale

The OEB agrees with the proposed clarifying language with respect to the "No Harm" Test. Intended quantitative and qualitative benefits have frequently been documented in past consolidation applications and considered by the OEB in assessing transactions on a cumulative basis.

[6] The first report titled *Report of the Board on Rate-making Associated with Distributor Consolidation* issued on July 23, 2007 (2007 Report), and the March 26, 2015 report issued under the same name. The 2016 MAADs Handbook provided guidance to applicants and stakeholders on applications to the OEB for approval of electricity distributor and transmitter consolidations; and discussed ratemaking policies associated with consolidations and set out the timing of when such matters will be considered by the OEB.

The approval of a consolidation transaction on the basis that it meets the “No Harm” Test does not mean the OEB’s assessment of the matters prescribed in its statutory objectives ends in future applications. At the time of the consolidated entity’s rebasing application, the OEB will assess the actual results achieved and the rate-setting aspects of the consolidation to determine whether they are satisfactory. Clarifications in this regard have been made in the 2024 MAADs Handbook.

Future Rate Harmonization

The Discussion Paper proposed a requirement that an applicant state whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so. Where the utility does intend to harmonize rates, a brief description of the plan should be provided.

Intervenors related “no harm” with rates. Generally, these comments suggested that the OEB should assess “no harm” in the context of rate harmonization - consolidation applications should include a rate harmonization plan demonstrating that customers will not have higher rates than they would have had if the transaction did not occur. Or, as suggested by one intervenor, where higher rates may occur, this “harm” is more than offset by the other benefits of consolidation such that the “No Harm” Test is satisfied in aggregate.[7]

One intervenor suggested that in circumstances where an applicant does not intend to harmonize rates in the future, or for consolidations between non-contiguous distributors, the OEB should require the maintenance of separate financial records for each rate zone.[8]

OEB Policy and Rationale

While details of future rate harmonization plans will not be required, the requirement associated with rate harmonization as outlined in the Discussion Paper has been added to the 2024 MAADs Handbook. This information may serve as a signal to the OEB, ratepayers, and intervenors that potential issues to be decided at the time of next rebasing have been considered by the parties at the time of the transaction.
Where an applicant does not intend to harmonize rates, or for consolidations between non-contiguous distributors, the OEB will consider whether separate financial records shall be maintained on a case-by-case basis. The OEB believes that having consolidating entities operate as one entity as soon as possible after the transaction is in the best interest of consumers.

[7] EB-2023-0188, Comments of the Vulnerable Energy Consumers Coalition, p. 4
[8] Ibid

The OEB believes providing clarity with respect to its expectations regarding rate harmonization will help ensure the efficient assessment and processing of future consolidation applications and rate harmonization proposals at rebasing.

The OEB's current Handbook for Utility Rate Applications states that in the first rebasing application following the consolidation the OEB will scrutinize specific rate-setting aspects of the MAADs transaction, including a rate harmonization plan and/or customer rate classifications post consolidation. This approach will continue. For acquisitions, distributors can propose plans that place acquired customers into an existing rate class or into a new rate class. Regardless of the option adopted, the OEB will assess whether the proposed harmonized rates will reflect the cost to serve the acquired customers, including the anticipated productivity gains resulting from consolidation.[9]

Objective 1 of the OEB Act is "to inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service." With respect to price, the OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers. The OEB has previously stated that a downward impact on cost structures would tend to decrease rates, whereas an upward impact on cost structures would tend to increase rates. This will occur regardless of what decision is taken concerning rate harmonization at the time of rebasing.[10]

The OEB has jurisdiction to address rates-related matters in future proceedings. Rates must be just and reasonable and reflect the cost to serve customers at the time of their determination in a rebasing application. The potential for higher rates for one customer class or rate zone is only one consideration; other benefits of consolidation must also be considered. All relevant factors can be considered by the OEB when rate harmonization plans are filed at the time of rebasing.

Deferred Rebasing Period

The Discussion Paper proposed that the OEB's current policy regarding the deferred rebasing period should be maintained. The policy permits consolidating distributors to elect to defer rebasing for up to ten years from the closing of the transaction. No supporting evidence is required to justify the selection.

Intervenors expressed concern regarding the option for utilities to defer rebasing for up to 10 years. Three intervenors suggested the maximum allowed should be five years with two specifically citing the changing energy landscape. One of these intervenors noted that given the changing sector, the OEB should require evidence to justify the

[9] Handbook for Utility Rate Applications, October 13, 2016, p. 21
[10] EB-2013-0196/EB-2013-0187/EB-2013-0198, Decision and Order, p. 16

selection of a 10-year deferred rebasing period going forward. One other intervenor suggested applicants should have to justify a deferred rebasing period of more than five years.

OEB Policy and Rationale

The OEB has yet to adjudicate on a rebasing application following consolidation in which a 10-year deferred rebasing period had been elected. It is premature to limit rebasing to less than 10 years until greater experience is gained. A shorter period would reduce the incentive to consolidate. Consolidating entities that propose to defer rebasing beyond five years, must implement an Earnings Sharing Mechanism (ESM) for the period beyond five years. The ESM is designed to protect customers and ensure that they share in any increased benefits from consolidation during the deferred rebasing period. The OEB will not make any changes to its current policy at this time.

Post-Consolidation Monitoring and Reporting

The Discussion Paper proposed requirements intended to address the recommendations set out in the OAGO Audit Report related to consolidations.[11]

With respect to monitoring of post-consolidation activities during deferred rebasing periods, intervenors generally supported the proposal for a mid-term report that details the progress on the distributor's steps towards integration as set out in the Discussion Paper. Such a report would only apply to consolidated distributors that elect to defer rebasing for more than five years. Intervenors suggested other potential additions to the contents of the mid-term report as proposed in the Discussion Paper.

With respect to reliability reporting, the Discussion Paper proposed that feeder-level reliability information should be provided in the consolidation application, and going forward by rate zone, if available. The Discussion Paper noted the OEB can consider how to address circumstances in which applicants cannot provide feeder-level reliability information for any rate zone on a case-by-case basis.

Distributors did not support additional reporting requirements or reporting by rate zone. Distributors commented that reporting by rate zone during deferred rebasing periods will likely affect the ability to achieve synergies from consolidation. Distributors remarked that the OEB's existing requirements through other avenues (e.g., Reporting and

[11] The November 2022 OAGO Audit Report (pp. 43-44) recommended that the OEB:

- implement effective and timely monitoring of post-consolidation activities during deferred rebasing periods to obtain periodic status updates from local distribution companies on steps taken toward integration and to verify that consolidated entities are adhering to approval conditions for consolidations and maintaining necessary records; and
- require acquired and merged entities to report on key performance measures (for example, reliability metrics) separate from the consolidated entities during deferred rebasing periods to create greater transparency.

Record-keeping Requirements) provide sufficient information. A distributor commented that Commissioners can prescribe additional reporting requirements, if necessary, on a case specific basis. If the requirement for a mid-term report is implemented, clarification on how the report will be used by the OEB and/or any associated procedural steps should be provided.

OEB Policy and Rationale

The OEB is implementing monitoring and reporting requirements for consolidated distributors in response to the OAGO Audit Report recommendations. In establishing the new requirements, the OEB has balanced the regulatory and financial requirements on utilities with increased transparency for customers. In determining what these requirements should entail, the OEB has considered the proposals outlined in the Discussion Paper, and the comments received in response.

Monitoring of Post-Consolidation Activities During Deferred Rebasing Periods

The OEB has a proactive performance monitoring framework, however, no requirements currently exist to monitor the integration progress of consolidated utilities during a deferred rebasing period. The OEB believes a mid-term report will be an enhancement to the OEB's current reporting framework. A mid-term report also balances the requirements on utilities (i.e., in lieu of providing more detailed annual reporting on progress than would already be expected to be provided by a consolidated utility under the OEB's Reporting and Record-keeping Requirements) with increased transparency for customers. Based on further suggestions from stakeholders, the OEB has enhanced the requirements for the mid-term report as initially set out in the Discussion Paper. [12] Details can be found in the 2024 MAADs Handbook.

A consolidated distributor must file its mid-term report with the OEB under the associated file number of the respective consolidation application proceeding. The report will be made publicly available. A distributor must also post the mid-term report on its respective website for ease of reference for customers. OEB staff will review mid-term reports internally and may contact distributors for certain clarifications, however, no formal adjudicative steps on the mid-term report are anticipated. OEB staff may identify matters for internal review as part of the OEB's ongoing monitoring and/or reporting processes. The OEB expects this mid-term report will be filed as part of subsequent applications for incremental capital funding (ICMs) or new DVAs.

In the first rebasing application for a consolidated distributor, updates to this information based on achieved results should be provided including for any period not covered by the initial mid-term report.

[12] Discussion Paper, p. 30

As suggested by one stakeholder, the OEB is also implementing a requirement for a similar report to be filed for consolidated distributors that elect to defer rebasing for less than five years. This report will only be required at the time of the post-consolidation rebasing application. Details can be found in the 2024 MAADs Handbook.

These reports will help in understanding differences from the forecasts provided at the time of the consolidation application and assist the OEB and other stakeholders in assessing the consolidated distributor's rebasing application.

The OEB expects that following a decision approving a consolidation transaction going forward, consolidated distributors will track the necessary data to fulfil the minimum requirements of the mid-term and rebasing report, as applicable.

Separate Reporting on Key Performance Measures During Deferred Rebasing Periods – Reliability

The OEB has incorporated expectations related to reliability reporting at the rate zone level post-consolidation into the 2024 MAADs Handbook. Distributors that have the information available are encouraged to start reporting feeder-level reliability data, including which rate zone(s) are supplied by each feeder. Applicants that do not have rate zone reliability information or feeder-level reliability information identified by rate zone, are required to propose a different mechanism for reporting reliability in each rate zone during its deferred rebasing period.

Unlike service quality measures, there is currently no industry target for the system reliability measures on the OEB's scorecard for each utility.[13] Reliability information by rate zone may help assess whether ratepayers are experiencing continuous improvement in reliability. A distributor should supplement its quantitative reliability reporting and results with qualitative discussions as part of its scorecard reporting, the mid-term report (if applicable), and the post-consolidation rebasing application.

Items for Future Consideration

The OEB has considered the Discussion Paper proposals and stakeholder comments on the following:

1. whether the OEB should implement changes to the inflation rate(s) used in calculating the materiality threshold for incremental capital funding prior to the OEB considering the Incremental Capital Module (ICM) policy in its entirety.
2. potential recovery of incremental funding for Operations, Maintenance & Administration expenses directly tied to a qualifying ICM request.

[13] For System Average Interruption Duration Index (SAIDI) and System Average Interruption Frequency Index (SAIFI), the default individual performance baselines use the average of the previous five years of historical data, to establish performance expectations. LDC may use a different value than the default.

3. new language related to Z-Factor[14] materiality thresholds for consolidated utilities.
4. what criteria may allow a consolidation application to be processed under shorter versus a longer timeframe.

The OEB has determined that the first two points are more appropriately addressed as part of the OEB's future review of its ICM policies. The OEB intends to review the ICM/ACM policy applicable to all utilities, including those that are part of a consolidation. That review may result in amendments to the policy.

With regard to point three, while not related to the OEB's ICM policy, the OEB sees a potential benefit of consistency across the two mechanisms (i.e., ICM and Z-Factor). The Discussion Paper proposed language relating to Z-factor materiality threshold calculations. It suggested that the cumulative impact of inflationary rate adjustments and growth in demand since the last rebasing application of predecessor utilities should be reflected in the applicant's calculation of its Z-factor materiality threshold. Growth and inflationary adjustments are currently considered in the ICM formula to determine materiality. Whether to align the methodologies for how to apply inflationary and growth adjustments to either an ICM or a Z-factor should be considered as part of the OEB's future review of its ICM or Z-factor policies.

Finally, the OEB will undertake a review of its section 86 (change of ownership or control of utilities and assets) performance standards and their alignment with those of other application types following the issuance of the 2024 MAADs Handbook. The OEB appreciates the suggested criteria for consideration provided by stakeholders.

Conclusion

The issuance of the 2024 MAADs Handbook marks the conclusion of the consultation. A Notice of Hearing for Cost Awards will be issued separately.

The OEB thanks stakeholders for their helpful input that was considered in detail to update the consolidation policies.

Yours truly,

Nancy Marconi
Registrar

[14] Distributors may request cost recovery associated with unforeseen events that are outside the control of a distributor's ability to manage. This is referred to as a claim for a "Z-factor" event.

Schedule A
List of Substantive Changes and/or Clarifications

Updates

- Language regarding completeness of an application and confidentiality to align with other OEB documents, current practice
- OEB Act objectives
- Incorporated stand-alone ICM policy updates issued by the OEB
- Addition of guiding language noting if, during its deferred rebasing period, a consolidated utility finds that it has significant capital needs not easily accommodated by an ICM, it should consider rebasing.
- Addition of language to address expected impacts to cost structures from an evolving energy sector
- Updated language in section “Early Termination or Extension of Selected Deferred Rebasing Period”

Clarifications

- In assessing “no harm”, both quantitative and qualitative information included in the application will be weighed by the OEB in consideration of the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the matters prescribed in the OEB’s objectives
- Revenue requirement is a suitable proxy for cost structure comparisons.
    - Revenue requirement analysis to be provided for cost structure analysis.
    - Application should include information on the assumptions in forecasts.
    - Updates to this analysis including a comparison and discussion to be provided at the time of the mid-term report (if applicable), and rebasing application
- Use of consistent wording – “transition” costs instead of “integration” costs
- Treatment of capital assets classified as part of the utility’s “transition” costs at the time of the post-consolidation rebasing
- Licensing matters relating to the proposed transaction should be included as part of the consolidation application

Revised Policies

- The ESM is applied on a calendar year, with revised conditions on when the ESM starts depending on the transaction closing date.
- Calculation of a deemed return on equity for the purposes of the ESM calculations
- Identification of the rate year and effective date for rebased rates at the end of the elected deferred rebasing period

Additions

- Statement indicating whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so. Where the utility intends to harmonize rates, a brief description of the plan
- Applicants may discuss preliminary plans for future rate structures where such plans are anticipated to impact the applicant's ability to support its claim of "no harm"
- Guidance regarding the treatment of deferral periods in the event of successive consolidations (multiple transactions)
- Applicants must document known, or reasonably anticipated incremental capital module applications over the deferred rebasing period.
- Applicants must provide assumptions/explanations, methodology used to forecast amounts in pro-forma financial statements
- Reporting requirements to address the recommendations of the OAGO Audit Report
- If the consolidation or a decision by the consolidated utility post-consolidation will affect how the utility will track and bill for pass-through costs by rate zones, the proposal for this must be provided in the consolidation application (e.g., changes in wholesale metering configuration)
- Accounting orders for the ESM account and Accounting Policy Changes account
- If the sum of the deferred rebasing period and period since the last Group 2 disposition is longer than five years, provide a plan to submit Group 2 account balances for potential disposition.
- Proposal on how Group 2 accounts are to be tracked
- For Group 1 accounts, the OEB encourages utilities to consolidate the accounts as soon as it is practical. However, if there are unique impacts to the utilities' Group 1 accounts, these circumstances should also be brought forward at the time of the consolidation application.

TAB G

ONTARIO ENERGY BOARD

Handbook to Electricity Distributor and Transmitter Consolidations

Rate-making Considerations and Filing Requirements for Consolidation Applications

JUNE18, 2024

Ontario Energy Board

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1. INTRODUCTION AND BACKGROUND

The Ontario Energy Board (OEB) developed and issued an original version of this Handbook in January 2016, to provide guidance to applicants and stakeholders on applications to the OEB for approval of distributor and transmitter consolidations and subsequent rate applications. This Handbook uses the term consolidation to be inclusive of mergers, acquisitions, amalgamations and divestitures (MAADs).

In July 2023, the OEB initiated a consultation to review and update the OEB's 2016 Handbook and associated filing requirements for consolidation applications.[1] The review leveraged the OEB's experience to-date of consolidation-related decisions; identified and addressed any continuing barriers to consolidation while ensuring that customers are protected; and considered whether there are areas of the consolidation policy that may benefit from modification or guidance. The consultation also addressed the recommendations related to consolidations as outlined in the Office of the Auditor General of Ontario's Value for Money audit report entitled *Ontario Energy Board: Electricity Oversight and Consumer Protection* (OAGO Audit Report).[2]

This revised Handbook reflects updates on OEB policies and filing requirements applicable to consolidations. It also reflects updates to rate-making considerations, accounting and other matters related to consolidating utilities, as informed by comments received from stakeholders during the consultation. Section 6 of this Handbook outlines the OEB's post-consolidation monitoring and reporting requirements.

Application of the policies herein will create a more predictable regulatory environment for applicants that are considering consolidation, thereby facilitating planning and decision-making, while assisting applicants in determining the value of consolidation transactions.

Consolidation is expected to enable distributors to address challenges in an evolving electricity industry. Emerging challenges facing the energy sector include (among others) impacts of net-zero carbon initiatives such as increased use of electric vehicles and other electrification initiatives: challenges related to cybersecurity; the need for system resiliency in the face of climate change; management of distributed energy resources, and considerations of distribution system operator models. Distributors will need considerable additional investment to meet these challenges, and

[1] EB-2023-0188, Evaluation of Policy on Utility Consolidations

[2] Office of the Auditor General of Ontario Value for Money Audit: Ontario Energy Board: Electricity Oversight and Consumer Protection, November 2022, pp. 43-44

consolidation generally offers larger utilities better access to capital markets, with lower financing costs, and opportunities to better realize resulting operational efficiencies. While consolidation is not the only way to meet these challenges, economies of scale resulting from further consolidation may enhance a distributor's capabilities to address them.

Distributors are also expected to meet public policy goals relating to electricity conservation and demand management and innovation. Delivering on these public policy goals will require capabilities that may be more cost effective for larger distributors to develop or retain.

There are various other transactions or arrangements that might be pursued for strategic or other reasons. Some of which are MAADs transactions that are subject to OEB approval under section 86 of the *Ontario Energy Board Act, 1998* (OEB Act), while others are not. The OEB recognizes that some of these other transactions or arrangements can facilitate the delivery of innovative and more cost-effective distribution services. This can be beneficial to both shareholders and ratepayers. It is not the OEB's intention to discourage distributors from pursuing transactions or arrangements that increase efficiencies.

The OEB has a statutory obligation to review and approve consolidation transactions where they are in the public interest. In discharging its mandate, the OEB is committed to reducing regulatory barriers to consolidation. To facilitate both a thorough and timely review of requests for approval of transactions, in this Handbook the OEB provides guidance on the process for review of an application, the information the OEB expects to receive in support, and the approach it will take in assessing the merits of the consolidation in meeting the public interest.

OEB policies and decisions on consolidation applications have already established several principles to create a more predictable regulatory environment for applicants.

This Handbook provides further clarity to applicants, investors, shareholders, and other stakeholders to reflect changes in policy, arising issues and experience from OEB decisions in consolidation and rate applications of consolidated utilities since 2016.

The policies and filing requirements documented in this Handbook and filing requirements supersede those in the previous version.

While the Handbook is applicable to both electricity distributors and transmitters, most of the OEB's policies and prior OEB decisions have related to distributors. Transmitters should consider the intent of the Handbook and make appropriate modifications as needed to reflect

differences in transmitter consolidations, including considering Section 6 and proposing post-consolidation monitoring and reporting.

The Handbook does not automatically apply to consolidation applications in the natural gas sector filed and decided upon under section 43 of the OEB Act. The OEB panel deciding a section 43 application may decide whether the policies, options and requirements documented herein should apply in whole, in part, or not at all, based on the circumstances and supporting documentation filed in a specific application.

This Handbook documents OEB policy. Similar to other policies, OEB panels considering individual applications are not bound by the OEB's policy, and where justified by specific circumstances, may choose to apply or not to apply the policy (or to apply a part of the policy).

2. THE OEB AUTHORITY AND REVIEW PROCESS

This section describes the OEB's legal authority in approving consolidation applications and clarifies how the OEB reviews these applications.

2.1 The OEB Legislative Authority

OEB approval is required for transactions described under section 86 of the OEB Act (For ease of reference, section 86 is reproduced in Schedule 1 of this Handbook.) Briefly, these transactions are as follows:

- A distributor or transmitter sells or otherwise disposes of its distribution or transmission system as an entirety or substantially as an entirety to another distributor
- A distributor or transmitter sells a part of a distribution or transmission system that is necessary in serving the public
- A distributor or transmitter amalgamates with another distributor or transmitter
- A person acquires voting securities of a transmitter or distributor or acquires control of a corporation with voting shares

Section 86(2) relating to voting securities does not, however, apply to the acquisition or sale of shares in Hydro One, a company created by the Crown under section 50(1) of the *Electricity Act, 1998*, which is explicitly exempt under section 86(2.1) from the conditions stipulated in section 86(2).

2.2 The Application Review Process

This Handbook applies specifically to applications under sections 86(1)(a) and (c) and sections 86(2)(a) and (b) of the OEB Act, which are processed through the OEB's adjudicative review process. Sections 86(1)(a) and (c) of the OEB Act relate to asset sales and amalgamations. Section 86(2) of the OEB Act relates to voting securities. To assist applicants, the Filing Requirements for Consolidation Applications in Schedule 2 of this Handbook set out the information that needs to be provided in an application.

Applications filed under section 86(1)(b) of the OEB Act are typically determined by OEB staff acting under delegated authority under section 6 of the OEB Act without a hearing. These applications generally include the sale of specific distribution or transmission assets from one distributor or transmitter to another, or to a large consumer who is served by the same assets. For these applications, applicants should continue using the form entitled *Application Form for Applications under Section 86(1)(b) of the OEB Act* that is posted on the OEB's website.

The OEB may elect to process a section 86(1)(b) application under its adjudicative review process if the OEB considers that certain aspects of an application could affect service to the public and/or have a material effect on rates.[3] This will be determined once the application is filed with the OEB. In those circumstances, this Handbook, or parts of it, will be applicable. If there is any question, the OEB suggests that applicants who are of the view that their transaction is material should use this Handbook to inform their application.

If an applicant believes that certain requirements do not apply in its circumstances, the application should include reasoning with supporting justification. Applicants may wish to contact the OEB through an Industry Relations Enquiry or contact OEB staff to discuss the matter.

3. THE OEB TEST – THE "NO HARM" TEST

In reviewing an application by a distributor for approval of a consolidation transaction, the OEB has, and will continue, to apply its "no harm" test. The "no harm" test was first established by the OEB in 2005 through an adjudicative proceeding (the Combined Proceeding).[4]

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[3] These applications may be decided by OEB staff acting under delegated authority under section 6 of the OEB Act, or by an OEB panel of Commissioners.

[4] Combined Proceeding Decision - OEB File No. RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257

In carrying out its responsibilities, the OEB is guided by statutory objectives set out in section 1 of the OEB Act. The “no harm” test considers whether the proposed transaction is expected to have an adverse effect on the matters prescribed in these statutory objectives. The OEB will consider whether the “no harm” test is satisfied based on an assessment of the cumulative effect of the transaction on the matters prescribed in its statutory objectives. If the proposed transaction is expected to have a positive or neutral effect on these matters, the OEB will approve the application. The definition of the “no harm” test is not a colloquial understanding of “no harm” but is based on the tests laid out in the MAADs policy.

The OEB’s statutory objectives are:

1. To inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer’s economic circumstances.
4. To facilitate innovation in the electricity sector.

4. THE OEB ASSESSMENT OF THE APPLICATION

This section sets out how the OEB applies the “no harm” test within the context of the performance-based regulatory framework, the *Renewed Regulatory Framework* (RRF).[5] This framework was established by the OEB in 2012 to ensure that regulated distribution companies operate efficiently, cost effectively and deliver outcomes valued by its customers and in 2016 was extended to all rate regulated utilities.[6]

4.1 The Renewed Regulatory Framework

Ongoing performance improvement and performance monitoring are underlying principles of the RRF. The OEB’s oversight of utility performance relies on the establishment of performance standards to be met by

[5] *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18, 2012

[6] *Handbook to Utility Rate Applications*, October 13, 2016, p. 4

distributors, ongoing reporting to the OEB by distributors, and ongoing monitoring of distributor achievement against these standards by the OEB.

An electricity distributor is required, as a condition of its licence, to provide information about its distribution business. Metrics are used by the OEB to assess a distributor's services, such as frequency of power outages, financial performance and costs per customer. The OEB uses this information to monitor an individual distributor's performance and to compare performance across the sector. The OEB also has a robust audit and compliance program to test the accuracy of reporting by distributors.

As part of the regulatory framework, distributors are expected to achieve certain outcomes that provide value for money for customers. One of these outcomes is operational effectiveness, which requires continuous improvement in productivity and cost performance by distributors and that utilities deliver on system reliability and quality objectives. The OEB uses processes to hold all utilities to a high standard of efficiency and effectiveness.

The OEB has a proactive performance monitoring framework that inherently protects electricity customers from harm related to service quality and reliability and has established the mechanisms to intervene if corrective action is warranted. The OEB will be informed by the metrics that are used to evaluate a distributor's performance in assessing a proposed consolidation transaction.

All of these measures are in place to ensure that distributors meet expectations regardless of their corporate structure or ownership. The OEB assesses applications for consolidation within the context of this regulatory framework.

4.2 The "No Harm" Test

The "no harm" test assesses whether the proposed transaction are expected to have an adverse effect on the matters prescribed in the OEB's statutory objectives. In assessing "no harm", both quantitative (e.g., cost) and qualitative information (e.g., customer services) included in the application will be weighed by the OEB in consideration of the circumstances of each case to determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the matters prescribed in the OEB's objectives.

Qualitative and quantitative forecasts of expected efficiencies and savings provided in a consolidation application offer context to measure what a consolidated entity believes can be achieved as a result of a transaction. The OEB uses this information to assess a proposed transaction. At the time of the rebasing application of the consolidated entity, the OEB reviews the achieved results and the consolidated entity's rate-setting proposals to determine whether they are satisfactory, or if any corrective measures need to be taken (e.g., potential disallowance of proposed costs at rebasing).

While the OEB has broad statutory objectives, in applying the “no harm” test, the OEB has primarily focused its review on impacts of the proposed transaction on price and quality of service to customers, and the cost effectiveness, economic efficiency and financial viability of the electricity distribution sector. The OEB considers this to be an appropriate approach, given the performance-based regulatory framework under which all regulated distributors are required to operate and the OEB’s existing performance monitoring framework. This does not preclude applicants from detailing how a proposed transaction may help promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario and help facilitate innovation in the electricity sector generally. However, the OEB typically does not consider consolidations to have adverse impacts in respect of these other objectives, and the OEB has guidelines and initiatives to address them.

For example, in March 2024, the OEB issued the *Non-Wires Solutions Guidelines for Electricity Distributors* which replaces the OEB’s Conservation and Demand Management Guidelines for Electricity Distributors.[7] With guidelines in place, the OEB is satisfied that its objective to promote electricity conservation and demand management will not be adversely affected by a consolidation.

The OEB has and will continue initiatives to facilitate innovation in the electricity sector. An example includes the OEB’s Innovation Sandbox which supports pilot projects testing new activities, services and business models in Ontario’s electricity and natural gas sectors. The OEB does not consider that its objective to facilitate innovation will be adversely affected by consolidations. The OEB is of the view that consolidations may help facilitate innovation by better enabling distributors to address challenges in an evolving electricity industry.

[7] EB-2024-0118, *Non-Wires Solutions Guidelines for Electricity Distributors*, March 28, 2024. The change in name reflects the fact that non-wires solutions to address system needs can encompass a broader range of solutions than traditional conservation and demand management, including, but not limited to, third-party distributed energy resources such as energy storage and distributed (embedded) generation. Certain aspects of the NWS Guidelines are also relevant to rate-regulated transmitters and natural gas distributors (p. 3)

4.3 Scope of the Review

The factors that the OEB will consider in detail in reviewing a proposed transaction are as follows:

Objective 1 – Protect consumers with respect to price and the adequacy, reliability and quality of electricity service

Price

A simple comparison of current rates between consolidating distributors does not reveal the potential for lower cost service delivery. These entities may have dissimilar service territories, each with a different customer mix resulting in differing rate class structure characteristics. For these reasons, the OEB will assess the underlying cost structures of the consolidating utilities. As distribution rates are based on a distributor's current and projected costs, it is important for the OEB to consider the impact of a transaction on the cost structure of consolidating entities both now and in the future, particularly if there appear to be significant differences in the size or demographics of consolidating distributors. A key expectation of the RRF is continuous improvement in productivity and cost performance by distributors. The OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers.

Consistent with past decisions,[8] the OEB will not consider temporary rate decreases proposed by applicants, and other such temporary provisions, to be demonstrative of "no harm" as they are not supported by, or reflective of the underlying cost structures of the entities involved and may not be sustainable or beneficial in the long term. In reviewing a transaction, the OEB must consider the long-term effect of the consolidation on customers and the financial sustainability of the sector.

To demonstrate "no harm", applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been. The OEB will take into consideration any evidence which highlights expected impacts to cost structures from an evolving energy sector relative to the status quo, with detailed supporting rationale. The OEB will weigh both the quantitative and qualitative impacts of a proposed transaction and consider the circumstances of each case to

[8] For example, Hydro One Inc./Norfolk Power Distribution Inc. – OEB File No. EB-2013-0196/EB-2013-0187/EB-2013-0198, Hydro One Inc./Haldimand County Hydro Inc. – OEB File No. EB-2014-0244

determine whether the proposed transaction, on a net basis, has a positive or neutral effect on the attainment of the OEB's objectives.

The OEB considers revenue requirement to be a suitable proxy for cost structure comparisons between the proposed consolidating utilities and the status quo scenario (i.e., in the absence of the transaction).

A utility is expected to provide a forecast of revenue requirements for both the consolidation and status quo (separate LDCs) scenarios over the deferred rebasing period and including the future post-consolidation rebasing year. This forecast should consider, among other factors, the forecasted cumulative impact of price cap adjustments and growth. Assumptions used in these forecasts must also be clearly documented in the application (e.g., inflation, productivity, cost of service adjustments, evolving energy sector, expected Incremental Capital Module requests (timing and quanta), if applicable, etc.).

Presentations of cost structure analyses should be based on a utility's assessment of its future operating needs over its elected deferred rebasing period. Factors including, but not limited to potential historical underinvestment, safety considerations and an evolving energy sector all may contribute to anticipated changes in underlying cost structures.

In a consolidation application, this forecast cost-related analysis provides evidence relating to one aspect of the "no harm" test based on current information and also is one component of what the OEB will use to assess whether to approve a transaction.

Equally important are the achieved results of efficiencies, synergies, and any unanticipated cost increases, etc., to a distributor's underlying cost structure. At the time of rebasing, the OEB expects the consolidated utility to produce an updated analysis comparing the revenue requirements for the consolidated entity and the status quo (separate LDCs), based on information available on a reasonable efforts basis.[9]

It is understood that the environment in which utilities operate may have evolved from the time of the consolidation application to the rebasing application. The intent of providing forecasts with associated assumptions as part of the consolidation application, and then updating those forecasts at rebasing, is to assist the utility, the OEB and other stakeholders in understanding what may have changed during the deferred rebasing period. This, in turn, will aid in parties' and the OEB's assessment of the reasonableness of the consolidated entities' revenue requirement at the time of the rebasing application. The OEB

[9] This would, of necessity, include forecasts for the bridge year (the last year of the deferred rebasing) and the rebasing test year.

panel deciding on the rebasing application will take that evidence into consideration when making its determinations.

Details of the OEB's expectations regarding these matters are outlined in the filing requirements attached as Schedule 2.

While the implications to all customers will be considered, for an acquisition, the primary consideration will be the expected impact on customers of the acquired utility.

Adequacy, reliability and quality of electricity service

In considering the impact of a proposed transaction on the adequacy, quality and reliability of electricity service, and whether the "no harm" test has been met, the OEB will be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard.

The OEB's *Report of the Board: Electricity Distribution Systems Reliability Measures and Expectations*, issued on August 25, 2015 sets out the OEB's expectations on the level of reliability performance by distributors. In the Report, the OEB noted that continuous improvement will be demonstrated by a distributor's ability to deliver improved reliability performance without an increase in costs, or to maintain the same level of performance at a reduced cost.

Under the OEB's regulatory framework, utilities are expected to deliver continuous improvement for both reliability and service quality performance to benefit customers. This continuous improvement is expected to continue after a consolidation and will continue to be monitored for the consolidated entity under the same established requirements.

Because the enhancement of system reliability and hardening in light of climate change and an evolving energy sector are becoming more important, utilities are encouraged to discuss in their applications how a proposed consolidation transaction will provide benefits for consumers in these areas.

Objective 2 – Promote economic efficiency and cost effectiveness and to facilitate the maintenance of a financially viable electricity industry

The impact that the proposed transaction will have on economic efficiency and cost effectiveness (in the distribution or transmission of electricity) will be assessed based on the applicant's identification of the various aspects of utility operations where it expects sustained operational efficiencies, both quantitative and qualitative.

The impact of a proposed transaction on the acquiring utility's financial viability for an acquisition, or on the financial viability of the consolidated

entity in the case of a merger will also be assessed. The OEB's primary considerations in this regard are:

- The effect of the purchase price, including any premium paid above the historic (book) value of the assets involved
- The financing of incremental costs (transaction and transition costs) to implement the consolidation transaction

In the Combined Proceeding decision, the OEB made it clear that the selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company. This remains the relevant test. While there may not be a premium involved with mergers, the OEB will nevertheless consider the financial viability of the newly consolidated entity.

Electricity distribution rates are currently based on a return on the historic value of the assets. If a premium has been paid above the historic value, this premium is not recoverable through distribution rates and no return can be earned on the premium. A shareholder may recover the premium over time through savings generated from efficiencies of the consolidated entity. In considering the appropriateness of purchase price or the quantum of the premium that has been offered, only the effect of the purchase price on the underlying cost structures and financial viability of the regulated utilities will be reviewed. Specifically, the OEB will test the financial ratios and borrowing capacity of the resulting entity, as the improvement in financial strength is one of the expected underlying benefits of consolidation.

Incremental transaction and transition costs are not generally recoverable through rates. If an applicant considers that it has unique circumstances which may warrant recovery of transaction and/or transition costs, evidence and justification to demonstrate such unique circumstances should be brought forth in the consolidation application for OEB consideration.

Transaction costs can be defined as costs incurred that are directly attributable to the development of the proposed transaction and its execution.

Transition costs can be defined as costs that are attributable to the consolidation, and often relate to being able to operationalize efficiencies that the consolidation enables. At some point, further efforts to execute operational savings should be considered "normal business" operations of the consolidated utility, and not transitional costs and efficiencies.

Distributors have indicated that transaction and transition costs are significant and that recovery of these costs can be a barrier to consolidation. To address distributors' concerns, the OEB's policy provides the opportunity for distributors to defer rebasing for a period up to ten years following the closing

of a consolidation transaction.[10] This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain achieved savings for a period of time to help offset the costs of the transaction.

Most transaction and transition costs from recent consolidation applications have been expensed. Since expensed transition and transaction costs are temporary and time-limited, it is presumed that they will not be a consideration at the next rebasing application (and that they were recovered through savings achieved during the deferred rebasing period or from shareholders).

If a utility has capitalized any assets it has classified as part of the utility's "transition" costs (i.e., capitalized costs intended to integrate operations) these will be subject to review, on a case-by-case basis. The nature of the expenditure and whether it would have occurred regardless of the consolidation will be reviewed, in addition to the typical review for need and prudence. The OEB will determine whether it is appropriate to include the remaining book value of these capitalized costs in the opening test year rate base or whether there was an expectation that these costs be recovered through the consolidation savings.

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The OEB considers that certain aspects of a consolidation transaction are not relevant in assessing whether the transaction is in the public interest, either because they are out of scope, or because the OEB has other approaches and instruments for ensuring that statutory objectives will be met. Accordingly, the OEB will not require applicants to file evidence on the following matters as part of a consolidation application.

1. Deliberations, activities, and documents leading up to the final transaction agreement

The question for the OEB is neither the why nor the how of the proposed transaction. The application of the "no harm" test is limited to the effect of the proposed transaction before the OEB when considered in light of the OEB's statutory objectives.[11]

It is not the OEB's role to determine whether another transaction, whether real or potential, can have a more positive effect than the transaction that has been placed before the OEB. Accordingly, the OEB will not consider, whether

[10] Established in the *Report of the Board: Rate-making Associated with Distributor Consolidation*, March 26, 2015

[11] EB-2013-0196/EB-2013-0187/EB-2013-0198, Hydro One Inc./Norfolk Power Distribution Inc. Decision and Order and Procedural Order No. 8; EB-2014-0213, Hydro One Inc./Woodstock Hydro Services Inc. Decision and Procedural Order No. 4

a purchasing, selling, or amalgamating utility could have achieved a better transaction than that being put forward for approval in the application.

The OEB will not consider issues relating to the overall merits or rationale for applicants' consolidation plans nor the negotiating strategies or positions of the parties to the transaction. The OEB will not consider issues relating to the extent of the due diligence, the degree of public consultation or public disclosure by the parties leading up to the filing of the transaction with the OEB.

Applicants and stakeholders should not file any of the following types of information as they are not considered relevant to the proceeding:

- Draft share purchase agreements and other draft confidential agreements and documents utilized in the course of the negotiation process
- Negotiating strategies or conduct of the parties involved in the transaction
- Details of public consultation prior to the filing of the application

2. Implementing public policy requirements for promoting conservation, facilitating innovation

The OEB's performance-based regulation, which includes performance monitoring and reporting based on standards, combined with the regulatory instruments of guidelines, codes and licences, establishes a framework for success in achieving public policy requirements. A utility that does not meet established performance expectations is subject to corrective action by the OEB. Given these means for ensuring that public policy objectives are met by all regulated entities, the OEB is satisfied that the "no harm" test will be met for these objectives following a consolidation and there is no need or merit in further detailed consideration as part of a consolidation transaction. For these reasons, no evidence is required to be filed for these issues. As stated previously, this does not preclude applicants from identifying how a proposed transaction could promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario and facilitate innovation in the electricity sector generally.

3. Prices not related to a utility's own costs

The OEB's review is limited to the components of the distribution business and the costs and services directly under a distributor's control. For example, one of the mandates of a distributor is to pass-through certain wholesale market and commodity related costs to customers. These costs are passed through and not part of a utility's underlying costs to serve its customers. Accordingly, the prices of these services are not considered by the OEB in its review of a consolidation application.

However, if the consolidation or a decision by the consolidated utility post-consolidation will affect how the utility will track and bill for pass-through costs by rate zones, the proposal for this must be provided in the consolidation application. For example, changes in wholesale metering configuration.

5. RATE-MAKING CONSIDERATIONS ASSOCIATED WITH CONSOLIDATION APPLICATIONS

The OEB's policies on rate-making matters associated with consolidation in the electricity distribution sector were originally set out in two reports of the OEB. The first report titled "*Report of the Board: Rate-making Associated with Distributor Consolidation*" issued on July 23, 2007 (2007 Report) was supplemented by the 2015 Report, issued under the same name.[12]

This section of the Handbook consolidates information that is provided in these two reports, and incorporates any changes, additions or clarifications resulting from the OEB's consultation launched in 2023.[13] This section of the Handbook identifies the key rate-making considerations expected to arise in consolidation transactions. This Handbook replaces the OEB's consolidation policy documents on rate-making matters associated with consolidation in the electricity distribution sector (2007 Report and 2015 Report), as well as the 2016 Handbook. Applicants, however, may wish to review both reports in preparing their applications for both the consolidation transaction and subsequent rate application for background information.

Rate-setting following a consolidation will not be addressed in an application for approval of a consolidation transaction unless there is a rate proposal that is an integral aspect of the consolidation e.g., a temporary rate reduction. Rate-setting for the consolidated entity will be addressed in a separate rate application, in accordance with the rate setting policies established by the OEB. The OEB's review and approval of a consolidated utility's revenue requirement, and the establishment of distribution rates paid by customers, occurs through an open, fair, transparent and robust process ensuring the protection of customers.

[12] *Report of the Board: Rate-Making Associated with Distributor Consolidation*, March 26, 2015

[13] EB-2023-0188, Evaluation of Policy on Utility Consolidations

Rate-Setting Policies

The rate making considerations relating to consolidation that applicants and parties need to be aware of are:

- Deferred Rebasing
    - Multiple Transactions
- Early Termination of Pre-Consolidation Rate-Setting term
- Early Termination or Extension of Deferred Rebasing Period
- Rate Setting During Deferred Rebasing Period
- Off Ramp
- Earnings Sharing Mechanism
- Incremental Capital Investments During Deferred Rebasing Period
- Future Rate Structures and Rate Harmonization
- Accounting Matters

5.1 Deferred Rebasing

The setting of rates for a consolidated entity using a cost of service methodology or a Custom Incentive Rate-setting method (both referred to in this document as rebasing of rates) involves a detailed assessment by the OEB of a utility's underlying costs. A consolidated entity is required to file a separate application with the OEB under section 78 of the OEB Act for a rebasing of its rates. This typically takes place at some point in time following the OEB's approval of a consolidation.

To encourage consolidations and provide distributors with the flexibility to manage their own circumstances, the OEB provides consolidating distributors with an opportunity to offset transaction and transition costs with achieved savings. The OEB has previously recognized that providing a reasonable opportunity to use savings to at least offset the costs of a MAADs transaction is an important factor in a utility's consideration of the merits of a given consolidation initiative. The OEB permits consolidating distributors to defer rebasing for up to ten years from the closing of the transaction.[14]

The extent of the deferred rebasing period is at the option of the distributor and no supporting evidence is required to justify the selection of the deferred rebasing period subject to the minimum requirements set out below.

[14] *Report of the Board: Rate making Associated with Distributor Consolidation*, March 26, 2015, p. 6

While the OEB has determined that allowing a maximum 10-year deferred rebasing period is appropriate to incent consolidation, there must be an appropriate balance between the incentives provided to utilities and the protection provided to customers. The OEB will therefore require consolidating distributors to identify in their consolidation application the specific number of years for which they choose to defer rebasing. Distributors must select a definitive timeframe for the deferred rebasing period. This will allow the OEB to assess any proposed departure from this stated plan. Applicants must also identify the rate year and effective date for rebased rates at the end of the elected deferred rebasing period. This will provide greater certainty for planning purposes and will better inform ratepayers of the utility's intentions.

In addition, distributors cannot select a deferred rebasing period that is shorter than the shortest remaining term of one of the consolidating distributors, subject to the requirements set out in the section "Early Termination of Pre-Consolidation Rate-setting Term".

The OEB requires that for any elected deferral period longer than five years, the OEB will require the consolidating entity to implement an earnings sharing mechanism. More details are provided in the Earning Sharing Mechanism section of this Handbook.

Further, if a consolidating entity elects to defer rebasing for more than five years (i.e., six to ten years), a mid-term report must be filed detailing the progress to date on steps the distributor has taken toward integration. At the time of the consolidated entity's first rebasing application post-consolidation, the OEB expects the consolidated utility to provide updates to this information based on achieved results, including for any period not covered by the initial mid-term report. For distributors that elect to defer rebasing for less than five years, a similar report is required, but only at the time of post-consolidation rebasing application. More details are provided in the Post-Consolidation Monitoring and Reporting section of this Handbook.

The OEB will continue to make use of its monitoring tools to determine whether the results of MAADs transactions for consumers and the industry warrant additional consumer protection measures. If so, future changes to the policy may be considered.

Multiple Transactions

Future consolidations may involve several consolidating distributors as well as the possibility of successive consolidation transactions by a previously consolidated entity. While a distributor should have some flexibility with respect to its deferred rebasing period if it enters a further consolidation

transaction before the end of the deferral period, this flexibility should be limited to protect the interest of consumers. A consolidated distributor retaining savings on a continuing basis rather than sharing any savings with ratepayers and delaying a review of costs, operations and rates by the OEB would not be in the public interest.

Schedule A outlines the OEB's filing requirements relating to the deferred rebasing period for a proposed transaction in which a distributor already in a deferred rebasing period (as a result of a previously approved consolidation) amalgamates with or acquires another distributor not in a deferred rebasing period as a result of a prior consolidation. The OEB's requirements in this scenario remove the potential for the deferral of rebasing indefinitely.

The OEB recognizes that the situation documented above is one of many that can be encountered in the future. It is not prudent or reasonable for the OEB to reflect all scenarios without consideration of evidence. Each transaction may offer the potential for different benefits that vary in nature and timing. For circumstances not covered in this Handbook, the OEB needs to ensure ratepayers are not disadvantaged. In some consecutive consolidations entered near the end of a deferral period, extending the deferral period may not be appropriate. The onus is on the applicant(s) to justify any proposal for their deferred rebasing period involving multiple transactions and demonstrate that ratepayers will not be adversely affected.

5.2 Early Termination of Pre-Consolidation Rate-setting Term

At the time distributors first enter into a consolidation transaction, consolidating distributors may be on any one of the rate-setting mechanisms and may not necessarily be using the same rate-setting mechanism or have the same termination dates.

A consolidated entity may apply to the OEB to rebase its rates as a consolidated entity through a cost of service or Custom IR application following the expiry of the original rate-setting term of at least one of the consolidating entities and once the selected deferred rebasing period has concluded. If, however, a consolidated entity wishes to rebase its rates prior to the end of the pre-consolidation rate-setting term of the distributor that has the earliest termination date, the consolidated entity must demonstrate the need for this "early rebasing" as part of the early rebasing application.

The OEB established its approach to early rebasing in a letter dated April 20, 2010 and reiterated it in the RRF. The OEB expects a distributor that seeks to have its rates rebased earlier than scheduled to clearly demonstrate why early rebasing is required and why and how the distributor cannot adequately

manage its resources and financial needs during the remaining years of its current rate term.

5.3 Early Termination or Extension of Selected Deferred Rebasing Period

The OEB considers that consolidations can provide for greater efficiencies and benefits to customers and is committed to reducing regulatory barriers to consolidations. Therefore, the OEB will be open to requests for early termination of extended deferral periods. During the deferred rebasing period, specifically not earlier than during year four, a consolidated entity may apply to the OEB to terminate its deferral period and rebase the consolidated entity (if the deferral period initially elected is longer than four years).[15] The application will allow the OEB to establish rates that reflect the efficiencies from the consolidation transaction.

A consolidated entity that seeks to rebase earlier than its elected deferral period should inform the OEB of its intent and provide sufficient reasons for the request. Examples for such a request may include an Asset Condition Assessment that shows significant investment is needed (not known at the time of consolidation), or a significant new requirement imposed that cannot be addressed through existing means.

A consolidating entity that selected a deferred rebasing period of less than ten years in its application may seek to extend its deferred rebasing period. However, the OEB notes that if a consolidated entity seeks to extend its deferred rebasing period (up to the ten-year maximum), it must file supporting and compelling rationale for the extension. The OEB will consider the reasons and information provided, including other relevant factors such as the distributor's financial and service quality performance. An example of a circumstance in which it may be reasonable to make such a request is if a consolidated utility needs a longer than expected deferral period to offset transaction and transition costs with efficiency savings.

If a consolidated entity seeks to amend (i.e., shorten or extend) its deferred rebasing period, the OEB will consider whether approval of such a request is in the public interest.

5.4 Rate Setting during Deferred Rebasing Period

Under the OEB's RRF, there are three rate-setting options: Price Cap Incentive Rate-Setting (Price Cap IR or PCIR), Custom Incentive Rate-

[15] Based on the assumption that the last rebasing year was the year prior to the first full year of consolidation, "after year four" would align with the OEB's five-year rate plan if a utility chose to rebase in the first year it had an opportunity to do so.

Setting (Custom IR or CIR) and Annual Incentive Rate-Setting Index (Annual IR Index or AIRI). The term of the Price Cap IR and Custom IR options is normally five years. The Annual IR Index option has no specific term.

Consolidating distributors may be on any one of the rate-setting mechanisms and may not necessarily be using the same rate-setting mechanism or have the same termination dates. Rates will be set for a distributor who is a party to a consolidation transaction during any deferred rebasing period after the distributor's original incentive rate-setting plan has concluded as follows:

- A distributor on Price Cap IR, whose plan expires, would continue to have its rates based on the Price Cap IR adjustment mechanism during the remainder of the deferred rebasing period.
- A distributor on Custom IR, whose plan expires, would move to having rates based on the Price Cap IR adjustment mechanism during the remainder of the deferred rebasing period.
- A distributor on the Annual IR Index plan may move to the Price Cap IR plan[16] or may continue to have rates based on the Annual IR Index.

Table 1 below illustrates six potential scenarios for rate-setting during the deferred rebasing period, assuming the consolidation of two distributors. The table also sets out the conditions that must be met by a consolidated entity that elects to rebase its rates. The table provides guidance on rebasing for the first rate-setting period after the consolidation but does not provide guidance on subsequent rebasing applications in the event of multiple transactions. While Table 1 is intended to illustrate a situation of two consolidating distributors, as stated above, the OEB is aware that future consolidations may involve several consolidating distributors as well as the possibility of multiple successive consolidation transactions by a single consolidated entity. For unique circumstances, the OEB expects that rate-setting proposals will need to be assessed on a case-by-case basis.

[16] This became effective with 2023 rates to provide a further incentive for distributors considering consolidation. See OEB's December 1, 2021 letter - *Applications for 2023 Electricity Distribution Rates*. A distributor on the Annual IR Index plan and not in a current deferral period arising out of a consolidation must still rebase before moving to the Price Cap IR plan.

Table 1. Rate-Setting Options During the Deferred Rebasing Period

Going in Rates. As of the date of the closing of the transaction. Assumes two distributors. Assumes no amendments to originally elected deferred rebasing period sought.

	Both on PCIR	One on PCIR and one on CIR	Both on CIR
Deferral Period	Continue with current plans for chosen deferred rebasing period.	LDC on PCIR continues on current plan for chosen deferred rebasing period and LDC on CIR moves to PCIR for the remaining years of chosen deferred rebasing period, following the expiration of the CIR term.	Continue with current plans. Once each term expires, each LDC will move to PCIR for the remaining years of the chosen deferred rebasing period.
	Or	Or	Or
Rebasing Options	Rebase as a consolidated entity following the expiration of one of the entities' term and once the selected deferred rebasing period has concluded.	LDC on PCIR continues on current plan. If its term expires in advance of the expiration of the other LDC's CIR term the consolidated entity may rebase once the selected deferred rebasing period has concluded.	Continue with current plans. Once the earlier of the two terms expires the consolidated entity may rebase once the selected deferred rebasing period has concluded.
		Or	
		If the term for the LDC on CIR expires first, the consolidated entity may rebase following the expiration of the CIR term and once the selected deferred rebasing period has concluded.	
	One on PCIR and one on AIRI	**Both on AIRI**	**One on AIRI and one on CIR**
Deferral Period	Continue with current plans for chosen deferred rebasing period. OR LDC on PCIR continues on current plan and LDC on AIRI may move to PCIR	Continue with current plans for chosen deferred rebasing period OR one or both LDCs may move to PCIR	LDC on AIRI continues on current plan for chosen deferred rebasing period or moves to PCIR and LDC on CIR moves to PCIR for the remaining years of chosen deferred rebasing period, following the expiration of the CIR term.
	Or	Or	Or
Rebasing Options	Consolidated entity may rebase once the selected deferred rebasing period has concluded.	Consolidated entity may rebase once the selected deferred rebasing period has concluded.	Consolidated entity may rebase once the selected deferred rebasing period has concluded.

5.5 Off Ramp

As set out in the OEB's RRF, each incentive rate-setting method includes an annual return on equity (ROE) dead band of ±300 basis points. When a distributor performs outside of this earnings dead band, a regulatory review may be initiated by the OEB. The OEB requires consistent, meaningful and timely reporting to effectively monitor utility performance and determine if expected outcomes are being achieved. The OEB's performance monitoring framework allows the OEB to take corrective action if required, including the possible termination of the distributor's rate-setting method and requiring the distributor to have its rates rebased.

The dead band of ±300 basis points on ROE continues to apply to utilities who have deferred rebasing due to consolidation. For utilities who defer rebasing up to five years, the OEB may initiate a regulatory review if the earnings are outside of the dead band. For utilities deferring rebasing beyond five years, an earnings sharing mechanism is required above ±300 basis points as discussed in the next section.

5.6 Earnings Sharing Mechanism (ESM)

Consolidating entities that propose to defer rebasing beyond five years, must implement an ESM for the period beyond five years.[17] The ESM is designed to protect customers and ensure that they share in any increased benefits from consolidation during the deferred rebasing period.

Under the ESM, excess earnings are shared with consumers on a 50:50 basis for all earnings that are more than 300 basis points above the consolidated entity's annual ROE. Earnings will be assessed each year once audited financial results are available and excess earnings beyond 300 basis points will be shared with customers annually. No evidence is required in support of an ESM that follows the form set out in the 2015 Report.

The 300-basis point dead band is a well-established tool that the OEB has used for various purposes for many years. It is consistent with the incentive rate-setting policy for off-ramps. It is also used in the means test for advanced capital modules/incremental capital modules, and the means test for recovery of balances recorded in Account 1509 - Impacts Arising from the COVID-19 Emergency.[18] In addition, the OEB sees merit in using a default

[17] 2016 MAADs Handbook, p. 16

[18] *Report of the OEB, New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, September 18, 2014, p.15 (EB-2014-0219), and *Report of the OEB, Regulatory Treatment of Impacts Arising from the COVID-19 Emergency*, p.15 (EB-2020-0133)

ESM approach as a starting point because using a consistent initial approach for all consolidated utilities can lead to regulatory efficiencies.

There are numerous types and structures of consolidation transactions, and there can be significant differences between utilities involved in a transaction. The ESM as set out in the 2015 Report may not achieve the intended objective of customer protection for all types of consolidation proposals. For these cases, applicants are invited to propose an ESM that better achieves the objective of protecting customer interests during the deferred rebasing period.

An ESM balances the opportunity for the consolidated utility to accrue net savings to its shareholders to offset the consolidation costs while continuing to protect ratepayer interests. Regulatory efficiencies can be gained if any excess earnings recorded in an ESM account are requested for disposition in the consolidated utility's next rebasing application instead of in the annual Incentive Rate Mechanism (IRM) application. An ESM account is a Group 2 account - requesting the disposition of the ESM account balance at rebasing would be consistent with the OEB's disposition policy for Group 2 accounts.[19] A prudence review of the account for all years of the ESM can be conducted at the time of the rebasing application, rather than reviewing balances annually in an IRM rate application, which is intended to be a mechanistic process. Furthermore, the results of the ESM calculation can be considered along with any other MAADs considerations required at the time of the next rebasing application. If the audited ESM balances covering all applicable years of the rate term are not available at the time of the next rebasing application, then the outstanding balance(s) shall be brought forward for disposition in the subsequent IRM application(s) following the next rebasing application. For example, the audited bridge year balance in the ESM account may not be available at the time of rebasing.

The ESM shall be calculated annually on a calendar-year basis. The ESM calculation should include all transaction and transition costs, as well as savings. An annual ESM calculation rather than a cumulative ESM calculation should be used to determine ESM balances that are requested for disposition at rebasing.

Utilities should provide an update of the audited ESM balance in each of their IRM or Custom IR Update applications for all applicable years of the rate term.

Many consolidations close on dates that are not at calendar year end. Calculating ESMs on a calendar-year basis, regardless of when the MAADs transaction closed, would be efficient and practical as the data required

[19] EB-2008-0046, *Report of the OEB, on Electricity Distributors' Deferral and Variance Account Review Initiative (EDDVAR),* July 31, 2009, p.13

would align with the consolidated utility's financial reporting period, which is subject to the utility's financial statement external audit.

For purposes of ESM calculations, calendar year data shall be used regardless of the actual closing date of the consolidation**.** If a MAADs transaction closes prior to June 30 in a given year, the ESM shall be applied starting at January 1 of the same calendar year. If the MAADs transaction closes after June 30 in a given year, the ESM shall be applied starting at January 1 of the subsequent calendar year.[20]

Regarding transition and transaction costs, to the extent they continue to be incurred in the years the ESM is calculated, these costs shall be included in the ESM calculation for the years that the ESM applies. This symmetrical treatment allows for ratepayer protection while acknowledging utility costs.

At the time of consolidation, the consolidating utilities may also have differing deemed ROEs. The most appropriate way to determine a deemed ROE for the purposes of the ESM calculations for the consolidated entity shall be to weight the approved ROEs for each utility from their respective last rebasing applications, by the deemed equity component of the rate base of each utility in their last rebasing applications. The OEB has approved this approach in prior cases and does not see any reason to deviate from this approach.[21]

An accounting order shall be established in the MAADs proceeding, to take effect on the closing date of the MAADs transaction, subject to the calendar year data considerations discussed above. The OEB considers it more efficient to establish the ESM account in the MAADs proceeding, rather than revisiting the issue and establishing the account in a subsequent rate application prior to the effective date of the ESM.

Consistent with the filing requirements for cost of service applications, the accounting order must include a description of the mechanics of the account; examples of general journal entries; and the proposed account duration.[22]

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[20] For example, if the ESM is effective starting in year six of the deferred rebasing period and the MAADs transaction closed on March 30, the ESM shall be calculated starting January 1 of year six. On the other hand, if the MAADs transaction closed August 1, the ESM shall be calculated starting January 1 of year seven.

[21] For example, see EB-2021-0280, Decision and Order, Brantford Power Inc. and Energy + Inc. MAADs, March 17, 2022, p. 13; and EB-2022-0006, Decision and Order, Kitchener-Wilmot Hydro Inc. Waterloo North Hydro Inc. MAADs, June 28, 2022, p. 21

[22] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, p. 67

5.7 Incremental Capital Investments during Deferred Rebasing Period

The Incremental Capital Module (ICM) is an additional rate-setting mechanism under the Price Cap IR option. The ICM allows for funding of significant capital investments for discrete projects that are not part of typical annual capital programs during the period of incentive regulation between the cost of service applications to rebase rates. The details of the mechanism are described in the *Report of the Board: New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, issued on September 18, 2014 (2014 ACM Report) and in the *Report of the OEB: New Policy Options for the Funding of Capital Investments: Supplemental Report*, issued on January 22, 2016. To qualify for an ICM, the capital project must satisfy a materiality threshold to demonstrate that the incremental capital amounts are beyond the normal level of capital expenditures expected to be funded by existing rates, including the effect of customer and load growth.

Electricity distributors are eligible to apply for ICMs if they are on the:

1. Price Cap IR plan;[23] or
2. Annual IR plan and are in a MAADs deferred rebasing period.

Electricity distributors on Price Cap IR and in a deferral period associated with a utility consolidation that request ICM funding are expected to file an updated Distribution System Plan (DSP) if their ICM application falls in a rate year that is beyond the planning horizon of their previous DSP.[24]

The 2014 ACM Report states that projects proposed for incremental capital funding during the IR term must be discrete projects, and not part of typical annual capital programs.[25] To enhance the efficiency of the regulatory process and to provide a further incentive for distributors considering consolidation, the OEB updated its ICM policy for responding to capital investment needs of electricity distributors that select an extended deferred rebasing period (beyond five years) under the OEB's MAADs policy. Specifically, the OEB provided additional flexibility for these electricity distributors to apply for incremental capital funding for an annual capital program during the extended rebasing period (i.e., years six to ten) if they can demonstrate the following:

- An urgent need for such additional funding that is based on new information that has arisen since the utility's most recent rebasing application related to the management of risk associated with asset

[23] The *OEB's December 1, 2021 letter* noted that the ICM is not available to electricity distributors on Price Cap IR for any deferral period not associated with a utility consolidation.

[24] OEB Letter, Applications for 2023 Electricity Distribution Rates, December 1, 2021, p. 3

[25] 2014 ACM Report, p. 13

condition, reliability and quality of service and public safety

- History of good utility practice in capital planning, capital program management and asset maintenance
- How the proposed ICM investment addresses customer needs and preferences and delivers benefits to customers
- Exhaustion of other available options to manage its costs within the envelope provided by the existing price cap or another applicable formula.[26]

The February 2022 letter states that electricity distributors that are in an extended MAADs deferred rebasing period would still have to meet the remaining ICM requirements, including the maximum eligible incremental capital envelope calculation, the tests of prudence, causation and materiality, and the use of the existing ICM Excel template.

With respect to the "project-specific materiality" criterion, the OEB's 2014 ACM Report states that minor expenditures in comparison to the overall capital budget should be considered ineligible for ACM or ICM treatment.[27] Funding requests for annual programs are not for individual projects as anticipated when the ICM requirements were set out in the 2014 ACM Report. Whether incremental funding requests for annual capital programs for a utility in a deferred rebasing period are subject to this "project specific materiality" criterion will be considered by the OEB on a case-by-case basis, and if applicable would generally be based on the merged entity, not the individual rate zones.

A distributor in the midst of the Custom IR plan at the time of the transaction that consolidates with an entity operating under a Price Cap IR or an Annual IR Index may only apply for an ICM for investments incremental to its Custom IR plan. The rules that apply to a specific rate-setting method continue to apply even following a consolidation of distributors. To be specific, an ICM would not be available for the rates in the service area for which the Custom IR plan term applies until the term of the Custom IR ends and Price Cap IR applies. Part of a review of any ICM request by the consolidated entity, where one of the distributors was on a Custom IR, would include a test to determine whether the requested amounts for ICM recovery were separate from the amounts that had been included in the distributor's Custom IR plan.

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[26] *OEB Letter*, *Incremental Capital Modules During Extended Deferred Rebasing Periods*, February 10, 2022

[27] *Report of the Board: New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, September 18, 2014, p. 17

Materiality thresholds for the ICM will be calculated based on the individual distributors' accounts and not that of the consolidated entity. This policy statement pertains to the ICM materiality threshold formula that is calculated based on depreciation, not the project-specific materiality test based on a comparison of an expenditure to the overall capital budget.

In the ACM Report, the OEB adopted an approach establishing the following three principles with respect to the eligibility of a capital project for ACM/ICM treatment:

- minor expenditures in comparison to the overall capital budget should not be considered eligible for ICM treatment
- a certain degree of project expenditure over and above the threshold calculation is expected to be absorbed within the total capital budget
- the project amount being proposed for recovery should be significant within the context of the distributor's overall capital budget

Any known or reasonably anticipated future ICMs should be documented in a consolidation application. A description of the nature of the project and expected timing should also be provided. The intent of the documentation is to assist stakeholders and the OEB in assessing an applicants' forecasted cost structure (i.e. revenue requirement) analysis provided in a consolidation application. This requirement does not preclude consolidated entities from seeking future ICM funding not identified at the time of the consolidation application. The OEB will consider additional ICMs on the same basis as any ICMs noted in the consolidation application.

If, during its deferred rebasing period, a consolidated utility finds that it has significant capital needs not easily accommodated by an ICM, it should consider rebasing.

The OEB intends to review the ICM/ACM policy applicable to all utilities, including those that are part of a consolidation. That review may result in amendments to the policy.

5.8 Future Rate Structures and Rate Harmonization

Objective 1 of the OEB Act is "to inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service." With respect to price, the OEB's review of underlying cost structures supports the OEB's role in regulating price for the protection of consumers. The OEB has previously stated that a downward impact on cost structures would tend to decrease rates, whereas an upward impact on cost structures

would tend to increase rates. This will occur regardless of what decision is taken concerning rate harmonization at the time of rebasing.[28]

As stated previously, to demonstrate "no harm", applicants must show that there is a reasonable expectation, based on underlying cost structures, that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been. Further, it is important for the OEB to consider the impact of a transaction on the cost structure of consolidating entities both now and in the future, particularly if there appear to be significant differences in the size or demographics of consolidating distributors.

While not a requirement, applicants may wish to discuss in their consolidation application any preliminary plans for future rate structures (e.g., anticipated new rate classes, explanation of cost allocation beyond the deferred rebasing period) of the consolidated entity, where such plans are anticipated to impact the applicant's ability to support its claim that "no harm" would result from the approval of a transaction. Consideration and discussion in a consolidation application of how these matters may be addressed at the time of a rebasing application may help assist the OEB in its assessment of the application with respect to the "no harm" test. The OEB recognizes that different transaction types may require different information to support the transaction's claim of "no harm".

Rate Harmonization

The OEB's *Handbook for Utility Rate Applications* states that in the first rebasing application following the consolidation the OEB will scrutinize specific rate-setting aspects of the MAADs transaction, including a rate harmonization plan and/or customer rate classifications post consolidation. This approach will continue. For acquisitions, distributors can propose plans that place acquired customers into an existing rate class or into a new rate class. Regardless of the option adopted, the OEB will assess whether the proposed harmonized rates will reflect the cost to serve the acquired customers, including the anticipated productivity gains resulting from consolidation.[29]

The issue of rate harmonization in the context of a consolidation transaction is better examined at the time of rebasing because this is when the consolidated entity will apply for its combined revenue requirement based on actual circumstances at that time.[30] However, discussion in a consolidation

[28] EB-2013-0196/EB-2013-0187/EB-2013-0198, Decision and Order, p. 16

[29] Handbook for Utility Rate Applications, October 13, 2016, p. 21

[30] A rate harmonization plan can propose the approach and timeline for harmonizing rate classes or provide rationale for why certain rate classes should not be harmonized based on underlying differences in cost structures and drivers.

application of how these matters may be addressed at the time of rebasing may serve as a signal to the OEB, ratepayers, and intervenors that potential issues to be decided at the time of next rebasing have been considered by parties to a transaction.

A statement indicating whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so, should be included in the consolidation application. Where the utility does intend to harmonize rates, a brief description of the plan should also be provided. This information can be informative to the OEB as to the intentions of the consolidated entity.

The OEB has jurisdiction to address rates-related matters in future proceedings. Rates must be just and reasonable and reflect the cost to serve customers at the time of their determination in a rebasing application. The potential for higher rates for one customer class or rate zone is only one consideration, other benefits of consolidation must also be considered. All relevant factors can be considered by the OEB when rate harmonization plans are filed at the time of rebasing.

The OEB recognizes that information on plans for future rate structures and harmonization is based on forecasts at the time of a consolidation application. Plans will not be considered exhaustive or binding, unless otherwise decided by an OEB panel based on the specific approvals sought, or orders made by the OEB, as part of the proposed consolidation transaction. The intent of the information provided as part of a consolidation application is not to conflate section 78 (i.e., rates) matters, that are appropriately considered at the time of a rebasing application, with section 86 matters.

5.9 Accounting Matters

Disposition Timing

In accordance with the *Electricity Distributors' Deferral and Variance Account Review Initiative* (EDDVAR), Group 1 DVAs are reviewed and subject to disposition if they meet a pre-set threshold during the IRM term.[31] This practice will continue during the deferred rebasing period for utilities that underwent a MAADs transaction. Group 2 accounts require a prudence review and are subject to disposition in a rebasing rate application, which is typically every five years.[32]

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[31] EB-2008-0046, *Report of the OEB on Electricity Distributors' Deferral and Variance Account Review Initiative (EDDVAR)*, July 31, 2009, p.10

[32] Ibid, pp. 6 & 13

As deferred rebasing periods may be up to ten years, Group 2 account balances for the predecessor utilities that have consolidated may not be disposed for ten or more years. Significant balances may accumulate in these accounts during this period and could lead to intergenerational inequity concerns and/or result in large bill impacts on disposition. Earlier and/or more frequent disposition of Group 2 accounts post-consolidation would address this concern. However, this needs to be balanced with the costs of required prudence reviews in IRM rate applications which contain Group 2 disposition requests.

The OEB sees a benefit in allowing utilities the flexibility to propose disposition of Group 2 DVAs based on their specific circumstances, for example for bill impact concerns. The length of the deferred rebasing period is an important consideration for when Group 2 DVAs should be disposed of, but just as important is how long it has been since the consolidated utilities last rebased. Therefore, if the sum of the deferred rebasing period and period since the last Group 2 disposition is longer than five years, utilities shall provide a plan to submit Group 2 account balances for potential disposition (e.g., at the mid-point of the deferred rebasing period) to mitigate intergenerational inequity. Requests for disposition shall be made if the balances are material at that time set out in the plan. If the sum of the deferred rebasing period and period since the last Group 2 disposition is less than five years, utilities shall have the flexibility of requesting disposition of Group 2 account balances, if warranted and supported, for example in an IRM application.

Tracking of Accounts

Utilities may gain efficiencies by tracking accounts on a consolidated basis, rather than a rate zone basis. Given the nature of the Group 1 accounts and the reliance on data from various systems (e.g., billing system), it is likely practical and efficient for utilities to consolidate the Group 1 accounts for new activities post-closing of the transaction. Therefore, for Group 1 accounts, the OEB encourages utilities to consolidate the accounts as soon as it is practical. Legacy balances should be tracked separately on a rate zone basis for purposes of maintaining cost causality at the time of disposition. However, if there are unique impacts to the utilities' Group 1 accounts, these circumstances should also be brought forward at the time of the consolidation application.

Legacy Group 2 accounts should also generally be tracked separately on a rate zone basis. Tracking accounts on a rate zone basis will enable those account balances to be disposed to the group of customers that contributed to the balances. However, there could also be some accounts where tracking on

a rate zone basis may not be warranted post-MAADs transaction.[33] Therefore, utilities shall be required to provide a proposal in their MAADs applications on which legacy or new Group 2 accounts are to be tracked on a legacy rate zone basis or consolidated basis going forward, with supporting rationale.

Accounting Policy Changes

At the time of the MAADs application, utilities may not have had the opportunity to identify and assess the accounting policy changes required. However, these changes may be material and could result in a refund to, or recovery from, ratepayers. Therefore, in all MAADs applications, a consolidated utility shall establish an account to record the impact of accounting policy changes, effective at the transaction's closing date, unless the predecessor utilities provide sufficient justification as to why such an account is not needed.

The account will serve to symmetrically protect both the consolidated utility and ratepayers. The account shall record the full revenue requirement impact of accounting policy changes.

Materiality shall be a consideration for the continued tracking of amounts in this account so that the cost of maintaining the account does not outweigh the benefit. Once the consolidated utility has completed its assessment of accounting policy changes required, the consolidated utility may propose to close the account in the next IRM application where an audited balance in this account is available, if the impacts of the accounting policy changes are not material. In such cases, no disposition shall be required. Materiality shall be based on the materiality for the predecessor utility whose accounting policies are changed and be disposed of to the customers of the predecessor utility that underwent accounting policy changes.

Although there are precedents where materiality was based on the consolidated utility (rather than the predecessor utility), materiality shall be established based on the predecessor utility, given that it is the predecessor utility that is being specifically impacted by the accounting policy changes.[34] Nevertheless, utilities shall be permitted to propose a different materiality threshold if it better achieves the objective of protecting customer interests.

An accounting order shall be established in the MAADs proceeding, to take effect on the closing date of the MAADs transaction. Consistent with the filing

[33] For example, Account 1522 – Pension & OPEB Forecast Accrual vs. Cash Payment Differential Carrying charges, Account 1508 – Other Regulatory Assets, Sub-account Green Button Initiative Costs may be tracked on a consolidated basis.

[34] EB-2021-0280, Decision and Order, Brantford Power Inc. and Energy + Inc. MAADs, March 17, 2022, p. 17, EB-2022-0006, Decision and Order, Kitchener-Wilmot Hydro Inc. Waterloo North Hydro Inc. MAADs, June 28, 2022. p. 33

requirements for cost of service applications, the accounting order must include a description of the mechanics of the account; examples of general journal entries; and the proposed account duration.[35] The distributor must also file evidence demonstrating how the eligibility criteria of causation, materiality, and prudence have been met.

6. POST-CONSOLIDATION MONITORING AND REPORTING

In November 2022, the Office of the Auditor General of Ontario released its OAGO Audit Report. The OAGO Audit Report included recommendations related to consolidations. In response to these recommendations, the OEB implemented monitoring and reporting requirements for consolidated distributors.[36] As stated previously, the focus of many policies in the MAADs Handbook is electricity distributors, therefore, transmitters should consider the intent of those policies and propose post-consolidation monitoring and reporting.

The OEB as part of its oversight role, collects financial and non-financial information from regulated entities as set out in its *Reporting and Record-keeping Requirements* (RRR). The data collected through RRR ranges from financial and operating to reliability and customer service information. This RRR data is used by the OEB to develop distributor-specific OEB scorecards. Scorecards also provide an opportunity for a distributor to provide a Management Discussion and Analysis of its results. Most RRR information post-consolidation is filed with the OEB on a consolidated basis.

Monitoring of Post-Consolidation Activities During Deferred Rebasing Periods

Consolidation applications include evidence (both qualitative and quantitative) which highlight activities where efficiencies are expected to be achieved, and the savings associated with those efficiencies. This evidence provides an indication of what the consolidated utilities (or acquiring utility) expect could be achieved (based on forecasts). The evidence provided is, in part, what is used by the OEB to reach its decision on a consolidation application and serves as the starting point for the OEB panel considering the first rebasing application post-consolidation. The OEB understands that a utility requires sufficient time to achieve savings and efficiency gains, and these will not begin to be realized until the new entity has begun to operate.

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[35] Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, pp. 66 & 67

[36] Evaluation of Policy on Utility Consolidations (EB-2023-0188)

The savings are also likely to change over time as the utility begins to better understand its operating needs and environment. Further, transaction and transition costs may be incurred for several years following the completion of the transaction.

For these reasons, in the event of approval of a proposed transaction, a distributor that defers rebasing for more than five years (i.e., six to ten years) must file a mid-term report detailing the progress to date on the steps it has taken toward integration.

At a minimum, the mid-term report shall include the following information, collected on a reasonable efforts basis:

- progress to date on the various activities where efficiencies were expected, and the savings achieved associated with those efficiencies
- a qualitative discussion on enhanced reliability and service quality as a consolidated distributor
- a qualitative discussion on enhanced reliability and service quality on a rate zone basis
- progress towards the recovery of transaction and transition costs
- a discussion on potential obstacles going forward in reaching the consolidated entity's targets as set out in the consolidation application, if any
- an updated revenue requirement analysis as provided in the consolidation application based on information known at the time of the filing of the mid-term report, and a variance analysis to explain material differences to what was filed in the consolidation application.

Distributors must file their mid-term reports with the OEB under the associated filing number of the respective consolidation application proceeding. Reports will be made publicly available. Distributors must also post the mid-term report on their respective website for ease of reference for customers. OEB staff will review mid-term reports internally and may contact distributors for certain clarifications, however, no formal adjudicative steps on the mid-term report are anticipated. OEB staff may identify matters for internal review as part of the OEB's ongoing monitoring and/or reporting processes. The OEB expects this mid-term report will be filed as part of subsequent applications for incremental capital funding (ICMs) or new DVAs.

At the time of the consolidated entity's first rebasing application post-consolidation, the OEB expects the consolidated utility to provide updates to

this information based on achieved results, including for any period not covered by the initial mid-term report.

For distributors that elect to defer rebasing for less than five years, a similar report is required, but only at the time of post-consolidation rebasing application (i.e., no mid-term report is required in these circumstances). At a minimum, this end of rebasing report shall include the following:

- achieved efficiencies and savings associated with the various activities where efficiencies were expected (as documented in the consolidation application)
- a qualitative discussion on enhanced reliability and service quality as a consolidated distributor
- a qualitative discussion on enhanced reliability and service quality on a rate zone basis
- total transaction and transition costs, and whether those have been recovered over the term of the deferred rebasing period through the savings achieved
- a discussion on any obstacles encountered since consolidation and how the distributor managed those obstacles. If applicable, a discussion of how obstacles affected the consolidated entity from reaching its targets should also be included

The OEB reminds distributors that at the time of the post-consolidation rebasing application, the OEB expects a utility to provide, on a reasonable efforts basis, an updated version of the revenue requirement analysis provided in the consolidation application (under Price) based on information known at the time of the filing, and a variance analysis to explain material differences.

The OEB expects that following a decision approving a consolidation transaction going forward, consolidated distributors will track the necessary data to fulfil the minimum requirements of the mid-term and rebasing report, as applicable.

The intent of the mid-term report is to inform and increase transparency for the OEB, stakeholders and customers on the progress towards integration. The reports provided at rebasing will help in understanding differences from the forecasts provided at the time of the consolidation application and assist the OEB and other stakeholders in assessing the consolidated distributor’s rebasing application.

Reporting on Key Performance Measures During Deferred Rebasing Periods

Service Quality

Service quality metrics post-consolidation are to be filed with the OEB on a consolidated basis per the RRR filing requirements for the first full fiscal year. Section 7 of the OEB's Distribution System Code sets the minimum conditions that a distributor must meet in carrying out its obligations to distribute electricity under its licence with respect to service quality requirements.[37] Each distributor, regardless of consolidation, is expected to meet these targets. This does not preclude independent panels of OEB Commissioners to order the monitoring and/or reporting of service quality metrics by rate zone where such reporting may be necessary on a case-specific basis.

Reliability

Unlike service quality measures, there is currently no industry target for the system reliability measures. The OEB expects either rate zone level or feeder-level reliability reporting post-consolidation. Requirements related to reliability reporting at the rate zone level post-consolidation are detailed in the filing requirements in Schedule 2 of this Handbook.

On January 30, 2024, the OEB implemented new reporting by electricity distributors to improve customer awareness of reliability. Specifically, the OEB established voluntary reporting by distributors on reliability data at the distribution feeder level. The OEB expects this information will be supportive in building customer awareness and understanding of reliability of their distribution service.[38]

Distributors that have not historically reported feeder-level reliability information are encouraged to include such data in the consolidation application for the most recently completed historical years, up to five years, if feeder-level reliability information is available. The rate zone (or multiple zones if applicable) for this feeder-level reliability information should be identified to the extent possible.

Applicants that do not have rate zone reliability information or feeder-level reliability information identified by rate zone, are required to propose a

[37] Distribution System Code, last revised March 27, 2024. The service quality metrics and requirements set out in Section 7 include: Connection of New Services, Appointment Scheduling, Appointments Met, Rescheduling a Missed Appointment, Telephone Accessibility, Telephone Call Abandon Rate, Written Response to Enquiries, Emergency Response, Reconnection Standards, Billing Accuracy.

[38] EB-2021-0307, OEB Letter, Implementing Voluntary Feeder-Level Reliability Reporting, January 30, 2024

different mechanism for reporting reliability for each rate zone during its deferred rebasing period. Reporting requirements should not be a barrier to good system planning that may result in greater integration of systems between rate zones. If system integration affects some of the reliability reporting by rate zone, this should be explained.

Reliability information by rate zone may help assess whether the consolidated utility's ratepayers are experiencing continuous improvement in reliability, or at a minimum, are not experiencing worsening reliability. The OEB recognizes that quantitative reliability data is predicated on historic information that is not necessarily indicative of future results. The OEB is of the view that a distributor should supplement its quantitative reliability reporting and results with qualitative discussions as part of its scorecard reporting,[39] the mid-term report (if applicable), and the post-consolidation rebasing application.

Verification of Adherence to Conditions of Approval and Maintaining Necessary Records

The OEB reminds applicants that it may prescribe certain conditions of consolidation approval on a case-specific basis. The OEB may also require a consolidated entity to maintain certain records during a deferred rebasing period. Independent panels of OEB Commissioners will consider these matters, as needed, on a case-by-case basis. This will include, but is not limited to, an appropriate level and frequency of reporting on these matters during deferred rebasing periods.

[39] Through its Management Discussion and Analysis.

7. INDEX: SCHEDULE 1 – RELEVANT SECTIONS OF THE OEB ACT

Section 86 of the OEB Act

Change in ownership or control of systems

86 (1) No transmitter or distributor, without first obtaining from the Board an order granting leave, shall,

(a) sell, lease or otherwise dispose of its transmission or distribution system as an entirety or substantially as an entirety;

(b) sell, lease or otherwise dispose of that part of its transmission or distribution system that is necessary in serving the public; or

(c) amalgamate with any other corporation. 2003, c. 3, s. 55 (1).

Same

(1.1) Subsection (1) does not apply with respect to a disposition of securities of a transmitter or distributor or of a corporation that owns securities in a transmitter or distributor. 2002, c. 1, Sched. B, s. 9 (1).

Acquisition of share control

(2) No person, without first obtaining an order from the Board granting leave, shall,

(a) acquire such number of voting securities of a transmitter or distributor that together with voting securities already held by such person and one or more affiliates or associates of that person, will in the aggregate exceed 10 per cent of the voting securities of the transmitter or distributor; or

(b) acquire control of any corporation that holds, directly or indirectly, more than 10 per cent of the voting securities of a transmitter or distributor if such voting securities constitute a significant asset of that corporation. 1998, c. 15, Sched. B, s. 86 (2); 2015, c. 29, s. 15 (1, 2).

8. INDEX: SCHEDULE 2 – FILING REQUIREMENTS FOR CONSOLIDATION APPLICATIONS

ONTARIO ENERGY BOARD

Filing Requirements for Consolidation Applications

JUNE 18, 2024

Ontario
Energy
Board

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Filing Requirements for Consolidation Applications

1. INTRODUCTION

These filing requirements outline relevant information that is necessary for a complete consolidation application. These filing requirements provide the minimum information that applicants must file for a complete consolidation application. However, an applicant is responsible for supporting its application, and should provide any additional information that is necessary to justify the approvals being sought in the application. If circumstances warrant, the OEB may require an applicant to file evidence in addition to that identified in the filing requirements.

1.1 Completeness Review

The filing of a comprehensive application is essential for the development of an accurate Notice of Hearing and for the timely and effective review of an application. Therefore, before the OEB can begin processing the application, it must conduct a preliminary review to determine if the application is complete. The preliminary review determines if the information provided adheres to these Filing Requirements and provides sufficient information to prepare an accurate Notice of Hearing, and if there is any missing information. The OEB typically completes this review within 14 calendar days.

A filing that includes all documentation detailed in these filing requirements will be considered complete for purposes of further processing by the OEB. If the Registrar determines that the application is consistent with these filing requirements, the Registrar will issue a letter notifying the applicant that the OEB has commenced processing the application.

If there are any information gaps in the application, OEB staff will contact the applicants and provide the applicants with an opportunity to file the missing information. The timing required for filing the missing information is determined by the type of information that is missing.

If the missing information adversely affects the OEB’s ability to prepare the Notice of Hearing or materially affects the OEB’s ability to assess the application, applicants will be required to file the missing information within the 14-day completeness review period. If the information cannot be filed within the 14-day review period, the Registrar will issue an “incomplete letter.” This letter will list the information that must be provided before the OEB can commence its review of the application.

If the missing information does not adversely affect the OEB’s ability to prepare the Notice of Hearing or materially affect the OEB’s ability to assess

the application, the OEB may commence the proceeding before the missing information is filed. In such applications, the Registrar will generally issue a letter directing the applicants to file the missing information by the date of the OEB's first procedural order (refer to OEB performance standards for details on the timing of the first procedural order), so that the information is available for the preparation of interrogatories by OEB staff and intervenors. If the information cannot be filed by the noted date and the delay could impact the schedule for the case or the OEB's ability to continue processing the application, the OEB may stop the proceeding and place the application in abeyance until the missing information is filed.

An applicant should only file information that is relevant to the OEB's statutory objectives in relation to electricity. Applicants should refer to the Handbook on the OEB's expectations and approach to reviewing consolidation applications.

1.2 Certification of Evidence

An application filed with the OEB must include a certification by a senior officer of the applicant that the evidence filed is accurate, consistent and complete to the best of their knowledge.

1.3 Updating an Application

When changes or updates to an application or supporting evidence are necessary, applicants must follow the requirements of Rule 11 of the *Rules of Practice and Procedure*. When these changes or updates are contemplated in later stages of a proceeding, updates should only be made if there is a material change to the evidence. In these circumstances, there may be a need for further process to review the updated information and therefore the OEB's planned decision date may shift to accommodate the added process.

1.4 Interrogatories

The OEB advises applicants to consider the clarity, completeness and accuracy of their evidence in order to reduce the need for interrogatories. The purpose of an interrogatory process is to test and/or to further clarify the evidence, not to seek information that should have been provided in the original application. The OEB also advises parties to carefully consider the relevance and materiality of information being sought before requesting it through interrogatories.

Parties must consult Rules 26 and 27 of the OEB's *Rules of Practice and Procedure* (Rules) for additional information on the filing of interrogatories and responses.

1.5 Confidential Information

The OEB relies on complete disclosure of all relevant material to ensure that its decisions are well-informed. To ensure a transparent and accessible review process, applicants should make every effort to file all material publicly and completely. However, the Rules and the *Practice Direction on Confidential Filings* (Practice Direction) allow distributors and other parties to request that certain evidence be treated as confidential. In the event a party wishes to request confidential treatment of certain material, the Practice Direction sets out the requirements for filing the request.

Applicants should be aware that the OEB is required to devote additional resources to the administration, management and adjudication of requests for confidentiality and confidential filings. Applicants must ensure that filings for which they request confidential treatment are both relevant to the proceeding and genuinely in need of confidential treatment. A list of the categories of information that will presumptively be considered confidential is set out in Appendix B of the Practice Direction. To reduce the administrative issues associated with the management of those filings, the OEB expects that distributors will minimize, to the extent possible, requests for confidential information.

1.6 Certification Regarding Personal Information

All parties are reminded of the OEB's rules regarding personal information in any filing they make as part of a proceeding. Parties should consult Rule 9A of the OEB's Rules (and the Practice Direction, as applicable) regarding how to file documents (including interrogatories) containing personal information.

Rule 9A states that “any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document.” There must be one version of the document that is a redacted version of the document from which the personal information has been deleted or stricken, and a second version of the document that is un-redacted (i.e., that includes the personal information) and should be marked “Confidential—Personal Information”.

The OEB does not expect that personal information would typically need to be filed. However, if the applicant considers it necessary to file personal information as part of its application, the onus is on the applicant to ensure that the application and any evidence filed in support of the application does not include any personal information unless it is filed in accordance with Rule 9A (and the *Practice Direction*, as applicable).

Accordingly, an application filed with the OEB must include a certification by a senior officer of the distributor stating that the application and any evidence filed in support of the application does not include any personal information unless it is filed in accordance with Rule 9A (and the Practice Direction, as applicable).

An applicant is required to provide a similar certification when filing interrogatory responses or other evidence as part of a proceeding.

2. INFORMATION REQUIRED OF APPLICANTS

The OEB expects an application for consolidation to have the following components:

2.1 Exhibit A: The Index

Content	Described In
Exhibit A	
Index	2.1
Exhibit B	
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Administrative	2.2.1
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Other	2.2.9

2.2 Exhibit B: The Application

2.2.1 Administrative

This section must include the formal signed application, which must incorporate the following:

- Legal name of the applicant or applicants
- Details of the authorized representative of the applicant/s, including the name, phone and fax numbers, and email and delivery addresses
- Legal name of the other party or parties to the transaction, if not an applicant
- Details of the authorized representative of the other party or parties to the transaction, including the name, phone and fax numbers, and email and delivery addresses
- Brief description of the nature of the transaction for which approval of the OEB is sought by the applicant or applicants

2.2.2 Description of the Business of the Parties to the Transaction

This section of the application requires the applicant to provide the following information on the parties to the proposed transaction:

- Describe the business of each of the parties to the proposed transaction, including each of their electricity sector affiliates engaged in, or providing goods or services to anyone engaged in, the generation, transmission, distribution or retailing of electricity.
- Describe the geographic territory served by each of the parties to the proposed transaction, including each of their affiliates, if applicable, noting whether service area boundaries are contiguous or, if not, the relative distance between service boundaries.
- Describe the customers, including the number of customers in each rate class, served by each of the parties to the proposed transaction.
- Describe the proposed geographic service area of each of the parties after completion of the proposed transaction.
- Provide a corporate chart describing the relationship between each of the parties to the proposed transaction and each of their respective affiliates.
- If the proposed transaction involves the consolidation of two or more distributors, please indicate the maximum peak load (kW) for each distributor’s service area that is used to calculate the distributor's maximum “cumulative generation capacity from net metered

generators". The OEB will, in the absence of exceptional circumstances, add together the kW peak load from each distributor and assign the sum to the new or remaining utility. Applicants must indicate if there are any special circumstances that may warrant the OEB using a different methodology to determine the net metering threshold for the new or remaining utility.

2.2.3 Description of the Proposed Transaction

This section of the application requires the applicant to provide the following:

- Provide a detailed description of the proposed transaction.
- Provide a clear statement on the leave being sought by the applicant, referencing the particular section or sections of the Ontario Energy Board Act, 1998. This also includes all approvals being sought that are necessary for the proposed consolidation. Examples include, without limitation, licence amendments and cancellations; issuance of new licences; accounting orders (to establish any new deferral and variance accounts); and code exemptions, if applicable.
- Provide details of the consideration (e.g. cash, assets, shares) to be given and received by each of the parties to the proposed transaction.
- Provide all final legal documents to be used to implement the proposed transaction.
- Provide a copy of appropriate resolutions by parties such as parent companies, municipal council/s, or any other entities that are required to approve a proposed transaction confirming that all these parties have approved the proposed transaction.

2.2.4 Impact of the Proposed Transaction

In reviewing an application, the OEB will apply the "no harm" test as outlined in the Handbook. Applicants are required to provide the following evidence to demonstrate the impact of the proposed transaction with respect to the OEB's first two statutory objectives.

Objective 1 – Protect consumers with respect to prices and the adequacy, reliability and quality of electricity service

- Indicate the impact the proposed transaction will have on all consumers with respect to prices and the adequacy, reliability and quality of electricity service. The impacts may include but not be limited to operational considerations and aspects of customer service.
- Provide a year-over-year comparative forecast revenue requirement analysis for the proposed transaction, comparing the costs of the utilities post-transaction on a consolidated basis and the costs of the utilities in the absence of the transaction (status quo scenarios). The analysis should cover the duration of the deferred rebasing period, up to and including the post-consolidation rebasing year. For the post-consolidation rebasing year, the utility should include the forecast net savings that would flow to ratepayers at that time.
    - Document assumptions about inflation, growth and productivity adjustments
    - Under the status quo scenarios, provide what would be normal expected cost of service revenue requirement adjustments at normally scheduled rebasing years during the deferred rebasing period.[40]
    - Document and describe any assumptions made related to the impact of an evolving energy sector, and associated impacts on cost structures
    - Document any known or reasonably anticipated future ICMs in the application both in terms of timing and in quanta (i.e., revenue requirement). Any known or reasonably anticipated ICMs should be reflected in both the consolidated and stand-alone scenarios, or otherwise provide explanation.

  Applicants can refer to Appendix A as an example of a revenue requirement analysis for a merger between two utilities on Price Cap IR which elect a ten-year deferred rebasing period. Applicants should adapt the analysis to suit their circumstances and incorporate their assumptions.
- Provide a statement confirming that at the time of the post-consolidation rebasing application, the consolidated entity will produce an updated analysis comparing the revenue requirement (under both the consolidated scenario and the status quo) but based on

[40] Generally, forecasts of these hypothetical rebasing applications would be based on past experience, but also informed by information on current inflation, interest rate and market returns, and cost trends of the utility.

information available on a reasonable efforts basis. Further, provide a statement confirming that this will be supplemented with a comparison and discussion of the consolidation application forecasts versus those filed in the post-consolidation rebasing application.[41]

- Provide a comparison of the OM&A cost per customer per year between the consolidating utilities. The information should include the latest actual OM&A per customer for each utility and the forecast OM&A per customer for each year of the elected deferred rebasing period (including the post-consolidation rebasing year) for each utility and on a consolidated basis.
- Confirm whether the proposed transaction will cause a change of control of any of the transmission or distribution system assets, at any time, during or by the end of the transaction.
- Describe how the distribution or transmission systems within the service areas will be operated.

Objective 2 – Promote economic efficiency and cost effectiveness and to facilitate the maintenance of a financially viable electricity industry

- Indicate the impact that the proposed transaction will have on economic efficiency and cost effectiveness (in the distribution or transmission of electricity), identifying the various aspects of utility operations where the applicant expects sustained operational efficiencies (both quantitative and qualitative) (e.g., expected OM&A and capital efficiencies).
- Identify all incremental costs that the parties to the proposed transaction expect to incur which may include incremental transaction costs (e.g. legal, regulatory), incremental transition costs (e.g. employee severances), and incremental on-going costs (e.g. purchase and maintenance of new IT systems). Explain how the consolidated entity intends to finance these costs.
- Provide a valuation of any assets or shares that will be transferred in the proposed transaction. Describe how this value was determined.
- If the price paid as part of the proposed transaction is more than the book value of the assets of the selling utility, provide details as to why this price will not have an adverse effect on the financial viability of the acquiring utility.

[41] Documentation on differences in actual inflation and stretch factors, growth, unanticipated needed investments, and other matters as required, from what was forecast at the time of the MAADs, or details of additional actual costs (e.g., ICMs or Z-factors) may suffice.

- Provide details of the financing of the proposed transaction.
- Provide financial statements (including balance sheet, income statement, and cash flow statement) of the parties to the proposed transaction for the past two most recent years.
- Provide pro forma financial statements for the consolidated entity for the first full year following the completion of the proposed transaction, including the assumptions/explanations used in the pro forma financials, as well as the methodology used to forecast amounts. If pro forma financials are not available, an explanation should be provided.

2.2.5 Rate considerations for consolidation applications

Applicants are required to provide the information with respect to the following rate making considerations relating to consolidation:

- Indicate a specific deferred rate rebasing period that has been chosen.
- Identify the rate year and effective date for rebased rates at the end of the elected deferred rebasing period.
- For deferred rebasing periods greater than five years:
    - Confirm that the ESM will be as required by the 2015 Report and the Handbook.
    - If the applicant's proposed ESM is different from the ESM set out in the 2015 Report, the applicant must provide evidence to demonstrate that the ESM better achieves the objective of protecting customer interests during the deferred rebasing period.
    - Calculate a deemed ROE for the purposes of the ESM calculations for the consolidated entity, by weighting the approved ROEs for each utility from their respective last rebasing applications by the deemed equity component of the rate base of each utility in their last rebasing applications.
    - For the ESM account, provide an accounting order, to take effect on the closing date of the MAADs transaction (subject to the calendar year data considerations discussed above), including a description of the mechanics of the account; examples of general journal entries; and the proposed account duration.[42]

[42] The accounting order shall be consistent with the Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, p. 67

- If applicable, for a proposed consolidation between one consolidated utility in a deferred rebasing period (as a result of a previously approved consolidation) merging or acquiring another utility not in a deferred rebasing period:
    - Confirm the remaining deferral period for the previously consolidated entity.
    - Identify the elected number of years for the deferred rebasing period (maximum 10) for the utility being consolidated into the previously consolidated entity and identify the rate year for which rebased rates would be effective (in other words, for the most recent utility being acquired or merged into the previously consolidated entity).
    - Identify the proposed timing for rebasing of the new consolidated entity.
    - If the applicants seek to extend the elected deferred rebasing period of the previously consolidated entity (if the originally elected period was less than ten years), the onus will be on the applicant(s) to justify the need for, and benefits of, any requested extension to the current deferral period.

The last bullet point above allows the OEB to rationalize successive MAADs transactions involving one utility deferring rebasing for a longer period than originally contemplated (but only if the original deferral period elected was less than ten years) and assesses the impacts of potentially retaining savings on a continuing basis for shareholders rather than sharing those savings with ratepayers. It also commits the utility to explaining why further delays in reviews of costs, operations, and rates of a consolidated utility and its predecessor utilities by the OEB is in the public interest.

2.2.6 Rate Harmonization

Provide a statement indicating whether the consolidated utility intends to undertake rate harmonization at the time of rebasing or, if not, an explanation for not doing so. Where the utility does intend to harmonize rates, a brief description of the plan should be provided.

2.2.7 Post-Consolidation Monitoring and Reporting

Post-Consolidation Reports

For applicants that defer rebasing for more than five years:

- A statement confirming that a mid-term report will be filed containing the required components as set out in the Post-Consolidation Monitoring and Reporting section of the Handbook.
- A statement confirming that in the first rebasing application, updates to this information will be provided including for any period not covered by the initial mid-term report.

For applicants that defer rebasing for less than five years:

- A statement confirming that in the first rebasing application, a report containing the components as set out in the Post-Consolidation Monitoring and Reporting section of the Handbook will be provided.

Reliability Reporting During Deferred Rebasing Periods

- For applicants that have historically filed feeder level reliability information leading up to the consolidation application or for applicants that have not historically reported feeder-level reliability information, but will do so going forward:
    - Provide a listing of feeder reliability by rate zone (i.e. for the predecessor utilities) for the most recently completed historical years available, up to five years.
    - Confirm that going forward, the consolidated utility will continue report feeder-level reliability information and identify the rate zone for each feeder during the deferred rebasing period.
- For applicants that cannot provide feeder-level reliability information for at least one (or any) rate zone as part of the consolidation application and going forward:
    - Propose a different mechanism to report reliability by rate zone during the deferral period.

2.2.8 Accounting Matters

- For Group 1 accounts, the OEB encourages utilities to consolidate the accounts as soon as it is practical. However, if there are unique impacts to the utilities' Group 1 accounts, these circumstances should also be brought forward at the time of the consolidation application.
- If the sum of the deferred rebasing period and period since the last Group 2 disposition is longer than five years, provide a plan to submit Group 2 account balances for potential disposition (e.g., at the mid-point of the deferred rebasing period) to mitigate intergenerational inequity.
- Provide a proposal on which legacy or new Group 2 accounts are to be tracked on a legacy rate zone basis or consolidated basis going forward, with supporting rationale.
- For the Accounting Policy Changes account, provide an accounting order, to take effect on the closing date of the MAADs transaction, including a description of the mechanics of the account; examples of general journal entries; the proposed account duration; and how the eligibility criteria of causation, materiality, and prudence have been met.[43]
- In the alternative, provide sufficient justification as to why the Accounting Policy Changes account is not needed.

2.2.9 Other

Applicants have, in previous consolidation applications, made additional requests to the OEB which have formed part of the OEB's determination of a consolidation application. Examples include:

a) Implementation of new or the extension of existing rate riders
b) Transfer of rate order

Applicants are required to provide justification for these types of requests and for any other requests for which a determination is being sought from the OEB as part of a consolidation application.

[43] The accounting order shall be consistent with the Filing Requirements For Electricity Distribution Rate Applications - 2023 Edition for 2024 Rate Applications, Chapter 2, Cost of Service, December 15, 2022, p. 66 & 67

3. APPENDIX A

Example of Cost Structure Analysis

Assumptions

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
Customer Growth (%) – Utility 1											
Customer Growth (%) – Utility 1											
Inflation (%)											
Stretch Factor on a Standalone Basis (%) – Utility 1											
Stretch Factor on a Standalone Basis (%) – Utility 2											
Stretch Factor on a Consolidated Basis (%) – Rate Zone 1											
Stretch Factor on a Consolidated Basis (%) – Rate Zone 2											
Other											

Revenue Requirement – Standalone

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
	Budget	**IRM**	**IRM**	**COS**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**	**IRM**	**IRM**
Utility 1											
	Budget	**IRM**	**IRM**	**COS**	**IRM**	**IRM**	**IRM**	**IRM**	**COS**	**IRM**	**IRM**
Utility 2											
Standalone Total – Utility 1 + 2											

Note: tables have been shown with an example of the yearly rate application types for each predecessor utilities. Applicants are to reflect their particular rate application types per year for each predecessor utility.

Revenue Requirement – Merged

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10	Year 11
	Budget	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**COS or CIR**
Rate Zone 1											
	Budget	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**IRM**	**COS or CIR**
Rate Zone 2											
Merged Total											

Note: IRM could be Annual IR. See Table 1 of Handbook.

TAB H

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

DECISION ON MOTION

EB-2020-0156

MOTION BY INDUSTRIAL GAS USERS ASSOCIATION TO REVIEW AND VARY THE ONTARIO ENERGY BOARD'S DECISION IN EB-2019-0194

BEFORE: **Michael Janigan**
Presiding Member

Emad Elsayed
Member

Cathy Spoel
Member

September 24, 2020

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1 INTRODUCTION AND SUMMARY

Enbridge Gas Inc. (Enbridge Gas) filed an incentive rate-setting mechanism (IRM) application with the Ontario Energy Board (OEB) on October 8, 2019, seeking approval for changes to its natural gas distribution rates to be effective January 1, 2020 (2020 Rates Proceeding).[1] Phase 1 of the proceeding addressed the IRM related elements and certain deferral and variance accounts. In a decision issued on December 5, 2019, the Hearing Panel accepted a settlement between the applicant and intervenors on all issues in Phase 1 of the proceeding. Phase 2 of the proceeding addressed the remaining matters including Incremental Capital Module Funding, Cost Allocation, Unaccounted for Gas and E-billing. The Hearing Panel issued a decision and order on May 14, 2020 on all outstanding matters in Phase 2 of the proceeding (Decision). With respect to cost allocation, the Hearing Panel determined that changes to the methodology and implementation should be examined as part of Enbridge Gas's 2024 rebasing application. While the Hearing Panel acknowledged in its Decision that the current cost allocation methodology for the Union Gas rate zone was outdated, the Hearing Panel determined that cost allocation changes are more appropriate at rebasing.

On June 3, 2020, an intervenor in that proceeding, the Industrial Gas Users Association (IGUA), filed a motion pursuant to Rule 40.01 of the OEB's *Rules of Practice and Procedure*. IGUA asked the OEB to review and vary that part of the Decision which deferred the reallocation of the Panhandle System costs until Enbridge Gas's next rebasing in 2024. In the Notice of Hearing and Procedural Order No. 1 dated June 17, 2020, the OEB invited written submissions on both the threshold question of whether the matter should be reviewed and the merits of IGUA's motion.

Most intervenors, Enbridge Gas and OEB staff opposed the motion. For reasons that follow, the Review Panel dismisses the motion.

[1] EB-2019-0194.

2 THE PROCESS

On June 3, 2020, IGUA filed a motion to review and vary the Hearing Panel's Decision pertaining to the allocation of Panhandle Reinforcement Project costs (Panhandle System costs). In the Notice of Hearing and Procedural Order No. 1 issued on June 17, 2020, the OEB determined that it would consider the threshold question of whether the matter should be reviewed at the same time it would hear submissions on the merits of the motion. The OEB adopted as intervenors in this proceeding the intervenors from the 2020 Rates Proceeding. The OEB set procedural timelines for IGUA to file additional submissions in support of its motion, other parties and OEB staff to file written submissions, and IGUA to file a reply submission.

IGUA filed additional submissions on June 30, 2020. Intervenors, Enbridge Gas and OEB staff filed written submissions on July 17, 2020 and IGUA filed its reply submission on August 3, 2020. The following intervenors filed submissions in this proceeding:

- Building Owners and Managers Association (BOMA)
- Canadian Manufacturers and Exporters (CME)
- Consumers Council of Canada (CCC)
- Ontario Greenhouse Vegetable Growers (OGVG)
- Pollution Probe
- School Energy Coalition (SEC)
- Vulnerable Energy Consumers Coalition (VECC)

3 DECISION

3.1 History of Panhandle System Costs

In June 2016, the former Union Gas Limited (Union Gas) applied to the OEB to reinforce the Panhandle System by constructing approximately 40 kilometres of pipeline in the Municipality of Chatham-Kent.[2] The Panhandle System is a primary transmission pipeline used to transport natural gas from Dawn and the Ojibway Valve Site in Windsor to high pressure distribution lines serving customers in southern Ontario. The need to reinforce the Panhandle System was largely driven by growth in the greenhouse market.

In the Panhandle Reinforcement leave to construct proceeding, Union Gas proposed a cost allocation methodology for the project that was different from the OEB's approved cost allocation methodology.[3] The Panhandle System and the St. Clair System had been combined for cost allocation purposes since Union Gas's Rate C1 was first introduced in Union Gas's cost allocation study in 1999. The main reason for combining the two systems was that both systems provide transportation service between the river crossings west of Dawn and the Dawn Compressor Station.[4] However, with the addition of significant project costs related only to the Panhandle System (resulting from the reinforcement) and no change to the cost of the St. Clair System, the use of the combined system for cost allocation purposes no longer reflected the costs to serve the customers using each respective transmission system.[5] IGUA supported the proposed change in cost allocation of Panhandle System costs noting that it was in accordance with the principle of cost causation (costs in line with benefits).[6] However, in the leave to construct decision the OEB determined that Union Gas's proposed change to the cost allocation methodology should be reviewed at Union Gas's next cost of service application which at that time was expected to be for 2019 rates.

IGUA raised the issue of Panhandle System cost allocation in Union Gas's 2018 rates proceeding.[7] In a Procedural Order in that proceeding, the OEB determined that cost allocation issues would be better addressed prior to Union Gas entering another price

[2] EB-2016-0186.
[3] EB-2016-0186, Exhibit A, Tab 8, p. 7.
[4] EB-2016-0186, Exhibit J1.2, Attachment 2, p. 1.
[5] EB-2016-0186, Exhibit A, Tab 8, p. 7.
[6] EB-2016-0186, IGUA Submission, p. 8.
[7] EB-2017-0087.

cap rate mechanism framework.[8] The OEB noted that it would not be appropriate to address cost allocation changes in the last year of the existing IRM framework (2014 to 2018 IRM framework). Prior to the issuance of the procedural order in the 2018 rates proceeding, Union Gas and Enbridge Gas Distribution filed a separate application to amalgamate (the MAADs proceeding) and sought approval of a rate setting mechanism and associated parameters, to be effective January 1, 2019.[9]

In a decision issued on August 30, 2018, the OEB approved the amalgamation of Union Gas and Enbridge Gas Distribution. In response to concerns raised by IGUA and some other intervenors regarding inequities in cost allocation and the over-allocation of costs for some rate classes, the OEB noted:

> However, the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair systems. The OEB therefore requires Amalco [Enbridge Gas] to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.[10]

As directed, Enbridge Gas filed a cost allocation study for the legacy Union Gas rate zones in the 2020 Rates Proceeding. Enbridge Gas requested that changes resulting from the cost allocation study be implemented at the next rebasing. In the event the Hearing Panel disagreed and decided that the changes should be implemented prior to rebasing, Enbridge Gas indicated that it would only be able to implement the changes in the 2021 rates application.[11]

The Association of Power Producers of Ontario (APPrO) and IGUA argued that if the implementation of the cost allocation study were delayed until 2024, the existing inequity would continue for another four years and large customers would continue to

[8] EB-2017-0087, Procedural Order No. 3, November 29, 2017.
[9] EB-2017-0306/0307 – Approval to amalgamate under the OEB's policy of mergers, acquisitions, amalgamations and divestitures (MAADs).
[10] EB-2017-0306/0307, Decision and Order (MAADs Decision), August 30, 2018, p. 41.
[11] EB-2019-0194, Cost Allocation Evidence, November 27, 2019.

overpay. They urged the Hearing Panel to implement the changes in 2021. On the other hand, most intervenors, OEB staff and Enbridge Gas supported the deferral of cost allocation changes to the next rebasing. Intervenors and OEB staff submitted that significant rate increases as a result of cost allocation changes during an IRM regime were not appropriate as customers expect a certain amount of rate stability and predictability during IRM. Intervenors and OEB staff argued that the proposed changes were isolated in nature and did not present a complete picture of the costs and revenues that is common in a cost allocation study done at rebasing.

In its Decision in the 2020 Rates Proceeding, the Hearing Panel acknowledged that the current cost allocation is outdated but determined that it was better to wait until rebasing to make cost allocation changes on a holistic basis than to make selective updates in the interim:

> The OEB acknowledges that the existing cost allocation over time has resulted in changes to the costs and benefits to certain parties since the OEB approved Union Gas's 2013 cost allocation study. Accordingly, Enbridge Gas responded to the OEB's direction in the MAADs Decision to undertake a new cost allocation study. However, the OEB notes that, consistent with the approved rate setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes. At the next rebasing, potential changes to the comprehensive cost allowance are anticipated including other adjustments to rate base, possible rate harmonization proposals and rate design changes.[12]

IGUA then filed this motion to review and vary the Hearing Panel's Decision insofar as it dealt with the allocation of Panhandle System costs.

3.2 Position of Parties

Summary of Motion Grounds

IGUA argued that the Hearing Panel's May 14, 2020 Decision failed to provide sufficient reasons for deferring the Panhandle System cost allocation issue to rebasing in 2024. IGUA asserted that the Hearing Panel's findings on that issue "consisted of perfunctory

[12] EB-2019-0194, Decision and Order, May 14, 2020, p. 17 (internal footnotes omitted).

statements of broad principle without any substantive analysis of the application of those principles in light of previous Board decisions and the record, and did not meaningfully grapple with key issues and central arguments raised by the parties". Referencing the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,[13] IGUA argued that the Hearing Panel's reasons did not meet the legal requirement to demonstrate justification, transparency and intelligibility, and that "IGUA and its affected members have been unable to conclude that they have actually been listened to."

In particular, IGUA submitted that the Hearing Panel's reasons did not adequately explain why the cost allocation issue should be deferred even though the OEB had expressed concern about it in previous cases going back to the leave to construct proceeding, and in fact had specifically directed Enbridge Gas in the MAADs case to prepare a cost allocation study for consideration in the 2020 Rates Proceeding. IGUA maintained that "there is no dispute that … the Panhandle System costs are currently inequitably allocated" and that the 2020 rates panel "completely ignore[d] a line of previous Board decisions on this very issue". According to IGUA, as a result of the Hearing Panel's Decision, addressing the known allocation inequity which was initially expected to happen in 2019, will now have to wait until 2024. Until then, some customers "who do not in any way rely on or utilize the Panhandle System" will continue paying for it. IGUA noted that implementing the cost allocation changes in accordance with the cost allocation study filed by Enbridge Gas in the 2020 Rates Proceeding would "remove from rates T2, M16 and C1, $12.6 million dollars of revenue requirement that is being inappropriately and inequitably recovered from these customers for the Panhandle System in 2019, and reallocate that revenue requirement to those customers who are relying on the Panhandle System."

IGUA also alleged that the May 14, 2020 Decision contained a factual error. IGUA pointed to the statement that "The OEB acknowledges that the current cost allocations are outdated; however, attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024." It argued that there was no evidence to substantiate the conclusion that making selected changes to the Panhandle System cost allocation now would result in more changes when a comprehensive cost allocation is considered at rebasing.

IGUA maintained that the shortcomings of the 2020 Rates Hearing Panel's reasoning in the Decision render the cost allocation determination legally deficient, and thus merit a

[13] 2019 SCC 65.

review by the Review Panel considering this motion. IGUA submitted that the Review Panel should consider the matter "duly informed, but not wholly constrained" by the IRM objective of rate stability and predictability. IGUA noted that it had been "patient and respectful of the Board's process for almost 4 years now, through 4 proceedings and 5 decisions which consistently accepted deferral of rectification of a clear and acknowledged inequity in the allocation of Panhandle System costs for a short period of time pending imminent rebasing or, as determined in the Merger Decision, to be addressed now as part of establishing EGI's [Enbridge Gas] current IRM rate plan. The cross-subsidy of millions of dollars annually which first appeared in 2018 rates has continued throughout this period."[14]

Relief Requested

In this motion, IGUA asks the Review Panel to vacate the May 14, 2020 finding on the Panhandle Cost allocation issue, and to direct Enbridge Gas "to file a rate design proposal for adjustment of rates either in accord with the cost allocation study filed in the 2020 Rates Application or, in the alternative, in accord with the methodology for allocation of incremental Panhandle System Reinforcement Project costs proposed by (then) Union Gas in its application for leave to construct the Panhandle Reinforcement, but in either case for implementation in 2021 rates."[15]

Threshold Question

Rule 43.01 of the OEB's *Rules of Practice and Procedure* states that, where a motion to review is filed, "the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits."

In the Natural Gas Electricity Interface Review (NGEIR) case – in a passage that has since been cited several times – the OEB explained the threshold test as follows:

> Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

[14] IGUA Reply Submission, p. 15, para. 62.
[15] *ibid*, para. 69.

> With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.
>
> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.
>
> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.[16]

IGUA maintained that, as required by the threshold criteria set forth in the NGEIR decision, there were identifiable errors in the Hearing Panel Decision, that, if corrected, would change the outcome of the decision. These included:

1. Error of fact: The Hearing Panel's conclusion that the making of the cost allocation changes to Panhandle System costs now would necessitate further changes in the 2024 rebasing.
2. Errors that are "something of a similar nature": The Hearing Panel did not meet the requirements of reasonable decision-making by failing to consider evidence, failing to address material issues, and the making of findings inconsistent with previous OEB decisions.

BOMA submitted that IGUA did not raise any new issues in its motion that it had not already raised in its several submissions on cost allocation over the last four years. Similarly, some intervenors suggested that the motion was simply an attempt by IGUA to re-argue its position before another hearing panel of the OEB, after it had been fully argued in the 2020 Rates Proceeding.

[16] Decision with Reasons, May 22, 2007 (EB-2006-0322/EB-2006-0338/EB-2006-0340), p. 18.

OEB staff, while opposing the motion on the merits, argued that it met the threshold test and should be heard. OEB staff submitted that IGUA's contention that the Hearing Panel's reasons were inadequate warrants consideration on the merits by the Review Panel. If IGUA was right, and the reasons were insufficient, that would cast the "correctness" of the Decision in doubt. OEB staff argued that, although the reasons in this case withstand scrutiny, the Review Panel should not simply decide at the threshold stage not to scrutinize them.

Adequacy of Hearing Panel Reasons

IGUA maintained that the Hearing Panel failed to provide reasons that satisfy the requirements of administrative tribunal decision-making set out in *Vavilov*. Applying the *Vavilov* requirements, IGUA argued that the reasons were deficient because they failed to explain how and why a decision was made and show that its arguments were considered.[17] IGUA further submitted that based on the *Vavilov* decision, "The reasonableness of a decision may be jeopardized where the decision maker has failed to account for the evidence before it."[18]

In response, SEC argued that the Hearing Panel did exactly what was required by administrative decision-makers as per the *Vavilov* ruling, which was to "meaningfully grapple with key issues or central arguments raised by the parties".[19] SEC stated that the Hearing Panel agreed that the current allocation of Panhandle System costs was unfair to certain large volume customers but on balance decided that it was not appropriate to implement changes during an IRM. SEC submitted that the absence of a regurgitation of the history of the issue and a discussion of every argument does not render the Hearing Panel's Decision unreasonable. As the *Vavilov* case stated, "written reasons given by an administrative body must not be assessed against a standard of perfection".[20] SEC argued that while the OEB should strive for perfection, it is not a standard that it has to meet. SEC submitted that *Vavilov* provides a useful guide to administrative decision-makers, including the OEB, on the importance of reasons, but it is not a sufficient basis to grant the motion to review. SEC argued that insufficiency or inadequacy of reasons are not themselves a standalone ground for review. To be reviewable, defects in the reasons must undermine or raise questions as to the

[17] IGUA Motion submissions para. 28.
[18] IGUA Motion submissions para. 34.
[19] *Vavilov*, para. 128.
[20] *Vavilov*, para. 91.

reasonableness of the decision. SEC added that the Hearing Panel exercised its discretion reasonably, and on that basis, IGUA's motion should be dismissed.

CME disagreed with IGUA's characterization of the Decision as "unreasonable". CME noted that courts have regularly found that the OEB has a "wide ambit of power in its rate setting function".[21] CME argued that decisions of the OEB are entitled to substantial deference and should be reviewed on the "reasonableness" standard. CME further cited *Vavilov* for the proposition that reasonableness review is not a "line-by-line treasure hunt for error".[22] CME submitted that the reasons regarding cost allocation in the 2020 rates Decision allow a reviewing body to identify a rational chain of analysis which leads from the evidence on the record to the ultimate decision.

OEB staff acknowledged that the reasons in this case on the cost allocation issue could have been more detailed. Nevertheless, although brief, the reasons fulfilled their fundamental purpose: to "explain how and why [the] decision was made".[23]

IGUA in reply argued that the Hearing Panel's Decision on Panhandle System costs allocation presents no analysis, does not provide assistance in understanding the rationale for the departure from four previous decisions of the OEB regarding the appropriate time to address the issue, does not consider any facts and is not reasonable.

Reasonableness of the Hearing Panel Deferral Decision

Contrary to IGUA's suggestion, OGVG submitted that the Hearing Panel in the 2020 Rates Proceeding was "alert and sensitive to the matters before it", and the Hearing Panel expressly acknowledged in its Decision that the cost allocation of the Union Gas rate zone underpinning 2013 rates had changed.

OEB staff submitted that there were countervailing factors identified by Enbridge Gas and others, in particular, the importance of rate stability and predictability during the period between rebasing that were given greater weight by the 2020 Rates Proceeding Hearing Panel in the deferral of cost allocation changes for the Panhandle system to the 2024 rebasing. Moreover, although IGUA's argument is grounded in a concern about fairness, the Hearing Panel recognized that it can also be unfair to make changes to cost allocation on a piecemeal basis.

[21] *Toronto Hydro-Electric Systems Ltd. v. Ontario Energy Board*, 2010 ONCA 284, paras. 25-28.
[22] *Vavilov*, para. 102.
[23] OEB Staff submission, p. 8.

SEC argued that in the rate-setting context, there is almost never a clear right or wrong answer. Most OEB decisions require the balancing of various competing considerations. Sometimes different hearing panels looking at similar evidence will reach different outcomes, each of which can be reasonable. SEC further added that the Hearing Panel in its Decision took into account the reasonable balancing of competing interests between customer classes in setting just and reasonable rates.

VECC disagreed with the claims of IGUA that the 2020 Rates Decision on cost allocation contains insufficient explanation to meet the test of reasonableness. VECC referred to the Decision wherein the Hearing Panel noted that the IRM framework requires decoupling of costs from rates and selective changes were disruptive to rate stability.

IGUA in reply argued that there was no such balancing of competing considerations and interests or weighing or reviewing of evidence or costs vs. benefits reflected in the Hearing Panel's Decision. IGUA also noted that the decoupling of costs during an IRM was not limitless, either in time (as indicated by the OEB's clear expectations in previous decisions that the misallocation of Panhandle System costs would be imminently addressed) or scope (as evidenced by the capital pass-through treatment of Panhandle System costs to rates during Union Gas's IRM).

Consistency with Previous OEB Decisions

IGUA submitted that while the Hearing Panel stated the principles of rate stability and predictability, and it referred to the position of the parties, it did not engage with the issues, the evidence, the positions, or the expectations of the previous OEB panels that dealt with the Panhandle System cost allocation question. IGUA argued that the Hearing Panel completely ignored the previous OEB decisions on the issue:

> The 2020 Rates Application Hearing Panel did not, despite the legitimate expectations of IGUA and its affected members based on 4 Board rulings over the prior 3 years, address the current and continuing misallocation of Panhandle System costs as expected by the Cost Allocation Directive, or reasonably explain why it was not now prepared to do so and thus why it effectively reversed the Board's recent Cost Allocation Directive despite no material change in circumstances.[24]

VECC noted that IGUA was essentially emphasizing the last sentence of the OEB's finding in the MAADs Decision, "The OEB accepts that this proposal will not be perfect,

[24] IGUA Submissions on Motion, June 30, 2020, para 47.

but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service."[25] VECC submitted that IGUA assumed that the MAADs panel's direction of requiring a cost allocation proposal and recognizing that any proposal would likely be imperfect, implies that a new cost allocation is required to be implemented prior to rebasing. VECC disagreed with the assumed connection. VECC noted that the panel in the MAADs proceeding did not have detailed evidence on the impact of the cost allocation update on the various rate classes; it merely directed Enbridge Gas to file a cost allocation proposal.

OEB staff, CME, OGVG and SEC made a similar observation noting that the MAADs Decision merely required Enbridge Gas to file a cost allocation proposal; it was up to the Hearing Panel in the 2020 Rates Proceeding to determine what to do about that proposal. Had the MAADs panel intended for cost allocation changes to be implemented in 2020, regardless of the results of the study, it would have said so expressly.

OEB staff referenced other OEB decisions where the OEB rejected selective changes to cost allocation. OEB staff referred to a decision where the OEB denied a proposal by Horizon Utilities Corporation (Horizon) to update the load profile for the street lighting class in the absence of new load profile data for other classes, stating that: "there is no advantage to selective updating. Until data that is more accurate is available for all classes, Horizon must continue to use the existing load profiles for the purpose of its cost allocation model."[26] That decision was upheld on appeal by the Divisional Court, which observed that "the Board's concern with selectively updating load profiles based on partial load data is one of fairness."[27]

In response, IGUA argued that the determination provided little guidance in respect of Panhandle System costs for which Enbridge Gas has provided (in the 2020 Rates Proceeding and other referenced proceedings) better information on allocation of these costs to all rate classes.

The Alleged Factual Error

IGUA maintained that "rectification of the discrete inequity resulting from the legacy approach to allocating Panhandle System costs can and should be addressed now."[28] IGUA argued that the Hearing Panel was in error in concluding that making selected

[25] EB-2017-0306/0307, Decision and Order, August 30, 2018, pg. 41.
[26] Decision and Order, December 10, 2015 (EB-2015-0075), pp. 6-7.
[27] *Hamilton (City) v. The Ontario Energy Board*, 2016 ONSC 6447, para. 10.
[28] IGUA Submissions on Motion para. 69.

changes to Panhandle System cost allocations now will result in more changes when a comprehensive cost allocation is considered at rebasing.

SEC submitted that a cost allocation adjustment based only on a subset of costs is rarely a good idea and generally avoided by the OEB. Implementation of the partial review would have seen significant rate increases in 2020 and further adjustments in 2024 upon rebasing. The Hearing Panel in the 2020 Rates Decision noted that implementing cost allocation changes now would be disruptive to the predictability of rates and result in more changes in 2024.

OEB staff disagreed with IGUA's interpretation of the Hearing Panel's Decision and contended that there was no factual error. OEB staff submitted that all the Hearing Panel had meant was that "the specific allocation issues addressed in the study would still need to be re-evaluated as part of a comprehensive review of costs, cost allocation and rate design in the next rebasing proceeding as is typically the case in a cost based application. Adjusting rates now (beyond the routine annual adjustments contemplated under incentive regulation) would cause ratepayers to experience more rate volatility than they would normally expect during the IRM term."[29]

CME also noted that nothing about IGUA's argument invalidates or negates the existence of Enbridge Gas's evidence that other adjustments are likely needed at rebasing if IGUA's proposal for cost allocation changes were implemented now.

In reply, IGUA noted that although cost allocation changes would occur in 2024, there was no evidence on the record that addressing the Panhandle System cost allocation now would result in further changes in 2024, or that further changes in 2024 would in any way undermine or negate the rectifications made now to Panhandle System cost misallocations. IGUA maintained that if the Hearing Panel in the 2020 Rates Proceeding based its determination on this assumption, it did so without any supporting evidence or explanation and in fact, as a "bald" conclusion.[30]

OEB Policy on Revenue to Cost Ratios

OEB staff further noted that there are additional reasons that support the Hearing Panel's 2020 Rates Decision. OEB staff referred to the arguments of OGVG in its original submission regarding the revenue to cost (RTC) ratios.[31] OEB staff referenced the OEB policy where it has indicated that a perfect match between revenues and

[29] OEB Staff Submissions, p.9
[30] IGUA Submissions, para 43
[31] OGVG submission, pp. 3-7.

allocated costs is not always achievable or in some cases even desirable.[32] Currently, the target range for both the large user class and the residential class in the electricity sector is 0.85 to 1.15 (sometimes expressed as 85% to 115%), and for the GS < 50 kW and GS 50 to 4,999 kW classes, it is 0.80 to 1.20 (or 80% to 120%).[33] An RTC ratio of 1.0 means that the rate class is paying its full share of the allocated costs. OEB staff noted that the OEB has also tolerated a departure from 1.0 or "unity" in gas cases. For instance, in the recent EPCOR Southern Bruce decision, the OEB approved an RTC ratio of 0.78 for one class and 1.37 for another.[34]

The current RTC ratio which includes the allocation of the costs of the Panhandle System and other capital pass-through projects (under the existing cost allocation methodology) is 1.148 for the T2 class (IGUA's constituents).[35] The RTC ratio for the T2 class as approved in Union Gas's 2013 cost of service proceeding was 1.0. Although an RTC ratio of 1.148 indicates that there is some cross-subsidization of other rate classes by the T2 class, OEB staff and OGVG submitted that it is within a reasonable range that should be tolerated within an IRM period.

OEB staff also agreed with OGVG's submission in the 2020 Rates Proceeding that the threshold for making changes to cost allocation should be relatively high, given the fundamental decoupling of rates from costs during an IRM period.[36] OGVG had further added that it is inevitable that RTC ratios will shift over the course of an IRM period, and that such shifting should largely be tolerated as a necessary consequence of an IRM framework where costs are likely to shift amongst rate classes over time.

OEB staff further noted that if the cost allocation changes pertaining to Panhandle System costs are implemented, it would result in a rate reduction of $4.9 million for the T2 class.[37] That works out to an average of a little more than $200,000 for each of the 23 customers in the class that are large users of gas. OEB staff noted that the resulting bill impact for the average T2 customer in the Union South rate zone would be a reduction of less than 1% on the total bill. IGUA disagreed with the continuing cross-subsidies of several million dollars and maintained that these amounts do not represent a "modest benefit" as claimed by OEB staff. OEB staff further noted that implementing the cost allocation changes would result in significant rate increases for other ratepayer

[32] *Report of the Board: Review of Electricity Distribution Cost Allocation Policy*, March 31, 2011 (EB-2010-0219); *Report of the Board: Application of Cost Allocation for Electricity Distributors*, November 28, 2007 (EB-2007-0667).
[33] *Ibid*.
[34] Decision and Order, November 28, 2019 (EB-2018-0264), p. 17.
[35] Cost Allocation Study, Tables 1 and 3, and Working Papers Schedule 4, p. 1.
[36] OGVG submission, p. 4.
[37] IGUA submission, para. 34; *ibid*.,Table 2.

classes: 7% for Rate 10, 15% for Rate 25, 10% for each of Rate M4 (small) and Rate M7 (large).[38]

With respect to RTC ratios, IGUA in reply referenced the OEB's policy which requires that "distributors should endeavor to move their revenue-to-cost ratios closer to one if this is supported by improved allocations".[39] Pursuant to the MAADs direction on cost allocation, IGUA argued that there was now an improved allocation for Panhandle System costs; i.e. the improved allocations contemplated by the referenced OEB policy. IGUA submitted that the OEB policy does not support an RTC ratio for T2 customers that has now moved significantly away from unity. IGUA further argued that the movement in the RTC ratio was not the result of cost efficiencies during an IRM (where costs are changing but rates are not increasing), but it was largely due to the result of passing through, to the wrong customers, the revenue requirement impact of $264.5 million in Panhandle System expansion costs. IGUA submitted that the reasons in the 2020 Rates Decision reflected no such deliberations.

IGUA also noted that to the extent that the Hearing Panel was concerned about rate impacts for certain rate classes, it could direct Enbridge Gas to provide an appropriate rate mitigation proposal.

Other Submissions

The only intervenor to express support for IGUA's motion was Pollution Probe. In a short submission, Pollution Probe said, "it supports the timely resolution of cost allocation issues unless there is a specific reason for delaying the review to 2024."

For its part, Enbridge Gas opposed the motion. While taking no position on whether the motion met the threshold test, Enbridge Gas submitted that, if the Review Panel determines the test has been met, the motion should be dismissed on the merits, and referred the Review Panel to the evidence and arguments presented by Enbridge Gas in the 2020 Rates Proceeding.

[38] OEB staff submission, p. 11; Exhibit I.Staff.4.
[39] *Report of the Board: Review of Electricity Distribution Cost Allocation Policy*, March 31, 2011 (EB-2010-0219); p. iii and p. 36.

3.3 Findings

General

The Review Panel finds that there was no error made by the Hearing Panel in its Decision to defer consideration of the allocation of Panhandle System costs until the rebasing of costs takes place in 2024. The Decision followed the IRM ratemaking framework established by the OEB. This framework discourages mid-term rate changes in response to changes in costs after base rates are established. The Review Panel also finds that the Hearing Panel did not err in concluding that a deferral of the issue was also merited based on a likelihood that a cost adjustment for the Panhandle System costs now would again be subject to review when the rebasing of rates takes place in 2024. IGUA's motion to review and vary the Hearing Panel Decision is dismissed.

Motion Grounds:

IGUA's grounds for its motion can be summarized as follows:

1. The Hearing Panel Decision was unreasonable because:
   (i) The Hearing Panel failed to provide sufficient reasons to justify the rejection of the argument of IGUA to reallocate costs attributed to the Panhandle System in accordance with the study filed in that proceeding;
   (ii) In deferring consideration of any reallocation of costs, the Hearing Panel ignored the effect of previous decisions of the OEB concerning the issue of Panhandle System costs without providing adequate reasons for so doing.
2. The Hearing Panel erred in concluding that a reallocation of Panhandle System costs in that proceeding would result in further changes to the allocation of those costs when rebasing takes place in 2024.

Threshold Test

Rule 42.01 of the OEB's *Rules of Practice and Procedure* provides that a motion to review and vary an OEB decision must provide grounds that "raise a question as to the correctness of the order or decision".

IGUA contends that, as the Decision does not set out reasons that justify the deferral of the reallocation of costs of the Panhandle System, the continued misallocation provides an inequitable result which must be varied. In addition, IGUA alleges that the Hearing Panel made a factual error in finding that a reallocation of Panhandle System costs would result in further changes to the allocation of those costs when a full rebasing occurs in 2024.

The Review Panel notes that the alleged failure of the Hearing Panel to provide adequate reasons must be coupled with proof of unreasonableness of the decision for a motion to succeed with its objective of variance. Likewise, IGUA's argument that the Hearing Panel's conclusion that Panhandle System costs might require further reallocation in 2024 must also be shown to raise an issue of correctness.

The Review Panel finds that the IGUA motion meets the threshold test and that the Review Panel will consider whether the elements of proof required to establish that the Decision was incorrect have been established by the motion applicant.

The Hearing Panel's Reasons

IGUA cites, in support of its argument, the brevity of the conclusions provided by the Hearing Panel in its disposition of the issue in question. The Decision does not provide an extensive discussion of the merits of making the cost allocation changes favoured by IGUA, as opposed to a deferral of the matter until rebasing in 2024. However, any determination of the adequacy of reasons provided must consider the context in which the Decision was made.

Enbridge Gas's rates for 2020 were determined using an IRM. As the OEB's Utility Rates Handbook provides:

> Under this methodology, base rates are set through a cost of service process for the first year and the rates for the following four years are adjusted using a formula specific to each year.[40]

The objective of the IRM is to decouple costs from rates during the period following the setting of base rates also known as rebasing. This means that, during the IRM, a utility may implement efficiencies that may result in reduced costs and greater return for the shareholder. Conversely, poor utility cost containment performance during that period will not be compensated by implementation of higher rates. The IRM is intended to promote rate stability and certainty.

These rate-making principles inherent in the IRM rate framework were central to the Decision:

> However, the OEB notes that, consistent with the approved rate-setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes.[41]

[40] Handbook for Utility Rate Applications, October 13, 2016, pg. 23.
[41] EB-2019-0194, Decision and Order, May 14, 2020, p. 17.

The Hearing Panel acknowledged that the Panhandle System costs were not being allocated in accordance with the principles of cost allocation. However, the integrity of the IRM rate-making process was found to take precedence over the reallocation of those costs. Adjustments to the allocation of costs are to be addressed at rebasing. This ensures that all the impacts of changes in costs and the effects of those changes to various customer classes can be properly and comprehensively assessed. While the discussion was brief, the Hearing Panel did not find sufficient reason to depart from that accepted method of addressing cost allocation changes in the context of an IRM.

Effect of Previous OEB Decisions

IGUA cited four previous instances in which the OEB identified a need to address the Panhandle System cost allocation issue.[42] It is important to note that there is no dispute that any utility-wide cost allocation review would make changes required for the Panhandle System costs in tandem with any other changes required to achieve accepted cost allocation and rate design objectives.

IGUA's argument, however, goes further to submit that, in essence, the weight and directives of these decisions necessitated changes in the cost allocation of the Panhandle System in the Hearing Panel's Decision to incorporate the results of the study presented by Enbridge Gas in the 2020 Rates Proceeding.

IGUA alleges that inconsistency with previous OEB decisions provides support for its assertion that the Hearing Panel Decision was unreasonable. The Review Panel disagrees.

None of these decisions determined that the issue should be dealt with within the scope of an IRM application such as the 2020 Rates proceeding. In fact, the first three instances cited by IGUA explicitly suggested that the issue be dealt with in a rebasing application.

In the Panhandle leave to construct decision,[43] the OEB indicated that deferral for 14 months was acceptable until the end of Union's then current IRM term. In Union Gas's 2018 rates proceeding[44] (Procedural Order No. 3), the OEB reiterated that deferral was appropriate during the balance of Union's then current IRM term and, later in the same proceeding (Decision and Rate Order), determined that the issue of the allocation of the Panhandle System cost on a going-forward basis would be dealt with in Union's 2019 rates proceeding. In doing so, the OEB noted the reasons for caution in making mid-term cost allocation changes without a full rebasing:

[42] IGUA reply submission, p. 4-5.
[43] EB-2016-0186
[44] EB-2017-0087

> The OEB is of the view that any change to the existing cost allocation model should be done with the assistance of a comprehensive system-wide full cost allocation study. Cost allocation is a zero-sum exercise. A full study ensures that all changes to facilities, operations and use in the transmission system since the development of the previous cost allocation model are recognized across all customer classes. This form of study provides that positive and negative changes in costs throughout the system are accounted for. A finding that current rates are inequitable because of the underlying allocation of costs for one project could introduce other inequalities by an incomplete analysis of the changing cost impacts on customers. Equitable cost causality is only possible with a full study. The OEB will not vary the Panhandle leave to construct decision that declined to change the cost allocation methodology for Panhandle Project costs and directed that any change should be considered in the next Union rates proceeding. Consistency in OEB decisions is important to regulatory clarity and predictability.[45]

The fourth and last of these instances (MAADs Decision) did not require that the cost allocation issue be resolved in the 2020 Rates Proceeding. That decision directed Enbridge Gas to file a cost allocation study in 2019 "for consideration" in the 2020 Rates Proceeding.[46] There was no direction to implement the results of the study.

As noted earlier, Enbridge Gas did file a cost allocation study in the 2020 Rates Proceeding as directed in the MAADs Decision based on a 2019 test year. However, Enbridge Gas did not recommend changes to rates in the 2020 Rates Proceeding as a result of the study update. Rather, Enbridge Gas suggested that the cost allocation changes should be implemented at rebasing. The Hearing Panel agreed. What Enbridge Gas requested in the 2020 Rates Proceeding was approval for changes to the cost allocation methodology, with approval of implementation to follow at rebasing. The Hearing Panel supported the suggestion that the review and approval of cost allocation methodology changes should occur as close as possible to the time the changes are proposed to be implemented.

The OEB decisions in the leave to construct application[47] and in the Union Gas 2018 Rates proceeding[48] did reflect an expectation that the issue of the incremental costs of the Panhandle System, arising subsequent to the last basing of rates in 2013, would be dealt with in a rates rebasing proceeding in 2019. That event was frustrated by the proposed merger of Union Gas with Enbridge Gas Distribution that was approved by the OEB in the MAADs Decision which deferred any rebasing of rates until 2024.

[45] EB-2017-0087, Decision and Rate Order dated January 18, 2018, page 8.
[46] IGUA reply submission, p. 4-5.
[47] EB-2016-0186
[48] EB-2017-0087

The OEB's MAADs Decision may have provided a rationale for reallocating the Panhandle System costs in accordance with accepted principles. However, the Hearing Panel's Decision to implement any reallocation also had to consider the effect of making such changes within the context of the IRM rate framework and its objectives of fairness, stability and certainty. The Hearing Panel's decision did not depart from the established rate methodology and its application in previous OEB IRM applications. As noted by OEB Staff, the Hearing Panel's conclusion is directionally similar to the approach ordered by the OEB in the Horizon case and upheld by the Divisional Court that cost allocation should be done on a holistic rather than piecemeal basis.[49]

The rebasing of rates provides the opportunity to consider and allocate all cost changes in the system and to fashion a rate design framework that reflects the OEB's statutory responsibilities and practice in fashioning just and reasonable rates. Without such comprehensive analysis, a piecemeal cost allocation approach could undermine the objectives of both the IRM rate framework and overall fairness in the making of rates.

The Review Panel is not prepared to determine that the Hearing Panel unreasonably ignored the history of the previous OEB considerations on this issue. The Hearing Panel determination to defer the Panhandle System costs to a 2024 rate rebasing was consistent with the decoupling of costs and rates inherent in the IRM ratemaking framework.

The Decision was Supported by the Evidence

The reasonableness of the Hearing Panel deferral Decision is also supported by the evidence that was before the Hearing Panel. As noted by OGVG in its submissions in the 2020 Rates Proceeding, and the OEB staff submissions in this motion for review, the current allocation of Panhandle System costs produces an acceptable range of resulting RTC ratios for the T2 class which includes IGUA's members, in accordance with OEB guidelines.

Cost Changes Upon 2024 Rebasing

IGUA submits that the Hearing Panel erred in concluding that making changes to cost allocation at this time will result in rate instability at rebasing as set out in a passage from the Decision:

> The OEB acknowledges that the current cost allocations are outdated; however, attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024.[50]

[49] *Hamilton (City) v. The Ontario Energy Board*, 2016 ONSC 6447,
[50] EB-2019-0194, p.17

In its reply submission in this proceeding, IGUA stated that “there is absolutely no evidence on the record that addressing the Panhandle System cost misallocation now will result in further changes in 2024”.

As noted by CME in its submission on this motion, Enbridge Gas did in fact file evidence in the 2020 Rates Proceeding that supported the Hearing Panel’s conclusion.[51] This evidence showed that certain customer classes could see a significant increase in delivery charges if the cost allocation study were to be implemented now and that other adjustments are likely needed at rebasing. As pointed out by OEB staff in its submission on the motion, if the cost allocation is implemented now, the specific allocation issues addressed in the study would still need to be re-evaluated as part of a comprehensive review of costs, cost allocation and rate design in the rebasing proceeding.[52]

The Review Panel finds that the Hearing Panel’s finding that rate stability could be negatively impacted by changing the cost allocation twice – once now and again at rebasing – was not in error, and IGUA’s assertion to the contrary does not provide a basis for the relief it requests.

Conclusion

The Review Panel finds that the Hearing Panel did not err in its Decision to defer any changes to the cost allocation of the Panhandle System costs to the 2024 rate rebasing proceeding. The Decision did not misstate the evidence before the Hearing Panel, and its findings reflect adherence to accepted OEB ratemaking practices and precedents. The Review Panel finds that the Hearing Panel Decision was a reasonable conclusion based upon the objectives of the IRM ratemaking framework and fairness to all customer classes. The deferral of this issue was justified despite the unavoidable merger-related delays that had prevented an earlier rebasing. The IGUA motion is accordingly dismissed.

[51] CME submission on IGUA’s motion, pp. 5-6
[52] OEB staff submission, p. 9

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. IGUA's motion is dismissed.

2. IGUA and cost eligible intervenorsshall file their cost claims with the OEB and forward them to Enbridge Gas on or before **October 6, 2020**.

3. Enbridge Gas shall file with the OEB and forward to the intervenors and IGUA any objections to the claimed costs by **October 14, 2020**.

4. IGUA and intervenors shall file with the OEB and forward to Enbridge Gas any responses to any objections for cost claims by **October 21, 2020**.

All materials filed with the OEB must quote the file number, **EB-2020-0156**, be submitted in a searchable/unrestricted PDF format with a digital signature through the OEB's web portal at https://pes.ontarioenergyboard.ca/eservice. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at https://www.oeb.ca/industry. If the web portal is not available parties may email their documents to boardsec@oeb.ca.

All communications should be directed to the attention of the Board Secretary at the address below and be received no later than 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, Khalil Viraney, at Khalil.Viraney@oeb.ca and OEB Counsel, Ian Richler, at Ian.Richler@oeb.ca.

DATED at Toronto, September 24, 2020

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary

TAB I

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

DECISION AND ORDER

EB-2023-0313

ENVIRONMENTAL DEFENCE

Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249

BEFORE: **Pankaj Sardana**
Presiding Commissioner

Lynne Anderson
Chief Commissioner

Allison Duff
Commissioner

December 13, 2023

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1 OVERVIEW

This motion relates to three separate but concurrent written hearings on applications by Enbridge Gas Inc. for leave to construct community expansion projects. On April 17, 2023 a panel of the Ontario Energy Board (OEB) denied Environmental Defence's request to file evidence on heat pumps in the three proceedings. On September 21, 2023, the same panel granted leave to construct the three natural gas projects.

Environmental Defence brought this motion under Rule 40.01 of the OEB's *Rules of Practice and Procedure* (Rules) to review and reverse the decision not to admit the heat pump evidence, arguing that it was a breach of procedural fairness. Environmental Defence also challenged the decisions to approve the three projects, arguing that they were tainted by the refusal to allow the evidence and pointing to certain other alleged legal errors.

After final submissions on the motion were filed, Environmental Defence withdrew the motion insofar as it concerned one of the projects, which would serve a First Nations reserve. The OEB confirmed withdrawal of this portion of the motion.

For the reasons that follow, the review panel denies the remainder of the motion, in respect of the other two projects. The review panel is not persuaded that the original panel made a "material and clearly identifiable error" within the meaning of the Rules.

The result is that all three orders approving the projects remain in full force and effect.

2 CONTEXT AND PROCESS

In December 2022, Enbridge Gas filed an application for leave to construct the Hidden Valley Community Expansion Project in the Town of Huntsville; in January 2023 it filed applications for leave to construct the Selwyn Community Expansion Project in the Township of Selwyn and the Mohawks of the Bay of Quinte and Shannonville Community Expansion Project in Tyendinaga Mohawk Territory Reserve No. 38 and the community of Shannonville. All three projects are eligible for funding under the Government of Ontario's Natural Gas Expansion Program (NGEP).

These are relatively small projects. Between them they have a total forecast capital cost of under $7 million (after accounting for the NGEP contribution), and are intended to serve fewer than 400 new customers, as shown in the table below:

Overview of the Three Community Expansion Projects

Project	Case Number	Gross Capital Cost Forecast ($ million)	NGEP Funding ($ million)	Net Capital Cost ($ million)	Forecast Customer Connections
Hidden Valley	EB-2022-0249	3.3	1.9	1.4	130
Selwyn	EB-2022-0156	4.5	1.7	2.8	87
Mohawks of the Bay of Quinte and Shannonville*	EB-2022-0248	10.7	8.1	2.6	179

**This project is no longer included in Environmental Defence's motion*

The three applications were heard by the same panel of Commissioners. Environmental Defence intervened in all three proceedings. After the Notices of Hearing were published, but before any procedural orders had been issued, Environmental Defence wrote to the OEB advising of its intention to file evidence in each of the three cases. The evidence, to be prepared by Dr. Heather McDiarmid, would "compare the costs for an average customer in each of the relevant three communities to convert their heating to electric cold climate heat pumps instead of converting to gas."[1] Environmental Defence explained that the proposed evidence "is relevant to the customer addition forecast that drives the revenue forecast and is determinative of the financial risks to existing

[1] EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence letter, March 9, 2023.

customers."[2] Environmental Defence asked for a cost award in relation to the proposed evidence. It estimated that Dr. McDiarmid's report would cost between $3,000 and $5,000 per proceeding, plus potentially an additional 40% for Dr. McDiarmid's preparation of interrogatory responses and participation in a technical conference; there would also be incremental counsel costs related to the preparation of the evidence of between $1,000 and $2,000 per proceeding.

The OEB invited submissions from other parties on Environmental Defence's request to file the evidence. Enbridge Gas opposed it. So did the Mohawks of the Bay of Quinte, who intervened only in the Mohawks of the Bay of Quinte and Shannonville proceeding. Pollution Probe, who intervened in all three cases, supported the request, as did OEB staff.

On April 17, 2023, the OEB denied Environmental Defence's request (the Decision on Intervenor Evidence). The Decision observed that the availability of NGEP funding is "an important consideration in the determination of the public interest in providing the availability of natural gas service in unserved communities," and suggested that it was not necessary to examine alternatives to natural gas when a utility applies for leave to construct an NGEP project.[3] The Decision added that "this application does not involve the OEB making a choice between the approval, or recommending the use, of such heat pumps instead of an expansion of natural gas facilities in serving the relevant communities."[4] In any case, it was "questionable whether there would be a sufficient record even with the proposed Environmental Defence evidence to enable such a choice," as a number of other considerations besides cost may factor into the choice.[5]

Moreover, the OEB found that, to the extent it was relevant to the economics of the three projects, the impact of heat pumps could be explored without Environmental Defence's proposed evidence, "but rather through interrogatories or by further discovery or follow-up as the OEB may require."[6]

On April 25, 2023, Environmental Defence filed a notice of motion to review the Decision on Intervenor Evidence. However, Environmental Defence asked that its motion be held in abeyance while it pursued additional discovery on the topic of heat

[2] *Ibid.*
[3] EB-2022-0156/EB-2022-0248/EB-2022-0249, Decision on Intervenor Evidence and Confidentiality, April 17, 2023, p. 4.
[4] *Ibid.*, p. 4.
[5] *Ibid.*, p. 4.
[6] *Ibid.*, p. 5.

pumps through supplementary interrogatories and potentially further follow-up. Environmental Defence clarified that it "hope[d] that a review motion can be avoided."[7]

Enbridge Gas objected to the supplementary interrogatories but did agree to file an updated response to one of Environmental Defence's original interrogatories. This updated response included an analysis prepared for Enbridge Gas by Guidehouse of the performance and operational costs of heat pumps for typical Ontario homes. The OEB declined to provide for any further rounds of interrogatories but instead asked Enbridge Gas to respond in its argument-in-chief, on a best-efforts basis, to a number of questions Environmental Defence had raised about alleged deficiencies in the heat pump analyses by Enbridge Gas and Guidehouse.[8]

On June 30, 2023, Environmental Defence wrote to the OEB asking for its motion to be adjudicated and for a schedule to be set for submissions, or alternatively that its motion "could be heard following a decision by the hearing panel on the merits of the case, with that decision being subject to review."[9]

On July 12, 2023, the OEB accepted ED's alternative proposal, explaining that "the appropriate time to consider any motion is once the current hearing panel has issued its final decisions for the proceedings."[10]

Those final decisions were issued on September 21, 2023 (the Final Decisions). The OEB found that the three projects were in the public interest and granted leave to construct them subject to certain standard conditions.

The following week, Environmental Defence filed an amended notice of motion, asking for the Decision on Intervenor Evidence to be varied or cancelled, and for the proposed evidence of Dr. McDiarmid to be admitted and eligible for cost recovery. In addition, Environmental Defence asked that the Final Decisions be "cancelled and remitted for reconsideration". The thrust of the amended notice of motion is that the denial of Environmental Defence's request to file the heat pump evidence amounted to a breach of procedural fairness. In addition, the amended notice of motion pointed to two alleged errors of law in the Final Decisions: first, they "appear to be predicated on the assumption that the Panel did not have the jurisdiction to allocate 100% of the revenue

[7] EB-2022-0156/EB-2022-0248/EB-2022-0249, Environmental Defence letter, April 25, 2023.
[8] EB-2022-0156, Procedural Order No. 3; EB-2022-0248, Procedural Order No. 4; EB-2022-0249, Procedural Order No. 3.
[9] EB-2023-0190, Environmental Defence letter, June 30, 2023.
[10] EB-2023-0190, OEB letter, July 12, 2023.

forecasting risk to Enbridge"; and second, they "completely disregarded" Environmental Defence's submissions that Enbridge Gas's customer attachment survey was deficient and that there was no analysis regarding subsequent customer exits over the 40-year revenue horizon.

On October 18, 2023, the OEB issued a Notice of Hearing and Procedural Order No. 1 setting out a schedule for written argument on Environmental Defence's amended notice of motion. All of the intervenors in the leave to construct proceedings were approved as intervenors in the motion.

Submissions were filed by Environmental Defence, Enbridge Gas, Pollution Probe, the Mohawks of the Bay of Quinte, and OEB staff.

Environmental Defence did not ask for a stay of the Final Decisions under Rule 40.04.

Pursuant to the condition in the leave to construct decisions requiring it to notify the OEB of certain construction milestones, Enbridge Gas advised as follows:

- For the Hidden Valley project, construction was completed on November 3, 2023 and the project went into service that same day[11]
- For the Selwyn project, the planned in-service date was December 1, 2023[12]
- For the Mohawks of the Bay of Quinte and Shannonville project, construction would commence on October 27, 2023[13]

Then on November 29, 2023, the same day Environmental Defence's reply submission on this motion was due, Enbridge Gas wrote to the OEB to say that it was "ceasing remaining construction activities related to the Projects, effective immediately," in light of the "regulatory uncertainty" in connection with the motion.[14] It reiterated the request it had made in its submission on the motion "that the motion be addressed in a timely way."[15]

On December 4, 2023, the Mohawks of the Bay of Quinte filed a letter expressing their disappointment that Enbridge Gas had halted construction on the project that would serve their community, and adding: "We reiterate that the MBQ Project is unique in that it is located on the actual territory of the MBQ as established by treaty and as such

[11] EB-2022-0249, Enbridge Gas letters, both dated November 7, 2023.
[12] EB-2022-0156, Enbridge Gas letter, November 21, 2023.
[13] EB-2022-0248, Enbridge Gas letter, October 17, 2023.
[14] EB-2022-0156/EB-2022-0248/EB-2022-0249, Enbridge Gas letter, November 29, 2023.
[15] *Ibid.*

plays a critical role in the community's rights to self-determination and ability to govern themselves."[16] Environmental Defence responded that same day. Noting its "position of deference to the First Nation's wishes and its recognition that special considerations apply," Environmental Defence withdrew its motion insofar as it related to that particular project.[17]

The OEB wrote to all parties on December 8, 2023 confirming that the motion was partially withdrawn and urging Enbridge Gas to resume construction of that project expeditiously. Enbridge Gas responded on December 12, 2023 that construction had restarted.

[16] EB-2023-0313, Mohawks of the Bay of Quinte letter, December 4, 2023.
[17] EB-2023-0313, Environmental Defence letter, December 4, 2023.

3 THE THRESHOLD TEST

Rule 43.01 of the Rules provides that, before hearing a motion to review, "the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits."

In the Notice of Hearing and Procedural Order No. 1, the OEB did not make a determination of the threshold question. Rather, the OEB invited submissions on the threshold question and the merits at the same time.

Environmental Defence did not specifically address the threshold question in its argument-in-chief. It did however, speak to it in its amended notice of motion, arguing that the original panel made errors of law by (a) denying Environmental Defence the opportunity to file the evidence, in breach of procedural fairness, (b) misapprehending the panel's own jurisdiction to allocate the revenue forecast risk, and (c) disregarding Environmental Defence's submissions on the customer attachment survey and the lack of any analysis of customer exits. These errors, according to Environmental Defence, materially affected the Final Decisions; for instance, without them, the original panel might have reached a different conclusion on the economics of the projects and added conditions of approval such as requiring Enbridge Gas to assume the revenue forecasting risk.

Enbridge Gas argued that the threshold was not met. It observed that Rule 43.01 lists a number of factors that may be taken into consideration when assessing whether the issues raised in a motion are material enough to warrant a review on the merits, and argued that some of those factors weigh against a review on the merits in this case. For example, "except for the alleged denial of procedural fairness, the other alleged errors are essentially disagreements as to the weight the OEB gave to particular evidence or facts (in respect of the customer attachment survey) or how it exercised its discretion (in respect of risk allocation)."[18]

OEB staff argued that, while it did not agree with the allegations, they are the type of allegations (errors of law) that are captured under Rule 43 and therefore can ground a motion to review.

[18] Enbridge Gas submission, p. 26.

Findings

The review panel finds that the motion meets the threshold. The review panel accepts that the motion raises legitimate questions regarding the relevant issue of Enbridge Gas's revenue forecast. In particular, whether the original panel:

- made material and clearly identifiable errors of law by denying Environmental Defence the opportunity to file the heat pump evidence
- misunderstood its own jurisdiction to allocate the revenue forecasting risk
- disregarded Environmental Defence's submissions on the customer attachment survey and the possibility of customer exits over the 40-year revenue horizon.

Such questions properly form the basis of a motion to review under Rule 42.01.

4 THE MERITS OF THE MOTION

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

Rule 42.01(a) sets out a number of grounds. The one invoked by Environmental Defence in this Motion is that "the OEB made a material and clearly identifiable error of fact, law or jurisdiction." The Rule specifies:

> For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law.

As OEB staff noted in its submission, when Rule 42 was recently amended, the OEB explained that "the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order."[19]

4.1 *Was the Decision on Intervenor Evidence a breach of procedural fairness?*

Environmental Defence asserts that the Decision on Intervenor Evidence "constituted a breach of procedural fairness by preventing Environmental Defence from filing its own evidence and requiring it to rely solely on the evidence of its opponent."[20] It adds that "[f]undamental fairness and the *audi alteram partem* rule require that both sides be given an opportunity to adduce evidence."[21]

Environmental Defence says the proposed heat pump evidence "goes to the core" of its position in the leave to construct cases.[22] The evidence would have been used to cast doubt on Enbridge Gas's customer connection (and retention) forecasts, and therefore on the economics of the projects. It would also have been used to critique the customer

[19] OEB staff submission, p. 4.
[20] Environmental Defence argument-in-chief, p. 3.
[21] *Ibid.*, p. 3.
[22] *Ibid.*, p. 3.

surveys that Enbridge Gas relied on for its connection forecasts; Environmental Defence maintained that the "survey results were unreliable in large part because respondents were not provided with key information regarding heat pumps before being asked whether they were likely to switch to gas."[23]

"The unfairness was compounded," according to Environmental Defence, "by the Panel's express reliance on Enbridge's evidence in relation to heat pumps and the revenue forecast."[24] Environmental Defence pointed to a decision of the Saskatchewan Court of Appeal holding that "fundamental fairness dictates that if one side adduces extrinsic evidence the other side must be given, I repeat, subject to the rules of evidence and admissibility, the opportunity to file a response to attempt to persuade the judge to the contrary."[25]

In response to the review panel's request (set out in the Notice of Hearing and Procedural Order No. 1) for submissions on the balance between the right to be heard and the ability of a tribunal to control its own process and to conduct an efficient hearing, Environmental Defence argued that it would have been "*more* efficient" if the original panel had simply allowed the heat pump evidence.[26] Environmental Defence added that the ability of a tribunal to control its own process does not supersede procedural fairness, pointing to the Supreme Court's statement that "the rule of autonomy in administrative procedure and evidence, widely accepted in administrative law, has never had the effect of limiting the obligation on administrative tribunals to observe the requirements of natural justice."[27]

In the alternative, Environmental Defence argued that, "if the Intervenor Evidence Decision is understood to have determined that the proposed evidence was not relevant, that was an error of law."[28] Environmental Defence explained that the purpose of the proposed evidence was not to "request that the OEB make a choice between heat pumps or natural gas expansion," but to test the accuracy of the customer attachment forecast and the accuracy of Enbridge Gas's communications to potential new customers.

[23] *Ibid.*, p. 4.
[24] *Ibid.*, p. 4.
[25] *Ibid.*, p. 4, citing *Bailey v. Saskatchewan Registered Nurses' Association*, (1996), 140 D.L.R. (4th) 547.
[26] *Ibid.*, p. 5 (emphasis in original).
[27] *Ibid.*, p. 5, citing *Université de Québec à Trois-Rivières v. Larocque,* [1993] 1 S.C.R. 471.
[28] *Ibid.*, p. 5.

In response to the review panel's request for submissions on how the Final Decisions might have been different if Environmental Defence had been allowed to file the evidence, Environmental Defence argued that the original panel might not have accepted Enbridge Gas's customer attachment forecast and might have ultimately concluded that the projects were not economic. Environmental Defence further suggested that the original panel might have imposed conditions requiring Enbridge Gas to bear some or all of the revenue shortfall risk if it chose to proceed with the projects. Environmental Defence added that, "[i]n any event, the Supreme Court of Canada has held that a reviewing entity should not deny relief in the face of procedural unfairness based on speculation on how the outcome may have been different if a party had been able to file evidence."[29]

In a brief submission, Pollution Probe supported Environmental Defence's motion. Pollution Probe argued that "[t]here is no question on the relevance and value" of the proposed evidence, and that the heat pump evidence filed by Enbridge Gas "was not helpful, incomplete and biased in favour of supporting the natural gas project in lieu of the more cost-effective energy options to consumers in those communities."[30]

Enbridge Gas and OEB staff argued that there was no denial of procedural fairness. Both explained that the duty of fairness owed to Environmental Defence was towards the lower end of the spectrum. As Enbridge Gas put it, "ED is not owed a duty of procedural fairness in the same way, or to the same extent, as a party whose interests are directly affected by a decision. ED is a broad-based environmental advocacy group intervenor. These applications do not involve a decision being made that is directly adverse to ED, and there is no 'case against ED to be met.'"[31] OEB staff noted that "[t]he statutory test for granting leave to construct is whether the proposed project is in the public interest. Applying that test is a nuanced, polycentric and discretionary exercise. It does not require the same degree of procedural protections as a trial (or a highly adversarial administrative proceeding, like a disciplinary hearing, that resembles a trial)."[32]

Enbridge Gas argued that "the OEB gave ED a fair and meaningful opportunity to participate and be heard in multiple ways," and that ED was able to get evidence on the record concerning the cost comparison of heat pumps to natural gas conversion, including through interrogatories directed at Enbridge Gas and through the

[29] *Ibid.*, p. 7, citing *Cardinal v. Director of Kent Institution,* [1985] 2 S.C.R. 643.
[30] Pollution Probe submission, p. 1.
[31] Enbridge Gas submission, p. 14.
[32] OEB staff submission, p. 6 (internal footnotes omitted).

supplementary questions which the OEB directed Enbridge Gas to answer in its argument-in-chief.[33] Similarly, OEB staff argued that, "[i]n Environmental Defence's final submission on Enbridge Gas's applications it forcefully made its point about how the customer attachment forecasts were unreliable because they did not account for the competitiveness of heat pumps. It was able to do so based on the record that had been built up. Simply put, it was not hamstrung by its inability to file the Dr. McDiarmid evidence on heat pumps. Its concerns about the attachment forecasts – and by corollary the economics of the projects – came through loud and clear."[34]

Enbridge Gas further submitted that the proposed evidence "would not have changed the OEB's conclusion on Enbridge's customer attachment forecast or resulting revenue forecast. ED was not proposing to put forward evidence regarding the actual potential customers in these particular communities or the choices they would in fact make."[35] The original panel did not err in concluding that "the best evidence" on the customer attachment forecast "is provided by the willingness of potential customers to obtain natural gas service demonstrated by the market surveys submitted."[36] Moreover, the original panel was well aware of the potential savings associated with the installation of heat pumps and in fact referred to them in the Final Decisions.[37] The original panel found that the decision of individual customers to choose natural gas service is based on a number of factors, and that cost comparison between gas and heat pumps could change in the future.

OEB staff also submitted that the proposed evidence would not have changed the Final Decisions. OEB staff explained: "That is based not on mere speculation but on OEB staff's reading of the Final Decisions as a whole…. The original panel was clearly of the view that the proposed heat pump evidence would not assist it in drawing any conclusions about the actual adoption of heat pumps in the three communities, because the choice of heat pumps is a multivariate analysis of which cost is only one consideration, and because Enbridge Gas had presented evidence about the expressed preferences of people in those communities."[38]

OEB staff emphasized that the question "is not whether this review panel would have decided Environmental Defence's request to file evidence in the same way as the

[33] Enbridge Gas submission, pp. 16-17.
[34] OEB staff submission, p. 12.
[35] Enbridge Gas submission, pp. 21-22.
[36] Decision on Intervenor Evidence, pp. 20-21.
[37] Enbridge Gas submission, p. 21.
[38] OEB staff submission, p. 13.

original panel – in other words, whether it would have struck a different balance between the right to be heard and administrative efficiency – but whether the original panel made a material and clearly identifiable legal error."[39] In OEB staff's view, it did not: "the Final Decisions demonstrate that, even without the evidence, the original panel fully grasped [Environmental Defence's] concerns about the accuracy of the attachment forecast. The balance struck by the original panel was not unfair."[40] OEB staff pointed out that in another leave to construct proceeding, for Enbridge Gas's Panhandle Regional Expansion Project, a different panel of Commissioners allowed Environmental Defence to present similar heat pump evidence (Dr. McDiarmid recently testified at the oral hearing).[41] That project is much larger than any of the three projects at issue in this motion, and is not eligible for NGEP funding.

The Mohawks of the Bay of Quinte also opposed the motion. They argued that there was no breach of procedural fairness: Environmental Defence's proposal to file evidence "was not outright denied but reasonably considered and properly adjudicated by the Board after thoughtful deliberation through an open and transparent process that involved detailed written reasons."[42] They reiterated their support for the project that would serve their territory, and noted that the motion had "already resulted in delays and the frustration of the community's wishes."[43]

In its reply, Environmental Defence disagreed with Enbridge Gas's contention that it was owed only a minimum level of procedural fairness in these proceedings. It denied that its interests were indirect or unimportant, emphasizing among other things its "efforts to combat fossil fuel subsidies" and "to help consumers adopt heat pumps as the home heating option that minimizes energy bills and carbon emissions," and its interest in averting "catastrophic climate change."[44] It also noted that it had "worked on these issues with local resident groups in Selwyn and Huntsville."[45]

Environmental Defence argued that, even if it were entitled to procedural fairness on the lower end of the spectrum, that would include the opportunity to file evidence, which is a "bare minimum procedural right".[46] It added: "It is absurd to suggest that fairness can be achieved by forcing a party to rely only on evidence prepared by its opponent,

[39] OEB staff submission, p. 13.
[40] *Ibid.*, pp. 13-14.
[41] EB-2022-0157, Oral Hearing Transcript, Vol. 1, November 13, 2023.
[42] Mohawks of the Bay of Quinte submission, p. 3.
[43] *Ibid.*, p. 5.
[44] Environmental Defence reply, p. 3.
[45] *Ibid.*, p. 4.
[46] *Ibid.*, p. 4.

particularly where there is no opportunity to cross-examine on that evidence or even ask follow-up questions in supplementary interrogatories or a technical conference."[47]

Environmental Defence reiterated that "special considerations apply" to the Mohawks of the Bay of Quinte, and "where any relief requested herein conflicts with the relief requested by the First Nation, the latter should prevail, including the First Nation's request that construction proceed. However, there is no conflict with respect to Enbridge assuming the revenue forecast risk and with respect to the proposed condition that customers be provided with accurate information."[48] The following week, after Enbridge Gas advised that it was halting construction on all three projects and the Mohawks of the Bay of Quinte filed a letter expressing their concerns with the delay, Environmental Defence withdrew its motion in respect of that one project.

Findings

As Environmental Defence has withdrawn its motion as it concerns the Mohawks of the Bay of Quinte and Shannonville Community Expansion Project, it is unnecessary to say anything further about that project. These findings relate solely to the other two projects.

The review panel finds that there was no denial of procedural fairness. The original panel considered Environmental Defence's request to file the heat pump evidence, after inviting submissions from all parties, and determined that the evidence was not necessary. The question in this motion is not whether this review panel would have made a different determination than the original panel, but whether the original panel made a material and clearly identifiable error. We conclude that it did not.

The Final Decisions demonstrate that the original panel was alive to Environmental Defence's concerns about Enbridge Gas's customer attachment forecast. Despite not being allowed to file the evidence it wanted to, Environmental Defence was able to elicit and test Enbridge Gas's evidence through interrogatories and to critique Enbridge Gas's evidence in its final submission.

Indeed, in the Final Decisions, the original panel acknowledged the potential benefits that heat pumps may afford customers and identified heat pump uptake as a potential risk to project viability. The original panel concluded there were many different factors affecting a decision to opt for natural gas service (with forecast revenue being only one

[47] *Ibid.*, p. 8.
[48] *Ibid.*, p. 9.

consideration) and relied upon letters of support from the target communities and the market surveys.

In sum, Environmental Defence was able to make out its case. It was heard.

In assessing the public interest, the original panel indicated that an important consideration was the selection of the projects for NGEP funding. The NGEP selected 28 projects from among 210 proposals to receive funding assistance to expand natural gas to the communities, including the two projects.

The original panel could have allowed the proposed evidence. But it was not a material and clearly identifiable error to disallow it. As evident in the Final Decision, the panel decided to defer the consideration of risk, regarding both costs and revenues, until the rebasing application after the ten-year rate stability period (RSP). This was a decision within its discretion.

The content of the duty of procedural fairness is variable and context-specific. In the particular context of this case, there was no unfairness.

The original panel had a measure of discretion, as the "master of its own procedure",[49] in balancing Environmental Defence's demands against the need for efficiency. As OEB staff pointed out, the value of efficiency is inherent in the *Statutory Powers Procedure Act*, which speaks to the need "to secure the just, most expeditious and cost-effective determination of every proceeding on its merits", and in the OEB's own Rules, which include similar language.[50] Even in the context of a judicial trial, which is generally less procedurally flexible than an administrative proceeding, the courts have recognized the principle of proportionality.[51]

Moreover, Environmental Defence's interests in these proceedings, while important, included broad issues. Opposing fossil fuel subsidies, fostering the adoption of heat pumps and avoiding the looming threat of catastrophic climate change[52] demand careful deliberation but extend beyond the immediate scope of these proceedings. These proceedings were specifically focused on whether to approve the construction of these

[49] *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, para. 53.
[50] *Statutory Powers Procedure Act*, s. 2; Rule 2.01.
[51] See, for example, *S.A. Thomas Contracting v. Dyna-Build Construction,* 2017 ONSC 4271 and *R. v. Mohan,* [1994] 2 S.C.R. 9.
[52] Environmental Defence reply submission, p.3.

small community expansion projects involving 217 customers and $4.2 million in capital investment, net of NGEP funding.

4.2 *Did the original panel misapprehend its own jurisdiction in respect of allocating the revenue forecasting risk?*

Environmental Defence submits that the procedural unfairness of the Decision on Intervenor Evidence is enough to overturn the Final Decisions. But in its amended notice of motion, it also alleges that the Final Decisions contained two other errors.

First, Environmental Defence says the Final Decisions "appear to be predicated on the assumption that the Panel did not have the jurisdiction to allocate the revenue forecasting risk to Enbridge, either in relation to the disposition of any shortfalls arising over the first ten years or in relation to any further shortfalls that might arise in years 11 to 40."[53] It points to the statement in the Final Decisions that the OEB "cannot bind a future panel determining that future application to be made by Enbridge Gas post-RSP." According to Environmental Defence, "That may be true. However, that does not prevent the OEB from ensuring that existing customers are insulated from the risk of revenue shortfalls," for instance, by requiring Enbridge Gas to assume the revenue forecast risk as a precondition to proceeding with the projects.[54]

Enbridge Gas responded that there was no jurisdictional error. The original panel considered the issue of allocating the revenue forecasting risk "and simply exercised its discretion to not grant the order ED was requesting."[55] The panel's decision in that regard was consistent with the earlier decision on the Haldimand Shores Community Expansion Project,[56] and Environmental Defence should not "get a second 'kick at the can' and relitigate this issue on this motion."[57]

OEB staff also argued that the original panel did not misunderstand its own jurisdiction: "The word 'jurisdiction' does not even appear in the Final Decisions."[58]

[53] Environmental Defence argument-in-chief, p. 8.
[54] *Ibid.*, p. 8.
[55] Enbridge Gas submission, p. 22.
[56] EB-2022-0088, Decision and Order, August 18, 2022.
[57] Enbridge Gas submission, p. 23.
[58] OEB staff submission, p. 14.

Findings

For these projects, Enbridge Gas proposed to apply a rate stability period for the first ten years, during which the company would bear the risk of any shortfall in the customer attachment forecast, consistent with the decision in the Harmonized System Expansion Surcharge decision.[59] The original panel accepted this. The original panel specifically asked for submissions on how to treat any shortfall that may arise after the RSP.[60] After considering those submissions, the original panel found that any shortfall would be dealt with in the first rebasing proceeding following the RSP. In that proceeding, the original panel noted:

> all options will be available to the OEB … with respect to the appropriate rate treatment of potential capital cost overruns and/or lower than forecast customer attachments/volumes (and associated revenues). Enbridge Gas is not guaranteed total cost recovery if actual capital costs and revenues result in an actual PI [profitability index] below 1.0.[61]

The original panel added that, while it cannot bind a future panel, there is "a reasonable expectation that [existing] customers will not be called upon to provide a further subsidy to compensate for post-RSP revenue shortfalls."[62]

The review panel sees no error in the decision to leave the rate treatment of any post-RSP shortfall to a future rate case.

These were leave to construct applications, not rate applications. The scope of the two are different. While the original panel could have added conditions of approval or provided other directions on the post-RSP rate treatment, it chose not to do so. It did not make that choice on the basis of a misunderstanding of its jurisdiction; in fact, it specifically invited submissions on the rate treatment question. Rather, it exercised its discretion not to grant what Environmental Defence asked for.

Determining the rate treatment of any shortfalls in the next rebasing proceeding after the ten-year RSP will allow the OEB to consider the issue more broadly in the context

[59] EB-2020-0094, Decision and Order, November 5, 2020.
[60] EB-2022-0156, Procedural Order No. 3; EB-2022-0248, Procedural Order No. 4; EB-2022-0249, Procedural Order No. 3.
[61] EB-2022-0156, Final Decision, pp. 20-21; EB-2022-0248, Final Decision, p. 21; EB-2022-0249, Final Decision, p. 20.
[62] EB-2022-0156, Final Decision, p. 21; EB-2022-0248, Final Decision, p. 21; EB-2022-0249, Final Decision, p. 20.

of Enbridge Gas's entire franchise area with 3.8 million existing customers, not just the two communities with 217 forecast customers.

There are 28 projects that have been approved in Phase 2 of the NGEP. The OEB strives for procedural efficiency and regulatory consistency. It makes sense to consider questions about rate treatment for such projects on a consolidated basis in a rebasing hearing, rather than on a piecemeal basis in each leave to construct proceeding. In that rebasing hearing, all options will be open, as the original panel said.

4.3 *Did the Final Decisions fail to consider some of Environmental Defence's submissions?*

The other alleged problem with the Final Decisions is that they "completely disregarded Environmental Defence's detailed submissions regarding Enbridge's customer attachment survey (i.e. that it was highly biased and unreliable) and the lack of any analysis regarding subsequent customer exits over the 40-year revenue horizon."[63]

Enbridge Gas responded that the Final Decisions demonstrate that the original panel was fully aware of Environmental Defence's concerns (as well as Pollution Probe's). Enbridge Gas points to particular passages, including where the panel noted, "Enbridge Gas disagreed with the assertion of Environmental Defence and Pollution Probe, as set out in their submissions, that the forecast of the attachments is not reliable because Enbridge Gas did not consider that the customers may switch to other forms of energy in the future."[64] Enbridge Gas argued that this aspect of the motion is really an attempt to challenge the original panel's weighing of the evidence or exercise of discretion, which is not a proper basis for a motion to review under the Rules. In any case, the panel was "not required to recite in detail every submission that is made or every detail regarding their reasoning."[65]

OEB staff also made that last point, citing the Supreme Court's *Vavilov* decision which confirmed that administrative decision-makers cannot be expected "to 'respond to every argument or line of possible analysis", or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion.'"[66] OEB staff

[63] Environmental Defence argument-in-chief, p. 9.
[64] Enbridge Gas submission, p. 22, citing the Final Decisions in EB-2022-0156 at p. 11, EB-2022-0248 at p. 12 and EB-2022-0249 at p. 11.
[65] Enbridge Gas submission, p. 25.
[66] OEB staff submission, p. 15, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, para. 128.

argued that although the Final Decisions did not directly address Environmental Defence's submissions on the usefulness of the surveys, that was not in itself a legal error. The original panel implicitly rejected those submissions. That was a reasonable finding based on the record and submissions that were in front of the original panel.

In its reply, Environmental Defence acknowledged that the original panel considered the customer attachment forecast in a broad way, but maintained that "the problem is the reliance on the survey results while completely disregarding the alleged omissions and misrepresentations in the survey script that undermine the survey conclusions."[67]

Findings

The original panel did not err in accepting Enbridge Gas's forecast of customer attachments and associated revenues. That was an assessment based on its judgment of the known revenue risks as articulated by Environmental Defence in submission.

Although the panel did not specifically respond to each of Environmental Defence's detailed arguments, it was not required to do so. When each Final Decision is read as a whole, it is apparent that the panel was well aware that Environmental Defence and Pollution Probe took issue with the evidence underpinning Enbridge Gas's customer attachment forecast. The original panel acknowledged the uncertainties yet indicated that uncertainties could encompass a range of scenarios including policy changes, technology changes, cost changes and economic cycles – both favourable and unfavourable.

Additionally, the original panel's reliance on letters of support from the target communities and market surveys was not arbitrary; rather, it served as demonstrative evidence underpinning the genuine interest and willingness of potential customers to avail themselves of natural gas services.

In summary, the review panel is not persuaded that the original panel failed to consider Environmental Defence's submissions on the attachment survey or customer exits. We therefore find no material and clearly identifiable error in the Final Decisions.

[67] Environmental Defence reply, p. 9.

5 COSTS

Although Environmental Defence has withdrawn its motion as it relates to the Mohawks of the Bay of Quinte and Shannonville project, and has been unsuccessful in the remainder of the motion as it relates to the other projects, it may seek its costs of the motion in accordance with the schedule below. The other intervenors who participated in the hearing of the motion, Pollution Probe and the Mohawks of the Bay of Quinte, are also entitled to ask for their costs. Enbridge Gas has the opportunity to object to the claimed costs. As set out in the Notice of Hearing and Procedural No. 1, Enbridge Gas is liable for any cost awards.

6 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Environmental Defence's motion is denied. The Decision on Intervenor Evidence and the Final Decisions in EB-2022-0156 and EB-2022-0249 are confirmed.

2. Environmental Defence and cost eligible intervenors shall submit to the OEB and copy Enbridge Gas any cost claims no later than January 11, 2024.

3. Enbridge Gas may file with the OEB and forward to the applicable party any objections to the claimed costs of that intervenor by January 18, 2024.

4. A party whose cost claims were objected to may file with the OEB and forward to Enbridge Gas any responses to the objections by January 25, 2024.

5. Enbridge Gas shall pay the OEB's costs of and incidental to this proceeding upon receipt of the OEB's invoice.

How to File Materials

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-2023-0313** 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.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto December 13, 2023

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar

TAB J

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

DECISION AND ORDER - PHASE 2

EB-2022-0024

ELEXICON ENERGY INC.

Application for rates and other charges to be effective January 1, 2023

BEFORE: Allison Duff
Presiding Commissioner

Michael Janigan
Commissioner

July 6, 2023

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

Ontario

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1 OVERVIEW

In this Decision and Order, the Ontario Energy Board (OEB) approves partial funding of the Incremental Capital Module (ICM) requests included in the incentive rate-setting mechanism (IRM) application filed by Elexicon Energy Inc. (Elexicon Energy) for new rates effective January 1, 2023.

Elexicon Energy serves approximately 46,910 mostly residential and commercial electricity customers in its Whitby rate zone and 125,834 residential and commercial customers in its Veridian rate zone. The utility serves customers in Ajax, Pickering, Belleville, Brock, Uxbridge, Scugog, Clarington, Port Hope, Gravenhurst, Whitby, Brooklin, Ashburn and Myrtle.

Elexicon Energy is seeking OEB approval for capital funding through an ICM related to two capital projects. An ICM is a means by which a distributor can collect additional revenue from customers to fund capital expenditures in the years between cost of service applications based on established criteria. The two projects are as follows:

1. **Whitby Smart Grid:**

    - $36.7M for the Whitby rate zone and $6.4M for costs allocated to the Veridian rate zone associated with a community-wide smart grid project. The expected in-service date is 2025 with $4.04M in funding from Natural Resources Canada.

2. **Sustainable Brooklin:**

    - $26.7M for the construction of two 27.6kV feeders from the Whitby transmission station to connect a planned sub-division in North Brooklin with an expected in-service date in 2025. The request necessitates 22 exemptions from section 3.2 of the Distribution System Code, including an exemption from collecting a capital contribution from local developers towards the cost of the project.

Elexicon Energy filed two applications for rate increases and incremental funding in 2022. A residential customer in the Whitby rate zone would see a distribution rate increase of 31.63%[1] if the OEB were to approve the ICM funding requests, 2023 IRM application[2], and incremental capital funding through the Z-factor application.[3]

[1] Oral Hearing Transcript Vol. 1, pp. 179 - 180
[2] EB-2022-0024 Phase 1 proceeding
[3] EB-2022-0317

The OEB approves $8.8M in ICM funding in 2025 for the proposed smart grid project. The OEB regards the project as one capital investment affecting both the Whitby and Veridian rate zones, not two mutually exclusive ICM requests. The OEB's funding approval is contingent on Natural Resources Canada funding of $4.04M which in turn requires project completion by March 31, 2025.

The OEB does not approve the 22 requested exemptions to the Distribution System Code related to the Sustainable Brooklin ICM funding request. As a result, ICM funding of $26.7M is denied. The OEB finds that the arrangements do not provide sufficient protection for existing customers when weighing the cost and benefit risks. This decision is not strictly based on nonconformance with the Distribution System Code but also based on an assessment of the business case benefits identified by Elexicon Energy.

The OEB acknowledges the innovative aspects of Elexicon Energy's application. The OEB also encourages energy use that is in line with the policies of the government. Innovation consistent with government policy should be advanced – but not at any cost.

2 THE PROCESS AND CONTEXT

On December 20, 2018, the OEB approved the amalgamation between the former Veridian Connections Inc. and Whitby Hydro Electric Corporation to form Elexicon Energy. Elexicon Energy was granted a ten-year deferred rebasing period from 2018 to 2028 for the Veridian rate zone and the Whitby rate zone. The elements of this application pertaining to both rate zones are based on the Price Cap Incentive Rate-setting (Price Cap IR) option.

Elexicon Energy is transitioning its Whitby rate zone from the Annual IR Index rate-setting method to the Price Cap IR option as part of this application as per the OEB letter issued December 1, 2021.[4] Elexicon Energy can apply for ICM funding for its Whitby rate zone due to changes in the OEB's policies to support consolidations. Elexicon Energy's last Distribution System Plan (DSP) was filed in 2021.

Elexicon Energy's application filed on July 28, 2022, was bifurcated into two phases on November 1, 2022. The OEB released its decision on Phase 1 (the incentive rate-setting elements of the application) on December 8, 2022. In Phase 2, the OEB is deciding on the ICM requests associated with the two capital projects involving three funding requests: (i) the cost of the Whitby Smart Grid project for the Whitby rate zone, (ii) the costs of the Whitby Smart Grid for the Veridian rate zone, and (iii) the Sustainable Brooklin project for the Whitby rate zone.

In addition to the current ICM requests, Elexicon Energy also requested incremental capital funding through a Z-factor request for costs incurred after a derecho storm in May of 2022. That request was adjudicated separately, with an OEB decision approving $4.1M to be recovered from customers.[5]

The approved intervenors in this proceeding are the Brooklin Landowners Group Inc. (Brooklin Landowners), Consumers Council of Canada (CCC), Coalition of Concerned Manufacturers and Businesses of Canada (CCMBC), Distributed Resource Coalition (DRC), Environmental Defence, Power Workers' Union (PWU), Small Business Utility Alliance (SBUA), School Energy Coalition (SEC)[6] and Vulnerable Energy Consumers Coalition (VECC). Cost eligibility was granted to CCC, CCMBC, Environmental Defence, SBUA, SEC and VECC. Letters of Comment were received by the OEB and added to the public record.

[4] OEB letter: Applications for 2023 Electricity Distribution Rates, issued December 1, 2021, p. 2
[5] EB-2022-0317, Decision and Order, issued June 15, 2023
[6] At page 2 of its letter of intervention, dated August 31, 2022, SEC states that "SEC notes that this intervention will not include participation related to the North Brooklin Line, or the DSC exemption."

The application was supported by pre-filed written evidence and completed incremental capital models. During the proceeding, Elexicon Energy responded to interrogatories and, where required, updated and clarified the evidence. The Brooklin Landowners requested and was granted permission to file written responses to supplement the written responses of Elexicon Energy. Those responses were filed on January 9, 2023. Elexicon Energy filed a letter on January 12, 2023, noting that it was unable to adopt this evidence as its own.

A Technical Conference was held on January 17 and 18, 2023 where both Elexicon Energy and the Brooklin Landowners provided witness panels. Elexicon Energy and the Brooklin Landowners filed their undertaking responses from the Technical Conference on January 24, 2023.

Elexicon Energy also responded to written questions from the panel on February 21, 2023. On March 23, 2023, Elexicon Energy filed updated evidence informing the OEB among other issues, that the expected in-service date for the Sustainable Brooklin project would be delayed until the second quarter of 2025.[7]

An oral hearing was held on March 31 and April 3, 2023. Elexicon Energy filed its Argument-in-Chief on March 12, 2021. Submissions on the application were filed by the Brooklin Landowners, CCC, CCMBC, DRC, Environmental Defence, PWU, SEC, VECC and OEB staff on May 5, 2023. On May 18, 2023, Elexicon Energy filed a reply submission.

[7] Elexicon Energy also requested clarification regarding the OEB staff letter titled “Reminder of Distributor Discretion to extend Customer Connection Horizon for System Expansion” issued December 22, 2022

3 INCREMENTAL CAPITAL MODULE (ICM) POLICY

3.1 Background

The OEB's ICM policy[8] was established to address the treatment of a distributor's capital investment needs that arise during a Price Cap IR rate-setting plan and which are incremental to a calculated materiality threshold. An ICM is a means by which a distributor can collect additional revenue from customers to fund capital expenditures in the years between cost of service applications. The ICM is available for discretionary or non-discretionary projects and is not limited to extraordinary or unanticipated investments.

To qualify for funding under the ICM policy, a distributor must satisfy the eligibility criteria of materiality, need and prudence as outlined in the *Report of the Board New Policy Options for the Funding of Capital Investments: The Advanced Capital Module* (ACM Report).[9]

Elexicon Energy addressed the ICM criteria in its submissions but noted that the overly technical adherence to the decade old ICM policy will pose a barrier to innovation.

3.2 Materiality

The materiality criterion has two steps. The first step requires that the ICM capital exceeds the ICM "materiality threshold formula"[10], which serves to define the level of capital expenditures that a distributor should be able to manage within current rates. Any incremental capital amounts approved for recovery must fit within the total eligible incremental capital amount and must clearly have a significant influence on the operations of the distributor. A second, project-specific, materiality test provides that minor expenditures, in comparison to the overall capital budget, should be considered ineligible for ICM treatment. Moreover, a certain degree of project expenditure over and above the OEB-defined threshold calculation is expected to be absorbed within the total capital budget.[11]

Eligible Incremental Capital and Project-Specific Materiality Threshold

[8] The OEB's policy for the funding of incremental capital is set out in the *Report of the Board New Policy Options for the Funding of Capital Investments: The Advanced Capital Module*, September 18, 2014 (ACM Report) and the subsequent *Report of the OEB New Policy Options for the Funding of Capital Investments: Supplemental Report* (Supplemental Report) (collectively referred to as the ICM policy).
[9] ACM Report, p. 17
[10] The ICM materiality threshold formula refers to the updated multi-year materiality threshold formula as defined on p. 19 of the Supplemental Report.
[11] ACM Report, p. 17

On March 27, 2023, Elexicon Energy updated its maximum eligible incremental capital amounts for both ICM projects going into service in 2025 as part of its evidence update.

For the Whitby rate zone, Elexicon Energy updated its forecast for the 2025 capital budget to $75.2M, which includes the proposed Whitby Smart Grid and the Sustainable Brooklin projects. The OEB's ICM model calculated the defined materiality threshold for Elexicon Energy's Whitby rate zone at $11.6M.[12] As a result, the maximum available eligible incremental capital amount is $63.6M, which is calculated as the difference between the forecasted 2025 capital budget and the OEB-defined materiality threshold.[13]

For the Veridian rate zone, Elexicon Energy updated its forecast for the 2025 capital budget to $40.6MM, which includes the cost of the Whitby Smart Grid that is allocated to the Veridian rate zone. The ICM model calculated a materiality threshold of $24.4M for the Veridian rate zone.[14] As a result, the maximum available eligible incremental capital amount is $16.2M.[15]

No party took issue with Elexicon Energy meeting the materiality criteria for the Whitby Smart Grid project or the Sustainable Brooklin projects in 2025. In its submission, OEB staff noted that an absolute threshold for the 2025 rate year cannot be established as the final input parameters are not available.

3.3 Need

To qualify for ICM funding for a particular project, a distributor must demonstrate that there is a need for incremental funding. The OEB's ACM Report requires a three-fold test to demonstrate need:

1. The Means Test
2. The amounts must be based on discrete projects and should be directly related to the claimed driver.
3. The amounts must be clearly outside of the base upon which the rates were derived.[16]

[12] ICM model Whitby rate zone for the Whitby Smart Grid_JT1.15_20230327
[13] $63.629 = $75.239 – $11.610
[14] Elexicon Energy Argument-in-Chief, Table 7
[15] $16.197 = $40.546 – $24.349
[16] ACM Report, p. 17

For the Means Test, if a distributor's most recently available regulated return on equity (ROE) exceeds 300 basis points above the deemed ROE embedded in the distributor's rates, then funding for any incremental capital project would not be allowed.[17]

Elexicon Energy deemed ROE of 9.43% is based on a combined OEB-approved ROE of its legacy service areas. Elexicon Energy's achieved 2022 ROE is 4.86%.

Elexicon Energy stated that its ICM funding requests are discrete, directly related to claimed drivers and outside its annual capital programs on which rates are derived.

No party took issue with Elexicon Energy meeting the Means Test to be eligible for ICM funding. Submissions regarding the two other factors required to demonstrate need will be addressed in the project-specific sections in this Decision.

3.4 Prudence

A distributor needs to establish that the proposed incremental capital amount is prudent. To satisfy the prudence test, a distributor must demonstrate that its decision to incur the incremental capital represents the most cost-effective option for its customers (though, not necessarily the least initial cost option).[18]

Submissions regarding prudence, as it relates to the Whitby Smart Grid project, are addressed in sections 4.1 and 4.2 of this Decision.

[17] Filing Requirements For Electricity Distribution Rate Applications - 2022 Edition for 2023 Rate Applications, Chapter 3, p. 24
[18] ACM Report, p. 17

4 THE WHITBY SMART GRID PROJECT

4.1 Summary and Benefits of the Proposed Whitby Smart Grid Project

The Whitby Smart Grid involves the deployment of a suite of technologies to modernize Elexicon Energy's distribution system. The Whitby Smart Grid includes an Advanced Distribution Management System (ADMS) and Supervisory Control and Data Acquisition (SCADA) software, plus the devices to be installed in the field such as poles, switches, and transformers, the benefits of which are summarized as follows:

- **ADMS**: provides increased operational awareness, reduced restoration time, and improved asset management of devices.[19]
- **SCADA**: is a category of software applications for controlling processes, which is the gathering of data in real time from remote locations to monitor and operate equipment. SCADA provides utilities with the information and tools to make and deploy data-driven decisions regarding their distribution system.
- **Voltage/VAR Optimization (VVO)**: allows a distribution system to operate at the lower end of the acceptable voltage ranges to lower energy consumption. Elexicon Energy estimated that it will be able to reduce the voltage by 3% for all customers, resulting in a total annual cost of power savings of $3.4M.[20]
- **Fault Location Isolating and Service Restoration (FLISR)/ Distribution Automation (DA)**: allows for rapid isolation of 75% of sustained feeder outages and converts them to momentary outages. This would also reduce costs to locate and isolate faults and save approximately 1 hour per outage. Elexicon Energy estimated the annual savings from the improvements in reliability to be $1.8M.[21] While the number of outages would not be reduced, the duration of the outage would be shorter.[22]

Elexicon Energy also noted that this project has anticipated benefits such as increased accommodation of Distributed Energy Resources (DER), management of residential-based energy storage, and connection of electric vehicles.

[19] OEB Staff IR-10, October 18, 2022
[20] Oral Hearing Undertaking J2.8, April 12, 2023
[21] Oral Hearing Undertaking J2.7, April 12, 2023
[22] Technical Conference Transcript Vol. 2, p. 92, lines 1-3

Customer Net Benefits

The actual net benefit to customers can vary and is dependent on numerous factors, including energy consumption and electricity prices. Elexicon Energy stated that when testing the sensitivity of a net benefit analysis to the forecasted capital cost of the Whitby Smart Grid project, it forecast that the project is expected to deliver a net present value of net benefits over its 27-year average useful life of $39.8M.[23] Also, the cost in the net present value analysis is based on a Class 4 cost estimate (-30% to +50%). This could result in a change in the projected net benefit of $39.8M, producing results ranging from $53.54M to $13.2M.[24] The VVO savings is based on 3% energy savings on Whitby rate zone's cost of power. The reliability savings is based on the unit cost savings from a study by Lawrence Berkley National Laboratory and multiplied against expected reliability reductions. Elexicon Energy assumed a zero net benefit until the entire system is installed.

Project Costs

The total proposed cost for the Whitby Smart Grid project is estimated at $47.2M. Elexicon Energy has been granted $4.04M of Natural Resources Canada (NRCan) funding that is related to the funding of the ADMS element of this project. The total cost can be broken down as follows:[25]

	Total Capital Expenditures $M	Whitby RZ $M	Veridian RZ $M	NRCan $M
ADMS, including SCADA[26]	12.8	2.3	6.4	4.0
Field Hardware	34.4	34.4	0.0	0.0
Total Capital Expenditures	**47.2**	**36.7**	**6.4**	**4.0**

Contribution Agreement with NRCan

Elexicon Energy entered into a Contribution Agreement with NRCan to qualify for funding for the ADMS portion of the Whitby Smart Grid in August of 2022. The estimated NRCan contribution is $4.04M. The Contribution Agreement obligates

[23] Elexicon Energy Argument-in-Chief, p. 27
[24] Elexicon Energy Argument-in-Chief, p. 5
[25] Interrogatory Response OEB staff-10(a)
[26] These amounts include ADMS and SCADA

Elexicon Energy to complete the ADMS portion of the Whitby Smart Grid by March 31, 2025.

Elexicon Energy is requesting incremental funding of $43.2M[27] on an interim basis for the Whitby Smart Grid through the ICM mechanism. This amount is based on the net of the total project cost and the NRCan contribution, which is a net capital cost of $36.7M for the Whitby rate zone and $6.4M for the Veridian rate zone.[28]

Bill Impact Mitigation and True-Ups

For the Whitby rate zone, the proposed ICM funding request for the project would result in an estimated monthly bill increase for residential customers of $5.73 per month.[29] This impact is based on illustrative rate riders, which would be approved on an interim basis. In response to oral hearing undertakings, Elexicon Energy provided an illustrative bill mitigation proposal to address the cumulative bill impact from their proposal to put both ICM projects in-service in the same year. Elexicon Energy suggested increasing its ICM-related rates and customer bills across all rate classes in a phased manner over three years. Elexicon Energy suggested collecting one-third of the total ICM project's revenue requirement in 2025, two-thirds of the total ICM revenue requirement in 2026, and the full amount of the total ICM revenue requirement in 2027.

The amounts of total revenue requirements that are not collected in 2025 and 2026 would be recorded in each project ICM revenue deferral account (ICM Deferred Revenue) and Elexicon Energy suggested to apply to recover the ICM Deferred Revenue in its rebasing application as part of the ICM project true-up.

For the Veridian rate zone, the proposed bill impact would be $0.70 per month for residential customers.

ICM/ACM Policy and Timing

Elexicon Energy submitted its ICM request for the Whitby Smart Grid well in advance of the expected in-service date of 2025. In its application, Elexicon Energy noted that the advanced funding request is a result of (i) the long lead time required to construct the Whitby Smart Grid, including significant lead time for material orders which have been exacerbated by the supply chain constraints of recent years; and (ii) the need for cost recovery certainty prior to significant investments being made. Elexicon Energy

[27] Any difference compared to the table is due to rounding
[28] Interrogatory Response OEB staff-10
[29] Oral Hearing Undertaking J2.9

proposed that the OEB approve its ICM request based on illustrative rate riders on an interim basis, which will be updated for the year the assets will go into service.

To address the ICM policy's prudence criteria, Elexicon Energy considered three options before coming to the determination to proceed with the Whitby Smart Grid project and provided a discussion of each option.

- **Option 1:** complete the Whitby Smart Grid project by 2025 following OEB approval
- **Option 2:** develop the Whitby Smart Grid by 2028 using Elexicon Energy's existing capital expenditure allocation
- **Option 3:** not proceed with the Whitby Smart Grid project

Elexicon Energy rejected Option 2 because the NRCan funding was secured related to the ADMS portion of the Whitby Smart Grid, which expires in 2025[30]. In addition, Elexicon Energy's opinion was that this investment was too large to be accommodated within Elexicon Energy's existing capital envelope and would have unacceptable impacts on other necessary capital investments. Elexicon Energy stated that Option 3 could result in a future decline in reliability performance in years to come as the DER penetration growth would make it more difficult for Elexicon Energy to operate the grid under two-way power flow and thus maintain the status quo level of reliability.

4.2 Summary of Submissions

Various issues were raised by the parties and OEB staff for the Whitby Smart Grid project, including the timing of the application given that the Whitby Smart Grid project is expected to go into service in 2025.

Position of the Parties

Regarding the timing of the application, the Brooklin Landowners, DRC and Environment Defence supported the Whitby Smart Grid project for 2025. However, DRC submitted that certain conditions should be part of an approval, including a requirement to address an information gap relevant to DERs. SEC and OEB staff indicated that they support innovation and endorsed the ADMS portion of the smart grid. Both argued that the field equipment for the project should be phased in over time. SEC indicated that rates should be effective as of January 1, 2024, while OEB staff supported funding the ADMS and the SCADA portion for both rate zones effective January 1, 2025. CCMBC,

[30] Application, Appendix B-1, Whitby Smart Grid Business Case, Table 22

CCC, VECC and PWU argued that the OEB should not approve the project since Elexicon Energy had not reasonably justified its ICM request.

The Brooklin Landowners, DRC and Environment Defence supported the Whitby Smart Grid project for the following reasons:

- lower customer energy bills through VVO savings
- benefits in increased reliability, although the value is difficult to quantify[31]
- avoided carbon emissions over 20 years[32]
- efficiently facilitating the integration and connection of existing and proposed DERs to achieve long-term customer and grid efficiencies[33]
- potential avoidance of transmission and/or distribution infrastructure
- it represents an effective early response to the challenges of energy transition[34]

OEB staff and SEC generally supported the Whitby Smart Grid but noted that prudent capital spending requires a phased approach. OEB staff supported ICM funding for the ADMS and SCADA portions of the Whitby Smart Grid, while SEC supported only ADMS funding. The reasons are as follows:

- rational investment balances the need to improve systems with the impacts of the spending on customers and utility[35]
- benefits will be realized incrementally as the field hardware is installed across the distribution system[36]
- NRCan funding is for the ADMS system only
- the installation of the ADMS and SCADA system are the backbone of the smart grid [37] to enable further modernization or a “grid of the future”
- concerns with completing the work as one large project over a compressed period
- a portion of the project overlaps with the 2021 DSP
- the OEB could apply the ACM policy including the +/- 30% dead band or approve the ADMS project for a 2024 ICM with rate riders effective January 1, 2024

[31] Environmental Defence Submission, p. 2
[32] Ibid, p. 3 – Environmental Defence noted that the Whitby Smart Grid project will save 202,977 TCO2e in carbon emissions over 20 years.
[33] DRC Submission, p. 3
[34] Ibid, p. 6
[35] SEC Submission, p. 5
[36] OEB staff Submission, p. 21
[37] OEB staff Submission, p. 15

For the remainder of the Whitby Smart Grid project, the $34.4M cost for field hardware, OEB staff and SEC argued for a paced approach for the following reasons:

- as Elexicon Energy's last DSP was filed in 2021, the potential overlap and prioritization between the DSP and the field hardware aspects of the VVO and FLISR should be examined[38]
- benefits should be realized incrementally as field hardware is installed across the distribution system, as VVO and FLISR field equipment replaces aging equipment and feeders with poor reliability[39]
- no studies have been conducted on DER penetration in the franchise area.[40]
- the rate impacts are definite and significant, while the benefits are uncertain
- with a Class 4 cost estimate, final project costs are uncertain[41]

CCC, CCMBC, PWU and VECC did not support any ICM funding for the Whitby Smart Grid for the following reasons:

- residential customer would pay 68% of the cost but only receive 33% of the projected benefits[42]
- both cost and benefits are highly uncertain at this time[43] and there is uncertainty whether the project will produce tangible and measurable benefits[44]
- if approved, the project would result in high bill impacts for residential and small commercial customers and Elexicon Energy has not demonstrated the need for ratepayer funding[45]
- capital expenditures are disproportionate to Elexicon Energy's rate base and represent a high risk to ratepayers[46]
- Elexicon Energy failed to reprioritize any other capital expenditures to accommodate this project[47]
- Elexicon Energy had not adequately demonstrated that the Whitby Smart Grid is a higher priority than other projects outlined in its DSP[48]
- a failure to justify the need for ICM funding relief[49]

[38] OEB staff Submission, p. 25, SEC Submission p. 23
[39] OEB staff submission p. 19, SEC Submission, p. 23
[40] SEC Submission, p. 21
[41] SEC Submission, p. 18
[42] VECC Submission, p. 4
[43] CCC Submission, p. 2 and VECC Submissions, p. 4
[44] VECC Submission, p. 4
[45] CCMBC Submission, p. 1
[46] OEB staff submission, p. 14 and VECC Submission, p. 4
[47] VECC Submission, p. 4
[48] VECC Submission, p. 9 and CCC p. 11
[49] PWU Submission, p. 1

In response to OEB staff and intervenor submissions, Elexicon Energy submitted the following:

- the Whitby Smart Grid represents an important “no regrets”[50] action that is needed now to avoid a forecasted material upstream capacity investment in 2030
- rate mitigation can be used to address the rate impact concerns by spreading the rate increase over 2025, 2026 and 2027
- confirmation that if the ADMS portion is complete, NRCan funding would not be at risk
- the project is a good example of utility innovation aligned with OEB and Government policy objectives and expectations, while responding to the call for distribution sector resiliency, responsiveness and cost-effectiveness
- uncertainty in costs and benefits are exaggerated and should be dismissed
- the OEB commonly accepts advanced approvals based on Class 4 estimates
- pacing the construction of the Whitby Smart Grid will not only delay customer benefits, but take an extraordinary amount of time
- the cost of power is unlikely to decrease and a 3% estimate savings is similar to savings achieved in other projects
- delaying the implementation of the Whitby Smart Grid until 2028 would delay the adoption of new DERs
- is it unable to defer or modify other investments in its DSP when comparing its existing capital plan with the Whitby Smart Grid due to the needs of its system and there is little overlap

4.3 Findings

The OEB approves $8.8M in ICM funding in 2025 for the ADMS and SCADA aspects of the proposed Whitby Smart Grid project. This is a partial funding approval compared to the $43.2M requested. The ICM funding is approved as one project for Elexicon, not considered mutually exclusive to the Whitby and Veridian rate zones.

The OEB finds that Elexicon Energy meets the ICM criteria of materiality, need and prudence for the ADMS and SCADA aspects of the proposed project. The ICM model calculated a materiality threshold for Elexicon Energy’s rate zones at $11.6M for the Whitby and $24.4M for the Veridian rate zones. Based on the updated 2025 capital budget forecasts, this results in maximum eligible incremental capital amounts of $63.6M and $16.2M respectively which exceeds the approved ICM funding. The OEB finds that the project is needed to modernize the merged distribution systems through

[50] Elexicon Energy Reply Submission, p. 5

further enablement of control systems, to help restore power after outages and prepare for DER penetration. The OEB agrees that the project, as described by Elexicon Energy, is discrete, outside the base upon which rates were derived and will have a significant influence on the future operations of the distributor as a merged entity. The OEB finds that prudence has been established for the ADMS and SCADA elements in terms of utility need and the reasonableness of the costs to be incurred.

The OEB denies the ICM funding request for the field hardware, such as wood poles, pole mount transformers, and overhead load switches of the proposed Whitby Smart Grid project in 2025. The OEB does not find it prudent to approve the investment of this incremental field hardware at this time. Elexicon Energy may consider phasing-in these components after the ADMS is complete in 2025, which OEB staff referred to as the backbone of the smart grid project. Elexicon Energy should consider the timing of the hardware investment and prioritization in the context of its annual capital expenditure budgets once the ADMS and SCADA aspects are complete and in service. This may enable Elexicon Energy to consider variations to Option 2.

The OEB finds that the additional investment is out of proportion for a utility of this size. The $34.4M capital cost for field hardware exceeds the entire 2025 capital budget of $32.7M in the 2021 DSP, a budget that did not include this project. Further, this cost estimate of $34.4M raises concern of a significant financial burden for customers which is compounded by the risk of a further 50% cost increase that is comprehended by a Class 4 estimate.

The OEB is not persuaded by the cost benefit analysis. The proposed 3% energy savings benefit is subject to verification. The OEB does not have the necessary confidence to embed this 3% benefit in the NPV analysis that would be sufficient to approve ICM funding. As one sensitivity analysis indicated, an energy savings of 2.6% or lower shows that the project could yield no net benefits. The OEB notes that phasing-in the other components of the Whitby Smart Grid would allow Elexicon to reconsider the foundation of its forecasts in its cost benefit analysis.

The OEB is approving an exception to the ICM funding policy and practice in 2023 to enable $8.8M in funding to start April 1, 2025. The OEB considered the long lead times for the project and the request for cost recovery certainty. The OEB also considered that Elexicon Energy began work on the project in 2022 and NRCan funding installments have been received to date.

The OEB does not find it appropriate to consider the funding request as an ACM as proposed by OEB staff. The OEB finds that ACM and ICM funding are substantially different, as an ACM should be proposed with a cost of service application supported by

a current DSP. Further, the OEB believes that such a change is not a fit with the application filed.

The approved NRCan funding is integral to the OEB's consideration of the ICM request. The OEB finds it appropriate to require the receipt of the entire $4.04M in NRCan funding and a March 31, 2025 completion date as conditions of approval for the implementation of the ICM rate riders. Elexicon Energy's management is responsible for ensuring the scope and timing of the ADMS meets NRCan's Schedule A requirements[51] to enable both OEB and NRCan funding mechanisms.

The OEB approves the proposed cost allocation to both the Whitby and Veridian rate zones based on total customer numbers, given the community system-wide benefits of ADMS and SCADA to Elexicon Energy service area. The OEB directs Elexicon Energy to file a draft rate order with the proposed Whitby and Veridian rate riders calculated to reflect the findings in this Decision. The OEB does not find the need for illustrative rate riders for 2025 approved on an interim basis as proposed. Elexicon Energy will use the cost estimates provided in evidence and the currently known parameters for final rate rider calculations. Any increase in actual costs above the current cost estimates may be considered when Elexicon Energy rebases its rates in 2028.

[51] Interrogatory Response OEB staff-9, Attachment 1

5 SUSTAINABLE BROOKLIN

5.1 Summary of the Proposed Sustainable Brooklin Project

The Sustainable Brooklin project involves the construction of two 27.6kV feeders over a distance of approximately 10 kilometers from the Whitby transmission station to a connection point from which to connect a planned sub-division in North Brooklin. The two feeders would be constructed on two separate pole lines. Each pole line has the capacity to accommodate two additional feeders, for a total of three feeders. Elexicon Energy's application includes a request for an exemption from section 3.2 of the Distribution System Code (DSC)[52], which requires collecting a capital contribution from the local developers towards the cost of constructing and operating the Sustainable Brooklin line.

Capital contributions would need to be paid by members of the Brooklin Landowners Group Inc. (Brooklin Landowners) which are first movers in the development of the North Brooklin Community. The Brooklin Landowners is an umbrella development company that comprises of 13 developers representing 30 of the 90 individual landowners in North Brooklin and owners of 60 of the 123 parcels of land in this community.[53]

Elexicon Energy requested 22 exemptions from the DSC including the requirement of capital contributions from the customer, which is the Brooklin Landowners for the project. In exchange for capital contributions, the developers would build DER-ready homes that include rough-ins for solar panels and battery systems as well as for electric vehicle chargers. The estimated cost for the rough-ins to accommodate DERs and electric vehicles in the new community is $2,260 per home. Over a twenty-year horizon, it is estimated that approximately 10,000 homes will be built and that the total cost of the rough-in to the builders would be approximately $23M.

Instead of collecting a capital contribution as per the DSC, Elexicon Energy requests funding of the Sustainable Brooklin expansion project through an ICM and states that the DSC exemption and the ICM funding request are inextricably linked.

Project Costs and Project Design

The incremental capital funding request is for $26.7M and represents the cost of the two feeders from the Whitby transmission station to a connection point from which to

[52] The Distribution System Code sets the minimum conditions that a distributor must meet in carrying out its obligations to distribute electricity under its licence.
[53] Brooklin Landowners Submission, p. 3

connect the planned sub-division in North Brooklin. Elexicon Energy seeks to recover these costs from all Whitby rate zone ratepayers.

As noted by the Brooklin Landowners, the next phase of the system expansion required to serve the North Brooklin development, would distribute electricity along primary streets in the community of North Brooklin.

The subject of the DSC exemption request, and consequently the ICM funding request, is only for the Sustainable Brooklin Line that needs to be constructed in entirety, at one time. The next phase of the project was not defined in the proceeding as it could be scaled and constructed over time and could also be subject to capital contributions as per the DSC.

Distribution System Code

The Brooklin Landowners noted that Elexicon Energy advised them that the construction of the Brooklin Line constitutes an "expansion" of its existing system and would, accordingly, trigger a capital contribution as per the DSC to be collected from the new customer requesting the line. Section 3.2 of the DSC sets out the rules for the distributor to determine the customer contribution amount for the expansion of the distribution system.

Under the DSC, a customer must make a capital contribution if the present value of the cost of the expansion and ongoing maintenance exceeds the present value of the projected incremental distribution revenue that will be generated by the load connected to the expansion.[54] In addition, a customer who paid a capital contribution would be entitled to receive a rebate if a customer whose load was not included in a distributor's original economic evaluation requests to connect to the same expansion facilities during the applicable connection horizon.[55]

Quid pro Quo

Elexicon Energy stated in its application that it was requesting the exemption as a "quid pro quo" for Brooklin Landowners "incurring incremental costs to build Standard Rough-Ins" in anticipation of the potential future installation of rooftop solar, battery storage, and EV chargers.[56] The specific intention is to save homeowners the cost of such rough-ins should they decide to invest in a DER, yielding more future DER installations

[54] DSC; ss. 3.2.4. Note that if a distributor must construct an expansion "in order to be able to connect a specific customer or group of customers", ss. 3.2.1 obliges them to "perform an initial economic evaluation…as described in Appendix B" to the Distribution System Code.
[55] DSC; ss. 3.2.27 and where applicable under ss. 3.2.27A to 3.2.27F.
[56] "The estimated cost to the Brooklin Developers to install the Standard Rough-In is approximately $23M." Application; Appendix B-2; p. 4 of 37.

compared to the “business as usual” case.

The Brooklin Landowners noted that Elexicon Energy should not be required to collect a capital contribution from them if the OEB approves the request for ICM funding for the Brooklin Line. The Brooklin Landowners indicated that they would be prepared to enter into binding agreements with Elexicon Energy that reflect their DER and EV-enablement commitment.

5.2 Summary of Submissions

Elexicon Energy’s submitted that its request for approval of the ICM funding for the Brooklin Line is inextricably linked with the requested DSC exemption. Elexicon Energy argued that the Sustainable Brooklin project is a highly innovative and unique opportunity to facilitate the development of DER and EV-ready community at the construction phase. Elexicon Energy noted that this project will lower barriers and costs for North Brooklin customers to procure residential DERs and EVs by avoiding costly future retrofits. Elexicon Energy also noted that greater penetration of DERs and EVs has the potential to create system benefits as well as customer-specific benefits.

Elexicon Energy noted that its proposed ICM request and the record of this proceeding meet the OEB’s policy requirements and the policy mandate of the Ontario Government.

The Brooklin Landowners, DRC and Environmental Defence agreed and support the proposal.

Environmental Defence provided an alternative to the quid pro quo proposal as discussed below. DRC noted that Elexicon Energy’s proposal fails to ensure that developers will suffer a financial penalty if they do not provide the required installations under the quid pro quo and may inadvertently incentivize developers not to complete the rough-ins since cost may exceed the proposed penalty amounts. DRC submitted that the OEB should approve the application subject to a number of conditions.

The Brooklin Landowners also submitted that approval of the DSC exemption redresses its fairness concerns and the disproportionate allocation of cost responsibilities to first movers, which represent the first ‘customer’ under the DSC. The Brooklin Landowners also argued that the Brooklin Line serves a transmission function and that some costs are system costs. While Elexicon Energy agreed with Brooklin Landowners that the project is in the public interest and that the fairness principle justifies a quid pro quo treatment, Elexicon Energy disagreed with the assertion that the Brooklin Line serves a transmission function or that there are any system costs involved.

SEC took no position on this project.

OEB staff, CCC, CCMBC, PWU and VECC submitted that the funding request should be denied for the following reasons:

- the request is contrary to the beneficiary pays principle that is stated in the DSC[57]
- the most likely beneficiaries of the exemption will be the developers and the DER and EV-ready homeowners who end up installing DERs and/or EV chargers[58]
- the DSC does not contemplate the use of ratepayer funds to subsidize the construction of rough-ins in new homes[59]
- the evidence does not support a reasonable expectation of quantifiable or tangible benefits to ratepayers[60], [61], [62]. The benefits that Elexicon Energy describes are potential avoided costs that are not certain to materialize[63]
- evaluated against a $26.6M cost to ratepayers, the cost outweighs the benefits, and the comparison is distorted by the timeframe used to calculate the net present value benefits[64]
- the project cost and bill impacts are speculative[65]
- cross-subsidization of new customers by existing customers[66]
- the proposal to install only rough-ins and not electrified outlets is not current practice and will discourage EV and solar adoption[67]
- Brooklin Landowners will opt to construct some DER/EV Ready homes on their own in the absence of the Sustainable Brooklin project to be competitive in the market and respond to evolving development approval guidelines[68]
- OEB approval is counter to the intent of the DSC and could set an undesirable precedent[69]
- the OEB does not have jurisdiction to facilitate the efficient development of any particular electricity appliance or the behind the meter activities of consumers[70]

[57] OEB staff Submission, p. 2
[58] OEB staff Submission, p. 8
[59] PWU Submission, paragraph 12
[60] OEB staff Submission, p. 2
[61] VECC Submission, p. 29
[62] CCC Submission, p. 8
[63] PWU Submission, paragraph 18
[64] PUW Submission, paragraph 27
[65] Ibid, p. 29
[66] PWU Submission, pp. 5-10 and CCMBC Submission, pp. 7-8
[67] Ibid, p. 29
[68] VECC Submission, p. 29 and CCC submission, p. 8
[69] VECC Submission, p. 29
[70] VECC Submission, pp. 28-29

and if the OEB were to approve this ICM it would compromise its principles and damage its authority[71]

OEB staff also argued that if the project was to be funded through an ICM without the approval of the DSC exemption, the funding request for the Sustainable Brooklin project does not meet the criteria of materiality and need as described in the ACM Report.[72]

Elexicon Energy replied to the parties' submissions as follows:

- OEB staff takes an overly narrow read of the evidence that fails to do justice to this innovative proposal
- Elexicon Energy understands the beneficiary pays principle but argued that OEB staff did not address the following benefits of the Sustainable Brooklin project:
    - Facilitation of innovation of the electricity sector through the creation of DER and EV-ready communities
    - Deferral of electricity infrastructure
    - Alleviation of fairness principle raised by the Brooklin Landowners
    - Reduction of GHG emissions through the facilitation of DER uptake
    - Support of Ontario's commitment to get 1.5M homes built over the next ten years
- Beneficiary of incremental DER capacity facilitated through this project will be much broader than the developers or the local property owners
- OEB staff failed to recognize the benefits that accrue to Whitby ratepayers associated with significant load growth in the North Brooklin area, such as the results of the economies of scale leading to a reduction in monthly fixed charges
- The Brooklin Landowners will not make these homes DER and EV-ready absent a quid pro quo and the installations of rough-ins after the fact would be burdensome and disruptive to homeowners
- The evidence does not support the assertion that EV ready parking requirements for new developments are emerging as a leading practice in the Town of Whitby. When asserting that there is a trend moving towards additional requirements for EV ready parking or solar ready homes, VECC ignored the fact that the 2018 Ontario Building Code requirements were revoked in 2019.
- The Sustainable Brooklin project is aligned with the OEB's objective under the *Ontario Energy Board Act, 1998* to "promote economic efficiency and cost-effectiveness in generation, transmission, distribution, sale and demand management of electricity and facilitate the maintenance of a financially viable

[71] CCMBC Submission, p. 9
[72] OEB staff Submission, p. 2

electricity industry."[73] The OEB has through conservation frameworks overseen and facilitated rate recovery of various incentive programs.

Alternate Proposals

While SEC did not take a position on the Sustainable Brooklin project, SEC noted that in the event the OEB approves this project, or some variation on it, all new customers connecting downstream of that line should be granted similar incentive/subsidies for comparable upgrades to their new buildings. Such upgrades would include solar, electric vehicle chargers, storage and any other improvements beyond applicable codes. SEC noted that these incentives should be used, as with the Sustainable Brooklin proposal, to offset their capital contributions dollar for dollar.

Elexicon Energy agreed in principle but noted another, more administratively efficient alternative, which would be to simply not require any contributions from unforecasted non-residential loads and have the line entirely funded by ratepayers.[74]

Instead of the quid pro quo proposal, Environmental Defence proposed that Elexicon Energy use financial incentives to address concerns raised by the Brooklin Landowners including:

- Extending the customer attachment and customer revenue horizon from 5 to 10 years and from 25 to 40 years, respectively
- Relieving first contributor from fronting the full capital contribution by instead collecting those costs developer-by-developer until the customer attachment forecast underpinning the capital contribution has been met. By continuing to require payment until the connection forecast has been met, instead of a date-based cut-off, the risks are reduced. This approach would: (a) greatly reduce the financing required from the first movers, (b) eliminate free ridership caused by the normal five-year rebate cut-off, and (c) eliminate the complication of administering rebates to a large number of developers over time.
- Dispense with or reduce the expansion deposit required in DSC section 3.2.20

Elexicon Energy disagreed with Environmental Defence's proposal and noted that this proposal would shift the financial risk in the connection process onto utilities and ratepayers, including the risk for overbuilt or stranded assets.

[73] Elexicon Energy Reply Submission, p. 25
[74] Elexicon Energy Reply Submission, p.22

Elexicon Energy also argued that it would be providing discriminatory service if it offers different connection horizons to similar situated consumers as its licence requires a non-discriminatory access to its distribution system.

5.3 Findings

The OEB denies the 22 DSC exemptions requested.[75] As a result, the ICM funding request of $26.7M is denied. The OEB finds that the arrangements do not provide sufficient protections for existing customers when weighing the cost and benefit risks.

In carrying out its statutory responsibilities, the OEB considers the promotion of electricity conservation and demand management in a manner consistent with the policies of the government. The OEB's objectives also include the facilitation of innovation – but not at any cost. Innovations must be considered at the same time as the objectives and responsibilities of the OEB in protecting the public interest in ensuring reasonable rates that reflect the benefits obtained by them. The fact that a project is innovative cannot automatically override the OEB's responsibility to protect the public with respect to price, adequacy, reliability and quality of service when evaluating it for approval.

The DSC has evolved in tandem with the needs of distributors and their customers. There has been extensive consultation in this evolution. The OEB has recognized the beneficiary pays principle in the consideration of amendments to the DSC in past proceedings.[76] In this Decision, the OEB is of the view that there are insufficient reasons to override that principle. The principle that beneficiaries pay for the costs of their benefits is important and relevant to this proceeding.

The core issue is "who will pay" for connecting this planned sub-division, notwithstanding that existing customers who would pay for the costs are not the primary beneficiaries. Under the proposal, each existing residential customer would pay $3.26 per month obviating the necessity of developers paying the $26.7M contribution in aid of construction while installing rough ins for future homeowners. The OEB must consider who will benefit and what will be the ultimate price tag. In particular, the OEB as an economic regulator must balance the rate impact with the benefits. Quid pro quo requires evidence of equivalence. It is imperative that the "quid" is the equivalent of the "quo". The OEB finds that it is not.

SEC submits that regulatory fairness requires that similar DER and EV incentives are provided to all customers downstream of the two feeder lines, including the planned 15-

[75] Sections 3.2.1, 3.2.2, 3.2.3, 3.2.4, 3.2.6, 3.2.7, 3.2.8, 3.2.12, 3.2.14, 3.2.16, 3.2.18, 3.2.20, 3.2.21, 3.2.22, 3.2.23, 3.2.24, 3.2.25, 3.2.26, 3.2.27 and 3.2.30
[76] EB-2016-0003 Notice of Proposal to Amend a Code (DSC or TSC), p. 3

20 schools that SEC would represent. The OEB finds that there is insufficient evidence that such fairness will be provided in Elexicon Energy's proposal.

The OEB is of the view that the interests of existing customers were not sufficiently considered when the quid pro quo evolved. The concerns expressed by ratepayer groups in this proceeding dealt with the fact that the burden of funding this project fell unfairly on existing customers.

The OEB acknowledges that Whitby's Town Council supported this funding request. However, based on a review of the presentations provided to them, it appears that that the Town Council did not have the benefit of all the evidence available to the OEB in this proceeding including the size of the potential rate increase on the distribution component of the electricity bill for their constituents.

The OEB is concerned that any approval of exemptions that create an imbalance among stakeholders will have an undesirable precedential impact that would reverberate across the province and affect all distribution customer interests in Ontario.

The decision not to approve the ICM funding request is not strictly based on nonconformance with the DSC but also based on the following assessment of business case benefits identified by Elexicon Energy.[77]

Facilitating innovation and DER/EV uptake

The OEB encourages collaboration with its customers and the building industry. In particular, the OEB recognizes the opportunity for leveraging private capital to accomplish goals that can benefit the utility, its customers and the public interest. However, the end result of the Sustainable Brooklin project does not meet the objectives sought. The primary benefits that are attributed to the project are at best preparatory. The project proposes rough-ins that require further investment and do not produce DER and EV ready homes.

Opportunity to defer infrastructure investments

Elexicon Energy agrees that it would take 20 years to install $23M of rough ins in 10,000 homes. In addition, those homeowners must invest additional capital to generate any DER benefits which in turn, could enable deferred infrastructure (i.e. a transmission station). One scenario forecasts a deferral of infrastructure in 2038, 15 years from

[77] Evidence, pp. 43-52

now[78]. The OEB finds that such benefits are premised on timelines and assumptions that are too speculative and as such, not sufficient to warrant approval.

Fairness issues raised

While the OEB agrees that there may be issues of the fairness of cost attribution to first movers with incremental electricity demands, such considerations of fairness must also extend to existing customers. In this proceeding the benefits appear to be heavily weighted in favour of the first movers when compared to existing customers. In particular, existing customers will not receive any rough ins and the OEB finds the benefits associated with the deferral of infrastructure are too speculative.

Facilitating GHG emission reductions

A result that involves the rough-ins and capital investment, presumably by homeowners, to make homes DER/EV ready would undoubtedly enable GHG emission reductions. However, the societal benefits of such GHG emission reductions that might be achieved must consider the cost effectiveness and the allocation of the cost commitment.

As set out in this Decision, the case has not been made to align the benefits of the Sustainable Brooklin project with the OEB's statutory objectives to protect the interests of consumers while promoting economic efficiency and cost effectiveness.

5.4 Connection Horizon

On December 22, 2022, the OEB staff issued a letter to remind licensed electricity distributors that under the DSC they have discretion, on a case-by-case basis, to extend the customer connection horizon that is used in distribution system expansions beyond the default five years as set out under the DSC.[79]

In its reply submission, Elexicon Energy raised concerns with this letter. Elexicon Energy submitted that there is a contradiction between the letter and the *Ontario Energy Board Act, 1998* as well as prior OEB staff guidance.

OEB staff submitted that this issue does not need to be decided in this proceeding, but if the OEB decides to consider this issue further, OEB staff would stand by its views expressed in the December 2022 letter.[80]

[78] Oral Hearing Transcript Volume 2, p. 156
[79] OEB Staff Letter "Reminder of Distributor Discretion to Extend Customer Connection Horizon for System Expansions", issued December 22, 2022
[80] OEB Staff Submission, p. 55

Elexicon Energy disagreed with OEB staff's view and submitted that if the OEB denies the DSC exemption for the Sustainable Brooklin project, the application of the 5-year customer connection horizon becomes an immediate and live issue. Elexicon Energy requested that the OEB provide further clarity.[81]

CCMBC[82] and Environmental Defence proposed to extend the customer connection horizon and customer revenue horizon from 5 to 10 years and from 25 to 40 years respectively, to reduce the upfront costs for developers. Environmental Defence disagreed that the adjustments to the capital contribution calculation parameters would be a breach to section 26 of the *Electricity Act, 1998*. It noted that adjusting these parameters to address fairness and to obtain other benefits is not "discrimination".[83]

Elexicon Energy replied that extending the connection horizon will not address the issue of requiring a significant capital contribution.[84]

5.5 Findings

The OEB agrees with OEB staff that the customer connection horizon and revenue horizon issues do not need to be resolved in this Decision. The structure of the application is such that no end-use customers attach, and no revenues are associated with the Sustainable Brooklin project. This ICM funding request is limited to the two 27.6kV feeder lines that run from the transmission station to the boundary of a planned subdivision.

Further, the OEB acknowledges Elexicon Energy's reply submission that an extension of the connection horizon would not address the issue of requiring a significant capital contribution in these circumstances. A substantial capital contribution would be required from developers in all scenarios considered.

Finally, the OEB is reluctant to set out guidance that purports to bind a future panel or a delegated authority.

[81] Elexicon Energy Reply Submission, p. 55
[82] CCMBC Submission, p. 10
[83] Environmental Defence, pp. 4-6
[84] Elexicon Energy Reply Submission, p. 55

6 ACCOUNTING ORDER

6.1 Background

Elexicon Energy provided a draft Accounting Order to reflect the ICM sub accounts required, including those related to the NRCan funding. The draft also included sample journal entries for when the asset is placed in service and at rebasing.

OEB staff submitted that it supported the establishment of the sub accounts under Account 1508 if all or part of the ICM funding request is approved.

6.2 Findings

The OEB approves an Accounting Order, which establishes the following three ICM sub accounts:

- Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital
- Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Carrying Charges
- Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Amortization

The approved Accounting Order incorporates the April 1, 2025 effective date and is attached as Schedule A to this Decision.

7 IMPLEMENTATION

Elexicon Energy shall file a draft rate order including ICM models for the Veridian and Whitby rate zones to reflect the findings in this Decision, calculate rate riders to be approved on a final basis and provide illustrative bill impacts to be realized in the 2025 rate year.

The rate riders will be effective and implemented April 1, 2025. Despite this mid-year implementation date, the OEB finds that the rate rider calculation should be based on a 12-month period. The parameters used for the calculation of the ICM rates riders should reflect the currently known parameters, such as the approved 2023 rates, 2022 billing determinants and the most up-to-date inflation factor. When Elexicon Energy files its 2025 rate application, it shall include the approved ICM rate riders on the proposed 2025 tariff sheet.

CCC, CCMBC, Environmental Defence, SBUA, SEC and VECC are eligible to apply for cost awards in this proceeding. The OEB has made provisions in this Decision for intervenors to file their cost claims. The OEB will issue its cost awards decision after the steps outlined in the following Order section are completed.

8 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Elexicon Energy Inc. shall file with the OEB and forward to intervenors and OEB staff a Draft Rate Order by **July 17, 2023**.
2. Intervenors and OEB staff shall file any comments on the Draft Rate Order with the OEB and forward them to Elexicon Energy Inc. by **July 24, 2023**.
3. Elexicon Energy Inc. shall file with the OEB and forward to intervenors, responses to any comments on its Draft Rate Order by **July 31, 2023**.

Cost Awards

1. Each cost eligible intervenor shall submit its cost claim to the OEB and forward it to Elexicon Energy Inc. **by August 7, 2023**.
2. Elexicon Energy Inc. shall file with the OEB and forward to intervenors any objections to the claimed costs by **August 17, 2023**.
3. Intervenors shall file with the OEB and forward to Elexicon Energy Inc. any responses to any objections for cost claims by **August 24, 2023**.
4. Elexicon Energy 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-2022-0024** 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, Birgit Armstrong at Birgit.Armstrong@oeb.ca, and OEB Counsel, Lawren Murray at Lawren.Murray@oeb.ca.

DATED at Toronto July 6, 2023

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar

SCHEDULE A

TO DECISION AND ORDER

ACCOUNTING ORDER

ELEXICON ENERGY INC.

EB-2022-0024

JULY 6, 2023

Elexicon Energy Inc.
Accounting Order
Account 1508, Sub-account Deferred Revenue – Contributed Capital

Elexicon shall establish three new sub-accounts for each of the Whitby and Veridian rate zones to record amounts associated with capital contributions received for the Whitby Smart Grid Project. These three new sub-accounts will capture capital contributions, associated carrying charges and amortization, as described below. The sub-accounts will be effective April 1, 2025,

1) Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital
This sub-account shall be used to record amounts received in contributed capital for the Project.

2) Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Carrying Charges
This sub-account shall be used to record carrying charges on *Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital*.
Carrying charges shall be calculated using simple interest applied to the opening balances in the account. The interest rate shall be the rate prescribed by the OEB.

3) Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Amortization
This sub-account shall be used to record the amortization associated with the capital contribution amounts recorded in *Account 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital.*

The following outlines the accounting entries in the year the Project assets are placed into service:

USoA#	**Description**
Dr: 1110	Account Receivable
Cr: 1508	Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital

To record the amount received in contributed capital for the Project.

Dr: 1525	Miscellaneous Deferred Debits
Cr: 1508	Other Regulatory Assets - Sub-account Deferred Revenue Carrying Charges

To record carrying charges on the contributed capital received for the Project.

Dr: 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital
Cr: 1508 Other Regulatory Assets, Sub-account Deferred Revenue Amortization
To record the amortization associated with contributed capital for the Project.

The following outlines the entries upon approval of the ICM included with Elexicon's next Cost of Service rebasing application:

USoA#	**Description**
Dr: 1508	Other Regulatory Assets, Sub-account Deferred Revenue Carrying Charges
Cr: 1525	Miscellaneous Deferred Debits

To reverse carrying charges, which would be included in a revenue requirement true-up, as approved.

Dr: 1508 Other Regulatory Assets, Sub-account Deferred Revenue Contributed Capital
Cr: 2440 Deferred Revenues
To transfer contributed capital for the Project to deferred revenue.

Dr: 1508 Other Regulatory Assets, Sub-account Deferred Revenue Amortization
Cr: 4245 Government and Other Assistance Directly Credited to Income
To transfer the amortization of deferred revenue to income.

TAB 6

TAB A

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

Commission de l'énergie de l'Ontario *Appelante*

c.

Ontario Power Generation Inc., Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 et Society of Energy Professionals *Intimés*

et

Corporation des services en éducation de l'Ontario *Intervenante*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

Répertorié : Ontario (Commission de l'énergie) *c.* Ontario Power Generation Inc.

2015 CSC 44

N° du greffe : 35506.

2014 : 3 décembre; 2015 : 25 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Services publics — Électricité — Décision d'un organisme de réglementation des services publics relativement à l'établissement de tarifs — Demande d'un service public en vue d'obtenir le recouvrement de dépenses de rémunération faites ou convenues grâce aux tarifs établis par la Commission de l'énergie de l'Ontario — La Commission avait-elle l'obligation d'employer une méthode particulière axée sur la prudence pour apprécier les dépenses du service public? — Le refus de la Commission d'approuver 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public était-il raisonnable? — Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, art. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether

Droit administratif — Organismes et tribunaux administratifs — Appels — Qualité pour agir — La Commission de l'énergie de l'Ontario a-t-elle agi de manière inappropriée en se pourvoyant en appel et en faisant valoir

Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

le caractère raisonnable de sa propre décision? — A-t-elle tenté de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale?

En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que le service public touche des paiements qui correspondent à ses dépenses. La Commission a refusé certains paiements sollicités par Ontario Power Generation (« OPG ») dans sa décision sur la demande d'établissement des tarifs pour la période 2011-2012. Elle a en fait refusé à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public au motif que ces dépenses étaient en rupture avec celles d'organismes comparables dans le secteur réglementé de la production d'énergie. Les juges majoritaires de la Cour divisionnaire de l'Ontario ont rejeté l'appel d'OPG et confirmé la décision de la Commission. La Cour d'appel a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs.

La thèse d'OPG en l'espèce veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence doit s'appliquer à son bénéfice. La Commission prétend pour sa part que la loi ne l'oblige pas à employer quelque méthode fondée sur le principe de la prudence et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses convenues, mais bien des dépenses prévues.

OPG exprime en outre des préoccupations sur la participation de la Commission à l'appel de sa propre décision et fait valoir que la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée et que l'organisme a tenté de se servir de l'appel pour s'auto-justifier en formulant de nouveaux arguments à l'appui de sa décision initiale. La Commission soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli. La décision de la Cour d'appel est annulée et celle de la Commission est rétablie.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon : Se pose en premier lieu la question du caractère approprié de la participation de la Commission au pourvoi. Les préoccupations relatives à la participation d'un tribunal administratif à l'appel de sa propre décision ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes. Vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Qui plus est, dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige. Les considérations suivantes permettent de délimiter l'exercice du pouvoir discrétionnaire de la cour de révision : les dispositions législatives portant sur la structure, le fonctionnement et la mission du tribunal en cause et le mandat du tribunal, à savoir si sa fonction consiste soit à trancher des différends individuels opposant plusieurs parties, soit à élaborer des politiques, à réglementer ou à enquêter, ou à défendre l'intérêt public. L'importance de l'équité, réelle et perçue, milite davantage contre la reconnaissance de la qualité pour agir du tribunal administratif qui a exercé une fonction juridictionnelle dans l'instance. Il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

L'application de ces principes à la situation considérée en l'espèce mène à la conclusion qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. La Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait d'autre choix que de prendre part à l'instance pour que sa décision

a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and

soit défendue au fond. Aussi, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Sa participation au pourvoi n'avait rien d'inapproprié en l'espèce.

La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir, alors que l'autojustification touche à la teneur des prétentions. Un tribunal s'autojustifie lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire. Un tribunal ne peut défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle. Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire, un tribunal ne puisse profiter d'un contrôle judiciaire pour modifier, changer, nuancer ou compléter ses motifs. Même s'il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, la cour de révision étant alors saisie des arguments les plus convaincants à l'appui de chacune des thèses, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Dans la présente affaire, la Commission n'a pas indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant la Cour. Les arguments qu'elle a invoqués en appel n'équivalent pas à une autojustification inadmissible.

La question de fond est celle de savoir si la Commission a employé une méthode appropriée pour refuser à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération. L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins. Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en

utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood

capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prescrit pas la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et du consommateur lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Suivant cette loi, il incombe cependant au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables. Il semble donc contraire au régime législatif de présumer que la décision du service public de faire les dépenses était prudente. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter la méthode à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

La question à trancher est celle de savoir si la Commission était tenue à l'application d'un critère excluant le recul et présumant la prudence pour décider si les dépenses de rémunération du personnel étaient justes et raisonnables. Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Toutefois, aucun élément du régime législatif n'appuie l'idée que la Commission devrait être tenue en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence de sorte que la seule décision de ne pas l'appliquer pour apprécier des dépenses convenues rendrait déraisonnable sa décision sur les paiements. Lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements.

Lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue. Dans la présente affaire, il convient mieux de voir dans

as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable

les dépenses de rémunération dont le recouvrement a été refusé à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux de ses syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conservait une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Cependant, la Commission n'était pas tenue d'appliquer un principe de prudence donné pour apprécier ces dépenses. Il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Présumer la prudence aurait été incompatible avec le fardeau de la preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses.

Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG de ces dépenses et en refusant le recouvrement de celles-ci. Puisque les dépenses en cause sont des dépenses d'exploitation, il est peu probable que le refus essuyé dissuade OPG de faire de telles dépenses à l'avenir, car les dépenses de la nature de celles dont le recouvrement a été refusé sont inhérentes à l'exploitation d'un service public. Aussi, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de

for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield

rémunération d'un service public. La Commission n'entend aucunement, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés syndiqués. Il n'était pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre de ces catégories.

Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il visait à signifier clairement à OPG qu'il lui incombe d'accroître sa performance. L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

La juge Abella (dissidente) : La Commission a rendu une décision déraisonnable en ce qu'elle n'a pas appliqué la méthode qu'elle avait elle-même établie pour déterminer le montant de paiements justes et raisonnables. Elle a à la fois méconnu le caractère contraignant en droit des conventions collectives liant Ontario Power Generation et les syndicats et omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles.

Dans ses motifs, la Commission a dit recourir à deux examens pour arrêter le montant de paiements justes et raisonnables. En ce qui concerne les « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter, la Commission a expliqué qu'elle examinait ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombait au service public d'en démontrer le caractère raisonnable. Cependant, une démarche différente était suivie pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission a expliqué

these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

qu'elle appréciait ces dépenses en se livrant à un « contrôle de la prudence ». L'application du principe de la prudence ne soustrait pas ces dépenses à tout examen, mais elle présume que les dépenses ont été faites de manière prudente.

Toutefois, au lieu d'appliquer la méthode qu'elle avait elle-même établie, la Commission a considéré *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables sans se demander s'il s'agissait en partie de dépenses pour lesquelles la société ne pouvait prendre de mesures de réduction. Par son omission d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission a méconnu à la fois son propre cadre méthodologique et le droit du travail.

Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire. Ces conventions ne laissaient pas seulement au service public peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

Or, en appliquant la méthode qu'elle avait dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission a en fait obligé Ontario Power Generation à prouver le caractère raisonnable de toutes ses dépenses de rémunération et a conclu que l'entreprise n'avait présenté ni preuve convaincante, ni documents ou analyses qui justifiaient les barèmes de rémunération. Si elle avait eu recours à l'approche qu'elle avait dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

donc être assimilées à juste titre à des dépenses prévues. La Commission n'a toutefois tiré aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation étaient fixes et dans quelle proportion elles demeuraient assujetties au pouvoir discrétionnaire du service public. Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce sens.

En choisissant un critère éminemment susceptible de confirmer l'hypothèse de la Commission selon laquelle les dépenses issues de négociations collectives sont excessives, on se méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas. Même si la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont justes et raisonnables et, à l'intérieur de certaines limites, de définir la méthode utilisée pour établir le montant de ces paiements, dès lors qu'elle a établi une telle méthode, elle doit à tout le moins l'appliquer avec constance.

En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation ne peut savoir comment déterminer les dépenses et les investissements à faire et de quelle manière les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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Je serais donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et de renvoyer l'affaire à la Commission pour réexamen.

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Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

John B. Laskin, *Crawford Smith*, *Myriam Seers* and *Carlton Mathias*, for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

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Glenn Zacher, *Patrick Duffy* et *James Wilson*, pour l'appelante.

John B. Laskin, *Crawford Smith*, *Myriam Seers* et *Carlton Mathias*, pour l'intimée Ontario Power Generation Inc.

Richard P. Stephenson et *Emily Lawrence*, pour l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000.

Paul J. J. Cavalluzzo et *Amanda Darrach*, pour l'intimée Society of Energy Professionals.

Mark Rubenstein, pour l'intervenante.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by

[1] ROTHSTEIN J. — In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon rendu par

[1] LE JUGE ROTHSTEIN — En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario (« Commission ») l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que l'entreprise touche des paiements qui correspondent à ses dépenses. Le présent pourvoi vise la décision de la Commission de refuser certains paiements à Ontario Power Generation Inc. (« OPG ») par suite de sa demande d'approbation de tarifs pour la période 2011-2012. Plus particulièrement, la Commission a refusé d'approuver des dépenses de 145 millions de dollars au titre de la rémunération du personnel affecté aux installations nucléaires au motif que le coût de la main-d'œuvre d'OPG était en rupture avec celui d'organismes comparables dans le secteur réglementé de la production d'énergie.

[2] OPG en a appelé devant la Cour divisionnaire de l'Ontario, dont les juges majoritaires ont rejeté l'appel et confirmé la décision de la Commission. OPG s'est alors adressée à la Cour d'appel de l'Ontario, qui a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs. La Commission interjette aujourd'hui appel devant notre Cour.

[3] OPG soutient que le refus de la Commission d'approuver ces dépenses de rémunération de ses employés est déraisonnable. Sa thèse veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence

methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility

doit s'appliquer à son bénéfice. La Commission n'ayant pas eu recours à pareille méthode pour se prononcer sur la prudence d'OPG, sa décision serait déraisonnable.

[4] La Commission rétorque que la loi ne l'oblige pas à employer quelque méthode pour appliquer le « principe de la prudence » et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses « convenues », mais bien des dépenses prévues.

[5] OPG déplore par ailleurs que la Commission soit partie à l'appel de sa propre décision. Selon elle, la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée, et la Commission tente de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale.

[6] La Commission fait valoir que la Cour a circonscrit la faculté qu'elle avait de plaider en appel lorsqu'elle lui a reconnu tous les droits d'une partie au moment d'autoriser le pourvoi. Subsidiairement, elle soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

[7] Il convient mieux, à mon sens, de voir dans les dépenses de rémunération qui ont été refusées à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conserve une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Je ne crois cependant pas, malgré ce qu'affirme OPG, que la Commission était tenue d'appliquer un principe de prudence donné pour apprécier les dépenses. La *Loi de 1998 sur la*

costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

1. (1) . . .

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the

Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, et ses règlements connexes accordent à la Commission une grande latitude dans le choix d'une méthode pour apprécier les dépenses d'un service public, sous réserve de l'obligation de faire en sorte que, au final, les paiements qu'elle ordonne soient justes et raisonnables vis-à-vis à la fois du service public et du consommateur.

[8] Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en refusant de les approuver.

[9] En ce qui concerne la participation de la Commission au pourvoi, je ne crois pas qu'il soit inapproprié qu'elle défende la justesse de sa décision, ni que les arguments qu'elle invoque en appel équivalent à une « autojustification » inadmissible.

[10] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la décision de la Commission.

I. Cadre réglementaire

[11] La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* fait de la Commission un organisme de réglementation investi du pouvoir de surveiller, entre autres choses, la production d'électricité en Ontario. Son article premier énonce les objectifs de la Commission dans la réglementation de l'électricité, dont les suivants :

1. (1) . . .

1. Protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité.

2. Promouvoir l'efficacité économique et la rentabilité dans les domaines de la production, du transport, de la distribution et de la vente d'électricité ainsi que de la gestion de la demande d'électricité et faciliter le maintien d'une industrie de l'électricité financièrement viable.

La Commission doit donc s'acquitter de sa fonction de réglementation dans le souci d'établir un équilibre entre l'intérêt du consommateur, d'une part,

electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that the amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on

et l'efficacité et la viabilité financière du secteur de l'électricité, d'autre part. On lui attribue aussi un rôle de « substitut du marché » (2012 ONSC 729, 109 O.R. (3d) 576, par. 54; 2013 ONCA 359, 116 O.R. (3d) 793, par. 38). Sa fonction consiste alors à reproduire au mieux les forces auxquelles serait soumis un service public dans un contexte concurrentiel (*Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, par. 48).

[12] L'un des leviers les plus puissants dont dispose la Commission pour atteindre ses objectifs réside dans son pouvoir de fixer le montant des paiements que touche l'entreprise pour la prestation du service. Voici l'extrait pertinent du par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* :

(5) La Commission peut fixer les autres paiements qu'elle estime justes et raisonnables :

a) dans le cadre d'une requête en vue d'obtenir une ordonnance prévue au présent article, si elle n'est pas convaincue que le montant du paiement qui fait l'objet de la requête est juste et raisonnable; . . .

[13] Le paragraphe 78.1(6) dispose pour sa part : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du présent article ».

[14] Suivant mon interprétation de ces dispositions, le service public demande des paiements pour une période à venir (appelée « période de référence »). La Commission fait droit à la demande, sauf lorsqu'elle n'est pas convaincue que les paiements demandés sont justes et raisonnables. Lorsqu'elle n'en est pas convaincue, le par. 78.1(5) lui permet de déterminer les paiements qui lui paraissent justes et raisonnables.

[15] Dans l'arrêt *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, la Cour a eu l'occasion de se prononcer sur le sens d'un libellé législatif semblable. Elle a alors statué que la tarification « juste et raisonnable » était celle [TRADUCTION] « qui, dans les circonstances, était juste pour le

the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

consommateur, d'une part, et qui permettait à l'entreprise d'obtenir un juste rendement sur les capitaux investis, d'autre part » (p. 192-193).

[16] Dès lors, le service public doit pouvoir à long terme recouvrer, grâce à la tarification approuvée, ses dépenses d'exploitation et ses coûts en capital, ces derniers s'entendant alors de tous les coûts liés aux capitaux investis par le service public. Le pourvoi vise principalement les dépenses d'exploitation. Si leur recouvrement n'est pas autorisé, le service public n'obtient pas l'équivalent du coût du capital, soit le rendement exigé par les investisseurs pour investir dans le service public. Le rendement exigé équivaut à celui qu'ils pourraient réaliser sur un investissement comportant un risque comparable. À long terme, à moins que le service public réglementé ne puisse obtenir l'équivalent du coût du capital, les nouveaux investissements seront découragés et l'entreprise ne pourra accroître ses activités, ni même les poursuivre. Ce sont non seulement ses actionnaires, mais aussi ses clients, qui en souffriront (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149).

[17] Évidemment, la Commission n'est pas tenue pour autant d'accepter toute dépense avancée par le service public, et le rendement obtenu par les actionnaires n'est pas non plus garanti. À court terme, ce rendement peut fluctuer, notamment lorsque la consommation d'électricité est supérieure ou inférieure à celle prévue. De même, le refus d'approuver des dépenses d'exploitation dont le service public a convenu aura un effet défavorable sur le rendement des actions. Je n'entends pas me livrer à une analyse détaillée de la manière dont le coût du capital-actions devrait être considéré par les organismes qui réglementent les services publics, mais seulement faire observer que tout refus d'approuver une dépense dont un service public a convenu a un effet sur le rendement des actions. Cet effet justifie une grande attention au vu de la nécessité qu'un service public attire les investissements à long terme et réinvestisse ses bénéfices afin de survivre et de fonctionner de manière efficace et rentable, conformément aux objectifs légaux de la Commission applicables à la réglementation de l'électricité en Ontario.

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated

[18] Rappelons qu'il incombe au service public de convaincre la Commission du caractère juste et raisonnable des paiements qu'il sollicite. S'il n'y parvient pas, la Commission peut rejeter la demande en partie à raison du montant qui, selon elle, n'est pas juste et raisonnable.

[19] En cas de refus d'approbation, le service public peut renoncer, si cela lui est possible, aux dépenses d'exploitation en cause. S'il ne peut y renoncer, ses actionnaires absorbent le déficit en touchant un rendement inférieur à celui prévu, c'est-à-dire le coût du capital-actions pour le service public. Il appartient dès lors à la direction de ce dernier de faire en sorte que ses dépenses correspondent à celles que la Commission tient pour justes et raisonnables.

[20] Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

II. Faits

[21] OPG est le plus grand producteur d'énergie de l'Ontario, et sa tarification est réglementée par la Commission. Elle a vu le jour en 1999 et fait partie des entreprises qui ont succédé à Ontario Hydro. Elle exploite des installations nucléaires et hydroélectriques soumises à la réglementation de la Commission qui produisent environ la moitié de l'électricité consommée dans la province. Son unique actionnaire est la province d'Ontario.

[22] Son effectif se compose d'environ 10 000 personnes pour ses activités réglementées, dont 95 p. 100 travaillent dans le secteur nucléaire. Environ 90 p. 100 des employés affectés à ses activités

businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 ("Board 2008-2009 Decision") (online), at pp. 5-6.

réglementées sont syndiqués, dont approximativement les deux tiers sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 (« STTSE »), et le tiers par Society of Energy Professionals (« Society »).

[23] Dès ses débuts en tant que service public indépendant, OPG a eu conscience de l'importance d'accroître sa performance d'entreprise. Dans le cadre de mesures générales prises à cette fin, elle a entrepris de comparer le rendement de son secteur nucléaire à celui de centrales comparables dans le monde. Dans un protocole d'accord intervenu avec la province d'Ontario le 17 août 2005, OPG a pris l'engagement suivant :

> [TRADUCTION] OPG visera l'amélioration constante de son secteur nucléaire et de ses services internes. Elle comparera sa performance dans ces domaines à celle de l'exploitation des réacteurs CANDU à travers le monde ainsi qu'à celle des producteurs privés et publics d'électricité d'origine nucléaire appartenant au quartile supérieur en Amérique du Nord. Sa priorité première sera d'améliorer l'exploitation de son parc nucléaire actuel.

(d.a., vol. III, p. 215)

[24] Dans la toute première demande qu'elle a présentée à la Commission en 2007 pour la période de référence 2008-2009, OPG a sollicité l'approbation de « recettes nécessaires » se chiffrant à 6,4 milliards de dollars; ce poste correspond [TRADUCTION] « aux recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors », dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521). Il s'agissait d'une majoration d'un milliard de dollars par rapport à ce qu'OPG avait demandé et obtenu en application du régime de réglementation en vigueur avant que la Commission ne soit investie de son pouvoir de réglementation vis-à-vis d'elle (EB-2007-0905, décision motivée, 3 novembre 2008 (« décision 2008-2009 de la Commission ») (en ligne), p. 5-6).

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. ("Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[25] La Commission a estimé qu'OPG ne satisfaisait pas aux attentes de son unique actionnaire quant à la performance de son secteur nucléaire et qu'elle avait peu fait pour comparer sa performance à celle de ses pairs, alors qu'elle s'y était engagée dès 2005. De fait, la seule preuve d'une démarche en ce sens présentée par OPG dans le cadre de sa demande d'approbation de tarifs était un rapport établi par Navigant Consulting Inc. en 2006 (« rapport Navigant ») et selon lequel l'effectif d'OPG dépassait de 12 p. 100 celui de ses pairs. La Commission a conclu qu'OPG n'avait pas donné suite aux recommandations du rapport Navigant, ni commandé d'études comparatives ultérieures pour évaluer sa performance (décision 2008-2009 de la Commission, p. 27 et 30). Elle a aussi jugé les coûts d'exploitation d'OPG aux installations nucléaires de Pickering [TRADUCTION] « bien supérieurs à la moyenne du secteur » (p. 29). Elle a donc refusé d'approuver 35 millions de dollars au chapitre des recettes nécessaires et enjoint à OPG de réaliser des études comparatives pour étayer ses demandes ultérieures (p. 31).

[26] Pour expliquer l'importance de la comparaison, la Commission dit ce qui suit : [TRADUCTION] « La raison pour laquelle le protocole d'accord insiste sur la conduite d'une étude comparative est qu'une telle étude peut faire et fait ressortir toute inefficacité ou absence d'accroissement de la productivité » (décision 2008-2009 de la Commission, p. 30).

[27] Le 5 mai 2010, peu avant qu'OPG ne dépose sa deuxième demande d'approbation de tarifs — qui est l'objet du pourvoi —, le ministre de l'Énergie et de l'Infrastructure de l'Ontario a écrit au président-directeur général du service public afin que ce dernier fasse état, dans sa demande, [TRADUCTION] « d'efforts concertés pour trouver des moyens de réaliser des économies et mette l'accent sur les postes de dépense qui sont essentiels à l'exploitation sûre et fiable de ses actifs existants et de ses installations projetées déjà en cours de réalisation » (d.a., vol. IV, p. 38).

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses was fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

[28] Le 26 mai 2010, OPG a déposé sa demande de paiements pour la période de référence 2011-2012. Elle a présenté à l'appui deux rapports de ScottMadden Inc., un cabinet-conseil en gestion générale spécialisé dans la comparaison et la planification opérationnelle d'installations nucléaires. Le rapport de la phase 1 compare la performance opérationnelle et financière d'OPG à celle d'autres entreprises à partir de mesures de la performance dans le secteur d'activité. Le rapport final de la phase 2 porte sur les objectifs d'accroissement de la performance dans l'optique d'une amélioration de l'exploitation du secteur nucléaire. OPG a collaboré avec ScottMadden pour l'établissement des rapports des phases 1 et 2, qui ont respectivement été publiés les 2 juillet et 11 septembre 2009.

[29] La demande visait la période allant du 1er janvier 2011 au 31 décembre 2012. OPG y demandait l'approbation de recettes nécessaires de 6,9 milliards de dollars, soit une augmentation de 6,2 p. 100 par rapport aux recettes d'alors compte tenu des tarifs approuvés pour la période précédente. Des 6,9 milliards de dollars sollicités au titre des recettes nécessaires, 2,8 milliards auraient été affectés à la rémunération, dont environ 2,4 milliards dans le secteur nucléaire.

[30] Une grande partie des dépenses d'OPG au chapitre des salaires et de la rémunération était déterminée par des conventions collectives intervenues avec les syndicats (STTSE et Society). Lors du dépôt de la demande, OPG était liée par une convention collective conclue avec le STTSE en vigueur d'avril 2009 à mars 2012, alors que la convention collective qui la liait à Society avait expiré le 31 décembre 2010. Ces conventions collectives prévoyaient des augmentations annuelles de salaires se situant entre 2 et 3 p. 100, auxquelles s'ajoutait 1 p. 100 pour les changements d'échelon et l'avancement. Après l'audition de la demande par la Commission dans la présente affaire, un arbitre a ordonné l'application d'une nouvelle convention collective liant OPG et Society à compter du 3 février 2011. La convention collective prévoyait des augmentations de salaires de 1 à 3 p. 100.

III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of

III. Historique judiciaire

A. *Commission de l'énergie de l'Ontario (2011 LNONOEB 57 (QL) (« décision de la Commission »))*

[31] Dans sa décision relative à la demande d'approbation de tarifs d'OPG pour la période de référence 2011-2012, la Commission dit que le règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 ») et l'art. 78.1 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* lui confèrent un vaste pouvoir discrétionnaire quant [TRADUCTION] « au choix d'une méthode indiquée pour fixer des tarifs justes et raisonnables » (para. 73). Elle reconnaît que différents principes peuvent s'appliquer selon qu'il s'agit du recouvrement de dépenses prévues ou de l'examen après coup de dépenses déjà faites. Pour statuer sur la demande dont elle était saisie, il convenait de tenir compte de tout élément de preuve que la Commission jugeait pertinent pour apprécier le caractère raisonnable des recettes nécessaires d'OPG.

[32] La Commission refuse d'approuver les 6,9 milliards de dollars demandés par OPG au titre des recettes nécessaires, les réduisant de 145 millions de dollars pour la période référence [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (par. 350). Cette décision défavorable tient surtout à l'opinion de la Commission selon laquelle OPG compte trop d'employés et ses niveaux de rémunération sont excessifs.

[33] Au sujet de la taille de l'effectif, la Commission relève que, selon une étude comparative qu'OPG a elle-même commandée (le rapport final de la phase 2 de ScottMadden), la dotation de certains postes peut être réduite, voire supprimée. Elle recommande à OPG de revoir sa structure organisationnelle et de réaffecter du personnel ou de supprimer des postes au cours des années suivantes. Vingt à vingt-cinq pour cent du personnel d'OPG devait en effet partir à la retraite entre 2010 et 2014 et il était possible de recourir davantage à la sous-traitance. Au chapitre de la rémunération, elle estime qu'OPG n'a pas présenté d'éléments convaincants pour justifier que les salaires de son personnel opérationnel

industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms

se situent au 75e percentile des salaires versés dans le secteur selon une étude de Towers Perrin. Selon la Commission, ils devraient se situer au 50e percentile, soit le même que pour le personnel de direction. Pour décider de la réduction qui s'impose, elle reconnaît qu'OPG pourrait ne pas être en mesure, pendant la période de référence, de réaliser des économies de 145 millions de dollars par la réduction de sa seule masse salariale à cause des conventions collectives en vigueur.

B. *Cour supérieure de Justice de l'Ontario, Cour divisionnaire (2012 ONSC 729, 109 O.R. (3d) 576)*

[34] OPG a fait appel de la décision au motif que celle-ci était déraisonnable et mal motivée. Elle a soutenu que la Commission aurait dû appliquer le principe de l'investissement prudent, c'est-à-dire que, dans son examen des dépenses de rémunération, elle aurait dû seulement s'interroger sur la prudence de conclure, à l'époque, les conventions collectives qui commandaient ces dépenses. Elle a ajouté que la Commission aurait dû présumer que les dépenses étaient prudentes.

[35] La décision de la formation de trois juges de la Cour divisionnaire est partagée. Au nom des juges majoritaires, la juge Hoy (aujourd'hui Juge en chef adjointe de l'Ontario) conclut que la décision de la Commission est raisonnable, car il était possible à la direction d'OPG de réduire ultérieurement ses dépenses globales de rémunération dans le respect des conventions collectives. L'application stricte du principe de l'investissement prudent n'aurait pas permis à la Commission d'atteindre son objectif, d'origine législative, de favoriser la rentabilité de la production d'électricité. Vu la présence de « deux monopoles », il importait particulièrement que la Commission exerce son pouvoir de fixer des tarifs justes et raisonnables :

[TRADUCTION] Les conventions collectives sont intervenues entre un monopole réglementé qui refile ses coûts au consommateur et qui n'est pas soumis à la concurrence, et deux syndicats qui représentent environ 90 p. 100 des salariés et qui constituent presque un second monopole

inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793*

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

étant donné les conditions héritées d'Ontario Hydro et le fait qu'il serait extrêmement difficile d'exploiter des installations nucléaires sans les salariés. [par. 54]

[36] Dissidente, la juge Aitken opine que,

[TRADUCTION] dans la mesure où les coûts [de rémunération des employés du secteur nucléaire] étaient déterminés à l'avance, c'est-à-dire qu'ils étaient arrêtés par des conventions collectives conclues avant la demande et la période de référence, OPG devait seulement prouver la prudence ou le caractère raisonnable de la décision de conclure ces conventions au vu des circonstances connues ou qui auraient pu raisonnablement être prévues au moment de prendre la décision. [par. 83]

Elle aurait statué que l'omission de la Commission d'appliquer séparément et expressément le principe de la prudence à la partie des dépenses de rémunération du secteur nucléaire dont elle avait convenu, jumelée à son appréciation avec le recul du caractère raisonnable de ces dépenses, a rendu la décision de la Commission déraisonnable.

C. *Cour d'appel de l'Ontario (2013 ONCA 359, 116 O.R. (3d) 793)*

[37] La Cour d'appel de l'Ontario infirme le jugement de la Cour divisionnaire et renvoie le dossier à la Commission. Elle établit une distinction entre les dépenses prévues et les dépenses convenues, ces dernières correspondant à celles que le service public [TRADUCTION] « a convenu d'acquitter pendant [la période de référence] » et qu'il « ne peut modifier ou réduire pendant cette période, généralement à cause d'obligations contractuelles » (par. 29). Même si les dépenses n'ont pas à être acquittées dans l'immédiat, comme en l'espèce, celles qui, « par contrat, doivent être acquittées pendant la période de référence constituent néanmoins des dépenses convenues, même si elles n'ont pas encore été acquittées » (par. 29). La Cour d'appel statue que la Commission doit, dans son examen de ces dépenses, appliquer le principe de la prudence énoncé dans *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4 (par. 15-16). En ne respectant pas ce précédent et en obligeant OPG à « modifier des dépenses qu'elle ne peut juridiquement modifier », la Commission a agi déraisonnablement (par. 37).

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and

IV. Questions en litige

[38] La Commission soulève deux questions dans le cadre du pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Sa décision de retrancher 145 millions de dollars des recettes nécessaires d'OPG est-elle raisonnable?

[39] Devant notre Cour, OPG fait valoir que la Commission outrepasse le rôle qui sied à un tribunal administratif dans le cadre d'un appel de sa propre décision, ce qui soulève la question supplémentaire suivante :

3. La Commission a-t-elle agi de manière inacceptable en se pourvoyant en tant que partie à l'appel en l'espèce?

V. Analyse

[40] Il convient en toute logique d'examiner d'abord le caractère approprié de la participation de la Commission au pourvoi. J'examinerai ensuite la norme de contrôle applicable, puis la question de fond de savoir si la décision de la Commission est raisonnable.

A. *Le rôle qui sied à la Commission dans le cadre du pourvoi*

(1) La qualité pour agir d'un tribunal administratif

[41] Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern Utilities* »), sous la plume du juge Estey, notre Cour se demande pour la première fois en quoi la participation d'un décideur administratif à l'appel ou au contrôle de sa propre décision peut soulever des doutes sur son impartialité. Pour reprendre les propos du juge Estey, « [u]ne participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures

issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

concernant des intérêts et des questions semblables ou impliquant les mêmes parties » (p. 709). Il ajoute que le tribunal administratif avait déjà le loisir de s'expliquer clairement dans sa décision initiale et « [qu'il] enfreint de façon inacceptable la réserve dont [il doit] faire preuve lorsqu'[il] particip[e] aux procédures comme partie à part entière » (p. 709).

[42] Dans *Northwestern Utilities*, notre Cour statue finalement que la portée des observations que pouvait présenter l'Alberta Public Utilities Board — qui, à l'instar de la Commission de l'énergie de l'Ontario, jouissait légalement du droit d'être entendue en appel devant une cour de justice (voir la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 33(3)) — était limitée. Le juge Estey fait remarquer ce qui suit :

> Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. [p. 709]

[43] Dans *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, qui porte sur le contrôle judiciaire d'une décision de la commission des relations de travail de la Colombie-Britannique, notre Cour approfondit la question de la qualité pour agir d'un organisme administratif. Même si les juges majoritaires qui ont entendu le pourvoi n'adoptent pas d'approche particulière pour se prononcer, le juge La Forest, avec l'appui du juge en chef Dickson, reconnaît qu'un tribunal administratif a qualité non seulement pour expliquer le dossier et faire valoir son point de vue sur la norme de contrôle applicable, mais aussi pour soutenir que sa décision est raisonnable.

[44] Cette conclusion repose sur la nécessité de faire en sorte que la cour de révision rende un jugement parfaitement éclairé sur la décision du tribunal administratif. Le juge La Forest invoque l'arrêt *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), p. 153, pour avancer que le tribunal administratif est le mieux placé pour attirer l'attention de la cour

those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision

sur les considérations, enracinées dans la compétence ou les connaissances spécialisées du tribunal, qui peuvent rendre raisonnable ce qui autrement paraîtrait déraisonnable à quelqu'un qui n'est pas versé dans les complexités de ce domaine spécialisé.

(*Paccar*, p. 1016)

Toutefois, le juge La Forest conclut que le tribunal administratif ne peut aller jusqu'à défendre le bien-fondé de sa décision (p. 1017). Sa thèse ne convainc pas une majorité de ses collègues, mais la juge L'Heureux-Dubé, dissidente, qui se prononce elle aussi sur la qualité pour agir du tribunal administratif, souscrit à son analyse sur le fond (p. 1026).

[45] Juridictions de première instance et d'appel ont tenté tant bien que mal de concilier les opinions exprimées par les juges de la Cour dans les arrêts *Northwestern Utilities* et *Paccar*. De fait, même si notre Cour n'est jamais expressément revenue sur *Northwestern Utilities*, elle a parfois autorisé un tribunal administratif à participer à l'instance à titre de partie à part entière sans expliquer sa décision (voir p. ex. *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; voir également *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) (« *Goodis* »), par. 24).

[46] Dans un certain nombre de décisions, les cours d'appel se sont attaquées à la question et, [TRADUCTION] « pour la plupart, elles sont désormais plus enclines à autoriser un tribunal administratif à participer au contrôle judiciaire ou à l'appel, prévu par la loi, de sa propre décision » (D. Mullan, « Administrative Law and Energy Regulation », dans G. Kaiser et B. Heggie, 35, p. 51). Le survol de trois arrêts de juridictions d'appel suffit à établir la raison d'être de ce revirement.

[47] Dans *Goodis*, le Bureau de l'avocate des enfants demandait à la cour de ne pas reconnaître ou de restreindre la qualité pour agir du Commissaire

was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.

(*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and

à l'information et à la protection de la vie privée dont la décision faisait l'objet d'une demande de contrôle. La Cour d'appel de l'Ontario a refusé de se montrer formaliste et d'appliquer une règle fixe qui aurait obligé le tribunal administratif à s'en tenir à des observations d'un certain type et elle a adopté plutôt une approche contextuelle et discrétionnaire (*Goodis*, par. 32-34). Elle a conclu que l'approche catégorique n'avait pas de fondement rationnel et a fait remarquer qu'une telle approche pouvait avoir des conséquences fâcheuses :

> [TRADUCTION] Par exemple, la règle catégorique qui refuse au tribunal administratif la qualité pour agir lorsque la contestation allègue le déni de justice naturelle peut priver la cour d'observations capitales lorsque la contestation se fonde des défaillances alléguées de la structure ou du fonctionnement du tribunal administratif, car ce sont des sujets sur lesquels ce dernier est particulièrement bien placé pour formuler des observations. De même, la règle qui reconnaît à un tribunal administratif la qualité pour défendre sa décision au regard du critère de la raisonnabilité, mais non du critère de la décision correcte, permet le débat inutile et empêche le débat utile. Parce que le meilleur moyen d'établir la raisonnabilité d'une décision peut être de démontrer qu'elle est correcte, une règle fondée sur cette distinction semble au mieux ténue, comme l'affirme le juge Robertson dans *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1386 c. Bransen Construction Ltd.*, [2002] A.N.-B. n° 114, 249 R.N.-B. (2e) 93 (C.A.), par. 32.

(*Goodis*, par. 34)

[48] La Cour d'appel statue qu'il faut voir dans les arrêts *Northwestern Utilities* et *Paccar* la source de [TRADUCTION] « considérations fondamentales » qui doivent guider l'exercice de son pouvoir discrétionnaire eu égard au contexte de l'affaire (*Goodis*, par. 35). Les deux considérations les plus importantes, selon ces arrêts, sont « la nécessité de faire en sorte que la cour rende une décision parfaitement éclairée sur les questions en litige » (par. 37) et « celle d'assurer l'impartialité du tribunal administratif » (par. 38). La cour doit limiter la participation du tribunal administratif lorsque cette participation est de nature à miner la confiance

to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern*

ultérieure des citoyens dans son objectivité. La Cour d'appel énumère les considérations — sur lesquelles je reviendrai — qui jouent dans la décision d'autoriser ou non le tribunal administratif à présenter des observations et dans la détermination de la mesure dans laquelle il lui est permis de le faire, le cas échéant (par. 36-38).

[49] Dans *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3, le juge Stratas relève deux considérations qui, en common law, limitent selon lui la participation éventuelle d'un tribunal administratif à l'appel de sa propre décision : le caractère définitif et l'impartialité. Le principe du caractère définitif veut qu'un tribunal ne puisse se prononcer de nouveau dans une affaire une fois qu'il a rendu sa décision, motifs à l'appui. J'y reviendrai plus en détail, car j'estime que ce principe se rapporte plus directement à l'« autojustification » de sa décision par le tribunal administratif qu'à sa qualité pour agir comme telle.

[50] Le principe de l'impartialité entre en jeu lorsque le tribunal administratif défend une thèse en appel car, dans certains cas, sa décision peut lui être renvoyée pour réexamen. Le juge Stratas conclut que « [l]es observations que le tribunal administratif présente dans une instance en contrôle judiciaire et qui plongent trop loin, trop intensément ou trop énergiquement dans le bien-fondé de l'affaire soumise au tribunal administratif risquent d'empêcher celui-ci de procéder par la suite à un réexamen impartial du bien-fondé de l'affaire » (*Quadrini*, par. 16). Il conclut toutefois au final que les principes applicables n'imposaient pas de « règles absolues », et il souscrit à l'approche discrétionnaire de la Cour d'appel de l'Ontario dans *Goodis* (*Quadrini*, par. 19-20).

[51] L'arrêt *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110, constitue un troisième exemple récent où une cour de justice est appelée à se pencher sur le sujet. Leon's Furniture a contesté la qualité du commissaire intimé de plaider sur le fond en appel (par. 16). La Cour d'appel de l'Alberta estime elle aussi que le droit applicable doit donner suite aux considérations fondamentales soulevées dans

Utilities but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court

l'arrêt *Northwestern Utilities*, mais que la question de la qualité pour agir d'un tribunal administratif relève néanmoins d'un pouvoir discrétionnaire qu'il faut exercer eu égard aux éléments contextuels applicables (par. 28-29).

[52] Les considérations énoncées par notre Cour dans *Northwestern Utilities* témoignent de préoccupations fondamentales quant à la participation d'un tribunal administratif à l'appel de sa propre décision. Or, ces préoccupations ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire préconisée dans *Goodis*, *Leon's Furniture* et *Quadrini* offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes (voir N. Semple, « The Case for Tribunal Standing in Canada » (2007), 20 *R.C.D.A.P.* 305; L. A. Jacobs et T. S. Kuttner, « Discovering What Tribunals Do : Tribunal Standing Before the Courts » (2002), 81 *R. du B. can*. 616; F. A. V. Falzon, « Tribunal Standing on Judicial Review » (2008), 21 *R.C.D.A.P.* 21).

[53] Plusieurs considérations militent en faveur d'une démarche discrétionnaire. En particulier, vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Par exemple, il peut être en mesure d'expliquer en quoi une certaine interprétation de la disposition législative en cause peut avoir une incidence sur d'autres dispositions du régime de réglementation ou sur les réalités factuelles et juridiques de son domaine de spécialisation. Il pourrait être plus difficile d'obtenir de tels éléments d'information d'autres parties.

[54] Dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Le contrôle judiciaire se révèle optimal lorsque les deux facettes du litige sont vigoureusement défendues devant la cour de révision. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de

ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige.

[55] Les tribunaux administratifs canadiens tiennent nombre de rôles différents dans les contextes variés où ils évoluent, de sorte que la crainte d'une partialité de leur part peut être plus ou moins grande selon l'affaire en cause, ainsi que la structure du tribunal et son mandat légal. Dès lors, les dispositions législatives portant sur la structure, le fonctionnement et la mission d'un tribunal en particulier sont cruciales aux fins de l'analyse.

[56] Le mandat de la Commission, comme celui des tribunaux administratifs qui lui sont apparentés, la différencie des tribunaux administratifs appelés à trancher des différends individuels opposant plusieurs parties. Dans le cas de ces derniers, [TRADUCTION] « l'importance de l'équité, réelle et perçue, milite davantage » contre la reconnaissance de leur qualité pour agir (*Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, par. 42).

[57] Par conséquent, je suis d'avis qu'il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

[58] Dans la présente affaire, le par. 33(3) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit à titre préliminaire que « [l]a Commission a le droit d'être représentée par un avocat lors de l'audition de l'appel » devant la Cour divisionnaire. Cette disposition ne confère pas expressément à la Commission une qualité pour agir qui permet de faire valoir le bien-fondé de sa décision en appel, ni ne limite expressément la thèse qu'elle peut défendre à la présentation d'arguments relatifs à la compétence ou à la norme de contrôle comme le fait la disposition en cause dans l'affaire *Quadrini* (voir par. 2).

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute

[59] Au vu de cette analyse de la qualité pour agir d'un tribunal administratif, lorsque le texte législatif applicable n'est pas clair sur ce point, la cour de révision s'en remet à son pouvoir discrétionnaire pour délimiter les attributs du tribunal administratif en appel. Voici quelles sont, entre autres, les considérations — relevées par les juridictions et les auteurs précités — qui délimitent l'exercice de ce pouvoir discrétionnaire :

(1) lorsque, autrement, l'appel ou la demande de contrôle serait non contesté, il peut être avantageux que la cour de révision exerce le pouvoir discrétionnaire qui lui permet de reconnaître la qualité pour agir du tribunal administratif;

(2) lorsque d'autres parties sont susceptibles de contester l'appel ou la demande de contrôle et qu'elles ont les connaissances et les compétences spécialisées nécessaires pour bien avancer une thèse ou la réfuter, la qualité pour agir du tribunal administratif peut revêtir une importance moindre pour l'obtention d'une issue juste;

(3) le fait que la fonction du tribunal administratif consiste soit à trancher des différends individuels opposant deux parties, soit à élaborer des politiques, à réglementer ou enquêter ou à défendre l'intérêt public influe sur la mesure dans laquelle l'impartialité soulève des craintes ou non. Ces craintes peuvent jouer davantage lorsque le tribunal a exercé une fonction juridictionnelle dans l'instance visée par l'appel, et moins lorsque son rôle s'est révélé d'ordre plutôt réglementaire.

[60] Au vu de ces considérations, je conclus qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. Premièrement, la Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait donc d'autre choix que de prendre part à l'instance pour que sa décision soit défendue au fond. Contrairement à d'autres provinces, l'Ontario n'a nommé aucun défenseur des droits des clients des services publics,

with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e.

si bien que la Commission — qui est légalement garante de l'intérêt public — n'avait pas vraiment d'autre avenue que celle de se constituer partie à l'instance.

[61] Deuxièmement, la Commission a pour mandat de réglementer les activités de services publics, y compris ceux qui appartiennent au domaine de l'électricité. Son mandat de réglementation est large. Au nombre de ses nombreuses fonctions, mentionnons l'octroi de permis aux participants du marché, l'approbation de nouvelles installations de transport et de distribution et l'autorisation des tarifs exigés des consommateurs. Dans la présente affaire, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Il s'agit d'une situation différente de celle où le tribunal administratif est habilité à trancher un différend entre deux parties, le souci d'impartialité pouvant alors militer davantage contre la qualité d'agir comme partie à part entière.

[62] L'objet de la réglementation est un autre élément qui milite en faveur de la pleine reconnaissance de la qualité pour agir de la Commission, puisque la crainte d'apparence de partialité est faible en l'espèce. Pour reprendre les propos du juge Doherty dans *Enbridge*, par. 28, [TRADUCTION] « [à] l'instar de tout organisme réglementé, je suis certain que [la Commission] donne parfois raison à Enbridge et lui donne parfois tort. J'ose croire qu'Enbridge comprend parfaitement le rôle de l'organisme de réglementation et sait que [la Commission] statue sur chaque demande en fonction des faits qui lui sont propres ». Je conclus donc que la participation de la Commission au pourvoi n'a rien d'inapproprié. Reste à savoir si les arguments de la Commission sont appropriés.

(2) L'autojustification

[63] La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif (ci-après le « tribunal ») est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la

jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to

qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir (p. ex. des prétentions relatives à sa compétence ou à la justesse de sa décision), alors que l'« autojustification » touche à la teneur des prétentions.

[64] Suivant le sens attribué à cette notion par les cours de justice qui l'ont examinée dans le contexte de la qualité pour agir, un tribunal « s'autojustifie » lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire (voir p. ex. *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93). Autrement dit, un tribunal ne pourrait [TRADUCTION] « défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle » (*Goodis*, par. 42).

[65] Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, le tribunal ait statué définitivement et que son travail soit terminé, « à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire » (*Quadrini*, par. 16, citant *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848). Partant, la cour a conclu qu'un tribunal ne peut profiter d'un contrôle judiciaire pour « modifier, changer, nuancer ou compléter ses motifs » (*Quadrini*, par. 16). Dans l'arrêt *Leon's Furniture*, le juge Slatter affirme qu'un tribunal peut [TRADUCTION] « offrir différentes interprétations de ses motifs ou de sa conclusion, [mais] non tenter de remanier ses motifs, invoquer de nouveaux arguments ou se prononcer sur des questions de fait que ne soulève pas déjà le dossier » (par. 29).

[66] En revanche, le juge Goudge conclut, dans l'arrêt *Goodis*, avec l'accord de tous ses collègues, que même si la commissaire invoque un argument qui ne figure pas expressément dans sa décision initiale, elle peut le soulever en appel. Il reconnaît que [TRADUCTION] « [l']importance de décisions bien étayées pourrait être compromise si un tribunal pouvait simplement offrir, à l'appui de sa décision attaquée devant une cour de justice,

support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also

des motifs différents, plus convaincants, voire opposés » (par. 42), mais il conclut finalement que la commissaire peut présenter un nouvel argument dans le cadre d'un contrôle judiciaire. Le nouvel argument n'est toutefois « pas incompatible avec les motifs formulés dans la décision, car on peut en effet affirmer qu'il en fait implicitement partie » (par. 55). « La commissaire pouvait donc soulever l'argument devant la Cour divisionnaire, et celle-ci pouvait en tenir compte pour se prononcer » (par. 58).

[67] Les deux thèses avancées sur l'autojustification se défendent. D'une part, il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, car la cour de révision est alors saisie des arguments les plus convaincants à l'appui de chacune des thèses (Semple, p. 315). Cela demeure vrai même si ces arguments ne figurent pas dans la décision initiale. D'autre part, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Permettre au tribunal de présenter de nouveaux arguments en appel ou dans le cadre du contrôle judiciaire de sa décision initiale peut aussi amener les parties à conclure que le processus n'est pas équitable. Il peut surtout en être ainsi lorsque le tribunal est appelé à trancher des différends opposant deux personnes privées, puisque la présentation de nouveaux arguments en appel peut donner l'impression que le tribunal « se ligue » contre l'une des parties. Or, je le rappelle, il ne convient généralement pas que le tribunal doté d'un tel mandat participe en tant que partie à l'appel.

[68] Je ne suis pas convaincu que la formulation en appel de nouveaux arguments qui interprètent la décision initiale ou qui l'étayaient implicitement, mais non expressément, va à l'encontre du principe du caractère définitif. De même, il n'est pas contraire à ce principe de permettre au tribunal d'expliquer à la cour de révision quelles sont ses politiques et pratiques établies, même lorsque les motifs contestés n'en font pas mention. Le tribunal n'a pas à les expliquer systématiquement dans chaque décision à la seule fin de se prémunir contre une allégation d'autojustification advenant qu'il

respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> . . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone

soit appelé à les préciser en appel ou en contrôle judiciaire. Il peut aussi répondre aux arguments de la partie adverse dans le cadre du contrôle judiciaire de sa décision car il le fait dans le but de faire confirmer sa décision initiale, non de rouvrir le dossier et de rendre une nouvelle décision ou de modifier la décision initiale. L'effet de la décision initiale demeure inchangé même lorsque le tribunal demande sa confirmation en offrant une interprétation de cette décision ou en invoquant des motifs qui la sous-tendent implicitement.

[69] Cependant, je ne crois pas qu'un tribunal devrait avoir la possibilité inconditionnelle de présenter une thèse entièrement nouvelle dans le cadre d'un contrôle judiciaire, car lui reconnaître cette faculté pourrait l'exposer à des allégations d'iniquité et nuire au prononcé de décisions bien motivées au départ. Je suis d'avis qu'il y a un juste équilibre entre ces considérations et celles voulant que la cour de révision entende les arguments les plus convaincants de chacune des parties lorsqu'il est permis au tribunal d'offrir différentes interprétations de ses motifs ou de ses conclusions ou de présenter des arguments qui sous-tendent implicitement ses motifs initiaux (voir *Leon's Furniture*, par. 29; *Goodis*, par. 55).

[70] Je ne crois pas que, dans la présente affaire, la Commission a indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant notre Cour. Dans son mémoire en réplique, la Commission signale — à juste titre, selon moi — que ses observations mettent simplement en évidence ce qui ressort du dossier ou répondent aux arguments des intimées.

[71] J'exhorte toutefois la Commission et, de façon générale, tout tribunal qui se constitue partie à une instance à se soucier du ton qu'il adopte lors du contrôle judiciaire de sa décision. Comme le fait remarquer le juge Goudge dans l'arrêt *Goodis*,

> [TRADUCTION] le tribunal administratif qui veut faire valoir son point de vue lors du contrôle judiciaire de sa décision [doit] porte[r] une attention particulière au ton qu'il adopte. Bien qu'il ne s'agisse pas d'un motif précis pour lequel sa qualité pourrait être restreinte, il ne

of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the

fait aucun doute que le ton des observations proposées offre une toile de fond à cet égard. Le tribunal qui désire contester une demande de contrôle judiciaire sera utile à la cour dans la mesure où ses observations permettront d'éclaircir les questions et où elles seront fondées sur ses connaissances spécialisées, au lieu d'être empreintes d'un parti pris agressif contre la partie adverse. [par. 61]

[72] En l'espèce, la Commission a généralement présenté des arguments utiles dans le cadre d'un débat contradictoire, mais respectueux. Une mise en garde s'impose toutefois selon moi en ce qui concerne l'affirmation de la Commission selon laquelle l'application du critère de l'investissement prudent [TRADUCTION] « ne changerait vraisemblablement pas l'issue de l'affaire » si la décision lui était renvoyée pour réexamen (m.a., par. 99). Une telle affirmation peut, si elle est poussée trop loin, faire douter de l'impartialité du tribunal au point où une cour de justice serait justifiée d'exercer son pouvoir discrétionnaire et de limiter la qualité pour agir du tribunal de manière à préserver son impartialité.

B. *Norme de contrôle*

[73] Les parties conviennent que la norme de contrôle qui s'applique aux actes de la Commission lorsqu'elle fait appel à son expertise pour fixer les tarifs et approuver des paiements sur le fondement de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* est celle de la décision raisonnable. Je suis d'accord. En outre, dans la mesure où l'issue du pourvoi repose sur l'interprétation de cette loi — la loi constitutive de la Commission —, l'application de la norme de la décision raisonnable doit être présumée (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35). Rien ne donne à penser en l'espèce que la présomption soit réfutée.

[74] Le pourvoi fait intervenir deux notions distinctes de ce qui est « raisonnable ». L'une est liée à la norme de contrôle : en appel, la Cour doit apprécier la « justification [. . .], [. . .] la transparence et [. . .] l'intelligibilité » du raisonnement de la

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

Commission et se demander si la décision appartient « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (*Dunsmuir*, par. 47). L'autre est d'origine législative : la Commission doit utiliser son pouvoir de fixation des tarifs de manière à établir un équilibre qu'elle considère juste et raisonnable entre les intérêts du service public et ceux des consommateurs. Je m'efforce ci-après de respecter cette distinction.

C. *Choix de la méthode suivant la Loi de 1998 sur la Commission de l'énergie de l'Ontario*

[75] La question de savoir si le refus de la Commission d'approuver le recouvrement de certaines dépenses est raisonnable ou non dépend du lien de ce refus avec les pouvoirs légaux et réglementaires de la Commission d'approuver des paiements au service public et de répercuter ces paiements sur les tarifs exigés des consommateurs. Les pouvoirs généraux de la Commission en matière de fixation des tarifs et des paiements sont énoncés précédemment à la rubrique « Cadre réglementaire ».

[76] L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins.

[77] Or, la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prévoit ni à l'art. 78.1 ni à quelque autre article la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et des consommateurs lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Certes, sous réserve de certaines exceptions prévues au par. 6(2), le par. 6(1) du règlement 53/05 permet expressément à la Commission de [TRADUCTION] « définir la forme, la méthode, les hypothèses et les calculs utilisés pour rendre une ordonnance qui établit le montant du paiement aux fins de l'article 78.1 de la Loi ».

[78] As a contrasting example, para. 4.1 of s. 6(2) of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": para. 4.1 of s. 6(2). The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[78] En revanche, la disposition 4.1 du par. 6(2) du règlement 53/05 prescrit le recours à une méthode particulière lorsque la Commission examine [TRADUCTION] « les dépenses faites et les engagements financiers fermes pris dans le cadre de la planification et de la préparation relatives à la réalisation d'installations nucléaires projetées ». La Commission doit être convaincue que « les dépenses ont été faites de manière prudente » et que « les engagements financiers ont été pris de manière prudente » (la disposition 4.1 du par. 6(2)). La disposition établit donc un cadre précis où l'analyse de la Commission est axée sur la prudence de la décision de faire certaines dépenses ou de convenir de certaines dépenses. L'absence d'un libellé en ce sens dans la disposition générale qu'est le par. 6(1) constitue un autre motif de considérer que le règlement confère à la Commission un large pouvoir discrétionnaire quant à la méthode à employer pour ordonner un paiement lorsque les dispositions particulières du par. 6(2) ne s'appliquent pas.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[79] Pour ce qui concerne la question de savoir si la présomption de prudence doit s'appliquer aux décisions d'OPG de faire des dépenses, ni la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, ni le règlement 53/05 n'établissent expressément une telle présomption. D'ailleurs, suivant cette loi, il incombe au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables (par. 78.1(6) et (7)). Il semble donc contraire au régime législatif de présumer que la décision de faire des dépenses est prudente.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998*: ". . . the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just

[80] La juge Abella conclut que l'examen des dépenses d'OPG par la Commission aurait dû consister à « contrôl[er] la prudence des dépenses après coup et [à] appliqu[er] la présomption réfutable selon laquelle elles étaient raisonnables » (par. 150). Or, une telle approche est contraire au régime législatif. La Commission jouit certes d'une grande marge de manœuvre quant au choix d'une méthode, mais elle n'a pas la faculté d'inverser le fardeau de la preuve établi au par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du

and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be

présent article ». Il ne s'ensuit pas, bien sûr, que le requérant doit systématiquement prouver le caractère juste et raisonnable de chacune de ses dépenses, individuellement. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter les méthodes à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

[81] La cour de justice appelée à contrôler la décision de la Commission d'approuver ou non des paiements à un service public doit se demander si la conclusion de la Commission selon laquelle un paiement d'un certain montant est « juste et raisonnable » tant pour le service public que pour le consommateur est raisonnable ou non. Cette approche concorde avec les décisions de notre Cour sur l'établissement de tarifs dans d'autres secteurs réglementés où l'organisme de réglementation dispose d'un pouvoir discrétionnaire qui lui permet de recourir à une méthode ou à une autre. Dans ces décisions, la Cour signale que « [l]'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir » (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 40 (tarification des télécommunications), citant *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), p. 13 (tarification du transport ferroviaire des marchandises)). Certes, de nos jours, il faut voir dans ces propos la reconnaissance du pouvoir d'une cour de justice d'intervenir lorsqu'elle estime que l'exercice du pouvoir discrétionnaire a débouché sur une décision déraisonnable. Reste donc à décider si la méthode d'analyse retenue par la Commission pour refuser d'approuver les dépenses en l'espèce a rendu sa décision déraisonnable selon la norme du paiement « juste et raisonnable ».

D. *Qualification des dépenses en cause*

[82] Les dépenses prévues sont celles que le service public n'a pas encore acquittées et qu'un pouvoir discrétionnaire lui permet de renoncer à faire.

made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

Lorsque leur approbation est refusée, le service public peut soit modifier ses plans et renoncer aux dépenses, soit les faire malgré le refus étant entendu qu'elles seront assumées par les actionnaires plutôt que par les consommateurs. À l'opposé, les dépenses convenues sont celles que ses actionnaires et lui n'auront d'autre choix que d'assumer si l'organisme de réglementation refuse de permettre leur recouvrement et d'approuver les paiements sollicités. Cela peut advenir lorsque le service public a déjà déboursé la somme en cause ou qu'il a pris un engagement contraignant ou était assujetti à d'autres obligations qui écartent tout pouvoir discrétionnaire lui permettant de ne pas acquitter la somme ultérieurement.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[83] Les parties ne s'entendent pas sur la qualification des dépenses que la Commission a refusé d'approuver. Selon cette dernière, les dépenses de rémunération pour la période de référence sont des dépenses prévues dans la mesure où elles n'ont pas encore été acquittées. OPG soutient plutôt qu'il s'agit de dépenses convenues puisqu'elle est tenue par contrat de verser les sommes en cause au moment où elles deviennent exigibles. Ce désaccord est important car le contrôle de la prudence « sans recul », sur lequel je reviendrai plus en détail, a vu le jour dans le contexte de dépenses « convenues ». Il est en effet absurde d'appliquer ce critère lorsque le service public peut encore décider, en fin de compte, de faire ou non les dépenses; la décision de convenir de ces dépenses n'a pas encore été prise. Par conséquent, lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

[84] En l'espèce, au moins une partie des dépenses de rémunération jugées excessives par la Commission était imputable à des conventions collectives qu'OPG avait conclues avant la présentation de sa demande et qui faisaient en sorte que sa masse salariale globale dépasse le 75e percentile pour des emplois comparables dans d'autres services publics. Les conventions collectives laissaient

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has

peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, OPG devait respecter ceux établis par les conventions collectives et elle ne jouissait d'une marge de manœuvre que pour les conditions qui n'étaient pas ainsi régies. Par conséquent, les dépenses liées aux barèmes de rémunération et aux niveaux de dotation imposés par les conventions collectives étaient des dépenses convenues.

[85] La Commission conclut cependant que les dépenses de rémunération pour la période de référence ne sont pas toutes déterminées par les conventions collectives et qu'elles ne sont donc pas toutes convenues, car OPG dispose d'une certaine marge de manœuvre pour gérer globalement les niveaux de dotation en fonction du départ prévu d'employés d'âge mûr. Toutefois, la décision de la Commission ne précise pas quel pourcentage exact des 145 millions de dollars refusés au chapitre de la rémunération pourrait être recouvré grâce à la réduction naturelle du nombre d'employés ou à d'autres ajustements, ni quel pourcentage serait nécessairement assumé par le service public et son actionnaire. Par conséquent, les dépenses refusées en l'espèce doivent être considérées comme des dépenses convenues, du moins en partie. Il est déraisonnable d'y voir en totalité des dépenses prévues étant donné l'effet contraignant des conventions collectives sur OPG.

[86] Après avoir établi que les dépenses refusées sont, du moins partiellement, des dépenses convenues, il faut déterminer si la Commission a agi de façon raisonnable en appliquant le critère de l'investissement prudent sans exclure le recul. J'examine donc maintenant l'historique jurisprudentiel du critère de l'investissement prudent et les données méthodologiques y afférentes.

E. *Le critère de l'investissement prudent*

[87] Décider si la méthode de la Commission était raisonnable en l'espèce exige de se pencher sur l'historique du critère de l'investissement prudent (parfois appelé « contrôle de la prudence » ou « critère de la prudence ») pour déterminer ses origines, le situer dans le contexte et savoir quelle portée lui

been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

ont attribué les services publics, les organismes de réglementation et les rédacteurs législatifs.

(1) Jurisprudence américaine

[88] La jurisprudence américaine a joué un rôle important dans l'application du critère de l'investissement prudent aux services publics réglementés. Rappelons d'abord l'observation de notre Cour selon laquelle, « [b]ien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 54).

[89] L'application du critère de l'investissement prudent aux services publics réglementés s'origine de l'opinion concordante du juge Brandeis, de la Cour suprême des États-Unis, datant de 1923 et selon laquelle les services publics ont droit à la déférence lorsqu'ils cherchent à recouvrer [TRADUCTION] « un investissement qui, normalement, serait considéré comme raisonnable » (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1).

[90] Dans les décennies qui ont suivi, les organismes de réglementation américains chargés de l'examen de dépenses déjà faites par les services publics ont généralement appliqué soit le critère axé sur [TRADUCTION] « l'emploi et l'utilité », soit le critère de « l'investissement prudent » (J. Kahn, « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43, p. 49). À chacun de ces critères correspond une approche différente pour déterminer quelles dépenses peuvent équitablement et raisonnablement être refilées aux consommateurs. Le critère de l'emploi et de l'utilité permet au service public d'obtenir un rendement, mais seulement sur l'investissement qui est réellement employé et qui se révèle utile à l'exploitation de l'entreprise, étant entendu que les consommateurs ne doivent pas être tenus de payer pour un investissement dont ils ne bénéficient pas.

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[91] Au critère de l'investissement prudent correspond l'approche retenue par le juge Brandeis et selon laquelle des dépenses peuvent être recouvrées si elles ne sont pas imprudentes compte tenu de ce qu'on sait au moment où est fait l'investissement ou la dépense (Kahn, p. 49-50). Bien qu'il puisse sembler problématique du point de vue de la protection des intérêts des consommateurs d'adopter le critère de l'investissement prudent — dans la mesure où il autorise un paiement pour un investissement qui n'a été ni employé ni utile —, ce critère permet aux organismes de réglementation d'atténuer les possibles effets draconiens du critère de l'emploi et de l'utilité, lequel impose un lourd fardeau au service public. Par exemple, refuser le recouvrement d'un mauvais investissement qui paraissait raisonnable au moment où il a été fait risque de compromettre la santé financière du service public et d'avoir un effet dissuasif sur l'investissement ultérieur de capitaux par ce dernier. Pareil résultat peut ensuite entraîner des conséquences négatives pour les consommateurs, dont les intérêts à long terme sont mieux servis si le secteur de l'électricité est à la fois dynamique, efficace et viable. Par conséquent, un organisme de réglementation peut recourir au critère de l'investissement prudent afin d'établir un juste équilibre entre les intérêts des consommateurs et ceux du service public (voir Kahn, p. 53-54).

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[92] Les États ont eu recours à des approches différentes pour établir le fondement légal de la réglementation des services publics. Certains ont permis aux organismes de réglementation d'appliquer le critère de l'investissement prudent, alors que d'autres ont légiféré pour écarter le recouvrement de capitaux investis qui n'étaient [TRADUCTION] « ni employés ni utiles au public » (*Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), p. 302). Fait à signaler, dans cette affaire où on lui demandait si des paiements « justes et raisonnables » à un service public nécessitaient, sur le plan constitutionnel, que le critère de l'investissement prudent s'applique aux dépenses déjà faites, la Cour suprême des É.-U. a conclu que « [l']élévation d'une seule méthode de tarification au rang de norme constitutionnelle écarterait inutilement d'autres avenues dont pourraient bénéficier à la fois consommateurs et investisseurs » (p. 316).

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> . . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), at p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

[93] Les cours de justice américaines ont aussi reconnu que, dans certains contextes, des aspects du critère de l'investissement prudent peuvent se révéler moins justifiables. Par exemple, saisie du contrôle judiciaire de coûts transférés à un service public par une entreprise affiliée non réglementée, la Cour suprême de l'Utah s'est demandé s'il était justifié de présumer que les coûts étaient raisonnables et elle a conclu par la négative :

> [TRADUCTION] . . . nous ne pensons pas que les dépenses de l'affiliée devraient être présumées raisonnables. Bien que la pression exercée par un marché concurrentiel puisse nous permettre de présumer, faute d'une preuve contraire, que les dépenses d'une entreprise non affiliée sont raisonnables, on ne peut en dire autant des dépenses d'une affiliée qui ne sont pas faites dans le cadre d'une opération sans lien de dépendance.

(*U.S. West Communications, Inc. c. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), p. 274)

[94] Il appert donc de la jurisprudence américaine que le critère de l'investissement prudent s'est révélé utile pour arriver à un résultat juste et raisonnable, mais qu'il ne saurait constituer un élément obligatoire de la réglementation des services publics dont l'application s'impose même lorsqu'aucune disposition législative ne le prévoit.

(2) Jurisprudence canadienne

[95] Sous l'impulsion de la jurisprudence américaine, plusieurs organismes de réglementation et cours de justice du Canada se sont aussi penchés sur le rôle du contrôle de la prudence et ont parfois appliqué une variante du critère de l'investissement prudent. Je passerai en revue certaines de leurs décisions dans le but non pas de répertorier toutes les applications du critère, mais bien de faire état de la manière dont on l'a appliqué dans différents contextes.

[96] Dans l'arrêt *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, le juge Martland relève que, suivant la loi en cause, l'organisme de réglementation est tenu à ce qui suit lorsqu'il fixe des tarifs :

(*a*) . . . shall consider all matters which it deems proper as affecting the rate: [and]

(*b*) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is

[TRADUCTION]

(*a*) . . . considérer tout élément qu'il juge susceptible d'influer sur les tarifs; [et]

(*b*) . . . tenir dûment compte, notamment, de la protection du public contre les tarifs excessifs qui excèdent ce qui est juste et raisonnable en contrepartie du service de la nature et de la qualité de celui fourni et de l'obtention par le service public d'un rendement juste et raisonnable sur les biens qu'il affecte à la prestation du service ou qu'il acquiert à cette fin de manière prudente et raisonnable, selon leur valeur d'expertise. [p. 852]

(Citant *Public Utilities Act*, R.S.B.C. 1948, c. 227, al. 16(1)*b*) (abrogé S.B.C. 1973, c. 29, art. 187).)

Le juge Martland conclut de ce libellé que l'organisme de réglementation [TRADUCTION] « appelé à se prononcer sur la fixation de tarifs jouit d'un pouvoir discrétionnaire absolu quant aux éléments qu'il juge susceptibles d'influer sur les tarifs, mais qu'il doit, lorsqu'il établit la tarification, satisfaire aux deux exigences expressément prévues à l'al. (*b*) » (p. 856). Ainsi, l'organisme de réglementation est tenu par cette loi de faire en sorte que le public ne paie que ce qui est juste et raisonnable et que le service public obtienne un rendement juste et raisonnable sur la valeur des biens qu'il a utilisés *ou acquis de manière prudente et raisonnable*. Cette protection légale expresse du recouvrement du coût des biens acquis avec prudence offre un exemple de libellé législatif sur le fondement duquel notre Cour a conclu à l'existence d'une obligation non discrétionnaire d'assurer au service public un rendement juste sur les immobilisations qu'il a utilisées ou acquises avec prudence.

[97] En 2005, la Nova Scotia Utility and Review Board (« NSUARB ») a examiné puis adopté la définition du critère de l'investissement prudent proposée par l'Illinois Commerce Commission :

[TRADUCTION] . . . la prudence est la norme de diligence qu'une personne raisonnable aurait respectée dans la situation rencontrée par la direction du service public au moment où elle a dû prendre les décisions. [. . .] Le recul est exclu lorsqu'il s'agit d'apprécier la prudence. [. . .]

prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

– Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

La décision du service public est prudente si elle fait partie des décisions qu'une personne raisonnable aurait pu prendre. [. . .] La norme de la prudence reconnaît que des personnes raisonnables peuvent sincèrement différer d'opinions sans pour autant que l'une ou l'autre soit imprudente.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (« *Nova Scotia Power 2005* »), par. 84 (CanLII))

La NSUARB conclut alors que, [TRADUCTION] « [a]près examen de la jurisprudence, [. . .] la définition d'imprudence proposée par l'Illinois Commerce Commission constitue un critère raisonnable susceptible d'application en Nouvelle-Écosse » (par. 90). Elle se demande notamment si la stratégie récente d'achat de carburant du service public a été prudente, et elle répond par la négative (par. 94). Elle ne se dit cependant pas tenue d'appliquer le critère de l'investissement prudent.

[98] En 2012, la NSUARB a renouvelé son adhésion au critère de l'investissement prudent (*Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 (« *Nova Scotia Power 2012* »), par. 143-146 (CanLII)). Dans cette affaire, le service public dont les arguments faisaient l'objet de l'examen [TRADUCTION] « a confirmé que, selon lui, il s'agit du critère que la commission devrait appliquer » (par. 146). La NSUARB a ensuite appliqué le critère de la prudence pour décider si plusieurs décisions opérationnelles du service public avaient été prudentes ou non, et elle a conclu que certaines d'entre elles ne l'avaient pas été (par. 188).

[99] En 2006, dans l'arrêt *Enbridge*, la Cour d'appel de l'Ontario se penche sur la teneur du critère de l'investissement prudent. Cet arrêt revêt un intérêt particulier pour deux raisons. Premièrement, la Cour d'appel y circonscrit précisément l'application du critère :

[TRADUCTION]

– La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.

– To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

– Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

– Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether

– Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.

– Le recul est exclu de l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.

– La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision. [par. 10]

[100] Deuxièmement, elle donne plusieurs fois à entendre que le recours au critère de l'investissement prudent est nécessaire pour se prononcer sur les dépenses convenues. Plus précisément, elle signale que pour décider du caractère juste et raisonnable de l'augmentation des tarifs demandée par Enbridge,

[TRADUCTION] la [Commission] était tenue de soupeser les intérêts opposés d'Enbridge et des consommateurs. Pour ce faire, elle devait appliquer ce qu'on appelle dans le domaine de la réglementation des tarifs des services publics le critère de la « prudence ». Enbridge était en droit de recouvrer ses coûts au moyen d'une augmentation de ses tarifs, mais seulement si la décision derrière ces coûts était « prudente ». [par. 8]

La Cour d'appel ajoute que la Commission a appliqué le [TRADUCTION] « bon critère » (par. 18). Ces affirmations tendent à indiquer que, selon la Cour d'appel, le contrôle de la prudence est fondamental et nécessaire afin que les paiements soient justes et raisonnables.

[101] Or, dans cette affaire, la Cour d'appel n'était pas directement saisie de la question de savoir si, dans ce contexte, l'application du critère de la prudence était nécessaire à l'appréciation du caractère juste et raisonnable des paiements. En fait, les parties s'entendaient [TRADUCTION] « pour l'essentiel sur la démarche qui devait être celle de la Commission pour apprécier la prudence d'une décision d'un

the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exist different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment

service public » (par. 10). La question en litige était celle de savoir si la Commission avait eu recours à cette démarche de manière raisonnable. En ce sens, l'affaire *Enbridge* s'apparente à *Nova Scotia Power 2012* : les deux concernent l'application du critère de la prudence lorsqu'aucune des parties ne soutient qu'une autre démarche aurait pu raisonnablement s'appliquer.

(3) Conclusion sur le critère de l'investissement prudent

[102] Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Il existe certes des formulations différentes du contrôle de la prudence, mais l'arrêt *Enbridge* précise en détail quelle peut être la démarche d'un organisme de réglementation appelé à décider si, au moment où le service public les a faites ou en a convenu, les dépenses étaient prudentes ou non. Le plus souvent, le contrôle de la prudence excluant le recul s'applique aux coûts en capital, mais l'arrêt *Enbridge* et les décisions *Nova Scotia Power* (*2005* et *2012*) montrent qu'il s'applique aussi aux dépenses d'exploitation. Je ne vois aucune raison de principe d'interdire à un organisme de réglementation d'appliquer le critère de la prudence aux dépenses d'exploitation.

[103] Toutefois, aucun élément du régime législatif ou de la jurisprudence applicable ne me paraît appuyer l'idée que la Commission devrait être *tenue* en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence énoncé dans l'arrêt *Enbridge*, de sorte que la seule décision de ne pas l'appliquer pour apprécier la prudence de dépenses convenues rendrait déraisonnable sa décision sur les paiements. Notre Cour n'est pas non plus justifiée de créer pareille obligation. Je le répète, lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers

amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements (règlement 53/05, par. 6(1)).

[104] En résumé, il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Comme nous l'avons vu, présumer la prudence serait incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec le recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses. Je précise toutefois que la présente décision ne doit pas être interprétée de façon à permettre aux organismes de réglementation de refuser à leur guise d'approuver des dépenses convenues. Le contrôle de la prudence de dépenses convenues peut, dans bien des cas, constituer un bon moyen de faire en sorte que les services publics soient traités équitablement et demeurent aptes à obtenir les investissements de capitaux requis. Comme je l'explique plus loin, en ce qui a trait plus particulièrement aux coûts en capital convenus, le contrôle de la prudence offre le plus souvent un moyen raisonnable d'établir un équilibre entre les intérêts du consommateur et ceux du service public.

[105] Cette conclusion sur le pouvoir de la Commission de décider de sa démarche découle du régime législatif qui régit son fonctionnement. D'autres régimes législatifs prévoient expressément que l'organisme de réglementation en cause est tenu d'indemniser le service public de certaines dépenses découlant de décisions prudentes (voir l'arrêt *British Columbia Electric Railway Co.*). Selon ces autres cadres législatifs, le pouvoir discrétionnaire qui permet à l'organisme de réglementation de décider de sa démarche peut être plus restreint.

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

(4) Application à la décision de la Commission

[106] En l'espèce, la Commission refuse à OPG le recouvrement au total de 145 millions de dollars au titre des dépenses de rémunération dans le secteur nucléaire, sur deux ans. Rappelons qu'il faut considérer que ces dépenses constituent, du moins en partie, des dépenses convenues. Compte tenu de la nature de ces dépenses en particulier et des circonstances dans lesquelles le service public en a convenu, je ne saurais conclure que la Commission a agi déraisonnablement en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG à leur égard.

[107] Premièrement, il s'agit de dépenses d'exploitation, et non de coûts en capital. Les coûts en capital, en particulier ceux qui se rapportent par exemple à l'accroissement de la capacité ou à l'amélioration des installations actuelles, comportent souvent un risque et peuvent ne pas être nécessaires, à strictement parler, à la production à court terme du service public. Ces coûts peuvent néanmoins constituer un investissement judicieux pour le bon fonctionnement et la viabilité ultérieurs de ce dernier. Dès lors, le contrôle de la prudence, qui exclut le recul (et présume ou non la prudence, selon les dispositions législatives applicables), peut jouer un rôle particulièrement important pour faire en sorte que le service public ne soit pas dissuadé d'investir de manière optimale dans le développement de ses installations.

[108] Les dépenses d'exploitation, comme celles visées en l'espèce, diffèrent des coûts en capital. Il est peu probable que le refus de les approuver dissuade OPG d'en faire à l'avenir, car les dépenses de la nature de celles qui ont été refusées sont inhérentes à l'exploitation d'un service public. Certes, une décision comme celle rendue par la Commission en l'espèce peut faire hésiter OPG à convenir de dépenses relativement élevées au chapitre de la rémunération, mais tel était précisément l'effet voulu par la Commission.

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[109] Deuxièmement, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Le contrôle de la prudence tire son origine de l'examen de décisions d'effectuer certains investissements, notamment pour accroître la capacité; il s'agit souvent de décisions isolées prises à la lumière d'un ensemble de données alors connues ou supposées.

[110] À l'opposé de celles issues de telles décisions, les dépenses de rémunération convenues d'OPG découlent d'une relation continue dans le cadre de laquelle OPG devra négocier ultérieurement les barèmes de rémunération avec les mêmes parties. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Le contrôle de la prudence se révèle tout simplement moins indiqué lorsque la Commission n'entend pas seulement indemniser le service public des engagements déjà pris, mais aussi réguler les dépenses qui seront faites dans l'avenir. En fin de compte, le refus de la Commission ne vise pas que des dépenses convenues, mais bien la totalité des dépenses de rémunération considérées globalement. Même si la Commission reconnaît qu'OPG n'avait peut-être pas de pouvoir discrétionnaire lui permettant de réduire ses dépenses à raison du montant total refusé, le refus de la Commission vise à inciter OPG à la maîtrise constante de ses dépenses de rémunération.

[111] Après que la Commission eut signifié à OPG que ses dépenses d'exploitation lui paraissaient préoccupantes (voir la décision 2008-2009 de la Commission, p. 28-32), il n'était pas déraisonnable qu'elle se montre plus stricte dans l'examen des dépenses de rémunération du service public afin d'en assurer la régulation réelle à l'avenir. Le fait que la Commission dit refuser l'approbation [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350) montre qu'elle a bel et bien conscience des répercussions actuelles de son refus.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[112] Le caractère raisonnable du refus de la Commission d'approuver des dépenses de 145 millions de dollars au titre de la rémunération tient à ce qu'elle reconnaît qu'OPG était liée dans une certaine mesure par les conventions collectives dans sa prise de décisions en matière de personnel et dans la fixation des barèmes de rémunération, et à ce qu'elle en tient compte pour déterminer la somme totale refusée (décision de la Commission, par. 350). La souplesse méthodologique dont bénéficie la Commission lui permet d'éviter les extrêmes. Lorsque le service public ne peut réduire ses dépenses, la prise en charge de celles-ci peut, si le dossier s'y prête, être modérée ou répartie entre les actionnaires du service public et les consommateurs. La modération opérée par la Commission en l'espèce montre que, en refusant d'approuver les dépenses sans recourir formellement à un contrôle de la prudence excluant le recul, elle ne perd pas de vue la nécessité de veiller à ce que tout refus ne soit pas injuste envers OPG ni, assurément, à ce qu'il ne nuise pas à sa viabilité.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[113] Dans ses motifs de dissidence, la juge Abella reconnaît que, lors du contrôle de la prudence, la Commission peut, du moins dans certaines circonstances, refuser des dépenses convenues (par. 152). Elle dit toutefois craindre qu'un tel refus puisse « mettre en péril la garantie d'un service d'électricité fiable » (par. 156). Le refus d'une somme importante ou opposé sans discernement pourrait exposer à un tel risque, mais il se peut aussi que l'organisme de réglementation fasse ce que la Commission fait en l'espèce, c'est-à-dire modérer son refus en tenant compte des réalités auxquelles fait face le service public.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its

[114] Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public. La coexistence du droit à la négociation collective des employés du service public et du pouvoir de la Commission de fixer le montant des paiements pour les dépenses de rémunération indique que ni l'un ni l'autre n'a

obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

préséance. La Commission ne peut empiéter sur les conventions collectives en ordonnant au service public de manquer aux obligations qu'elles lui imposent, mais les conventions collectives ne priment pas l'obligation de la Commission d'assurer un équilibre juste et raisonnable entre le service public et les consommateurs.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[115] La juge Abella affirme que l'examen des dépenses convenues auquel se livre la Commission à partir d'éléments de recul paraît contredire ce que l'organisme affirme précédemment dans sa décision. La Commission écrit en effet qu'elle prendra en compte tout élément de preuve pertinent pour apprécier les dépenses prévues, mais qu'elle s'en tiendra à un examen sans recul pour ce qui concerne les dépenses à l'égard desquelles OPG [TRADUCTION] « ne pouvait prendre de mesures de réduction » (décision de la Commission, par. 75). À mon sens, on peut en conclure qu'elle recourt à une démarche raisonnable pour l'analyse de dépenses que l'on peut assimiler avec assurance soit à des dépenses prévues, soit à des dépenses convenues. Cependant, toutes les dépenses ne sont pas susceptibles d'une distinction aussi nette par la Commission lorsqu'il s'agit d'apprécier le montant des paiements pour une période de référence.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

[116] En ce qui a trait aux dépenses de rémunération en cause, la Commission refuse de préciser quelle partie de la somme totale refusée correspond à des dépenses prévues et quelle partie correspond à des dépenses convenues pour les besoins de son analyse. Le juge Hoy fait observer que, [TRADUCTION] « [v]u la complexité de l'activité d'OPG et l'autonomie de gestion dont elle jouit, [la Commission] n'a pas tenté de déterminer avec précision le montant dont les dépenses de rémunération prévues d'OPG auraient pu être réduites dans le contexte des conventions collectives en vigueur » (motifs de la C. div., par. 53). En somme, la Commission ne départage pas les dépenses de rémunération totales entre celles qui sont « prévues » et celles qui sont « convenues ». Elle considère plutôt que les dépenses de rémunération refusées se composent à la fois de dépenses prévues et de dépenses convenues sur lesquelles la direction conservait une certaine maîtrise, mais non une maîtrise totale.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at

[117] Il n'est pas déraisonnable que la Commission considère que la prévision du taux d'attrition du personnel constitue en soi une entreprise incertaine et qu'elle n'est pas en mesure de microgérer les décisions d'affaires qui relèvent des dirigeants d'OPG. Dès lors, toute tentative de prédire la mesure exacte dans laquelle OPG pourrait abaisser ses dépenses de rémunération (autrement dit, quelle partie de ces dépenses est prévue) serait empreinte d'incertitude. Il n'est donc pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche est compatible avec l'analyse de la Commission figurant aux par. 73-75 de sa décision et correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre des catégories mentionnées dans cette analyse.

[118] Tout au long de ses motifs, la juge Abella rappelle que les dépenses découlant des conventions collectives ne peuvent être rajustées. Je n'en disconviens pas. Cependant, lorsqu'elle opine que les conventions collectives « rend[ent] *illégale* la modification par le service public [. . .] des barèmes de rémunération et des niveaux de dotation » à l'égard de son personnel syndiqué (par. 149 (en italique dans l'original)), d'aucuns pourraient en conclure que la Commission tente de quelque manière de s'immiscer dans l'exécution des obligations d'OPG suivant les conventions collectives. Il importe de ne pas oublier que la Commission n'entend pas, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés.

[119] Enfin, la remarque de ma collègue selon laquelle la Commission canadienne de sûreté nucléaire (« CCSN ») « [a] impos[é] [. . .] des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires » (par. 127) importe peu quant aux questions soulevées en l'espèce. Bien que le régime établi par la CCSN impose sûrement des conditions

pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

[122] Abella J. (dissenting) — The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned

d'exploitation et de dotation aux installations nucléaires (voir dossier OPG, p. 43-46), nul élément des motifs de la Commission et nulle plaidoirie devant notre Cour n'indiquent que le refus de la Commission entraînera le non-respect des dispositions de la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9.

[120] Je rappelle qu'il est essentiel qu'un service public obtienne à long terme l'équivalent du coût du capital. Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il vise à [TRADUCTION] « signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350). L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

VI. Conclusion

[121] Je conclus que la Commission n'a pas agi de manière inappropriée en se pourvoyant en tant que partie en appel; elle n'a pas non plus agi déraisonnablement en refusant d'approuver les dépenses de rémunération en cause. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir celle de la Commission.

Version française des motifs rendus par

[122] La juge Abella (dissidente) — La Commission de l'énergie de l'Ontario a été mise sur pied en 1960. Son mandat était alors d'établir les tarifs applicables à la vente et au stockage de gaz naturel et d'autoriser les projets de construction de pipelines. Au fil du temps, ses compétences et ses fonctions ont évolué. En 1973, le législateur lui a confié la responsabilité d'examiner les tarifs d'électricité puis de faire rapport au ministre de l'Énergie. Pendant cette

Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, paras. 1 and 2 of s. 1(1).

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in

période, en Ontario, le marché de l'électricité était peu réglementé. Il était dominé par la société d'État Ontario Hydro, qui possédait des installations de production d'énergie fournissant plus de 90 p. 100 de l'électricité dans la province (Ron W. Clark, Scott A. Stoll et Fred D. Cass, *Ontario Energy Law : Electricity* (2012), p. 134; *Rapport annuel 2011*, Bureau du vérificateur général de l'Ontario, p. 1 et 72).

[123] À la fin des années 1990, une série de mesures législatives a été adoptée en vue d'axer le secteur de l'électricité sur le marché et de le soumettre à la concurrence. Ontario Hydro a été scindée en cinq entités. L'une d'elles, Ontario Power Generation Inc., s'est vu confier l'actif de production d'électricité de l'ancienne société Ontario Hydro. Elle a été constituée en société commerciale dont le seul actionnaire est la province d'Ontario (Clark, Stoll et Cass, p. 5-7 et 134).

[124] Depuis le 1er avril 2008, la Commission est légalement investie du pouvoir de fixer les paiements pour l'électricité produite par les installations prescrites que possède Ontario Power Generation (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O. 1998, c. 15, ann. B, par. 78.1(2); règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 », art. 3). Suivant le régime législatif, Ontario Power Generation est tenue de faire une demande à la Commission pour obtenir l'approbation de paiements « justes et raisonnables » (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 78.1(5)). La Commission établit sa propre méthode pour déterminer ce qui constitue des paiements « justes et raisonnables » au regard des objectifs législatifs qui consistent à maintenir une « industrie de l'électricité financièrement viable » et à « protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité » (règlement 53/05, par. 6(1); *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, dispositions 1 et 2 du par. 1(1).

[125] Ontario Power Generation demeure le plus grand producteur d'électricité de la province. L'Ontario Hydro Employees' Union (auquel a succédé le Syndicat des travailleurs et travailleuses du secteur

the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for

énergétique) a été accrédité comme agent négociateur auprès de l'entreprise dans les années 1950, alors que Society of Energy Professionals l'a été à son tour en 1992 (Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (en ligne), art. 6.2). Le personnel d'Ontario Power Generation affecté à ses activités réglementées se compose aujourd'hui d'environ 10 000 personnes, dont 90 p. 100 sont syndiquées. Deux tiers de ces employés syndiqués sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, un tiers par Society of Energy Professionals.

[126] Le syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals avaient tous deux conclu des conventions collectives avec Ontario Hydro avant la création d'Ontario Power Generation. Lorsqu'elle a succédé à Ontario Hydro, Ontario Power Generation a hérité de la totalité des obligations issues de ces conventions (*Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A, art. 69), qui la lient et l'empêchent de réduire unilatéralement les niveaux de dotation ou les barèmes de rémunération.

[127] La Commission canadienne de sûreté nucléaire, un organisme fédéral indépendant chargé de faire respecter la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9, impose également des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires.

[128] Le 26 mai 2010, Ontario Power Generation a demandé à la Commission d'approuver des recettes nécessaires se chiffrant à 6 909,6 millions de dollars pour la période allant du 1er janvier 2011 au 31 décembre 2012, dont 2 783,9 millions devaient être affectés à la rémunération du personnel — salaires, avantages sociaux, prestations de retraite et incitatifs annuels (EB-2010-0008, p. 8, 49 et 80).

[129] Dans sa décision, la Commission dit soumettre à [TRADUCTION] « deux types d'examen » les dépenses du service public. En ce qui concerne les dépenses prévues — par le service public, pour une

a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and

période ultérieure et qu'il est toujours possible de réduire ou d'éviter —, la Commission soutient qu'il incombe à Ontario Power Generation de démontrer leur caractère raisonnable. En revanche, pour ce qui est des dépenses à l'égard desquelles « [l]a société ne pouvait prendre de mesures de réduction », à savoir les dépenses convenues, la Commission dit qu'elle effectuera « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence », c'est-à-dire une présomption selon laquelle les dépenses du service public sont raisonnables (p. 19).

[130] La Commission ne fait aucune distinction entre les dépenses de rémunération qui sont réductibles et celles qui ne le sont pas. Elle soumet plutôt toutes les dépenses de rémunération à l'appréciation qu'elle réserve aux dépenses prévues réductibles et elle refuse d'approuver les paiements demandés à raison de 145 millions de dollars au motif que les barèmes de rémunération et les niveaux de dotation sont trop élevés.

[131] En appel, les juges majoritaires de la Cour divisionnaire confirment l'ordonnance de la Commission. Dans ses motifs dissidents, la juge Aitken conclut que la décision de la Commission est déraisonnable, car elle n'applique pas la bonne approche aux dépenses de rémunération, lesquelles constituent, par l'effet de conventions collectives contraignantes en droit, des dépenses fixes et non ajustables. Selon elle, la Commission [TRADUCTION] « regroupe » plutôt toutes les dépenses de rémunération et ne fait aucune distinction entre celles qui découlent d'obligations contractuelles obligatoires et celles qui n'en découlent pas. Comme elle l'affirme :

[TRADUCTION] Premièrement, j'estime que les dépenses de rémunération du secteur nucléaire [d'Ontario Power Generation], pour une période ultérieure, assujetties à une contrainte en raison de conventions collectives qui s'appliquaient avant la demande et la période de référence, constituent des dépenses déjà faites qui doivent faire l'objet d'un contrôle de la prudence après coup, en deux étapes. Deuxièmement, dans l'analyse (mais pas nécessairement dans l'appréciation finale) des dépenses de rémunération du secteur nucléaire dont fait état la demande, la [Commission] était tenue de faire une distinction entre les dépenses déjà effectuées et d'autres

not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

réellement prévues, mais non préétablies. Troisièmement, à mon avis, la [Commission] devait soumettre à un contrôle de la prudence la partie des dépenses de rémunération du secteur nucléaire qui découlait de contrats obligatoires conclus avant la demande et la période de référence. Pour ce qui est des autres facteurs présidant à la rémunération globale du secteur nucléaire, la [Commission] pouvait, en se fondant sur toute la preuve disponible, décider s'ils étaient raisonnables ou non. Quatrièmement, si un contrôle de la prudence avait été effectué, des éléments de preuve auraient pu raisonnablement permettre à la [Commission] de conclure à la réfutation de la présomption de prudence en ce qui a trait aux éléments issus des conventions collectives qui influaient sur les dépenses. Malheureusement, je constate que nulle part dans sa décision la [Commission] ne se livre à une telle analyse. Elle regroupe sans distinctions toutes les dépenses de rémunération du secteur nucléaire. Elle considère qu'elles ont toutes la même origine et qu'aucune ne découle d'obligations contractuelles auxquelles [Ontario Power Generation] était tenue par une convention collective conclue avant la demande et la période de référence. Enfin, j'estime que, lorsqu'elle se penche sur le caractère raisonnable de la rémunération globale du secteur nucléaire, la [Commission] commet l'erreur de tenir compte d'éléments de preuve ayant vu le jour après la conclusion des conventions collectives pour apprécier le caractère raisonnable des barèmes de rémunération et d'autres dispositions contraignantes des conventions collectives. [par. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[132] La Cour d'appel souscrit à l'unanimité à la conclusion de la juge Aitken et statue que [TRADUCTION] « les dépenses de rémunération en cause devant la [Commission] étaient des dépenses convenues » qu'il aurait donc fallu apprécier en présumant leur prudence. Elles reconnaissent toutes deux qu'il était loisible à la Commission de conclure que la présomption était réfutée en ce qui concerne les obligations contractuelles obligatoires, mais qu'elle a agi déraisonnablement en ne tenant pas compte de la nature immuable des coûts fixes.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs

[133] Je suis d'accord. Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les dépenses de rémunération

were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being

d'Ontario Power Generation étaient donc en très grande partie préétablies et ne pouvaient être rajustées par l'entreprise au cours de la période considérée. Il s'agit précisément du type de dépenses que la Commission qualifie, dans sa décision, de dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » et qui doivent faire l'objet d'un « contrôle de la prudence comportant l'application d'une présomption de prudence » (par. 75).

[134] Soit dit tout en respect, la Commission rend une décision déraisonnable en ne reconnaissant pas le caractère contraignant en droit et non réductible des dépenses auxquelles le service public s'était engagé lors de la signature des conventions collectives et en omettant de soumettre ces dépenses au contrôle qui s'imposait pourtant selon elle à leur égard.

Analyse

[135] Conformément au par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, sur demande d'Ontario Power Generation, la Commission fixe le montant des paiements « justes et raisonnables » auxquels a droit le service public. Dans le contexte de la réglementation des services publics, l'expression « justes et raisonnables » traduit l'objectif qui consiste à [TRADUCTION] « naviguer entre les récifs » que sont, d'une part, les tarifs excessifs imposés au consommateur et, d'autre part, la rétribution insuffisante du service public (*Verizon Communications Inc. c. Federal Communications Commission*, 535 U.S. 467 (2002), p. 481; voir aussi *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193).

[136] La méthode retenue par la Commission pour déterminer le montant des paiements « justes et raisonnables » auxquels a droit Ontario Power Generation prend en partie appui sur la notion de « prudence ». En droit réglementaire, la prudence offre un [TRADUCTION] « fondement juridique pour se prononcer sur le respect des obligations des services publics liées à l'intérêt public, plus particulièrement en ce qui concerne le processus de tarification » (Robert E. Burns et autres, *The Prudent Investment Test in the 1980s*, rapport NRRI-84-16, The National Regulatory Research Institute, avril 1985, p. 20). Apparue

used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]
>
> (*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting)

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be

au début du 20e siècle, cette notion jurisprudentielle visait à remédier à la [TRADUCTION] « complexité paralysante » des approches différentes utilisées par les organismes de réglementation pour arrêter des montants « justes et raisonnables », et elle présumait que le service public réglementé avait agi raisonnablement (*Verizon Communications*, p. 482). Ainsi, comme l'explique le juge Brandeis dans un extrait bien connu datant de 1923 :

> [TRADUCTION] L'emploi de l'expression « investissement prudent » n'est pas décisif. L'établissement de la base de tarification ne devrait pas exclure les investissements qui, dans des circonstances ordinaires, seraient considérés raisonnables. Cet emploi vise plutôt à exclure les dépenses qui pourraient être jugées malhonnêtes ou manifestement excessives ou imprudentes. On peut supposer que tout investissement considéré a été fait dans l'exercice d'un jugement raisonnable, sauf preuve du contraire. [Je souligne.]
>
> (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1, le juge Brandeis (dissident))

[137] La présomption de prudence constitue le point de départ de l'examen que la Commission appelle [TRADUCTION] « contrôle de la prudence ». Lorsqu'elle entreprend ce contrôle de la prudence, la Commission applique un « ensemble bien établi de principes » :

[TRADUCTION]

- La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.
- Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.
- Le recul est exclu dans l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.
- La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et

based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2.)

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.

reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), par. 55, citant *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), par. 3.12.2.)

[138] Dans *Enbridge Gas Distribution Inc. (Re)*, par. 3.12.1 à 3.12.5, conf. par *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4, par. 8 et 10-12, la Commission et la Cour d'appel de l'Ontario considèrent ce contrôle — qui comporte l'application d'une présomption de prudence et exclut le recul — comme la méthode appropriée pour fixer des tarifs « justes et raisonnables ».

[139] Toutefois, dans la présente affaire, la Commission choisit de ne pas soumettre toutes les dépenses à un contrôle de la prudence. Elle dit plutôt recourir à deux examens. Le premier s'appliquerait aux « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter. Dans ses motifs, la Commission explique qu'elle examine ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombe au service public de démontrer le caractère raisonnable de ses dépenses :

[TRADUCTION] Lors de l'examen des dépenses prévues, il incombe à la société d'établir le bien-fondé de sa demande et d'étayer son allégation selon laquelle ces dépenses sont raisonnables. Elle doit fournir un large éventail d'éléments de preuve en ce sens, notamment des analyses de rentabilité et de tendances, des données de référence, etc. Le critère applicable n'est pas celui de la malhonnêteté, de la négligence ou de la perte menant au gaspillage, mais bien celui du caractère raisonnable. Et dans l'appréciation du caractère raisonnable, la Commission n'est pas tenue d'examiner uniquement les données qui intéressent [Ontario Power Generation]. Elle a le pouvoir discrétionnaire de conclure que les dépenses prévues sont déraisonnables au vu de la preuve, laquelle peut se rapporter à l'analyse coût/bénéfice, à l'incidence sur les consommateurs, aux comparaisons avec d'autres entités ou à autre chose.

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket

L'avantage d'une période de référence ultérieure est qu'elle permet à la société de connaître à l'avance la décision de la Commission concernant le recouvrement de dépenses prévues. Par exemple, lorsque des dépenses sont refusées, la société peut modifier ses plans en conséquence. Autrement dit, l'actionnaire n'a pas nécessairement à assumer un coût (à moins que la société ne décide, en tout état de cause, de maintenir les dépenses jugées excessives). [par. 74-75]

[140] Selon la Commission, une démarche différente serait suivie pour les dépenses à l'égard desquelles la société ne pouvait [TRADUCTION] « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission explique qu'elle jauge ces dépenses en se livrant à un « contrôle de la prudence » qui comporte l'application d'une présomption selon laquelle les dépenses ont été faites de manière prudente :

[TRADUCTION] Des considérations quelque peu différentes entreront en jeu lors d'un contrôle de la prudence après coup. La dépense que la Commission refusera alors d'approuver sera nécessairement assumée par l'actionnaire. La société ne pourra plus prendre de mesures de réduction à son égard. C'est pourquoi la Commission estime qu'il existe une différence entre les deux types d'examen, le contrôle après coup constituant un contrôle de la prudence assorti d'une présomption de prudence. [par. 75]

[141] À titre d'exemple, dans *Enersource Hydro Mississauga Inc. (Re)*, la Commission conclut qu'elle doit effectuer un contrôle de la prudence pour apprécier les dépenses qu'Enersource a déjà faites :

[TRADUCTION] Le présent dossier porte sur des dépenses que la société a déjà faites en grande partie. [. . .] Comme il est question de dépenses antérieures qui sont aujourd'hui contestées, la Commission doit effectuer un contrôle de la prudence. [par. 55]

[142] Comme le dit la Commission dans ses motifs, il est logique de soumettre à un contrôle de la prudence des dépenses convenues, car refuser d'approuver des dépenses auxquelles Ontario

for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

Power Generation ne peut se soustraire oblige le service public à acquitter sur ses propres deniers des dépenses déjà faites. Cela pourrait nuire au bon fonctionnement d'Ontario Power Generation et l'amener à restructurer ses liens avec les milieux financiers et ses fournisseurs de services, voire à faire faillite (voir Burns et autres, p. 129-165). Dès lors, [TRADUCTION] « les coûts en capital et les tarifs seraient supérieurs à ce qu'ils auraient été si une sanction modérée avait résulté de l'application du principe de prudence », de sorte que le consommateur ontarien serait contraint de payer des tarifs d'électricité plus élevés (Burns et autres, p. vi).

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[143] Le présent pourvoi a donc pour objet la décision de la Commission de considérer *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables, sans se demander s'il s'agit en partie de dépenses pour lesquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » (par. 75). La Commission ne les qualifie pas à proprement parler de dépenses prévues, mais lorsqu'elle affirme que « les conventions collectives peuvent rendre ardue l'élimination rapide de certains postes » et que « modifier des conventions collectives [. . .] prend du temps » (par. 346 et 352), elle considère clairement qu'il s'agit de dépenses théoriquement compressibles. De plus, l'omission de soumettre celles-ci au contrôle de la prudence qu'elle dit pourtant s'appliquer aux dépenses non réductibles confirme l'assimilation des obligations issues de négociations collectives à des obligations ajustables.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

[144] La Commission ne dit pas pourquoi elle estime que les dépenses de rémunération issues des conventions collectives constituent des dépenses prévues ajustables, mais par l'adoption de son approche, elle empêche Ontario Power Generation de bénéficier de l'application de sa méthode d'appréciation qui considère différemment les dépenses convenues. À mon humble avis, en omettant d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission méconnaît à la fois son propre cadre méthodologique et le droit du travail.

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and

[145] Ontario Power Generation était partie à des conventions collectives obligatoires qui étaient intervenues avec le Syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals et qui s'appliquaient pendant la plus grande partie de la période considérée. À l'époque de la demande, elle avait déjà conclu une convention collective avec le Syndicat des travailleurs et travailleuses du secteur énergétique pour la période comprise entre le 1er avril 2009 et le 31 mars 2012.

[146] La convention collective intervenue avec Society of Energy Professionals et imposant la médiation-arbitrage pour le règlement des différends pendant des négociations collectives a expiré le 31 décembre 2010. Par suite d'une impasse dans les négociations, les conditions d'une nouvelle convention collective pour la période du 1er janvier 2011 au 31 décembre 2012 ont été imposées par voie d'arbitrage obligatoire (*Ontario Power Generation c. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL)).

[147] Les conventions collectives conclues avec les deux syndicats prescrivaient les barèmes de rémunération des employés syndiqués, réglementaient rigoureusement les niveaux de dotation aux installations d'Ontario Power Generation et limitaient le pouvoir du service public de réduire unilatéralement ses barèmes de rémunération et ses niveaux de dotation. Par exemple, la convention collective conclue avec le Syndicat des travailleurs et travailleuses du secteur énergétique prévoyait qu'il n'y aurait aucun licenciement pendant la durée de son application. Bien au contraire, Ontario Power Generation serait contrainte soit de réaffecter tout employé excédentaire, soit de lui offrir une indemnité de départ selon les barèmes établis au préalable par le service public et le syndicat (« Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union », 1er avril 2009 au 31 mars 2012, art. 11).

[148] De même, la convention collective conclue avec Society of Energy Professionals limitait grandement le pouvoir du service public de négocier et de déterminer les barèmes de rémunération. À l'expiration de cette convention le 31 décembre 2010,

the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

le service public défendait la position de son unique actionnaire, la province d'Ontario, à savoir l'exclusion de toute augmentation nette des salaires pendant les deux années suivantes. Les parties n'ont pu parvenir à un accord, de sorte que le dossier a été renvoyé à l'arbitrage obligatoire comme convenu lors de négociations précédentes. Dans sa décision, l'arbitre Kevin M. Burkett a ordonné une augmentation générale des salaires de 3 p. 100 le 1er janvier 2011, de 2 p. 100 le 1er janvier 2012 et, en sus, de 1 p. 100 le 1er avril 2012 (*Ontario Power Generation c. Society of Energy Professionals*, par. 1, 9 et 28).

[149] Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire (*Loi de 1995 sur les relations de travail*, art. 56). Il était donc interdit à Ontario Power Generation de réduire unilatéralement les niveaux de dotation, les salaires ou les avantages sociaux de ses employés syndiqués. Contrairement à ce qu'affirment les juges majoritaires (par. 84), ces conventions ne laissaient pas seulement « peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble », elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

[150] En appliquant la méthode qu'elle a dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission oblige en fait Ontario Power Generation à prouver le caractère raisonnable de ses dépenses et conclut que l'entreprise n'a présenté ni [TRADUCTION] « preuve convaincante », ni « documents ou analyses » qui justifient les barèmes de rémunération (par. 347). Si elle avait eu recours à l'approche qu'elle a dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act, 1998* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[151] Contrairement à ce que soutiennent les juges majoritaires, appliquer le contrôle de la prudence à ces dépenses de rémunération serait difficilement « incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ». Considérer que le par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit un fardeau de preuve aussi strict a essentiellement pour effet d'empêcher totalement la Commission d'effectuer des contrôles de la prudence, alors qu'elle en a effectués sans difficulté dans le passé et qu'elle a affirmé — comme dans ses motifs en l'espèce — qu'il y a lieu de soumettre les dépenses convenues à « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence ». Or, suivant le raisonnement des juges majoritaires, comme le contrôle de la prudence présume toujours la prudence, la Commission ne verrait pas seulement sa marge de manœuvre réduite sur le plan méthodologique, mais elle contreviendrait aussi à la Loi.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[152] L'application du principe de la prudence ne soustrait pas les dépenses de rémunération du service public à tout examen. Comme le fait remarquer la Cour d'appel, le contrôle de la prudence

> [TRADUCTION] n'écarte pas la possibilité que la [Commission] puisse contrôler les barèmes de rémunération applicables aux employés syndiqués d'[Ontario Power Generation] ou le nombre de leurs postes. Lors d'un tel contrôle, il peut ressortir de la preuve, d'une part, que la présomption selon laquelle les dépenses ont été faites de manière prudente doit être écartée et, d'autre part, que les barèmes de rémunération et les niveaux de dotation convenus ne sont pas raisonnables; cependant, la [Commission] ne peut se prononcer avec le recul, mais doit tenir compte de ce qui était connu ou qui aurait dû l'être à l'époque. Le contrôle de la prudence admet un tel résultat et permet à la [Commission] de s'acquitter de son mandat légal et de jouer son rôle de substitut du marché tout en assurant un juste équilibre entre les intérêts d'[Ontario Power Generation] et ceux de ses clients. [par. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant

[153] L'affirmation des juges majoritaires selon laquelle, « si le législateur avait voulu que les dépenses [. . .] issues [de conventions collectives] se répercutent inévitablement sur les consommateurs, il

the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public » (par. 114), laisse perplexe. Le législateur ne voulait pas que *toute* dépense se répercute « inévitablement » sur les consommateurs. Son intention était de donner à la Commission le pouvoir d'arrêter des paiements justes et raisonnables en fonction des engagements actuels et projetés d'Ontario Power Generation. Ni les conventions collectives ni aucune autre obligation contractuelle ne devaient « inévitablement » se répercuter sur qui que ce soit. Cependant, elles devaient inévitablement peser dans la balance. Or, c'est précisément la nature unique des engagements contraignants qu'a invoquée la Commission lorsqu'elle a affirmé qu'elle soumettrait ces dépenses à un contrôle différent.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[154] Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent donc être assimilées à juste titre à des dépenses prévues. La Commission ne tire toutefois aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation sont fixes et dans quelle proportion elles demeurent assujetties au pouvoir discrétionnaire du service public. La Commission ne tire pour ainsi dire aucune conclusion de fait quant à savoir dans quelle mesure l'entreprise pouvait réduire ses dépenses de rémunération issues des conventions collectives. Au contraire, comme le souligne la juge Aitken, la Commission [TRADUCTION] « regroupe » sans distinctions toutes les dépenses liées à la rémunération, reconnaît que la réduction de celles issues des conventions collectives « prend[rait] du temps » et « [serait] ardue », et considère qu'elles sont globalement ajustables.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's

[155] Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce

words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine

sens. Pour reprendre les propos des juges majoritaires, ces dépenses correspondent à des « obligations qui écartent tout pouvoir discrétionnaire [. . .] permettant [au service public] de ne pas acquitter la somme ultérieurement » (par. 82). Selon la propre méthode de la Commission, les dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » bénéficient d'une « présomption de prudence » (par. 75).

[156] Refuser d'approuver des dépenses qu'Ontario Power Generation est juridiquement tenue d'acquitter en raison de ses conventions collectives obligerait le service public et son seul actionnaire, la province d'Ontario, à combler la différence en puisant ailleurs. Ontario Power Generation pourrait notamment être forcée de réduire ses investissements dans l'accroissement de sa capacité et dans l'amélioration de ses installations. Et, comme il s'agit du plus grand producteur d'électricité de l'Ontario, un tel refus pourrait non seulement nuire à la « viabilité financière » du secteur de l'électricité de la province, mais également mettre en péril la garantie d'un service d'électricité fiable.

[157] Les juges majoritaires tiennent cependant pour acquis que la relation continue entre Ontario Power Generation et les syndicats devrait conférer à la Commission, relativement aux dépenses de rémunération issues de négociations collectives, un pouvoir de refus plus grand que celui dont elle bénéficie dans le cadre d'une analyse qui exclut le recul et présume la prudence. Ils font droit également à la conclusion de la Commission selon laquelle les dépenses de rémunération issues de négociations collectives auxquelles Ontario Power Generation a participé pourraient être [TRADUCTION] « excessives » et concluent donc que la Commission a agi raisonnablement en écartant le principe de la « prudence » pour arriver à sa conclusion. Leur approche ne trouve aucun appui, pas même dans la méthode que la Commission établit elle-même pour déterminer le montant de paiements justes et raisonnables.

[158] En tout respect pour l'opinion contraire, en choisissant un critère éminemment susceptible de confirmer l'hypothèse que les dépenses issues de négociations collectives sont excessives, on se

whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements

méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient, soit dit tout en respect, à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas.

[159] Je reconnais que la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont « justes et raisonnables » et, à l'intérieur de certaines limites, de [TRADUCTION] « définir la [. . .] méthode » utilisée pour établir le montant de ces paiements (règlement 53/05, art. 6; *Loi de 1998 sur la Commission de l'Énergie de l'Ontario*, art. 78.1). Cela dit, dès lors qu'elle a établi une méthode pour déterminer ce qui est juste et raisonnable, la Commission doit à tout le moins l'appliquer avec constance (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149 (CanLII), par. 30-32, le juge Rothstein). Pour autant, les conventions collectives ne « priment » pas le pouvoir de la Commission de fixer les paiements, mais une fois que la Commission a choisi une méthode pour exercer son pouvoir discrétionnaire, elle doit s'y tenir. En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation serait vouée à l'incertitude quant à la démarche à suivre pour déterminer les dépenses et les investissements à faire et quant à la manière de les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster.

[160] En refusant d'approuver des dépenses de 145 millions de dollars au motif qu'Ontario Power Generation pouvait réduire ses barèmes de rémunération et ses niveaux de dotation, la Commission a méconnu le caractère contraignant en droit des

and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

conventions collectives et a omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

[161] Je suis donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et, à l'instar de la Cour d'appel, de renvoyer l'affaire à la Commission pour qu'elle la réexamine à la lumière des présents motifs.

Pourvoi accueilli, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Stikeman Elliott, Toronto.

Procureurs de l'intimée Ontario Power Generation Inc. : Torys, Toronto; Ontario Power Generation Inc., Toronto.

Procureurs de l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intimée Society of Energy Professionals : Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante : Jay Shepherd Professional Corporation, Toronto.

TAB B

Her Majesty The Queen *Appellant*

v.

Colin Sheppard *Respondent*

Indexed as: R. *v.* Sheppard

Neutral citation: 2002 SCC 26.

File No.: 27439.

2001: June 21; 2002: March 21.

Present: Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

Criminal law — Trial — Judgments — Duty of trial judge to give reasons in criminal case — Appellate review — Proposed approach — Functional test.

Criminal law — Trial — Judgments — Duty of trial judge to give reasons — Court of Appeal setting aside accused's conviction for possession of stolen property and ordering new trial because trial decision unintelligible and incapable of proper appellate review — Whether trial judge erred in law in failing to deliver meaningful reasons for his decision — Criminal Code, R.S.C. 1985, c. C-46, s. 686(1)(a).

The accused, a carpenter with no criminal record, separated from his girlfriend. Their relationship had been stormy and the separation was not amicable. He had been renovating his house and, two days after the separation, his ex-girlfriend told the police that he had confessed to her to stealing two windows from a local supplier. The supplier confirmed that two windows were missing from a truck parked across the road from his shop, which was used for storage. Employees and passers-by had access to the area and there had been no indication of forced entry. The accused was charged with possession of stolen property. At trial, the ex-girlfriend's evidence was the only evidence connecting him to the missing windows. She testified that he stole them "to use in his house", but there was no evidence that a search had been made of his premises. No stolen windows were found in the accused's possession or elsewhere. The accused testified and asserted his innocence. Despite the weaknesses of the Crown's evidence, he was convicted. The trial judge

Sa Majesté la Reine *Appelante*

c.

Colin Sheppard *Intimé*

Répertorié : R. *c.* Sheppard

Référence neutre : 2002 CSC 26.

N° du greffe : 27439.

2001 : 21 juin; 2002 : 21 mars.

Présents : Les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

Droit criminel — Procès — Jugements — Obligation du juge du procès de motiver sa décision en matière criminelle — Examen en appel — Démarche proposée — Critère fonctionnel.

Droit criminel — Procès — Jugements — Obligation du juge du procès de motiver sa décision — Décision de la Cour d'appel annulant la déclaration de culpabilité de l'accusé pour possession de biens volés et ordonnant la tenue d'un nouveau procès parce que la décision de première instance n'était pas intelligible et rendait impossible un examen judiciaire valable en appel — Le juge du procès a-t-il commis une erreur de droit en ne prononçant pas de motifs valables à l'appui de sa décision — Code criminel, L.R.C. 1985, ch. C-46, art. 686(1)a).

L'accusé, un menuisier sans casier judiciaire, s'est séparé de sa petite amie. Leur relation était orageuse et leur séparation ne s'est pas faite à l'amiable. Il rénovait sa maison et, deux jours après la séparation, son ex-petite amie a raconté aux policiers qu'il lui avait avoué avoir volé deux fenêtres d'un fournisseur local. Le fournisseur a confirmé que deux fenêtres manquaient dans un camion stationné en face de son commerce qu'il utilisait en guise d'entrepôt. Les employés et les passants avaient accès à ces lieux et aucune trace d'effraction n'avait été relevée. Des accusations de possession de biens volés ont été portées contre l'accusé. Au procès, l'unique preuve reliant l'accusé aux fenêtres manquantes était le témoignage de son ex-petite amie. Elle a affirmé dans son témoignage que l'accusé les avait volées « pour s'en servir dans sa maison », mais aucune preuve n'établissait qu'une perquisition avait été effectuée sur les lieux. Les fenêtres volées n'ont jamais été retrouvées en la possession de l'accusé, ni où que ce soit. L'accusé a témoigné et affirmé son

addressed none of the troublesome issues in the case but said only: "Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged." A majority of the Court of Appeal characterized the trial reasons as "boiler plate". The conviction was set aside and a new trial ordered based on the absence of adequate reasons.

Held: The appeal should be dismissed. The trial judge erred in law in failing to provide reasons that were sufficiently intelligible to permit appellate review of the correctness of his decision.

The requirement of reasons is tied to their purpose and the purpose varies with the context. The present state of the law on the duty of a trial judge to give reasons, in the context of appellate intervention in a criminal case, can be summarized in the following propositions:

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not

innocence. Il a été déclaré coupable malgré les faiblesses de la preuve du ministère public. Le juge du procès n'a traité aucune des questions problématiques en litige et a simplement dit : « Après avoir examiné l'ensemble des témoignages en l'espèce et me rappelant le fardeau qui incombe au ministère public et la crédibilité des témoins, et la façon dont le tout doit être apprécié, je conclus que le défendeur est coupable des actes reprochés. » La Cour d'appel, à la majorité, a qualifié les motifs de première instance de « formule standard ». Elle a annulé la déclaration de culpabilité et ordonné la tenue d'un nouveau procès pour cause d'insuffisance des motifs.

Arrêt : Le pourvoi est rejeté. Le juge du procès a commis une erreur de droit en ne donnant pas de motifs suffisamment intelligibles pour permettre l'examen en appel de la justesse de sa décision.

L'obligation de donner des motifs est liée à leur fin, qui varie selon le contexte. L'état actuel du droit en ce qui concerne l'obligation du juge de première instance de donner des motifs, dans le contexte de l'intervention d'une cour d'appel en matière criminelle, peut se résumer par les propositions suivantes :

1. Prononcer des décisions motivées fait partie intégrante du rôle du juge. Cette fonction est une composante de son obligation de rendre compte de la façon dont il s'acquitte de sa charge. Dans son sens le plus général, c'est en faveur du public qu'est établie l'obligation de motiver une décision.

2. Il ne faut pas laisser l'accusé dans le doute quant à la raison pour laquelle il a été déclaré coupable. Il peut être important d'exprimer les motifs du jugement pour clarifier le fondement de la déclaration de culpabilité, mais il se peut que ce fondement ressorte clairement du dossier. Il s'agit de savoir si, eu égard à l'ensemble des circonstances, le besoin fonctionnel d'être informé a été comblé.

3. Il se peut que les motifs s'avèrent essentiels aux avocats des parties pour les aider à évaluer l'opportunité d'interjeter appel et à conseiller leurs clients à cet égard. Par contre, il est possible que les autres éléments du dossier leur apprennent tout ce qu'ils doivent savoir à cette fin.

4. Comme le droit d'appel conféré par la loi s'applique à la déclaration de culpabilité (ou, dans le cas du ministère public, au jugement ou au verdict d'acquittement) plutôt qu'aux motifs, chaque omission ou lacune dans l'exposé des motifs ne constituera pas nécessairement un moyen d'appel.

5. L'exposé des motifs joue un rôle important dans le processus d'appel. Lorsque les besoins fonctionnels ne

satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(*a*) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue, unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact**,** the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in that case for a new trial. Such an error of law at the trial level, if it is so found, would be cured under the s. 686(1)(*b*)(iii) proviso.

In the circumstances of this case, the majority of the Court of Appeal correctly concluded that the reasoning of the trial judge was unintelligible and therefore incapable of proper judicial scrutiny on appeal. There were significant inconsistencies or conflicts in the evidence. The trial judge's reasons were so "generic" as to be no reasons at all. The absence of reasons prevented the Court of Appeal from properly reviewing the correctness of the

sont pas comblés, la cour d'appel peut conclure qu'il s'agit d'un cas de verdict déraisonnable, d'une erreur de droit ou d'une erreur judiciaire qui relèvent de l'al. 686(1)*a*) du *Code criminel*, suivant les circonstances de l'affaire, et suivant la nature et l'importance de la décision rendue en première instance.

6. Les motifs revêtent une importance particulière lorsque le juge doit se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments de preuve embrouillés et contradictoires sur une question clé, à moins que le fondement de la conclusion du juge de première instance ressorte du dossier, même sans être précisé.

7. Il faut tenir compte des délais et du volume des affaires à traiter dans les cours criminelles. Le juge du procès n'est pas tenu à une quelconque norme abstraite de perfection. On ne s'attend pas et il n'est pas nécessaire que les motifs du juge du procès soient aussi précis que les directives adressées à un jury.

8. Le juge de première instance s'acquitte de son obligation lorsque ses motifs sont suffisants pour atteindre l'objectif visé par cette obligation, c'est-à-dire lorsque, compte tenu des circonstances de l'espèce, sa décision est raisonnablement intelligible pour les parties et fournit matière à un examen valable en appel de la justesse de la décision de première instance.

9. Les juges sont certes censés connaître le droit qu'ils appliquent tous les jours et trancher les questions de fait avec compétence, mais cette présomption a une portée limitée. Même les juges très savants peuvent commettre des erreurs dans une affaire en particulier, et c'est la justesse de la décision rendue dans une affaire en particulier que les parties peuvent faire examiner par un tribunal d'appel.

10. Lorsque la décision du juge de première instance ne suffit pas à expliquer le résultat aux parties, et que la cour d'appel s'estime en mesure de l'expliquer, l'explication que cette dernière donne dans ses propres motifs est suffisante. Un nouveau procès n'est alors pas nécessaire. L'erreur de droit décelée, le cas échéant, est corrigée au sens du sous-al. 686(1)*b*)(iii).

Compte tenu des circonstances de l'espèce, les juges majoritaires de la Cour d'appel ont conclu à bon droit que le raisonnement du juge de première instance n'était pas intelligible et ne permettait pas un examen judiciaire valable en appel. La preuve comportait des incohérences ou des contradictions importantes. Les motifs du juge de première instance étaient formulés en termes tellement « généraux » qu'il n'a tout simplement pas motivé sa

unknown, unexpressed pathway taken by the trial judge in reaching his conclusion and from properly assessing whether he had properly addressed the principal issues in the case. The trial judge's failure to deliver meaningful reasons for his decision was an error of law within the meaning of s. 686(1)(*a*)(ii) of the *Criminal Code*.

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décision. L'absence de motifs a empêché la Cour d'appel d'apprécier convenablement la justesse du raisonnement inconnu, inexprimé qu'avait adopté le juge du procès pour parvenir à sa conclusion et de vérifier valablement s'il avait examiné correctement la principale question en litige en l'espèce. L'omission du juge du procès de motiver valablement sa décision constituait une erreur de droit au sens du sous-al. 686(1)*a*)(ii) du *Code criminel*.

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APPEAL from a judgment of the Newfoundland Court of Appeal (1999), 138 C.C.C. (3d) 254, 178 Nfld. & P.E.I.R. 1, [1999] N.J. No. 229 (QL), setting aside the accused's conviction and ordering a new trial. Appeal dismissed.

Harold J. Porter, for the appellant.

Richard S. Rogers, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — In this case, the Newfoundland Court of Appeal overturned the conviction of the respondent because the trial judge failed to deliver reasons in circumstances which "crie[d] out for some explanatory analysis". Put another way, the trial judge can be said to have erred in law in failing to provide an explanation of his decision that was sufficiently intelligible to permit appellate review. I agree with this conclusion and would therefore reject the Crown's appeal.

Twenty-four-year-old Colin Sheppard, an unemployed carpenter from Spaniard's Bay, Newfoundland and Labrador, was charged with possession of stolen property, being two casement

Conseil canadien de la magistrature déposé par le Comité d'enquête nommé conformément aux dispositions du paragraphe 63(1) de la Loi sur les juges à la suite d'une demande du procureur général de la Nouvelle-Écosse. Ottawa : Conseil canadien de la magistrature, 1990.

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POURVOI contre un arrêt de la Cour d'appel de Terre-Neuve (1999), 138 C.C.C. (3d) 254, 178 Nfld. & P.E.I.R. 1, [1999] N.J. No. 229 (QL), qui a annulé la déclaration de culpabilité de l'accusé et ordonné la tenue d'un nouveau procès. Pourvoi rejeté.

Harold J. Porter, pour l'appelante.

Richard S. Rogers, pour l'intimé.

Version française du jugement de la Cour rendu par

1 LE JUGE BINNIE — Dans la présente affaire, la Cour d'appel de Terre-Neuve a annulé la déclaration de culpabilité de l'intimé parce que le juge du procès avait omis de prononcer des motifs dans des circonstances [TRADUCTION] « qui commandaient une analyse explicative ». En d'autres termes, le juge du procès a commis une erreur de droit en n'expliquant pas sa décision d'une manière suffisamment intelligible pour en permettre l'examen en appel. Je souscris à cette conclusion et, par conséquent, je rejetterais le pourvoi du ministère public.

2 Colin Sheppard, âgé de 24 ans, est un menuisier sans emploi de Spaniard's Bay (Terre-Neuve-et-Labrador). Il a été accusé de possession de biens volés, à savoir deux fenêtres à battants d'une valeur

windows with a value of $429. No stolen windows were ever found in his possession. The case against Mr. Sheppard rested entirely on an accusation by his estranged girlfriend who took her story to the police two days after the termination of their tempestuous relationship saying that "she would get him". He testified in his own defence. He was convicted by a provincial court judge after a summary trial and fined $600 and ordered to "repay" the cost of two windows to a local builders' supply yard. He still does not understand the basis of his conviction and neither do we. The sum total of the trial judge's reasons consists of the following statement:

> Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

3 Defence counsel says that he was able to sum up his argument in two or three minutes (46 lines of transcript) and Crown counsel rather more succinctly (15 lines of transcript) and questions why less should be expected of a trial judge.

4 The appellant Crown contends that "[i]t has been a settled principle of Canadian law that a trial judge does **not** have to give reasons" (factum, at para. 13 (emphasis in original)). This proposition is so excessively broad as to be erroneous. It is true that there is no *general* duty, viewed in the abstract and divorced from the circumstances of the particular case, to provide reasons "when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances" (*R. v. Barrett*, [1995] 1 S.C.R. 752, at para. 1). An appeal lies from the judgment, not the reasons for judgment. Nevertheless, reasons fulfill an important function in the trial process and, as will be seen, where that function goes unperformed, the judg-

de 429 $. Aucune fenêtre volée n'a jamais été trouvée en sa possession. La preuve recueillie contre M. Sheppard reposait entièrement sur une accusation portée par son ex-petite amie, qui a raconté son histoire à la police deux jours après la fin de sa relation orageuse avec l'intimé en promettant [TRADUCTION] « d'avoir sa peau ». L'intimé a témoigné pour sa propre défense. À l'issue d'une poursuite sommaire, un juge de la Cour provinciale l'a déclaré coupable et condamné à une amende de 600 $ en plus de lui ordonner de [TRADUCTION] « rembourser » le coût de deux fenêtres à un fournisseur de matériaux de construction de l'endroit. L'intimé ne comprend toujours pas le fondement de sa condamnation et nous non plus. Les motifs prononcés par le juge du procès consistent en tout et pour tout en l'énoncé suivant :

> [TRADUCTION] Après avoir examiné l'ensemble des témoignages en l'espèce et me rappelant le fardeau qui incombe au ministère public et la crédibilité des témoins, et la façon dont le tout doit être apprécié, je conclus que le défendeur est coupable des actes reprochés.

L'avocat de la défense affirme qu'il a été en mesure de résumer son argumentation en deux ou trois minutes (46 lignes dans la transcription) et que l'avocat du ministère public a pu le faire un peu plus succinctement (15 lignes dans la transcription). Il se demande pourquoi on devrait s'attendre à moins d'un juge de première instance.

Le ministère public appelant soutient [TRADUCTION] « qu'il existe un principe établi en droit canadien selon lequel un juge de première instance **n'est pas** tenu de prononcer des motifs » (mémoire, par. 13 (en caractères gras dans l'original)). Cette affirmation est d'une généralité excessive, ce qui la rend fausse. Certes, dans l'absolu et indépendamment des circonstances d'une affaire donnée, il n'existe aucune obligation *générale* de prononcer des motifs « lorsque la décision est par ailleurs appuyée par la preuve ou lorsque le fondement de la décision est évident compte tenu des circonstances » (*R. c. Barrett*, [1995] 1 R.C.S. 752, par. 1). Appel peut être interjeté d'un jugement, et non des motifs d'un jugement. Les motifs jouent néanmoins un rôle important en première instance

ment itself may be vulnerable to be reversed on appeal.

At the broadest level of accountability, the giving of reasoned judgments is central to the legitimacy of judicial institutions in the eyes of the public. Decisions on individual cases are neither submitted to nor blessed at the ballot box. The courts attract public support or criticism at least in part by the quality of their reasons. If unexpressed, the judged are prevented from judging the judges. The question before us is how this broad principle of governance translates into specific rules of appellate review.

I. Facts

The respondent lived with the informant, Ms. Sandra Noseworthy, for about a year and a half in a relationship that, at least during its latter stages, can best be described as stormy. He, for example, alleged that at one time she had thrown a beer glass at him and, at another time, had slashed at his knees with a hammer. On one occasion, he said, he went to the RCMP "with [his] face busted open" and was advised, he says, "to get out of the relationship". The separation was not amicable, at least as described by the respondent:

> So I got my friend Martin to come up with me and when I got up there she [Ms. Noseworthy] was kicking the . . . trying to kick the door in on my shed. And I unlocked it and let her get her chair and Christmas stuff and ah, she give me a couple of punches in the face again then and threw a rock at me trying to beat the window out of my house and ah, beat the back window out of me truck, and ah, threw a stick and hit me in the face with it. Just kept on going on and on like.

The respondent says that when he decided to go his own way, she threatened him saying, "I hope you live your life in misery. If I have anything to do with it, you will." At trial she testified that "Maybe I did say it. Maybe I did."

et, comme on le verra, lorsqu'ils ne jouent pas leur rôle, le jugement même est susceptible d'être infirmé en appel.

5 Au sens le plus large de la responsabilité judiciaire, la motivation des jugements constitue un aspect fondamental de la légitimité des institutions judiciaires aux yeux du public. Les décisions portant sur des cas individuels ne sont pas soumises à l'approbation de l'électorat ni sanctionnées par lui. Les tribunaux s'attirent la critique du public ou obtiennent son appui au moins en partie par la qualité de leurs motifs. Sans motifs, les jugés ne peuvent pas juger les juges. La question qui nous est soumise est de savoir comment ce principe général de fonctionnement se traduit par des règles spécifiques d'examen en appel.

I. Les faits

6 L'intimé a vécu pendant environ un an et demi avec la dénonciatrice, M^me^ Sandra Noseworthy. Leur relation peut être qualifiée au mieux d'orageuse, du moins à la fin. Par exemple, l'intimé a allégué qu'une fois, elle lui avait lancé un verre de bière, et qu'une autre fois, elle lui avait assené des coups de marteau aux genoux. À une occasion, a-t-il dit, il s'est présenté à la GRC [TRADUCTION] « le visage en sang » et on lui a conseillé [TRADUCTION] « de sortir de cette relation ». La séparation ne s'est pas faite à l'amiable, du moins selon la description qu'en a donnée l'intimé :

> [TRADUCTION] Alors, mon ami Martin a accepté de venir avec moi et lorsque je suis arrivé là-bas, elle [M^me^ Noseworthy] était en train de donner des coups de pied dans [. . .] elle essayait d'enfoncer à coups de pied la porte de ma remise. Et je l'ai déverrouillée et je l'ai laissée prendre sa chaise et ses affaires de Noël et eh, elle m'a encore donné quelques coups de poing au visage et m'a lancé une roche en essayant de briser la fenêtre de ma maison et eh, de briser la vitre arrière de mon camion, et eh, elle a lancé un bâton que j'ai reçu en plein visage. Ça n'en finissait plus.

L'intimé affirme que lorsqu'il a décidé de la quitter, elle l'a menacé en lui disant : [TRADUCTION] « Je te souhaite de vivre dans la misère. Si je peux faire quelque chose pour que ça t'arrive, ça va t'arriver. » Lors du procès, elle a témoigné : [TRADUCTION] « J'ai peut-être dit ça. Peut-être. »

7 During their year and a half together the respondent, then unemployed, had been renovating a house. Two days after the break-up, Ms. Noseworthy went to the police to inform them that the respondent had a month or so previously confessed to stealing two windows from a local building supplies dealer. Her description of the allegedly stolen goods, in its entirety, was "vinyl windows, two-pane. They were the . . . they rolled out, one side". The local building supplies dealer was contacted. Despite the lapse of time since the alleged theft, he was unaware of it. He then checked his inventory and confirmed that two 40 x 36 inch vinyl windows were missing from a truck parked across the road from his shop, which was used for storage. At the date the windows went missing, which is unknown, the truck contained 30 to 40 windows plus other building supplies, and was not kept under lock and key. He testified that employees and passers-by had access to the area, and there had been no indication of forced entry. Ms. Noseworthy testified that the respondent stole the windows "to use them in his house", but in fact there was no evidence that the house had been searched or that "stolen" windows were incorporated in the structure or were otherwise located on the respondent's property or, indeed, elsewhere.

Pendant l'année et demie au cours de laquelle ils ont vécu ensemble, l'intimé, alors sans emploi, rénovait une maison. Deux jours après leur rupture, M^me^ Noseworthy s'est rendue au poste de police pour informer les policiers que l'intimé avait avoué, environ un mois auparavant, avoir volé deux fenêtres chez un fournisseur de matériaux de l'endroit. Pour toute description des biens qui auraient été volés, elle a dit qu'il s'agissait de : [TRADUCTION] « fenêtres en vinyle, à deux vitres. Elles étaient [. . .] elles s'ouvraient d'un côté ». On a communiqué avec le fournisseur de matériaux. Il n'était pas au courant du vol allégué, malgré le temps écoulé depuis. Après avoir vérifié son inventaire, il a confirmé qu'il manquait deux fenêtres de vinyle de 40 po x 36 po dans un camion utilisé comme entrepôt et stationné de l'autre côté de la rue, en face de son commerce. Au moment de la disparition des fenêtres, à une date inconnue, le camion contenait de 30 à 40 fenêtres en plus d'autres matériaux de construction et il n'était pas verrouillé. Le fournisseur de matériaux a témoigné que les employés et les passants avaient accès à ces lieux et qu'aucune trace d'effraction n'avait été relevée. Madame Noseworthy a témoigné que l'intimé avait volé les fenêtres [TRADUCTION] « pour s'en servir dans sa maison », mais dans les faits, aucune preuve n'indiquait qu'une perquisition avait été effectuée chez lui ni que les fenêtres « volées » avaient été incorporées à la structure ou qu'elles se trouvaient sur la propriété de l'intimé, ni où que ce soit.

8 Other than the evidence of Ms. Sandra Noseworthy, there was no evidence connecting the respondent with the missing windows. Ms. Noseworthy acknowledged that there were no identifying stickers on the windows when she saw them. She said the respondent had admitted to her that he had scraped them off and burned them.

À l'exception du témoignage de M^me^ Sandra Noseworthy, aucun élément de preuve ne reliait l'intimé aux fenêtres manquantes. Madame Noseworthy a reconnu qu'il n'y avait aucune étiquette identifiant les fenêtres lorsqu'elle les a vues. Elle a dit que l'intimé lui avait avoué avoir enlevé les étiquettes et les avoir brûlées.

9 All of this was vigorously denied by the respondent, who was 24 years old and had no criminal record, nor had he ever been charged with a criminal offence.

L'intimé qui, à 24 ans, ne possédait pas de casier judiciaire et n'avait jamais été accusé d'une infraction criminelle, a nié vigoureusement toutes ces allégations.

II. Judicial History

II. Historique des procédures judiciaires

A) *Newfoundland Provincial Court*

A) *Cour provinciale de Terre-Neuve*

10 As stated, Judge Barnable's judgment in its entirety was as follows:

Comme on l'a vu plus tôt, le jugement du juge Barnable tenait en entier en ces lignes :

Having considered all the testimony in this case, and reminding myself of the burden on the Crown and the credibility of witnesses, and how this is to be assessed, I find the defendant guilty as charged.

B) *Newfoundland Court of Appeal* (1999), 138 C.C.C. (3d) 254

1. O'Neill J.A.

O'Neill J.A. held that the trial judge should have indicated that he was alive to the issues of the accused's denial, the lack of corroborative evidence, the informant's reasons to be vindictive and her alleged threats, that the goods had not been recovered and that there was no evidence as to when the windows had been taken. He held that in the absence of sufficient reasons, the Court of Appeal could not carry out its appellate function. He set aside the verdict under s. 686(1)(*a*)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46 ("unreasonable verdict") and ordered a new trial.

2. Green J.A., concurring in the result

Green J.A. held that "a failure to intervene in this case would amount to an affirmation of the use of boilerplate language in trial judgments as a means of insulating such judgments from appellate review" (p. 268). To dismiss the appeal, he thought, would encourage trial judges to deliberately structure judgments to frustrate appellate review or to mask a lazy or inadequate analysis. There was nothing here for an appellate court to scrutinize. The argument that busy trial judges should not be required in every case to provide detailed reasons did not justify giving no reasons in all cases, especially those where common sense would expect controversial aspects to be discussed and analyzed. He questioned whether the trial judge had considered whether someone else could have taken the windows and whether this raised a reasonable doubt, or the motives of the informant to lie, or whether there was still reasonable doubt even if he did not believe the accused. Failure to address these matters demonstrated that the trial judge either had failed to grasp important

[TRADUCTION] Après avoir examiné l'ensemble des témoignages en l'espèce et me rappelant le fardeau qui incombe au ministère public et la crédibilité des témoins, et la façon dont le tout doit être apprécié, je conclus que le défendeur est coupable des actes reprochés.

B) *Cour d'appel de Terre-Neuve* (1999), 138 C.C.C. (3d) 254

1. Le juge O'Neill

11 Le juge O'Neill a statué que le juge du procès aurait dû indiquer qu'il avait bel et bien considéré les questions relatives au démenti de l'accusé, à l'absence de preuve corroborante, aux raisons qu'avait la dénonciatrice d'agir par esprit de vengeance et aux menaces qu'elle aurait proférées, au fait que les biens n'avaient pas été retrouvés et qu'il n'existait aucune preuve du moment où les fenêtres avaient été dérobées. Il a conclu qu'en l'absence de motifs suffisants, la Cour d'appel ne pouvait s'acquitter de son rôle en appel. Il a annulé le verdict par application du sous-al. 686(1)*a*)(i) du *Code criminel*, L.R.C. 1985, ch. C-46 (« verdict déraisonnable »), et il a ordonné la tenue d'un nouveau procès.

2. Le juge Green, souscrivant au résultat

12 Le juge Green a statué que [TRADUCTION] « le fait de ne pas intervenir dans cette affaire équivaudrait à sanctionner l'emploi d'une formule standard dans les jugements de première instance comme moyen de soustraire ces jugements à l'examen en appel » (p. 268). À son avis, le rejet de l'appel encouragerait les juges de première instance à structurer délibérément leurs jugements de façon à faire obstacle à l'examen en appel ou à masquer une analyse bâclée ou inadéquate. En l'espèce, le tribunal d'appel n'avait rien à examiner. L'argument voulant que les juges très affairés qui président les procès ne devraient pas être tenus de donner des motifs détaillés dans chaque cas ne justifie pas qu'ils ne donnent jamais de motifs, particulièrement dans les affaires où le bon sens voudrait que les aspects controversés soient examinés et analysés. Le juge Green s'est posé la question de savoir si le juge du procès s'était demandé si quelqu'un d'autre avait pu subtiliser les fenêtres et si cette possibilité soulevait un doute raisonnable, ou si la dénonciatrice avait

points or had chosen to disregard them. The verdict was unreasonable.

3. Cameron J.A., dissenting

13 Cameron J.A. held that a review of the evidence did not support a finding that the verdict was unreasonable or unsupported by evidence. The case turned on credibility. In her opinion, if the complainant's version of events was accepted, then there was evidence upon which a conviction could reasonably be entered. In her view, it is not an error of law to fail to give reasons. The evidence was not complicated or confused nor was there any uncertainty in the law. In the absence of a general duty to give reasons, she saw nothing in this case that demanded that reasons be given or that suggested there was a misapprehension of a legal principle.

III. Relevant Statutory Provisions

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

Powers of the Court of Appeal

686. (1) [Powers] On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(*b*) may dismiss the appeal where

. . .

des raisons de mentir, ou s'il subsistait toujours un doute raisonnable même s'il ne croyait pas l'accusé. L'omission d'aborder ces questions démontrait que le juge du procès soit n'avait pas saisi certains points importants, soit avait choisi de ne pas en tenir compte. Le verdict était déraisonnable.

3. Madame le juge Cameron, dissidente

Madame le juge Cameron a estimé qu'un examen de la preuve ne permettait pas de conclure que le verdict était déraisonnable ou qu'il ne pouvait pas s'appuyer sur la preuve. L'issue de l'affaire reposait sur la crédibilité. À son avis, si la version des faits de la plaignante était retenue, il existait alors une preuve permettant raisonnablement d'inscrire une déclaration de culpabilité. Selon elle, l'omission de donner des motifs ne constitue pas une erreur de droit. La preuve n'était ni compliquée ni embrouillée, et il n'existait aucune incertitude quant au droit. En l'absence d'une obligation générale de prononcer des motifs, elle n'a décelé, dans cette affaire, aucun élément qui commandait l'énoncé de motifs ou qui laissait croire à une interprétation erronée d'un principe juridique.

III. Les dispositions législatives pertinentes

Code criminel, L.R.C. 1985, ch. C-46

Pouvoirs de la cour d'appel

686. (1) [Pouvoirs] Lors de l'audition d'un appel d'une déclaration de culpabilité ou d'un verdict d'inaptitude à subir son procès ou de non-responsabilité criminelle pour cause de troubles mentaux, la cour d'appel :

a) peut admettre l'appel, si elle est d'avis, selon le cas :

(i) que le verdict devrait être rejeté pour le motif qu'il est déraisonnable ou ne peut pas s'appuyer sur la preuve,

(ii) que le jugement du tribunal de première instance devrait être écarté pour le motif qu'il constitue une décision erronée sur une question de droit,

(iii) que, pour un motif quelconque, il y a eu erreur judiciaire;

b) peut rejeter l'appel, dans l'un ou l'autre des cas suivants :

. . .

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred; or

. . .

(2) [Order to be made] Where a court of appeal allows an appeal under paragraph (1)(*a*), it shall quash the conviction and

(*a*) direct a judgment or verdict of acquittal to be entered; or

(*b*) order a new trial.

IV. Analysis

Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, but critics respond that it is difficult to see how justice can be *seen* to be done if judges fail to articulate the reasons for their actions. Trial courts, where the essential findings of facts and drawing of inferences are done, can only be held properly to account if the reasons for their adjudication are transparent and accessible to the public and to the appellate courts.

In some common law jurisdictions, including England and Australia, the courts have adopted a general, albeit qualified, requirement in both civil and criminal cases to give reasons subject to significant exceptions: see generally H. L. Ho, "The judicial duty to give reasons" (2000), 20 *Legal Stud.* 42; *Coleman v. Dunlop Ltd.*, [1998] P.I.Q.R. 398 (Eng. C.A.), at p. 403; and *Flannery v. Halifax Estate Agencies Ltd.*, [2000] 1 All E.R. 373 (C.A.). It is not clear, however, the extent to which a reasonable result based on a solid evidentiary record will nevertheless be reversed and sent back for retrial because the reasons for the decision are considered inadequate, confusing, or poorly expressed. In most of the reported cases, the deficiency in the reasons created

(iii) bien qu'elle estime que, pour un motif mentionné au sous-alinéa *a*)(ii), l'appel pourrait être décidé en faveur de l'appelant, elle est d'avis qu'aucun tort important ou aucune erreur judiciaire grave ne s'est produit;

. . .

(2) [Ordonnance à rendre] Lorsqu'une cour d'appel admet un appel en vertu de l'alinéa (1)*a*), elle annule la condamnation et, selon le cas :

a) ordonne l'inscription d'un jugement ou verdict d'acquittement;

b) ordonne un nouveau procès.

IV. Analyse

15 Les motifs de jugement constituent le principal mécanisme par lequel les juges rendent compte aux parties et à la population des décisions qu'ils prononcent. Les tribunaux disent souvent qu'il faut non seulement que justice soit rendue, mais qu'il soit manifeste qu'elle a été rendue, ce à quoi les critiques répondent qu'il est difficile de voir comment il pourrait être *manifeste* que justice a été rendue si les juges n'exposent pas les motifs de leurs actes. Les tribunaux de première instance, à qui il revient de tirer les conclusions de fait et les inférences essentielles, ne s'acquittent convenablement de leur obligation de rendre compte que si les motifs de leurs décisions sont transparents et accessibles au public et aux tribunaux d'appel.

16 Dans certains ressorts de common law, notamment en Angleterre et en Australie, les tribunaux ont posé comme règle générale, quoique relative, l'obligation tant en matière civile que criminelle de donner des motifs, sauf certaines exceptions importantes : voir de façon générale H. L. Ho, « The judicial duty to give reasons » (2000), 20 *Legal Stud.* 42; *Coleman c. Dunlop Ltd.*, [1998] P.I.Q.R. 398 (C.A. Angl.), p. 403; et *Flannery c. Halifax Estate Agencies Ltd.*, [2000] 1 All E.R. 373 (C.A.). On ne sait toutefois pas précisément dans quelle mesure un résultat raisonnable fondé sur un solide dossier de preuve pourra néanmoins être infirmé et l'affaire renvoyée pour la tenue d'un nouveau procès parce que les motifs de la décision sont insuffisants, confus ou mal exprimés. Dans la plupart des arrêts

significant problems of substance for the appellate court.

17 In Australia, it has been said by one state appellate court that it is as much a judicial duty "to give reasons in an appropriate case as there is otherwise a duty to act judicially, such as to hear arguments of counsel and hear evidence and admit relevant evidence of a witness": *Pettitt v. Dunkley*, [1971] 1 N.S.W.L.R. 376 (C.A.), at pp. 387-88. The issue is not only to define the "appropriate case" but to define circumstances in which failure to provide adequate reasons will constitute grounds for an acquittal or a new trial.

18 In Canadian administrative law, this Court held in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43, that:

> . . . it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

19 There are, of course, significant differences between the criminal courts and administrative tribunals. Each adjudicative setting drives its own requirements. If the context is different, the rules may not necessarily be the same. These reasons are directed to the criminal justice context.

20 Even in the criminal law context, Parliament has intervened to require the giving of reasons in specific circumstances. Section 276.2(3) of the *Criminal Code* requires trial judges to give reasons for their determination of the admissibility of a complainant's prior sexual history. All the factors affecting the decision must be referred to as well as the manner in which the proposed evidence is considered to be relevant. In the same way, s. 278.8(1) states that trial judges *shall* provide reasons for

publiés, les lacunes des motifs créaient d'importants problèmes de fond pour le tribunal d'appel.

En Australie, la cour d'appel d'un État a dit qu'il existe une obligation judiciaire [TRADUCTION] « de donner des motifs dans un cas opportun, au même titre qu'il existe une obligation d'agir de façon judiciaire, notamment d'entendre les arguments des avocats ainsi que la preuve et d'accepter le témoignage pertinent d'un témoin » : *Pettitt c. Dunkley*, [1971] 1 N.S.W.L.R. 376 (C.A.), p. 387-388. Il ne faut pas seulement définir la notion de « cas opportun », mais établir les circonstances dans lesquelles l'omission de fournir des motifs suffisants constituera un moyen d'obtenir un acquittement ou la tenue d'un nouveau procès.

En droit administratif canadien, notre Cour a ainsi statué dans l'arrêt *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 43 :

> . . . il est maintenant approprié de reconnaître que, dans certaines circonstances, l'obligation d'équité procédurale requerra une explication écrite de la décision. Les solides arguments démontrant les avantages de motifs écrits indiquent que, dans des cas comme en l'espèce où la décision revêt une grande importance pour l'individu, dans des cas où il existe un droit d'appel prévu par la loi, ou dans d'autres circonstances, une forme quelconque de motifs écrits est requise.

Bien entendu, il existe des différences importantes entre les cours criminelles et les tribunaux administratifs. Chaque cadre juridictionnel possède ses propres exigences. Si le contexte diffère, les mêmes règles ne s'appliqueront pas nécessairement. Les présents motifs visent le contexte de la justice criminelle.

Même dans le contexte du droit criminel, le législateur est intervenu pour imposer l'obligation de donner des motifs dans des circonstances particulières. Le paragraphe 276.2(3) du *Code criminel* oblige les juges du procès à motiver la décision qu'ils rendent sur l'admissibilité de la preuve portant sur le passé sexuel de la plaignante. Ils doivent mentionner tous les facteurs ayant fondé leur décision et préciser en quoi ils jugent la preuve soumise pertinente. De la même façon, le par. 278.8(1) dis-

ordering or refusing to order the production of certain records that contain personal private information. Section 726.2 provides that when imposing a sentence the court *shall* state the reasons for it. The only discernable purpose for these provisions is to facilitate appellate review of the correctness of the conviction or acquittal or sentence. It would be strange to impose a more rigorous standard of judicial articulation on an evidentiary ruling or sentence than on the conviction whose correctness is equally before the appellate court for review.

The task is not so much to extol the virtues of giving full reasons, which no one doubts, but to isolate those situations where deficiencies in the trial reasons will justify appellate intervention and either an acquittal or a new trial.

There is a general sense in which a duty to give reasons may be said to be owed to the public rather than to the parties to a specific proceeding. Through reasoned decisions, members of the general public become aware of rules of conduct applicable to their future activities. An awareness of the reasons for a rule often helps define its scope for those trying to comply with it. The development of the common law proceeds largely by reasoned analogy from established precedents to new situations. Few would argue, however, that failure to discharge this jurisprudential function necessarily gives rise to appellate intervention. New trials are ordered to address the potential need for correction of the outcome of a particular case. Poor reasons may coincide with a just result. Serious remedies such as a new trial require serious justification.

On a more specific level, within the confines of a particular case, it is widely recognized that having to give reasons itself concentrates the judi-

pose que les juges du procès sont *tenus* de motiver leurs décisions de rendre ou refuser de rendre l'ordonnance de communiquer certains dossiers contenant des renseignements personnels. L'article 726.2 dispose que lors du prononcé de la peine, le tribunal *donne* ses motifs. Le seul objet logique de ces dispositions est de faciliter l'examen en appel de la justesse de la déclaration de culpabilité, de l'acquittement ou de la peine. Il serait insolite que les tribunaux soient assujettis à une norme plus rigoureuse lorsqu'ils expliquent leur décision sur une question concernant la preuve ou la peine que lorsqu'ils motivent une déclaration de culpabilité dont le tribunal d'appel est aussi appelé à examiner la justesse.

21 Il ne s'agit pas tant de chanter les vertus des décisions pleinement motivées, dont personne ne doute, que d'identifier les situations où les lacunes des motifs exprimés en première instance justifieront que la cour d'appel intervienne et prononce un acquittement ou ordonne la tenue d'un nouveau procès.

22 De manière générale, on peut dire que c'est en faveur du public plutôt qu'en faveur des parties à l'instance qu'est établie l'obligation de donner des motifs. Grâce aux décisions motivées, le grand public est avisé des règles de conduite applicables à ses activités futures. Le fait de connaître la raison d'être d'une règle aide souvent ceux qui tentent de s'y conformer à en définir la portée. La common law évolue en grande partie par l'application, à des situations nouvelles, d'analogies motivées tirées de la jurisprudence. Toutefois, rares sont ceux qui prétendraient que le défaut de s'acquitter de cette fonction jurisprudentielle donne nécessairement ouverture à une intervention en appel. On ordonne la tenue d'un nouveau procès dans les cas où il peut s'avérer nécessaire de corriger l'issue d'une affaire donnée. De piètres motifs peuvent coïncider avec un résultat juste. Seule une raison sérieuse peut justifier une réparation aussi sérieuse qu'un nouveau procès.

23 De manière plus spécifique, dans le cadre d'une affaire en particulier, il est largement reconnu que l'obligation de motiver sa décision amène le juge à

cial mind on the difficulties that are presented (*R. v. G. (M.)* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.), at p. 356; *R. v. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49 (Man. C.A.), at pp. 53-56 and 61-63; *R. v. Hache* (1999), 25 C.R. (5th) 127 (N.S.C.A.), at pp. 135-39; *R. v. Graves* (2000), 189 N.S.R. (2d) 281, 2000 NSCA 150, at paras. 19-23; *R. v. Gostick* (1999), 137 C.C.C. (3d) 53 (Ont. C.A.), at pp. 67-68). The absence of reasons, however, does not necessarily indicate an absence of such concentration. We are speaking here of the *articulation* of the reasons rather than of the reasoning process itself. The challenge for appellate courts is to ensure that the latter has occurred despite the absence, or inadequacy, of the former.

A) *Functional Test*

24 In my opinion, the requirement of reasons is tied to their purpose and the purpose varies with the context. At the trial level, the reasons justify and explain the result. The losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be.

25 The issue before us presupposes that the decision has been appealed. In that context the purpose, in my view, is to preserve and enhance meaningful appellate review of the correctness of the decision (which embraces both errors of law and palpable overriding errors of fact). If deficiencies in the reasons do not, in a particular case, foreclose meaningful appellate review, but allow for its full exercise, the deficiency will not justify intervention under s. 686 of the *Criminal Code*. That provision limits the power of the appellate court to intervene to situations where it is of the opinion that (i) the verdict is unreasonable, (ii) the judgment is vitiated by an error of law and it cannot be said that no substantial wrong or miscarriage of justice has occurred, or (iii) on any ground where there has been a miscarriage of justice.

26 The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself.

centrer son attention sur les difficultés soulevées (*R. c. G. (M.)* (1994), 93 C.C.C. (3d) 347 (C.A. Ont.), p. 356; *R. c. N. (P.L.F.)* (1999), 138 C.C.C. (3d) 49 (C.A. Man.), p. 53-56 et 61-63; *R. c. Hache* (1999), 25 C.R. (5th) 127 (C.A.N.-É.), p. 135-139; *R. c. Graves* (2000), 189 N.S.R. (2d) 281, 2000 NSCA 150, par. 19-23; *R. c. Gostick* (1999), 137 C.C.C. (3d) 53 (C.A. Ont.), p. 67-68). L'absence de motifs ne signifie cependant pas nécessairement qu'il n'a pas centré son attention sur ces difficultés. Nous parlons ici de l'*expression* des motifs plutôt que du raisonnement lui-même. La tâche des cours d'appel consiste à s'assurer de l'existence d'un raisonnement malgré l'absence ou l'insuffisance des motifs exprimés.

A) *Un critère fonctionnel*

À mon avis, l'obligation de donner des motifs est liée à leur fin, qui varie selon le contexte. En première instance, les motifs justifient et expliquent le résultat. La partie qui n'a pas gain de cause sait pourquoi elle a perdu. Un examen éclairé des moyens d'appel est alors possible. Les membres du public intéressés peuvent constater que justice a été rendue, ou non, selon le cas.

La question qui nous est soumise présuppose que la décision a été portée en appel. Dans ce contexte, la fin visée consiste, selon moi, à préserver et à favoriser un examen valable en appel de la justesse de la décision (qui englobe à la fois les erreurs de droit et les erreurs de fait manifestes et dominantes). Si, dans une affaire donnée, les lacunes des motifs ne font pas obstacle à un examen valable en appel et qu'un examen complet demeure possible, ces lacunes ne justifieront pas l'intervention de la cour d'appel en vertu de l'art. 686 du *Code criminel*. Cette disposition limite le pouvoir d'intervention de la cour d'appel aux situations où elle estime (i) que le verdict est déraisonnable, (ii) que le jugement est entaché d'une erreur de droit et qu'il est impossible de dire qu'aucun tort important ni aucune erreur judiciaire grave ne s'est produit, ou (iii) que, pour un motif quelconque, il y a eu erreur judiciaire.

La cour d'appel n'est pas habilitée à intervenir simplement parce qu'elle estime que le juge du procès s'est mal exprimé.

Reasons for decision may be examined in other contexts for other purposes. The Canadian Judicial Council, for example, regularly reviews reasons for judgment in response to complaints. Its criteria will be apt for its purpose and will obviously differ from the criteria applicable in the appellate context: see, e.g., Canadian Judicial Council, *Report to the Canadian Judicial Council of the Inquiry Committee [in the case of Donald Marshall Jr.] Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990). My focus in this case, to reiterate, is appellate intervention in a criminal case.

27 Les motifs de la décision peuvent être examinés dans d'autres contextes et à d'autres fins. Par exemple, le Conseil canadien de la magistrature examine régulièrement les motifs de jugement afin de répondre à des plaintes. Ses critères seront adaptés à cette fin et différeront évidemment des critères applicables dans le contexte d'un appel : voir, p. ex., Conseil canadien de la magistrature, *Rapport au Conseil canadien de la magistrature déposé par le Comité d'enquête nommé [dans l'affaire Donald Marshall fils] conformément aux dispositions du paragraphe 63(1) de la Loi sur les juges à la suite d'une demande du procureur général de la Nouvelle-Écosse* (août 1990). Rappelons que c'est l'intervention en appel en matière criminelle qui nous intéresse en l'occurrence.

It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.

28 Il n'est ni nécessaire ni approprié de limiter les circonstances dans lesquelles une cour d'appel peut s'estimer incapable de procéder à un examen valable en appel. Le mandat de la cour d'appel consiste à vérifier la justesse de la décision rendue en première instance et un critère fonctionnel exige que les motifs donnés par le juge du procès soient suffisants à cette fin. La cour d'appel est la mieux placée pour se prononcer sur cette question. Le seuil est manifestement atteint lorsque, comme en l'espèce, le tribunal d'appel s'estime incapable de déterminer si la décision est entachée d'une erreur. Les facteurs suivants sont pertinents dans le présent pourvoi : (i) des incohérences ou des contradictions importantes dans la preuve ne sont pas résolues dans les motifs du jugement, (ii) la preuve embrouillée et contradictoire porte sur une question clé en appel et (iii) le dossier ne permet pas par ailleurs d'expliquer de manière satisfaisante la décision du juge de première instance. D'autres facteurs seront évidemment en cause dans d'autres instances. En termes simples, la règle fondamentale est la suivante : lorsque la cour d'appel estime que les lacunes des motifs font obstacle à un examen valable en appel de la justesse de la décision, une erreur de droit a été commise.

I believe this rather pragmatic approach is signalled, if not always explicitly, in earlier decisions of this Court. A convenient starting point is the judgment of Laskin C.J. in *Macdonald v. The Queen*, [1977] 2 S.C.R. 665. In the course of dealing with

29 Je crois que la jurisprudence antérieure de notre Cour évoque cette approche plutôt pragmatique, même si elle ne le fait pas toujours explicitement. Le jugement rendu par le juge en chef Laskin dans l'affaire *Macdonald c. La Reine*, [1977] 2 R.C.S.

an appeal from a court martial, he expressed concern that imposing a general duty on judges to give reasons, especially in the busy criminal courts, would risk ending up with "a ritual formula" (p. 672) that would be of no real assistance to the parties or to a reviewing court. Nevertheless, he said, at p. 673:

> It does not follow, however, that failure of a trial judge to give reasons, not challengeable *per se* as an error of law, will be equally unchallengeable if, having regard to the record, there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue or in appreciation of evidence that would affect the propriety of his verdict. [Emphasis added.]

30 Laskin C.J. was not addressing a case where silence alone was said to be the error. He insisted on a "rational basis" in the record to justify appellate intervention.

31 The point was picked up and elaborated by Estey J. in *Harper v. The Queen*, [1982] 1 S.C.R. 2, a case involving the conviction of a police officer for assault of an individual in the course of an arrest. The appeal was based on an alleged error of law (p. 23). The Court was confronted with skeletal reasons in the context of an unsatisfactory record and concluded that the trial judge had "fatally overlooked" (p. 16) relevant defence evidence. Estey J. said, at p. 14:

> Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede. [Emphasis added.]

If the trial judge provides some reasons, and therein demonstrates that he or she has failed to grasp an important point or has disregarded it, then as McLachlin J. (as she then was) pointed out in *R. v. Burns*, [1994] 1 S.C.R. 656, this may also lead "to the conclusion that the verdict was not one which

665, constitue un point de départ pratique. Dans le cadre d'un pourvoi interjeté contre une décision d'une cour martiale, le juge en chef Laskin s'est dit préoccupé par le fait qu'en imposant aux juges une obligation générale de donner des motifs, particulièrement à ceux des tribunaux criminels qui sont très occupés, on risquerait d'en venir à « une formule rituelle » (p. 672) qui ne serait d'aucune utilité véritable pour les parties ni pour un tribunal d'appel. Néanmoins, il a dit, à la p. 673 :

> Cela ne veut pas dire cependant que l'omission par un juge de première instance de donner des motifs, qui ne constitue pas en soi une erreur de droit, ne pourra être contestée si, compte tenu du dossier, on peut logiquement conclure que le juge s'est trompé dans l'appréciation d'une question pertinente ou d'un élément de preuve de nature à influer sur la justesse de son verdict. [Je souligne.]

Le juge en chef Laskin n'était pas saisi d'une allégation portant que le silence constituait en soi une erreur. Il a insisté sur la nécessité de pouvoir « logiquement conclure » à une erreur, compte tenu du dossier, pour que l'intervention de la cour d'appel soit justifiée.

Ce point a retenu l'attention du juge Estey qui en a traité dans l'arrêt *Harper c. La Reine*, [1982] 1 R.C.S. 2, une affaire concernant un policier condamné pour avoir agressé une personne lors d'une arrestation. Le pourvoi était fondé sur une prétendue erreur de droit (p. 23). Aux prises avec des motifs squelettiques dans le contexte d'un dossier qui laissait à désirer, notre Cour a conclu que le juge du procès avait « commis l'erreur fatale de faire abstraction » (p. 16) d'éléments de preuve pertinents. Le juge Estey a dit ceci, à la p. 14 :

> S'il se dégage du dossier, ainsi que des motifs de jugement, qu'il y a eu omission d'apprécier des éléments de preuve pertinents, et plus particulièrement, qu'on a fait entièrement abstraction de ces éléments, le tribunal chargé de révision doit alors intervenir. [Je souligne.]

Si le juge du procès fournit des motifs qui démontrent qu'il ou elle n'a pas saisi un point important ou n'en a pas tenu compte, alors, pour reprendre le propos du juge McLachlin (maintenant Juge en chef) dans l'arrêt *R. c. Burns*, [1994] 1 R.C.S. 656, on peut être amené « à conclure que le juge

the trier of fact could reasonably have reached" (p. 665).

The more problematic situation is where the trial judge renders a decision and gives either no reasons or, as in this case, "generic" reasons that could apply with equal facility to almost any criminal case. The complaint is not that the reasoning is defective but that it is unknown or unclear. In this respect, McLachlin J. stated as follows on behalf of the full Court in *Burns*, *supra*, at p. 664:

> Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(*a*). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points [citations omitted]. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside the verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case. [Emphasis added.]

The appellant relies on this statement as establishing a simple rule that trial judges are under no duty to give reasons, but it seems to me, on the contrary, that this Court *did* expect trial judges to state more than the result. McLachlin J. anticipated at least "their conclusions" on the main issues (though perhaps not "collateral" issues) at least "in brief compass". Further, as pointed out by O'Neill J.A. in the court below, the observations in *Burns* were substantially qualified by the use of the words "all", "general", "merely", "all aspects", "in itself", "every aspect", "in brief compass", and "collateral aspects". What was said in *Burns*, it seems to me,

des faits n'a pas rendu un verdict raisonnable » (p. 665).

32 La situation est plus problématique lorsque le juge du procès rend une décision et qu'il ne donne aucun motif ou bien, comme en l'espèce, qu'il donne des motifs « généraux » qui pourraient s'appliquer à pratiquement toutes les affaires criminelles. Le recours ne porte pas sur les lacunes du raisonnement, mais sur le fait que celui-ci est inconnu ou incertain. À cet égard, madame le juge McLachlin s'exprimant au nom de la Cour dans l'arrêt *Burns*, précité, a dit ceci à la p. 664 :

> L'omission d'indiquer expressément que tous les facteurs pertinents ont été considérés pour en arriver à un verdict ne constitue pas une raison d'admettre un appel en application de l'al. 686(1)*a*). Cela est conforme à la règle générale selon laquelle le juge du procès ne commet pas une erreur du seul fait qu'il ne motive pas sa décision sur des questions problématiques [citations omises]. Le juge n'est pas tenu de démontrer qu'il connaît le droit et qu'il a tenu compte de tous les aspects de la preuve. Il n'est pas tenu non plus d'expliquer pourquoi il n'a pas de doute raisonnable sur la culpabilité de l'accusé. L'omission d'accomplir l'une de ces choses ne permet pas en soi à une cour d'appel d'annuler le verdict.
>
> Cette règle est logique. Obliger les juges du procès qui sont appelés à présider de nombreux procès criminels à traiter, dans leurs motifs, de tous les aspects de chaque affaire ralentirait incommensurablement le système de justice. Les juges du procès sont censés connaître le droit qu'ils appliquent tous les jours. S'ils formulent leurs conclusions avec concision et si ces conclusions s'appuient sur la preuve, il n'y a pas lieu d'infirmer le verdict simplement parce qu'ils n'ont pas analysé des aspects accessoires de l'affaire. [Je souligne.]

33 L'appelante soutient que cet énoncé établit une règle simple selon laquelle les juges du procès n'ont aucune obligation de motiver leurs décisions, mais il me semble, au contraire, que notre Cour s'attendait effectivement à ce que les juges du procès ne se bornent pas à énoncer simplement le résultat. Madame le juge McLachlin prévoyait à tout le moins qu'ils formuleraient « leurs conclusions » sur les questions principales (quoique peut-être pas sur les questions « accessoires ») à tout le moins « avec concision ». En outre, comme l'a souligné le juge O'Neill de la Cour d'appel, les observations faites dans l'arrêt *Burns* étaient nettement nuancées

was that the effort to establish the absence or inadequacy of reasons as a freestanding ground of appeal should be rejected. A more contextual approach is required. The appellant must show not only that there is a deficiency in the reasons, but that this deficiency has occasioned prejudice to the exercise of his or her legal right to an appeal in a criminal case.

1. Allegation of "Unreasonable Verdict" Cases

34 It is important to note that *Burns* was a case in which the accused alleged an unreasonable verdict under s. 686(1)(*a*)(i) of the *Criminal Code*. The door was not shut to consideration of the absence of reasons, in an appropriate case, as an error of law under s. 686(1)(*a*)(ii) or a miscarriage of justice under s. 686(1)(*a*)(iii). In an appeal founded on s. 686(1)(*a*)(i), the Court is engaged in a review of the facts: *R. v. S. (P.L.)*, [1991] 1 S.C.R. 909, at p. 915. The test for an "unreasonable verdict" is whether "the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered": *Corbett v. The Queen*, [1975] 2 S.C.R. 275, at p. 282; *R. v. Yebes*, [1987] 2 S.C.R. 168, at p. 185; and *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at para. 36. The test is equally applicable to a judge sitting at trial without a jury: *Biniaris*, at para. 37. In such a case, while a court "must re-examine and to some extent reweigh and consider the effect of the evidence" (*Yebes*, at p. 186), the verdict itself is the error complained of. The absence or inadequacy of reasons, while potentially supportive of a conclusion of unreasonable verdict, is not the mischief aimed at by the remedy.

35 *Barrett*, *supra*, confirmed the correctness of the view that the *dicta* in *Burns* was not intended as an appellate invitation to trial judges to insulate their decisions from judicial review by saying as little as

par l'utilisation des mots : « tous », « générale », « seul », « tous les aspects », « en soi », « avec concision » et « aspects accessoires ». Voici, selon moi, la véritable portée de l'arrêt *Burns* : il faut repousser toute tentative de faire de l'absence de motifs ou de leur insuffisance un moyen d'appel distinct. Une approche plus contextuelle s'impose. L'appelante doit établir non seulement que les motifs comportent des lacunes, mais également que ces lacunes lui ont causé un préjudice dans l'exercice du droit d'appel que lui confère la loi en matière criminelle.

1. Jurisprudence concernant les allégations de « verdict déraisonnable »

Il importe de souligner que l'arrêt *Burns* portait sur une affaire dans laquelle l'accusé plaidait que le verdict était déraisonnable au sens du sous-al. 686(1)*a*)(i) du *Code criminel*. Il n'a pas été exclu que l'absence de motifs puisse, dans un cas opportun, être considérée comme une erreur de droit au sens du sous-al. 686(1)*a*)(ii), ou comme une erreur judiciaire au sens du sous-al. 686(1)*a*)(iii). Lors d'un appel interjeté en vertu du sous-al. 686(1)*a*)(i), la cour procède à un examen des faits : *R. c. S. (P.L.)*, [1991] 1 R.C.S. 909, p. 915. Le critère applicable pour déterminer si un « verdict est déraisonnable » consiste à décider « si le verdict est l'un de ceux qu'un jury qui a reçu les directives appropriées et qui agit d'une manière judiciaire aurait pu raisonnablement rendre » : *Corbett c. La Reine*, [1975] 2 R.C.S. 275, p. 282; *R. c. Yebes*, [1987] 2 R.C.S. 168, p. 185; et *R. c. Biniaris*, [2000] 1 R.C.S. 381, 2000 CSC 15, par. 36. Ce critère s'applique tout autant à un juge siégeant sans jury : *Biniaris*, par. 37. En pareil cas, la cour « doit réexaminer l'effet de la preuve et aussi dans une certaine mesure la réévaluer » (*Yebes*, p. 186), mais c'est le verdict lui-même qui constitue l'erreur invoquée. Le recours ne vise pas à corriger l'absence de motifs ou leur insuffisance, même si celles-ci peuvent éventuellement étayer une conclusion de verdict déraisonnable.

L'arrêt *Barrett*, précité, a confirmé la justesse de l'opinion selon laquelle les remarques incidentes de l'arrêt *Burns* ne constituaient pas une invitation lancée aux juges de première instance à soustraire

possible about the reasons for their judgment. That case involved allegations of police brutality which led to a four-day *voir dire* to determine the admissibility of the statements made by the accused after his arrest. The accused had sustained physical injuries while in custody and there was no evidence of a fight with other inmates. The trial judge issued no reasons for admitting the statement other than letting it be known through his staff that his ruling was based on a finding of credibility. Arbour J.A., as she then was, ruled that:

> Reasons must be given for findings of facts made upon disputed and contradicted evidence, and upon which the outcome of the case is largely dependent.
>
> (*R. v. Barrett* (1993), 82 C.C.C. (3d) 266 (Ont. C.A.), at p. 287)

In brief oral reasons this Court reversed, stating at para. 1:

> While it is clearly preferable to give reasons and although there may be some cases where reasons may be necessary, by itself, the absence of reasons of a trial judge cannot be a ground for appellate review when the finding is otherwise supportable on the evidence or where the basis of the finding is apparent from the circumstances. [Emphasis added.]

This statement did not bless the absence of reasons. It said only that appellate review in such cases would not be available where the disputed finding is otherwise supportable on the evidence (i.e., the verdict is not unreasonable), or where the basis of the finding is apparent from the circumstances. The Court concluded, on the facts of *Barrett*, that these conditions were met. On this basis it disagreed with the Ontario Court of Appeal.

It should be added that even where the allegation is unreasonable verdict, the absence of adequate reasons may, in some circumstances, contribute to appellate intervention. This is shown by *R. v. Burke*, [1996] 1 S.C.R. 474, which involved the conviction of a former Christian Brother at the Mount Cashel Orphanage in St. John's, Newfoundland and

leurs décisions à l'examen en appel en révélant le moins possible les motifs de leur jugement. Cette affaire portait sur des allégations de brutalité policière ayant mené à un voir-dire de quatre jours sur l'admissibilité des déclarations faites par l'accusé après son arrestation. L'accusé avait subi des blessures pendant sa détention et il n'existait aucune preuve d'une bagarre avec d'autres détenus. Le juge du procès a jugé les déclarations admissibles sans donner de motifs sauf pour indiquer, par l'entremise de son cabinet, que sa décision était fondée sur une question de crédibilité. Madame le juge Arbour, maintenant juge de notre Cour, a conclu :

> [TRADUCTION] Il faut motiver les conclusions de fait tirées d'une preuve litigieuse et contradictoire, et dont l'issue de l'affaire dépend largement.
>
> (*R. c. Barrett* (1993), 82 C.C.C. (3d) 266 (C.A. Ont.), p. 287)

36 Dans de brefs motifs exprimés oralement, notre Cour a infirmé cette décision, disant ceci au par. 1 :

> Certes, il est nettement préférable que des motifs soient donnés et, dans certains cas, il peut être nécessaire de le faire, mais, l'absence de motifs de la part d'un juge du procès ne peut, en soi, justifier une révision en appel lorsque la décision est par ailleurs appuyée par la preuve ou lorsque le fondement de la décision est évident compte tenu des circonstances. [Je souligne.]

37 Cet énoncé n'a pas sanctionné l'absence de motifs. Il a seulement précisé que, en pareils cas, la décision litigieuse ne pourra être révisée en appel lorsqu'elle est par ailleurs appuyée par la preuve (c.-à-d. que le verdict n'est pas déraisonnable) ou lorsque le fondement de la décision est évident compte tenu des circonstances. Après avoir examiné les faits dans l'affaire *Barrett*, la Cour a conclu que ces conditions étaient remplies. Par conséquent, la Cour ne partageait pas l'opinion de la Cour d'appel de l'Ontario.

38 Il y a lieu d'ajouter que, même en présence d'une allégation de verdict déraisonnable, l'absence de motifs suffisants peut, dans certaines circonstances, jouer un rôle dans la décision de la cour d'appel d'intervenir. On en trouve un exemple dans l'arrêt *R. c. Burke*, [1996] 1 R.C.S. 474, qui portait sur la déclaration de culpabilité d'un ancien frère des

Labrador, on multiple counts of indecent assault and assault causing bodily harm. In respect of one count, the Crown relied on the evidence of the witness L., who identified the accused from a photograph, but was not asked to identify him during the trial. The Crown offered no explanation for this omission. Sopinka J. reviewed the weaknesses of the identification evidence and concluded at para. 53:

> The trial judge made no comment on the frailty of the identification evidence other than the general statement that she found L.'s evidence credible and accepted it. No reference is made to the fact that the appellant was not identified in court and that no explanation for failure to ask L. to do so was given. No reference is made to the erroneous identification made by T. using the photograph of the appellant. Given the unsatisfactory nature of L.'s evidence in general, this uncritical reliance on the unorthodox identification evidence renders the conviction unreasonable. Pursuant to s. 686(1)(*a*)(i), I would quash the conviction.

The absence of an explanation by the trial judge contributed to the Court's conclusion that "this is one of those rare instances where the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence" (para. 7). Sopinka J. said that the power to overturn "unreasonable verdicts" was intended "as an additional and salutary safeguard against the conviction of the innocent" (para. 6). The omissions of the trial judge would not be permitted to preclude the making of that appellate determination. I fully agree with that proposition.

2. Allegation of "Error of Law" Cases

39 More recently, the Court has explored circumstances where, short of finding a verdict to be unreasonable, the trial judge's failure to articulate reasons in relation to a key issue in circumstances which require explanation could be characterized as an

Écoles chrétiennes de l'orphelinat de Mount Cashel à St. John's (Terre-Neuve-et-Labrador), relativement à plusieurs chefs d'accusation d'attentat à la pudeur et de voies de fait causant des lésions corporelles. Relativement à un chef d'accusation, le ministère public s'est fondé sur le témoignage du témoin L., qui a identifié l'accusé à partir d'une photographie, mais à qui on n'a pas demandé de l'identifier au procès. Le ministère public n'a offert aucune explication relativement à cette omission. Le juge Sopinka a analysé la faiblesse de la preuve d'identification et a conclu, au par. 53 :

> Le juge du procès n'a fait aucun commentaire sur la faiblesse de la preuve d'identification, si ce n'est sa déclaration générale qu'elle jugeait crédible le témoignage de L. et l'acceptait. Elle n'a pas mentionné le fait que l'appelant n'a pas été identifié en cour et qu'on n'a pas expliqué la raison pour laquelle L. n'avait pas été requis de le faire. Il n'y a aucune mention de l'identification erronée que T. a faite à l'aide de la photographie de l'appelant. Étant donné la nature insatisfaisante du témoignage de L. en général, le fait qu'on s'en soit remis aveuglément à cette preuve d'identification hétérodoxe rend la déclaration de culpabilité déraisonnable. Conformément au sous-al. 686(1)*a*)(i), je suis d'avis d'annuler la déclaration de culpabilité.

L'absence d'une explication par le juge de première instance a incité la Cour à conclure qu'il s'agissait « d'un de ces cas peu communs où l'appréciation de la crédibilité par la cour de première instance ne peut pas s'appuyer sur quelque interprétation raisonnable que ce soit de la preuve » (par. 7). Le juge Sopinka a dit que le pouvoir de rejeter les « verdicts déraisonnables » visait à créer « une garantie additionnelle et salutaire contre les déclarations de culpabilité de personnes innocentes » (par. 6). On ne saurait permettre que les omissions du juge du procès empêchent la cour d'appel de se prononcer à cet égard. Je souscris entièrement à cette proposition.

2. Jurisprudence concernant les allégations d'« erreur de droit »

Plus récemment, la Cour a étudié les circonstances où, sans qu'on puisse conclure à un verdict déraisonnable, l'omission par le juge de première instance d'exprimer ses motifs sur une question clé dans des circonstances qui exigeaient une

error of law, giving rise to a new trial (rather than, as is the case with an unreasonable verdict, an acquittal).

In *R. v. McMaster*, [1996] 1 S.C.R. 740, at paras. 25-27, Lamer C.J. referenced the earlier statements made in *Burns* and *Barrett* and stated that he did not interpret these cases as holding that there will never be an obligation on trial judges to write reasons:

. . . I wish to address briefly the issue of a trial judge's obligation to write reasons in criminal cases since this case involved a trial before a judge sitting without a jury. The issue was recently considered in this Court in the cases of [*Burns*] and [*Barrett*]. I do not interpret these cases as suggesting that there is no obligation on trial judges to write reasons. Indeed, in *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, I held at p. 806 that:

> Of course, courts should normally disclose in their judgment the basis for their decisions and, when relevant, the evidence it has decided to rely upon. However, if a court chooses not to do so, it may well, in some circumstances though surely not in all, have failed in its adjudicative duties . . . . [Emphasis added.]

. . .

I am of the view that in cases where the law is well settled and the disposition turns on an application of the law to the particular facts of the case, it will be difficult for an appellant to argue that the failure to provide reasons requires appellate intervention. . . .

. . .

However, in a case where it appears that the law is unsettled, it would be wise for a trial judge to write reasons setting out the legal principles upon which the conviction is based so that an error may be more easily identified, if error there be. In the case at bar, there is no doubt that at the time of the appellants' trial in October of 1993, the law of intoxication was in a very unsettled and unsatisfactory state. . . . If the trial judge had not provided reasons in this case, we would not have been in a position to know whether he had applied the *MacAskill* approach as he in fact had done. [Emphasis added.]

explication pouvait être considérée comme une erreur de droit donnant ouverture à un nouveau procès (plutôt qu'à un acquittement, comme c'est le cas lorsque le verdict est déraisonnable).

Dans l'arrêt *R. c. McMaster*, [1996] 1 R.C.S. 740, par. 25-27, le juge en chef Lamer, se reportant aux énoncés antérieurs faits dans *Burns* et *Barrett*, a dit qu'à son avis, ces arrêts n'établissent pas que les juges de première instance ne sont jamais tenus de rédiger des motifs : 40

. . . je tiens à examiner brièvement la question de l'obligation du juge du procès de rédiger des motifs dans des affaires criminelles, étant donné qu'il s'est agi en l'espèce d'un procès devant un juge siégeant sans jury. Notre Cour a récemment examiné cette question dans les arrêts [*Burns*] et [*Barrett*]. Je ne considère pas que ces arrêts laissent entendre que les juges du procès ne sont pas tenus de rédiger des motifs. En fait, dans l'arrêt *MacKeigan c. Hickman*, [1989] 2 R.C.S. 796, j'affirme, à la p. 806 :

> Évidemment les tribunaux devraient normalement révéler dans leur jugement le fondement de leurs décisions et, lorsque cela est pertinent, les éléments de preuve sur lesquels ils ont décidé de se fonder. Cependant, si une cour choisit de ne pas le faire, elle peut bien, dans certains cas mais sûrement pas dans tous les cas, avoir commis une faute dans l'exercice de ses fonctions décisionnelles . . . [Je souligne.]

. . .

Je suis d'avis que, dans les affaires où le droit est bien établi et où la décision repose sur l'application du droit aux faits particuliers de l'affaire, il sera difficile pour l'appelant d'alléguer que le défaut d'exposer des motifs nécessite l'intervention d'une cour d'appel . . .

. . .

Toutefois, dans un cas où il appert que le droit est incertain, il serait sage que le juge du procès rédige des motifs exposant les principes juridiques sur lesquels se fonde la déclaration de culpabilité, de manière que toute erreur qui peut s'être glissée puisse être identifiée plus facilement. En l'espèce, il ne fait aucun doute qu'au moment du procès des appelants, en octobre 1993, l'état du droit en matière d'intoxication était très incertain et insatisfaisant [. . .] Si le juge du procès n'avait pas exposé des motifs en l'espèce, nous n'aurions pas été en mesure de savoir s'il avait appliqué l'approche de l'arrêt *MacAskill*, comme il l'a fait en l'espèce. [Je souligne.]

McMaster thus adverted to the reasoned nature of "adjudicative duties" in the context of the need to preserve meaningful appellate review. While Lamer C.J. spoke in terms of it being "wise" rather than obligatory to deal with "unsettled" points of law, the important point is that if the trial judge's reasons had not treated the point in legal controversy, he was of the opinion that the appellate court "would not have been in a position" to assess the correctness of the result. Prejudice would flow from the deficiency. The delivery of inadequate trial reasons which cause or contribute to a deprivation of the meaningful exercise of a party's right to have the correctness of the trial decision reviewed by an appellate court is, I think, an error of law.

41 More explicit recognition of the principle that a failure to give reasons in circumstances not amounting to unreasonable verdict may constitute an error of law came with *R. v. R. (D.)*, [1996] 2 S.C.R. 291. The appellants in that case were charged with numerous counts of sexual and physical abuse against three children. The alleged assaults took place between 1983 and 1989. The "birth" parents and the mother's lover were convicted of three counts of sexual assault and assault causing bodily harm. The children not only testified at trial to sexual and physical abuse, but spoke of babies who had been killed ritually and buried in the back garden, lengthy hospital stays for which no record could be found, and the eating of blood, urine and "pooh". It emerged that some of these references were childhood code, e.g. "urine" was apple juice and "pooh" was pork and beans. It was in this context that Major J., writing for the majority on this point, stated, at para. 54:

> It is my view that the trial judge erred in law by failing to address the confusing evidence, and failing to separate fact from fiction. [Emphasis added.]

After referring to the passages in *Burns* previously mentioned, Major J. went on to state, at para. 55:

L'arrêt *McMaster* a ainsi évoqué la motivation de l'exercice des « fonctions décisionnelles » dans le contexte de la nécessité de préserver un examen valable en appel. Même si le juge en chef Lamer a dit qu'il serait « sage » plutôt qu'impératif de traiter des points de droit « incertain[s] », ce qui importe c'est que si les motifs du juge du procès n'avaient pas traité du point en litige, la cour d'appel « n'[aurait] pas été en mesure », selon lui, d'apprécier la justesse du résultat. Le préjudice découlerait des lacunes des motifs. À mon avis, le juge du procès qui prononce des motifs insuffisants au point de priver une partie de son droit de faire examiner valablement la justesse de la décision de première instance par une cour d'appel, commet une erreur de droit.

L'arrêt *R. c. R. (D.)*, [1996] 2 R.C.S. 291, reconnaît plus explicitement le principe voulant que l'omission de donner des motifs dans des circonstances où le verdict n'est pas vraiment déraisonnable puisse constituer une erreur de droit. Dans cette affaire, les appelants devaient répondre à plusieurs chefs d'abus sexuels et physiques commis contre trois enfants. Les agressions alléguées étaient survenues entre 1983 et 1989. Les parents naturels des enfants et l'ami de la mère ont été déclarés coupables de trois chefs d'agression sexuelle et de voies de fait causant des lésions corporelles. Lors du procès, les enfants ont non seulement témoigné au sujet des abus sexuels et physiques, mais ils ont parlé de bébés qui auraient été tués selon un rituel et enterrés dans la cour arrière, de longs séjours à l'hôpital dont on n'a trouvé aucune trace et de consommation de sang, d'urine et de « caca ». Il s'est avéré que certaines de ces allusions correspondaient à un code des enfants, p. ex. l'« urine » était du jus de pomme et le « caca » des fèves au lard. C'est dans ce contexte que le juge Major, s'exprimant sur ce point au nom de la majorité, a dit au par. 54 :

> À mon avis, le juge du procès a commis une erreur de droit en ne traitant pas des éléments de preuve déroutants et en ne distinguant pas la réalité de la fiction. [Je souligne.]

Après un renvoi aux extraits de l'arrêt *Burns* cités précédemment, le juge Major a poursuivi en ces termes, au par. 55 :

The above-quoted passage does not stand for the proposition that trial judges are never required to give reasons. Nor does it mean that they are always required to give reasons. Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions.

This, I think, is clear support for the proposition that, *for purposes of appellate review*, the duty to give reasons is driven by the circumstances of the case rather than abstract notions of judicial accountability. Major J. continues, at para. 55:

Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere.

This statement affirms that deficiency in reasons, by itself, is not a stand-alone ground of appeal. Major J. concludes, at para. 55:

Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions. The trial judge in this case did not do so. She failed to address the troublesome evidence, and she failed to identify the basis on which she convicted D.R. and H.R. of assault. This is an error of law necessitating a new trial. [Emphasis added.]

As stated at para. 58 of his reasons, Major J. considered *R. (D.)* to raise in an unusual aspect "the presumption of innocence and the requirement of proof beyond a reasonable doubt". The deficiency in the trial reasons precluded the appellate court from being satisfied that these fundamental principles had been properly applied. It is thus not every case of "confused and contradictory evidence" that will convert deficiency of reasons into an error of law for purposes of s. 686(1)(*a*)(ii). The error of law arises in that context because *in the opinion of the appellate court*, the deficiency precludes meaningful appellate review of the correctness of the decision. That threshold is not confined to cases of "bizarre" evidence.

Le passage ci-dessus ne signifie pas que les juges du procès ne sont jamais tenus d'exposer leurs motifs. Il ne veut pas dire non plus qu'ils sont toujours tenus de le faire. Selon les circonstances d'une affaire donnée, il peut être souhaitable que le juge du procès explique ses conclusions.

42 Selon moi, ce passage étaye clairement l'affirmation qu'aux *fins d'examen en appel*, l'obligation d'exposer des motifs est dictée par les circonstances de l'affaire plutôt que par des notions abstraites de responsabilité judiciaire. Le juge Major ajoute, au par. 55 :

Les tribunaux d'appel n'interviendront pas lorsque les motifs montrent que le juge du procès a examiné les questions importantes d'une affaire, ou lorsque les motifs du juge du procès ressortent clairement du dossier ou que la preuve est telle qu'il n'est pas nécessaire d'exposer des motifs.

Cet énoncé confirme que les motifs qui comportent des lacunes ne constituent pas, en soi, un moyen d'appel distinct. Le juge Major conclut, au par. 55 :

De même, dans des cas comme la présente affaire, où il y a des éléments de preuve embrouillés et contradictoires, le juge du procès devrait exposer des motifs expliquant ses conclusions. Le juge du procès ne l'a pas fait en l'espèce. Elle n'a pas traité des éléments de preuve troublants et elle n'a pas indiqué sur quoi elle s'est fondée pour déclarer D.R. et H.R. coupables de voies de fait. Il s'agit là d'une erreur de droit qui commande la tenue d'un nouveau procès. [Je souligne.]

43 Ainsi qu'il l'a dit au par. 58 de ses motifs, le juge Major a considéré que l'arrêt *R. (D.)* soulevait, sous un angle inhabituel, « la présomption d'innocence et [. . .] l'exigence d'une preuve hors de tout doute raisonnable ». Les lacunes des motifs donnés en première instance empêchaient le tribunal d'appel de vérifier si ces principes fondamentaux avaient été appliqués convenablement. Ce n'est donc pas dans toutes les affaires comportant des « éléments de preuve embrouillés et contradictoires » que les lacunes des motifs deviendront une erreur de droit pour l'application du sous-al. 686(1)*a*)(ii). Dans ce contexte, l'erreur de droit survient parce que, *de l'avis du tribunal d'appel*, les lacunes des motifs font obstacle à un examen valable en appel de la justesse de la décision. Ce seuil ne s'applique pas seulement aux affaires comportant des éléments de preuve « bizarres ».

44 The "error of law" approach was adopted by Sopinka J. in *R. v. Feeney*, [1997] 2 S.C.R. 13, at para. 30. The accused was charged with the murder of an elderly man. The victim was found at his home, having died from five blows to the head with a blunt object. A brief investigation led police officers to the accused's trailer where he was arrested without a warrant after they observed him wearing a blood-stained t-shirt. One of the issues faced by this Court was whether the police had reasonable and probable grounds for the arrest. At trial, the arresting officer testified that he did not believe he had reasonable grounds to arrest the accused when he entered the trailer. Rather, he formed this belief only after he was inside and observed the blood-stained shirt. Sopinka J., for the majority, concluded that the trial judge committed an error of law when he failed to explain his rejection of the policeman's admission that he had himself lacked the grounds to arrest the accused prior to entering the trailer (at para. 31):

> In order to conclude that, objectively speaking, reasonable and probable grounds for arrest existed, one must conclude that the officer on the scene was unreasonable in reaching a different conclusion. The trial judge, however, did not explain his dismissal of the officer's evidence in this respect. In my view, such a failure to clarify the basis for his finding that the objective test was satisfied constituted an error of law. [Emphasis added.]

45 The judge's silence bore on a critically important point. The police officer's admission was the equivalent of admitting that the arrest was not in accordance with s. 495 of the *Code*. Thus, by failing to explain why he had rejected the police officer's testimony, the trial judge arrived at a conclusion that was not intelligible from the record and the correctness of which could not be evaluated by the reviewing court. The basis of the finding, to quote *Barrett*, *supra*, at para. 1, was not "apparent from the circumstances".

46 These cases make it clear, I think, that the duty to give reasons, where it exists, arises out of the

Le juge Sopinka a adopté l'approche de « l'erreur de droit » dans l'affaire *R. c. Feeney*, [1997] 2 R.C.S. 13, par. 30. L'accusé avait été inculpé du meurtre d'un homme âgé. La victime avait été trouvée à son domicile, décédée après avoir été frappée à la tête à cinq reprises avec un objet contondant. Une enquête rapide a mené les policiers à la remorque de l'accusé où ce dernier a été arrêté sans mandat après que les policiers ont remarqué qu'il portait un t-shirt taché de sang. L'une des questions soumises à notre Cour consistait à savoir si la police avait des motifs raisonnables et probables d'effectuer l'arrestation. Lors du procès, le policier ayant effectué l'arrestation a témoigné qu'au moment d'entrer dans la remorque, il ne croyait pas avoir de motifs raisonnables pour arrêter l'accusé. C'est plutôt après être entré à l'intérieur et avoir remarqué le chandail taché de sang qu'il a acquis cette conviction. Le juge Sopinka a conclu, au nom de la majorité, que le juge du procès avait commis une erreur de droit en n'expliquant pas pourquoi il avait rejeté l'aveu du policier selon lequel il n'avait lui-même aucune raison d'arrêter l'accusé avant d'entrer dans la remorque (au par. 31) :

> Pour conclure que de tels motifs existaient objectivement, il faut conclure qu'il était déraisonnable pour le policier sur les lieux de tirer une autre conclusion. Le juge du procès n'a toutefois pas expliqué pourquoi il avait rejeté le témoignage du policier à cet égard. À mon avis, une telle omission de clarifier les motifs de sa conclusion que l'on satisfaisait au critère objectif constituait une erreur de droit. [Je souligne.]

Le silence du juge concernait un point d'une importance cruciale. L'aveu du policier équivalait à admettre que l'arrestation n'avait pas été faite conformément à l'art. 495 du *Code*. En omettant ainsi d'expliquer pourquoi il avait rejeté le témoignage du policier, le juge du procès est arrivé à une conclusion qui était inintelligible à la lumière du dossier et dont la justesse ne pouvait pas être examinée par le tribunal chargé de l'appel. Pour reprendre les termes de l'arrêt *Barrett*, précité, par. 1, le fondement de la conclusion n'était pas « évident compte tenu des circonstances ».

J'estime que ces affaires montrent clairement que l'obligation de donner des motifs, lorsqu'elle

circumstances of a particular case. Where it is plain from the record why an accused has been convicted or acquitted, and the absence or inadequacy of reasons provides no significant impediment to the exercise of the right of appeal, the appeal court will not on that account intervene. On the other hand, where the path taken by the trial judge through confused or conflicting evidence is not at all apparent, or there are difficult issues of law that need to be confronted but which the trial judge has circumnavigated without explanation, or where (as here) there are conflicting theories for why the trial judge might have decided as he or she did, at least some of which would clearly constitute reversible error, the appeal court may in some cases consider itself unable to give effect to the statutory right of appeal. In such a case, one or other of the parties may question the correctness of the result, but will wrongly have been deprived by the absence or inadequacy of reasons of the opportunity to have the trial verdict *properly* scrutinized on appeal. In such a case, even if the record discloses evidence that on one view could support a reasonable verdict, the deficiencies in the reasons may amount to an error of law and justify appellate intervention. It will be for the appeal court to determine whether, in a particular case, the deficiency in the reasons precludes it from properly carrying out its appellate function.

existe, découle des circonstances d'une affaire donnée. Lorsque la raison pour laquelle un accusé a été déclaré coupable ou acquitté ressort clairement du dossier, et que l'absence de motifs ou leur insuffisance ne constitue pas un obstacle important à l'exercice du droit d'appel, le tribunal d'appel n'interviendra pas. Par contre, lorsque le raisonnement qu'a suivi le juge du procès pour démêler des éléments de preuve embrouillés ou litigieux n'est pas du tout évident ou lorsque des questions de droit épineuses requièrent un examen, mais que le juge du procès les a contournées sans explication, ou encore lorsque (comme en l'espèce) on peut donner de la décision du juge du procès des explications contradictoires dont au moins certaines constitueraient manifestement une erreur en justifiant l'annulation, le tribunal d'appel peut, dans certains cas, s'estimer incapable de donner effet au droit d'appel prévu par la loi. Alors, l'une ou l'autre des parties pourra douter de la justesse du résultat, mais l'absence de motifs ou leur insuffisance l'aura à tort privée de la possibilité d'obtenir un examen *convenable* en appel du verdict prononcé en première instance. En pareil cas, même si le dossier révèle des éléments de preuve qui, d'une certaine manière, pourraient appuyer un verdict raisonnable, les lacunes des motifs peuvent équivaloir à une erreur de droit et fonder l'intervention d'un tribunal d'appel. Il appartiendra à la cour d'appel de décider si, dans un cas donné, les lacunes des motifs l'empêchent de s'acquitter convenablement de ses fonctions en appel.

3. Miscarriage of Justice

I would certainly not foreclose the possibility that the absence or inadequacy of reasons could contribute to a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) of the *Criminal Code*. Inadequate trial reasons may cause or contribute to an appellate conclusion that the trial judge failed to appreciate important evidence, but the failure might not be based on a misapprehension of some legal principle, and the court therefore may hesitate to characterize it as an error of law: *R. v. Morin*, [1992] 3 S.C.R. 286, at p. 295. In such cases, resort may be had to s. 686(1)(*a*)(iii): *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 17; *Fanjoy v. The Queen*,

3. L'erreur judiciaire

47 Je n'écarterais certainement pas la possibilité que l'absence de motifs ou leur insuffisance puisse mener à une erreur judiciaire au sens du sous-al. 686(1)*a*)(iii) du *Code criminel*. Des motifs insuffisants en première instance peuvent amener la cour d'appel à conclure que le juge du procès a omis d'apprécier un élément de preuve important, mais il est possible que l'omission ne résulte pas de l'interprétation erronée d'un principe juridique et le tribunal pourrait en conséquence hésiter à la qualifier d'erreur de droit : *R. c. Morin*, [1992] 3 R.C.S. 286, p. 295. En pareil cas, on peut recourir au sous-al. 686(1)*a*)(iii) : *R. c. Khan*, [2001] 3 R.C.S. 823,

[1985] 2 S.C.R. 233; *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at pp. 220-21; *R. v. G. (G.)* (1995), 97 C.C.C. (3d) 362 (Ont. C.A.), at p. 380. The present case, in my view, is more properly dealt with as an error of law under s. 686(1)(*a*)(ii).

B) *The Floodgate Argument*

48 Lurking beneath the Crown's argument is perhaps the concern that already burdened trial judges will become overburdened, and appeal courts will be swamped with a wave of new cases based on allegations of non-existent or inadequate reasons. I do not think this is so.

49 Canada has the advantage of professional judges at all levels and for the most part they regard it as a mark of professionalism to give at least an adequate, and usually a more than adequate, explanation of their decisions.

50 It will be up to the appeal courts themselves to determine whether the deficiencies in the trial reasons, taken together with the trial record as a whole, preclude meaningful appellate review. If that is their conclusion, they *should* have the power to intervene. Section 686(1)(*a*)(ii), which may lead to a new trial, is a more proportionate response to such a situation than is an acquittal based on s. 686(1)(*a*)(i) ("unreasonable verdict") which addresses a situation where the verdict itself is the error. In the present case, the verdict itself was not necessarily an error, but the Court of Appeal felt unable to subject the correctness of the conviction to proper appellate scrutiny because of "boilerplate" reasons. This engaged its authority under s. 686(1)(*a*)(ii) of the *Criminal Code* ("error of law"). Given the high standards set by trial judges in this country, I would expect situations to be rare where the verdict is not unreasonable but the right of appeal is nevertheless frustrated by a poor or non-existent set of reasons.

2001 CSC 86, par. 17; *Fanjoy c. La Reine*, [1985] 2 R.C.S. 233; *R. c. Morrissey* (1995), 97 C.C.C. (3d) 193 (C.A. Ont.), p. 220-221; *R. c. G. (G.)* (1995), 97 C.C.C. (3d) 362 (C.A. Ont.), p. 380. À mon avis, la présente affaire relève davantage de l'erreur de droit prévue au sous-al. 686(1)*a*)(ii).

B) *L'argument de l'avalanche de poursuites*

Derrière l'argument du ministère public se profile peut-être la crainte que les juges de première instance, déjà très occupés, deviennent surchargés, et que les cours d'appel soient submergées par une vague de nouvelles affaires fondées sur l'inexistence ou l'insuffisance alléguées des motifs. Je ne pense pas que cela se produira.

Le Canada a l'avantage d'avoir des juges de profession à tous les niveaux et la plupart d'entre eux considèrent comme une marque de professionnalisme d'expliquer leurs décisions, à tout le moins convenablement et habituellement plus que convenablement.

Il reviendra aux cours d'appel de décider si les lacunes des motifs donnés en première instance, analysés globalement avec le dossier d'instruction, font obstacle à un examen valable en appel. Si elles arrivent à cette conclusion, elles *devraient* avoir le pouvoir d'intervenir. Le sous-alinéa 686(1)*a*)(ii), qui peut mener à la tenue d'un nouveau procès, constitue une réponse plus proportionnée qu'un acquittement fondé sur le sous-al. 686(1)*a*)(i) (« verdict déraisonnable »), qui vise le cas où le verdict lui-même est erroné. En l'espèce, le verdict lui-même n'était pas nécessairement erroné, mais la Cour d'appel s'est estimée incapable d'examiner convenablement en appel la justesse de la déclaration de culpabilité parce que les motifs se résumaient à une « formule standard ». Cette conclusion lui permettait d'exercer le pouvoir que lui confère le sous-al. 686(1)*a*)(ii) du *Code criminel* (« erreur de droit »). Compte tenu des normes élevées établies par les juges de première instance au pays, je m'attends à ce qu'il arrive rarement que le verdict ne soit pas déraisonnable, mais que le droit d'appel soit néanmoins compromis par l'insuffisance des motifs ou leur inexistence.

Moreover, for those who fear overburdening already burdened trial judges, the presumption that judges know the law and deal properly with the facts presupposes that whatever time is required to adjudicate the issues has in fact been taken. While, as suggested above, the act of formulating reasons may further focus and concentrate the judge's mind, and demands an additional effort of self-expression, the requirement of reasons as such is directed only to having the trial judge articulate the thinking process that it is presumed has already occurred in a fashion sufficient to satisfy the demand of appellate review.

Where the factual basis of the decision is intelligible to the appellate court for purposes of reviewing its correctness, it would rarely if ever be open to an appellant to argue "intelligibility to the parties" as an independent ground for reversal. It will generally be sufficient for purposes of judicial accountability if the appellate court, having decided that it understands from the whole record (including the allegedly deficient reasons) the factual and legal basis for the trial decision, then communicates that understanding to the accused in its own reasons.

C) *Proponents of a More Extensive Duty to Give Reasons*

I have stressed the necessary connection in the appellate context between the failure to provide proper reasons and frustration of rights of appeal. Some judicial commentators have taken recent cases in this Court and elsewhere as authority for a more general duty to give reasons: see, e.g., "Do Trial Judges Have a Duty to Give Reasons for Convicting?" (1999), 25 C.R. (5th) 150, by Justice Gerard Mitchell of the Prince Edward Island Court of Appeal, at p. 156; Judge Ian MacDonnell of the Ontario Court (Provincial Division), "Reasons for Judgment and Fundamental Justice", in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (1996), 151, at pp. 158-59; and R. J. Allen and G. T. G. Seniuk, "Two Puzzles of Juridical Proof" (1997), 76 *Can. Bar Rev.* 65, at pp. 69-80. See also: D. Stuart, *Charter Justice in Canadian*

51 En outre, pour ceux qui craignent de surcharger les juges de première instance déjà très occupés, la présomption voulant que les juges connaissent le droit et traitent convenablement les faits présuppose qu'ils ont effectivement pris le temps voulu pour statuer sur les questions en litige. Bien que, comme je l'ai dit précédemment, la formulation des motifs puisse amener le juge à concentrer davantage son attention sur l'affaire et à fournir un effort d'expression supplémentaire, l'obligation de donner des motifs ne vise qu'à garantir que le juge du procès expose le raisonnement qu'il est présumé avoir déjà suivi, en des termes suffisants pour en permettre l'examen en appel.

52 Lorsque le fondement factuel de la décision est intelligible pour fins d'examen de sa justesse par la cour d'appel, l'appelant ne pourra que rarement, sinon jamais, soulever l'argument de « l'intelligibilité pour les parties » comme moyen distinct d'annulation. Sur le plan de la responsabilité judiciaire, il suffira généralement que la cour d'appel, ayant décidé que l'ensemble du dossier (y compris les motifs dont on allègue l'insuffisance) lui permet de comprendre le fondement factuel et juridique de la décision de première instance, explique alors à l'accusé ce qu'elle a compris dans ses propres motifs.

C) *Les tenants d'une obligation plus étendue de donner des motifs*

53 J'ai insisté sur le lien nécessaire, dans le contexte d'un appel, entre l'omission de fournir des motifs suffisants et l'entrave à l'exercice des droits d'appel. Certains commentateurs judiciaires se sont appuyés sur la jurisprudence récente de notre Cour et d'autres tribunaux pour avancer qu'il existe une obligation plus générale de donner des motifs : voir p. ex. « Do Trial Judges Have a Duty to Give Reasons for Convicting? » (1999), 25 C.R. (5th) 150, par le juge Gerard Mitchell de la Cour d'appel de l'Île-du-Prince-Édouard, p. 156; le juge Ian MacDonnell de la Cour de l'Ontario (Division provinciale), « Reasons for Judgment and Fundamental Justice », dans J. Cameron, dir., *The Charter's Impact on the Criminal Justice System* (1996), 151, p. 158-159; et R. J. Allen et G. T. G. Seniuk, « Two Puzzles of Juridical Proof » (1997), 76 *R. du B. can.*

Criminal Law (3rd ed. 2001), at p. 187; and G. Cournoyer, Annotation to *R. v. Biniaris* (2000), 32 C.R. (5th) 1, at p. 6. To the extent these commentators are saying that giving reasons is part of the job of a professional judge and accountability for the exercise of judicial power demands no less, I agree with them. To the extent they go further and say that the inadequacy of reasons provides a free-standing right of appeal and in itself confers entitlement to appellate intervention, I part company. The requirement of reasons, in whatever context it is raised, should be given a functional and purposeful interpretation.

65, p. 69-80. Voir également : D. Stuart, *Charter Justice in Canadian Criminal Law* (3e éd. 2001), p. 187; et G. Cournoyer, Annotation to *R. v. Biniaris* (2000), 32 C.R. (5th) 1, p. 6. Dans la mesure où ces commentateurs disent que le prononcé des motifs fait partie du travail d'un juge de profession et que la responsabilité découlant de l'exercice du pouvoir judiciaire n'exige rien de moins, je suis d'accord avec eux. Dans la mesure où ils vont jusqu'à affirmer que l'insuffisance des motifs crée un droit d'appel distinct et confère en soi le droit à l'intervention d'une cour d'appel, je me dissocie d'eux. L'obligation de donner des motifs, peu importe le contexte dans lequel elle est invoquée, devrait recevoir une interprétation fonctionnelle et fondée sur l'objet.

54 Other observers criticize the rationale for the present rules, including the presumption that "judges are presumed to know the law with which they work day in and day out" (*Burns*, *supra*, at p. 664). A review of some reported cases appears in D. M. Tanovich, "Testing the Presumption That Trial Judges Know the Law: The Case of *W. (D.)*" (2001), 43 C.R. (5th) 298. Such attacks, in my view, take insufficient account of the differences between presumptions of law (which this is) and presumptions of fact. The presumption here simply reflects the burden on the appellant to demonstrate errors in the trial decision or to show frustration of appellate review of the correctness of that decision. This is entirely consistent with the normal operation of the adversarial process on appeal. Nothing more is intended. The appellant is not required to "rebut" the presumption of general competence. A judge who knows the law may still make mistakes in a particular case.

D'autres observateurs critiquent le fondement des présentes règles, notamment la présomption selon laquelle « [l]es juges [. . .] sont censés connaître le droit qu'ils appliquent tous les jours » (*Burns*, précité, p. 664). Dans « Testing the Presumption That Trial Judges Know the Law : The Case of *W. (D.)* » (2001), 43 C.R. (5th) 298, D. M. Tanovich fait une recension de certaines décisions publiées. À mon avis, ces critiques ne tiennent pas suffisamment compte des distinctions entre les présomptions de droit (comme en l'espèce) et les présomptions de fait. En l'occurrence, la présomption exprime simplement le fardeau qui incombe à l'appelante de prouver que la décision de première instance comporte des erreurs ou d'établir une entrave à l'examen en appel de la justesse de cette décision. Cette présomption est tout à fait compatible avec le déroulement normal du processus contradictoire en appel. On ne vise rien de plus. L'appelante n'est pas tenue de « réfuter » la présomption de compétence générale. Un juge qui connaît le droit peut néanmoins commettre des erreurs dans une affaire donnée.

D) *A Proposed Approach*

D) *L'approche proposée*

55 My reading of the cases suggests that the present state of the law on the duty of a trial judge to give reasons, viewed in the context of appellate intervention in a criminal case, can be summarized in the following propositions, which are intended to be helpful rather than exhaustive:

Selon mon interprétation de la jurisprudence, l'état actuel du droit en ce qui concerne l'obligation du juge de première instance de donner des motifs, dans le contexte de l'intervention d'une cour d'appel en matière criminelle, peut se résumer par les propositions suivantes, qui se veulent utiles sans être exhaustives :

1. The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.

2. An accused person should not be left in doubt about why a conviction has been entered. Reasons for judgment may be important to clarify the basis for the conviction but, on the other hand, the basis may be clear from the record. The question is whether, in all the circumstances, the functional need to know has been met.

3. The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal. On the other hand, they may know all that is required to be known for that purpose on the basis of the rest of the record.

4. The statutory right of appeal, being directed to a conviction (or, in the case of the Crown, to a judgment or verdict of acquittal) rather than to the reasons for that result, not every failure or deficiency in the reasons provides a ground of appeal.

5. Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the scope of s. 686(1)(*a*) of the *Criminal Code*, depending on the circumstances of the case and the nature and importance of the trial decision being rendered.

6. Reasons acquire particular importance when a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue,

1. Prononcer des décisions motivées fait partie intégrante du rôle du juge. Cette fonction est une composante de son obligation de rendre compte de la façon dont il s'acquitte de sa charge. Dans son sens le plus général, c'est en faveur du public qu'est établie l'obligation de motiver une décision.

2. Il ne faut pas laisser l'accusé dans le doute quant à la raison pour laquelle il a été déclaré coupable. Il peut être important d'exprimer les motifs du jugement pour clarifier le fondement de la déclaration de culpabilité, mais il se peut que ce fondement ressorte clairement du dossier. Il s'agit de savoir si, eu égard à l'ensemble des circonstances, le besoin fonctionnel d'être informé a été comblé.

3. Il se peut que les motifs s'avèrent essentiels aux avocats des parties pour les aider à évaluer l'opportunité d'interjeter appel et à conseiller leurs clients à cet égard. Par contre, il est possible que les autres éléments du dossier leur apprennent tout ce qu'ils doivent savoir à cette fin.

4. Comme le droit d'appel conféré par la loi s'applique à la déclaration de culpabilité (ou, dans le cas du ministère public, au jugement ou au verdict d'acquittement) plutôt qu'aux motifs, chaque omission ou lacune dans l'exposé des motifs ne constituera pas nécessairement un moyen d'appel.

5. L'exposé des motifs joue un rôle important dans le processus d'appel. Lorsque les besoins fonctionnels ne sont pas comblés, la cour d'appel peut conclure qu'il s'agit d'un cas de verdict déraisonnable, d'une erreur de droit ou d'une erreur judiciaire qui relèvent de l'al. 686(1)*a*) du *Code criminel*, suivant les circonstances de l'affaire, et suivant la nature et l'importance de la décision rendue en première instance.

6. Les motifs revêtent une importance particulière lorsque le juge doit se prononcer sur des principes de droit qui posent problème et ne sont pas encore bien établis, ou démêler des éléments

unless the basis of the trial judge's conclusion is apparent from the record, even without being articulated.

7. Regard will be had to the time constraints and general press of business in the criminal courts. The trial judge is not held to some abstract standard of perfection. It is neither expected nor required that the trial judge's reasons provide the equivalent of a jury instruction.

8. The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.

9. While it is presumed that judges know the law with which they work day in and day out and deal competently with the issues of fact, the presumption is of limited relevance. Even learned judges can err in particular cases, and it is the correctness of the decision in a particular case that the parties are entitled to have reviewed by the appellate court.

10. Where the trial decision is deficient in explaining the result to the parties, but the appeal court considers itself able to do so, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial. The error of law, if it is so found, would be cured under the s. 686(1)(*b*)(iii) proviso.

de preuve embrouillés et contradictoires sur une question clé, à moins que le fondement de la conclusion du juge de première instance ressorte du dossier, même sans être précisé.

7. Il faut tenir compte des délais et du volume des affaires à traiter dans les cours criminelles. Le juge du procès n'est pas tenu à une quelconque norme abstraite de perfection. On ne s'attend pas et il n'est pas nécessaire que les motifs du juge du procès soient aussi précis que les directives adressées à un jury.

8. Le juge de première instance s'acquitte de son obligation lorsque ses motifs sont suffisants pour atteindre l'objectif visé par cette obligation, c'est-à-dire lorsque, compte tenu des circonstances de l'espèce, sa décision est raisonnablement intelligible pour les parties et fournit matière à un examen valable en appel de la justesse de la décision de première instance.

9. Les juges sont certes censés connaître le droit qu'ils appliquent tous les jours et trancher les questions de fait avec compétence, mais cette présomption a une portée limitée. Même les juges très savants peuvent commettre des erreurs dans une affaire en particulier, et c'est la justesse de la décision rendue dans une affaire en particulier que les parties peuvent faire examiner par un tribunal d'appel.

10. Lorsque la décision du juge de première instance ne suffit pas à expliquer le résultat aux parties, et que la cour d'appel s'estime en mesure de l'expliquer, l'explication que cette dernière donne dans ses propres motifs est suffisante. Un nouveau procès n'est alors pas nécessaire. L'erreur de droit décelée, le cas échéant, est corrigée au sens du sous-al. 686(1)*b*)(iii).

E) *Application of These Principles to the Facts*

56 The majority judgments of the Newfoundland Court of Appeal found the trial decision unintelligible and therefore incapable of proper judicial scrutiny on appeal. I agree with this conclusion.

E) *L'application de ces principes aux faits*

Les juges majoritaires de la Cour d'appel de Terre-Neuve ont conclu que la décision de première instance n'était pas intelligible et qu'elle rendait donc impossible un examen judiciaire valable en appel. Je souscris à cette conclusion.

1. Intelligibility to the Parties and Counsel

A distinction may be drawn for these purposes between a situation of no reasons and an allegation of inadequate reasons.

In the present case the trial judge stated his conclusion (guilt) essentially without reasons. In the companion appeal in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, the trial judge gave 17 pages of oral reasons, but the accused individuals argued that the reasons overlooked important issues and should be considered inadequate. The two types of situation raise somewhat different problems.

In this case, the trial judge says he "reminded himself" of various things including the burden on the Crown and the credibility of witnesses, but we are no wiser as to how his reasoning proceeded from there. The respondent was convicted of possession of stolen goods. It was central to Ms. Noseworthy's evidence that the "stolen" windows were to be incorporated into the respondent's house, but there was no evidence that a search had been made of his premises. The allegedly stolen property was never found in his possession. The respondent flatly asserted his innocence.

The trial judge's reasons were so "generic" as to be no reasons at all. Speaking of the Crown's attempt to excuse the "boilerplate" reasons by the busy nature of Judge Barnable's courtroom, Green J.A. commented (at. pp. 269-70):

> Reasons also relate to the fairness of the trial process. Particularly in a difficult case where hard choices have to be made, they may provide a modicum of comfort, especially to the losing party, that the process operated fairly, in the sense that the judge properly considered the relevant issues, applied the appropriate principles and

1. L'intelligibilité pour les parties et les avocats

57 Pour les besoins de la présente analyse, on peut faire une distinction entre l'absence de motifs et leur insuffisance alléguée.

58 En l'espèce, le juge du procès a exposé sa conclusion (de culpabilité) essentiellement sans en donner les motifs. Dans le pourvoi connexe *R. c. Braich*, [2002] 1 R.C.S. 903, 2002 CSC 27, le juge du procès a prononcé oralement des motifs qui couvrent 17 pages, mais les accusés alléguaient que ces motifs n'abordaient pas certaines questions importantes et devaient être considérés insuffisants. Ces deux types de situations soulèvent des problèmes quelque peu différents.

59 En l'espèce, le juge du procès dit [TRADUCTION] « s'être rappelé » différentes choses, notamment le fardeau qui incombe au ministère public et la crédibilité des témoins, mais nous n'en savons pas plus sur le raisonnement qu'il a adopté à partir de là. L'intimé a été déclaré coupable de possession de biens volés. Le fait que les fenêtres « volées » devaient être incorporées à la maison de l'intimé se trouvait au cœur du témoignage de M^me^ Noseworthy, mais aucune preuve n'a été présentée pour établir qu'une perquisition avait été effectuée sur les lieux. Les biens censément volés n'ont jamais été trouvés en la possession de l'intimé et ce dernier a catégoriquement clamé son innocence.

60 Les motifs du juge du procès étaient formulés en termes tellement « généraux » qu'il est possible d'affirmer qu'il n'a tout simplement pas motivé sa décision. Au sujet de la tentative du ministère public de justifier la « formule standard » des motifs en invoquant le nombre d'affaires entendues dans la salle d'audience du juge Barnable de la Cour provinciale, le juge Green de la Cour d'appel a fait le commentaire suivant (aux p. 269-270) :

> [TRADUCTION] Les motifs sont également liés à l'équité du procès. En particulier dans un cas épineux où des choix difficiles doivent être faits, ils peuvent offrir la maigre consolation, surtout à la partie perdante, que le procès s'est déroulé équitablement, c'est-à-dire que le juge a évalué convenablement les questions pertinentes,

addressed the key points of evidence and argument submitted.

. . .

It is cold comfort, I would suggest, to an accused seeking an explanation for being convicted in a case where there was a realistic chance of success, to be told he is not entitled to an explanation because judges are "too busy".

I agree, provided it is kept in mind that in the vast majority of criminal cases both the issues and the pathway taken by the trial judge to the result will likely be clear to all concerned. Accountability seeks basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it.

61 Given the weaknesses of the Crown's evidence in this case, even the most basic notion of judicial accountability for the imposition of a criminal record would include accountability to the accused (respondent) as well as to an appellate court: *R. v. Gun Ying*, [1930] 3 D.L.R. 925 (Ont. S.C., App. Div.); *R. v. McCullough*, [1970] 1 C.C.C. 366 (Ont. C.A.).

62 The respondent's expressed bewilderment about the trial judge's pathway through the evidence to his decision is not contrived. The majority of the Newfoundland Court of Appeal shared the bewilderment, as do I.

63 The next question is whether this failure of clarity, transparency and accessibility to the legal reasoning prevented appellate review of the correctness of the decision.

2. Meaningful Appellate Review

64 The majority of the Newfoundland Court of Appeal found the absence of reasons prevented them from properly reviewing the correctness of

qu'il a appliqué les principes appropriés et qu'il a tranché les éléments clés de la preuve et des arguments soumis.

. . .

Pour l'accusé dont les chances de succès étaient réalistes et qui cherche une explication à sa déclaration de culpabilité, c'est une piètre consolation, j'imagine, que de se faire dire qu'il n'a pas droit à une explication parce que les juges sont « trop occupés ».

Je souscris à ce commentaire, à la condition de garder à l'esprit que, dans la grande majorité des affaires criminelles, tant les questions litigieuses que le raisonnement qu'a suivi le juge de première instance pour arriver au résultat seront vraisemblablement clairs pour toutes les parties concernées. La responsabilité judiciaire vise l'équité fondamentale et non la perfection, et elle ne justifie pas qu'on opère un changement indu de perspective en s'attachant davantage à une dissection ésotérique des mots employés pour exprimer le raisonnement qui sous-tend le résultat qu'à la justesse du résultat.

Vu les faiblesses de la preuve du ministère public en l'espèce, même la notion la plus élémentaire de responsabilité judiciaire relativement à la création d'un casier judiciaire engloberait la responsabilité tant envers l'accusé (l'intimé) qu'envers une cour d'appel : *R. c. Gun Ying*, [1930] 3 D.L.R. 925 (C.S. Ont., div. app.); *R. c. McCullough*, [1970] 1 C.C.C. 366 (C.A. Ont.).

La perplexité alléguée de l'intimé à l'égard du cheminement qu'a emprunté le juge du procès pour arriver à sa conclusion eu égard à la preuve n'est pas feinte. Les juges majoritaires de la Cour d'appel de Terre-Neuve étaient eux aussi perplexes, et je le suis tout autant.

L'autre question qui se pose est de savoir si ce manque de clarté, de transparence et d'accessibilité du raisonnement juridique a fait obstacle à l'examen en appel de la justesse de la décision.

2. L'examen valable en appel

Les juges majoritaires de la Cour d'appel de Terre-Neuve ont conclu que l'absence de motifs les empêchait d'apprécier convenablement la

the unknown pathway taken by the trial judge in reaching his conclusion, but which remained unexpressed.

Their problem, clearly, was their inability to assess whether the principles of *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 757, had been applied, namely, whether the trial judge had addressed his mind, as he was required to do, to the possibility that despite having rejected the evidence of the respondent, there might nevertheless, given the peculiar gaps in the Crown's evidence in this case, be a reasonable doubt as to the proof of guilt. The ultimate issue was not whether he believed Ms. Noseworthy or the respondent, or part or all of what they each had to say. The issue at the end of the trial was not credibility but reasonable doubt.

Where a party has a right of appeal, the law presupposes that the exercise of that right is to be meaningful. This obvious proposition is widely supported in the cases. In *R. v. Richardson* (1992), 74 C.C.C. (3d) 15 (Ont. C.A.), for example, the accused was convicted of two counts of sexual assault. On appeal, in an argument that to some extent anticipates the present case, the accused submitted that the trial judge had concentrated solely on the credibility of the complainant and ignored the totality of evidence, particularly the evidence of five other witnesses that corroborated his version of events. In allowing the appeal, Carthy J.A., with whom Finlayson J.A. concurred, stated at p. 23:

> There is no need that the reasons of a trial judge be as meticulous in attention to detail as a charge to a jury. In moving under pressure from case to case it is expected that oral judgments will contain much less than the complete line of reasoning leading to the result. Nevertheless, if an accused is to be afforded a right of appeal it must not be an illusory right. An appellant must be in a position to look to the record and point to what are arguably legal errors or palpable and overriding errors of fact. If nothing is said on issues that might otherwise have brought about an acquittal, then a reviewing court simply cannot make

justesse du raisonnement qu'a adopté le juge du procès pour parvenir à sa conclusion, raisonnement qui est demeuré inexprimé.

65 Manifestement, le problème éprouvé par les juges résidait dans leur incapacité à déterminer si les principes énoncés dans *R. c. W. (D.)*, [1991] 1 R.C.S. 742, p. 757, avaient été appliqués, c'est-à-dire si le juge de première instance s'était interrogé, comme il était tenu de le faire, sur la possibilité qu'en dépit du fait qu'il avait rejeté le témoignage de l'intimé, un doute raisonnable pouvait subsister à l'égard de la preuve de la culpabilité, compte tenu des lacunes particulières de la preuve du ministère public en l'espèce. La question ultime n'était pas de savoir s'il croyait M^me^ Noseworthy ou l'intimé, ni la totalité ou une partie du témoignage de chacun. À l'issue du procès, la question qui se posait n'était pas celle de la crédibilité, mais celle du doute raisonnable.

66 Lorsqu'une partie possède un droit d'appel, la loi présuppose qu'elle peut l'exercer valablement. Cette proposition évidente est largement soutenue par la jurisprudence. Dans l'affaire *R. c. Richardson* (1992), 74 C.C.C. (3d) 15 (C.A. Ont.), par exemple, l'accusé avait été déclaré coupable de deux chefs d'agression sexuelle. En appel, dans une argumentation qui, dans une certaine mesure, anticipe la présente affaire, l'accusé a soutenu que le juge de première instance s'était intéressé uniquement à la crédibilité de la plaignante et qu'il avait ignoré l'ensemble de la preuve, particulièrement le témoignage de cinq autres témoins qui avaient corroboré la version des faits de l'accusé. En faisant droit à l'appel, le juge Carthy, avec l'appui du juge Finlayson, a dit ce qui suit, à la p. 23 :

> [TRADUCTION] Il n'est pas nécessaire que les motifs donnés par un juge de première instance soient aussi détaillés qu'un exposé au jury. Les juges étant pressés de trancher une affaire après l'autre, on s'attend à ce que leurs jugements prononcés oralement soient beaucoup plus succincts que le raisonnement complet qui en sous-tend le résultat. Néanmoins, si un accusé se voit accorder un droit d'appel, celui-ci ne doit pas être illusoire. L'appelant doit être en mesure d'examiner le dossier et d'y repérer les erreurs de droit ou les erreurs de fait manifestes et dominantes susceptibles d'être invoquées. Si le juge est resté muet sur des questions

an assessment, and justice is not afforded to the appellant.

67 To the same effect, see *R. v. Dankyi* (1993), 86 C.C.C. (3d) 368 (Que. C.A.); *R. v. Anagnostopoulos* (1993), 20 C.R. (4th) 98 (Nfld. S.C., App. Div.); *R. v. Davis* (1995), 98 C.C.C. (3d) 98 (Alta. C.A.); and *Hache*, *supra*. In each of these cases, the lack of reasons prevented the reviewing court from effectively addressing important grounds of appeal.

V. Conclusion

68 Cameron J.A., in dissent, protested that "if Ms. Noseworthy's version of events is accepted by the trier of fact there is evidence upon which a trier of fact could reasonably convict" (para. 85). I agree that this case does not amount to an "unreasonable verdict" within the meaning of s. 686(1)(*a*)(i) of the *Criminal Code*. That conclusion, however, did not exhaust the powers of the Court of Appeal. In my opinion, the failure of the trial judge to deliver meaningful reasons for his decision in this case was an error of law within the meaning of s. 686(1)(*a*)(ii) of the *Criminal Code*. The Crown has not sought to save the conviction under the proviso in s. 686(1)(*b*)(iii), and rightly so.

VI. Disposition

69 The appeal is dismissed. Whether or not to hold a new trial is in the discretion of the Attorney General of Newfoundland and Labrador.

Appeal dismissed.

Solicitor for the appellant: The Department of Justice, St. John's, Newfoundland and Labrador.

Solicitors for the respondent: Williams, Roebotham, McKay and Marshall, St. John's, Newfoundland and Labrador.

qui auraient pu par ailleurs conduire à un acquittement, une cour d'appel ne peut tout simplement pas évaluer le dossier et l'appelant ne peut obtenir justice.

Voir, dans le même sens, *R. c. Dankyi* (1993), 86 C.C.C. (3d) 368 (C.A. Qué.); *R. c. Anagnostopoulos* (1993), 20 C.R. (4th) 98 (C.S.T.-N., div. app.); *R. c. Davis* (1995), 98 C.C.C. (3d) 98 (C.A. Alb.); et *Hache*, précité. Dans chacune de ces affaires, l'insuffisance des motifs a empêché la cour d'appel d'examiner efficacement d'importants moyens d'appel.

V. Conclusion

Madame le juge Cameron, dans sa dissidence, a répliqué que [TRADUCTION] « si le juge des faits retient la version des faits de M^me^ Noseworthy, il dispose d'une preuve sur laquelle il peut raisonnablement fonder une déclaration de culpabilité » (par. 85). Je conviens que la présente affaire ne constitue pas un « verdict déraisonnable » au sens du sous-al. 686(1)*a*)(i) du *Code criminel*. Cette conclusion n'a cependant pas épuisé les pouvoirs de la Cour d'appel. À mon avis, en l'espèce, l'omission du juge du procès de motiver valablement sa décision constituait une erreur de droit au sens du sous-al. 686(1)*a*)(ii) du *Code criminel*. Le ministère public n'a pas cherché à valider la déclaration de culpabilité par application du sous-al. 686(1)*b*)(iii), et ce, à bon droit.

VI. Dispositif

Le pourvoi est rejeté. La tenue d'un nouveau procès est laissée à la discrétion du procureur général de Terre-Neuve-et-Labrador.

Pourvoi rejeté.

Procureur de l'appelante : Le ministère de la Justice, St. John's, Terre-Neuve-et-Labrador.

Procureurs de l'intimé : Williams, Roebotham, McKay and Marshall, St. John's, Terre-Neuve-et-Labrador.

TAB C

COURT OF APPEAL FOR ONTARIO

CITATION: Farej v. Fellows, 2022 ONCA 254
DATE: 20220329
DOCKET: C68515

Doherty, Miller and Sossin JJ.A.

BETWEEN

Sabrin Farej, an infant under the age of eighteen years by her Litigation Guardian Amara Idris, Amara Idris, personally and in her capacity as Estate Trustee of the Estate of Romodan Farej

Plaintiffs
(Appellants/Respondents by Cross-Appeal)

and

George Fraser Fellows

Defendant
(Respondent/Appellant by Cross-Appeal)

AND BETWEEN

Murad Farej and Muntasir Farej, a minor by his Litigation Guardian Murad Farej

Plaintiffs
(Appellants/Respondents by Cross-Appeal)

and

George Fraser Fellows

Defendant
(Respondent/Appellant by Cross-Appeal)

John J. Adair, Jordan V. Katz, Duncan Embury, Daniela M. Pacheco and Brandyn Di Domenico, for the appellants

Peter W. Kryworuk and Jacob R.W. Damstra, for the respondent

Heard: October 27 and 28, 2021 by videoconference

On appeal from the judgment of Justice Kelly A. Gorman of the Superior Court of Justice, dated November 23, 2020, and reported at 2020 ONSC 3732, dismissing the action.

Doherty J.A.:

I

OVERVIEW

[1] This is a truly tragic case. Sabrin Farej ("Sabrin") was born on June 3, 2007 in London, Ontario. She was profoundly disabled at birth and continues to be so. Sabrin cannot walk, talk or feed herself. Sabrin requires 24-hour a day care, is totally dependent on her family and caregivers, and will be for the rest of her life. Sabrin's life expectancy is about 38 years.

[2] Sabrin suffered acute near total oxygen deprivation for about 25 to 30 minutes before her birth. The oxygen deprivation led to severe brain damage and damage to other vital organs, leaving Sabrin with multiple devastating, permanent disabilities.

[3] Sabrin, her parents, Amara Idris and Romodan Farej, and her two brothers sued Ms. Idris' obstetrician, Dr. George Fraser Fellows, alleging he was negligent during Sabrin's delivery.

[4] The evidence at trial focused primarily on the 26 minutes between Dr. Fellows' arrival in the delivery room at 11:01 p.m. and Sabrin's delivery at 11:27 p.m. Dr. Fellows faced an obstetrical emergency when he walked into the delivery room. Sabrin was not getting an adequate oxygen supply. Dr. Fellows believed he had to deliver Sabrin as quickly as was safely possible. Dr. Fellows elected to proceed with a vaginal delivery. After two unsuccessful attempts to deliver Sabrin, Dr. Fellows was able to deliver her on his third attempt, some 26 minutes after he entered the delivery room.

[5] The plaintiffs alleged that Dr. Fellows fell below the applicable standard of care in several respects. Their main argument focused on Dr. Fellows' decision to deliver Sabrin vaginally with the assistance of forceps. The plaintiffs argued that the applicable standard of care required Dr. Fellows to proceed immediately with an emergency C-section at 11:05 p.m., by which time he had assessed the situation and observed blood in Ms. Idris' amniotic fluid after he ruptured her membranes. The plaintiffs maintained that by this time, Dr. Fellows knew there was reason to suspect that Ms. Idris had suffered a uterine rupture, a life-threatening complication. He also knew Sabrin's head was above her mother's

pelvic bone. Both the uterine rupture and the position of the baby's head contraindicated a vaginal delivery.

[6] The plaintiffs argued that, had Dr. Fellows proceeded immediately with an emergency C-section, as he should have, Sabrin would have been delivered within 8 to 10 minutes, approximately 12 to 14 minutes before she was actually delivered. The plaintiffs submitted that this delay caused or materially contributed to the catastrophic injuries Sabrin had when she was born.

[7] In addition to arguing that Dr. Fellows should have proceeded immediately with an emergency Caesarean section, the plaintiffs argued that after Dr. Fellows decided to proceed with a vaginal delivery, he made a series of decisions that fell below the applicable standard of care. Those errors, considered individually or cumulatively, caused or materially contributed to Sabrin's injuries.

[8] The trial judge dismissed the action. She found against the plaintiffs on all three issues relevant to liability. First, she found the plaintiffs had failed to establish any breach of the applicable standard of care by Dr. Fellows. Second, she found no causal link between any of Dr. Fellows' actions and Sabrin's injuries. Third, she rejected the argument that Dr. Fellows had failed to obtain the required informed consent before proceeding with a vaginal delivery using forceps.

[9] Although the trial judge found no liability, she proceeded to consider damages. Her damages assessment largely adopted the position advanced by the plaintiffs.

[10] Sabrin, her mother, her brothers, and her father's estate (her father unfortunately died before trial) appeal from the dismissal of the action.[1] They accept that, on the evidence, the trial judge could have dismissed the action. They submit, however, that the reasons are legally inadequate in that they do not permit meaningful appellate review. The appellants advance several arguments which they assert demonstrate the inadequacy of the reasons on most of the crucial issues at trial.

[11] With respect to remedy, the appellants submit that if this court concludes the reasons are inadequate and the judgment must be set aside, this court is not the appropriate forum in which to examine the complicated and conflicting evidence and engage in the extensive fact-finding and credibility assessments necessary to resolve the many contested issues. Counsel submits that the interests of justice require that this court order a new trial on liability.

[12] The respondent describes the appellants' submissions as an attempt to relitigate the credibility assessments and findings of fact made by the trial judge. The respondent submits that a review of the reasons shows the trial judge had a

[1] For ease of reference, I will refer to the appellants/plaintiffs as the appellants in the rest of these reasons.

firm grasp of the evidentiary record, an understanding of the applicable legal principles, and an appreciation of the issues to be resolved. The respondent further contends that the bases upon which the trial judge decided the material issues are clear when the reasons are read in the context of the evidence, and the detailed written and oral submissions made at trial.

[13] Alternatively, the respondent submits that, if the appeal is allowed and a new trial ordered, the new trial should be on all issues, including damage-related issues. The respondent points out that only some of the damage-related issues were addressed by the trial judge. The respondent further contends that if Dr. Fellows is found liable on a retrial, the findings of facts relevant to liability may be relevant to the assessment of damages. Only the trial judge at the retrial can properly make that damage assessment.

[14] The respondent also brings a cross-appeal, challenging aspects of the trial judge's damages assessment. This appeal is contingent upon this court both ordering a new trial on liability and rejecting the respondent's submission that if there is to be a new trial, it should be on all issues, including damages.

[15] The respondent submits, that if this court reaches the contingent cross-appeal, the trial judge made two very significant errors, both of which require a recalibration of the damages as assessed by her.

II

MY CONCLUSION

[16] The evidence at trial was lengthy and complex. The trial judge had to consider a series of difficult factual issues. Her reasons are, in many respects, comprehensive and clear. The appellants contend, however, that the reasons are inadequate in respect of several issues that were central to the appellants' case on liability.

[17] For the reasons that follow, I am satisfied that two of the arguments advanced by the appellants should succeed. The trial judge's reasons with respect to causation and her reasons dealing with one of the several allegations of negligence are inadequate. On these two issues, the reasons do not reveal critical findings that had to be made, and do not explain how the trial judge arrived at some of the conclusions she did reach. This court cannot meaningfully review her decision on those two issues. The inadequacies in the reasons, taken together, require the setting aside of the judgment dismissing the action. I agree with the appellants that, in the circumstances, a new trial is the appropriate remedy. I also agree with the respondent that the new trial should be on all issues relating to liability and damages.

[18] In the reasons that follow, I explain why I conclude the trial judge's reasons are fatally inadequate in respect of the two issues identified above. Given my

conclusion that those errors require a new trial, it is unnecessary to deal with all of the other alleged inadequacies identified by the appellants. I will, however, examine what I see as the other main arguments advanced by the appellants. In my view, none of those arguments should succeed.

III

THE FACTS

[19] This is a fact-intensive appeal. Both counsel, in their written and oral submissions, have gone through the evidentiary record in considerable detail. Different parts of the evidence are germane to different arguments advanced by the appellants. I will leave most of the details of the evidence until I address those specific arguments. What follows is a summary intended to provide the essential narrative and context for the arguments advanced on appeal.

[20] Ms. Idris and her husband, Romodan Farej, immigrated to Canada in 1997. They had a son Murad, born in 1999, and a second son, Muntasir, born in June 2005. Dr. Fellows provided pre- and post-natal care in both pregnancies, but he was not involved in either delivery. By all accounts, Ms. Idris and her husband got along well with Dr. Fellows and they developed a good relationship over the years. Ms. Idris was happy with the care he provided.

[21] When Ms. Idris was pregnant with her first child, Murad, she told Dr. Fellows she would prefer to deliver vaginally. It turned out, however, that Murad was in a

breech position and a Caesarean section was necessary. There were no problems with the delivery or the postnatal care.

[22] When Ms. Idris was pregnant with Muntasir, she told Dr. Fellows she wanted to deliver Muntasir vaginally, even though her first baby was born by Caesarean section. Dr. Fellows explained to her that vaginal birth after a Caesarean ("VBAC") was possible. Ms. Idris eventually gave birth vaginally, although the attending obstetrician had recommended a Caesarean section when Ms. Idris' labour became prolonged. Ms. Idris, however, persisted and her baby was born vaginally. There were no problems.

[23] Just as with Ms. Idris' two earlier pregnancies, Dr. Fellows provided prenatal care to Ms. Idris when she was pregnant with Sabrin in 2006. They discussed how Ms. Idris would give birth. They agreed they would make the decision based on how things were going in the hospital at the time of the birth. The pregnancy was uneventful and Dr. Fellows had no concerns about Ms. Idris' or the baby's wellbeing during the pregnancy.

[24] On June 3, 2007, Ms. Idris went into labour with Sabrin. She arrived at the hospital at about 7:30 p.m. with her husband and a friend. Ms. Idris was told Dr. Fellows was in the hospital and would deliver the baby. The nursing staff immediately put a fetal heart monitor ("FHM") in place.

[25] According to Ms. Idris, she began to experience considerable pain at around 9:30 p.m. The pain continued even after an epidural. She asked to see Dr. Fellows but was told by the nursing staff that it was not time to call him.

[26] By 10:24 p.m., Ms. Idris was fully dilated. As of approximately 10:45 p.m., the FHM had been showing variable decelerations in Sabrin's heart rate for close to an hour. At 10:55 p.m., her heart rate dropped precipitously and remained in a prolonged deceleration, indicating that blood flow to Sabrin's brain had essentially stopped.

[27] The attending nurse paged Dr. Fellows at 10:55 p.m. He was delivering another baby. Dr. Fellows arrived at Ms. Idris' bedside at 11:01 p.m. He quickly determined that Sabrin was not getting an adequate oxygen supply and was in severe distress. At 11:04 p.m., Sabrin's heart rate was bradycardic, meaning it was at or below 60 beats a minute. Bradycardia was a clear sign to Dr. Fellows that Sabrin was not getting oxygen to her brain. Dr. Fellows knew he was facing an obstetrical emergency and had to take immediate action to deliver Sabrin as quickly as safely possible.

[28] Dr. Fellows performed a vaginal and abdominal examination of Ms. Idris. He could see the position of the baby's head. Dr. Fellows realized, that because of Sabrin's positioning, her head would have to be turned if she was delivered vaginally.

[29] At 11:05 p.m., Dr. Fellows artificially ruptured the membranes to facilitate delivery. There was blood in the amniotic fluid. The presence of blood in the amniotic fluid gave Dr. Fellows added concerns about the wellbeing of both Sabrin and her mother. Dr. Fellows suspected a placental abruption, meaning the placenta had detached from the uterus, thereby separating Sabrin from her source of oxygen. Dr. Fellows' differential diagnosis included the possibility that Ms. Idris' uterus had ruptured. A uterine rupture can result in quick and substantial blood loss by the mother and is a life-threatening complication for both the mother and the baby. The two conditions share many symptoms. Both conditions are serious and must be addressed immediately. A uterine rupture is more serious, but a placental abruption is more common.

[30] Dr. Fellows testified that, after he ruptured the membranes, he believed he was dealing with a placental abruption, but was alive to the possibility of a uterine rupture. Dr. Fellows indicated his immediate concern was Sabrin's wellbeing. She had to be delivered immediately. Ms. Idris was stable and alert.

[31] Dr. Fellows decided that a vaginal delivery would be the fastest and safest way to deliver Sabrin. In his evidence, Dr. Fellows outlined several considerations that led him to that conclusion, including Ms. Idris' successful prior vaginal delivery of her second son, who was a larger baby than Sabrin. Dr. Fellows told Ms. Idris to push, but quickly concluded that pushing alone would not deliver Sabrin. Dr. Fellows decided to use forceps to deliver Sabrin.

[32] Using Tucker-McLean forceps, Dr. Fellows began to move the baby down the birth canal. To turn Sabrin's head so she would be in a proper position for delivery, Dr. Fellows had to release the forceps and then reapply them. He anticipated that Sabrin would remain near the crowning position when he released the forceps. Instead, when he released the forceps, there was a large gush of blood and Sabrin retreated back up the vaginal cavity. This occurred at about 11:07 p.m. The blood made Dr. Fellows more concerned about the possibility of a uterine rupture.

[33] Dr. Fellows decided to make a second attempt to deliver Sabrin using forceps. This time, he used Kielland forceps which would allow him to deliver Sabrin without releasing the forceps during delivery. Dr. Fellows applied the forceps and once again the baby began to descend the birth canal. However, as Sabrin approached the crowning position, Dr. Fellows became concerned that if he completed the delivery with the Kielland forceps, the configuration of those forceps would cause considerable damage to Ms. Idris' perineum. Dr. Fellows decided to remove the Kielland forceps, believing that Ms. Idris could push the baby out. When he released the forceps, Sabrin again retreated back into the vaginal cavity.[2] Dr. Fellows now suspected a uterine rupture.

[2] In Dr. Fellows' operative note, he indicated the baby retracted "into the abdomen". In his testimony, Dr. Fellows stated that the note was an error and that it should have read "into the vagina".

[34] Dr. Fellows was cross-examined as to how long his efforts to remove Sabrin with the Kielland forceps took. As I read his evidence, Dr. Fellows agreed his efforts with the Kielland forceps took about five minutes.

[35] Dr. Fellows made a third attempt to deliver Sabrin vaginally with forceps. This time, using the Tucker-McLean forceps, and after performing an episiotomy, which involves cutting the perineum, Dr. Fellows successfully manoeuvred Sabrin to a crowning position. He released the forceps and told Ms. Idris to push. Sabrin arrived about 30 seconds later at 11:27 p.m.

[36] In argument, counsel for the appellants submitted that Dr. Fellows agreed the third and ultimately successful attempt to deliver Sabrin took about 15 minutes. Counsel for the respondent submitted that, while the appellants suggested to Dr. Fellows that the third effort to deliver Sabrin took 15 minutes, he did not agree with that suggestion.

[37] Counsel for Dr. Fellows' reading of the evidence may be accurate. Some of the times relied on by the appellants in their timeline for the delivery are clearly approximations. They are, however, estimates made within an undoubtedly very narrow timeframe. Taking into account the overall timeframe of 26 minutes from Dr. Fellows' arrival in the delivery room to the delivery of Sabrin, and the agreed upon times at which other events occurred, it seems reasonable to conclude the

third and successful attempt to deliver Sabrin took something in the order of 15 minutes.

[38] After Dr. Fellows delivered Sabrin, he took Ms. Idris to the operating room and performed a laparotomy. Dr. Fellows located a laceration on the back of her uterus. Ms. Idris had lost a significant amount of blood. Dr. Fellows successfully repaired and reattached the lower uterine section of the uterus to the walls of the vagina. Ms. Idris stayed in the hospital for seven or eight days, but recovered without further incident.

[39] Ms. Idris was told within a few days that Sabrin had suffered a catastrophic brain injury and would never be able to eat, walk or talk. Ms. Idris had a brief conversation with Dr. Fellows about a month after the delivery. He told her everything was fine until the last minutes.

[40] Dr. Fellows testified that he remains convinced, even with the benefit of hindsight, that he chose the proper mode of delivery and that he was correct in attempting to continue to effect the delivery with forceps even after two unsuccessful attempts. In Dr. Fellows' opinion, had he abandoned vaginal delivery with the use of forceps in favour of a C-section, he "would be dealing with a dead baby".

IV

WERE THE REASONS INADEQUATE?

A. THE APPLICABLE LEGAL PRINCIPLES

[41] Reasons for judgment fully and clearly explaining both the result and the reasons for the result serve several important purposes. Reasons for judgment improve the transparency, accountability and reliability of decision-making, thereby enhancing public confidence in the administration of justice: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S. C.R. 869, at para. 5; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 98; *R. v. G.F.*, 2021 SCC 20,459 D.L.R. (4th) 375, at para. 68; *Sagl v. Chubb Insurance Company of Canada*, 2009 ONCA 388, [2009] I.L.R. I-4839, at paras. 95-99; *Dovbush v. Mouzitchka*, 2016 ONCA 381, 131 O.R. (3d) 474, at paras. 20-23.

[42] In the context of the appeal process, however, the focus is not on the overall quality of the reasons given at trial, or the extent to which those reasons serve all of the purposes outlined above. Instead, the focus is on whether the reasons allow the appeal court to engage in a meaningful review of the substantive merits of the decision under appeal. As Binnie J., with his usual clarity, explained in *Sheppard*, at para. 28:

> It is neither necessary nor appropriate to limit circumstances in which an appellate court may consider itself unable to exercise appellate review in a meaningful way. The mandate of the appellate court is to determine

> the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. Relevant factors in this case are that (i) there are significant inconsistencies or conflicts in the evidence which are not addressed in the reasons for judgment, (ii) the confused and contradictory evidence relates to a key issue on the appeal, and (iii) the record does not otherwise explain the trial judge's decision in a satisfactory manner. Other cases, of course, will present different factors. The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed. [Emphasis added.]

[43] A submission that trial reasons are legally inadequate does not necessarily attack the sufficiency of the evidence, the reasonableness of the factual findings, or allege legal errors in the trial judge's analysis. Rather, the submission that reasons are inadequate amounts to a claim that proper substantive review of the trial judge's reasons is foreclosed by the inadequacy of those reasons. In other words, counsel cannot effectively make arguments about the sufficiency of the evidence, the reasonableness of the fact finding, or alleged errors in law because the reasons of the trial judge do not provide the window into the trial judge's conclusions and reasoning process necessary to make those arguments.

[44] The appellants have a statutory right of appeal from the dismissal of their action. If the appellants are correct and the reasons do not reveal the factual or

legal basis for the trial judge's conclusions, the appellants are effectively denied the exercise of their statutory right of appeal. That denial amounts to both an error in law and can result in a miscarriage of justice.

[45] There is now a deep jurisprudence addressing the sufficiency of reasons as a ground of appeal. The cases repeatedly make two important points. First, the adequacy of reasons must be determined functionally. Do the reasons permit meaningful appellate review? If so, an argument that the reasons are inadequate fails, despite any shortcomings in the reasons. Second, the determination of the adequacy of the reasons is contextual. Context includes the issues raised at trial, the evidence adduced, and the arguments made before the trial judge. For example, if a review of the evidence and arguments indicates that a certain issue played a minor role at trial, the reasons of the trial judge cannot be said to be inadequate because they reflect the minor role assigned to the issue by the parties at trial: *Sheppard*, at paras. 33, 42 and 46; *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at p. 525; *Dovbush*, at para. 23.

[46] In *G.F.*, the Supreme Court of Canada recently cautioned against appellate courts reviewing trial judge's reasons with an overly critical eye, especially in cases turning on credibility assessments: *G.F.*, at paras. 74-76. The majority said, at para. 79:

> To succeed on appeal, the appellant's burden is to demonstrate either error or the frustration of appellate

> review. Neither are demonstrated by merely pointing to ambiguous aspects of the trial decision. Where all that can be said is a trial judge may or might have erred, the appellant has not discharged their burden to show actual error or the frustration of appellate review. Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. It is only where ambiguities, in the context of the record as a whole, render the path taken by the trial judge unintelligible that appellate review is frustrated. An appeal court must be rigorous in its assessment, looking to the problematic reasons in the context of the record as a whole and determining whether or not the trial judge erred or appellate review was frustrated. It is not enough to say that a trial judge's reasons are ambiguous – the appeal court must determine the extent and significance of the ambiguity. [Emphasis added.] [Citations omitted.]

[47] The caution sounded in *G.F.* applies in this appeal. The position of Sabrin's head when Dr. Fellows decided to proceed with a forceps delivery was one of the main contentious factual issues at trial. There was arguably a dramatic inconsistency between Dr. Fellows' description of the position of the head in his operative note and Dr. Fellows' testimony describing the position of Sabrin's head. The appellants vigorously challenged Dr. Fellows' credibility, claiming he fabricated evidence to avoid the implications of the operative note.

[48] The trial judge clearly believed Dr. Fellows' evidence relating to the position of Sabrin's head. The appellants argue she did not adequately explain how she came to that conclusion. In considering that argument, this court cannot engage in its own assessment of Dr. Fellows' credibility under the guise of a purported review

of the adequacy of the trial judge's reasons for believing Dr. Fellows: *R. v. Ramos*, 2020 MBCA 111, at para. 53, aff'd 2021 SCC 15, 457 D.L.R. (4th) 369.

[49] While *G.F.* sounds a clear cautionary note to appellate courts considering arguments based on allegations of the inadequacy of trial reasons, the case does not go so far as to suggest that if reasons that suffer from ambiguity can possibly be read so as to remove the ambiguity, the reasons are legally adequate. If it is not possible to resolve the ambiguity by determining which of multiple possible meanings the trial judge actually intended, the reasons will be incapable of effective appellate review. Ambiguity is of course only one sort of error that can make reasons insufficient for the purpose of appellate review. The appellants in this appeal rely more on the absence of findings or explanations for the findings than they do on any ambiguities in the findings.

[50] Because the adequacy of trial reasons is assessed functionally and depends on the ability of the appellate court to effectively review the correctness of the decision arrived at by the trial court, the appellate court is entitled to look at the record as a whole when determining the trial judge's findings and the reasons for those findings are adequately laid out. For example, in reasons for judgment, the trial judge may find the evidence of a certain witness incredible but say very little about why that finding was made. However, a review by the appellate court of the testimony of that witness may make the reasons for the trial judge's assessment crystal clear. In that circumstance, the appellate court can, by reference to the

testimony, effectively review the trial judge's credibility assessment. Consequently, the reasons do not prevent meaningful appellate review and are not legally inadequate: *G.F.*, at para. 70; *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation No. 231*, 2015 ONCA 520, 389 D.L.R. (4th) 711, at paras. 30-32.

B. THE ISSUES AT TRIAL

[51] There were three broad issues to be resolved at trial. The trial judge set them out early in her reasons (paras. 11-13):

- Did Dr. Fellows have the informed consent of Amara to proceed in the fashion in which he did? [informed consent]
- Did Dr. Fellows fall below the reasonable standard of care of an obstetrician/gynaecologist? In particular, did his failure to immediately perform an emergency Caesarean section fall below the standard of care? [standard of care]
- If Dr. Fellows was negligent, did his acts or omissions cause or materially contribute to the injuries suffered by Sabrin Farej? [causation]

[52] Setting aside the informed consent issue, to succeed at trial, the appellants had to establish both causation and a breach of the standard of care. The trial judge found against the appellants on both issues. To succeed on appeal based on arguments alleging the reasons to be inadequate, the appellants must show the

reasons are inadequate with respect to causation and at least one of the standard of care issues. If the causation reasons do allow for meaningful appellate review of the causation finding, there would be no reason to interfere with the trial judge's finding the appellants failed to prove causation and the appeal would be dismissed, regardless of the adequacy of the reasons relating to standard of care issues. Similarly, if the reasons relating to the standard of care issues allow for meaningful appellate review, the trial judge's finding there was no breach of the standard of care would stand, and the appeal would be dismissed even if the causation reasons were inadequate.

[53] Each of the three issues raised a number of sub-issues, most of which turned on findings of fact. The appellants submit the trial judge failed to make necessary findings and failed to adequately explain those findings she did make. I will examine those arguments by considering the reasons in the following order:

- The causation reasons;
- The standard of care reasons; and
- The informed consent reasons.

C. ARE THE REASONS ON CAUSATION ADEQUATE?

(i) The Evidence

[54] When Sabrin was born, she was suffering from acute near total asphyxia (oxygen deprivation) brought on by a loss of blood flow to her brain prior to delivery.

In all likelihood, Ms. Idris' uterine rupture precipitated Sabrin's acute near total asphyxia.

[55] Sabrin's oxygen deprivation lasted for about 25 to 30 minutes before her delivery. At some point in time during that timeframe, Sabrin suffered permanent brain damage as a result of the ongoing oxygen deprivation.

[56] Oxygen deprivation as a result of acute asphyxia does not lead immediately, or inevitably, to permanent brain damage. Oxygen deprivation will, however, cause permanent brain damage and ultimately death if the deprivation goes on for a sufficiently long time period.

[57] The experts agreed that Sabrin's acute near total asphyxia began between 10:55 p.m., when Sabrin's heart rate dropped precipitously, and 11:04 p.m., when the FHM showed she was bradycardic. None of the experts could say exactly when the acute near total asphyxia began, or when it first caused permanent brain damage. They all agreed the length of time required before permanent brain damage would occur varied and depended on a number of variables.

[58] Dr. Oppenheimer, the defence expert, testified that the state of the baby's oxygen reserves when the acute asphyxia occurred was one of those important variables. Sabrin's heart rate had decelerated at various times in the hour before Dr. Fellows arrived in the delivery room. Dr. Oppenheimer testified that those decelerations put stress on Sabrin's oxygen reserves and would have

compromised, to some degree, her ability to withstand the acute near total asphyxia that occurred some time between 10:55 p.m. and 11:04 p.m. I do not read the evidence of the appellants' experts as contradicting this aspect of Dr. Oppenheimer's evidence.

[59] The experts, as well as Dr. Fellows, also accepted that, as a general rule, the longer and more severe the oxygen deprivation suffered by the baby, the more extensive and severe the brain injuries and other consequential injuries to the baby are likely to be. The increase in the severity of brain damage is not, however, linear or consistent in the sense that it proceeds at a known or predictable rate, or results in the loss of certain specific brain functions in a given order or at specific points in time.

[60] The experts agreed that Sabrin's acute near total asphyxia caused the permanent brain damage which led to her many injuries and disabilities. They gave various estimates as to when Sabrin may have suffered permanent brain damage. The experts made it clear, however, that these were estimates and Sabrin could have suffered permanent brain damage almost at any stage of the asphyxia and certainly before or after the timeframes estimated by the experts.

[61] Dr. Oppenheimer testified that permanent brain damage could occur as quickly as 10 minutes after the initial event causing the acute asphyxia occurred, or permanent damage could occur significantly later. It was Dr. Oppenheimer's

position that the initial event compromising Sabrin's oxygen supply occurred as early as 10:55 p.m. and as late as 11:04 p.m. If the initial incident causing the acute asphyxia occurred at 11:04 p.m., Dr. Oppenheimer testified the permanent brain damage could have occurred by 11:14 p.m.

[62] Dr. Oppenheimer was asked whether Sabrin's injuries could have been avoided or lessened had Sabrin been delivered by Caesarean section as soon as reasonably possible. He responded:

> I think it's quite unlikely that – that she could have been delivered more quickly and, even if she had been delivered more quickly, I think it's unlikely her injuries could have been avoided.

[63] Dr. Shah, the appellants' expert, agreed that Sabrin's acute near total asphyxia began some time between 10:55 p.m. and 11:04 p.m. He also agreed that babies have a limited ability to defend against such events and that the defences can be compromised by a history of heart decelerations during the labour.

[64] Dr. Shah testified that it was his estimate that Sabrin's permanent brain damage occurred between 20 and 30 minutes after the onset of her acute near total asphyxia (10:55 p.m. – 11:04 p.m.). On this estimate, Sabrin could have suffered permanent brain damage as early as 11:15 p.m. Dr. Shah also testified that he would place the onset of Sabrin's permanent brain damage nearer the time

of her actual birth as had it occurred earlier and closer to the 20-minute mark, he did not believe Sabrin would have been born alive.

[65] In cross-examination, Dr. Shah agreed that he could not say with any degree of confidence that Sabrin had not suffered a permanent brain injury within a short period of time after Dr. Fellows arrived in the delivery room. Similarly, he could not say with any confidence that Sabrin had not suffered a permanent brain injury even before Dr. Fellows first attempted to deliver Sabrin vaginally using forceps.

(ii) The causation arguments at trial

[66] There is no suggestion Dr. Fellows did anything, or failed to do anything, that caused Sabrin's acute near total asphyxia. It would appear that the uterine rupture was the physical cause of her near total asphyxia. In legal terms, the near total asphyxia was a non-tortious cause of Sabrin's ultimate injuries. She, in all likelihood, was suffering from acute oxygen deprivation before Dr. Fellows arrived in the delivery room at 11:01 p.m.

[67] The appellants advanced their causation argument at trial through a series of possible scenarios, each based on an alleged act of negligence by Dr. Fellows and a comparison of the time at which the appellants said Sabrin could have been delivered, but for Dr. Fellows' negligence, with the time Sabrin was actually delivered. The appellants argued that the lost time attributable to Dr. Fellows' negligence, which ranged from about 15 minutes on most of the scenarios to 30

seconds on one scenario, caused, or at least materially contributed to, the catastrophic injuries Sabrin had when she was born: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 13-16; *Donleavy v. Ultramar Ltd.*, 2019 ONCA 687, 60 C.C.L.T. (4th) 99, at paras. 72-73.

[68] The respondent met the appellants' causation arguments with the submission that the timelines advanced by the appellants were based on speculation and not evidence. In particular, the respondent submitted that the appellants' contention that he could have delivered Sabrin by emergency Caesarean section in 8 to 10 minutes from the time he made the decision to do an emergency Caesarean section was unrealistic. At trial, Dr. Fellows testified that 8 to 10 minutes took into account only the time between incision and delivery and did not take into account the time needed for the necessary preparation prior to commencing the actual operation.

[69] The respondent also took on the appellants' argument that he caused Sabrin's injuries on a broader front. The respondent argued that on the evidence, especially the evidence of the appellants' expert, Dr. Shah, the appellants had failed to establish on the balance of probabilities that had he delivered Sabrin by emergency Caesarean section as soon as reasonably possible, her delivery at that time would have made any material difference to her physical condition when she was born. The respondent argued that, apart entirely from whether he was negligent, the appellants had failed to demonstrate on the balance of probabilities

that anything he did or did not do caused or materially contributed to Sabrin's injuries. If this argument carried the day, the appellants' other arguments, save one, would necessarily fail.[3]

(iii) The trial judge's causation reasons

[70] The trial judge correctly identified the causation issue early in her reasons, at para. 13:

> If Dr. Fellows was negligent, did his acts or omissions cause, or materially contribute to the injuries suffered by Sabrin Farej?

[71] The trial judge's analysis of the causation issue begins at para. 306. After a thorough and accurate review of the legal principles (paras. 307-23), the trial judge correctly identified the "but for" test as the applicable test to determine causation (para. 325).

[72] The trial judge next reviewed some of the evidence relevant to causation (paras. 326-37). She had outlined the evidence in some detail earlier in her reasons.

[73] After summarizing the evidence, the trial judge turned to the appellants' arguments (paras. 338-41, 343). The trial judge rejected those arguments. In

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[3] The appellants' argument that Dr. Fellows was negligent in not completing the delivery with the Kielland forceps rather than releasing them and having Ms. Idris attempt to push the baby out would still have to be considered as the question of when Sabrin could have been delivered by way of Caesarean section is not relevant to that allegation of negligence. I address that argument below at paras. 141-58.

reference to the submission that Dr. Fellows should have done an immediate C-section, or performed a C-section immediately after the first attempt to deliver Sabrin vaginally failed, the trial judge said, at para. 342:

> These submissions are not founded in the evidence. Dr. Fellows testified that he could perform an emergency c-section within eight to ten minutes from incision to delivery. This estimate does not account for delivery room preparation, patient transportation and the administration of anaesthesia, and there was no evidence called in that regard.

[74] The trial judge next focused on the argument that, on the third attempt to deliver Sabrin, Dr. Fellows had been negligent in removing the forceps and allowing Ms. Idris to push Sabrin out. The appellants argued that by having Ms. Idris push rather than removing Sabrin with the forceps, Dr. Fellows added 30 seconds to the delivery, causing additional brain damage to Sabrin. The appellants emphasized that, by this time, Sabrin had been in an acute asphyxic state for up to 32 minutes. The trial judge dismissed this argument, at para. 344:

> At its highest, this argument is grounded in “loss of chance”. As the court stated in *Laferriere* (*supra*), a mere loss of chance is not compensable in medical malpractice cases.

[75] The trial judge had, earlier in her reasons, summarized the case law distinguishing between causation and a mere loss of chance (para. 323).

[76] After rejecting the appellants’ arguments, the trial judge turned to the respondent’s submission that the appellants had failed to prove on the balance of

probabilities that anything Dr. Fellows did or failed to do was causally linked to Sabrin's injuries. The trial judge referred to Dr. Oppenheimer's evidence that he did not think it likely that a quicker delivery would have avoided the injuries suffered by Sabrin. The trial judge also referred to the evidence that permanent brain damage may have occurred within 10 minutes of the initial near total asphyxia. On the evidence of both experts, near total asphyxia may have occurred as early as 10:55 p.m. Finally, the trial judge referred to Dr. Fellows' evidence that had he abandoned the forceps delivery, he "would be dealing with a dead baby". The trial judge then concluded, at para. 348:

> I can find no causal connection between Dr. Fellows' actions and Sabrin's injuries.

[77] I read this as a finding that the appellants had not proved that Dr. Fellows did or failed to do anything that materially contributed to the injuries Sabrin had when she was born. The appellants vigorously argue that this simple, short, single sentence all but ended their case. They submit they were entitled to an explanation as to how the trial judge arrived at that conclusion.

(iv) The appellants' submissions

[78] In support of their contention that the reasons do not explain the trial judge's causation finding, the appellants submit that the trial judge never came to grips with the evidence about the time needed to perform an emergency Caesarean section. They contend the trial judge, at para. 342, wrongly concluded "there was

no evidence" as to the time needed to perform an emergency Caesarean section. The appellants point to the evidence of Dr. Cohen in which he opined that 8 to 10 minutes to perform an emergency Caesarean section was a generous estimate and included the minimal preparation time needed for the procedure.

[79] The appellants submit that without coming to a conclusion as to the time needed to perform an emergency Caesarean section, the trial judge could not rationally decide whether the failure to perform an emergency Caesarean section caused or materially contributed to Sabrin's injuries. The determination of whether any causal link existed between the failure to perform an emergency Caesarean section and Sabrin's injuries could only be properly made after a finding of what delay, if any, occurred between the time at which Sabrin could have been delivered by way of emergency Caesarean section and the actual delivery time. If the trial judge found the failure to perform an emergency Caesarean section did delay Sabrin's birth, she would then have had to determine whether that delay caused or materially contributed to the injuries Sabrin had when she was born.

[80] The appellants further submit that, although the trial judge recognized early in her reasons that a material contribution to Sabrin's injuries sufficed to establish causation, she ignored the "material contribution" component of the causation inquiry when considering the effect of any delay in the delivery of Sabrin on her catastrophic condition when she was born. The appellants submit the trial judge's reasons on causation indicate she approached causation as if the injuries Sabrin

had when she was born occurred at a specific point in time when she suffered permanent brain damage, rather than over a period of time after she had suffered permanent brain damage due to acute oxygen deprivation. The appellants contend that it cannot be determined from the trial judge's reasons whether in finding no causal connection between Dr Fellows' actions and Sabrin's injuries, the trial judge even considered whether an earlier delivery by way of emergency Caesarean section would have materially reduced the extent of Sabrin's permanent brain damage and the injuries suffered by her.

[81] The appellants argue the absence of any reference in the reasons to the possibility that the failure to perform an emergency Caesarean section may have materially reduced Sabrin's injuries, even if it did not entirely eliminate the brain damage caused by the near total asphyxia, is especially important given the nature of the evidence adduced in this case. The experts and Dr. Fellows agreed that time was of the essence and minutes counted, both in respect of the likelihood of permanent brain damage and the potential severity of that damage. The appellants ask rhetorically what did the trial judge make of the consensus opinion that the longer Sabrin suffered oxygen deprivation, the more probable permanent brain damage and the more severe that permanent brain damage was likely to be? The appellants submit the reasons provide no answer to this fundamental question.

(v) The respondent's submission

[82] The respondent replies that the reasons of the trial judge reveal a full command of the evidence and the legal principles applicable to causation, including the recognition that causation extends to factors which materially contribute to the injury.

[83] The respondent urges the court in assessing the adequacy of the causation reasons to consider those reasons in the context of the evidence relating to causation. The respondent maintains that the evidence, especially the evidence of the appellants' expert, Dr. Shah, offers no support for the conclusion that Dr. Fellows did anything that caused Sabrin's injuries. The respondent submits that, on the evidence, no one could say that Sabrin was not permanently brain damaged before Dr. Fellows was in the delivery room, and no one could say what effect any delay in the delivery had on the extent of the injuries actually suffered by Sabrin. Nor could any of the experts indicate that had Sabrin been delivered before a specific point in time she would not have suffered the same kind of injuries she ultimately suffered. The respondent emphasizes that the appellants had the burden of proof on causation. Evidence that Dr. Fellows may or may not have caused or materially contributed to Sabrin's injuries would not suffice to meet that burden.

(vi) Analysis

[84] I agree with the thrust of the appellants' submissions on the causation issue. The reasons tell us that the trial judge decided that nothing Dr. Fellows did caused the injuries. Unfortunately, the reasons do not tell us how the trial judge arrived at her conclusion, or whether in doing so she addressed not only causation in the narrowest sense, but also causation by way of a material contribution to the injuries actually suffered by Sabrin: *Dunleavy v. Ultramar Ltd.*, at paras. 72-73.

[85] To decide whether Dr. Fellows' decision to proceed with a vaginal birth rather than an emergency C-section caused, or materially contributed to, Sabrin's injuries, the trial judge had to make three factual findings:

- When would Sabrin have been delivered had Dr. Fellows elected to proceed with an emergency C-section at 11:05 p.m.?
- What delay occurred as a result of Dr. Fellows' decision to proceed with a vaginal delivery rather than an emergency Caesarean section? This calculation required a comparison of the time of the delivery had a C-section been done and the actual time of delivery.
- Did the delay, as quantified at step 2, cause or materially contribute to the injuries Sabrin had when she was born?

[86] If the trial judge found the delay did cause or materially contributed to Sabrin's injuries, she would have had to go on and determine whether that delay

was the product of Dr. Fellows' negligence, that is did his decision not to perform an emergency Caesarean section fall below the applicable standard of care?

[87] The evidence indicates that Dr. Fellows was in the position to determine the appropriate mode of delivery at 11:05 p.m. By that time, he had assessed the patient and artificially ruptured the membranes. He fully appreciated the urgency of the situation, believed that Ms. Idris had suffered a placental abruption, but also realized that a uterine rupture was a possibility.

[88] There was conflicting evidence about how long it would take Dr. Fellows to deliver Sabrin by Caesarean section had he decided to follow that course of action. On Dr. Cohen's evidence, 8 to 10 minutes from decision to delivery was a generous estimate and, in many cases, the delivery could be completed in less time. Dr. Cohen explained there was virtually no preparation involved in an emergency Caesarean section once the patient was in the operating room and anesthetized. The operating room was directly across from the delivery room, and there was an anesthetist available.

[89] Dr. Fellows indicated in his discovery that it would take 8 to 10 minutes to complete an emergency Caesarean section. He later explained at trial that 8 to 10 minutes referred to the time needed from incision to delivery and did not include preparation time.

[90] In extracts from his discovery read in at trial, Dr. Fellows indicated that a "normal emergency Caesarean section" took "15, 20 minutes". When asked to "deal with this case", Dr. Fellows stated that if Ms. Idris was properly anaesthetized, an emergency Caesarean section could be done within 8 to 10 minutes.

[91] The trial judge did not refer to the evidence given by Dr. Fellows on his discovery. She also made no finding as to how long the necessary preparation would take. In her reasons (para. 342), she wrongly indicated there was "no evidence called" on that issue. In fact, as summarized above, Dr. Cohen had testified the preparation time would be very brief.

[92] Dr. Oppenheimer agreed with Dr. Fellows' evidence that the 8 to 10-minute estimate did not include preparation time. As I read his evidence, he offered no opinion as to the length of that preparation time and no opinion as to the time needed to complete a Caesarean section in the circumstances faced by Dr. Fellows.

[93] There was also evidence that Ms. Idris' first son was born by way of emergency Caesarean section at the same hospital. That procedure took seven minutes from administration of the anaesthesia to completion of the procedure. The circumstances, however, at the time of the birth of Ms. Idris' first child were very different than those faced by Dr. Fellows.

[94] On my review of the reasons, the trial judge accepted Dr. Fellows' evidence that the estimate of 8 to 10 minutes to conduct an emergency Caesarean section did not include preparation time. The trial judge made no findings beyond that.

[95] This was no minor factual matter. I agree with the appellants that without arriving at a time, or at least a timeframe, within which the emergency Caesarean section could have been completed, the finding of no causal connection between Dr. Fellows' actions and the injuries is unintelligible. This is particularly true bearing in mind that causation is established if the delay brought about by the failure to perform the immediate Caesarean section materially contributed to Sabrin's ultimate injuries.

[96] In light of the evidence that Sabrin's permanent brain damage occurred over a period of time during which she was acutely oxygen deprived, and that the damage worsened the longer the deprivation lasted, it was critical to the causation inquiry that the trial judge decide when Sabrin could have been delivered by emergency Caesarean section. Without a finding of at least a timeframe within which the Caesarean section could have been completed, there could be no finding as to how long, if at all, Sabrin was oxygen deprived as a consequence of the failure to deliver her by way of emergency Caesarean section. Without that finding, there could be no meaningful inquiry into whether the delay, if any, caused or materially contributed to Sabrin's injuries.

[97] There are avenues through the evidence which, if followed by the trial judge, could reasonably have led her to conclude that even if an emergency Caesarean section had been performed, Sabrin would not have been delivered sufficiently prior to 11:27 p.m. to make any material difference to the outcome. Nothing in the reasons, however, allows me to conclude the trial judge followed one of those roads.

D. ARE THE REASONS ON THE STANDARD OF CARE ISSUES ADEQUATE?

[98] The trial judge correctly identified the applicable standard of care (paras. 230-38) – did Dr. Fellows exercise the degree of skill and knowledge expected of an average competent obstetrician in the circumstances: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 46. The trial judge approached the standard of care issues by asking herself three questions:

- Did Dr. Fellows fall below a reasonable standard of care in failing to document any discussion with Ms. Idris, including benefits, risks and options?
- Did Dr. Fellows fall below a reasonable standard of care in failing to recognize Ms. Idris' uterine rupture?
- Did Dr. Fellows fall below a reasonable standard of care in performing a forceps delivery when Sabrin was station -1?

(1) Did the trial judge ask herself the wrong question?

[99] This submission focuses on the second of the three questions posed by the trial judge. The appellants submit that, while Dr. Fellows' failure to diagnose a uterine rupture had some relevance to the standard of care issues, none of the appellants' arguments depended on a finding that Dr. Fellows was negligent in failing to recognize Ms. Idris' uterine rupture.

[100] At trial, the appellants argued the applicable standard of care required Dr. Fellows to perform an immediate Caesarian section if a uterine rupture was on his differential diagnosis, even if he believed a placental abruption was the more likely cause of Sabrin's distress and the bleeding.

[101] A differential diagnosis recognizes various possible causes of a given medical problem. A uterine rupture, and a placental abruption, can generate many of the same symptoms. Both were on Dr. Fellows' differential diagnosis from the outset. After his initial assessment of Ms. Idris, Dr. Fellows believed that a placental abruption was the more likely diagnosis, but a uterine rupture remained on his differential diagnosis.

[102] The appellants contend that, under the applicable standard of care, Dr. Fellows was required to first address the most serious condition on his differential diagnosis. A uterine rupture is a more serious diagnosis than a placental abruption. A uterine rupture puts the life of both the mother and the baby at very real risk. The

appellants submit an immediate Caesarean section was the only way to properly address the risks posed by a uterine rupture.

[103] The appellants submit that, despite the centrality of the appellants' submission that a differential diagnosis, including a uterine rupture, requires an immediate Caesarean section, the trial judge ignored Dr. Fellows' acknowledgement that a uterine rupture was on his differential diagnosis, and instead focused on the reasonableness of Dr. Fellows' diagnosis of a placental abruption as the more likely cause of Sabrin's bradycardia. The appellants argue that the trial judge's ultimate determination that Dr. Fellows' diagnosis of a placental abruption was reasonable, at para. 277, did nothing to resolve the crucial question of whether the applicable standard of care required him to proceed immediately with an emergency Caesarean section.

(i) The evidence on whether Dr. Fellows was required to proceed with an immediate Caesarean section

[104] Dr. Cohen, the appellant's expert, testified:

> He should have been suspicious of uterine rupture, and unless the fetus is able to be readily delivered, meaning at the perineum, or basically crowning, he should have proceeded to laparotomy [Caesarean section].

[105] Dr. Cohen indicated that in the face of a possible uterine rupture, both the mother and baby were in jeopardy. Dr. Fellows had to "expedite delivery". In Dr.

Cohen's opinion, in the circumstances faced by Dr. Fellows, an emergency Caesarean section was the only way to adequately expedite delivery.

[106] In advancing his opinion, Dr. Cohen relied on guidelines prepared by the Society of Obstetricians and Gynecologists ("SOGC") and, in particular, recommendation No. 7:

> Suspected uterine rupture requires urgent attention and expedited laparotomy to attempt to decrease maternal and perinatal morbidity and mortality.

[107] Dr. Fellows acknowledged that a uterine rupture was a possible diagnosis. In his view, regardless of the cause of the problem, it was imperative that Sabrin be delivered as quickly and safely as possible both for her wellbeing and her mother's wellbeing. Delivering Sabrin as quickly as possible was essential, given her acute fetal distress. A quick delivery of Sabrin would also allow Dr. Fellows to examine Ms. Idris' uterus and conduct any needed repairs. Those repairs could not be performed until Sabrin was delivered.

[108] The SOGC guidelines were put to Dr. Fellows. He testified he did not treat the guidelines as rules, but as aides to the exercise of his clinical judgment. That clinical judgment had to be made depending on the exact circumstances in any specific case.

[109] Dr. Oppenheimer agreed with Dr. Fellows' approach. In his opinion, if, on a clinical assessment, a vaginal delivery was appropriate, the possibility of a uterine

rupture did not dictate that a Caesarean section was the only appropriate mode of delivery. The essence of Dr. Oppenheimer's evidence is set out below:

> There are any [m]any causes, of course, of fetal distress but in this scenario the causes we're concerned about are potentially abruption or uterine rupture, those are the two, and you can perform a forceps delivery, it doesn't matter what you consider the underlying etiology, if the patient meets your, you know, prerequisites and you feel you are going to succeed you can go ahead and do a forceps. The indication is not an issue.
>
> …
>
> [I]n every case where you come in the room and you have pain, bleeding and severe fetal distress, the differential diagnosis is always abruption versus rupture and you do not always assume that it's – that it's rupture because if it's abruption then – well it doesn't matter. Either way, the action is the same, urgent delivery. So, it doesn't matter which one you're prioritizing in what we discussed before in the differential, urgent delivery is the treatment of both.

[110] As I read the evidence of the experts and Dr. Fellows, the primary concern had to be to deliver Sabrin as quickly as safely possible. Delivering Sabrin would not only address her ongoing oxygen deprivation, but would also allow the doctor to locate and fix any uterine rupture Ms. Idris may have suffered.

[111] The experts differed on one essential point. In Dr. Cohen's view, an urgent delivery meant a delivery by way of emergency Caesarean section, except in those cases where it was obvious from the positioning of the baby that it could be delivered immediately vaginally. On the view of Dr. Fellows and Dr. Oppenheimer, the question of how best to deliver the baby quickly and safely involved a greater

element of clinical judgment and an assessment of various factors. In Dr. Oppenheimer's opinion, Dr. Fellows exercised that judgment appropriately when he decided to proceed with a vaginal delivery.

(ii) Analysis

[112] I agree with the appellants' submission that the reasonableness of Dr. Fellows' diagnosis of a placental abruption was not determinative of whether Dr. Fellows was negligent in failing to conduct an immediate Caesarean section. The trial judge's analysis of the reasonableness of Dr. Fellows' diagnosis of placental abruption (paras. 268-79) provides no answer to the claim that he was negligent in failing to perform an emergency Caesarean section once a uterine rupture was on his differential diagnosis. Although the trial judge, at para. 12, properly identified the issue as being whether Dr. Fellows fell below the standard when he failed to perform an immediate Caesarean section, her ultimate analysis, to the extent it focused on whether the failure to diagnose a uterine rupture was negligent, misapprehended the case advanced by the appellants.

[113] This misstep by the trial judge in her reasons does not, however, mean the reasons are inadequate. The reasons must be considered as a whole. Reasons may address issues that do not have to be addressed, or reasons may mischaracterize issues. What is important in an inquiry into the adequacy of the reasons is not necessarily the shortcomings of the reasons, but whether they

ultimately explain the basis for the decisions which had to be made to render the judgment in question. Effective appellate review may involve more work with some judgments than others. As long as the review can be conducted, the reasons are adequate.

[114] Looking at the reasons as a whole, it is clear the trial judge reviewed the evidence of Dr. Fellows concerning his decision to proceed with a vaginal delivery in some detail when she was outlining the evidence of various witnesses: at paras. 90-111, 143, 165, 171-84. The trial judge also thoroughly reviewed the experts' evidence and the differing opinions as to whether the applicable standard of care required an immediate emergency Caesarean section. The trial judge specifically accepted Dr. Oppenheimer's evidence to the effect that "a forceps delivery was clearly the best choice" (paras. 294-95). She also accepted, at para. 298, his evidence of the interpretation of the relevant guidelines as not precluding a forceps delivery in the circumstances faced by Dr. Fellows.

[115] The reasons of the trial judge reveal an appreciation of the conflicting evidence on the issue of whether Dr. Fellows should have proceeded with an emergency Caesarean section. The reasons demonstrate that the trial judge resolved the conflicting evidence by preferring the evidence of Dr. Oppenheimer over Dr. Cohen's evidence. The trial judge preferred the approach which placed more emphasis on individual clinical judgments over Dr. Cohen's approach, which favoured more of a bright line rule when a uterine rupture was on the differential

diagnosis. The trial judge's clear command of the content of the evidence given by the experts and Dr. Fellows supports the conclusion that she preferred Dr. Oppenheimer's opinion after a critical assessment of the evidence offered by both experts for and against their respective positions. The trial judge appreciated the substance of the evidence given by the experts, the points of contention between them, and ultimately determined she preferred Dr. Oppenheimer's evidence on this point.

[116] The clarity of the trial judge's reasons may have been enhanced had she dealt with the question of whether an immediate emergency Caesarean section was Dr. Fellows' only option under its own specific heading. Formatting deficiencies will, however, seldom render reasons unintelligible. The reasons for the trial judge's finding that Dr. Fellows was not negligent in proceeding with a vaginal forceps delivery reveal both what the trial judge decided and why she rendered that decision. The reasons permit meaningful appellate review.

(2) Did the trial judge fail to engage with and decide Dr. Fellows' credibility in respect of his evidence that Sabrin's head was engaged when he attempted the forceps delivery?

[117] The position of Sabrin's head when Dr. Fellows elected to proceed with a vaginal delivery using forceps was a crucial factual issue at trial. If her head was

not engaged, meaning it was above Ms. Idris' pelvic bone, Dr. Fellows and the experts agreed that a forceps delivery should not be attempted.

(i) The evidence on the location of Sabrin's head

[118] In his operative note prepared shortly after the delivery, Dr. Fellows referred to Sabrin's head as being at station -1 when he conducted his vaginal exam. Dr. Fellows made no mention of whether the head was "engaged".

[119] Dr. Cohen testified that a reference to the baby's head being at station -1 meant that the head was above the pelvic bone and, therefore, not engaged. To be engaged, the head had to be at station 0 or lower (station +1). Dr. Cohen referred to various texts in support of his definition of "engaged".

[120] Dr. Cohen was asked about Dr. Fellows' evidence on his discovery to the effect that Sabrin's head was "engaged at station -1". Dr. Cohen replied that as a trained experienced obstetrician, Dr. Fellows would know that if the head was at station -1, it could not be engaged.

[121] The appellants submitted that Dr. Fellows' operative note accurately described the position of Sabrin's head when Dr. Fellows attempted a forceps delivery. That position effectively ruled out the use of forceps and, therefore, by necessary implication, a vaginal delivery.

[122] Dr. Fellows acknowledged that when he initially did his vaginal examination, Sabrin's head was "just above spines", meaning the head was not engaged. Dr.

Fellows indicated that when he ruptured the membranes, the head descended slightly. By the time he completed the pelvic exam, Sabrin's head was engaged and remained so. Dr. Fellows agreed that his operative note made no reference to the head being engaged and that he did not amend the document at any time.

[123] Dr. Oppenheimer testified that Sabrin's head may have descended from station -1 before Dr. Fellows applied the forceps. The descent may have been caused by the rupture of the membranes, or Ms. Idris' pushing. Contrary to Dr. Cohen, Dr. Oppenheimer indicated that a designation of the head as being at station -1 was not necessarily incompatible with the observation that the head was below the pelvic bone and, therefore, engaged.

(ii) Analysis

[124] The trial judge ultimately accepted Dr. Fellows' evidence that he could see that Sabrin's head was engaged before he used the forceps. The trial judge accepted this evidence for two reasons. First, Dr. Fellows indicated the rupture of the membranes caused the head to descend (para. 301). Second, Dr. Fellows, who was by all accounts an experienced and skilled obstetrician, testified as to what he saw, and in particular, the location of Sabrin's head. He knew the significance of the location of the head when considering whether to attempt a forceps aided delivery (para. 304).

[125] The trial judge reviewed the relevant evidence at length. It was open to her to accept Dr. Fellows' evidence. She did not misapprehend any of the evidence relevant to this point. The two reasons she gave for accepting Dr. Fellows' evidence offer an intelligible explanation for her conclusion.

[126] Dr. Fellows' evidence that Sabrin's head moved slightly downward after he ruptured the membranes was supported, to some extent, by evidence from the experts, including Dr. Cohen, who agreed that a rupture of the membranes could cause the baby's head to move downward.

[127] I am satisfied that, the trial judge did not take an improper approach in her assessment of Dr. Fellows' evidence by taking into account his acknowledged experience and expertise. The trial judge found it unlikely that a person of Dr. Fellows' experience and expertise would, be mistaken in his observation of the location of Sabrin's head, a crucial consideration in determining how best to deliver Sabrin. The trial judge, for the same reason, found it implausible that Dr. Fellows would proceed with a vaginal delivery using forceps unless he was satisfied the head was engaged, a prerequisite to proceeding with a vaginal delivery.

[128] The trial judge did not engage in circular reasoning, but simply took into account Dr. Fellows' experience and expertise when considering the credibility and reliability of his evidence as to what he saw when he examined Ms. Idris in preparation for the delivery of Sabrin.

[129] The appellants, as they did at trial, argue that Dr. Fellows tailored his evidence about the location of Sabrin's head to coincide with certain suggestions found in Dr. Oppenheimer's report. They contend Dr. Fellows first testified that Sabrin's head moved downward after his initial examination after Dr. Fellows had read Dr. Oppenheimer's report in which he offered that possible explanation. The appellants submit the trial judge failed to consider this argument.

[130] Dr. Fellows did refer to Sabrin's head as being engaged in his discovery evidence, although he coupled that reference with an indication it was at "station -1". It does not appear that Dr. Fellows was asked questions on discovery about the position of Sabrin's head or any movement of her head after his initial assessment.

[131] Certainly, it was open to the appellants to argue that Dr. Fellows' trial evidence as to the positioning of Sabrin's head was coloured by his reading of Dr. Oppenheimer's report. The appellants made that argument at trial and I have no doubt the trial judge considered it. Her failure to address the argument specifically in her reasons does not undermine the explanation she gave for accepting Dr. Fellows' evidence as to the position of Sabrin's head. Trial judges are not required to answer every argument made by counsel at trial, particularly an argument predicated in part on the submission that the trial judge should draw an adverse inference with respect to credibility because a party failed to volunteer information on discovery. The reasons admit of meaningful appellate review.

(3) Did the trial judge fail to explain why she rejected the appellants' submission that Dr. Fellows should have done an emergency Caesarean section after the first attempt to deliver with forceps failed?

(i) The appellants' argument

[132] The first attempt to deliver Sabrin with forceps failed at about 11:07 p.m. The appellants submitted that as of 11:07 p.m., Dr. Fellows had two new additional factors to take into account when deciding how to proceed. First, the gush of blood and the immediate retreat of Sabrin's head gave Dr. Fellows even more reason to suspect Ms. Idris had suffered a uterine rupture. Second, under the SOGC guidelines, the failure to successfully deliver a baby using one technique was itself a reason to consider using a different approach.

[133] The appellants submit that these two new considerations should have led Dr. Fellows to change the mode of delivery from a vaginal delivery with forceps to an emergency Caesarean section. His failure to do so cost valuable time and caused or materially contributed to Sabrin's injuries.

[134] The appellants acknowledge that the trial judge rejected this argument. She said, at para. 304:

> Given the exigent circumstances and what was known at the time, Dr. Fellows acted reasonably in pursuing an operative vaginal delivery with forceps. Once he made that decision it was imperative that he follow through.

> Failure to do so, in all likelihood, would have resulted in the death of the baby.

[135] The appellants submit that the trial judge's reasons offer no explanation for her conclusion that Sabrin would likely have died had Dr. Fellows decided to perform an emergency Caesarean section at about 11:07 p.m. The appellants also submit the reasons offer no explanation for the trial judge's conclusion that it was "imperative" that Dr. Fellows follow through with a vaginal delivery, despite the change in the relevant circumstances.

(ii) Analysis

[136] There is merit to the appellants' submission. The trial judge's reasons shed no light on how the trial judge came to her conclusion that Sabrin would in all likelihood have been dead before she was born had Dr. Fellows ordered an emergency Caesarean section at 11:07 p.m. Certainly, Dr. Fellows gave that evidence. However, Dr. Fellows offered no evidence as to when he could have completed a Caesarean section had he decided at 11:07 p.m. to abandon the vaginal delivery in favour of an immediate emergency Caesarean section.[4]

[137] It may be that Dr. Fellows concluded that as Sabrin was born alive at 11:27 p.m., she would have been delivered some time after 11:27 p.m. had he decided to perform a Caesarean section at or about 11:07 p.m. Unfortunately, Dr. Fellows

[4] Dr. Fellows did give evidence on his discovery about the time needed to perform an emergency Caesarean section. Those parts of his discovery were read in at trial and are summarized above at paras. 88-91.

did not explain in his evidence why he believed Sabrin would not have survived the birth had he proceeded with a Caesarean section. Nor does the trial judge explain how she came to accept Dr. Fellows' evidence that Sabrin would not have survived had he proceeded with a Caesarean section when he gave no evidence as to when he believed she could have been delivered had he decided to proceed with a Caesarean section.

[138] Despite the shortcomings described above, the trial judge's reasons on this issue can be effectively reviewed in this court. As outlined above, the trial judge accepted the defence evidence that, regardless of the medical cause of the problem faced by Dr. Fellows, Sabrin's delivery as quickly as it could be safely done had to be the priority, both from Sabrin's perspective, and from Ms. Idris' perspective. Because the trial judge accepted the defence evidence that the need to deliver Sabrin as quickly as possible remained the primary concern regardless of the cause of the problem, Dr. Fellows' added suspicion of a uterine rupture after the blood gush during the first failed attempt to deliver Sabrin would not have caused him to rethink the appropriate mode of delivery. The speed with which he could deliver Sabrin safely remained the primary concern.

[139] There was also nothing in the failed attempt to deliver Sabrin which would have suggested to Dr. Fellows that a further attempt to deliver with forceps would delay Sabrin's birth beyond the time needed to effect the delivery by way of emergency Caesarean section. Dr. Fellows had moved Sabrin to crowning position

within about one minute of the application of the forceps. Sabrin's size presented no impediment to a vaginal delivery. It was reasonable for Dr. Fellows to conclude he could reapply the forceps, this time using a kind of forceps that would avoid releasing the head, and deliver the baby immediately.

[140] A fair reading of the reasons as a whole demonstrates that the trial judge rejected the argument that Dr. Fellows was negligent in not going to a Caesarean section after the first attempt to deliver with forceps failed for essentially the same reasons that he was not negligent in his initial decision to deliver vaginally with forceps. The two decisions were made within a minute or two of each other. In both instances, Dr. Fellows made a clinical judgment that it was essential to deliver Sabrin as quickly as it could be safely done. In both instances, he decided a vaginal delivery provided the most expeditious route. Dr. Oppenheimer agreed with the reasonableness of that assessment. The trial judge accepted Dr. Oppenheimer's opinion.

(4) Did the trial judge fail to consider whether Dr. Fellows was negligent when he failed to deliver Sabrin using the Kielland forceps?

(i) The evidence

[141] After his initial attempt to deliver Sabrin with the Tucker-McLean forceps failed, Dr. Fellows made a second attempt using Kielland forceps. He believed that the shape of those forceps would allow him to deliver Sabrin without removing the

forceps or relieving the traction. Sabrin had retreated back up the birth canal when Dr. Fellows had removed the forceps on his first attempt to deliver Sabrin.

[142] Dr. Fellows brought Sabrin to the crowning position using the Kielland forceps. He was confident he could deliver the baby quickly with those forceps.

[143] Dr. Fellows, however, became concerned that if he used the Kielland forceps to complete the delivery, those forceps, because of their shape, would destroy or damage Ms. Idris' perineum. Dr. Fellows decided to release the Kielland forceps and have Ms. Idris push Sabrin out. This same strategy had failed only a few minutes earlier on Dr. Fellows' first attempt to deliver Sabrin. Releasing the Kielland forceps also nullified the very reason Dr. Fellows had decided to use the Kielland forceps rather than the Tucker-McLean forceps. When Dr. Fellows released the forceps, Sabrin moved back up the birth canal just as she had moments earlier when Dr. Fellows released the Tucker-McLean forceps in his first attempt to deliver Sabrin.

[144] Dr. Fellows decided to use the Kielland forceps to deliver Sabrin at about 11:07 p.m. His attempt to deliver her with those forceps had failed by about 11:12 p.m. This led to the third effort to deliver Sabrin vaginally. That attempt eventually succeeded at 11:27 p.m.

[145] Dr. Cohen testified that the removal of the Kielland forceps when Sabrin was crowning and ready to be delivered was a breach of the applicable standard of care. He said:

> [I]f one is assuming that the fetal heart rate is extremely low, or non-existent, you want to expedite delivery, so you want to get that baby out in the quickest fashion possible, or the most timely fashion possible. So, the extraction with the forceps should have been done in my opinion.

[146] Dr. Oppenheimer did not comment on Dr. Fellows' release of the Kielland forceps in his report. In his testimony, he indicated the removal of the Kielland forceps was "common practice" done to avoid trauma to the perineum.

[147] Dr. Oppenheimer was not asked to consider Dr. Fellows' decision to remove the Kielland forceps in the context of the circumstances of this case. Specifically, Dr. Oppenheimer was not asked whether Sabrin's prolonged acute near total asphyxia placed this case outside of the realm of "common practice".

(ii) Appellants' position

[148] At trial, the appellants alleged Dr. Fellows was negligent in releasing the Kielland forceps rather than delivering Sabrin immediately with those forceps. They claimed he should have appreciated the need to urgently deliver Sabrin and the risk that she would once again retreat up the birth canal if the forceps were removed. In support of their position, the appellants relied on the following:

- Ms. Idris had been unable to push Sabrin out a few minutes earlier;

- Dr. Fellows was more suspicious of a uterine rupture after the first failed attempt to deliver Sabrin with forceps;
- Sabrin had been acutely oxygen deprived for at least eight minutes and, according to Dr. Fellows, probably longer by the time Dr. Fellows elected to remove the Kielland forceps;
- Given Sabrin's position in the vagina immediately before Dr. Fellows released the forceps, and Dr. Fellows' expertise, he could, in all likelihood, have delivered Sabrin immediately had he kept the Kielland forceps in place and used them for the delivery;
- Dr. Fellows had elected to release the forceps on his first attempt to deliver Sabrin. She had retreated up the birth canal when he did so. Despite this, he released the Kielland forceps only a few minutes later, only to have Sabrin retreat up the birth canal for a second time; and
- Neither Dr. Fellows nor Dr. Oppenheimer offered an opinion as to why the preservation of the perineum justified potentially delaying Sabrin's birth, given her near total ongoing acute oxygen deprivation. In fact, Dr. Fellows cut the perineum when he performed an episiotomy a few minutes later during the third and successful attempt to deliver Sabrin.

[149] The appellants' timeline as it relates to this argument is clear and simple. With the Kielland forceps, Sabrin could have been delivered at or very shortly after 11:12 p.m. She was actually delivered at 11:27 p.m. The 15-minute delay in

delivering Sabrin is attributable to Dr. Fellows' negligent failure to complete the delivery with the Kielland forceps.

(iii) Analysis

[150] Although the trial judge acknowledged, at para. 280, that the appellants had argued Dr. Fellows should have completed the delivery with the Kielland forceps, she never addressed the merits of that argument. Apart from a brief reference to Dr. Oppenheimer's evidence that the release of a forceps was "common practice", the trial judge made no reference to any of the evidence relevant to this issue.

[151] The trial judge's silence in respect of the allegation of negligence based on the failure to deliver Sabrin with the Kielland forceps cannot be answered by reference to her analysis of whether Dr. Fellows was obliged to conduct an emergency Caesarean section immediately, or whether the position of Sabrin's head precluded a forceps delivery.

[152] The argument that Dr. Fellows was negligent in not completing the delivery with the Kielland forceps did not depend in any way on whether he should have conducted an emergency Caesarean section immediately. Nor did it turn on when an emergency Caesarean section could have been completed. The resolution of those issues in favour of the respondent was no answer to the allegation of negligence based on the failure to deliver with the Kielland forceps.

[153] Similarly, the trial judge's conclusion that Sabrin's head was engaged when Dr. Fellows decided to deliver Sabrin was of no consequence in deciding whether Dr. Fellows was negligent when he did not complete the delivery with the Kielland forceps. There was no doubt that Sabrin's head was fully engaged and she was capable of being delivered with forceps when Dr. Fellows released the Kielland forceps.

[154] The central findings by the trial judge, which foreclosed a finding of negligence on the main arguments advanced by the appellants at trial, had no application to the allegation that Dr. Fellows was negligent when he withdrew the Kielland forceps. This allegation stood on an entirely different evidentiary footing. It was essential that the trial judge address this allegation separately and explain why she rejected it.

[155] There was evidence supporting the appellants' position that Dr. Fellows acted negligently in failing to complete the delivery with the Kielland forceps. There was also evidence that his failure to do so caused a significant delay in the delivery of Sabrin. On the causation evidence, it would have been open to the trial judge to infer that the delay resulting from the failure to complete the delivery with the Kielland forceps (about 15 minutes) caused or materially contributed to Sabrin's catastrophic injuries.

[156] My review of the reasons leaves me uncertain as to whether the trial judge gave any separate consideration to the argument that the failure to complete the delivery with the Kielland forceps constituted negligence and, if so, whether it caused or materially contributed to Sabrin's injuries. Even if I were to assume, in light of the arguments put to the trial judge, that she must have considered and rejected the argument that the failure to complete the delivery with the Kielland forceps was negligent, I see no analysis of the appellants' submissions and no explanation in the reasons for the rejection of the appellants' arguments on this issue.

[157] The absence of any analysis makes it impossible to determine why the trial judge rejected the claim that Dr. Fellows was negligent in not completing the delivery with the Kielland forceps. The trial judge refers to Dr. Oppenheimer's evidence that releasing the forceps was "common practice". She refers to no other evidence and no basis upon which she could conclude that Dr. Oppenheimer's reference to "common practice" had application to the circumstances as they existed when Dr. Fellows decided to release the Kielland forceps. This court does not know what the trial judge made of Dr. Oppenheimer's description of releasing the forceps as "common practice". In the same vein, the reasons offer no insight into why avoiding damage to the perineum justified any risk of additional delay in Sabrin's delivery. By that stage, Sabrin had been suffering from acute near total asphyxia for at least eight minutes.

[158] The reasons as they relate to the allegation that Dr. Fellows should have delivered Sabrin with the Kielland forceps are inadequate and do not admit of appellate review. The appellants' allegation is tenable on the evidence and provides a basis upon which Dr. Fellows could be found to have caused Sabrin's injuries.

E. THE REASONS ON THE INFORMED CONSENT ISSUE

[159] At trial, the appellants' argument in relation to informed consent focused on Dr. Fellows' admitted failure to obtain Ms. Idris' express consent to the use of forceps during the delivery. On appeal, the appellants argue the trial judge never addressed the issue of informed consent, but only considered whether Dr. Fellows had documented his conversations with Ms. Idris. The appellants refer to the question posed by the trial judge in her reasons:

> Did Dr. Fellows fall below a reasonable standard of care in failing to document any discussion with Ms. Idris, including benefits, risks and options?

[160] Dr. Fellows conceded that he did not document any of his discussions with Ms. Idris or Mr. Farej after he arrived in the delivery room at 11:01 p.m. Dr. Fellows did, however, testify to discussions he had with Ms. Idris and Mr. Farej after he arrived in the delivery room.

[161] The appellants submit the trial judge miscast their informed consent argument as turning exclusively on the failure to document any discussions that

may have occurred. The appellants acknowledge they placed significant evidentiary weight on the failure to document. However, they maintain the trial judge ultimately had to decide what in fact Dr. Fellows said to Ms. Idris and whether, in the circumstances, Ms. Idris gave her informed consent to the forceps delivery.

(i) The evidence

[162] Dr. Fellows testified that as he was examining Ms. Idris, he was in constant verbal and visual contact with Ms. Idris and Mr. Farej. He told them their baby was in serious distress and that she should be delivered as quickly as possible. He told Ms. Idris and Mr. Farej that he believed that the safest way to proceed was not by Caesarean section, but by a forceps delivery.

[163] In cross-examination, Dr. Fellows indicated he was speaking to both Mr. Farej and Ms. Idris during the time he was rupturing the membranes. He told them he could proceed using forceps or a Caesarean section and, in his clinical judgment, a forceps delivery was the most appropriate procedure.[5] Dr. Fellows testified he was speaking to both Mr. Farej and Ms. Idris, although he knew Mr. Farej, who had a better command of the English language than his wife and had

[5] In his cross-examination on June 10, 2019, at p. 86, l 7-8, the transcript has Dr. Fellows telling Ms. Idris that a Caesarean section was the most appropriate way to deliver the baby. It seems obvious, having regard to Dr. Fellows' evidence as a whole, that he misspoke on this one occasion. I do not understand the appellants to suggest otherwise.

medical training, would also be communicating with Ms. Idris. Dr. Fellows testified he emphasized the immediate risk to the baby's life, as at that point Ms. Idris' vital signs were stable.

[164] Dr. Fellows agreed that given the urgency, he probably did not discuss the risks and benefits associated, either with a forceps delivery or a Caesarean section. When asked who made the decision to proceed with a forceps delivery, Dr. Fellows said:

> I felt it was my obligation as a professional who was fully aware of the acuity of the situation that I would make those decisions while I was talking to the two of them, but I would ultimately be the one that made that decision for her.

[165] Dr. Fellows indicated that based on his prior experiences with Ms. Idris, she was aware that delivery by way of a Caesarean section or a vaginal delivery were the two possible options. They had discussed those options during her previous pregnancies and, to some extent, during this pregnancy. Ms. Idris had previously expressed a preference for a vaginal delivery. Dr. Fellows believed his relationship with Mr. Farej and Ms. Idris was such that they would trust his recommendation as to the appropriate way to proceed with Sabrin's delivery.

[166] Mr. Farej's testimony from his discovery was read into the trial record. The trial judge set that evidence out in her reasons (para. 68). Mr. Farej testified that his wife had a very good relationship with Dr. Fellows. In one of the prenatal appointments, they discussed whether Ms. Idris should deliver by Caesarean

section or vaginally. She told Dr. Fellows that it would depend on the situation when Ms. Idris was in the hospital and ready to deliver. Dr. Fellows agreed.

[167] Mr. Farej testified that when Dr. Fellows came into the delivery room, he quickly examined Ms. Idris. He told them she was bleeding and the situation was serious. Mr. Farej recalled Dr. Fellows telling him “I have to save your wife” by delivering the baby. Mr. Farej told Dr. Fellows “yes. Just go.” Dr. Fellows proceeded immediately with a forceps delivery.

(ii) The trial judge’s reasons

[168] The trial judge summarized the law of informed consent at paras. 240-44. She recognized that Dr. Fellows was faced with an obstetrical emergency in which seconds counted. She recognized that the urgency of the medical situation was a circumstance to be taken into account in assessing the adequacy of the information provided to the patient by the doctor. The trial judge said, at para. 244:

> When patients are in distress and the physician is making rapid assessments and judgments of the indicated alternative courses of action, it is not necessary or appropriate to require the physician to have a complicated, detailed discussion of all possible risks and benefits of each alternative procedure in such circumstances. In an obstetrical emergency, all the obstetrician is “required to convey in the circumstances to meet the standard of care is his intended course of action and his reasons for doing so”.

[169] The trial judge also acknowledged that there was nothing in the records documenting any discussion between Dr. Fellows and Ms. Idris or recording Ms.

Idris' consent to Dr. Fellows' course of action. The trial judge, however, went on to find that the discussions described by Dr. Fellows in his evidence, and Mr. Farej, to some extent in his evidence, did occur.

(iii) Analysis

[170] Although the heading used by the trial judge misdescribes the informed consent issue, her analysis under that heading is directed at the evidence relevant to whether consent was given and the application of the earlier stated legal principles to the circumstances as found by the trial judge.

[171] The trial judge obviously accepted Dr. Fellows' evidence. She also accepted Mr. Farej's evidence on discovery, which in her view confirmed, at least in some respects, the evidence given by Dr. Fellows.

[172] The trial judge was satisfied Dr. Fellows informed Mr. Farej and Ms. Idris that the situation was extremely urgent. He advised them in general terms of the potential dire consequences, especially to Sabrin. He identified the delivery options available, and told Mr. Farej and Ms. Idris which of those two options should be followed. In the context of a rapidly evolving, life and death medical emergency, and having regard to the existing relationship between Dr. Fellows, Ms. Idris and Mr. Farej, I am satisfied it was open to the trial judge to conclude the information provided by Dr. Fellows was sufficient and allowed Ms. Idris to make an informed decision as to the mode of delivery. It was also open to the trial judge to conclude

that Ms. Idris, along with her husband, accepted Dr. Fellows statement that the baby had to be delivered immediately and a vaginal delivery was the best way to accomplish that end.

[173] As I am satisfied the trial judge's reasons explain why she rejected the argument that Ms. Idris did not consent to the procedure, I will not address the causation arguments tied to the question of informed consent.

V

THE APPROPRIATE ORDER

[174] The trial judge's failure to give adequate reasons in respect of causation and one of the standard of care issues means this court cannot meaningfully review either the finding the appellants failed to prove causation, or the finding the appellants failed to prove Dr. Fellows was negligent. The judgment dismissing the action cannot stand.

[175] The appellants ask for a new trial. The respondent did not argue that if the appellants convinced the court the reasons were inadequate, this court could, or should, decide the case on the existing record.

[176] I accept the appellants' position. The evidence is complicated and the numerous issues are interrelated and interdependent. I agree the interests of justice are served by ordering a new trial and I would so order. I am sure

experienced, capable counsel will be able to make use of the existing trial record to expedite any subsequent proceedings which prove necessary.

[177] I accept the respondent's contention that the new trial should be on both liability and damages. If Dr. Fellows is found liable, findings on the liability portion of the trial may impact the damage assessment.

[178] I would dismiss the contingent cross-appeal as moot, given the order directing a new trial on both liability and damages.

[179] The appellants are the successful party on the main appeal. The parties agreed that the successful party on the main appeal should have costs in the amount of $60,000, inclusive of disbursements and relevant taxes. There should be no order as to costs on the cross-appeal.

Released: "March 29, 2022 DD"

"Doherty J.A."
"I agree B.W. Miller J.A."
"I agree. Sossin J.A."

TAB D

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),
Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,

Ministre de la Citoyenneté et de l'Immigration *Appelant*

c.

Alexander Vavilov *Intimé*

et

Procureur général de l'Ontario,
procureure générale du Québec,
procureur général de la Colombie-Britannique,
procureur général de la Saskatchewan,
Conseil canadien pour les réfugiés,
Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement,
Commission des valeurs mobilières de l'Ontario,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario),
Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut),
Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse,
Appeals Commission for Alberta Workers' Compensation,
Tribunal d'appel des accidents au travail (Nouveau-Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Conseil des tribunaux administratifs canadiens,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Congrès du travail du Canada,
Association nationale des organismes de réglementation de la pharmacie,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,

Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada *Interveners*

Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko, Association du Barreau canadien, Association canadienne des avocats et avocates en droit des réfugiés, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration et Société de soutien à l'enfance et à la famille des Premières Nations du Canada *Intervenants*

INDEXED AS: CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION) *v.* VAVILOV

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. C-29, s. 3(2)(a).

RÉPERTORIÉ : CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION) *c.* VAVILOV

2019 CSC 65

N° du greffe : 37748.

2018 : 4, 5, 6 décembre; 2019 : 19 décembre.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe et Martin.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Norme de contrôle — Démarche appropriée pour le contrôle judiciaire des décisions administratives — Démarche appropriée pour l'application de la norme de la décision raisonnable.

Citoyenneté — Citoyens canadiens — Annulation par la greffière de la citoyenneté du certificat de citoyenneté canadienne délivré au fils né au Canada de parents qui se sont plus tard révélés être des espions russes — Décision rendue par la greffière sur son interprétation de l'exception prévue par la loi à l'égard de la règle générale suivant laquelle les personnes nées au Canada ont la citoyenneté canadienne — Exception précisant qu'un enfant né au Canada n'est pas citoyen canadien si, au moment de sa naissance, son père ou sa mère était représentant ou au service au Canada d'un gouvernement étranger — La décision de la greffière d'annuler le certificat de citoyenneté était-elle raisonnable? — Loi sur la citoyenneté, L.R.C. 1985, c. C-29, art. 3(2)a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court

V est né à Toronto en 1994. Au moment de sa naissance, ses parents se font passer pour des Canadiens en utilisant des noms d'emprunt. En fait, ils sont des étrangers en mission pour le service des renseignements étrangers de la Russie. V ne sait pas que ses parents ne sont pas ceux qu'ils prétendent être. Il croit être citoyen canadien de naissance, il vit et s'identifie comme un Canadien, et il détient un passeport canadien. En 2010, les parents de V sont arrêtés aux États-Unis et accusés d'espionnage. Ils plaident coupables et sont renvoyés en Russie. Après leur arrestation, V tente en vain de renouveler son passeport canadien. On lui décerne toutefois en 2013 un certificat de citoyenneté canadienne.

Puis, en 2014, la greffière de la citoyenneté canadienne annule le certificat de V en se fondant sur son interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Cette disposition exempte les enfants d'un « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » de l'application de la règle générale selon laquelle les personnes nées au Canada ont la citoyenneté canadienne de naissance. La greffière conclut que, comme les parents de V étaient des employés ou représentants de la Russie au moment de la naissance de V, et selon l'interprétation qu'elle donne de l'exception prévue à l'al. 3(2)a) à l'égard de la règle de citoyenneté par la naissance, cette exception s'applique à V, qui n'a donc pas droit à la citoyenneté et n'y a jamais eu droit. La demande de contrôle judiciaire présentée par V à l'encontre de la décision de la greffière est rejetée par la Cour fédérale. La Cour d'appel accueille l'appel interjeté par V et casse la décision de la greffière parce qu'elle était déraisonnable. Le ministre de la Citoyenneté et de l'Immigration se pourvoit en appel.

Arrêt : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Moldaver, Gascon, Côté, Brown, Rowe et Martin : La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable, et il y a lieu de confirmer l'arrêt par lequel la Cour d'appel fédérale l'a cassée. La greffière ne pouvait raisonnablement interpréter l'al. 3(2)a) de la *Loi sur la citoyenneté* comme s'appliquant à un enfant dont les parents, au moment de sa naissance, ne s'étaient pas vu accorder des privilèges et immunités diplomatiques.

De façon plus générale, le présent pourvoi et les pourvois connexes (*Bell Canada c. Canada (Procureur général)*, 2019 CSC 66, [2019] 4 R.C.S. 845) donnent l'occasion d'analyser et de clarifier le droit applicable au contrôle judiciaire des décisions administratives tel que traité dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts subséquents. Les

have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldy and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely

observations présentées à la Cour ont mis en relief deux aspects du cadre d'analyse actuel qu'il est nécessaire de clarifier. Le premier aspect concerne l'analyse visant à déterminer la norme de contrôle applicable. Le deuxième aspect concerne la nécessité d'indications plus précises de la Cour sur l'application appropriée de la norme de contrôle de la décision raisonnable.

Il est devenu évident que la promesse de simplicité et de prévisibilité formulée à cet égard dans l'arrêt *Dunsmuir* ne s'est pas pleinement réalisée. Certains aspects du cadre d'analyse actuel de la norme de contrôle ne sont pas clairs et sont indûment complexes. L'ancienne analyse contextuelle s'est révélée complexe et d'utilité limitée pour donner une orientation pratique aux cours de justice qui tentent de déterminer la norme de contrôle applicable. Ce manque de clarté a pour effet pratique que les cours de justice ont parfois de la difficulté à effectuer l'analyse relative à la norme de contrôle, et des débats entourant la norme appropriée et son application continuent d'éclipser le contrôle sur le fond, ce qui mine l'accès à la justice. Il est donc nécessaire de revoir l'approche de la Cour afin d'apporter une cohérence et une prévisibilité accrues à ce domaine du droit. Un cadre d'analyse révisé servant à déterminer la norme de contrôle applicable lorsqu'une cour de justice se penche sur le fond d'une décision administrative s'impose.

En exposant un cadre d'analyse révisé, la présente décision s'écarte à certains égards de la jurisprudence actuelle de la Cour sur la norme de contrôle. Seules des circonstances convaincantes peuvent justifier un réexamen des précédents antérieurs et il faut soupeser soigneusement l'incidence de ce réexamen sur la certitude et la prévisibilité juridiques par rapport aux coûts liés au fait de continuer à souscrire à une approche erronée. Si le respect de la jurisprudence établie favorise généralement la certitude et la prévisibilité, dans certains cas, ce respect crée ou perpétue l'incertitude du droit. Dans ces circonstances, en suivant l'arrêt antérieur, on se trouve à aller à l'encontre des valeurs fondamentales de la clarté et de la certitude du droit.

Le cadre d'analyse révisé de la norme de contrôle repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable dans tous les cas. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle plus actif à jouer dans

be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Le respect de ces choix d'organisation institutionnelle oblige la cour de révision à adopter une attitude de retenue. Donc, chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. En conséquence, les cours de justice ne sont plus tenues de recourir à une analyse contextuelle pour établir la norme de contrôle appropriée. Fermer de manière définitive la porte au recours à l'analyse contextuelle pour déterminer la norme de contrôle applicable a pour effet d'alléger et de simplifier le cadre d'analyse applicable à la norme de contrôle. De plus, étant donné la présomption d'application de la norme de la décision raisonnable, l'expertise relative des décideurs administratifs n'est plus pertinente pour déterminer la norme de contrôle applicable. Elle est tout simplement incorporée au nouveau point de départ. L'expertise relative demeure cependant pertinente lors de l'exercice du contrôle judiciaire selon la norme de la décision raisonnable.

La présomption d'application de la norme de la décision raisonnable peut être réfutée dans deux types de situations. La première est celle où le législateur a indiqué qu'il souhaite l'application d'une norme différente. C'est le cas lorsque le législateur a prescrit expressément la norme de contrôle applicable. Tout cadre d'analyse fondé sur l'intention du législateur doit respecter les dispositions législatives claires. Le législateur peut également indiquer qu'une dérogation à la présomption est de mise en prévoyant un mécanisme d'appel à l'encontre d'une décision administrative devant une cour de justice, indiquant ainsi son intention que les cours de justice recourent, en matière de contrôle, aux normes applicables en appel. Lorsqu'il prévoit dans la loi un mécanisme d'appel, le législateur assujettit le régime administratif à une compétence d'appel et indique qu'il s'attend à ce que la cour vérifie attentivement une telle décision administrative par voie d'appel. La norme de contrôle applicable doit donc être déterminée eu égard à la nature de la question et à la jurisprudence sur les normes de contrôle applicables en appel. Par exemple, lorsqu'une cour de justice entend l'appel d'une décision administrative, elle appliquera la norme de la décision correcte aux questions de droit, touchant notamment à l'interprétation législative et à la portée de la compétence du décideur. Si l'appel prévu par la loi porte notamment sur des questions de fait ou des questions mixtes de fait et de droit, la norme de contrôle applicable à ces questions sera celle de l'erreur manifeste et déterminante.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

Donner un tel sens aux mécanismes d'appel prévus par la loi s'écarte de la jurisprudence récente de la Cour. Ce virage s'impose afin d'apporter uniformité et équilibre conceptuel à l'analyse relative à la norme de contrôle et il se justifie par la mise en balance des valeurs de la certitude et de la justesse. D'abord, d'importantes et valables critiques judiciaires et doctrinales ont été formulées au sujet de la conception que la Cour s'est faite des droits d'appel prévus par la loi et de l'incohérence inhérente à un cadre d'analyse de la norme de contrôle fondé sur l'intention du législateur qui refuse par ailleurs de donner un sens à un droit d'appel conféré expressément par la loi. Ensuite, rien ne justifie de façon satisfaisante la tendance récente de la Cour de ne pas tenir compte des droits d'appels conférés par la loi sauf en présence d'un libellé exceptionnel. De façon plus générale, il n'y a aucune raison convaincante de présumer que le législateur voulait que le mot « appel » revête un sens tout à fait différent dans une loi à caractère administratif. Accepter que le législateur souhaite le recours à une norme de contrôle applicable en appel permet également d'expliquer pourquoi bon nombre de textes législatifs prévoient à la fois des mécanismes d'appel et de contrôle judiciaire, conférant ainsi deux rôles possibles aux cours de révision. Enfin, puisque la présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire n'est plus fondée sur la notion d'expertise relative et repose maintenant sur le respect du choix d'organisation institutionnelle de la part du législateur, la dérogation à la présomption de contrôle selon la décision raisonnable dans le cas d'un appel prévu par la loi respecte ce choix du législateur.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot

La deuxième situation où la présomption d'application de la norme de la décision raisonnable est réfutée est celle où la primauté du droit commande l'application de la norme de la décision correcte. C'est le cas pour certaines catégories de questions de droit, soit les questions constitutionnelles, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble et les questions liées aux délimitations des compétences respectives d'organismes administratifs. Premièrement, les questions touchant au partage des compétences entre le Parlement et les provinces, au rapport entre le législateur et les autres organes de l'État, et à la portée des droits ancestraux et issus de traités reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*, et d'autres questions de droit constitutionnel nécessitent une réponse décisive et définitive des cours de justice. Deuxièmement, la primauté du droit exige que les cours de justice tranchent de manière définitive les questions de droit générales qui sont d'importance capitale pour le système juridique dans son ensemble parce qu'elles requièrent des réponses uniformes et cohérentes. Troisièmement, la primauté du droit

tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative

commande l'intervention des cours de justice lorsqu'un organisme administratif interprète l'étendue de ses pouvoirs d'une manière qui est incompatible avec la compétence d'un autre organisme administratif, car la primauté du droit ne saurait tolérer des ordonnances et des procédures qui entraînent un véritable conflit opérationnel entre deux organismes administratifs. L'application de la norme de la décision correcte à l'égard de ces questions s'accorde donc avec le rôle unique du pouvoir judiciaire dans l'interprétation de la Constitution, et fait en sorte que les cours de justice puissent avoir le dernier mot sur des questions à l'égard desquelles la primauté du droit exige une cohérence et une réponse décisive et définitive s'impose.

Conjuguée à ces exceptions limitées, la règle générale qui prévoit l'application de la norme de la décision raisonnable met en place une méthode complète pour déterminer la norme de contrôle applicable. On ne ferme pas définitivement la porte à la possibilité qu'une autre catégorie puisse ultérieurement être reconnue comme appelant une dérogation à la présomption de contrôle selon la norme de la décision raisonnable. Cependant, la reconnaissance de tout nouveau fondement pour l'application de la norme de la décision correcte devrait revêtir un caractère exceptionnel et devrait respecter ce cadre d'analyse et les principes prépondérants énoncés dans la présente décision. Toute nouvelle catégorie de questions qui commandent l'application de la norme de la décision correcte sur le fondement de l'intention du législateur devrait comporter une indication de cette volonté tout aussi solide et convaincante qu'une norme de contrôle établie par voie législative ou un mécanisme d'appel prévu par la loi. De la même manière, la reconnaissance d'une nouvelle catégorie de questions appelant la norme de la décision correcte sur le fondement de la primauté du droit ne serait justifiée que dans le cas où le défaut d'appliquer la norme de la décision correcte risquerait d'ébranler la primauté du droit et mettrait en péril le bon fonctionnement du système de justice d'une façon analogue aux trois situations décrites dans la présente décision.

Par exemple, la Cour n'est pas convaincue qu'elle devrait reconnaître l'existence d'une catégorie distincte de questions de droit qui appellent la norme de la décision correcte dans le cas où ces questions sèment constamment la discorde au sein d'un organisme administratif. L'absence d'unanimité parmi les membres d'un tribunal administratif est le prix à payer pour la liberté et l'indépendance décisionnelle. Bien que la discorde puisse mener à l'incohérence du droit, un cadre d'application plus rigoureux de la norme de la décision raisonnable permet de se prémunir face à ces menaces à la primauté du droit. En outre, les questions de compétence ne devraient plus

decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect

être reconnues comme une catégorie distincte devant faire l'objet d'un contrôle selon la norme de la décision correcte; il n'existe aucune balise claire qui permet de distinguer ces questions de celles touchant à l'interprétation de sa loi habilitante par un décideur administratif. En appliquant adéquatement la norme de la décision raisonnable, les cours de justice sont en mesure de veiller à ce que les organismes administratifs agissent dans les limites des pouvoirs qui leur sont conférés sans qu'il soit nécessaire de procéder à un examen préliminaire des questions de compétence et sans avoir à recourir à la norme de la décision correcte.

À l'avenir, la cour de justice qui cherche à arrêter la norme de contrôle applicable devrait d'abord s'en remettre à la présente décision pour savoir comment s'applique le cadre général. Il est ainsi possible que la cour soit appelée à trancher des questions subsidiaires à l'égard desquelles la jurisprudence continue de donner des indications utiles et continue de s'appliquer essentiellement telle quelle, comme les affaires portant sur des questions de droit générales d'importance capitale pour le système de justice dans son ensemble ou sur des questions liées aux délimitations des compétences respectives d'organismes administratifs. Pour d'autres catégories de questions, certains arrêts, dont ceux portant sur l'effet des mécanismes d'appel prévus par la loi, sur des questions touchant véritablement à la compétence ou sur l'ancienne analyse contextuelle, auront forcément une valeur de précédent moindre.

En outre, la Cour doit donner des indications plus précises sur l'application appropriée de la norme de contrôle de la décision raisonnable, ce que signifie cette norme et comment elle devrait être appliquée en pratique. Le contrôle selon la norme de la décision raisonnable est une approche visant à faire en sorte que les cours de justice interviennent dans les affaires administratives uniquement lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif. Il tire son origine du principe de la retenue judiciaire et témoigne d'un respect envers le rôle distinct des décideurs administratifs. Toutefois, il ne s'agit pas d'une « simple formalité » ni d'un moyen visant à soustraire les décideurs administratifs à leur obligation de rendre des comptes. Bien que les cours de justice doivent reconnaître la légitimité et la compétence des décideurs administratifs et adopter une attitude de respect, les décideurs administratifs doivent adhérer à une culture de la justification et démontrer que l'exercice du pouvoir public qui leur est délégué peut être justifié. Lorsqu'elle effectue un contrôle selon la norme de la décision raisonnable, la cour de révision doit tenir compte du résultat de la décision administrative eu égard au raisonnement sous-jacent à celle-ci afin de

toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant

s'assurer que la décision dans son ensemble est transparente, intelligible et justifiée. Le contrôle judiciaire porte à la fois sur le résultat et sur le raisonnement à l'origine de ce résultat. Une approche différente compromettrait le rôle institutionnel du décideur administratif plutôt que de le respecter.

Le contrôle selon la norme de la décision raisonnable est méthodologiquement distinct du contrôle selon la norme de la décision correcte. La cour de justice effectuant un contrôle selon la norme de la décision raisonnable doit centrer son attention sur la décision même qu'a rendue le décideur administratif, notamment sur sa justification. Une cour de justice qui applique la norme de contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'éventail des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution correcte au problème. La cour de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu.

Dans les cas où des motifs sont requis, ceux-ci constituent le point de départ du contrôle selon la norme de la décision raisonnable, car ils sont le mécanisme principal par lequel les décideurs administratifs démontrent le caractère raisonnable de leurs décisions. Les motifs sont le moyen par lequel le décideur communique la justification de sa décision : ils servent à expliquer le processus décisionnel et la raison d'être de la décision en cause, permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et démontrent que la décision a été rendue de manière équitable et licite, en plus de servir de bouclier contre l'arbitraire. Toute méthode raisonnée de contrôle selon la norme de la décision raisonnable s'intéresse donc avant tout aux motifs de la décision. Cela permet à la cour de révision de déterminer si la décision dans son ensemble est raisonnable. L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel.

Dans de nombreux cas, les motifs écrits d'une décision ne sont ni présentés, ni nécessaires. Même en l'absence de motifs, il se peut que le dossier et le contexte révèlent qu'une décision repose sur un mobile irrégulier ou sur un autre motif inacceptable. Il existe néanmoins des situations dans lesquelles ni le dossier ni le contexte général ne permettent de discerner le fondement de la décision en cause. En pareil cas, la cour de révision doit tout de même

factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance

examiner la décision à la lumière des contraintes factuelles et juridiques imposées au décideur afin de déterminer s'il s'agit d'une décision raisonnable.

Il est utile, d'un point de vue conceptuel, de s'arrêter à deux catégories de lacunes fondamentales qui tendent à rendre une décision déraisonnable. La première est le manque de logique interne du raisonnement. Pour être raisonnable, une décision doit être fondée sur un raisonnement intrinsèquement cohérent qui est à la fois rationnel et logique. Un manquement à cet égard peut amener la cour de révision à conclure qu'il y a lieu d'infirmer la décision. Le contrôle selon la norme de la décision raisonnable n'est pas une chasse au trésor, phrase par phrase, à la recherche d'une erreur. Cependant, la cour de révision doit être en mesure de suivre le raisonnement du décideur sans buter sur une faille décisive dans la logique globale. Puisqu'il faut interpréter les motifs écrits eu égard au dossier et en tenant dûment compte du régime administratif dans lequel ils sont donnés, une décision sera déraisonnable lorsque, lus dans leur ensemble, les motifs ne font pas état d'une analyse rationnelle ou montrent que la décision est fondée sur une analyse irrationnelle. Une décision sera également déraisonnable si la conclusion tirée ne peut prendre sa source dans l'analyse effectuée ou qu'il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central. De même, la logique interne d'une décision peut également être remise en question lorsque les motifs sont entachés d'erreurs manifestes sur le plan rationnel.

La seconde catégorie de lacune fondamentale se présente dans le cas d'une décision indéfendable sous certains rapports compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision. Même si la norme de la décision raisonnable est une norme unique qui tient déjà compte du contexte, et les éléments du contexte entourant une décision ne doivent pas altérer cette norme ou le degré d'examen que doit appliquer une cour de révision, ce qui est raisonnable dans un cas donné dépend toujours des contraintes juridiques et factuelles propres au contexte de la décision particulière sous examen. Ces contraintes d'ordre contextuel cernent les limites et les contours de l'espace à l'intérieur duquel le décideur peut agir, ainsi que les types de solution qu'il peut retenir. Le régime législatif applicable, tout autre principe législatif ou principe de common law pertinent, les principes d'interprétation des lois, la preuve portée à la connaissance du décideur et les faits dont le décideur peut prendre connaissance d'office, les observations des parties, les pratiques et décisions antérieures de l'organisme administratif et

depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

l'impact potentiel de la décision sur l'individu qui en fait l'objet sont tous des éléments qui sont généralement utiles pour déterminer si une décision est raisonnable. Ces éléments ne doivent pas servir de liste de vérification; leur importance peut varier selon le contexte et ils interagissent forcément entre eux.

En conséquence, il se peut que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. L'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur.

Le droit — tant la loi que la common law — limitera lui aussi l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier. Tout précédent sur la question soumise au décideur administratif ou sur une question semblable, ainsi que le droit international dans certains domaines du processus décisionnel administratif, aura pour effet de circonscrire l'éventail des issues raisonnables. La question de savoir si le décideur administratif a agi raisonnablement en adaptant une règle de droit ou d'equity appelle un examen fondé dans une très large mesure sur le contexte.

Les questions d'interprétation de la loi ne reçoivent pas un traitement exceptionnel. Comme toute autre question de droit, on peut les évaluer en appliquant la norme de la décision raisonnable. S'il s'agit de la norme applicable, la cour de révision ne procède pas à une analyse *de novo* de la question soulevée ni ne se demande ce qu'aurait été la décision correcte. Mais une méthode de contrôle selon la norme de la décision raisonnable qui respecte l'intention du législateur doit tenir pour acquis que les instances chargées d'interpréter la loi — qu'il s'agisse des cours de justice ou des décideurs administratifs — effectueront cet exercice conformément au principe moderne en matière d'interprétation des lois. Les décideurs administratifs ne sont pas tenus dans tous les cas de procéder à une interprétation formaliste de la loi. Or, quelle que soit la forme que prend l'opération d'interprétation d'une disposition législative, le fond de l'interprétation de celle-ci par le décideur administratif doit être conforme à son texte, à son contexte et à son objet.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative

Qui plus est, le décideur doit prendre en considération la preuve versée au dossier et la trame factuelle générale qui a une incidence sur sa décision et celle-ci doit être raisonnable au regard de ces éléments. Le caractère raisonnable d'une décision peut être compromis si le décideur s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte. Les motifs doivent aussi tenir valablement compte des questions et préoccupations centrales soulevées par les parties, même si les cours de révision ne peuvent s'attendre à ce que les décideurs administratifs répondent à tous les arguments ou modes possibles d'analyse.

Bien que les décideurs administratifs ne soient pas liés par leurs décisions antérieures, ils doivent se soucier de l'uniformité générale des décisions administratives. La question de savoir si une décision en particulier est conforme à la jurisprudence de l'organisme administratif est donc elle aussi une contrainte dont devrait tenir compte la cour de révision au moment de décider si cette décision est raisonnable. Enfin, les individus ont droit à une plus grande protection procédurale lorsque la décision sous examen est susceptible d'avoir des répercussions personnelles importantes ou de leur causer un grave préjudice. Lorsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux. Le principe de la justification adaptée aux questions et préoccupations soulevées veut que, si les conséquences sont particulièrement graves pour l'individu concerné, le décideur explique pourquoi sa décision reflète le mieux l'intention du législateur.

La question de la réparation qu'il convient d'accorder — en l'occurrence celle de savoir si la cour qui casse une décision déraisonnable devrait exercer son pouvoir discrétionnaire de renvoyer l'affaire pour réexamen à la lumière des motifs donnés par la cour — revêt de multiples facettes. Le choix de la réparation doit être guidé par la raison d'être de l'application de cette norme, y compris le fait pour la cour de révision de reconnaître que le législateur a confié le règlement de l'affaire à un décideur administratif, et non à une cour, les préoccupations liées à la bonne administration du système de justice, à la nécessité d'assurer l'accès à la justice et à la volonté de mettre sur pied un processus décisionnel à la fois rapide et économique. Donner effet à ces principes dans le contexte de la réparation signifie que, lorsque la décision contrôlée selon la norme de la décision raisonnable ne peut être confirmée, il conviendra le plus souvent de renvoyer l'affaire au décideur pour réexamen à la lumière des motifs donnés par la cour. Cependant, il y a des situations limitées dans lesquelles le renvoi de l'affaire pour nouvel examen fait échec au souci de résolution rapide et efficace d'une

decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support

manière telle qu'aucune législature n'aurait pu souhaiter. L'intention que le décideur administratif tranche l'affaire en première instance ne saurait donner lieu à un va-et-vient interminable de contrôles judiciaires et de nouveaux examens. Le refus de renvoyer l'affaire au décideur peut s'avérer indiqué lorsqu'il devient évident qu'un résultat donné est inévitable, si bien que le renvoi de l'affaire ne servirait à rien. Les préoccupations concernant les délais, l'équité envers les parties, le besoin urgent de régler le différend, la nature du régime de réglementation donné, la possibilité réelle ou non pour le décideur administratif de se pencher sur la question en litige, les coûts pour les parties et l'utilisation efficace des ressources publiques peuvent aussi influer sur l'exercice par la cour de son pouvoir discrétionnaire de renvoyer l'affaire.

Rien ne permet de s'écarter de la présomption de contrôle selon la norme de la décision raisonnable en l'espèce. La décision de la greffière a été soumise aux cours de justice par voie de contrôle judiciaire et non par voie d'appel prévu par la loi. Étant donné que le Parlement n'a pas prescrit la norme à appliquer, rien n'indique que le législateur voulait qu'une autre norme que celle de la décision raisonnable soit appliquée. La décision de la greffière ne soulève pas de questions constitutionnelles, de questions de droit générales d'importance capitale pour le système juridique dans son ensemble ou de questions liées aux délimitations des compétences respectives d'organismes administratifs. En conséquence, la décision de la greffière doit être examinée selon la norme de la décision raisonnable.

La décision de la greffière est déraisonnable. Elle n'a pas justifié son interprétation de l'al. 3(2)a) à la lumière des contraintes qu'imposent l'art. 3 pris dans son ensemble, les traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence relative à l'interprétation de l'al. 3(2)a), et les conséquences possibles de son interprétation. Chacun de ces éléments — pris individuellement ainsi que dans leur ensemble — appuie fortement la conclusion selon laquelle l'al. 3(2)a) n'est pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Bien que V ait soulevé bon nombre de ces considérations, la greffière n'a pas traité de ces arguments dans ses motifs et n'a pas fait davantage que se livrer à un examen superficiel de l'historique législatif de l'al. 3(2)a) et conclure que le libellé de celui-ci n'excluait pas explicitement son interprétation.

En premier lieu, la greffière n'a pas examiné le contexte législatif qui entoure l'al. 3(2)a), lequel étaye clairement la

for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per Abella and Karakatsanis JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

conclusion selon laquelle toutes les personnes visées par l'al. 3(2)a) doivent s'être vu accorder certains privilèges et immunités diplomatiques pour que l'exception trouve application. En deuxième lieu, la greffière a fait fi des observations convaincantes voulant que la raison d'être du par. 3(2) consiste à instituer une exception étroite conformément aux principes établis du droit international et aux traités internationaux d'importance en vertu desquels les employés et représentants au service d'un gouvernement étranger bénéficient de privilèges et immunités diplomatiques. En troisième lieu, il s'agissait d'une omission importante que d'ignorer les décisions pertinentes portées à la connaissance de la greffière qui tendent à indiquer que l'al. 3(2)a) n'est censé s'appliquer qu'aux personnes dont les parents se sont vu accorder des privilèges et immunités diplomatiques. En dernier lieu, rien n'établit que la greffière a tenu compte des conséquences que peut avoir le fait d'étendre son interprétation de l'al. 3(2)a) à l'ensemble des personnes à qui on n'a pas accordé de privilèges et d'immunités diplomatiques. Les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation pour se prémunir contre la perception d'arbitraire. L'interprétation de la greffière ne saurait se limiter aux enfants d'espions; sa logique vaudrait tout autant dans d'autres cas. En outre, il faut donner aux dispositions telles que l'al. 3(2)a) une interprétation étroite puisqu'elles refusent ou risquent d'enlever des droits qui autrement recevraient une interprétation large et libérale. Néanmoins, rien n'indique que la greffière a pris en compte les possibles conséquences sévères de son interprétation ou que, compte tenu de ces conséquences éventuelles, elle s'est demandée si le Parlement aurait voulu que l'al. 3(2)a) s'applique de cette manière. Même si la greffière était au fait du caractère inédit de son interprétation, elle n'a pas motivé cette interprétation élargie.

Il était donc déraisonnable de la part de la greffière de décider que l'al. 3(2)a) peut s'appliquer aux personnes dont les parents ne se sont pas vu accorder de privilèges et immunités diplomatiques au Canada. Nul ne conteste que les parents de V ne s'étaient pas vu accorder pareils privilèges et immunités. En conséquence, il ne servirait à rien de renvoyer l'affaire à la greffière. En tant que personne née au Canada, V dispose d'un statut régi uniquement par la règle générale de la citoyenneté de naissance. Il est citoyen canadien.

Les juges Abella et Karakatsanis : Il y a accord avec les juges majoritaires pour rejeter le pourvoi. La décision de la greffière d'annuler le certificat de citoyenneté de V était déraisonnable et la Cour d'appel a eu raison de la casser.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

Il y a également accord avec la majorité pour dire qu'il doit y avoir présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire. L'analyse contextuelle doit être éliminée du cadre d'analyse applicable à la norme de contrôle, et la catégorie des « questions touchant vraiment à la compétence » doit être abolie en tant que catégorie distincte de questions assujetties à la norme de la décision correcte. Toutefois, l'élimination de ces éléments ne justifie pas les modifications fondamentales apportées au contrôle judiciaire qui sont décrites dans le cadre proposé par la majorité et qui entraînent un élargissement du contrôle judiciaire fondé sur la norme de la décision correcte. Au lieu de confirmer l'existence d'une présomption significative de déférence en faveur des décideurs administratifs, la majorité prive de déférence des centaines d'acteurs administratifs, en appliquant une approche formaliste qui néglige la volonté du législateur de laisser à des décideurs administratifs le soin de trancher certaines questions de droit et de politique. La présomption d'application de la norme de la décision raisonnable qu'énonce la majorité repose sur une compréhension totalement nouvelle de l'intention du législateur et de la primauté du droit et interdit toute prise en compte des postulats bien établis du principe de la déférence. En élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui exercent leur mandat au quotidien, le cadre proposé par la majorité réoriente complètement le rapport entre les acteurs administratifs et la magistrature, et préconise du même coup une philosophie du droit administratif profondément différente.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core

Le cadre établi par la majorité repose sur une conception du contrôle judiciaire qui est à la fois erronée et incomplète et qui néglige sans raison valable l'expertise spécialisée des décideurs administratifs et fait fi des fondements de la conception moderne de l'intention du législateur. Au lieu de considérer que la volonté du législateur est de confier à des décideurs spécialisés possédant une expertise en la matière le soin de trancher les questions de droit relevant de leur mandat, la majorité fait table rase de l'expertise de ces décideurs. Ce faisant, la majorité ne tient pas compte de la raison historiquement reconnue pour laquelle le législateur souhaitait déléguer des pouvoirs à des acteurs administratifs. En particulier, cette approche ne tient pas compte de la possibilité que la spécialisation et l'expertise fassent partie intégrante de ce choix du législateur. Depuis l'arrêt *Dunsmuir*, la Cour n'a cessé de confirmer le rôle central que jouent la spécialisation et l'expertise, de confirmer le lien entre celles-ci et l'intention du législateur et de reconnaître

rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme

qu'elles confèrent aux décideurs administratifs un privilège en matière d'interprétation sur les questions de droit. L'expertise spécialisée est devenue la principale raison invoquée pour justifier la déférence. Pour donner l'effet voulu à la volonté du législateur de déléguer des pouvoirs aux décideurs administratifs, il faut comprendre les avantages que peut comporter l'exercice, par ces décideurs, de leur mandat. Parmi ces avantages se trouvent, au premier chef, l'expertise institutionnelle et la spécialisation inhérentes à l'exécution quotidienne d'un mandat particulier. Lorsqu'ils interprètent leur loi habilitante, les acteurs administratifs sont particulièrement bien placés pour saisir avec justesse les conséquences concrètes d'interprétations juridiques particulières, le contexte législatif, les objectifs qu'une disposition ou un régime législatifs sont censés viser et la terminologie spécialisée. Les avantages conférés par la spécialisation et l'expertise constituent une raison convaincante de faire preuve de déférence. L'approche préconisée par la majorité n'accorde aucun poids à de tels avantages institutionnels et évacue totalement l'expertise de l'analyse relative à la norme de contrôle. La suppression du fondement conceptuel qui justifie actuellement la déférence ouvre les portes à un contrôle judiciaire élargi fondé sur la norme de la décision correcte.

Selon le cadre proposé par la majorité, la déférence est éclipsée chaque fois que la primauté du droit l'exige. Cette approche découle toutefois d'une conception judiciarisée de la primauté du droit. La primauté du droit signifie que les décideurs administratifs prennent des décisions juridiques dans le cadre de leur mandat; elle ne signifie pas que seuls les juges peuvent trancher des questions de droit et ont carte blanche pour substituer leur opinion à celle des acteurs administratifs par le biais d'un contrôle selon la norme de la décision correcte. L'approche de la majorité à la fois affaiblit la présomption de déférence, et mine la confiance dans le fait que l'élaboration et l'interprétation du droit relèvent de la participation commune des tribunaux judiciaires et des décideurs administratifs. De plus, l'accès à la justice est au cœur du choix du législateur d'instaurer un système de droit administratif solide. Cet objectif est compromis lorsqu'on invoque une conception étroite de la primauté du droit pour imposer l'hégémonie judiciaire aux décideurs administratifs, ce qui augmente inutilement les coûts et la complexité. Permettre aux juges de s'immiscer encore plus dans la justice administrative et permettre un examen *de novo* de chaque décision juridique allonge les délais et augmente les frais engagés pour obtenir une décision définitive.

La reformulation de la notion de « l'intention du législateur » proposée par la majorité invite les cours à appliquer une présomption irréfragable d'application de la

includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations

norme de la décision correcte lorsqu'un régime administratif prévoit un droit d'appel. En élevant des dispositions créant un droit d'appel au rang d'indicateurs d'un contrôle assujetti à la norme de la décision correcte, on crée un système de droit administratif à deux vitesses dans lequel les juges s'en remettent à l'expertise des décideurs administratifs seulement lorsqu'il n'existe pas de disposition d'appel. Cependant, l'existence de droits d'appel ne crée pas un régime institutionnel différent qui commanderait un contrôle plus fouillé. Le simple fait qu'une loi envisage la possibilité d'un appel ne permet pas de tirer de conclusions quant au degré de déférence requis lors du contrôle en question. La position de la majorité repose presque exclusivement sur un argument textuel suivant lequel la présence du mot « appel » indique que le législateur voulait que les cours de révision appliquent les mêmes normes de contrôle que celles que les cours d'appel appliquent dans leurs arrêts en matière civile. Cela néglige les distinctions institutionnelles qui sont reconnues depuis longtemps entre les tribunaux judiciaires et les décideurs administratifs. L'emploi systématique du terme « appel » par les législatures ne saurait s'expliquer par l'intention que la majorité lui prête. L'idée selon laquelle il faut appliquer les normes de contrôle d'appel à tous les droits d'appel ne trouve aucun appui dans la jurisprudence. Depuis au moins 25 ans, la Cour ne considère pas les droits d'appel accordés par une loi comme une expression déterminante de l'intention du législateur, et de telles dispositions ne sont presque pas ou pas du tout entrées en ligne de compte dans l'analyse relative à la norme de contrôle. De surcroît, avant l'arrêt *Dunsmuir*, les droits d'appel conférés par la loi n'étaient encore perçus que comme un facteur parmi d'autres et non comme des indices sans équivoque d'un contrôle selon la norme de la décision correcte. Sauf en présence de circonstances exceptionnelles, un droit d'appel conféré par la loi n'écarte pas la présomption d'application de la norme de la décision raisonnable.

Le mépris de la majorité pour les précédents et la règle du *stare decisis* risque de compromettre l'intégrité des décisions de la Cour et d'ébranler la confiance du public à l'égard de la stabilité du droit. La règle du *stare decisis* limite considérablement la capacité de la Cour d'infirmer ses propres précédents. La doctrine favorise le développement prévisible et cohérent des principes de droit, favorise la confiance envers les décisions judiciaires et contribue à l'intégrité du processus judiciaire. Le respect des précédents préserve également la légitimité institutionnelle de la Cour. Les décisions de la Cour ne perdent pas leur valeur de précédent avec le départ des juges qui y ont participé. Lorsque la Cour choisit d'écarter ses propres précédents, elle doit le faire avec prudence et modération

that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify

et en tenant dûment compte de toutes les considérations importantes qui sous-tendent la doctrine du *stare decisis*. On doit trouver un équilibre subtil entre le maintien de la stabilité de la common law et l'assurance que le droit est suffisamment souple et réceptif pour s'adapter à de nouvelles réalités et à l'évolution des normes sociales. La règle du *stare decisis* joue un rôle essentiel pour maintenir cet équilibre et assurer le respect de la primauté du droit.

Il n'existe aucune raison logique justifiant de rompre avec la jurisprudence existante et d'abandonner la conception bien établie de la Cour quant à l'effet des dispositions législatives créant un droit d'appel sur l'analyse de la norme de contrôle. Ce faisant, la majorité ne tient pas compte du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de la Cour. Le rejet en bloc sans précédent de tout un arsenal jurisprudentiel est particulièrement troublant. Les arrêts touchés sont nombreux et comprennent maintes décisions rendues aux termes d'un contrôle fondé sur la déférence en dépit de l'existence d'un droit d'appel conféré par la loi ainsi que des arrêts fondamentaux confirmant la pertinence de l'expertise administrative pour l'analyse de la norme de contrôle. L'abandon de ces jugements bafoue la règle du *stare decisis* qui interdit aux tribunaux d'écarter des décisions antérieures qui représentent simplement une solution à laquelle la formation actuelle ne souscrit pas. L'approche de la majorité risque également de bousculer les interprétations établies de nombreuses lois prévoyant un droit d'appel; chaque interprétation existante de ces lois qui a été confirmée en appliquant la norme de contrôle de la décision raisonnable sera susceptible d'être remise en question. Par ailleurs, si la Cour s'était, dans ses décisions antérieures, méprise sur l'objet des dispositions d'appel prévues par la loi, il aurait alors été loisible aux législateurs de clarifier cette interprétation au moyen d'une modification législative. En l'absence d'intervention du législateur, les arguments militant en faveur du renversement des décisions antérieures sont encore moins convaincants.

La Cour devrait fournir des balises supplémentaires quant à la façon de procéder à un contrôle judiciaire fondé sur la norme de la décision raisonnable afin que les juges puissent assurer une surveillance minutieuse et concrète du système de justice administrative tout en respectant la légitimité de celui-ci et le point de vue des décideurs spécialisés de première ligne. Toutefois, plutôt que de clarifier le rôle que jouent les motifs et de préciser comment on doit les contrôler, la majorité ressuscite la démarche axée sur la recherche d'erreurs qui occupait une place prépondérante dans l'ancienne jurisprudence de la Cour. La liste multifactorielle et non limitative des contraintes à la prise de décisions administratives dressée par la majorité incitera

quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

les cours de révision à disséquer les motifs administratifs et à se lancer dans une chasse au trésor, phrase par phrase, à la recherche d'une erreur. En pratique, ces contraintes risquent de se transformer en un vaste catalogue d'erreurs hypothétiques qui peuvent servir à justifier l'annulation d'une décision administrative. Cette façon de structurer le contrôle selon la norme de la décision raisonnable astreint effectivement les décideurs administratifs à une norme de justification plus exigeante que celle qui s'applique aux juges de première instance. Cette approche sape la déférence. Le contrôle judiciaire selon la norme de la décision raisonnable devrait plutôt être centré sur le principe de la déférence à l'égard des décideurs administratifs et de l'intention du législateur de leur confier un mandat. La retenue judiciaire est la marque distinctive du contrôle selon la norme de la décision raisonnable et ce qui le distingue de la norme de la décision correcte, laquelle permet à la cour de substituer son opinion à celle du décideur administratif.

Le principe de la déférence soumet à trois exigences les tribunaux qui procèdent à un contrôle selon la norme de la décision raisonnable. D'abord, la déférence est l'attitude que la cour de révision doit adopter à l'égard du décideur administratif. Le principe de la déférence commande le respect du choix du législateur de confier à des acteurs administratifs plutôt qu'aux cours de justice le soin de rendre certaines décisions et la reconnaissance du rôle important que jouent les décideurs administratifs, ainsi que de leur expertise spécialisée et du cadre institutionnel dans lequel ils évoluent. Les cours de révision doivent également accorder une attention respectueuse aux motifs donnés à l'appui d'une décision administrative, s'efforcer sincèrement de comprendre la décision et interpréter la décision de façon équitable et généreuse. En deuxième lieu, le principe de la déférence influe sur la façon dont un tribunal formule la question à laquelle il doit répondre et la nature de l'analyse qu'il mènera. La cour de révision ne cherche pas à savoir comment elle aurait résolu la question, mais plutôt si la réponse donnée par le décideur administratif était déraisonnable. En fin de compte, la question de savoir si une décision administrative est raisonnable dépend du contexte, et la cour de révision doit tenir compte de toutes les circonstances pertinentes, y compris les motifs invoqués au soutien de la décision, le dossier, le régime législatif et les questions particulières soulevées par le demandeur, parmi d'autres facteurs. Troisièmement, le contrôle fondé sur le principe de la déférence influence la façon dont la cour de révision évalue la contestation dont fait l'objet la décision. Il incombe à la partie réclamant le contrôle judiciaire de démontrer que la décision en cause est déraisonnable; le décideur n'a pas à convaincre la cour de justice que sa décision est raisonnable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a

La décision administrative est en soi le point de mire du contrôle judiciaire. Dans tous les cas, la question à trancher demeure celle de savoir si la partie qui conteste la décision a démontré que celle-ci est déraisonnable. Lorsque le décideur n'est pas tenu de motiver sa décision ou qu'il est impossible d'obtenir les motifs de la décision, le caractère raisonnable de la décision peut être démontré à l'aide de décisions antérieures de l'organisme administratif ou à la lumière du contexte procédural. Pour déterminer si le décideur a agi raisonnablement, la cour de révision doit d'abord, cela va de soi, examiner les motifs, s'il en est, qui ont été exposés. En se penchant d'abord sur les motifs de la décision, à la lumière du contexte qui l'entoure et des arguments invoqués pour la contester, la cour de révision procède à un véritable contrôle tout en respectant la légitimité du processus décisionnel des autorités administratives spécialisées. Les cours de révision devraient aborder les motifs dans un esprit de respect envers les décideurs spécialisés, le rôle important qui leur a été confié et le contexte institutionnel choisi par le législateur. Elles devraient se garder de reconsidérer les incidences concrètes, les difficultés d'ordre pratique de même que les connaissances de terrain, et demeurer attentives aux concepts ou termes spécialisés. De plus, l'examen qu'effectue la cour de révision ne se limite pas à la teneur même des motifs écrits de la décision; lorsqu'elle constate l'existence d'une lacune dans les motifs, la cour doit examiner d'autres documents pour savoir s'ils permettent de mieux comprendre la décision, y compris : le dossier des actes de procédure officiels, les documents portés à l'attention du décideur, les décisions antérieures de l'organisme administratif, ainsi que les politiques ou lignes directrices élaborées pour l'aider dans sa démarche. Ces documents pourraient aider un tribunal à comprendre le résultat. Voilà comment les cours de révision peuvent légitimement compléter les motifs écrits sans supplanter l'analyse. Les motifs doivent être examinés en corrélation avec le résultat afin de savoir si celui-ci fait partie des issues possibles. Cette approche privilégie le fond plutôt que la forme dans les situations où le fondement de la décision est évident au vu du dossier, mais n'est pas exposé clairement dans les motifs écrits.

De plus, lors d'un contrôle fondé sur le principe de la déférence, la cour doit examiner les allégations d'erreur avec prudence, en tenant compte du contexte et de la nécessité d'éviter de substituer son opinion à celle des personnes qui sont habilitées à répondre aux questions en litige et mieux outillées qu'elle pour le faire. Étant donné que le principe de la déférence lui interdit de substituer son opinion à celle du décideur, la cour de révision doit

mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

évaluer avec circonspection les arguments que le demandeur invoque pour contester une décision administrative afin de s'assurer qu'ils concernent le caractère raisonnable de celle-ci et ne relèvent pas d'une simple divergence d'opinions. Les tribunaux doivent également tenir compte de la gravité des erreurs reprochées. Une erreur secondaire au regard du raisonnement ne suffit pas à justifier l'annulation d'une décision. Ils doivent conserver la même attitude de déférence lorsqu'ils interprètent une disposition législative. Dans ce genre de cas, la cour de révision ne devrait pas évaluer la décision en tentant de déterminer l'interprétation qui, à son avis, serait raisonnable. Pareille approche met en péril la déférence. Une interprétation *de novo* d'une loi occulte nécessairement le point de vue de l'organisme administratif spécialisé qui applique régulièrement le régime législatif en question. En plaçant ce point de vue au cœur de leur analyse, les cours de justice témoignent de leur respect à l'endroit des compétences et connaissances spécialisées des organismes administratifs ainsi qu'à l'égard du choix du législateur de déléguer le traitement de certaines questions à des organismes non judiciaires. À l'inverse, en imposant leur propre interprétation d'une loi, les cours de justice dénaturent l'intention du législateur.

En l'espèce, il y a accord avec la majorité sur le fait que la norme de contrôle applicable est celle de la décision raisonnable. La greffière n'a pas répondu à l'argument de V voulant que les objectifs de l'al. 3(2)a) de la *Loi sur la citoyenneté* exigent une interprétation restrictive de ses termes. Au contraire, la greffière a donné une interprétation large à l'al. 3(2)a) en se fondant sur une analyse purement textuelle. Cette interprétation n'était raisonnable que si l'on examinait le texte en faisant abstraction de son objectif. L'historique de la disposition n'indique nullement que le législateur fédéral avait l'intention d'en élargir le champ d'application. De plus, la façon dont les tribunaux ont interprété cette disposition indique elle aussi qu'il faut lui donner une interprétation restrictive. Qui plus est, le texte de l'al. 3(2)c) peut être perçu comme sapant l'interprétation que la greffière donne de l'al. 3(2)a), puisque l'al. 3(2)c) nie le droit à la citoyenneté aux enfants nés de personnes bénéficiant de privilèges et immunités diplomatiques équivalents à ceux dont jouissent les personnes visées par l'al. 3(2)a). Ce texte laisse croire que l'al. 3(2)a) ne vise donc que les personnes au service au Canada d'un gouvernement étranger qui jouissent de tels privilèges et immunités, ce qui n'est pas le cas des parents de V. La décision de la greffière était déraisonnable, vu qu'elle fait fi des objectifs de l'art. 3 dans son ensemble.

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Michael H. Morris, *Marianne Zorić* and *John Provart*, for the appellant.

Hadayt Nazami, *Barbara Jackman* and *Sujith Xavier*, for the respondent.

Sara Blake and *Judie Im*, for the intervener the Attorney General of Ontario.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

J. Gareth Morley and *Katie Hamilton*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

Matthew Britton and *Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut),

POURVOI contre un arrêt de la Cour d'appel fédérale (les juges Stratas, Webb et Gleason), 2017 CAF 132, [2018] 3 R.C.F. 75, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, [2017] A.C.F. nº 638 (QL), 2017 CarswellNat 9490 (WL Can.), qui a infirmé une décision du juge Bell, 2015 CF 960, [2016] 2 R.C.F. 39, 38 Imm. L.R. (4th) 110, [2015] A.C.F. nº 981 (QL), 2015 CarswellNat 4747 (WL Can.). Pourvoi rejeté.

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Hadayt Nazami, *Barbara Jackman* et *Sujith Xavier*, pour l'intimé.

Sara Blake et *Judie Im*, pour l'intervenant le procureur général de l'Ontario.

Stéphane Rochette, pour l'intervenante la procureure générale du Québec.

J. Gareth Morley et *Katie Hamilton*, pour l'intervenant le procureur général de la Colombie-Britannique.

Kyle McCreary et *Johnna Van Parys*, pour l'intervenant le procureur général de la Saskatchewan.

Jamie Liew, pour l'intervenant le Conseil canadien pour les réfugiés.

Karen Andrews, pour l'intervenant le Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement.

Matthew Britton et *Jennifer M. Lynch*, pour les intervenantes la Commission des valeurs mobilières de l'Ontario, British Columbia Securities Commission et Alberta Securities Commission.

Laura Bowman et *Bronwyn Roe*, pour l'intervenante Ecojustice Canada Society.

David Corbett et *Michelle Alton*, pour les intervenants le Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario), Workers' Compensation Appeals

the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

Written submissions only by *Gavin R. Cameron* and *Tom Posyniak*, for the intervener the British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan and *Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* and *Anne Marie Heenan*, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

Steven Barrett, for the intervener the Canadian Labour Congress.

Written submissions only by *William W. Shores*, *Q.C.*, and *Kirk N. Lambrecht*, *Q.C.*, for the intervener the National Association of Pharmacy Regulatory Authorities.

Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Tribunal (Territoires du Nord-Ouest et Nunavut), le Tribunal d'appel des décisions de la Commission des accidents du travail de la Nouvelle-Écosse, Appeals Commission for Alberta Workers' Compensation et le Tribunal d'appel des accidents au travail (Nouveau-Brunswick).

Argumentation écrite seulement par *Gavin R. Cameron* et *Tom Posyniak*, pour l'intervenante British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan et *Paul Michell*, pour l'intervenant le Conseil des tribunaux administratifs canadiens.

Argumentation écrite seulement par *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* et *Anne Marie Heenan*, pour les intervenantes National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association et la Conférence des arbitres du Québec.

Steven Barrett, pour l'intervenant le Congrès du travail du Canada.

Argumentation écrite seulement par *William W. Shores*, *c.r.*, et *Kirk N. Lambrecht*, *c.r.*, pour l'intervenante l'Association nationale des organismes de réglementation de la pharmacie.

Brendan Van Niejenhuis et *Andrea Gonsalves*, pour l'intervenante Queen's Prison Law Clinic.

Adam Goldenberg, pour l'intervenant Advocates for the Rule of Law.

Toni Schweitzer, pour l'intervenant Parkdale Community Legal Services.

Paul Warchuk et *Francis Lévesque*, pour l'intervenant Cambridge Comparative Administrative Law Forum.

James Plotkin et *Alyssa Tomkins*, pour l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko.

Guy Régimbald, for the intervener the Canadian Bar Association.

Audrey Macklin and *Anthony Navaneelan*, for the intervener the Canadian Association of Refugee Lawyers.

Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

[1] The Chief Justice and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. — This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and

Guy Régimbald, pour l'intervenante l'Association du Barreau canadien.

Audrey Macklin et *Anthony Navaneelan*, pour l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés.

Argumentation écrite seulement par *David Cote* et *Subodh Bharati*, pour l'intervenant Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard et *Peter Shams*, pour l'intervenante l'Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, pour l'intervenante la Société de soutien à l'enfance et à la famille des Premières Nations du Canada.

Daniel Jutras et *Audrey Boctor*, en qualité d'*amici curiae*, et *Olga Redko* et *Edward Béchard Torres*.

Version française du jugement rendu par

[1] Le juge en chef et les juges Moldaver, Gascon, Côté, Brown, Rowe et Martin — Le présent pourvoi et les pourvois connexes (voir *Bell Canada c. Canada (Procureur général)*, 2019 CSC 66, [2019] 4 R.C.S. 845), donnent à la Cour l'occasion de se pencher de nouveau sur sa façon d'aborder le contrôle judiciaire des décisions administratives.

[2] Dans les présents motifs, nous traitons de deux aspects clés de la jurisprudence actuelle en droit administratif qu'il est nécessaire de réexaminer et de clarifier. D'abord, nous traçons la nouvelle voie à suivre pour déterminer la norme de contrôle applicable lorsqu'une cour de justice contrôle une décision administrative au fond. Ensuite, nous donnons des indications additionnelles aux cours de révision qui procèdent au contrôle selon la norme de la décision raisonnable. Le cadre d'analyse révisé est encore guidé par les principes en matière de contrôle judiciaire qu'a énoncés la Cour dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190 : le contrôle judiciaire a pour fonction de préserver la primauté du droit tout en

strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

[5] Given the ubiquity and practical importance of administrative decision making, it is essential

donnant effet à la volonté du législateur. Nous insistons également sur la nécessité de développer et de renforcer une culture de la justification au sein du processus décisionnel administratif.

[3] Nous examinons ensuite le fond de l'affaire en l'espèce, qui porte sur une demande de contrôle judiciaire d'une décision rendue par la greffière de la citoyenneté canadienne concernant M. Alexander Vavilov, né au Canada de parents qui se sont plus tard révélés être des espions russes. Se fondant sur une interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*, L.R.C. 1985, c. C-29, la greffière a conclu que M. Vavilov n'était pas un citoyen canadien et a annulé son certificat de citoyenneté en application du par. 26(3) du *Règlement sur la citoyenneté*, DORS/93-246. Selon nous, la norme de contrôle applicable est celle de la décision raisonnable et la décision de la greffière était déraisonnable. Nous sommes donc d'avis de confirmer l'arrêt par lequel la Cour d'appel fédérale la casse et de rejeter le pourvoi du ministre de la Citoyenneté et de l'Immigration.

I. La nécessité de clarifier et de simplifier le droit relatif au contrôle judiciaire

[4] Au cours des dernières décennies, le droit canadien relatif au contrôle judiciaire des décisions administratives a connu une évolution jurisprudentielle continue et donné lieu à un vigoureux débat doctrinal. Ce domaine du droit touche des questions fondamentales pour notre ordre juridique et constitutionnel et tente d'assurer la bonne marche des rapports entre les décideurs administratifs, les cours de justice et les membres de notre société. Parallèlement au droit, le rôle du processus décisionnel administratif au Canada a connu sa propre évolution. Aujourd'hui, l'administration d'innombrables organismes publics et régimes de réglementation est confiée par la loi à des délégataires ayant un pouvoir décisionnel. Le nombre, la diversité et l'importance des affaires dont sont saisis ces délégataires font du processus décisionnel administratif l'une des principales manifestations du pouvoir de l'État dans la vie de la population canadienne.

[5] Vu l'omniprésence du processus décisionnel administratif et son importance pratique, il est essentiel

that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

[6] In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian*

que les décideurs administratifs, les personnes visées par leurs décisions et les tribunaux chargés de contrôler ces décisions disposent d'indications claires sur la façon dont le contrôle judiciaire doit être exercé.

[6] Dans son jugement qui accorde l'autorisation de pourvoi dans la présente affaire et les affaires connexes, la Cour a clairement indiqué qu'elle considère les présents pourvois comme une occasion de se pencher sur le droit applicable au contrôle judiciaire des décisions administratives tel que traité dans l'arrêt *Dunsmuir* et les arrêts subséquents. Vu l'importance de cet enjeu, la Cour a nommé deux *amici curiae*, invité les parties à consacrer une bonne partie de leurs arguments à la question de la norme de contrôle et accordé l'autorisation d'intervenir à 27 intervenants, dont 4 procureurs généraux et de nombreuses organisations représentatives de tout l'éventail du droit administratif canadien. Nous avons en conséquence reçu une grande quantité d'observations utiles sur ce sujet. Bien que la Cour ait examiné la question dans l'arrêt *Dunsmuir*, certains aspects du droit demeurent épineux. Les observations présentées à la Cour ont mis en relief deux aspects du cadre d'analyse actuel qu'il est nécessaire de clarifier.

[7] Le premier aspect concerne l'analyse visant à déterminer la norme de contrôle applicable. Il est devenu évident que la promesse de simplicité et de prévisibilité formulée à cet égard dans l'arrêt *Dunsmuir* ne s'est pas pleinement réalisée. Dans l'arrêt *Dunsmuir*, les juges majoritaires de la Cour ont fusionné la norme de la décision « manifestement déraisonnable » et la norme de la décision « raisonnable *simpliciter* » en une seule norme de la décision « raisonnable », en ramenant ainsi les normes de contrôle de trois à deux : par. 34-50. En outre, la Cour a voulu simplifier l'analyse relative à la norme de contrôle : par. 51-64. Depuis cet arrêt, la jurisprudence a évolué et reconnaît dorénavant que la norme de la décision raisonnable est la norme qui s'applique à la plupart des catégories de questions qui se posent dans le cadre d'un contrôle judiciaire; notamment, son application se présume lorsque le décideur interprète sa loi habilitante : voir, p. ex., *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Mouvement laïque québécois c. Saguenay (Ville)*,

Artists' Representation v. National Gallery of Canada, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

2015 CSC 16, [2015] 2 R.C.S. 3, par. 46; *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 55; *Front des artistes canadiens c. Musée des beaux-arts du Canada*, 2014 CSC 42, [2014] 2 R.C.S. 197, par. 13; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 26 et 28; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 25; *Dunsmuir*, par. 54. La Cour a par ailleurs précisé que cette présomption peut être réfutée en établissant que la question sous examen appartient à une catégorie de questions qui sont assujetties à la norme de la décision correcte : voir *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, par. 22. Elle peut aussi être réfutée en établissant que, d'après le contexte, le législateur a voulu que la norme de contrôle applicable soit celle de la décision correcte : *McLean*, par. 22; *Edmonton (Ville) c. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 CSC 47, [2016] 2 R.C.S. 293, par. 32; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2018 CSC 31, [2018] 2 R.C.S. 230 (« *CCDP* »), par. 45-46. Cependant, l'incertitude quant à savoir dans quel cas l'analyse contextuelle demeure indiquée, ainsi que le débat sur la portée des catégories de questions auxquelles s'applique la norme de la décision correcte ont parfois semé la confusion et compliqué l'analyse : voir, p. ex., P. Daly, « Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness » (2016), 62 *R.D. McGill* 527.

[8] En outre, cette analyse s'est à certains égards écartée des fondements théoriques du contrôle judiciaire. Si l'application de la norme de la décision raisonnable est fondée en partie sur la nécessité pour les cours de justice d'éviter « toute immixtion injustifiée » compte tenu de la volonté du législateur de laisser aux organismes administratifs, plutôt qu'à elles, le soin de trancher certaines questions (voir *Dunsmuir*, par. 27), son application générale s'est imposée même lorsque le législateur a instauré un régime institutionnel différent en créant un mécanisme d'appel par voie législative.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

[9] L'incertitude qui a suivi l'arrêt *Dunsmuir* a été mise en évidence par des critiques judiciaires et doctrinales, des plaideurs qui ont comparu devant notre Cour et des organisations représentant des Canadiens et des Canadiennes qui interagissent avec des décideurs administratifs. Il ne s'agit pas de critiques sans importance ou de difficultés théoriques. Ces critiques touchent au cœur de la cohérence de notre jurisprudence en droit administratif et aux ramifications pratiques de ce manque de cohérence. Notre Cour en a pris note elle aussi. Dans l'arrêt *Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770, par. 19, la juge Abella a exprimé le besoin de « simplifier le labyrinthe actuel de la norme de contrôle applicable » et a donné des suggestions dans le but d'amorcer un dialogue nécessaire sur la voie à suivre. C'est dans ce contexte que la Cour a décidé d'accorder l'autorisation d'appel pour instruire ensemble la présente affaire et les affaires connexes.

[10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[10] Ce cheminement nous amène à conclure qu'il est nécessaire de revoir l'approche de la Cour afin d'apporter une cohérence et une prévisibilité accrues à ce domaine du droit. Nous adoptons donc un cadre d'analyse révisé permettant de déterminer la norme de contrôle applicable lorsqu'une cour de justice se penche sur le fond d'une décision administrative. Ce cadre d'analyse repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable dans tous les cas. Les cours de révision ne devraient déroger à cette présomption que lorsqu'une indication claire de l'intention du législateur ou la primauté du droit l'exige.

[11] The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative

[11] Le deuxième aspect concerne la nécessité d'indications plus précises de la Cour sur l'application appropriée de la norme de contrôle de la décision raisonnable. La Cour a entendu les préoccupations exprimées au sujet de la norme de la décision raisonnable qui est parfois perçue comme favorisant un système de justice à deux vitesses où les personnes visées par des décisions administratives n'ont droit qu'à un résultat se situant entre une solution « assez bonne » et une solution « pas trop mauvaise ». Ces préoccupations ont été reprises par des membres de la profession juridique, des organisations de la société civile et des cliniques juridiques. La Cour se

decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt.

doit de prendre ces points de vue au sérieux et de voir à ce que le cadre d'analyse qu'elle retient s'adapte à tous les types de décisions administratives, qui vont de l'immigration, de l'administration carcérale et des programmes de sécurité sociale aux relations de travail, à la réglementation des valeurs mobilières et à la politique énergétique.

[12] Ces préoccupations sur l'application de la norme de la décision raisonnable témoignent de la nécessité d'expliquer plus clairement ce que signifie cette norme et comment elle devrait être appliquée en pratique. Le contrôle selon la norme de la décision raisonnable est méthodologiquement distinct du contrôle selon la norme de la décision correcte. Il tient compte de la nécessité de respecter le choix du législateur de déléguer le pouvoir décisionnel à un décideur administratif plutôt qu'à une cour de révision. Afin de remplir la promesse formulée dans l'arrêt *Dunsmuir* d'assurer « la légalité, la rationalité et l'équité du processus administratif et de la décision rendue », le contrôle selon la norme de la décision raisonnable doit comporter une évaluation sensible et respectueuse, mais aussi rigoureuse, des décisions administratives : par. 28.

[13] Le contrôle selon la norme de la décision raisonnable est une approche visant à faire en sorte que les cours de justice interviennent dans les affaires administratives uniquement lorsque cela est vraiment nécessaire pour préserver la légitimité, la rationalité et l'équité du processus administratif. Il tire son origine du principe de la retenue judiciaire et témoigne d'un respect envers le rôle distinct des décideurs administratifs. Toutefois, il ne s'agit pas d'une « simple formalité » ni d'un moyen visant à soustraire les décideurs administratifs à leur obligation de rendre des comptes. Ce type de contrôle demeure rigoureux.

[14] D'une part, les cours de justice doivent reconnaître la légitimité et la compétence des décideurs administratifs dans leur propre domaine et adopter une attitude de respect. D'autre part, les décideurs administratifs doivent adhérer à une culture de la justification et démontrer que l'exercice du pouvoir public qui leur est délégué peut être [TRADUCTION] « justifié aux yeux des citoyens et citoyennes sur

Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that

les plans de la rationalité et de l'équité » : la très honorable B. McLachlin, « The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law » (1998), 12 *R.C.D.A.P.* 171, p. 174 (italique omis); voir également M. Cohen-Eliya et I. Porat, « Proportionality and Justification » (2014), 64 *U.T.L.J.* 458, p. 467-470.

[15] Lorsqu'elle effectue un contrôle selon la norme de la décision raisonnable, la cour de révision doit tenir compte du résultat de la décision administrative eu égard au raisonnement sous-jacent à celle-ci afin de s'assurer que la décision dans son ensemble est transparente, intelligible et justifiée. Ce qui distingue le contrôle selon la norme de la décision raisonnable du contrôle selon la norme de la décision correcte tient au fait que la cour de justice effectuant le premier type de contrôle doit centrer son attention sur la décision même qu'a rendue le décideur administratif, notamment sur sa justification, et non sur la conclusion à laquelle elle serait parvenue à la place du décideur administratif.

II. La détermination de la norme de contrôle applicable

[16] Dans les sections qui suivent, nous exposons un cadre d'analyse révisé permettant à une cour de justice de déterminer la norme de contrôle applicable en cas de contestation qui porte sur le fond d'une décision administrative. Ce cadre d'analyse repose sur la présomption voulant que la norme de la décision raisonnable soit la norme applicable chaque fois qu'une cour contrôle une décision administrative.

[17] La présomption d'application de la norme de la décision raisonnable peut être réfutée dans deux types de situations. La première est celle où le législateur a indiqué qu'il souhaite l'application d'une norme différente ou d'un ensemble de normes différentes. C'est le cas lorsque le législateur a prescrit expressément la norme de contrôle applicable. C'est aussi le cas lorsque le législateur a prévu un mécanisme d'appel d'une décision administrative devant une cour, indiquant ainsi son intention que les cours de justice recourent, en matière de contrôle, aux normes applicables en appel. La deuxième situation où la présomption d'application de la norme

the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47; see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57, 129-31 and 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 849-50.

[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond

de la décision raisonnable est réfutée est celle où la primauté du droit commande l'application de la norme de la décision correcte. C'est le cas pour certaines catégories de questions, soit les questions constitutionnelles, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble et les questions liées aux délimitations des compétences respectives d'organismes administratifs. Conjuguée à ces exceptions limitées, la règle générale qui prévoit l'application de la norme de la décision raisonnable met en place une méthode complète pour déterminer la norme de contrôle applicable. En conséquence, les cours de justice ne sont plus tenues de recourir à une « analyse contextuelle » (*CCDP*, par. 45-47; voir aussi *Dunsmuir*, par. 62-64; *McLean*, par. 22) pour établir la bonne norme de contrôle.

[18] Avant d'exposer plus en détail le cadre d'analyse permettant de déterminer la norme de contrôle applicable, nous tenons à reconnaître que les présents motifs s'écartent à certains égards de la jurisprudence actuelle de la Cour en la matière. Seules des circonstances convaincantes peuvent justifier un réexamen comme celui effectué en l'espèce. Nous ne prenons pas cette décision à la légère. La décision d'opérer un changement de cap oblige toujours la Cour à soupeser soigneusement l'incidence de cette décision sur la certitude et la prévisibilité juridiques par rapport aux coûts liés au fait de continuer à souscrire à une approche erronée : voir *Canada (Procureur général) c. Bedford*, 2013 CSC 72, [2013] 3 R.C.S. 1101, par. 47; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 24-27; *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, par. 56-57, 129-131 et 139; *R. c. Henry*, 2005 CSC 76, [2005] 3 R.C.S. 609, par. 43-44; *R. c. Bernard*, [1988] 2 R.C.S. 833, p. 849-850.

[19] À cet égard, nous rappelons les propos du juge Gibbs dans *Queensland c. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), auxquels notre Cour a souscrit dans l'arrêt *Craig*, par. 26 :

[TRADUCTION] Nul juge ne peut ignorer les décisions et le raisonnement de ses prédécesseurs et arriver à ses propres conclusions comme si la jurisprudence n'existait pas, ou qu'une décision cessait d'être opposable dès l'ajournement

the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

[21] Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

> . . . judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. . . . If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told

d'une session. Contrairement au législateur, le juge ne peut entreprendre une réforme qui réduit à néant les décisions antérieures et les principes établis précédemment. Ce n'est qu'après avoir examiné la décision antérieure de la cour le plus attentivement et le plus respectueusement possible, et après avoir dûment considéré toutes les circonstances, que le juge peut faire primer sa propre opinion sur elle.

[20] Néanmoins, la Cour a revu des précédents qui avaient été jugés non fondés en principe, dont il a été démontré qu'ils étaient inapplicables et indûment complexes, ou qui s'étaient attirés d'importantes critiques valables, notamment judiciaires et doctrinales : *Craig*, par. 28-30; *Henry*, par. 45-47; *Fraser*, par. 135 (le juge Rothstein, motifs concordants quant au résultat); *Bernard*, p. 858-859. Si le respect de la jurisprudence établie favorise généralement la certitude et la prévisibilité, dans certains cas, ce respect crée ou perpétue l'incertitude du droit : *Ministre des Affaires indiennes et du Nord canadien c. Ranville*, [1982] 2 R.C.S. 518, p. 528; *Bernard*, p. 858; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740, p. 778. Dans ces circonstances, « en [. . .] suivant simplement [l'arrêt antérieur] par respect pour le principe du *stare decisis*, on se [trouve à] aller à l'encontre de la valeur fondamentale sous-tendant ce principe, c'est-à-dire celle de la clarté et de la certitude du droit » : *Bernard*, p. 858. Ces considérations s'appliquent en l'espèce.

[21] Certains aspects du cadre d'analyse actuel ne sont pas clairs et sont indûment complexes. Ce manque de clarté a pour effet pratique que les cours de justice ont parfois de la difficulté à effectuer l'analyse relative à la norme de contrôle. De coûteux débats entourant la norme appropriée et son application continuent d'éclipser le contrôle sur le fond dans bien des cas, ce qui mine l'accès à la justice. Les propos du juge Binnie dans ses motifs concordants dans l'arrêt *Dunsmuir*, par. 133, sont toujours pertinents :

> . . . le contrôle judiciaire est à la fois trop coûteux et trop long. On comprend le justiciable d'hésiter à s'adresser aux tribunaux pour obtenir réparation à l'égard de ce qu'il considère comme une injustice administrative lorsque son avocat ne peut même pas prévoir avec certitude quelle norme de contrôle s'appliquera. [. . .] Le justiciable qui va de l'avant constate que la cour ne met pas l'accent sur sa prétention ou sur la mesure prise par l'État, mais qu'elle

is [the choice of standard analysis]. . . . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome.

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review". While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law.

arbitre plutôt un long et mystérieux débat sur [l'analyse du choix de la norme]. [. . .] La décision favorable rendue par la cour de révision peut être infirmée en appel au motif que la bonne « norme de contrôle » n'a pas été appliquée. La petite entreprise à qui on refuse un permis ou le professionnel qui fait l'objet d'une mesure disciplinaire devrait pouvoir demander le contrôle judiciaire de la décision sans miser son commerce ou sa maison sur l'issue de l'instance.

Malheureusement, nous nous retrouvons dans une situation semblable depuis l'arrêt *Dunsmuir*. Comme l'a fait remarquer la juge Karakatsanis dans l'arrêt *Edmonton East*, au par. 35, « [l]e recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable ». Bien que les avocats et les cours de justice tentent de surmonter la difficulté de déterminer la norme de contrôle et la bonne façon de l'appliquer, les plaideurs prennent note que, « [p]endant ce temps, l'analyse au fond attend en coulisses » : *Wilson*, par. 25, la juge Abella.

[22] Comme il a été souligné dans l'arrêt *CCDP*, « [d]epuis plusieurs années, notre Cour tente de simplifier l'analyse relative à la norme de contrôle applicable, afin de "faire en sorte que les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond" » : par. 27, citant *Alberta Teachers*, par. 36, citant *Dunsmuir*, par. 145, le juge Binnie. Les changements de principe exposés ci-dessous visent à promouvoir les valeurs qui sous-tendent la règle du *stare decisis* et à rendre le droit applicable en matière de norme de contrôle plus certain, cohérent et facile à appliquer à l'avenir.

A. *La présomption selon laquelle la norme applicable est celle de la décision raisonnable*

[23] Lorsqu'une cour examine une décision administrative sur le fond (c.-à-d. le contrôle judiciaire d'une mesure administrative qui ne comporte pas d'examen d'un manquement à la justice naturelle ou à l'obligation d'équité procédurale), la norme de contrôle qu'elle applique doit refléter l'intention du législateur sur le rôle de la cour de révision, sauf dans les cas où la primauté du droit empêche de donner

The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the

effet à cette intention. L'analyse a donc comme point de départ une présomption selon laquelle le législateur a voulu que la norme de contrôle applicable soit celle de la décision raisonnable.

[24] Le Parlement et les législatures provinciales sont habilités par la Constitution à créer des organismes administratifs et à les investir de larges pouvoirs légaux : *Dunsmuir*, par. 27. Si le législateur a constitué un décideur administratif dans le but précis d'administrer un régime législatif, il faut présumer que le législateur a également voulu que ce décideur soit en mesure d'accomplir son mandat et d'interpréter la loi qui s'applique à toutes les questions qui lui sont soumises. Si le législateur n'a pas prescrit expressément que les cours de justice ont un rôle à jouer dans le contrôle des décisions de ce décideur, on peut aisément présumer que le législateur a voulu que celui-ci puisse fonctionner en faisant le moins possible l'objet d'une intervention judiciaire. Toutefois, étant donné que le contrôle judiciaire bénéficie de la protection de l'art. 96 de la *Loi constitutionnelle de 1867*, le législateur ne peut soustraire le processus décisionnel administratif à tout examen judiciaire : *Dunsmuir*, par. 31; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, p. 236-237; *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, p. 1090. Il n'en demeure pas moins que le respect de ces choix d'organisation institutionnelle de la part du législateur oblige la cour de révision à adopter une attitude de retenue lors du contrôle judiciaire.

[25] Depuis plusieurs années, la jurisprudence de notre Cour évolue vers une reconnaissance du fait que la norme de la décision raisonnable devrait être le point de départ du contrôle judiciaire d'une décision administrative. En effet, la présomption d'application de la norme de la décision raisonnable est déjà une caractéristique bien établie de l'analyse relative à la norme de contrôle applicable dans les cas où le décideur administratif interprète sa loi constitutive : voir *Alberta Teachers*, par. 30; *Saguenay*, par. 46; *Edmonton East*, par. 22. À notre avis, il y a maintenant lieu d'affirmer que chaque fois qu'une cour examine une décision administrative, elle doit partir de la présomption que la norme de contrôle applicable à l'égard de tous les aspects de cette décision est celle de la décision raisonnable. Si cette

presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach,

présomption vise l'interprétation de sa loi habilitante par le décideur administratif, elle s'applique aussi de façon plus générale aux autres aspects de sa décision.

[26] Avant d'expliquer comment la présomption d'application de la norme de la décision raisonnable peut être réfutée, nous estimons qu'il est souhaitable de clarifier un aspect du fondement conceptuel de cette présomption. Depuis l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227 (« *S.C.F.P.* »), la principale raison d'être de la norme de contrôle fondée sur la déférence en droit administratif est le respect du choix d'organisation institutionnelle du législateur consistant à déléguer certaines questions à des décideurs non judiciaires par voie législative : *S.C.F.P.*, p. 235-236. Toutefois, la Cour a par la suite établi un certain nombre d'autres raisons justifiant l'application de la norme de la décision raisonnable, dont certaines ont influencé l'analyse relative à la norme de contrôle à divers moments.

[27] Plus précisément, la Cour a retenu que l'expertise relative du décideur administratif à l'égard des questions qui lui sont soumises est un motif justifiant l'application de la norme de la décision raisonnable : voir, p. ex., *S.C.F.P.*, p. 236; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 32-35; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591-592; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 50-53; *Dunsmuir*, par. 49, citant D. J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *R.C.D.A.P.* 59, p. 93; voir également *Dunsmuir*, par. 68. Mais la jurisprudence de la Cour a parfois souffert de profondes divisions sur l'impact de la notion d'expertise dans le contexte administratif, sur la façon dont elle devrait être appréciée et sur la manière dont elle devrait guider l'analyse relative à la norme de contrôle : voir, p. ex., *Khosa*, par. 23-25, le juge Binnie au nom de la majorité, comparativement aux par. 93-96, le juge Rothstein, motifs concordants quant au résultat; *Edmonton East*, par. 33, la juge Karakatsanis au nom de la majorité, comparativement aux par. 81-86, les juges Côté et Brown, dissidents.

which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

À l'ère de ce que l'on appelait l'approche « pragmatique et fonctionnelle », énoncée pour la première fois dans l'arrêt *Bibeault*, l'expertise du décideur par rapport à celle de la cour de révision constituait l'un des principaux facteurs contextuels censés indiquer l'intention du législateur concernant la norme de contrôle, mais l'expertise relative du décideur n'était pas présumée. La question de savoir si le décideur avait une plus grande expertise que la cour de révision était plutôt appréciée en fonction de la question précise en litige et d'une analyse contextuelle pouvant incorporer des facteurs comme les compétences des membres de l'organisme administratif, leur expérience dans un domaine particulier et leur participation à l'élaboration des politiques : voir, p. ex., *Pezim*, p. 591-592; *Southam*, par. 50-53; *Dr Q c. College of Physicians and Surgeons of British Columbia*, 2003 CSC 19, [2003] 1 R.C.S. 226, par. 28-29; *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, 2001 CSC 36, [2001] 2 R.C.S. 100, par. 28-32; *Moreau-Bérubé c. Nouveau-Brunswick (Conseil de la magistrature)*, 2002 CSC 11, [2002] 1 R.C.S. 249, par. 50.

[28] Unfortunately, this contextual analysis proved to be unwieldy and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

[28] Malheureusement, l'analyse contextuelle s'est révélée complexe et d'utilité limitée pour donner une orientation pratique aux cours de justice qui tentent d'évaluer l'expertise relative du décideur administratif. Plus récemment, la méthode prédominante adoptée par notre Cour a consisté à reconnaître que l'expertise est simplement inhérente à un organisme administratif en raison des fonctions spécialisées que lui a confiées le législateur : *Edmonton East*, par. 33. Or, s'il est dorénavant tenu pour acquis que le décideur administratif possède une expertise spécialisée en ce qui concerne l'ensemble des questions dont il est saisi, la notion d'expertise n'aide plus la cour de révision à distinguer les questions qui commandent l'application de la norme de la décision raisonnable de celles qui ne la commandent pas.

[29] Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate

[29] Bien sûr, le rôle spécialisé du décideur administratif qui permet à celui-ci d'approfondir son expertise et son expérience institutionnelle n'est pas la seule raison pour laquelle le législateur peut choisir de lui déléguer un pouvoir décisionnel. Au fil des ans, la Cour a ainsi souligné plusieurs autres raisons convaincantes justifiant la délégation de l'administration d'un régime

the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

législatif à un décideur en particulier. Mentionnons la proximité des décideurs et des parties intéressées ainsi que la réceptivité envers ces dernières; la capacité des décideurs de trancher de manière rapide, souple et efficace; et leur faculté d'alléger et de simplifier la procédure pour favoriser ainsi l'accès à la justice.

[30] Si l'expertise spécialisée et ces autres considérations peuvent toutes justifier la délégation du pouvoir décisionnel, une cour de révision n'est pas tenue d'établir laquelle de ces considérations s'applique dans le cas d'un décideur donné afin de déterminer la norme de contrôle applicable. Nous sommes plutôt d'avis que c'est *le fait même* que le législateur choisit de déléguer le pouvoir décisionnel qui justifie l'application par défaut de la norme de la décision raisonnable. La Cour a de fait déjà reconnu ce fondement de l'application de la norme de la décision raisonnable aux décisions administratives. Dans l'arrêt *Khosa*, par exemple, les juges majoritaires ont interprété l'arrêt *Dunsmuir* comme appuyant la proposition selon laquelle, « sans égard à l'existence d'une clause privative, il est maintenant admis qu'une certaine déférence s'impose lorsqu'une décision particulière a été confiée à un décideur administratif plutôt qu'aux tribunaux judiciaires » : par. 25. Plus récemment, dans l'arrêt *Edmonton East*, la juge Karakatsanis a expliqué que la présomption de contrôle judiciaire selon la norme de la décision raisonnable « respecte le principe de la suprématie législative et la décision de déléguer le pouvoir décisionnel à un tribunal administratif plutôt qu'aux cours de justice » : par. 22. Qui plus est, dans l'arrêt *CCDP*, le juge Gascon a précisé que « le fait que le législateur a confié certains pouvoirs à un décideur administratif plutôt qu'aux tribunaux judiciaires porte à croire qu'il avait l'intention que la déférence s'impose » : par. 50. Autrement dit, la présomption d'application de la norme de la décision raisonnable se justifie à la fois par le respect de ce choix en matière d'organisation institutionnelle et du principe démocratique, ainsi que par la nécessité que les cours de justice évitent « toute immixtion injustifiée » dans l'exercice par le décideur administratif de ses fonctions : *Dunsmuir*, par. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

[33] This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that

[31] Puisque nous retenons dans les présents motifs la présomption d'application de la norme de la décision raisonnable en tant que point de départ, nous tenons à préciser que l'expertise n'est plus pertinente pour déterminer la norme de contrôle applicable, comme c'était le cas dans l'analyse contextuelle. Nous n'enlevons toutefois pas à l'expertise la place qu'elle occupe dans le processus décisionnel administratif. Cette considération est tout simplement incorporée au nouveau point de départ et, comme nous l'expliquons plus loin, l'expertise demeure pertinente lors de l'exercice du contrôle judiciaire selon la norme de la décision raisonnable.

[32] Cela dit, notre position de départ voulant que la norme de contrôle applicable soit celle de la décision raisonnable n'est pas inconciliable avec la primauté du droit. Puisque cette approche repose sur le respect du choix fait par le législateur, les cours de justice doivent aussi donner effet aux indications expresses de ce dernier sur l'application d'une norme de contrôle différente. De la même manière, la cour de révision doit être prête à déroger à la présomption d'application de la norme de la décision raisonnable dans les cas où le respect de la primauté du droit exige une réponse unique, décisive et définitive à la question dont elle est saisie. Nous examinons chacune de ces situations à tour de rôle.

B. *La dérogation à la présomption d'application de la norme de la décision raisonnable compte tenu de l'intention du législateur*

[33] La Cour a écrit que le respect de l'intention du législateur « doit nous guider » en matière de contrôle judiciaire : *S.C.F.P. c. Ontario (Ministre du Travail)*, 2003 CSC 29, [2003] 1 R.C.S. 539, par. 149. Cette position demeure pertinente. La présomption relative à l'application de la norme de la décision raisonnable décrite ci-dessus a pour objet de donner effet à la volonté du législateur de s'en remettre, pour certaines choses, à un décideur administratif plutôt qu'aux cours de justice. Cette présomption peut donc être réfutée si le législateur prévoit l'application d'une norme de contrôle différente, ce qu'il peut faire de deux façons. Premièrement, le législateur peut prescrire expressément, dans une loi, la norme de contrôle applicable aux décisions d'un décideur administratif

derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

en particulier. Deuxièmement, le législateur peut indiquer qu'une dérogation à la présomption de contrôle selon la norme de la décision raisonnable est de mise en prévoyant un mécanisme d'appel à l'encontre d'un décideur administratif devant une cour de justice, ce qui dénote que les normes générales en matière d'appel trouvent application.

(1) Les normes de contrôle établies par voie législative

[34] Tout cadre d'analyse fondé sur l'intention du législateur doit respecter, dans la mesure du possible, les dispositions législatives claires qui prescrivent la norme de contrôle applicable. Notre Cour a régulièrement affirmé qu'il faut donner effet aux normes de contrôle prescrites par la loi : voir, p. ex., *R. c. Owen*, 2003 CSC 33, [2003] 1 R.C.S. 779, par. 31-32; *Khosa*, par. 18-19; *Colombie-Britannique (Workers' Compensation Board) c. Figliola*, 2011 CSC 52, [2011] 3 R.C.S. 422, par. 20; *Moore c. Colombie-Britannique (Éducation)*, 2012 CSC 61, [2012] 3 R.C.S. 360, par. 55; *McCormick c. Fasken Martineau DuMoulin S.E.N.C.R.L./s.r.l.*, 2014 CSC 39, [2014] 2 R.C.S. 108, par. 16; *Colombie-Britannique (Workers' Compensation Appeal Tribunal) c. Fraser Health Authority*, 2016 CSC 25, [2016] 1 R.C.S. 587, par. 8 et 29; *British Columbia Human Rights Tribunal c. Schrenk*, 2017 CSC 62, [2017] 2 R.C.S. 795, par. 28.

[35] Ainsi, lorsque le législateur indique que les cours de justice ont l'obligation d'appliquer la norme de la décision correcte lors du contrôle de certaines questions, c'est la norme qu'il convient alors d'appliquer. En Colombie-Britannique, la législature a fixé la norme de contrôle applicable pour de nombreux tribunaux administratifs en se fondant sur l'*Administrative Tribunals Act*, S.B.C. 2004, c. 45 : voir art. 58 et 59. Par exemple, elle a prévu que les questions d'interprétation des lois dont est saisi le tribunal des droits de la personne de la Colombie-Britannique doivent être contrôlées selon la norme de la décision correcte : *ibid.*, par. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, art. 32. Nous sommes toujours d'avis que, dans les cas où le législateur énonce la norme de contrôle applicable, les cours de justice sont tenues au respect de celle-ci, dans les limites qu'impose la primauté du droit.

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in her factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative

(2) Les mécanismes d'appel prévus par la loi

[36] Nous avons réaffirmé que, dans l'analyse relative à la norme de contrôle, les cours de justice devaient autant que possible respecter les choix d'organisation institutionnelle du législateur consistant à déléguer certaines questions par voie législative. À notre avis, compte tenu de cette position de principe, les cours de justice doivent aussi donner effet à l'intention du législateur qui se manifeste par la présence d'un mécanisme d'appel à l'encontre d'une décision administrative et qui prévoit l'exercice d'une fonction d'appel au regard d'une telle décision. De la même manière que le législateur peut, dans le respect des limites fixées par la Constitution, mettre des décisions administratives à l'abri d'une intervention judiciaire, il peut également choisir d'établir un régime qui, « loin d'exclure les cours, les intègre dans le mécanisme d'application prévu » : *Seneca College of Applied Arts and Technology c. Bhadauria*, [1981] 2 R.C.S. 181, p. 195. Lorsqu'il accorde aux parties la possibilité de porter en appel, de plein droit ou sur autorisation, une décision administrative devant une cour de justice, le législateur assujettit le régime administratif à une compétence d'appel et indique qu'il s'attend à ce que la cour vérifie attentivement cette décision lors d'un processus d'appel. Cette volonté expresse réfute forcément la présomption générale d'application de la norme de la décision raisonnable fondée sur l'intention de respecter le choix du législateur de renvoyer certaines questions à un organisme autre qu'une cour de justice. Il y a lieu de donner effet à cette volonté. Comme le fait observer l'intervenante la procureure générale du Québec dans son mémoire, « [l]'obligation de déférence ne doit pas stériliser un tel mécanisme d'appel, jusqu'à dénaturer le processus décisionnel que le législateur voulait mettre en place » : par. 2.

[37] Il convient donc de reconnaître que, lorsque le législateur prévoit un appel à l'encontre d'une décision administrative devant une cour de justice, la cour saisie de l'appel doit recourir aux normes applicables en appel pour réviser la décision. Ainsi, la norme de contrôle applicable doit être déterminée eu égard à la nature de la question et à la jurisprudence de notre Cour en la matière. Par exemple, lorsqu'une cour de justice entend l'appel d'une décision

decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J. T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190-92, per Nadon J.A., concurring, and at paras. 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central*

administrative, elle se prononcera sur des questions de droit, touchant notamment à l'interprétation législative et à la portée de la compétence du décideur, selon la norme de la décision correcte conformément à l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 8. Si l'appel prévu par la loi porte notamment sur des questions de fait, la norme de contrôle sera celle de l'erreur manifeste et déterminante (applicable également à l'égard des questions mixtes de fait et de droit en l'absence d'un principe juridique facilement isolable) : voir *Housen*, par. 10, 19 et 26-37. Évidemment, si le législateur entend prévoir l'application en appel d'une autre norme de contrôle, il lui est toujours loisible d'exprimer son intention en énonçant dans la loi la norme de contrôle applicable.

[38] Il est vrai que donner un tel sens aux mécanismes d'appel prévus par la loi s'écarte de la jurisprudence récente de notre Cour. Cependant, après un examen attentif, nous estimons que ce virage s'impose afin d'apporter uniformité et équilibre conceptuel à l'analyse relative à la norme de contrôle. En outre, cette approche est justifiée par la mise en balance des valeurs de la certitude et de la justesse : *Craig*, par. 27. Notre conclusion repose sur les considérations suivantes.

[39] D'abord, d'importantes critiques judiciaires et doctrinales ont été formulées au sujet de cette conception somme toute récente que notre Cour s'est faite des droits d'appel accordés par la loi : voir, p. ex., Y.-M. Morissette, « What is a "reasonable decision"? » (2018), 31 *R.C.D.A.P.* 225, p. 244; l'honorable J. T. Robertson, *Administrative Deference : The Canadian Doctrine that Continues to Disappoint* (18 avril 2018) (en ligne), p. 8; l'honorable D. Stratas, « The Canadian Law of Judicial Review : A Plea for Doctrinal Coherence and Consistency » (2016), 42 *Queen's L.J.* 27, p. 33; Daly, p. 541-542; *Québec (Procureure générale) c. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, par. 36-46; *Bell Canada c. 7262591 Canada Ltd.*, 2018 CAF 174, par. 190-192 (CanLII), motifs concordants du juge Nadon, et par. 66 et 69-72, motifs dissidents du juge Rennie; *Garneau Community League c. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, par. 91 et 93-95, motifs

Supplies Limited, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

concordants du juge Slatter; *Nova Scotia (Attorney General) c. S&D Smith Central Supplies Limited*, 2019 NSCA 22, par. 250, 255-264 et 274-302 (CanLII), motifs dissidents du juge Beveridge; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) c. Oakley*, 2019 NSCA 14, par. 9-14 (CanLII). Ces critiques insistent sur l'incohérence inhérente à un cadre d'analyse de la norme de contrôle fondé sur l'intention du législateur qui refuse par ailleurs de donner un sens à un droit d'appel conféré expressément par la loi. D'après ces critiques, le choix du législateur n'est pas unidimensionnel; il pointe plutôt vers deux directions opposées. Si, d'un côté, le choix du législateur de déléguer des pouvoirs à un décideur administratif fonde une présomption d'application de la norme de la décision raisonnable, de l'autre côté, son choix de créer dans la loi un droit d'appel manifeste une intention d'attribuer un rôle de tribunal d'appel aux cours de révision.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[40] Notre Cour a déjà jugé que l'existence d'importantes critiques valables, notamment judiciaires et doctrinales, peut justifier le réexamen d'un précédent : *Craig*, par. 29; *R. c. Robinson*, [1996] 1 R.C.S. 683, par. 35-41. Cette considération s'applique en l'espèce. Plus précisément, l'affirmation selon laquelle l'examen des droits d'appel conférés par la loi représente une rupture avec le fondement conceptuel qui sous-tend le cadre d'analyse de la norme de contrôle est en soi une raison convaincante de revoir l'approche actuelle : *Khosa*, par. 87, le juge Rothstein, motifs concordants quant au résultat.

[41] Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would

[41] Ensuite, rien ne justifie de façon satisfaisante la tendance récente de notre Cour de ne pas tenir compte des droits d'appel conférés par la loi sauf en présence d'un libellé exceptionnel : voir *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35-39. En effet, la Cour rompt ainsi avec la jurisprudence antérieure : l'honorable J. T. Robertson, « Judicial Deference to Administrative Tribunals : A Guide to 60 Years of Supreme Court Jurisprudence » (2014), 66 *S.C.L.R.* (2d) 1, p. 91-93. Selon l'ancienne approche « pragmatique et fonctionnelle » adoptée pour déterminer la norme de contrôle applicable, l'existence d'une clause privative ou d'un droit d'appel prévu par la loi faisait partie des quatre facteurs contextuels

consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

[43] Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights

dont la cour de justice tenait compte pour cerner la norme que le législateur entendait appliquer à une décision particulière. Quoiqu'elle ne constituait pas un facteur déterminant, la disposition législative créant le droit d'appel était considérée comme un facteur clé témoignant de l'intention du législateur que les cours de justice appliquent une norme de contrôle moins déférente : voir, p. ex., *Pezim*, p. 589-592; *British Columbia Telephone Co. c. Shaw Cable Systems (B.C.) Ltd.*, [1995] 2 R.C.S. 739, par. 28-31; *Southam*, par. 30-32, 46 et 54-55; *Pushpanathan*, par. 30-31; *Dr Q*, par. 27; *Mattel*, par. 26-27; *Barreau du Nouveau-Brunswick c. Ryan*, 2003 CSC 20, [2003] 1 R.C.S. 247, par. 21 et 27-29; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476, par. 11; *Monsanto Canada Inc. c. Ontario (Surintendant des services financiers)*, 2004 CSC 54, [2004] 3 R.C.S. 152, par. 7.

[42] La Cour a certes statué parfois que, même dans le cas d'un appel prévu par la loi, les conclusions juridiques qui touchent directement à l'expertise du décideur commandaient une norme de contrôle empreinte de déférence : voir, p. ex., *Pezim*. Cependant, dans d'autres cas, la Cour a conclu que l'existence d'un mécanisme d'appel prévu par la loi et le fait que le décideur n'avait pas une plus grande expertise que les cours à l'égard de la question étudiée indiquaient que la norme de contrôle applicable était celle de la décision correcte, notamment en matière d'interprétation de la loi constitutive du décideur administratif : voir, p. ex., *Mattel*, par. 26-33; *Barrie Public Utilities*, par. 9-19; *Monsanto*, par. 6-16.

[43] Or, dans les arrêts *Dunsmuir*, *Alberta Teachers*, *Edmonton East* et la jurisprudence subséquente, où la Cour a simplifié l'analyse relative à la norme de contrôle pour passer d'une approche contextuelle à une approche davantage orientée vers des catégories, les mécanismes d'appel prévus par la loi ont cessé de jouer un rôle dans l'analyse. Bien qu'elle ait pu s'avérer louable, cette simplification de l'analyse relative à la norme de contrôle ne justifie pas que l'on cesse de donner *quelque* effet que ce soit aux mécanismes d'appel prévus par la loi. L'arrêt *Dunsmuir* lui-même donne peu d'indications sur la raison d'être de ce changement. Les juges majoritaires dans cet arrêt n'ont rien dit sur le rôle

of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature

que joue le droit d'appel accordé par la loi dans la détermination de la norme de contrôle applicable et n'ont pas parlé du traitement réservé autrefois aux droits d'appel de cette nature par l'approche pragmatique et fonctionnelle.

[44] De façon plus générale, il n'y a aucune raison convaincante de présumer que le législateur voulait que le mot « appel » revête un sens tout à fait différent dans une loi à caractère administratif que, par exemple, dans un contexte du droit criminel ou commercial. Accepter que le mot « appel » porte sur le même type de procédure dans tous ces contextes s'accorde également avec la présomption d'uniformité d'expression, selon laquelle le législateur est présumé employer des mots de telle sorte que les mêmes termes ont le même sens, dans une même loi ainsi que d'une loi à l'autre : R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 217. Le fait de tenir pour acquis que le législateur entend par « appel » le recours à une norme de contrôle applicable en appel permet également d'expliquer pourquoi bon nombre de textes législatifs prévoient *à la fois* des mécanismes d'appel et de contrôle judiciaire dans différents contextes, conférant ainsi deux rôles possibles aux cours de révision : voir, p. ex., la *Loi sur les Cours fédérales*, L.R.C. 1985, c. F-7, art. 27 et 28. Cela vient renforcer l'idée qu'il est nécessaire de donner effet aux droits d'appel conférés par la loi. La suggestion de nos collègues que notre position à cet égard « repose » sur ce qu'elles appellent un « argument textuel » (par. 246) est inexacte.

[45] L'examen du contexte général des mécanismes d'appel prévus par la loi fait ressortir l'absence de justification rationnelle au fait de ne pas tenir compte de ceux-ci. Ainsi, l'existence d'un droit d'appel circonscrit, par exemple sur des questions de droit ou sur autorisation judiciaire, ne fait pas obstacle à l'examen d'autres éléments de la décision par voie de contrôle judiciaire. Par contre, si les mêmes normes de contrôle s'appliquaient, que la question en cause soit visée ou non par le droit d'appel ou que la personne faisant l'objet de la décision administrative ait obtenu ou non l'autorisation d'interjeter appel ou ait présenté ou non une demande de contrôle judiciaire, la disposition créant le droit d'appel serait alors tout à fait redondante. Or, cela serait contraire

does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

[47] The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine

au principe bien établi voulant que le législateur ne parle pas pour ne rien dire : *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838.

[46] Enfin, et ceci est déterminant, les pourvois dont la Cour est saisie ont permis de procéder à un examen exhaustif et fouillé de l'analyse relative à la norme de contrôle afin de remédier aux difficultés conceptuelles et pratiques qui contribuent à rendre ce domaine du droit éprouvant tant pour les justiciables que pour les cours de justice. Pour atteindre cet objectif, le cadre d'analyse révisé doit permettre l'application des mécanismes d'appel prévus par la loi, et ce, pour au moins deux raisons. La première est d'ordre conceptuel. Dans le passé, notre Cour a fait abstraction d'une disposition créant un droit d'appel notamment dans le cas où le décideur possède une expertise relative supérieure — ce que la Cour a appelé le principe de la « spécialisation des fonctions » dans *Pezim*, p. 591. Or, comme nous l'avons mentionné, la présomption d'application de la norme de la décision raisonnable en cas de contrôle judiciaire n'est plus fondée sur la notion d'expertise relative. Elle repose plutôt maintenant sur le respect du choix d'organisation institutionnelle de la part du législateur qui a préféré confier le pouvoir décisionnel à un décideur administratif plutôt qu'à une cour de justice. Il serait incompatible avec ce fondement conceptuel de la présomption d'application de la norme de la décision raisonnable de faire fi d'indications claires que le législateur a délibérément voulu conférer un rôle plus actif aux cours de justice. Tout comme le fait de reconnaître la présomption d'application de la norme de la décision raisonnable à toutes les questions respecte la volonté du législateur de s'en remettre d'abord et avant tout à un décideur administratif pour certaines choses, la dérogation à cette présomption générale dans le cas d'un appel prévu par la loi respecte la volonté du législateur de conférer un rôle plus actif aux cours de justice dans la supervision du processus décisionnel administratif.

[47] La deuxième raison tient à ceci. Tenant compte de l'évolution de la jurisprudence au cours des dernières années, les présents motifs ferment de manière définitive la porte au recours à l'analyse contextuelle

the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

[48] Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

pour déterminer la norme de contrôle applicable, et ce, afin d'alléger et de simplifier le cadre d'analyse applicable à la norme de contrôle. Devant cette mise à l'écart de l'approche contextuelle dans le choix de la norme de contrôle applicable, il devient nécessaire que les droits d'appel prévus par la loi jouent le rôle qui est le leur. L'élimination de l'approche contextuelle fait en sorte que les droits d'appel accordés par la loi doivent maintenant soit ne jouer aucun rôle en droit administratif, soit être reconnus comme indiquant une dérogation à l'application par défaut de la norme de la décision raisonnable. La seconde thèse doit prévaloir.

[48] Nos collègues reconnaissent que le temps est venu d'en finir avec l'approche contextuelle énoncée dans l'arrêt *Dunsmuir* et d'adopter une présomption d'application de la norme de la décision raisonnable. Nous divergeons d'opinion sur la mesure dans laquelle cette rupture avec l'approche contextuelle requiert des modifications correspondantes à d'autres aspects de la jurisprudence en matière de norme de contrôle. Nous considérons que l'élimination de l'approche contextuelle constitue un ajustement progressif mais important aux fondements du contrôle judiciaire canadien. S'il est vrai que la jurisprudence de notre Cour a, au cours des dernières années, précisé que l'approche contextuelle devrait être appliquée « avec parcimonie » (*CCDP*, par. 46), il est inexact de soutenir que l'état de notre jurisprudence est tel que l'élimination de l'analyse contextuelle était « pratiquement achevée » : motifs des juges Abella et Karakatsanis, par. 277; voir, à ce sujet, *CCDP*, par. 44-54; *Saguenay*, par. 46; *Tervita*, par. 35; *McLean*, par. 22; *Edmonton East*, par. 32; *Rogers Communications Inc. c. Société canadienne des auteurs, compositeurs et éditeurs de musique*, 2012 CSC 35, [2012] 2 R.C.S. 283, par. 15. L'analyse contextuelle forme un volet du cadre d'analyse général de la norme de contrôle établi dans l'arrêt *Dunsmuir*. Une rupture avec cet aspect du cadre d'analyse énoncé dans l'arrêt *Dunsmuir* exige un rééquilibrage réfléchi du cadre d'analyse dans son ensemble afin de maintenir l'équilibre, fondamental en droit administratif, entre les rôles des décideurs administratifs et ceux des cours de révision.

[49] In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

[49] À notre avis, vu le point de départ qui repose sur cette présomption d'application de la norme de la décision raisonnable, et en l'absence d'une analyse contextuelle, le présent cadre d'analyse se doit de donner effet à l'intention du législateur en matière de mécanismes d'appel prévus par la loi. Il s'agit là d'indications claires de la volonté du législateur sur la norme de contrôle applicable, lesquelles imposent aux cours de révision d'appliquer les normes d'intervention qui prévalent en appel. À l'inverse, dans un tel cadre d'analyse qui repose sur la présomption d'application de la norme de la décision raisonnable, les facteurs contextuels que les cours de justice voyaient autrefois comme des signes militant en faveur d'un contrôle empreint de déférence, telles les clauses privatives, ne remplissent dorénavant aucune fonction indépendante ou supplémentaire dans la détermination de la norme de contrôle applicable.

[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[50] Nous apportons ici trois précisions sur le rôle que joue le mécanisme d'appel prévu par la loi dans le choix de la norme de contrôle applicable. Premièrement, nous soulignons que les régimes législatifs peuvent accorder aux parties le droit de porter en appel une décision administrative devant une cour de justice en tout temps (c'est-à-dire, de plein droit) ou sur autorisation. Si l'obligation d'obtenir une autorisation détermine si un appel à l'encontre d'une décision sera instruit, elle n'a aucun impact sur la norme qui prévaut en appel une fois l'autorisation accordée.

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of

[51] Deuxièmement, nous rappelons que ce ne sont pas toutes les dispositions législatives envisageant la possibilité qu'une cour de justice puisse contrôler une décision administrative qui confèrent dans les faits un droit d'appel. Certaines dispositions reconnaissent simplement que toute décision administrative est susceptible de contrôle judiciaire et traitent de questions de procédure ou d'autres éléments semblables du contrôle judiciaire applicable dans un contexte particulier. Comme elles n'attribuent pas de fonction d'appel aux cours de justice, ces dispositions ne permettent pas de recourir aux normes d'intervention applicables en appel. Parmi ces dispositions figurent les art. 18 à 18.2, 18.4 et 28 de la *Loi sur les Cours fédérales* qui donnent à la Cour fédérale et à la Cour d'appel fédérale compétence pour connaître des demandes de contrôle

Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

[52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution

judiciaire visant des offices fédéraux, accorder réparation le cas échéant et se prononcer sur les aspects procéduraux de ces demandes : voir *Khosa*, par. 34. Un autre exemple est celui de l'art. 470, dans sa version actuelle, de la *Municipal Government Act*, R.S.A. 2000, c. M-26, de l'Alberta, qui ne prévoit pas de droit d'appel devant une cour de justice, mais porte plutôt sur des considérations et des conséquences procédurales [TRADUCTION] « [d]ans le cas où la décision d'un comité de révision des évaluations fait l'objet d'une demande de contrôle judiciaire » : par. 470(1).

[52] Troisièmement, nous soulignons que les droits d'appel conférés par la loi sont souvent circonscrits : leur portée peut être restreinte en fonction des types de questions sur lesquelles une partie peut interjeter appel (par exemple, lorsque le droit d'appel ne vise que des questions de droit), ou en fonction du type de décision susceptible d'être portée en appel (lorsque, par exemple, certaines décisions d'un décideur administratif sont sans appel devant une cour de justice), ou bien en fonction de la partie ou des parties qui peuvent porter la cause en appel. La présence d'un droit d'appel circonscrit dans le cadre d'un régime législatif ne fait pas obstacle en soi aux demandes de contrôle judiciaire visant des décisions ou des questions qui ne sont pas visées par le mécanisme d'appel, ni aux recours intentés par des personnes qui n'ont aucun droit d'appel. Dans de tels cas, ce contrôle judiciaire diffère toutefois d'un appel, et la présomption d'application de la norme de la décision raisonnable lors du contrôle judiciaire ne sera pas réfutée en invoquant le mécanisme d'appel autrement prévu par la loi.

C. *La norme de la décision correcte s'impose lorsque la primauté du droit l'exige*

[53] À notre avis, le respect de la primauté du droit exige que les cours de justice appliquent la norme de la décision correcte à l'égard de certains types de questions de droit : les questions constitutionnelles, les questions de droit générales d'une importance capitale pour le système juridique dans son ensemble, et les questions liées aux délimitations des compétences respectives d'organismes administratifs. L'application de la norme de la décision

and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, at para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

correcte à l'égard de ces questions s'accorde avec le rôle unique du pouvoir judiciaire dans l'interprétation de la Constitution, et fait en sorte que les cours de justice ont le dernier mot sur des questions à l'égard desquelles la primauté du droit exige une cohérence et une réponse décisive et définitive s'impose : *Dunsmuir*, par. 58.

[54] La cour de révision qui applique la norme de la décision correcte peut choisir de confirmer la conclusion du décideur administratif ou de lui substituer sa propre conclusion : *Dunsmuir*, par. 50. S'il est opportun que la cour de révision tienne compte du raisonnement du décideur administratif — et puisse en fait le trouver convaincant et le faire sien — elle est en fin de compte habilitée à tirer ses propres conclusions sur la question en litige.

(1) Les questions constitutionnelles

[55] L'examen des questions touchant au partage des compétences entre le Parlement et les provinces, au rapport entre le législateur et les autres organes de l'État, à la portée des droits ancestraux et droits issus de traités reconnus à l'art. 35 de la *Loi constitutionnelle de 1982*, et à d'autres questions de droit constitutionnel nécessite une réponse décisive et définitive des cours de justice. Il faut donc continuer d'appliquer la norme de la décision correcte au moment d'examiner les questions de cette nature : *Dunsmuir*, par. 58; *Westcoast Energy Inc. c. Canada (Office national de l'énergie)*, [1998] 1 R.C.S. 322.

[56] La Constitution tant écrite que non écrite circonscrit l'ensemble des mesures prises par l'État. Les législateurs et les décideurs administratifs sont tenus de respecter la Constitution. Un législateur ne saurait modifier la portée de ses propres pouvoirs constitutionnels par voie législative. Il ne saurait non plus modifier les limites constitutionnelles de ses pouvoirs exécutifs en déléguant ceux-ci à un organe administratif. En d'autres termes, si un législateur peut choisir les pouvoirs à déléguer à un organisme administratif, il ne peut déléguer des pouvoirs dont la Constitution ne l'investit pas. Le pouvoir constitutionnel d'agir doit comporter des limites définies et uniformes, ce qui commande l'application de la norme de la décision correcte.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[57] Bien que des *amici curiae* aient remis en question la méthode de détermination de la norme de contrôle établie dans l'arrêt *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, le présent pourvoi ne nécessite pas que nous nous y attardions. Il importe par contre d'établir une distinction entre les cas où il est allégué que la décision administrative sous examen a pour effet de restreindre de façon injustifiable les droits consacrés par la *Charte canadienne des droits et libertés* (comme dans l'arrêt *Doré*) et les cas où le contrôle judiciaire porte sur la question de savoir si l'une des dispositions de la loi habilitante de l'organisme décisionnel viole la *Charte* (voir, p. ex., *Nouvelle-Écosse (Workers' Compensation Board) c. Martin*, 2003 CSC 54, [2003] 2 R.C.S. 504, par. 65). Suivant la jurisprudence de notre Cour, l'interprétation d'un décideur administratif sur ce dernier point doit être contrôlée selon la norme de la décision correcte. Les présents motifs n'ont pas pour effet d'écarter cette jurisprudence.

(2) Les questions de droit générales d'importance capitale pour le système juridique dans son ensemble

[58] Outre les questions constitutionnelles, la Cour a reconnu à la majorité dans l'arrêt *Dunsmuir* qu'une question de droit générale « à la fois, d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise de l'arbitre » commande l'application de la norme de la décision correcte : par. 60, citant *Toronto (Ville) c. S.C.F.P., section locale 79*, 2003 CSC 63, [2003] 3 R.C.S. 77, par. 62, motifs concordants du juge LeBel. Nous demeurons d'avis que la primauté du droit exige que les cours de justice tranchent de manière définitive les questions de droit générales qui sont « d'importance capitale pour le système juridique dans son ensemble ». Toutefois, au regard des principes qui sous-tendent de telles questions, il n'est pas nécessaire d'examiner l'expertise spécialisée du décideur pour déterminer s'il faut appliquer la norme de la décision correcte en pareils cas. Comme l'indique le par. 31 des présents motifs, la prise en compte de l'expertise est incorporée au nouveau point de départ adopté dans les présents motifs, à savoir la présomption d'application de la norme de la décision raisonnable.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, at para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

[59] Comme les juges majoritaires de la Cour l'ont reconnu dans l'arrêt *Dunsmuir*, la principale raison d'être de cette catégorie de questions est la nécessité de trancher certaines questions de droit générales « de manière uniforme et cohérente étant donné [leurs] répercussions sur l'administration de la justice dans son ensemble » : *Dunsmuir*, par. 60. Dans ces cas, la norme de contrôle de la décision correcte s'impose à l'égard des questions de droit générales qui sont « d'une importance fondamentale, de grande portée » et susceptibles d'avoir des répercussions juridiques significatives sur le système de justice dans son ensemble ou sur d'autres institutions gouvernementales : voir *Toronto (Ville)*, par. 70; *Alberta (Information and Privacy Commissioner) c. University of Calgary*, 2016 CSC 53, [2016] 2 R.C.S. 555, par. 20; *Compagnie des chemins de fer nationaux du Canada*, par. 60; *Chagnon c. Syndicat de la fonction publique et parapublique du Québec*, 2018 CSC 39, [2018] 2 R.C.S. 687, par. 17; *Saguenay*, par. 51; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471 (« *Mowat* »), par. 22; *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 CSC 8, [2016] 1 R.C.S. 29, par. 38. Par exemple, la question soulevée dans *University of Calgary* ne pouvait pas être tranchée par application de la norme de la décision raisonnable en raison des conséquences juridiques de la décision sur une vaste gamme d'autres régimes législatifs et en raison de la nécessité d'une protection uniforme du secret professionnel de l'avocat — en cause dans cette affaire — pour le bon fonctionnement du système de justice : *University of Calgary*, par. 19-26. Ainsi que le montre cette jurisprudence, résoudre des questions de droit générales « d'importance capitale pour le système juridique dans son ensemble » a des répercussions qui transcendent la décision en cause, d'où le besoin de « réponses uniformes et cohérentes ».

[60] This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of

[60] La jurisprudence de notre Cour continue de fournir des indications importantes sur ce qui constitue une question de droit générale d'une importance capitale pour le système juridique dans son ensemble. Par exemple, on a jugé que les questions de droit générales suivantes sont d'importance capitale pour le système juridique dans son ensemble : lorsqu'une procédure administrative est prescrite par

process (*Toronto (City)*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer

l'application des doctrines de l'autorité de la chose jugée et de l'abus de procédure (*Toronto (Ville)*, par. 15); la portée de l'obligation de neutralité religieuse de l'État (*Saguenay*, par. 49); le bien-fondé des limites du secret professionnel de l'avocat (*University of Calgary*, par. 20); et la portée du privilège parlementaire (*Chagnon*, par. 17). Il importe par contre de préciser qu'il y a lieu d'interpréter avec prudence ces décisions, puisque l'expertise perd dorénavant sa pertinence lorsqu'il s'agit d'identifier les questions appartenant à cette catégorie : voir, p. ex., *CCDP*, par. 43.

[61] Nous tenons à préciser que le simple fait qu'un conflit puisse être « d'intérêt public général » ne suffit pas pour qu'une question entre dans cette catégorie — pas plus que ne l'est le fait qu'une question formulée dans un sens général ou abstrait porte sur un enjeu important : voir, p. ex., *Syndicat canadien des communications, de l'énergie et du papier, section locale 30 c. Pâtes & Papier Irving, Ltée*, 2013 CSC 34, [2013] 2 R.C.S. 458, par. 66; *McLean*, par. 28; *Barreau du Québec c. Québec (Procureure générale)*, 2017 CSC 56, [2017] 2 R.C.S. 488, par. 18. La jurisprudence renferme de nombreux exemples de questions que notre Cour *n'*a *pas* considérées comme étant des questions de droit générales d'importance capitale pour le système juridique dans son ensemble. Mentionnons, entre autres, la question de savoir si un certain tribunal administratif peut accorder ou non un type particulier d'indemnité (*Mowat*, par. 25); les cas dans lesquels un arbitre peut appliquer une préclusion à titre de réparation (*Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, 2011 CSC 59, [2011] 3 R.C.S. 616, par. 37-38); l'interprétation d'une disposition législative prescrivant le délai pour mener à terme une enquête (*Alberta Teachers*, par. 32); la portée des droits de la direction prévus dans une convention collective (*Pâtes & Papier Irving*, par. 7, 15-16 et 66, les juges Rothstein et Moldaver, dissidents mais non sur ce point); l'application d'un délai de prescription en vertu d'une loi portant sur les valeurs mobilières (*McLean*, par. 28-31); la possibilité pour une partie à un contrat confidentiel de porter plainte sous un régime particulier de réglementation (*Compagnie des chemins de fer nationaux du Canada*, par. 60); et la portée d'une exception permettant aux non-avocats

plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, at para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a

de représenter un ministre dans certaines instances (*Barreau du Québec*, par. 17-18). Comme ces commentaires l'indiquent et ces exemples le montrent, le simple fait que l'expertise n'occupe plus de place dans la sélection de la norme de contrôle ne veut pas dire que les questions d'importance capitale forment désormais une vaste catégorie fourre-tout à laquelle s'applique la norme de la décision correcte.

[62] En somme, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble exigent une réponse unique et définitive. Lorsque ces questions se posent, la primauté du droit requiert que les cours de justice apportent un niveau de certitude juridique qui soit supérieur à celui que permet le contrôle en fonction de la norme de la décision raisonnable.

(3) Les questions liées aux délimitations des compétences respectives d'organismes administratifs

[63] Enfin, la primauté du droit veut que la norme de la décision correcte s'applique à la délimitation des compétences respectives d'organismes administratifs : *Dunsmuir*, par. 61. Une telle question s'est posée dans l'arrêt *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, 2000 CSC 14, [2000] 1 R.C.S. 360, où le débat portait sur la compétence d'un arbitre en matière de relations de travail pour statuer sur des questions de discipline et de renvoi de policiers qui étaient par ailleurs régies par un régime législatif complet. De même, dans l'arrêt *Québec (Commission des droits de la personne et des droits de la jeunesse) c. Québec (Procureur général)*, 2004 CSC 39, [2004] 2 R.C.S. 185, la Cour était saisie d'un conflit de compétence entre un arbitre en droit du travail et le Tribunal des droits de la personne du Québec.

[64] Il est rare que les décisions administratives soient contestées pour ce motif. Le cas échéant, toutefois, la primauté du droit commande l'intervention des cours de justice lorsqu'un organisme administratif interprète l'étendue de ses pouvoirs d'une manière qui est incompatible avec la compétence d'un autre organisme administratif. La raison d'être de cette catégorie de questions est simple : la primauté

true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*,

du droit ne saurait tolérer des ordonnances et des procédures qui entraînent un véritable conflit opérationnel entre deux organismes administratifs, de sorte qu'une partie se retrouve aux prises avec deux décisions contradictoires : voir *British Columbia Telephone Co.*, par. 80, motifs concordants de la juge McLachlin (plus tard juge en chef). Les membres du public doivent savoir à qui s'adresser en vue de régler un litige. À l'instar des questions de droit générales d'importance capitale pour le système juridique dans son ensemble, l'application de la norme de la décision correcte s'impose dans ces cas par souci de prévisibilité, de certitude et de caractère définitif du processus décisionnel en droit administratif.

D. *Un mot sur les questions de compétence*

[65] Nous sommes d'avis de mettre fin à la reconnaissance des questions de compétence comme une catégorie distincte devant faire l'objet d'un contrôle selon la norme de la décision correcte. Selon la majorité dans l'arrêt *Dunsmuir*, il ne faisait « aucun doute » (par. 50) que les questions liées à la compétence (ou les questions touchant véritablement à la compétence) devaient être examinées selon la norme de la décision correcte. Une véritable question de compétence se posait « lorsque le tribunal administratif [devait] déterminer expressément si les pouvoirs dont le législateur l'a investi l'autoris[ai]ent à trancher une question » : voir *Dunsmuir*, par. 59; *Québec (Procureure générale) c. Guérin*, 2017 CSC 42, [2017] 2 R.C.S. 3, par. 32. Or, depuis l'arrêt *Dunsmuir*, des opinions des juges majoritaires de la Cour ont mis en doute la pertinence de cette catégorie, ont peiné à en définir la portée et ont affirmé « douter sérieusement que la question appartienne à une catégorie distincte de questions de droit » : *McLean*, par. 25, renvoyant à *Alberta Teachers*, par. 34; *Edmonton East*, par. 26; *Guérin*, par. 32-36; *CCDP*, par. 31-41.

[66] Comme l'a fait remarquer le juge Gascon dans l'arrêt *CCDP*, la « compétence » en droit administratif est, de par sa nature même, un concept « aux contours flous » : par. 38. Il en est ainsi, parce que, en théorie, toute contestation d'une décision administrative peut être qualifiée de question qui « touche à la compétence », en ce sens qu'elle sème un doute à

at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill

savoir si le décideur était habilité à agir comme il l'a fait : voir *CCDP*, par. 38; *Alberta Teachers*, par. 34; voir également *City of Arlington, Texas c. Federal Communications Commission*, 569 U.S. 290 (2013), p. 299. Si notre Cour indique dans sa jurisprudence que seule une catégorie beaucoup plus circonscrite de questions touchant « véritablement » à la compétence appelle la norme de la décision correcte, elle fait aussi remarquer qu'il n'existe aucune « balise claire » qui permet de distinguer ces questions de celles touchant à l'interprétation de sa loi habilitante par un décideur administratif : voir *CCDP*, par. 38. Malgré les opinions divergentes sur la possibilité de délimiter la catégorie des questions touchant « véritablement » à la compétence, on s'entend généralement pour dire qu'il est « souvent difficile de distinguer l'exercice d'un pouvoir délégué qui soulève des questions touchant véritablement à la compétence de l'exercice du pouvoir qui fait intervenir l'application ordinaire d'une loi habilitante » : *CCDP*, par. 111, motifs concordants du juge Brown. Cette tension ressort peut-être le plus dans les cas où le législateur a délégué un large pouvoir à un organe administratif qui permet à celui-ci de concevoir des règlements dans la poursuite des objectifs de sa loi habilitante : voir, p. ex., *Green c. Société du Barreau du Manitoba*, 2017 CSC 20, [2017] 1 R.C.S. 360; *West Fraser Mills Ltd. c. Colombie-Britannique (Workers' Compensation Appeal Tribunal)*, 2018 CSC 22, [2018] 1 R.C.S. 635.

[67] Tout en soulignant cette difficulté inhérente — ainsi que l'effet néfaste de l'incertitude juridique qui en découle sur les justiciables — les juges majoritaires dans l'arrêt *CCDP* ont néanmoins laissé en suspens la question de savoir si la catégorie des questions touchant véritablement à la compétence était toujours nécessaire. Après avoir entendu les observations présentées à cet égard et saisi l'occasion de nous pencher sur ce point, nous sommes aujourd'hui en mesure de conclure qu'il n'est pas nécessaire de maintenir cette catégorie au sein des questions appelant la norme de la décision correcte. Les arguments à l'appui du maintien de cette catégorie — notamment la préoccupation relative au pouvoir du décideur, titulaire de pouvoirs délégués, de déterminer l'étendue de sa propre compétence — peuvent faire l'objet d'un examen adéquat au moyen du cadre d'analyse, exposé plus loin, qui doit servir

their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to

à effectuer un contrôle selon la norme de la décision raisonnable. Le contrôle judiciaire selon cette norme est à la fois rigoureux et adapté au contexte. En l'appliquant adéquatement, les cours de justice sont en mesure d'accomplir leur devoir constitutionnel de veiller à ce que les organismes administratifs agissent dans les limites des pouvoirs qui leur sont conférés sans qu'il soit nécessaire de procéder à un examen préliminaire pour établir si une interprétation particulière soulève une question touchant « véritablement » et « étroitement » à la compétence et sans avoir à recourir à la norme de la décision correcte.

[68] La norme de la décision raisonnable ne permet pas aux décideurs administratifs d'interpréter leur loi habilitante à leur gré et ne les autorise donc pas à élargir la portée de leurs pouvoirs au-delà de ce que souhaitait le législateur. Elle vient plutôt confirmer que le régime législatif applicable servira toujours à circonscrire les actes ainsi que les pouvoirs des décideurs administratifs. Même dans les cas où l'interprétation que le décideur donne de ses pouvoirs fait l'objet d'un contrôle selon la norme de la décision raisonnable, un texte législatif formulé en termes précis ou étroits aura forcément pour effet de restreindre les interprétations *raisonnables* que le décideur peut retenir — en les limitant peut-être à une seule. À l'inverse, lorsque le législateur confère au décideur de vastes pouvoirs au moyen d'un texte législatif rédigé en termes généraux, et ne prévoit aucun droit d'appel devant une cour de justice, il y a lieu de donner effet à son intention d'accorder une plus grande latitude au décideur sur l'interprétation de sa loi habilitante. Sans pour autant chercher à importer en bloc la jurisprudence américaine sur ce point, nous estimons pertinents les propos suivants formulés par la Cour suprême des États-Unis dans l'arrêt *Arlington*, p. 307 :

> [TRADUCTION] Il faut éviter le syndrome du « loup dans la bergerie » non pas en créant une catégorie arbitraire et indéfinissable de décisions d'organismes à l'égard desquelles il n'y a pas lieu de faire preuve de déférence, mais en prenant au sérieux et en appliquant rigoureusement, dans tous les cas, les restrictions prévues par la loi relativement aux pouvoirs conférés à un organisme. Si [le législateur] trace une ligne de démarcation claire, l'organisme ne peut aller au-delà de celle-ci; si [le législateur] trace une ligne de démarcation ambiguë, l'organisme ne

puzzle over whether the interpretive question presented is "jurisdictional."

E. *Other Circumstances Requiring a Derogation From the Presumption of Reasonableness Review*

[69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard

peut dépasser les limites de l'ambiguïté même. Or, pour l'application rigoureuse de cette dernière règle, la cour de justice n'est pas nécessairement tenue de s'arrêter et d'essayer de comprendre si la question d'interprétation soulevée touche à la « compétence ».

E. *Les autres circonstances qui nécessitent de déroger à l'application de la norme de la décision raisonnable*

[69] Dans les présents motifs, nous avons relevé cinq situations où se justifie une dérogation à la présomption de contrôle selon la norme de la décision raisonnable, soit sur le fondement de l'intention du législateur (en l'occurrence, les normes de contrôle établies par voie législative et les mécanismes d'appel prévus par la loi), soit parce que la primauté du droit exige un contrôle selon la norme de la décision correcte (en l'occurrence, les questions constitutionnelles, les questions de droit générales d'importance capitale pour le système juridique dans son ensemble, ainsi que les questions liées aux délimitations des compétences respectives d'organismes administratifs). Ce cadre d'analyse découle d'un examen minutieux, entrepris après avoir reçu des observations approfondies et procédé à une étude fouillée de la jurisprudence applicable. Pour le moment, nous estimons que les présents motifs couvrent l'ensemble des situations dans lesquelles il convient que la cour de révision déroge à la présomption de contrôle selon la norme de la décision raisonnable. Comme nous l'avons déjà indiqué, les cours de justice ne devraient plus recourir à l'analyse contextuelle pour déterminer la norme de contrôle applicable ou pour réfuter la présomption d'application de la norme de la décision raisonnable. En finir avec cette approche contextuelle fera en sorte, nous l'espérons, que « les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond » : *Alberta Teachers*, par. 36, citant *Dunsmuir*, par. 145, motifs concordants du juge Binnie.

[70] Toutefois, nous ne fermons pas définitivement la porte à la possibilité qu'une autre catégorie puisse ultérieurement être reconnue comme appelant une dérogation à la présomption de contrôle selon la norme de la décision raisonnable. Notre réticence à qualifier d'exhaustive la liste d'exceptions

is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

à l'application de la norme de la décision raisonnable ne doit cependant pas être interprétée comme visant à favoriser l'établissement routinier de nouvelles catégories de situations commandant l'application de la norme de la décision correcte. Cette réticence relève plutôt de la constatation qu'il serait illusoire de déclarer que nous avons envisagé toutes les combinaisons possibles de circonstances dans lesquelles l'intention du législateur ou la primauté du droit pourront commander une dérogation à la présomption d'application de la norme de la décision raisonnable. Cela dit, la reconnaissance de tout nouveau fondement pour l'application de la norme de la décision correcte devrait revêtir un caractère exceptionnel et devrait respecter le cadre d'analyse et les principes prépondérants énoncés dans les présents motifs. Autrement dit, toute nouvelle catégorie de questions qui justifie une dérogation à la norme de la décision raisonnable sur le fondement de l'intention du législateur devrait comporter une indication de cette volonté tout aussi solide et convaincante que les indications mentionnées dans les présents motifs (c.-à-d. une norme de contrôle établie par voie législative ou un mécanisme d'appel prévu par la loi). De la même manière, la reconnaissance d'une nouvelle catégorie de questions qui commande l'application de la norme de la décision correcte sur le fondement de la primauté du droit ne serait justifiée que dans le cas où le défaut d'appliquer la norme de la décision correcte risquerait d'ébranler la primauté du droit et mettrait en péril le bon fonctionnement du système de justice d'une façon analogue aux trois situations décrites dans les présents motifs.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative

[71] Selon les *amici curiae*, outre les trois catégories de questions de droit que nous avons déjà mentionnées, la Cour devrait reconnaître l'existence d'une autre catégorie de questions de droit qui commande l'application de la norme de la décision correcte sur le fondement de la primauté du droit : les questions de droit qui sèment constamment la discorde ou la dissension interne au sein d'un organisme administratif et qui mènent à l'incohérence du droit. Les *amici curiae* font valoir que l'application de la norme de la décision correcte s'impose en pareil cas parce que la primauté du droit est mise à mal lorsque l'incohérence du droit devient la norme et que les règles de droit dépendent de l'identité du décideur.

level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

Ils ajoutent que, dans les cas où des interprétations juridiques concurrentes et raisonnables persistent au niveau administratif — de sorte que la loi peut signifier à la fois « oui » et « non » — il appartient aux cours de justice d'intervenir et de trancher de manière décisive, et ce, sans faire preuve de déférence envers le décideur administratif : mémoire des *amici curiae*, par. 91.

[72] Nous ne sommes pas convaincus que la Cour devrait reconnaître l'existence d'une catégorie distincte de questions de droit qui appellent la norme de la décision correcte dans le cas où ces questions sèment constamment la discorde au sein d'un organisme administratif. Dans l'arrêt *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, notre Cour a conclu que « l'absence d'unanimité [parmi les membres d'un tribunal administratif] est [. . .] le prix à payer pour la liberté et l'indépendance décisionnelle accordées aux membres de ces mêmes tribunaux » : p. 800; voir aussi *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221, par. 28. Cela dit, nous convenons que le scénario hypothétique que proposent les *amici curiae* — où les règles de droit dépendent de l'identité du décideur et mènent à une incohérence du droit — va à l'encontre de la primauté du droit. Nous tenons cependant à préciser que le cadre d'application plus rigoureux de la norme de la décision raisonnable énoncé ci-dessous, qui tient compte de la valeur que représente la cohérence et du risque d'arbitraire, permet, de concert avec les processus administratifs internes qui favorisent l'uniformité et avec le contrôle que peut exercer le législateur (voir *Domtar*, p. 801), de se prémunir face aux menaces à la primauté du droit. En outre, il est difficile de cerner à quel moment une divergence interne sur une question de droit deviendrait grave, persistante et impossible à régler au point de créer une « incohérence du droit » et de commander l'intervention d'une cour de justice. Compte tenu de ces difficultés sur le plan pratique, des précédents de notre Cour et de la nature hypothétique du problème, nous nous abstenons de reconnaître l'existence d'une telle catégorie dans le présent pourvoi.

III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": factum of the *amici curiae*, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give

III. L'exercice du contrôle selon la norme de la décision raisonnable

[73] La jurisprudence de notre Cour en droit administratif a historiquement été axée sur le cadre d'analyse utilisé pour déterminer la norme de contrôle applicable, tout en donnant peu d'indications sur la façon de procéder en pratique à un contrôle fondé sur la norme de la décision raisonnable.

[74] Dans cette partie de nos motifs, nous fournissons de telles indications. L'approche retenue est axée sur la justification, s'appuie sur une cohérence sur le plan méthodologique, et renforce le principe voulant que « la prise de décisions motivées constitue la pierre angulaire de la légitimité des institutions » : mémoire des *amici curiae*, par. 12.

[75] Nous signalons que la manière dont nos collègues abordent le contrôle selon la norme de la décision raisonnable ne diffère pas fondamentalement de la nôtre. Nos collègues affirment que les cours de révision devraient respecter les décideurs administratifs et leur expertise spécialisée; ne devraient pas se demander comment elles auraient elles-mêmes tranché une question; et devraient se concentrer sur la question de savoir si la partie demanderesse a démontré le caractère déraisonnable de la décision : par. 288, 289 et 291. Nous sommes du même avis. Comme nous le mentionnons déjà au par. 13, le contrôle selon la norme de la décision raisonnable a pour point de départ la retenue judiciaire et le respect du rôle distinct des décideurs administratifs. De plus, comme nous l'expliquons ci-dessous, le contrôle selon la norme de la décision raisonnable tient compte de toutes les circonstances pertinentes pour déterminer si la partie demanderesse s'est acquittée de son fardeau.

A. *L'équité procédurale et le contrôle judiciaire sur le fond*

[76] Avant de procéder à l'analyse de la méthode proposée de contrôle selon la norme de la décision raisonnable, nous convenons que les exigences de l'obligation d'équité procédurale dans une affaire donnée — et notamment la question de savoir si

reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[78] In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for

cette obligation exige qu'un décideur motive sa décision — auront une incidence sur l'exercice par une cour de justice du contrôle en fonction de la norme de la décision raisonnable.

[77] Il est de jurisprudence constante que l'équité procédurale n'exige pas que toutes les décisions administratives soient motivées. L'obligation d'équité procédurale en droit administratif est « éminemment variable », intrinsèquement souple et tributaire du contexte : *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, p. 682; *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 22-23; *Moreau-Bérubé*, par. 74-75; *Dunsmuir*, par. 79. Dans le cas d'un contexte décisionnel administratif qui donne lieu à une obligation d'équité procédurale, les exigences procédurales applicables sont déterminées eu égard à l'ensemble des circonstances : *Baker*, par. 21. Dans l'arrêt *Baker*, la Cour a dressé une liste non exhaustive de facteurs qui servent à définir le contenu de l'obligation d'équité procédurale dans un cas donné, notamment la nécessité de fournir des motifs écrits. Parmi ces facteurs, mentionnons (1) la nature de la décision recherchée et le processus suivi pour y parvenir; (2) la nature du régime législatif; (3) l'importance de la décision pour l'individu ou les individus visés; (4) les attentes légitimes de la personne qui conteste la décision; et (5) les choix de procédure faits par le décideur administratif lui-même : *Baker*, par. 23-27; voir également *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Village)*, 2004 CSC 48, [2004] 2 R.C.S. 650, par. 5. Parmi les cas où des motifs écrits sont généralement nécessaires, on compte les situations où le processus décisionnel accorde aux parties le droit de participer, où une décision défavorable aurait une incidence considérable sur l'intéressé, ou encore celles où il existe un droit d'appel : *Baker*, par. 43; D. J. M. Brown et l'honorable J. M. Evans, avec l'aide de D. Fairlie, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), vol. 3, p. 12-54.

[78] Dans le présent pourvoi et dans les pourvois connexes, il s'agit de situations où il était nécessaire de motiver les décisions administratives contestées et où des motifs ont d'ailleurs été fournis. Notre analyse de la méthode qu'il convient d'utiliser pour effectuer

an administrative decision are required and available to the reviewing court.

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S. A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

un contrôle selon la norme de la décision raisonnable est donc axée sur la révision dans des circonstances où la décision administrative doit être motivée et où la cour de révision dispose des motifs à l'appui de ces décisions.

[79] Nonobstant les différences importantes qui existent entre le contexte administratif et le contexte judiciaire, les motifs répondent à bon nombre des mêmes besoins dans les deux contextes : *R. c. Sheppard*, 2002 CSC 26, [2002] 1 R.C.S. 869, par. 15 et 22-23. Les motifs donnés par les décideurs administratifs servent à expliquer le processus décisionnel et la raison d'être de la décision en cause. Ils permettent de montrer aux parties concernées que leurs arguments ont été pris en compte et démontrent que la décision a été rendue de manière équitable et licite. Les motifs servent de bouclier contre l'arbitraire et la perception d'arbitraire dans l'exercice d'un pouvoir public : *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 12-13. Comme l'a fait remarquer la juge L'Heureux-Dubé dans l'arrêt *Baker*, « [i]l est plus probable que les personnes touchées ont l'impression d'être traitées avec équité et de façon appropriée si des motifs sont fournis » : par. 39, citant S. A. de Smith, J. Jowell et lord Woolf, *Judicial Review of Administrative Action* (5e éd. 1995), p. 459-460. Et comme l'écrivent de manière convaincante Jocelyn Stacey et l'honorable Alice Woolley, [TRADUCTION] « les décisions rendues par les pouvoirs publics acquièrent leur autorité sur le plan juridique et démocratique par le biais d'un processus de justification publique » au moyen duquel les décideurs « motivent leurs décisions en tenant compte du contexte constitutionnel, législatif et de common law dans lequel ils œuvrent » : « Can Pragmatism Function in Administrative Law? » (2016), 74 *S.C.L.R.* (2d) 211, p. 220.

[80] Qui plus est, le processus de rédaction des motifs incite nécessairement le décideur administratif à étudier soigneusement son propre raisonnement et à mieux formuler son analyse : *Baker*, par. 39. C'est ce que le juge Sharpe désignait — quoique dans le contexte judiciaire — comme [TRADUCTION] « la discipline de motiver une décision » : *Good Judgment : Making Judicial Decisions* (2018), p. 134; voir aussi *Sheppard*, par. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what

[81] Les motifs favorisent un contrôle judiciaire valable en mettant en lumière la justification de la décision : *Baker*, par. 39. Dans l'arrêt *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, la Cour a réaffirmé que « l'objet des motifs, dans les cas où il faut en exposer, est d'établir "la justification de la décision [ainsi que] la transparence et [. . .] l'intelligibilité du processus décisionnel » : par. 1, citant *Dunsmuir*, par. 47; voir aussi *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 1, [2002] 1 R.C.S. 3, par. 126. Notre analyse prend donc comme point de départ que, lorsque des motifs sont requis, ceux-ci constituent le mécanisme principal par lequel les décideurs administratifs démontrent le caractère raisonnable de leurs décisions, tant aux parties touchées qu'aux cours de révision. En conséquence, la communication des motifs à l'appui d'une décision administrative est susceptible d'avoir des répercussions sur sa légitimité, à la fois au regard de l'équité procédurale et du caractère raisonnable de ceux-ci sur le fond.

B. *Le contrôle selon la norme de la décision raisonnable porte sur le processus décisionnel et ses résultats*

[82] Le contrôle selon la norme de la décision raisonnable vise à donner effet à l'intention du législateur de confier certaines décisions à un organisme administratif, tout en exerçant la fonction constitutionnelle du contrôle judiciaire qui vise à s'assurer que l'exercice du pouvoir étatique est assujetti à la primauté du droit : voir *Dunsmuir*, par. 27-28 et 48; *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 10; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3, par. 10.

[83] Il s'ensuit que le contrôle en fonction de la norme de la décision raisonnable doit s'intéresser à la décision effectivement rendue par le décideur, notamment au raisonnement suivi et au résultat de la décision. Le rôle des cours de justice consiste, en pareil cas, à *réviser* la décision et, en général à tout le moins, à s'abstenir de trancher elles-mêmes la question en litige. Une cour de justice qui applique la norme de

decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court

contrôle de la décision raisonnable ne se demande donc pas quelle décision elle aurait rendue à la place du décideur administratif, ne tente pas de prendre en compte l'« éventail » des conclusions qu'aurait pu tirer le décideur, ne se livre pas à une analyse *de novo*, et ne cherche pas à déterminer la solution « correcte » au problème. Dans l'arrêt *Delios c. Canada (Procureur général)*, 2015 CAF 117, la Cour d'appel fédérale a signalé que « le juge réformateur n'établit pas son propre critère pour ensuite jauger ce qu'a fait l'administrateur » : par. 28 (CanLII); voir aussi *Ryan*, par. 50-51. La cour de révision n'est plutôt appelée qu'à décider du caractère raisonnable de la décision rendue par le décideur administratif — ce qui inclut à la fois le raisonnement suivi et le résultat obtenu.

[84] Comme nous l'avons expliqué précédemment, les motifs écrits fournis par le décideur administratif servent à communiquer la justification de sa décision. Toute méthode raisonnée de contrôle selon la norme de la décision raisonnable s'intéresse avant tout aux motifs de la décision. Dans le cadre de son analyse du caractère raisonnable d'une décision, une cour de révision doit d'abord examiner les motifs donnés avec « une attention respectueuse », et chercher à comprendre le fil du raisonnement suivi par le décideur pour en arriver à sa conclusion : voir *Dunsmuir*, par. 48, citant D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286.

[85] Comprendre le raisonnement qui a mené à la décision administrative permet à la cour de révision de déterminer si la décision dans son ensemble est raisonnable. Comme nous l'expliquerons davantage, une décision raisonnable doit être fondée sur une analyse intrinsèquement cohérente et rationnelle et est justifiée au regard des contraintes juridiques et factuelles auxquelles le décideur est assujetti. La norme de la décision raisonnable exige de la cour de justice qu'elle fasse preuve de déférence envers une telle décision.

[86] L'attention accordée aux motifs formulés par le décideur est une manifestation de l'attitude de respect dont font preuve les cours de justice envers le processus décisionnel : voir *Dunsmuir*, par. 47-49.

conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of

Il ressort explicitement de l'arrêt *Dunsmuir* que la cour de justice qui procède à un contrôle selon la norme de la décision raisonnable « se demande dès lors si la décision et sa justification possèdent les attributs de la raisonnabilité » : par. 47. Selon l'arrêt *Dunsmuir*, le caractère raisonnable « tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » : *ibid*. En somme, il ne suffit pas que la décision soit *justifiable*. Dans les cas où des motifs s'imposent, le décideur doit également, au moyen de ceux-ci, *justifier* sa décision auprès des personnes auxquelles elle s'applique. Si certains résultats peuvent se détacher du contexte juridique et factuel au point de ne jamais s'appuyer sur un raisonnement intelligible et rationnel, un résultat par ailleurs raisonnable ne saurait être non plus tenu pour valide s'il repose sur un fondement erroné.

[87] La jurisprudence de notre Cour depuis l'arrêt *Dunsmuir* ne doit pas être interprétée comme ayant délaissé le point de mire du contrôle selon la norme de la décision raisonnable axé sur le raisonnement pour dorénavant s'attarder presque exclusivement au *résultat* de la décision administrative sous examen. D'ailleurs, le contrôle en fonction de la norme de la décision raisonnable tient dûment compte à la fois du résultat de la décision et du raisonnement à l'origine de ce résultat, comme la Cour l'a récemment rappelé dans l'arrêt *Delta Air Lines Inc. c. Lukács*, 2018 CSC 2, [2018] 1 R.C.S. 6, par. 12. Dans cette affaire, même si le résultat de la décision n'était peut-être pas déraisonnable eu égard aux circonstances, la décision a été infirmée parce que l'analyse ayant débouché sur ce résultat était déraisonnable. Cette façon de voir s'inscrit dans la foulée de la directive de l'arrêt *Dunsmuir* voulant que le contrôle judiciaire porte *à la fois* sur le résultat *et* sur le processus. Une approche différente compromettrait le rôle institutionnel du décideur administratif plutôt que de le respecter.

C. *La norme de la décision raisonnable est une norme unique qui tient compte du contexte*

[88] Lorsqu'on tente d'élaborer une méthode cohérente et unifiée de contrôle judiciaire, la diversité

decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a

des décisions et des décideurs que doit prendre en compte cette méthode pose en soi un défi inéluctable. Les décideurs dont les décisions peuvent faire l'objet d'un contrôle judiciaire vont des tribunaux spécialisés exerçant des attributions judiciaires aux organismes de réglementation indépendants, aux ministres, aux décideurs de première ligne et plus encore. Leurs décisions varient en complexité et en importance, allant des décisions banales à celles qui changent le cours d'une vie. Elles visent, d'une part, des questions « hautement politiques » et, d'autre part, des questions de « droit pur ». Ces décisions font parfois intervenir des considérations techniques complexes. À d'autres moments, le bon sens et la logique ordinaire suffisent.

[89] Malgré cette diversité, la norme de la décision raisonnable demeure une norme unique, et les éléments du contexte entourant une décision n'altèrent pas cette norme ou le degré d'examen que doit appliquer une cour de révision. Le contexte particulier d'une décision circonscrit plutôt la latitude du décideur administratif en matière de décision raisonnable dans un cas donné. C'est ce que l'on entend quand on affirme que « [l]a raisonnabilité constitue une norme unique qui s'adapte au contexte » : *Khosa*, par. 59; *Catalyst*, par. 18; *Halifax (Regional Municipality) c. Nouvelle-Écosse (Human Rights Commission)*, 2012 CSC 10, [2012] 1 R.C.S. 364, par. 44; *Wilson*, par. 22, la juge Abella; *Canada (Procureur général) c. Igloo Vikski Inc.*, 2016 CSC 38, [2016] 2 R.C.S. 80, par. 57, la juge Côté, dissidente mais non sur ce point; *Law Society of British Columbia c. Trinity Western University*, 2018 CSC 32, [2018] 2 R.C.S. 293, par. 53.

[90] La méthode de contrôle selon la norme de la décision raisonnable que nous décrivons dans les présents motifs tient compte de la diversité des décisions administratives en reconnaissant que ce qui est raisonnable dans un cas donné dépend toujours des contraintes juridiques et factuelles propres au contexte de la décision particulière sous examen. Ces contraintes d'ordre contextuel cernent les limites et les contours de l'espace à l'intérieur duquel le décideur peut agir, ainsi que les types de solution qu'il peut retenir. Le fait que ces contraintes d'ordre contextuel imposées au décideur administratif puissent

problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons.

varier d'une décision à l'autre ne pose pas problème pour la norme de la décision raisonnable parce que chaque décision doit être à la fois justifiée par l'organisme administratif et évaluée par la cour de révision en fonction de son propre contexte particulier.

D. *Les motifs écrits d'une décision devraient être interprétés à la lumière du dossier et en tenant dûment compte du contexte administratif dans lequel ils sont fournis*

[91] Une cour de révision doit se rappeler que les motifs écrits fournis par un organisme administratif ne doivent pas être jugés au regard d'une norme de perfection. Le fait que les motifs de la décision « ne fassent pas référence à tous les arguments, dispositions législatives, précédents ou autres détails que le juge siégeant en révision aurait voulu y lire » ne constitue pas un fondement justifiant à lui seul d'infirmer la décision : *Newfoundland Nurses*, par. 16. On ne peut dissocier non plus le contrôle d'une décision administrative du cadre institutionnel dans lequel elle a été rendue ni de l'historique de l'instance.

[92] On ne peut pas toujours s'attendre à ce que les décideurs administratifs déploient toute la gamme de techniques juridiques auxquelles on peut s'attendre de la part d'un avocat ou d'un juge et il ne sera pas toujours nécessaire, ni même utile, de le faire. En réalité, les concepts et le vocabulaire employés par ces décideurs sont souvent, dans une très large mesure, propres à leur champ d'expertise et d'expérience, et ils influent tant sur la forme que sur la teneur de leurs motifs. Ces différences ne sont pas forcément le signe d'une décision déraisonnable; en fait, elles peuvent indiquer la force du décideur dans son champ d'expertise précis. La « justice administrative » ne ressemble pas toujours à la « justice judiciaire » et les cours de révision doivent en demeurer pleinement conscientes.

[93] Par ses motifs, le décideur administratif peut démontrer qu'il a rendu une décision donnée en mettant à contribution son expertise et son expérience institutionnelle : voir *Dunsmuir*, par. 49. Lors du contrôle selon la norme de la décision raisonnable, le juge doit être attentif à la manière dont le décideur administratif met à profit son expertise, tel qu'en font

Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with

foi les motifs de ce dernier. L'attention respectueuse accordée à l'expertise établie du décideur peut indiquer à une cour de révision qu'un résultat qui semble déroutant ou contre-intuitif à première vue est néanmoins conforme aux objets et aux réalités pratiques du régime administratif en cause et témoigne d'une approche raisonnable compte tenu des conséquences et des effets concrets de la décision. Lorsqu'établies, cette expérience et cette expertise peuvent elles aussi expliquer pourquoi l'analyse d'une question donnée est moins étoffée.

[94] La cour de révision doit également interpréter les motifs du décideur en fonction de l'historique et du contexte de l'instance dans laquelle ils ont été rendus. Elle peut considérer, par exemple, la preuve dont disposait le décideur, les observations des parties, les politiques ou lignes directrices accessibles au public dont a tenu compte le décideur et les décisions antérieures de l'organisme administratif en question. Cela peut expliquer un aspect du raisonnement du décideur qui ne ressort pas à l'évidence des motifs eux-mêmes; cela peut aussi révéler que ce qui semble être une lacune des motifs ne constitue pas en définitive un manque de justification, d'intelligibilité ou de transparence. Ainsi, les parties adverses ont pu faire des concessions pour éviter que le décideur n'ait à trancher une question. De même, un décideur a pu suivre une jurisprudence administrative bien établie sur une question qu'aucune partie n'a contestée au cours de l'instance. Ou encore, un décideur a pu adopter une interprétation énoncée dans une politique d'interprétation publiée par l'organisme administratif dont il fait partie.

[95] Cela dit, les cours de révision doivent garder à l'esprit le principe suivant lequel l'exercice de tout pouvoir public doit être justifié, intelligible et transparent non pas dans l'abstrait, mais pour l'individu qui en fait l'objet. Il serait donc inacceptable qu'un décideur administratif communique à une partie concernée des motifs écrits qui ne justifient pas sa décision, mais s'attende néanmoins à ce que sa décision soit confirmée sur la base de dossiers internes qui n'étaient pas à la disposition de cette partie.

[96] Lorsque, même s'ils sont interprétés en tenant compte du contexte institutionnel et à la lumière du

sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts

dossier, les motifs fournis par l'organisme administratif pour justifier sa décision comportent une lacune fondamentale ou révèlent une analyse déraisonnable, il ne convient habituellement pas que la cour de révision élabore ses propres motifs pour appuyer la décision administrative. Même si le résultat de la décision pourrait sembler raisonnable dans des circonstances différentes, il n'est pas loisible à la cour de révision de faire abstraction du fondement erroné de la décision et d'y substituer sa propre justification du résultat : *Delta Air Lines*, par. 26-28. Autoriser une cour de révision à agir ainsi reviendrait à permettre à un décideur de se dérober à son obligation de justifier, de manière transparente et intelligible pour la personne visée, le fondement pour lequel il est parvenu à une conclusion donnée. Cela reviendrait également à adopter une méthode de contrôle selon la norme de la décision raisonnable qui serait axée uniquement sur le résultat de la décision, à l'exclusion de la justification de cette décision. Dans la mesure où des arrêts comme *Newfoundland Nurses* et *Alberta Teachers* ont été compris comme appuyant une telle conception, cette compréhension est erronée.

[97] En effet, l'arrêt *Newfoundland Nurses* est loin d'établir que la justification donnée par le décideur à l'appui de sa décision n'est pas pertinente. Cet arrêt nous enseigne plutôt qu'il faut accorder une attention particulière aux motifs écrits du décideur et les interpréter de façon globale et contextuelle. L'objectif est justement de comprendre le fondement sur lequel repose la décision. Nous souscrivons aux observations suivantes du juge Rennie dans l'affaire *Komolafe c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2013 CF 431, par. 11 (CanLII) :

> L'arrêt *Newfoundland Nurses* ne donne pas à la [cour] toute la latitude voulue pour fournir des motifs qui n'ont pas été donnés, ni ne l'autorise à deviner quelles conclusions auraient pu être tirées ou à émettre des hypothèses sur ce que le tribunal a pu penser. C'est particulièrement le cas quand les motifs passent sous silence une question essentielle. Il est ironique que l'arrêt *Newfoundland Nurses*, une affaire qui concerne essentiellement la déférence et la norme de contrôle, soit invoqué comme le précédent qui commanderait [à la cour] ayant le pouvoir de surveillance de faire le travail omis par le décideur, de fournir les motifs qui auraient pu être donnés et de formuler les conclusions

to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

de fait qui n'ont pas été tirées. C'est appliquer la jurisprudence à l'envers. L'arrêt *Newfoundland Nurses* permet aux cours de [révision] de relier les points sur la page quand les lignes, et la direction qu'elles prennent, peuvent être facilement discernées.

[98] En ce qui concerne l'arrêt *Alberta Teachers*, il concernait un contrôle judiciaire exercé dans des circonstances très précises et exceptionnelles : la question d'interprétation législative en litige n'avait jamais été soumise au décideur administratif et, en conséquence, ce dernier n'avait communiqué aucuns motifs à cet égard : par. 22-26. De plus, il avait été convenu que la décideuse — la déléguée du commissaire à l'information et à la protection de la vie privée — avait appliqué une interprétation bien établie de la disposition législative pertinente, et que si on lui avait demandé de motiver son interprétation, elle aurait souscrit aux motifs fournis par le commissaire dans des décisions antérieures. En d'autres termes, les motifs du commissaire invoqués par notre Cour pour conclure que la décision sous examen était raisonnable n'étaient pas simplement les motifs qui auraient *pu* être fournis, dans l'abstrait, mais ceux qui *auraient* été fournis si la question avait été soulevée devant la décideuse. Loin de suggérer dans l'arrêt *Alberta Teachers* que le contrôle selon la norme de la décision raisonnable porte principalement sur le résultat plutôt que sur la justification, notre Cour a rejeté la position selon laquelle la cour de révision a le pouvoir de « reformuler la décision en substituant à l'analyse qu'elle juge déraisonnable sa propre justification du résultat » : par. 54, citant *Petro-Canada c. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, par. 53 et 56. Dans l'arrêt *Alberta Teachers*, notre Cour a aussi confirmé l'importance de motiver adéquatement une décision et rappelé que « la déférence inhérente à la norme de la raisonnabilité se manifeste optimalement lorsqu'une décision administrative est justifiée de façon intelligible et transparente et que la juridiction de révision contrôle la décision à partir des motifs qui l'étayent » : par. 54. Lorsque le décideur omet de justifier, dans les motifs, un élément essentiel de sa décision, et que cette justification ne saurait être déduite du dossier de l'instance, la décision ne satisfait pas, en règle générale, à la norme de justification, de transparence et d'intelligibilité.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

E. *Une décision raisonnable est à la fois fondée sur un raisonnement intrinsèquement cohérent et justifiée à la lumière des contraintes juridiques et factuelles qui ont une incidence sur la décision*

[99] La cour de révision doit s'assurer de bien comprendre le raisonnement suivi par le décideur afin de déterminer si la décision dans son ensemble est raisonnable. Elle doit donc se demander si la décision possède les caractéristiques d'une décision raisonnable, soit la justification, la transparence et l'intelligibilité, et si la décision est justifiée au regard des contraintes factuelles et juridiques pertinentes qui ont une incidence sur celle-ci : *Dunsmuir*, par. 47 et 74; *Catalyst*, par. 13.

[100] Il incombe à la partie qui conteste la décision d'en démontrer le caractère déraisonnable. Avant de pouvoir infirmer la décision pour ce motif, la cour de révision doit être convaincue qu'elle souffre de lacunes graves à un point tel qu'on ne peut pas dire qu'elle satisfait aux exigences de justification, d'intelligibilité et de transparence. Les lacunes ou insuffisances reprochées ne doivent pas être simplement superficielles ou accessoires par rapport au fond de la décision. Il ne conviendrait pas que la cour de révision infirme une décision administrative pour la simple raison que son raisonnement est entaché d'une erreur mineure. La cour de justice doit plutôt être convaincue que la lacune ou la déficience qu'invoque la partie contestant la décision est suffisamment capitale ou importante pour rendre cette dernière déraisonnable.

[101] Qu'est-ce qui rend une décision déraisonnable? Il nous semble utile ici, d'un point de vue conceptuel, de nous arrêter à deux catégories de lacunes fondamentales. La première est le manque de logique interne du raisonnement. La seconde se présente dans le cas d'une décision indéfendable sous certains rapports compte tenu des contraintes factuelles et juridiques pertinentes qui ont une incidence sur la décision. Il n'est toutefois pas nécessaire que les cours de révision déterminent si les problèmes qui rendent la décision déraisonnable appartiennent à l'une ou à l'autre catégorie. Ces désignations offrent plutôt un moyen pratique d'analyser les types de questions qui peuvent révéler qu'une décision est déraisonnable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission),* 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Minister of Citizenship and Immigration)*,

(1) Une décision raisonnable est fondée sur un raisonnement intrinsèquement cohérent

[102] Pour être raisonnable, une décision doit être fondée sur un raisonnement à la fois rationnel et logique. Il s'ensuit qu'un manquement à cet égard peut amener la cour de révision à conclure qu'il y a lieu d'infirmer la décision. Certes, le contrôle selon la norme de la décision raisonnable n'est pas « une chasse au trésor, phrase par phrase, à la recherche d'une erreur » : *Pâtes & Papier Irving*, par. 54, citant *Newfoundland Nurses*, par. 14. Cependant, la cour de révision doit être en mesure de suivre le raisonnement du décideur sans buter sur une faille décisive dans la logique globale; elle doit être convaincue qu'« [un] mode d'analyse, dans les motifs avancés, [. . .] pouvait raisonnablement amener le tribunal, au vu de la preuve, à conclure comme il l'a fait » : *Ryan*, par. 55; *Southam*, par. 56. Les motifs qui [TRADUCTION] « ne font que reprendre le libellé de la loi, résumer les arguments avancés et formuler ensuite une conclusion péremptoire » permettent rarement à la cour de révision de comprendre le raisonnement qui justifie une décision, et « ne sauraient tenir lieu d'exposé de faits, d'analyse, d'inférences ou de jugement » : R. A. Macdonald et D. Lametti, « Reasons for Decision in Administrative Law » (1990), 3 *R.C.D.A.P.* 123, p. 139; voir également *Gonzalez c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 CF 750, par. 57-59 (CanLII).

[103] Bien que, comme nous l'avons déjà mentionné aux par. 89 à 96, il faille interpréter des motifs écrits eu égard au dossier et en tenant dûment compte du régime administratif dans lequel ils sont donnés, une décision sera déraisonnable lorsque, lus dans leur ensemble, les motifs ne font pas état d'une analyse rationnelle ou montrent que la décision est fondée sur une analyse irrationnelle : voir *Wright c. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, par. 56. Une décision sera également déraisonnable si la conclusion tirée ne peut prendre sa source dans l'analyse effectuée (voir *Sangmo c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2016 CF 17, par. 21 (CanLII)), ou qu'il est impossible de comprendre, lorsqu'on lit les motifs en corrélation avec le dossier, le raisonnement du décideur sur un point central (voir

2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements

Blas c. Canada (Ministre de la Citoyenneté et de l'Immigration), 2014 CF 629, par. 54-66 (CanLII); *Reid c. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd c. Canada (Procureur général)*, 2016 CAF 115; *Taman c. Canada (Procureur général)*, 2017 CAF 1, [2017] 3 R.C.F. 520, par. 47).

[104] De même, la logique interne d'une décision peut également être remise en question lorsque les motifs sont entachés d'erreurs manifestes sur le plan rationnel — comme lorsque le décideur a suivi un raisonnement tautologique ou a recouru à de faux dilemmes, à des généralisations non fondées ou à une prémisse absurde. Il ne s'agit pas d'inviter la cour de révision à assujettir les décideurs administratifs à des contraintes formalistes ou aux normes auxquelles sont astreints des logiciens érudits. Toutefois, la cour de révision doit être convaincue que le raisonnement du décideur « se tient ».

(2) Une décision raisonnable est justifiée au regard des contraintes juridiques et factuelles qui ont une incidence sur la décision

[105] En plus de la nécessité qu'elle soit fondée sur un raisonnement intrinsèquement cohérent, une décision raisonnable doit être justifiée au regard de l'ensemble du droit et des faits pertinents : *Dunsmuir*, par. 47; *Catalyst*, par. 13; *Nor-Man Regional Health Authority*, par. 6. Les éléments du contexte juridique et factuel d'une décision constituent des contraintes qui ont une influence sur le décideur dans l'exercice des pouvoirs qui lui sont délégués.

[106] Il est inutile de cataloguer toutes les considérations juridiques ou factuelles qui pourraient réduire la marge de manœuvre d'un décideur administratif dans un cas donné. Néanmoins, dans les sections qui suivent, nous nous penchons sur un certain nombre d'éléments qui sont généralement utiles pour déterminer si une décision est raisonnable. Il s'agit notamment du régime législatif applicable et de tout autre principe législatif ou principe de common law pertinent, des principes d'interprétation des lois, de la preuve portée à la connaissance du décideur et des faits dont le décideur peut prendre connaissance d'office, des observations des parties, des pratiques et décisions antérieures de l'organisme administratif

are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as

et, enfin, de l'impact potentiel de la décision sur l'individu qui en fait l'objet. Ces éléments ne doivent pas servir de liste de vérification pour l'exercice du contrôle selon la norme de la décision raisonnable et leur importance peut varier selon le contexte. L'objectif est simplement d'insister sur certains éléments du contexte pouvant amener la cour de révision à perdre confiance dans le résultat obtenu.

[107] Il est possible que la cour de révision estime qu'une décision est déraisonnable au regard de ces considérations contextuelles. Ces éléments interagissent forcément entre eux : par exemple, une sanction raisonnable infligée pour inconduite professionnelle dans un cas donné doit être justifiée *à la fois* au regard des sanctions prescrites par les dispositions législatives applicables et de la nature de l'inconduite en cause.

a) *Le régime législatif applicable*

[108] Comme les décideurs administratifs tiennent leurs pouvoirs d'une loi, le régime législatif applicable est probablement l'aspect le plus important du contexte juridique d'une décision donnée. Le fait que les décideurs administratifs participent, avec les cours de justice, à l'élaboration du contenu précis des régimes administratifs qu'ils administrent, ne devrait pas être interprété comme une licence accordée aux décideurs administratifs pour ignorer ou réécrire les lois adoptées par le Parlement et les législatures provinciales. Ainsi, bien qu'un organisme administratif puisse disposer d'un vaste pouvoir discrétionnaire lorsqu'il s'agit de prendre une décision en particulier, cette décision doit en fin de compte être conforme « à la raison d'être et à la portée du régime législatif sous lequel elle a été adoptée » : *Catalyst*, par. 15 et 25-28; voir aussi *Green*, par. 44. En effet, comme le faisait remarquer le juge Rand dans l'arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, p. 140, [TRADUCTION] « il n'y a rien de tel qu'une "discrétion" absolue et sans entraves », et tout exercice d'un pouvoir discrétionnaire doit être conforme aux fins pour lesquelles il a été accordé : voir aussi *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 7; *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 CSC 14, [2010] 1 R.C.S. 427, par. 32-33; *Nor-Man Regional Health Authority*,

the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly

par. 6. De même, la décision doit tenir compte de toute contrainte plus spécifique clairement imposée par le régime législatif applicable, telle que les définitions, les formules ou les principes prévus par la loi qui prescrivent l'exercice d'un pouvoir discrétionnaire : voir *Montréal (Ville)*, par. 33 et 40-41; *Canada (Procureur général) c. Almon Equipment Limited*, 2010 CAF 193, [2011] 4 R.C.F. 203, par. 38-40. Le régime législatif oriente également les approches acceptables en matière de prise de décisions : par exemple, lorsque le décideur dispose d'un vaste pouvoir discrétionnaire, il serait déraisonnable de sa part d'entraver un tel pouvoir discrétionnaire : voir *Delta Air Lines*, par. 18.

[109] Comme nous l'avons déjà mentionné, l'application appropriée de la norme de la décision raisonnable permet de dissiper la crainte que le décideur administratif puisse interpréter la portée de sa propre compétence de manière à étendre ses pouvoirs au-delà de ce que voulait le législateur. Il est ainsi inutile de conserver une catégorie de questions touchant « véritablement » à la compétence assujetties au contrôle selon la norme de la décision correcte. Si, en règle générale, il y a lieu de faire preuve de déférence envers l'interprétation que donne le décideur du pouvoir que lui confère la loi, ce dernier doit néanmoins justifier convenablement son interprétation. Le contrôle selon la norme de la décision raisonnable ne permet pas au décideur administratif de s'arroger des pouvoirs que le législateur n'a jamais voulu lui conférer. De la même manière, un organisme administratif ne saurait exercer un pouvoir qui ne lui a pas été délégué. Contrairement aux préoccupations exprimées par nos collègues (par. 285), cette démarche ne fait pas resurgir la notion d'« erreur de compétence » dans le contrôle judiciaire; elle ne fait que relever l'une des contraintes évidentes et nécessaires qui s'imposent aux décideurs administratifs.

[110] La question de savoir si une interprétation est justifiée dépendra du contexte, notamment des mots choisis par le législateur pour décrire les limites et les contours du pouvoir du décideur. Si le législateur souhaite circonscrire avec précision le pouvoir d'un décideur administratif de façon ciblée, il peut se servir de termes précis et restrictifs et définir en détail les pouvoirs conférés, limitant ainsi strictement

constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding

les interprétations que le décideur peut donner de la disposition habilitante. À l'inverse, dans les cas où le législateur choisit d'utiliser des termes généraux, non limitatifs ou nettement qualitatifs — par exemple, l'expression « dans l'intérêt public » — il envisage manifestement que le décideur jouisse d'une souplesse accrue dans l'interprétation d'un tel libellé. D'autres formulations se retrouveront entre ces deux extrêmes. Bref, selon le libellé des dispositions législatives habilitantes, certaines questions touchant à la portée du pouvoir d'un décideur peuvent se prêter à plusieurs interprétations, alors que d'autres questions ne sauraient commander qu'une seule interprétation. Ce qui importe, c'est de déterminer si, aux yeux de la cour de révision, le décideur a justifié convenablement son interprétation de la loi à la lumière du contexte. Évidemment, il sera impossible au décideur administratif de justifier une décision qui excède les limites fixées par les dispositions législatives qu'il interprète.

b) *Les autres règles législatives ou de common law*

[111] Il coule de source que le droit — tant la loi que la common law — limitera l'éventail des options qui s'offrent légalement au décideur administratif chargé de trancher un cas particulier : voir *Dunsmuir*, par. 47 et 74. Par exemple, le décideur administratif qui interprète la portée de son pouvoir de réglementation dans le but de l'exercer ne peut retenir une interprétation incompatible avec les principes de common law applicables en ce qui concerne la nature des pouvoirs législatifs : voir *Katz Group Canada Inc. c. Ontario (Santé et Soins de longue durée)*, 2013 CSC 64, [2013] 3 R.C.S. 810, par. 45-48. Un organisme chargé par la loi d'évaluer un taux d'imposition applicable conformément à un régime fiscal existant en particulier ne peut non plus faire fi de ce régime ni baser ses calculs sur un système « fictif » qu'il a créé arbitrairement : *Montréal (Ville)*, par. 40. Lorsqu'une relation est régie par le droit privé, il serait déraisonnable de la part du décideur de faire abstraction de ce fait lorsqu'il se prononce sur les droits des parties dans le cadre de cette relation : *Dunsmuir*, par. 74. De la même manière, lorsque la loi habilitante prévoit l'application d'une norme bien connue en droit et dans la jurisprudence, une décision

of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional*

raisonnable sera généralement conforme à l'acception consacrée de cette norme : voir, p. ex., l'analyse des « motifs raisonnables de soupçonner » dans l'arrêt *Canada (Transports, Infrastructure et Collectivités) c. Farwaha*, 2014 CAF 56, [2015] 2 R.C.F. 1006, par. 93-98.

[112] Tout précédent sur la question soumise au décideur administratif ou sur une question semblable aura pour effet de circonscrire l'éventail des issues raisonnables. La décision d'un organisme administratif peut être déraisonnable en raison de l'omission d'expliquer ou de justifier une dérogation à un précédent contraignant dans lequel a été interprétée la même disposition. Si, par exemple, une cour de justice a examiné une disposition législative dans un jugement pertinent, il serait déraisonnable que le décideur administratif interprète ou applique celle-ci sans égard à ce précédent. Le décideur devrait être en mesure d'indiquer pourquoi il est préférable d'adopter une autre interprétation, par exemple en expliquant pourquoi l'interprétation de la cour de justice ne fonctionne pas dans le contexte administratif : M. Biddulph, « Rethinking the Ramifications of Reasonableness Review : *Stare Decisis* and Reasonableness Review on Questions of Law » (2018), 56 *Alta. L.R.* 119, p. 146. Il peut y avoir des circonstances dans lesquelles il est tout simplement déraisonnable que le décideur administratif n'applique ou n'interprète pas une disposition législative en conformité avec un précédent contraignant. Par exemple, dans les cas où une cour de justice compétente en matière d'immigration est appelée à décider si un acte constitue une infraction criminelle en droit canadien (voir, p. ex., la *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, c. 27, art. 35 à 37), il serait à l'évidence déraisonnable que le tribunal retienne une interprétation d'une disposition pénale qui soit incompatible avec l'interprétation que lui ont donnée les cours criminelles canadiennes.

[113] Cela dit, les décideurs administratifs ne seront pas nécessairement tenus d'appliquer les principes d'equity et de common law de la même façon qu'une cour de justice pour que leurs décisions soient raisonnables. Par exemple, il serait raisonnable pour le décideur d'adapter une doctrine de common law ou d'equity au contexte administratif qui lui est propre :

Health Authority, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71
.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on

voir *Nor-Man Regional Health Authority*, par. 5-6, 44-45, 52, 54 et 60. En revanche, le décideur qui applique de manière rigide une doctrine de common law sans l'adapter au contexte administratif pertinent agit peut-être de manière déraisonnable : voir *Delta Air Lines*, par. 16-17 et 30. Bref, la question de savoir si le décideur administratif a agi raisonnablement en adaptant une règle de droit ou d'equity appelle un examen fondé dans une très large mesure sur le contexte.

[114] Nous tenons également à faire remarquer que le droit international représentera une contrainte importante pour un décideur administratif dans certains domaines du processus décisionnel administratif. Il est bien établi que la législation est réputée s'appliquer conformément aux obligations internationales du Canada et que l'organe législatif est « présumé respecter les valeurs et les principes du droit international coutumier et conventionnel » : *R. c. Hape*, 2007 CSC 26, [2007] 2 R.C.S. 292, par. 53; *R. c. Appulonappa*, 2015 CSC 59, [2015] 3 R.C.S. 754, par. 40. Depuis l'arrêt *Baker*, il est également établi que les conventions et les traités internationaux, même s'ils n'ont pas été mis en œuvre par une loi au Canada, s'avèrent utiles pour déterminer si une décision participe d'un exercice raisonnable du pouvoir administratif : *Baker*, par. 69-71.

c) *Les principes d'interprétation législative*

[115] Les questions d'interprétation de la loi ne reçoivent pas un traitement exceptionnel. Comme toute autre question de droit, on peut les évaluer en appliquant la norme de la décision raisonnable. Bien que la méthode générale de contrôle selon la norme de la décision raisonnable exposée précédemment s'applique dans ces cas, nous sommes conscients de la nécessité de fournir des indications supplémentaires aux cours de révision sur ce point. En effet, les cours de révision ont l'habitude de trancher les questions d'interprétation législative en première instance ou en appel, où elles doivent effectuer leurs propres analyses indépendantes et tirer leurs propres conclusions.

[116] Le contrôle selon la norme de la décision raisonnable s'effectue différemment. Si une question

a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

d'interprétation législative fait l'objet d'un contrôle selon la norme de la décision raisonnable, la cour de révision ne procède pas à une analyse *de novo* de la question soulevée ni ne se demande « ce qu'aurait été la décision correcte » : *Ryan*, par. 50. Tout comme lorsqu'elle applique la norme de la décision raisonnable dans l'examen de questions de fait ou de questions concernant un pouvoir discrétionnaire ou des politiques, la cour de justice doit plutôt examiner la décision administrative dans son ensemble, y compris les motifs fournis par le décideur et le résultat obtenu.

[117] La cour qui interprète une disposition législative le fait en appliquant le « principe moderne » en matière d'interprétation des lois, selon lequel il faut lire les termes d'une loi « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur » : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21, et *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 26, citant tous deux E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87. Le Parlement et les législatures provinciales ont également donné certaines indications en adoptant des règles législatives qui encadrent explicitement l'interprétation des lois et des règlements : voir, p. ex., la *Loi d'interprétation*, L.R.C. 1985, c. I-21.

[118] Notre Cour a adopté ce « principe moderne » en tant que méthode appropriée d'interprétation des lois parce que c'est uniquement à partir du texte de loi, de l'objet de la disposition législative et du contexte dans son ensemble qu'il est possible de saisir l'intention du législateur : Sullivan, p. 7-8. Les personnes qui rédigent et adoptent des textes de loi s'attendent à ce que les questions concernant leur sens soient tranchées à la suite d'une analyse qui tienne compte du libellé, du contexte et de l'objet de la disposition concernée, que l'entité chargée d'interpréter la loi soit une cour de justice ou un décideur administratif. Une méthode de contrôle selon la norme de la décision raisonnable qui respecte l'intention du législateur doit donc tenir pour acquis que les instances chargées d'interpréter la loi — qu'il s'agisse des cours de justice ou des décideurs administratifs — effectueront cet exercice conformément au principe d'interprétation susmentionné.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[119] Les décideurs administratifs ne sont pas tenus dans tous les cas de procéder à une interprétation formaliste de la loi. Comme nous l'avons déjà expliqué, il n'est pas toujours nécessaire de motiver formellement une décision. Dans les cas où il faut en fournir, les motifs peuvent revêtir diverses formes. Et même lorsque l'interprétation à laquelle se livre le décideur administratif est exposée dans des motifs écrits, elle pourrait sembler bien différente de celle effectuée par la cour de justice. L'expertise spécialisée et l'expérience des décideurs administratifs peuvent parfois les amener à s'en remettre, pour interpréter une disposition, à des considérations qu'une cour de justice n'aurait pas songé à évoquer, mais qui enrichissent et rehaussent bel et bien l'interprétation.

[120] Or, quelle que soit la forme que prend l'opération d'interprétation d'une disposition législative, le fond de l'interprétation de celle-ci par le décideur administratif doit être conforme à son texte, à son contexte et à son objet. En ce sens, les principes habituels d'interprétation législative s'appliquent tout autant lorsqu'un décideur administratif interprète une disposition. Par exemple, lorsque le libellé d'une disposition est « précis et non équivoque », son sens ordinaire joue normalement un rôle plus important dans le processus d'interprétation : *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10. Lorsque le sens d'une disposition législative est contesté au cours d'une instance administrative, il incombe au décideur de démontrer dans ses motifs qu'il était conscient de ces éléments essentiels.

[121] La tâche du décideur administratif est d'interpréter la disposition contestée d'une manière qui cadre avec le texte, le contexte et l'objet, compte tenu de sa compréhension particulière du régime législatif en cause. Toutefois, le décideur administratif ne peut adopter une interprétation qu'il sait de moindre qualité — mais plausible — simplement parce que cette interprétation paraît possible et opportune. Il incombe au décideur de véritablement s'efforcer de discerner le sens de la disposition et l'intention du législateur, et non d'échafauder une interprétation à partir du résultat souhaité.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[122] Il se peut qu'au moment d'interpréter une disposition législative, le décideur administratif ne tienne aucunement compte d'un aspect pertinent de son texte, de son contexte ou de son objet. Lorsqu'il s'agit d'un aspect mineur du contexte interprétatif, cette omission n'est pas susceptible de compromettre la décision dans son ensemble. Il est bien établi que les décideurs ne sont pas tenus « de traiter expressément de toutes les interprétations possibles » d'une disposition donnée : *Construction Labour Relations c. Driver Iron Inc.*, 2012 CSC 65, [2012] 3 R.C.S. 405, par. 3. À l'instar des juges, les décideurs administratifs peuvent estimer qu'il n'est pas nécessaire de s'attarder, dans leurs motifs, au moindre signal d'une intention législative. Dans bien des cas, il peut se révéler nécessaire de ne prendre en compte que les aspects principaux du texte, du contexte ou de l'objet. Toutefois, s'il est manifeste que le décideur administratif aurait pu fort bien arriver à un résultat différent s'il avait pris en compte un élément clé du texte, du contexte ou de l'objet d'une disposition législative, le défaut de tenir compte de cet élément pourrait alors être indéfendable et déraisonnable dans les circonstances. Comme d'autres aspects du contrôle selon la norme de la décision raisonnable, les omissions ne justifient pas à elles seules l'intervention judiciaire : il s'agit principalement de savoir si l'aspect omis de l'analyse amène la cour de révision à perdre confiance dans le résultat auquel est arrivé le décideur.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[123] Par ailleurs, il se peut que le décideur administratif n'examine pas expressément dans ses motifs le sens d'une disposition pertinente, mais que la cour de révision soit en mesure de discerner l'interprétation adoptée à la lumière du dossier et de se prononcer sur le caractère raisonnable de cette interprétation.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision,

[124] Enfin, même si la cour qui effectue un contrôle selon la norme de la décision raisonnable *ne* doit *pas* procéder à une analyse *de novo* ni déterminer l'interprétation « correcte » d'une disposition contestée, il devient parfois évident, lors du contrôle de la décision, que l'interaction du texte, du contexte et de l'objet ouvrent la porte à une seule interprétation raisonnable de la disposition législative en

that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally

cause ou de l'aspect contesté de celle-ci : *Dunsmuir*, par. 72-76. Cette conclusion a été tirée notamment dans l'arrêt *Nova Tube Inc./Nova Steel Inc. c. Conares Metal Supply Ltd.*, 2019 CAF 52, où, après avoir analysé le raisonnement du décideur administratif (par. 26-61 (CanLII)), le juge Laskin a statué que l'interprétation de ce décideur était déraisonnable et, en outre, que les facteurs dont il a tenu compte militaient si fortement en faveur de l'interprétation contraire qu'elle constituait la seule interprétation raisonnable de la disposition en cause : par. 61. Comme nous l'expliquerons plus loin, il ne servirait à rien de renvoyer la question de l'interprétation au décideur initial en pareil cas. Par contre, les cours de justice devraient généralement hésiter à se prononcer de manière définitive sur l'interprétation d'une disposition qui relève de la compétence d'un décideur administratif.

d) *La preuve dont disposait le décideur*

[125] Il est acquis que le décideur administratif peut apprécier et évaluer la preuve qui lui est soumise et qu'à moins de circonstances exceptionnelles, les cours de révision ne modifient pas ses conclusions de fait. Les cours de révision doivent également s'abstenir « d'apprécier à nouveau la preuve prise en compte par le décideur » : *CCDP*, par. 55; voir également *Khosa*, par. 64; *Dr Q*, par. 41-42. D'ailleurs, bon nombre des mêmes raisons qui justifient la déférence d'une cour d'appel à l'égard des conclusions de fait tirées par une juridiction inférieure, dont la nécessité d'assurer l'efficacité judiciaire, l'importance de préserver la certitude et la confiance du public et la position avantageuse qu'occupe le décideur de première instance, s'appliquent également dans le contexte du contrôle judiciaire : voir *Housen*, par. 15-18; *Dr Q*, par. 38; *Dunsmuir*, par. 53.

[126] Cela dit, une décision raisonnable en est une qui se justifie au regard des faits : *Dunsmuir*, par. 47. Le décideur doit prendre en considération la preuve versée au dossier et la trame factuelle générale qui a une incidence sur sa décision et celle-ci doit être raisonnable au regard de ces éléments : voir *Southam*, par. 56. Le caractère raisonnable d'une décision peut être compromis si le décideur

misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker

s'est fondamentalement mépris sur la preuve qui lui a été soumise ou n'en a pas tenu compte. Dans l'arrêt *Baker*, par exemple, le décideur s'était fondé sur des stéréotypes dénués de pertinence et n'avait pas pris en compte une preuve pertinente, ce qui a mené à la conclusion qu'il existait une crainte raisonnable de partialité : par. 48. En outre, la démarche adoptée par le décideur permettait *également* de conclure au caractère déraisonnable de sa décision, car il avait démontré que ses conclusions ne reposaient pas sur la preuve dont il disposait en réalité : *ibid*.

e) *Les observations des parties*

[127] Les principes de la justification et de la transparence exigent que les motifs du décideur administratif tiennent valablement compte des questions et préoccupations centrales soulevées par les parties. Le principe suivant lequel la ou les personnes visées par une décision doivent avoir la possibilité de présenter entièrement et équitablement leur position est à la base de l'obligation d'équité procédurale et trouve son origine dans le droit d'être entendu : *Baker*, par. 28. La notion de « motifs adaptés aux questions et préoccupations soulevées » est inextricablement liée à ce principe étant donné que les motifs sont le principal mécanisme par lequel le décideur démontre qu'il a effectivement *écouté* les parties.

[128] Les cours de révision ne peuvent s'attendre à ce que les décideurs administratifs « répondent à tous les arguments ou modes possibles d'analyse » (*Newfoundland Nurses*, par. 25) ou « tire[nt] une conclusion explicite sur chaque élément constitutif du raisonnement, si subordonné soit-il, qui a mené à [leur] conclusion finale » (par. 16). Une telle exigence aurait un effet paralysant sur le bon fonctionnement des organismes administratifs et compromettrait inutilement des valeurs importantes telles que l'efficacité et l'accès à la justice. Toutefois, le fait qu'un décideur n'ait pas réussi à s'attaquer de façon significative aux questions clés ou aux arguments principaux formulés par les parties permet de se demander s'il était effectivement attentif et sensible à la question qui lui était soumise. En plus d'assurer aux parties que leurs préoccupations

to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies

ont été prises en considération, le simple fait de rédiger des motifs avec soin et attention permet au décideur d'éviter que son raisonnement soit entaché de lacunes et d'autres failles involontaires : *Baker*, par. 39.

f) *Les pratiques et décisions antérieures*

[129] Les décideurs administratifs ne sont pas liés par leurs décisions antérieures au même titre que le sont les cours de justice suivant la règle du *stare decisis*. Comme l'a fait remarquer la Cour dans l'arrêt *Domtar*, « l'absence d'unanimité est [. . .] le prix à payer pour la liberté et l'indépendance décisionnelle » accordées aux décideurs administratifs, et la simple existence d'un certain conflit dans la jurisprudence d'un organisme administratif ne menace pas la primauté du droit : p. 800. Les décideurs administratifs et les cours de révision doivent toutefois se soucier de l'uniformité générale des décisions administratives. Les personnes visées par les décisions administratives sont en droit de s'attendre à ce que les affaires semblables soient généralement tranchées de la même façon et que les résultats ne dépendent pas seulement de l'identité du décideur — des attentes qui ne s'évaporent pas du simple fait que les parties ne comparaissent pas devant un juge.

[130] Heureusement, les organismes administratifs disposent généralement d'un éventail de ressources pour répondre à ce genre de préoccupations. La consultation des motifs antérieurs et de leurs résumés permet aux multiples décideurs au sein d'une même organisation (tels les membres d'un tribunal administratif) d'apprendre les uns des autres et de contribuer à l'édification d'une culture décisionnelle harmonisée. Les institutions se fient elles aussi régulièrement à des normes, à des directives stratégiques, ainsi qu'à des avis juridiques internes pour favoriser une plus grande uniformité et pour orienter le travail des décideurs de première ligne. La Cour a également conclu que les réunions plénières des membres d'un tribunal peuvent constituer un moyen efficace de « favoriser la cohérence » et d'« éviter [les] solutions incompatibles » : *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, p. 324-328. Lorsque des désaccords

to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to

surviennent au sein d'un organisme administratif sur la façon de trancher convenablement une question donnée, cette institution peut également prendre l'initiative de mettre au point des stratégies pour régler ses divergences à l'interne. Évidemment, l'uniformité peut être aussi encouragée par l'utilisation de méthodes moins formelles comme des outils de formation, des listes de vérification et des modèles, lesquels peuvent être élaborés afin de simplifier et de renforcer les pratiques exemplaires au sein de l'institution — pourvu que ces méthodes n'entravent pas le processus décisionnel.

[131] La question de savoir si une décision en particulier est conforme à la jurisprudence de l'organisme administratif est elle aussi une contrainte dont devrait tenir compte la cour de révision au moment de décider si cette décision est raisonnable. Lorsqu'un décideur *s'écarte* d'une pratique de longue date ou d'une jurisprudence interne constante, c'est sur ses épaules que repose le fardeau d'expliquer cet écart dans ses motifs. Si le décideur ne s'acquitte pas de ce fardeau, la décision est déraisonnable. En ce sens, les attentes légitimes des parties servent à déterminer à la fois la nécessité de motiver la décision et le contenu des motifs : *Baker*, par. 26. Nous le répétons, il ne s'ensuit pas pour autant que les décideurs administratifs sont liés par les décisions antérieures au même titre que les cours de justice. Cela veut plutôt dire qu'une décision dérogeant à une pratique de longue date ou à une jurisprudence interne établie sera raisonnable si cette dérogation est justifiée, ce qui réduit le risque d'arbitraire, lequel a un effet préjudiciable sur la confiance du public envers les décideurs administratifs et le système de justice dans son ensemble.

[132] Comme nous l'avons expliqué, certains ont soutenu qu'un contrôle selon la norme de la décision correcte s'imposerait dans les cas où des questions de droit « sèment constamment la discorde » dans les décisions d'un organisme administratif. Nous estimons que point n'est besoin d'une telle catégorie de questions où la norme de la décision correcte s'applique; nous devons toutefois souligner que les cours de révision ont un rôle à jouer lorsqu'il s'agit de réduire le risque d'interprétations juridiques constamment discordantes ou contradictoires dans les décisions

telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

d'un organisme administratif. Lorsqu'elle dispose d'une preuve concernant l'existence d'un désaccord au sein d'un organisme administratif sur la façon de trancher des questions de droit, une cour de révision pourrait estimer opportun d'en faire mention dans ses motifs et d'encourager le recours aux mécanismes internes pour résoudre le désaccord. Et si le désaccord interne persiste, il pourrait devenir de plus en plus difficile pour l'organisme administratif de justifier des décisions qui ne serviraient qu'à perpétuer la discorde.

(g) *Impact of the Decision on the Affected Individual*

g) *L'incidence de la décision sur l'individu visé*

[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[133] Il est bien établi que les individus ont droit à une plus grande protection procédurale lorsque la décision sous examen est susceptible d'avoir des répercussions personnelles importantes ou de leur causer un grave préjudice : *Baker*, par. 25. Toutefois, ce principe a également une incidence sur la manière dont une cour de justice effectue un contrôle selon la norme de la décision raisonnable. Le point de vue de la partie ou de l'individu sur lequel l'autorité est exercée est au cœur de la nécessité d'une justification adéquate. Lorsque la décision a des répercussions sévères sur les droits et intérêts de l'individu visé, les motifs fournis à ce dernier doivent refléter ces enjeux. Le principe de la justification adaptée aux questions et préoccupations soulevées veut que le décideur explique pourquoi sa décision reflète le mieux l'intention du législateur, malgré les conséquences particulièrement graves pour l'individu concerné. Cela vaut notamment pour les décisions dont les conséquences menacent la vie, la liberté, la dignité ou les moyens de subsistance d'un individu.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of*

[134] En outre, les préoccupations relatives à l'arbitraire sont généralement plus prononcées dans les cas où la décision a des conséquences particulièrement graves ou sévères pour la partie visée et le défaut de traiter de ces conséquences peut fort bien se révéler déraisonnable. Par exemple, notre Cour a statué qu'au moment d'exercer sa compétence en equity pour ordonner un sursis à l'exécution d'une mesure de renvoi en vertu de la *Loi sur l'immigration et la protection des réfugiés*, la section d'appel de l'immigration devait tenir compte des difficultés que risque

Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for

de connaître la personne concernée à l'étranger par suite de son expulsion : *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2002 CSC 3, [2002] 1 R.C.S. 84.

[135] Bon nombre de décideurs administratifs se voient confier des pouvoirs extraordinaires sur la vie de gens ordinaires, dont beaucoup sont parmi les plus vulnérables de notre société. Le corollaire de ce pouvoir est la responsabilité accrue qui échoit aux décideurs administratifs de s'assurer que leurs motifs démontrent qu'ils ont tenu compte des conséquences d'une décision et que ces conséquences sont justifiées au regard des faits et du droit.

F. *Le contrôle en l'absence de motifs*

[136] Lorsque l'obligation d'équité procédurale ou le régime législatif appellent la communication de motifs à la partie touchée mais qu'aucuns motifs n'ont été donnés, la décision doit généralement être infirmée et l'affaire, renvoyée au décideur : voir, p. ex., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, par. 35. En outre, si des motifs sont communiqués, mais que ceux-ci ne justifient pas la décision de manière transparente et intelligible comme nous l'avons expliqué, la décision sera déraisonnable. Dans de nombreux cas toutefois, ni l'obligation d'équité procédurale ni le régime législatif applicable ne requerra la présentation de motifs écrits : *Baker*, par. 43.

[137] Certes, il est parfois difficile d'employer une méthode de contrôle judiciaire qui accorde la priorité à la justification, par le décideur, de ses décisions dans les cas où aucuns motifs écrits ne sont communiqués. Il en sera souvent ainsi dans le cas où le processus décisionnel ne se prête pas facilement à la production d'une seule série de motifs, par exemple lorsqu'une municipalité adopte un règlement ou lorsqu'un barreau rend une décision au moyen de la tenue d'un vote : voir, p. ex., *Catalyst*; *Green*; *Trinity Western University*. Toutefois, même en pareil cas, le raisonnement qui sous-tend la décision n'est normalement pas opaque. Il importe de rappeler qu'une cour de révision doit examiner le dossier dans son ensemble pour comprendre la décision et qu'elle découvrira alors souvent une justification claire pour la décision : *Baker*, par. 44. Par exemple, comme

a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

la juge en chef McLachlin l'a souligné dans l'arrêt *Catalyst*, « [l]es motifs qui sous-tendent un règlement municipal se dégagent habituellement du débat, des délibérations et des énoncés de politique d'où il prend sa source » : par. 29. Dans cette affaire, non seulement « les motifs qui sous-tendaient le règlement contesté étaient clairs pour tous », mais ils avaient en outre été exposés dans un plan quinquennal : par. 33. À l'inverse, même en l'absence de motifs, il se peut que le dossier et le contexte révèlent qu'une décision repose sur un mobile irrégulier ou sur un autre motif inacceptable, comme dans l'arrêt *Roncarelli*.

[138] Il existe néanmoins des situations dans lesquelles aucuns motifs n'ont été fournis et où ni le dossier ni le contexte général ne permettent de discerner le fondement de la décision en cause. En pareil cas, la cour de révision doit tout de même examiner la décision à la lumière des contraintes imposées au décideur afin de déterminer s'il s'agit d'une décision raisonnable. Toutefois, il est peut-être inévitable que faute de motifs, l'analyse soit alors centrée sur le résultat plutôt que sur le raisonnement du décideur. Il ne s'ensuit pas pour autant que le contrôle selon la norme de la décision raisonnable est moins rigoureux dans ces circonstances; il prend seulement une forme différente.

G. *Un mot sur le pouvoir discrétionnaire en matière de réparation*

[139] La question de la réparation qu'il convient d'accorder dans les cas où une cour procède au contrôle d'une décision administrative revêt de multiples facettes. Cela fait intervenir des considérations comme la common law ou la compétence que confère la loi à la cour de révision, ainsi que la grande diversité d'éléments pouvant influer sur la décision d'une cour d'exercer son pouvoir discrétionnaire à l'égard des réparations possibles. Bien que nous n'entendions pas procéder ici à une analyse complète de la question des réparations dans le cadre d'un contrôle judiciaire, nous souhaitons toutefois aborder brièvement la question de savoir si la cour qui casse une décision déraisonnable devrait exercer son pouvoir discrétionnaire de renvoyer l'affaire pour réexamen à la lumière des motifs donnés par la cour.

[140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

[141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*,

[140] Lorsque la cour de révision applique la norme de la décision raisonnable au moment d'effectuer un contrôle judiciaire, le choix de la réparation doit être guidé par la raison d'être de l'application de cette norme, y compris le fait pour la cour de révision de reconnaître que le législateur a confié le règlement de l'affaire à un décideur administratif, et non à une cour : voir *Delta Air Lines*, par. 31. Toutefois, l'examen de la question de la réparation doit aussi être guidé par les préoccupations liées à la bonne administration du système de justice, à la nécessité d'assurer l'accès à la justice et à « la volonté de mettre sur pied un processus décisionnel à la fois rapide et économique qui préside souvent au départ à la création d'un tribunal administratif spécialisé » : *Alberta Teachers*, par. 55.

[141] Donner effet à ces principes dans le contexte de la réparation signifie que, lorsque la décision contrôlée selon la norme de la décision raisonnable ne peut être confirmée, il conviendra le plus souvent de renvoyer l'affaire au décideur pour qu'il revoie la décision, mais à la lumière cette fois des motifs donnés par la cour. Quand il revoit sa décision, le décideur peut alors arriver au même résultat ou à un résultat différent : voir *Delta Air Lines*, par. 30-31.

[142] Cependant, s'il convient, en règle générale, que les cours de justice respectent la volonté du législateur de confier l'affaire à un décideur administratif, il y a des situations limitées dans lesquelles le renvoi de l'affaire pour nouvel examen fait échec au souci de résolution rapide et efficace d'une manière telle qu'aucune législature n'aurait pu souhaiter : *D'Errico c. Canada (Procureur général)*, 2014 CAF 95, par. 18-19 (CanLII). L'intention que le décideur administratif tranche l'affaire en première instance ne saurait donner lieu à un va-et-vient interminable de contrôles judiciaires et de nouveaux examens. Le refus de renvoyer l'affaire au décideur peut s'avérer indiqué lorsqu'il devient évident aux yeux de la cour, lors de son contrôle judiciaire, qu'un résultat donné est inévitable, si bien que le renvoi de l'affaire ne servirait à rien : voir *Mobil Oil Canada Ltd. c. Office Canada-Terre-Neuve des hydrocarbures extracôtiers*, [1994] 1 R.C.S. 202, p. 228-230; *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 R.C.S. 855; *Groia c. Barreau du Haut-Canada*,

2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness

2018 CSC 27, [2018] 1 R.C.S. 772, par. 161; *Sharif c. Canada (Procureur général)*, 2018 CAF 205, par. 53-54 (CanLII); *Maple Lodge Farms Ltd. c. Agence canadienne d'inspection des aliments*, 2017 CAF 45, par. 51-56 et 84 (CanLII); *Gehl c. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, par. 54 et 88. Les préoccupations concernant les délais, l'équité envers les parties, le besoin urgent de régler le différend, la nature du régime de réglementation donné, la possibilité réelle ou non pour le décideur administratif de se pencher sur la question en litige, les coûts pour les parties et l'utilisation efficace des ressources publiques peuvent aussi influer sur l'exercice par la cour de son pouvoir discrétionnaire de renvoyer l'affaire — tout comme ces facteurs peuvent influer sur l'exercice de son pouvoir discrétionnaire de casser une décision lacunaire : voir *Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 45-51; *Alberta Teachers*, par. 55.

IV. Le rôle de la jurisprudence antérieure

[143] Puisque le présent pourvoi et les pourvois connexes impliquent un rajustement de la méthode à employer pour choisir la norme de contrôle ainsi qu'un éclaircissement de l'application appropriée de la norme de la décision raisonnable, il est nécessaire d'aborder brièvement la façon d'interpréter dorénavant la jurisprudence actuelle en droit administratif. Les présents motifs comportent une révision globale du cadre d'analyse qui sert à déterminer la norme de contrôle applicable. La cour de justice qui cherche à arrêter la norme de contrôle applicable dans une affaire dont elle est saisie devrait d'abord s'en remettre aux présents motifs pour savoir comment s'applique ce cadre général dans l'affaire en question. Il est ainsi possible que la cour soit appelée à trancher des questions subsidiaires à l'égard desquelles la jurisprudence continue de donner des indications utiles. En fait, une grande partie de la jurisprudence de notre Cour continue de s'appliquer essentiellement telle quelle : par exemple, les affaires portant sur des questions de droit générales d'importance capitale pour le système de justice dans son ensemble ou sur des questions liées aux délimitations des compétences respectives d'organismes administratifs. Pour d'autres catégories de questions, certains arrêts, dont ceux portant sur l'effet des mécanismes

review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

[144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

[145] Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar

d'appel prévus par la loi, sur des questions touchant « véritablement » à la compétence ou sur l'ancienne analyse contextuelle, auront forcément une valeur de précédent moindre. En ce qui concerne les arrêts qui établissent la manière dont il faut procéder au contrôle selon la norme de la décision raisonnable, ils garderont en général leur utilité, mais il convient d'y recourir prudemment et de faire en sorte que leur application cadre avec les principes énoncés dans les présents motifs.

[144] Cette approche vise à assurer une stabilité doctrinale pour l'avenir selon le nouveau cadre d'analyse tout en clarifiant en même temps la pertinence continue de notre jurisprudence actuelle. Si une cour de révision ne sait pas avec certitude en quoi les présents motifs se rapportent à l'affaire dont elle est saisie, elle peut estimer prudent de demander aux parties de présenter des observations tant sur la norme de contrôle indiquée que sur l'application de celle-ci.

[145] Avant de passer au cas de M. Vavilov, nous signalons que nos collègues dénaturent le cadre d'analyse élaboré dans les présents motifs lorsqu'elles affirment qu'il fait l'« apologie » de la norme de la décision correcte et délaisse l'approche empreinte de déférence de la Cour au point de « sonne[r] le glas » du principe de la déférence (par. 199 et 201). Avec égards, il s'agit d'une grossière exagération. Affirmer que les présents motifs reprennent une conception formaliste du droit administratif centrée sur les cours (par. 229 et 240), permettent une expansion illimitée du contrôle selon la norme de la décision correcte (par. 253), ou constituent une espèce de liste de vérification pour effectuer un contrôle « ligne par ligne » en fonction de la norme de la décision raisonnable (par. 284) va à l'encontre du libellé clair que nous utilisons et ne prend pas en considération l'équilibre délicat dont nous avons tenu compte en formulant ce cadre d'analyse.

V. La demande de contrôle judiciaire de M. Vavilov

[146] En l'espèce, nous sommes en présence d'une demande de contrôle judiciaire d'une décision rendue par la greffière de la citoyenneté canadienne le 15 août 2014. La décision de la greffière concerne M. Vavilov, qui est né au Canada de parents qui se sont plus tard révélés être des espions russes infiltrés. Se

determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

[147] Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

fondant sur une interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*, la greffière a décidé que M. Vavilov n'était pas citoyen canadien et a annulé son certificat de citoyenneté en application du par. 26(3) du *Règlement sur la citoyenneté*. Nous concluons que la norme de contrôle applicable à la décision de la greffière est celle de la décision raisonnable, et que la décision de la greffière est déraisonnable. Nous sommes d'avis de confirmer l'arrêt de la Cour d'appel fédérale cassant la décision de la greffière. Nous ne renverrions pas l'affaire à la greffière pour nouvel examen.

A. *Les faits*

[147] Monsieur Vavilov naît à Toronto le 3 juin 1994 sous le nom d'Alexander Foley. Au moment de sa naissance, ses parents se font passer pour des Canadiens en utilisant les noms d'emprunt de Tracey Lee Ann Foley et de Donald Howard Heathfield. En fait, ses parents s'appellent Elena Vavilova et Andrey Bezrukov et sont des étrangers en mission de longue durée pour le Service des renseignements étrangers de la Russie, le SVR. Les parents de M. Vavilov ont pris ces fausses identités canadiennes avant la naissance de ce dernier et de son frère aîné, Timothy, pour les besoins d'un réseau d'espionnage [TRADUCTION] « clandestin » relevant du SVR. Le département de la Justice des États-Unis y réfère comme étant le programme des « illégaux ».

[148] Madame Vavilova et M. Bezrukov ont été envoyés au Canada dans le but de se créer de faux antécédents personnels en tant que citoyens occidentaux. Ils ont occupé des emplois, dirigé une entreprise, fait des études supérieures et, rappelons-le, eu deux enfants au Canada. Après la naissance de leur deuxième fils, la famille déménage en France, et plus tard aux États-Unis. Là-bas, M. Bezrukov obtient une maîtrise en administration publique de l'Université Harvard et travaille comme consultant tout en recueillant des renseignements sur diverses questions délicates de sécurité nationale pour le compte du SVR. Étant donné la nature de leur mission d'infiltration, M^me^ Vavilova et M. Bezrukov n'ont jamais reconnu publiquement avoir une quelconque affiliation avec l'État russe. Ils n'ont jamais détenu quelque statut diplomatique ou consulaire officiel que ce soit. Ils n'ont jamais non plus bénéficié d'un privilège ou d'une immunité diplomatique.

[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

[151] However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness

[149] Jusqu'à l'âge d'environ 16 ans, M. Vavilov ne sait pas que ses parents ne sont pas ceux qu'ils prétendent être. Il croit être citoyen canadien de naissance. Il vit et s'identifie comme un Canadien, et il détient un passeport canadien. Il apprend les deux langues officielles et est fier de ses origines. Il apprend la véritable identité de ses parents le 27 juin 2010, lorsqu'ils sont arrêtés aux États-Unis et accusés (avec plusieurs autres individus) de complot en vue d'agir en tant qu'agents non accrédités d'un gouvernement étranger. Le 8 juillet 2010, ses parents plaident coupables et admettent leur statut de citoyens de la Russie agissant au nom de l'État russe. Le lendemain, ils sont renvoyés en Russie dans le cadre d'un [TRADUCTION] « échange d'espions ». Selon M. Vavilov, cette révélation est pour lui un événement traumatisant marqué par l'incrédulité et une crise d'identité.

[150] Juste avant l'expulsion de ses parents, M. Vavilov quitte les États-Unis en compagnie de son frère pour effectuer un voyage prévu avant l'arrestation de leurs parents. Ils se rendent d'abord à Paris, puis en Russie munis de visas de touristes. En octobre 2010, M. Vavilov tente en vain de renouveler son passeport canadien par l'entremise de l'ambassade du Canada à Moscou. Même s'il se soumet à un test d'ADN et change son nom de famille Foley pour Vavilov à la demande des autorités chargées de délivrer les passeports, sa deuxième demande de passeport canadien présentée en décembre 2011 est aussi rejetée. Les autorités l'informent ensuite que même s'il possède un certificat de naissance canadien, il doit également obtenir et fournir un certificat de citoyenneté canadienne avant de pouvoir obtenir un passeport. Monsieur Vavilov présente une demande de certificat de citoyenneté canadienne en octobre 2012 et obtient ce certificat le 15 janvier 2013. À ce moment-là, il présente une autre demande de passeport par l'entremise de l'ambassade du Canada à Buenos Aires, en Argentine. Cette demande fait l'objet d'un règlement extrajudiciaire en juin 2013 après que M. Vavilov ait déposé une demande de bref de *mandamus*. Le ministre de la Citoyenneté et de l'Immigration s'engage alors à lui délivrer un nouveau titre de voyage au plus tard le 19 juillet 2013.

[151] M. Vavilov ne reçoit cependant jamais de passeport. Il reçoit plutôt une lettre dite « d'équité

letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar's Decision

[152] In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

(a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.

(b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.

(c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".

(d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply

procédurale » de la greffière de la citoyenneté canadienne datée du 18 juillet 2013. Dans cette lettre, la greffière l'informe qu'il n'a jamais eu le droit d'obtenir un certificat de citoyenneté, que son certificat de citoyenneté lui a été délivré par erreur, et qu'il n'est pas un citoyen canadien suivant l'al. 3(2)a) de la *Loi sur la citoyenneté*. La greffière invite M. Vavilov à présenter des observations en réponse à cette lettre, ce qu'il fait. Le 15 août 2014, la greffière annule officiellement le certificat de citoyenneté canadienne de M. Vavilov en application du par. 26(3) du *Règlement sur la citoyenneté*.

B. *L'historique des procédures*

(1) La décision de la greffière

[152] Dans une brève lettre envoyée à M. Vavilov le 15 août 2014, la greffière informe ce dernier qu'elle annule son certificat de citoyenneté en application du par. 26(3) du *Règlement sur la citoyenneté* pour le motif qu'il n'a pas droit à un tel certificat. La greffière résume ainsi sa position :

a) Bien que M. Vavilov soit né à Toronto, ses parents n'avaient qualité ni de citoyens canadiens ni de résidents permanents au moment de sa naissance.

b) En 2010, les parents de M. Vavilov ont été reconnus coupables de [TRADUCTION] « complot en vue d'agir en tant qu'agents étrangers d'un gouvernement étranger aux États-Unis » et considérés comme des agents non officiels travaillant en tant qu'« illégaux » pour le compte du SVR.

c) Pour cette raison, la greffière estime qu'au moment de la naissance de M. Vavilov, ses parents étaient [TRADUCTION] « représentants ou au service d'un gouvernement étranger ».

d) Par conséquent, suivant l'al. 3(2)a) de la *Loi sur la citoyenneté*, M. Vavilov n'a jamais été un citoyen canadien et n'a jamais eu le droit d'obtenir le certificat de citoyenneté canadienne qui lui a été délivré en 2013. Selon cette disposition, l'al. 3(1)a) de la *Loi sur la citoyenneté* (au titre duquel obtient la citoyenneté toute personne née au Canada après le 14 février 1977) ne s'applique

to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

[153] For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

[154] In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., vol. I, at p. 3. The report was dated June 24, 2014.

[155] In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or

pas à la personne dont les parents, au moment de sa naissance, n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger ».

[153] Pour ces motifs, la greffière annule le certificat de M. Vavilov et déclare que ce dernier ne sera plus reconnu comme un citoyen canadien. La lettre de la greffière ne contient aucune analyse ou interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Toutefois, il semble que pour en arriver à sa décision, la greffière se soit appuyée sur un rapport de 12 pages rédigé par une analyste subalterne qui comprend une interprétation de cette disposition législative clé.

[154] Dans ce rapport, l'analyste présente la chronologie de l'historique des procédures relatives au dossier de M. Vavilov, un résumé de l'enquête menée au sujet de ses parents et des accusations portées contre eux aux États-Unis, ainsi que des renseignements généraux sur le programme des « illégaux » du SVR. L'analyste y parle aussi de plusieurs dispositions de la *Loi sur la citoyenneté*, dont l'al. 3(2)a), soit l'élément de son rapport le plus pertinent pour la demande de contrôle judiciaire de M. Vavilov. L'analyste conclut finalement que le certificat de citoyenneté qu'a obtenu M. Vavilov en janvier 2013 lui a été délivré par erreur parce que ses parents étaient [TRADUCTION] « représentants ou au service d'un gouvernement étranger (la Fédération de Russie) pendant leur séjour au Canada, y compris au moment de la naissance de M. Vavilov », et que « [e]n conséquence, M. Vavilov n'avait pas le droit d'obtenir un certificat de citoyenneté selon l'alinéa 3(2)a) de la *Loi sur la citoyenneté* » (d.a., vol. I, p. 3). Le rapport est daté du 24 juin 2014.

[155] Dans son étude de la loi applicable, l'analyste cite l'al. 3(1)a) de la *Loi sur la citoyenneté*, qui établit que toute personne née au Canada après le 14 février 1977 a qualité de citoyen canadien. Elle ajoute qu'une exception à cette règle générale figure au par. 3(2) de la *Loi sur la citoyenneté*, lequel est ainsi rédigé :

(2) L'alinéa (1)a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité

lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[156] The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government".

[157] The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in subparagraph (i).

ni de citoyens ni de résidents permanents et dont le père ou la mère était :

a) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;

b) au service d'une personne mentionnée à l'alinéa a);

c) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

[156] L'analyste fait remarquer que le terme « agent diplomatique ou consulaire » ainsi que l'expression « représentant *à un autre titre* ou au service au Canada d'un gouvernement étranger » sont utilisés à l'al. 3(2)a). Elle reconnaît que le terme « agent diplomatique ou consulaire » est défini au par. 35(1) de la *Loi d'interprétation*, et qu'il comprend un grand nombre de postes auprès d'une mission étrangère ou un consulat. Elle fait par contre remarquer que l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » n'est définie nulle part dans la législation.

[157] L'analyste compare le libellé de l'al. 3(2)a) de la *Loi sur la citoyenneté* à celui d'une disposition semblable de la loi qui l'a précédée. Cette disposition — l'al. 5(3)b) de la *Loi sur la citoyenneté canadienne*, S.R.C. 1970, c. C-19 — excluait du droit à la citoyenneté canadienne les enfants dont le « parent responsable » était, au moment de leur naissance :

(i) un agent diplomatique ou consulaire étranger ou un représentant d'un gouvernement étranger accrédité auprès de Sa Majesté,

(ii) un employé d'un gouvernement étranger, attaché à une mission diplomatique ou à un consulat au Canada, ou au service d'une telle mission ou d'un tel consulat, ou

(iii) un employé au service d'une personne mentionnée au sous-alinéa (i).

[158] The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government', but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

[159] Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship: *ibid.*, at p. 14.

(2) Federal Court (Bell J.), 2015 FC 960, [2016] 2 F.C.R. 39

[160] Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

[161] The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

[158] L'analyste en conclut que, puisque l'al. 3(2)a) [TRADUCTION] « parle de "représentant à un autre titre ou au service au Canada d'un gouvernement étranger" sans établir que cette personne est "attaché[e] à une mission diplomatique ou à un consulat au Canada" (comme c'était le cas dans la version antérieure de cette disposition), il est raisonnable de soutenir que cette disposition est censée englober les personnes qui ne sont pas visées par la définition du terme "personnel diplomatique et consulaire" » : d.a., vol. I, p. 7.

[159] Bien que l'analyste reconnaisse que [TRADUCTION] « M^me^ Vavilova et M. Bezrukov étaient au service au Canada d'un gouvernement étranger, mais ne bénéficiaient pas des avantages ou des protections (c.-à-d. l'immunité) dont jouissent les personnes affectées à des missions diplomatiques ou à des postes consulaires ou officiels », elle conclut néanmoins qu'ils étaient des « employés ou représentants non officiels » de la Russie au moment de la naissance de M. Vavilov : d.a., vol. I, p. 13. Selon son interprétation, l'exception prévue à l'al. 3(2)a) de la *Loi sur la citoyenneté* s'appliquait donc à M. Vavilov. En conséquence, l'analyste recommande que la greffière de la citoyenneté canadienne « rappelle » le certificat de M. Vavilov au motif qu'il n'avait pas droit à la citoyenneté et qu'il n'y avait d'ailleurs jamais eu droit : *ibid.*, p. 14.

(2) Cour fédérale (le juge Bell), 2015 CF 960, [2016] 2 R.C.F. 39

[160] Monsieur Vavilov demande et obtient l'autorisation de présenter une demande de contrôle judiciaire de la décision de la greffière devant la Cour fédérale en vertu de l'art. 22.1 de la *Loi sur la citoyenneté*. Sa demande est rejetée.

[161] La Cour fédérale écarte l'argument de M. Vavilov selon lequel la greffière avait manqué à son obligation d'équité procédurale en omettant de lui communiquer les documents qui ont donné lieu à l'envoi de la première lettre dite d'équité procédurale. Selon la Cour fédérale, la greffière a fourni suffisamment de renseignements à M. Vavilov pour qu'il puisse fournir des réponses valables; elle a donc respecté les exigences d'équité procédurale dans les circonstances.

[162] The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

[163] Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75

[164] A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

[165] The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained

[162] La Cour fédérale écarte également la contestation de M. Vavilov concernant l'interprétation qu'a faite la greffière de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Appliquant la norme de la décision correcte, la Cour fédérale souscrit à l'opinion de la greffière selon laquelle les agents d'infiltration étrangers vivant au Canada sont visés par les mots « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » de l'al. 3(2)a). Selon la Cour fédérale, interpréter l'al. 3(2)a) d'une autre façon aurait pour effet de rendre l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » vide de sens et donnerait lieu à un « résultat absurde » : « les enfants d'un diplomate étranger qui travaille dans une ambassade et mène des opérations d'espionnage ne seraient pas citoyens canadiens de naissance, alors que les enfants de personnes qui sont entrées illégalement au Canada pour accomplir des opérations similaires le seraient » : par. 25.

[163] Enfin, la Cour fédérale se dit convaincue, étant donné la preuve, du caractère raisonnable de la conclusion de la greffière selon laquelle les parents de M. Vavilov étaient en mission clandestine au Canada pour le compte du gouvernement de la Russie au moment de sa naissance.

(3) Cour d'appel fédérale (le juge Stratas, avec l'accord du juge Webb; la juge Gleason, dissidente), 2017 CAF 132, [2018] 3 R.C.F. 75

[164] La Cour d'appel fédérale accueille à la majorité l'appel interjeté par M. Vavilov contre le jugement de la Cour fédérale et casse la décision de la greffière.

[165] La Cour d'appel rejette à l'unanimité l'argument de M. Vavilov voulant que la greffière n'ait pas fait preuve d'équité procédurale envers lui. Selon la Cour d'appel, la lettre dite d'équité procédurale de la greffière contenait suffisamment de renseignements pour que M. Vavilov puisse connaître les faits à réfuter. Même si M. Vavilov avait le droit d'obtenir un complément d'information lorsqu'il a reçu cette lettre, la cour précise que sa contestation fondée sur le manquement à l'équité procédurale aurait néanmoins

that additional information through his own efforts and was able to make meaningful submissions.

[166] The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

[167] The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

[168] The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the

été rejetée : grâce à ses propres efforts, il a réussi à obtenir par la suite des renseignements supplémentaires et il a été en mesure de présenter des arguments valables.

[166] La Cour d'appel statue à l'unanimité que l'interprétation et l'application de l'al. 3(2)a) de la *Loi sur la citoyenneté* par la greffière devraient être examinées selon la norme de la décision raisonnable. La cour est cependant partagée quant à l'application de cette norme à la décision de la greffière.

[167] La majorité de la Cour d'appel conclut que l'interprétation donnée par l'analyste à l'al. 3(2)a) et adoptée par la greffière était déraisonnable, si bien que la décision de la greffière doit être cassée. L'analyse sur laquelle s'est fondée la greffière au sujet de la question de l'interprétation de la loi ne consistait qu'en une étude du libellé de l'al. 3(2)a) et en un bref résumé de l'origine législative de cette disposition, lequel passait complètement sous silence son objet ou son contexte. De l'avis de la majorité, l'utilisation d'une « approche aussi superficielle et incomplète pour l'interprétation des lois » dans une affaire comme la présente n'est pas justifiable : par. 44. De plus, lorsque l'on prend en compte l'objet et le contexte de cette disposition, la seule conclusion raisonnable est que l'expression « au service au Canada d'un gouvernement étranger » énoncée à l'al. 3(2)a) ne doit s'appliquer qu'aux personnes à qui on avait accordé des privilèges et immunités diplomatiques reconnus en droit international. Comme les parties s'entendent pour dire que ni la mère ni le père de M. Vavilov ne s'étaient vu accorder de privilèges ou d'immunités diplomatiques, l'al. 3(2)a) ne lui est pas applicable. La décision d'annuler son certificat de citoyenneté en application de l'al. 3(2)a) ne peut donc pas être maintenue et M. Vavilov a droit à la citoyenneté canadienne en vertu de la *Loi sur la citoyenneté*.

[168] La juge dissidente n'est pas de cet avis et conclut que l'interprétation qu'a faite la greffière de l'al. 3(2)a) était raisonnable. Selon la juge dissidente, le libellé de cette disposition permet au moins deux interprétations rationnelles : soit une interprétation incluant tous les employés au service d'un gouvernement étranger, soit une interprétation incluant

dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

[169] Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

seulement les employés au service d'un gouvernement étranger à qui on a accordé des privilèges et immunités diplomatiques. Selon la juge dissidente, le contexte ou l'objet de la disposition n'appellent pas forcément la première interprétation. Il était donc loisible à la greffière de conclure que les parents de M. Vavilov étaient visés par l'al. 3(2)a). La juge dissidente aurait maintenu la décision de la greffière.

C. *Analyse*

(1) La norme de contrôle applicable

[169] L'analyse visant à déterminer la norme de contrôle applicable présentée ci-dessus mène à la conclusion que le fond de la décision de la greffière doit être examiné selon la norme de la décision raisonnable.

[170] Lorsqu'une cour de justice contrôle une décision administrative au fond, la norme de contrôle applicable est présumée être celle de la décision raisonnable. Rien ne permet de s'écarter de cette présomption en l'espèce. La décision de la greffière a été soumise aux cours de justice par voie de contrôle judiciaire et non par voie d'appel en application de la loi. Signalons à cet effet que les art. 22.1 à 22.4 de la *Loi sur la citoyenneté* prescrivent des règles qui régissent les demandes de contrôle judiciaire des décisions rendues en vertu de cette loi. Par exemple, le par. 22.1(1) prévoit que toute demande de contrôle judiciaire de ce type de décisions est subordonnée à l'autorisation de la Cour fédérale. Toutefois, aucune de ces dispositions ne permet à une partie d'interjeter appel d'une décision rendue en vertu de la *Loi sur la citoyenneté*. Compte tenu de ce fait, et étant donné que le Parlement n'a pas prescrit la norme à appliquer dans le cas du contrôle judiciaire de la décision en litige, rien n'indique que le législateur voulait qu'une autre norme que celle de la décision raisonnable soit appliquée. La décision de la greffière ne soulève pas de questions constitutionnelles, de questions de droit générales d'importance capitale pour le système juridique dans son ensemble ou de questions liées aux délimitations des compétences respectives d'organismes administratifs. En conséquence, elle doit être examinée selon la norme de la décision raisonnable.

(2) Review for Reasonableness

[171] The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*.

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter, the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

[173] Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning

(2) L'examen du caractère raisonnable

[171] La principale question soumise à la Cour est de savoir s'il était raisonnable pour la greffière de conclure que les parents de M. Vavilov étaient des « représentant[s] à un autre titre ou au service au Canada d'un gouvernement étranger » au sens de l'al. 3(2)a) de la *Loi sur la citoyenneté*.

[172] À notre avis, il n'était pas raisonnable que la greffière tire cette conclusion. En effet, la greffière n'a pas justifié son interprétation de l'al. 3(2)a) de la *Loi sur la citoyenneté* à la lumière des contraintes qu'impose le libellé de l'art. 3 de la *Loi sur la citoyenneté* pris dans son ensemble, d'autres lois et traités internationaux qui éclairent l'objet de cette disposition, de la jurisprudence relative à l'interprétation de l'al. 3(2)a), et des conséquences possibles de son interprétation. Ces différents éléments — pris individuellement ainsi que dans leur ensemble — appuient fortement la conclusion selon laquelle l'al. 3(2)a) n'est pas censé s'appliquer aux enfants de représentants ou d'employés au service d'un gouvernement étranger à qui on n'avait pas accordé de privilèges et d'immunités diplomatiques. Bien que M. Vavilov ait soulevé bon nombre de ces considérations en réponse à la lettre dite d'équité procédurale, la greffière n'a pas traité de ces arguments dans ses motifs et n'a pas, pour justifier son interprétation de l'al. 3(2)a), fait davantage que se livrer à un examen superficiel de l'historique législatif et conclure que le libellé de l'al. 3(2)a) n'excluait pas explicitement son interprétation.

[173] Notre examen de la décision de la greffière mène à la conclusion qu'il était déraisonnable de sa part de décider que les mots « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » visent les individus à qui on n'a pas accordé de privilèges et d'immunités diplomatiques au Canada. Il est acquis aux débats que les parents de M. Vavilov ne s'étaient pas vu accorder pareils privilèges et immunités. En conséquence, il ne servirait à rien de renvoyer l'affaire à la greffière.

a) *Le paragraphe 3(2) de la Loi sur la citoyenneté*

[174] L'analyste fonde sa conclusion selon laquelle M. Vavilov n'a pas qualité de citoyen canadien en

that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

faisant valoir que les parents de ce dernier étaient des « agent[s] diplomatique[s] ou consulaire[s], représentant[s] à un autre titre ou au service au Canada d'un gouvernement étranger » au sens de l'al. 3(2)a) de la *Loi sur la citoyenneté*. Suivant cette disposition, les enfants d'un « agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger » sont exemptés de l'application de la règle générale énoncée à l'al. 3(1)a), selon laquelle les personnes nées au Canada après le 14 février 1977 ont la citoyenneté canadienne de naissance. L'analyste fait également remarquer que, contrairement au terme « agent diplomatique ou consulaire » qui est défini dans la *Loi d'interprétation* et ne s'applique pas aux personnes telles que les parents de M. Vavilov, l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » n'est définie nulle part dans la législation et s'applique potentiellement à eux.

[175] The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

[175] La tentative de l'analyste de donner des sens différents à l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » et au terme « agent diplomatique ou consulaire » est sensée. Elle cadre généralement avec le principe d'interprétation législative selon lequel le législateur souhaite que chaque mot employé dans une loi ait un sens : Sullivan, p. 211. Nous reconnaissons que si l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » était considérée isolément, elle pourrait viser un espion au service d'un gouvernement étranger qui est en mission au Canada. Cependant, l'analyste n'a pas examiné le contexte législatif qui entoure l'al. 3(2)a), notamment le libellé de l'al. 3(2)c) qui y est étroitement lié :

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(2) L'alinéa (1)a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était :

a) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;

b) au service d'une personne mentionnée à l'alinéa a);

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

c) fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

[176] As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

[176] Comme l'ont fait remarquer les juges majoritaires de la Cour d'appel (par. 61-62), le libellé de l'al. 3(2)c) étaye clairement la conclusion selon laquelle *toutes* les personnes visées par l'al. 3(2)a) — y compris celles qui sont « au service au Canada d'un gouvernement étranger » — doivent s'être vu accorder certains privilèges et immunités diplomatiques. Si, comme l'a conclu la greffière, l'al. 3(2)a) vise les personnes qui ne bénéficient pas de tels privilèges ou immunités, il est difficile de comprendre comment l'on pourrait donner effet à l'exigence d'équivalence énoncée explicitement à l'al. 3(2)c). Or, l'analyste ne tient pas compte de cette tension dans le contexte législatif qui entoure l'al. 3(2)a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

b) *La Loi sur les missions étrangères et les organisations internationales et les traités qu'elle met en œuvre*

[177] Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

[177] Monsieur Vavilov a soutenu devant la greffière qu'il faut interpréter le par. 3(2) de la *Loi sur la citoyenneté* de concert avec la *Loi sur les missions étrangères et les organisations internationales*, L.C. 1991, c. 41 (« *LMEOI* »), et la *Convention de Vienne sur les relations diplomatiques*, R.T. Can. 1966 nº 29 (« *CVRD* »). La *CVRD* ainsi que la *Convention de Vienne sur les relations consulaires*, R.T. Can. 1974 nº 25, sont deux traités d'importance en vertu desquels les employés et représentants au service d'un gouvernement étranger affectés à des missions diplomatiques ou à des postes consulaires bénéficient de privilèges et immunités diplomatiques et consulaires. Le Parlement a mis en œuvre les dispositions pertinentes de ces deux conventions en les intégrant au par. 3(1) de la *LMEOI*.

[178] To begin, we note that Canada affords citizenship in accordance both with the principle of

[178] Tout d'abord, nous constatons que le Canada accorde la citoyenneté en suivant à la fois le principe

jus soli, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.

Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a

du *jus soli*, en vertu duquel la citoyenneté est acquise à la naissance peu importe la nationalité des parents, et le principe du *jus sanguinis*, en vertu duquel la citoyenneté est acquise par filiation, habituellement par l'entremise d'un parent : *Loi sur la citoyenneté*, al. 3(1)a) et b); voir I. Brownlie, *Principles of Public International Law* (5e éd. 1998), p. 391-393. Ces deux principes servent de toile de fond à l'art. 3 de la *Loi sur la citoyenneté* dans son ensemble. Il n'est pas contesté que l'al. 3(2)a) constitue une exception à ces règles générales. Cependant, M. Vavilov a interprété cette exception de façon plus restrictive que la greffière. Dans ses observations adressées à la greffière, il a soutenu que l'intention du Parlement était que le par. 3(2) de la *Loi sur la citoyenneté* reflète simplement les dispositions de la *LMEOI* et de la *CVRD*, de même que l'art. II du *Protocole de signature facultative à la Convention de Vienne sur les relations diplomatiques, concernant l'acquisition de la nationalité*, 500 R.T.N.U. 223, qui énonce ce qui suit : « [l]es membres de la mission qui n'ont pas la nationalité de l'État accréditaire et les membres de leur famille qui font partie de leur ménage n'acquièrent pas la nationalité de cet État par le seul effet de sa législation ». Monsieur Vavilov a fait valoir les arguments suivants à la greffière :

[TRADUCTION] L'exclusion des diplomates et de leur famille, y compris les nouveau-nés, du droit d'obtenir la citoyenneté de l'État accréditaire est liée aux immunités dont bénéficie ce groupe de personnes. Les diplomates et les membres de leur famille jouissent d'une immunité contre les poursuites criminelles et la responsabilité civile dans l'État accréditaire. Par conséquent, ils ne peuvent pas obtenir la citoyenneté de l'État accréditaire et bénéficier également de ces immunités. De fait, un citoyen a des obligations et des responsabilités envers son pays. L'immunité est inconciliable avec ce principe et ne s'applique donc pas aux citoyens. Voir l'article 37 de la *Convention*.

Le paragraphe 3(2) transpose en droit interne canadien les principes susmentionnés et devrait être interprété de façon restrictive en gardant ces objectifs à l'esprit. L'expression « au service au Canada d'un gouvernement étranger » doit être interprétée comme désignant un employé affecté à une mission diplomatique, ou ayant des liens avec une telle mission, qui bénéficie des immunités prévues dans la *Convention*. Toute autre interprétation donnerait des

person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.

(A.R., vol. IV, at pp. 449-50)

[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67, a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

. . . Of particular interest are the special rules relating to the *jus soli*, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'

In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Footnotes omitted.]

(Brownlie, at pp. 392-93)

résultats absurdes. Il ne sert à rien d'exclure de l'application du principe du *jus soli* les enfants dont les parents n'étaient pas attachés à une mission diplomatique au Canada pendant leur séjour au pays.

(d.a., vol. IV, p. 449-450)

[179] Dans l'affaire *Al-Ghamdi c. Canada (Ministre des Affaires étrangères et du Commerce international)*, 2007 CF 559, un jugement dont il est question dans le rapport de l'analyste et dont nous traitons plus en détail ultérieurement, la Cour fédérale cite au par. 53 (CanLII) un passage de l'ouvrage du professeur Brownlie sur ce point :

[TRADUCTION] . . . Les règles spéciales régissant le droit du sol (*jus soli*) présentent un intérêt particulier. Elles constituent une exception au principe général et ont pour effet de supprimer les cas où l'application de celui-ci est de toute évidence injustifiable. Ainsi, un principe jouissant d'une autorité considérable voulait que les enfants nés de parents bénéficiant de l'immunité diplomatique ne pouvaient être considérés de naissance comme des ressortissants de l'État auprès duquel l'agent diplomatique concerné était accrédité. Treize États se sont prévalus de cette exception lors des travaux préliminaires de la Conférence de La Haye pour la codification du droit international. Un commentateur faisait observer ce qui suit au sujet de l'article pertinent sur les privilèges et immunités diplomatiques : « Cet article est censé consacrer un principe établi de droit international ». Ce principe bénéficie d'un large appui de la part des législateurs des divers pays et des experts. La Convention de 1930 concernant certaines questions relatives aux conflits de lois sur la nationalité prévoit à son article 12 : « Les dispositions légales relatives à l'attribution de la nationalité d'un État en raison de la naissance sur son territoire ne s'appliquent pas de plein droit aux enfants dont les parents jouissent des immunités diplomatiques dans le pays de la naissance ».

En 1961, la Conférence des Nations Unies sur les relations et immunités diplomatiques a adopté un Protocole facultatif concernant l'acquisition de la nationalité, qui prévoit, à son article II : « Les membres de la mission qui n'ont pas la nationalité de l'État accréditaire et les membres de leur famille qui font partie de leur ménage n'acquièrent pas la nationalité de cet État par le seul effet de sa législation ». Certains États étendent la portée de cette règle aux enfants des consuls, et certains experts appuient cette façon de procéder. [Notes en bas de page omises.]

(Brownlie, p. 392-393)

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at p. 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": *ibid*. Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

[181] In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[180] Monsieur Vavilov a joint des extraits pertinents des débats parlementaires qui avaient précédé l'adoption de la *Loi sur la citoyenneté* en vue d'appuyer son argument selon lequel le par. 3(2) de la *Loi sur la citoyenneté* vise précisément à harmoniser les règles du Canada en matière de citoyenneté avec ces principes de droit international. Dans ces extraits, il est mentionné que le par. 3(2) « suit l'usage international » et qu'il a été rédigé avec l'intention d'« empêche[r] les enfants nés au Canada de diplomates étrangers de devenir citoyens canadiens » : l'honorable J. Hugh Faulkner, Secrétaire d'État du Canada, Chambre des communes, *Procès-verbaux et témoignages du Comité permanent de la Radiodiffusion, des films et de l'assistance aux arts, concernant Bill C-20, Loi concernant la citoyenneté*, nº 34, 1re sess., 30e lég., 24 février 1976, p. 34:23. Le procès-verbal de ce débat révèle également que le Parlement a pris soin d'éviter qu'il y ait un « risque, en rédigeant quelque stipulation [. . .], de toucher d'autres gens, [à] savoir notamment ceux qui œuvrent pour le compte d'importantes sociétés étrangères » : *ibid.*, p. 34:23 et 34:24. Bien que l'analyste ait traité des différences entre le libellé du par. 3(2) et celui d'une disposition semblable de l'ancienne *Loi sur la citoyenneté canadienne*, elle n'a pas abordé ces autres éléments de l'historique législatif de ce paragraphe, et ce, même si ceux-ci mettent grandement en doute ses conclusions et indiquent que le par. 3(2) n'était pas censé modifier le statut des personnes dont les parents ne se sont pas vu accorder de privilèges et immunités diplomatiques.

[181] En tentant de faire une distinction entre le sens de l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » et celui du terme « agent diplomatique ou consulaire », l'analyste semble aussi ne pas avoir envisagé la possibilité que certaines personnes qui font partie de la première catégorie se voient accorder des privilèges ou immunités sans pour autant être des « agent[s] diplomatique[s] ou consulaire[s] » au sens de la *Loi d'interprétation*. Or, comme le soulignent les juges majoritaires de la Cour d'appel fédérale, ces personnes existent bel et bien : par. 53-55, citant la *LMEOI*, art. 3 et 4 et ann. II, articles 1, 41, 43, 49 et 53. Vu les observations de M. Vavilov concernant l'objet du par. 3(2), le défaut d'envisager cette possibilité constitue une omission évidente.

[182] It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53-54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth": A.R., vol. I, at p. 7. But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 168 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive

[182] Il est bien établi que la loi interne est présumée respecter les obligations internationales du Canada et qu'elle doit être interprétée d'une manière qui reflète les principes du droit international coutumier et conventionnel : *Appulonappa*, par. 40; voir aussi *Pushpanathan*, par. 51; *Baker*, par. 70; *GreCon Dimter inc. c. J.R. Normand inc.*, 2005 CSC 46, [2005] 2 R.C.S. 401, par. 39; *Hape*, par. 53-54; *B010 c. Canada (Citoyenneté et Immigration)*, 2015 CSC 58, [2015] 3 R.C.S. 704, par. 48; *Inde c. Badesha*, 2017 CSC 44, [2017] 2 R.C.S. 127, par. 38; *Bureau de l'avocat des enfants c. Balev*, 2018 CSC 16, [2018] 1 R.C.S. 398, par. 31-32. Néanmoins, l'analyste ne fait pas état des règles de droit international pertinentes, ne s'interroge pas sur l'objectif que le législateur visait en adoptant le par. 3(2), et ne répond pas aux observations que M. Vavilov a présentées à cet égard. L'analyste n'essaie pas non plus d'expliquer autrement pourquoi le législateur élaborerait au départ une disposition de cette nature. Malgré les observations convaincantes voulant que la raison d'être du par. 3(2) consiste à instituer une exception étroite à la règle générale, conformément aux principes établis du droit international, l'analyste et la greffière ont choisi une interprétation différente, sans motiver leur choix de façon raisonnée.

c) *La jurisprudence relative à l'interprétation du par. 3(2) de la Loi sur la citoyenneté*

[183] Dans une note en bas de page, l'analyste cite trois jugements de la Cour fédérale portant sur l'al. 3(2)a) de la *Loi sur la citoyenneté*, mais les juge dépourvus de pertinence au motif qu'ils concernent des [TRADUCTION] « personnes dont les parents jouissaient du statut diplomatique au Canada au moment de leur naissance » : d.a., vol. I, p. 7. Bien que ce soit exact, cette distinction ne permet pas d'expliquer l'inapplicabilité, dans le cas de M. Vavilov, du *raisonnement* adopté dans ces jugements et qui porte directement sur la portée, la signification et l'objectif législatif de l'al. 3(2)a). Si l'analyste s'était attardée ne serait-ce qu'aux trois jugements cités dans son rapport — *Al-Ghamdi*; *Lee c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2008 CF 614, [2009] 1 R.C.F. 204; et *Hitti c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 294 — il aurait été évident à ses yeux qu'elle devait confronter

and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that

> [t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats . . . .

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of

sa propre interprétation et la justifier eu égard au raisonnement juridique convaincant et détaillé à l'appui de la thèse voulant que l'al. 3(2)a) ne soit censé s'appliquer qu'aux personnes dont les parents se sont vu accorder des privilèges et immunités diplomatiques.

[184] Dans l'affaire *Al-Ghamdi*, la Cour fédérale s'est penchée sur la constitutionnalité des al. 3(2)a) et c) de la *Loi sur la citoyenneté* en contrôlant une décision par laquelle Passeport Canada avait refusé de délivrer un passeport à l'enfant d'un diplomate saoudien. Dans ses motifs, la cour est arrivée à plusieurs conclusions au sujet de l'objet et de la portée du par. 3(2), dont celle qui suit au par. 5 :

> Les seules personnes visées aux alinéas 3(2)a) et c) de la *Loi sur la citoyenneté* sont les enfants de personnes ayant le statut diplomatique. Il s'agit de personnes qui sont admises sur le territoire canadien dans des circonstances particulières et qui ne sont pas assujetties aux formalités habituelles. Mais surtout, pendant qu'elles se trouvent au Canada, elles bénéficient de toutes les immunités et de tous les privilèges reconnus aux diplomates . . .

[185] La cour a ensuite documenté en détail le lien entre l'exception à la règle de la citoyenneté par naissance énoncée au par. 3(2) de la *Loi sur la citoyenneté* et les règles de droit international, la *LMEOI* et la *CVRD* : *Al-Ghamdi*, par. 52 et suiv. Elle a fait remarquer qu'il est établi en droit international que les enfants nés de parents bénéficiant de l'immunité diplomatique n'acquièrent pas automatiquement la citoyenneté à la naissance, et que leur statut à cet égard constitue une exception au principe du *jus soli* : *Al-Ghamdi*, par. 53, citant Brownlie, p. 391-393. En concluant que les exceptions du par. 3(2) à la règle de la citoyenneté *jus soli* ne portent pas atteinte aux droits conférés aux enfants de diplomates par l'art. 15 de la *Charte*, la cour a souligné que *tous* les enfants auxquels s'applique le par. 3(2) bénéficient d'une « gamme extraordinaire de privilèges en vertu de la *Loi sur les missions étrangères et les organisations internationales* » : *Al-Ghamdi*, par. 62. Citant la *CVRD*, elle a ajouté que « [c]'est précisément en raison de la vaste gamme de privilèges dont jouissent les diplomates et leur famille, privilèges qui sont de par leur nature même incompatibles avec les obligations de la citoyenneté, qu'une personne qui jouit

the *Charter*, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

du statut diplomatique ne peut acquérir la citoyenneté » : par. 63. Dans son analyse conduite au regard de l'article premier de la *Charte*, la cour a conclu que le refus d'octroyer la citoyenneté aux personnes visées au par. 3(2) est « étroitement lié » à l'objectif urgent de l'État consistant à s'assurer « qu'aucun citoyen n'est dispensé des obligations afférentes à la citoyenneté », comme payer des impôts et respecter les lois criminelles : *Al-Ghamdi*, par. 74-75. En l'espèce, l'analyste n'a aucunement abordé les arguments retenus par la Cour fédérale dans l'affaire *Al-Ghamdi*, malgré la conclusion décisive de la cour portant que l'al. 3(2)a) s'appliquait uniquement aux « enfants nés de diplomates étrangers ou de l'équivalent », une conclusion au cœur de la constitutionnalité même de la disposition : *Al-Ghamdi*, par. 3, 9, 27, 28, 56 et 59.

[186] In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status": *Lee*, at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

[186] Dans l'affaire *Lee*, un autre jugement que cite l'analyste, la Cour fédérale a confirmé la conclusion de l'affaire *Al-Ghamdi* selon laquelle « [l]es seules personnes visées par les alinéas 3(2)a) et c) de la *Loi sur la citoyenneté* sont les enfants des personnes ayant le statut diplomatique » : *Lee*, par. 77. La cour a jugé dans *Lee* qu'il importait peu de connaître quelles « fonctions exerçait concrètement le père du demandeur » pour déterminer si le fils tombait ou non sous le coup de l'exclusion prévue à l'al. 3(2)a) de la *Loi sur la citoyenneté* : par. 58. Ce qui comptait au contraire, c'était que le père du demandeur était enregistré comme agent diplomatique au moment de la naissance de l'enfant et détenait un passeport diplomatique ainsi que le titre de vice-consul : par. 44, 58, 61 et 63.

[187] *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation*

[187] L'affaire *Hitti*, le troisième jugement invoqué dans le rapport de l'analyste, portait sur une décision de confisquer deux certificats de citoyenneté au motif que, suivant le par. 3(2) de la *Loi sur la citoyenneté*, leurs titulaires n'y avaient jamais eu droit. Dans cette affaire, le père des demandeurs, un citoyen libanais, avait travaillé comme agent d'information de la Ligue des États arabes à Ottawa. Puisque la Ligue ne jouissait d'aucun statut diplomatique à l'époque, le Canada a convenu, par courtoisie, de reconnaître aux agents du bureau d'information de la Ligue un statut diplomatique lié à leur État d'appartenance, à titre d'« attachés » de l'ambassade de leur pays respectif :

Act, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

[188] What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) *Possible Consequences of the Registrar's Interpretation*

[189] When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for — you're right, for diplomats and that they don't — because

Hitti, par. 6 et 9 (CanLII); voir également la *Loi d'interprétation*, par. 35(1). Si M. Hitti avançait qu'en pratique, il n'avait pas rempli des tâches liées à la fonction de diplomate ni agi à titre de représentant de l'État libanais, il existait néanmoins un document révélant qu'il avait qualité de diplomate accrédité, qu'il bénéficiait du statut diplomatique et qu'il était assujetti à la *CVRD* durant la période au cours de laquelle étaient nés ses enfants : par. 5 et 8. La Cour fédérale a rejeté la prétention suivant laquelle M. Hitti aurait été tenu d'exercer des fonctions au service du Liban pour que ses enfants tombent sous le coup de l'al. 3(2)a), concluant qu'« il n'[était] pas pertinent de déterminer ce que faisait M. Hitti alors qu'il était au pays » : par. 32.

[188] Il ressort des affaires *Lee* et *Hitti* que, pour l'application de l'al. 3(2)a), ce qui compte n'est pas de savoir si une personne se livre à des activités au service d'un État étranger alors qu'elle se trouve au Canada. Il s'agit plutôt de déterminer si la personne s'était vu accorder, à l'époque pertinente, des privilèges et immunités diplomatiques. Ainsi, outre le jugement rendu par la Cour fédérale dans l'affaire *Al-Ghamdi*, l'analyste se devait d'examiner deux autres affaires où l'application du par. 3(2) dépendait de la présence du statut diplomatique plutôt que des « fonctions [qu'exerçaient] concrètement » les parents de l'enfant. Dans ces circonstances, il s'agissait d'une omission importante de la part de l'analyste que d'ignorer le raisonnement de la Cour fédérale au moment de décider si les activités d'espionnage qu'avaient exercées M^me^ Vavilova et M. Bezrukov étaient suffisantes pour permettre l'application de l'al. 3(2)a).

d) *Les conséquences possibles de l'interprétation donnée par la greffière*

[189] Lorsqu'on lui a demandé les raisons pour lesquelles les enfants des personnes mentionnées à l'al. 3(2)a) n'auraient pas qualité de citoyens canadiens par naissance, une autre analyste impliquée dans le dossier de M. Vavilov (qui était aussi impliquée dans le dossier de son frère) a répondu ceci :

> [TRADUCTION] Eh bien, nous appliquons d'habitude l'alinéa 3(2)a) dans le cas — vous avez raison, dans le

they are not — they are not obliged . . . to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status.

But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person[s] than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that . . . .

(R.R., transcript, at pp. 87-88)

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

cas des diplomates et parce qu'ils — car ils ne sont pas — ils ne sont pas assujettis [. . .] aux lois canadiennes et à d'autres règles, alors c'est pourquoi leurs enfants n'obtiennent pas la citoyenneté au moment de leur naissance au Canada quand les parents s'y trouvaient et avaient ce statut.

Or, la disposition de la Loi porte aussi sur les représentants à un autre titre ou au service au Canada d'un gouvernement étranger, ce qui permet d'ajouter d'autres personnes aux diplomates et c'est la façon dont nous avons interprété l'alinéa 3(2)a) dans ce cas précis, mais il n'y a pas de jurisprudence qui porte sur cette question . . .

(d.i., transcription, p. 87-88)

[190] Autrement dit, les fonctionnaires chargées de ces dossiers savaient que l'al. 3(2)a) reposait sur le principe que les personnes faisant l'objet de l'exception ne sont « pas assujetti[e]s [. . .] aux lois canadiennes ». Elles étaient également au fait du caractère inédit de l'interprétation adoptée dans le cas des frères Vavilov. Même si la greffière avait connaissance des éléments susmentionnés, elle n'a pas motivé cette interprétation élargie.

[191] En outre, rien n'établit que la greffière a tenu compte des conséquences que peut avoir le fait d'étendre son interprétation de l'al. 3(2)a) aux personnes à qui on n'a pas accordé de privilèges et d'immunités diplomatiques. La citoyenneté a été qualifiée de [TRADUCTION] « droit d'avoir des droits » : le juge en chef de la Cour suprême des États-Unis, Earl Warren, cité dans A. Brouwer, *Statelessness in Canadian Context : A Discussion Paper* (juillet 2003) (en ligne), p. 2. L'importance de la citoyenneté a été reconnue dans l'arrêt *Benner c. Canada (Secrétaire d'État)*, [1997] 1 R.C.S. 358, où le juge Iacobucci, s'exprimant au nom de notre Cour, a affirmé : « Je ne puis imaginer d'intérêt plus fondamental que la citoyenneté canadienne pour quiconque veut être membre à part entière de la société canadienne » : par. 68. Cette position a été reprise dans l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Tobiass*, [1997] 3 R.C.S. 391, où notre Cour a conclu à l'unanimité que « [p]our certains, comme ceux qui pourraient devenir apatrides s'ils étaient privés de leur citoyenneté, elle peut être aussi précieuse que la liberté » : par. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

[193] Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 *Queen's L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and

[192] Il va probablement sans dire que les règles concernant la citoyenneté commandent une grande uniformité en matière d'interprétation pour se prémunir contre la perception d'arbitraire et assurer le respect des obligations internationales du Canada. Nous ne pouvons donc que supposer que la greffière voulait que cette nouvelle interprétation de l'al. 3(2)a) s'applique à toute autre personne dont les parents, au moment de sa naissance au Canada, représentaient un gouvernement étranger ou étaient au service d'un gouvernement étranger, tout en ne s'étant pas vu accorder de privilèges et d'immunités diplomatiques. L'interprétation de la greffière ne saurait en fin de compte limiter l'application de l'al. 3(2)a) aux enfants d'espions; sa logique vaudrait tout autant dans plusieurs autres cas, dont ceux de l'enfant d'un travailleur non-citoyen au service d'une ambassade à titre de jardinier ou de cuisinier, ou de l'enfant de gens d'affaires qui représentent une personne morale appartenant à un gouvernement étranger. Monsieur Vavilov avait évoqué le besoin de donner aux dispositions telles que l'al. 3(2)a) une interprétation étroite puisqu'elles refusent ou risquent d'enlever des droits, en l'occurrence la citoyenneté acquise au titre du par. 3(1), qui autrement recevraient une interprétation large et libérale : *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 R.C.S. 279, p. 307. Néanmoins, rien n'indique que la greffière a pris en compte les conséquences possiblement sévères de son interprétation pour une catégorie pourtant vaste de personnes, dont M. Vavilov. Rien n'indique non plus que, compte tenu de ces conséquences éventuelles, la greffière s'est demandé si le Parlement aurait voulu que l'al. 3(2)a) s'applique de cette manière.

[193] Nous tenons d'ailleurs à souligner que, malgré la voie judiciaire différente suivie, la décision de la greffière dans la présente affaire a eu le même effet qu'une révocation de la citoyenneté — processus que les universitaires ont assimilé à une [TRADUCTION] « forme de "mort politique" » — privant M. Vavilov de son droit de vote et de son droit d'entrer au Canada et d'y demeurer : voir A. Macklin, « Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien » (2014), 40 *Queen's L.J.* 1, p. 7-8. Bien que la question se pose à savoir si la greffière avait le pouvoir de modifier unilatéralement la

recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. *Conclusion*

[194] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament

position du Canada sur la citoyenneté de M. Vavilov, et tout en étant conscients que le lien entre l'annulation d'un certificat de citoyenneté en application de l'art. 26 du *Règlement sur la citoyenneté* et la révocation de la citoyenneté d'une personne (au titre de l'art. 10 de la *Loi sur la citoyenneté*) n'est pas clair, nous attendrons une autre occasion pour examiner cette question que les parties n'ont ni soulevée ni débattue.

D. *Conclusion*

[194] De multiples contraintes juridiques et factuelles peuvent influer sur une décision administrative donnée, et elles peuvent interagir les unes avec les autres. Parfois, l'omission de justifier la décision en regard d'une des contraintes pertinentes peut suffire à amener la cour de révision à perdre confiance dans le caractère raisonnable de la décision. L'article 3 de la *Loi sur la citoyenneté* pris dans son ensemble, les autres lois et traités internationaux qui éclairent l'objet de cette disposition, la jurisprudence citée dans le rapport de l'analyste et les conséquences possibles de la décision de la greffière mènent inéluctablement à la conclusion que le Parlement ne voulait pas que l'al. 3(2)a) s'applique aux enfants des personnes à qui on n'a pas accordé de privilèges et d'immunités diplomatiques. Le défaut de la greffière de justifier sa décision à l'égard de ces contraintes rend son interprétation déraisonnable. Nous sommes par conséquent d'avis de confirmer l'arrêt de la Cour d'appel fédérale qui a cassé la décision de la greffière.

[195] Tel que nous l'avons mentionné, nous sommes d'avis d'exercer notre pouvoir discrétionnaire de ne pas renvoyer l'affaire à la greffière pour qu'elle rende une nouvelle décision. Fait essentiel à nos yeux, M. Vavilov a soulevé explicitement toutes ces questions devant la greffière, et cette dernière a eu la possibilité d'en tenir compte mais elle ne l'a pas fait. Elle n'a justifié d'aucune manière l'interprétation qu'elle a retenue si ce n'est que pour procéder à un examen superficiel de la disposition en cause et de faire une remarque sur une partie de l'historique législatif de la disposition. En revanche, un très grand nombre de sources — notamment le débat parlementaire, des principes reconnus de droit international, un courant

did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

[196] Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

[197] The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

[198] Abella and Karakatsanis JJ. — Forty years ago, in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on

jurisprudentiel établi et le libellé même de la disposition — étayent la conclusion suivant laquelle le Parlement ne voulait pas que l'al. 3(2)a) de la *Loi sur la citoyenneté* s'applique aux enfants de personnes qui ne se sont pas vu accorder des privilèges et immunités diplomatiques. Cela établi, nous tenons à préciser que nous n'entendons pas donner une interprétation définitive de l'al. 3(2)a) à tous les égards, ni exclure la possibilité que les décideurs administratifs proposent plusieurs interprétations raisonnables d'autres aspects de la disposition. Autrement dit, nous ne proposons pas qu'il existe nécessairement « une seule interprétation raisonnable » de la disposition dans son ensemble. Par contre, nous convenons avec les juges majoritaires de la Cour d'appel que la greffière *ne pouvait* raisonnablement interpréter l'al. 3(2)a) comme s'appliquant à un enfant dont les parents, au moment de sa naissance, ne s'étaient pas vu accorder des privilèges et immunités diplomatiques.

[196] Puisque nul ne conteste que M^me^ Vavilova et M. Bezrukov, à titre d'espions infiltrés, n'avaient pas obtenu de tels privilèges, il ne servirait à rien en l'espèce de renvoyer l'affaire à la greffière. En tant que personne née au Canada après le 14 février 1977, M. Vavilov dispose d'un statut régi uniquement par la règle générale énoncée à l'al. 3(1)a) de la *Loi sur la citoyenneté*. Il est citoyen canadien.

E. *Dispositif*

[197] Le pourvoi est rejeté avec dépens devant notre Cour et les juridictions inférieures en faveur de M. Vavilov.

Version française des motifs rendus par

[198] Les juges Abella et Karakatsanis — Il y a 40 ans, dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, notre Cour s'est engagée dans un processus visant à reconnaître le rôle unique et précieux que jouent les décideurs administratifs dans l'ordre juridique canadien. Rompant avec les conceptions judiciarisées qui avaient jusqu'alors la faveur, la Cour a incité les juges à faire preuve de déférence lorsque des décideurs administratifs spécialisés proposaient des

this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

[200] We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a

réponses raisonnables à des questions de droit relevant de leur mandat. S'appuyant sur cette vision plus mûre du droit administratif, notre Cour a, dans ses décisions subséquentes, cherché à recourir concrètement au principe de la déférence et à expliquer sa relation avec les principes démocratiques fondamentaux. Les présents pourvois nous offraient l'occasion de clarifier et d'affiner notre jurisprudence en droit administratif, tout en demeurant fidèles au parcours empreint de déférence que cette jurisprudence a suivi depuis quatre décennies.

[199] Malheureusement, la majorité ne se montre pas aussi fidèle à nos précédents. Alors qu'elle se voit offrir l'occasion de garder le cap, elle choisit plutôt de faire volte-face, délaissant carrément l'approche axée sur la déférence de la génération actuelle et réintégrant la démarche plus interventionniste d'une génération antérieure. Au lieu de confirmer l'existence d'une présomption significative de déférence en faveur des décideurs administratifs, comme notre common law le fait de plus en plus depuis des décennies, les motifs de la majorité privent de déférence des centaines d'acteurs administratifs assujettis à des droits d'appel prévus par la loi. Au lieu d'appliquer la jurisprudence constante de notre Cour selon laquelle la volonté du législateur est de confier à des décideurs spécialisés possédant une expertise en la matière le soin de trancher les questions de droit relevant de leur mandat, la majorité fait table rase de l'expertise de ces décideurs et reformule la volonté du législateur comme étant centrée sur l'offre — ou non — de voies d'appel. Et, plutôt que de clarifier le rôle que jouent les motifs et de préciser comment on doit les contrôler, la majorité ressuscite la démarche axée sur la recherche d'erreurs qui occupait une place prépondérante à l'ère précédant l'arrêt *S.C.F.P.* En d'autres termes, au lieu de *réformer* l'approche évolutive du droit administratif de cette génération, la majorité la fait *régresser* en revenant à l'approche judiciarisée formaliste que notre Cour a mis des dizaines d'années à démanteler.

[200] Nous souscrivons à la décision de la majorité d'éliminer l'analyse contextuelle vexante du cadre d'analyse applicable à la norme de contrôle et d'abolir la catégorie rétrograde des « questions touchant vraiment à la compétence ». Ces améliorations,

meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[201] But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

The Evolution of Canadian Administrative Law

[202] The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

[203] In exercising their mandates, administrative decision-makers often resolve claims and disputes

conjuguées à une véritable présomption de déférence à l'égard des décideurs administratifs, auraient simplifié notre cadre d'analyse du contrôle judiciaire et permis de répondre à bon nombre des critiques dont notre jurisprudence fait l'objet depuis l'arrêt *Dunsmuir c. Nouveau-Brunswick*, [2008] 1 R.C.S. 190.

[201] Mais la majorité va beaucoup plus loin et réoriente complètement le rapport qui existe depuis des décennies entre les acteurs administratifs et la magistrature, en élargissant considérablement les circonstances dans lesquelles les juges généralistes pourront substituer leur propre opinion à celle des décideurs spécialisés qui exercent leur mandat au quotidien. Ce faisant, la majorité préconise une philosophie du droit administratif profondément différente de celle qui a guidé la jurisprudence de notre Cour depuis une quarantaine d'années. Les motifs de la majorité font l'apologie de la norme de la décision correcte et sonnent le glas du principe de la déférence.

L'évolution du droit administratif canadien

[202] L'État moderne canadien « ne saurait fonctionner sans les nombreux tribunaux administratifs de diverses sortes qui [. . .] parsèment le paysage juridique » (la très honorable Beverley McLachlin, « Tribunaux administratifs et tribunaux judiciaires : une relation en évolution », 27 mai 2013 (en ligne)). Le Parlement et les législatures provinciales ont confié à des acteurs administratifs une vaste gamme d'enjeux sociaux et économiques complexes, notamment la réglementation des relations de travail, les programmes d'aide sociale, la sécurité des médicaments et des aliments, l'agriculture, l'évaluation foncière, la production et la vente d'alcool, les infrastructures, les marchés financiers, les investissements étrangers, la discipline professionnelle, les assurances, la radiodiffusion, le transport et la protection de l'environnement, pour n'en nommer que quelques-uns. Sans l'apport de ces décideurs administratifs [TRADUCTION] « le gouvernement serait paralysé, et les tribunaux aussi » (Guy Régimbald, *Canadian Administrative Law* (2e éd. 2015), p. 3).

[203] Dans le cadre de leur mandat, les décideurs administratifs sont souvent appelés à trancher des

within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law.

demandes et des différends qui relèvent de leur champ de spécialisation (Gus Van Harten et autres, *Administrative Law : Cases, Text, and Materials* (7e éd. 2015), p. 13). La portée et l'objet de ces demandes et de ces différends sont extrêmement diversifiés. Les demandes de fusion d'entreprises, les plaintes portées devant un ordre professionnel par des clients insatisfaits, les demandes de réévaluation foncière et les demandes de prestations d'aide sociale, pour ne citer que celles-là, relèvent toutes du système de justice administrative.

[204] Les décideurs administratifs chargés de résoudre ces questions proviennent d'une grande diversité de milieux (Van Harten et autres, *Administrative Law*, p. 15). Certains ont une formation juridique, d'autres non. Le bassin hétérogène de décideurs qui œuvrent au sein du système administratif témoigne de la diversité des questions qu'ils sont appelés à trancher. Pour les aider à s'attaquer à ce vaste éventail de questions, les mécanismes administratifs de règlement des différends qu'ils appliquent sont généralement [TRADUCTION] « conçus de manière à être moins lourds, moins coûteux, moins formels et moins longs » que leur pendant judiciaire, mais [TRADUCTION] « tout aussi efficaces et crédibles » (*Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.), p. 279). Dans le domaine des relations de travail, par exemple, le législateur fédéral a expressément refusé d'adopter un régime judiciaire de règlement des différends en milieu de travail au profit d'une commission du travail composée de représentants de la direction et des travailleurs, ainsi que de membres indépendants (Bora Laskin, « Collective Bargaining in Ontario : A New Legislative Approach » (1943), 21 *R. du B. can.* 684; John A. Willes, *The Ontario Labour Court : 1943-1944* (1979); Katherine Munro, « A "Unique Experiment" : The Ontario Labour Court, 1943-1944 » (2014), 74 *Le Travail* 199). D'autres processus administratifs — renouvellement de permis, délivrance de permis de zonage et réévaluation fiscale, par exemple — ressemblent encore moins au modèle judiciaire traditionnel.

[205] Les cours de justice, par le biais du contrôle judiciaire, supervisent les paramètres du processus décisionnel administratif. Les questions relatives aux normes de contrôle judiciaire reviennent comme

The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional

un leitmotiv en droit administratif canadien. Ces derniers temps, le débat a été centré sur les normes de la « décision raisonnable » et de la « décision correcte », ainsi que sur la question de savoir dans quels cas l'une ou l'autre s'appliquait. D'une part, l'application de la norme de contrôle de la « décision raisonnable » suppose que les cours en défèrent aux décisions des décideurs spécialisés « pouvant se justifier au regard des faits et du droit »; d'autre part, la norme de la « décision correcte » permet aux cours de substituer leur propre opinion à celle du décideur initial (*Dunsmuir*, par. 47-50). Ce débat entourant la norme de contrôle applicable a des conséquences importantes sur la mesure dans laquelle les cours de révision peuvent substituer leur point de vue à celui des décideurs administratifs. Fondamentalement, ce débat porte sur deux conceptions distinctes du droit administratif.

[206] L'histoire du droit administratif canadien moderne est marquée par un virage consistant à se détourner de la philosophie judiciaire antérieure, qui refusait aux organismes administratifs le pouvoir d'interpréter ou de façonner le droit. Cette approche a été exprimée avec conviction par Albert Venn Dicey. Pour Dicey, primauté du droit était synonyme de primauté des cours. Dicey a élaboré sa philosophie à la fin du XIX^{e} siècle pour inciter la Chambre des lords à empêcher le gouvernement de mettre en œuvre les réformes d'assistance sociale administrées par de nouveaux organismes de réglementation. Dans une de ses déclarations célèbres, Dicey affirmait que le droit administratif représentait une abomination pour le système juridique anglais (Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (10^{e} éd. 1959), p. 334-335). Puisque, selon lui, seuls les juges avaient le pouvoir d'interpréter le droit, les cours n'avaient aucune raison de s'en remettre aux interprétations juridiques des organismes administratifs, puisque leurs décisions ne constituaient pas du « droit » (Kevin M. Stack, « Overcoming Dicey in Administrative Law » (2018), 68 *U.T.L.J.* 293, p. 294).

[207] L'exemple par excellence d'une application concrète de l'approche de Dicey est l'arrêt rendu par la Chambre des lords dans *Anisminic Ltd. c. Foreign Compensation Commission*, [1969] 2 A.C. 147, le

error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

[208] The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the

précurseur judiciaire de la notion d'« erreur de compétence ». L'arrêt *Anisminic* a consacré le modèle du contrôle judiciaire non axé sur la déférence en entérinant une longue liste d'« erreurs de compétence » susceptibles de porter atteinte à la validité des décisions administratives. Lord Reid a fait observer qu'un décideur administratif perdait sa compétence dans deux cas précis. Le premier scénario, étant restrictif, consistait à se demander si le législateur avait habilité le décideur administratif à [TRADUCTION] « entreprendre l'examen en cause » (p. 171). Le second scénario avait une portée plus large :

> [TRADUCTION] [I]l y a de nombreux cas où, même s'il avait compétence pour entreprendre l'examen, le tribunal a, au cours de son examen, fait ou omis de faire quelque chose de nature à entacher sa décision de nullité. Il peut avoir rendu sa décision de mauvaise foi. Il peut avoir rendu une décision qu'il n'avait pas le pouvoir de rendre. Il peut avoir omis au cours de l'examen de se conformer aux exigences de la justice naturelle. *Il peut en toute bonne foi avoir mal interprété les dispositions lui donnant le pouvoir d'agir, de sorte qu'il n'a pas traité de la question qui lui était soumise et a tranché une question dont il n'était pas saisi. Il peut avoir refusé de prendre en compte quelque chose dont il devait tenir compte. Ou il peut avoir fondé sa décision sur une considération qu'il n'avait pas le droit de prendre en compte, selon les dispositions en vertu desquelles il a été créé. Cette énumération ne se veut pas exhaustive*. [Italique ajouté; p. 171.]

[208] La conception large de l'« erreur de compétence » retenue dans l'arrêt *Anisminic* a d'abord été accueillie favorablement par notre Cour dans des décisions comme *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425, et *Bell c. Ontario (Human Rights Commission)*, [1971] R.C.S. 756. Dans ces arrêts, la Cour a « adopté la position qu'une définition de l'erreur juridictionnelle devrait comprendre toute question qui se rattache à l'interprétation d'une loi faite par un tribunal administratif », et dans chaque cas, « notre Cour a substitué ce qui, à son avis, constituait la bonne interprétation des dispositions habilitantes de la loi constitutive du tribunal, à celle donnée par ce tribunal » (*Canada (Procureur général) c. Alliance de la Fonction publique du Canada*, [1991] 1 R.C.S. 614, p. 650, le juge Cory, dissident, mais non sur ce point). Par

wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code*, *1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R. A. Macdonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned

exemple, dans l'arrêt *Metropolitan Life*, notre Cour a annulé la décision par laquelle une commission des relations du travail avait accrédité un syndicat, en concluant que la Commission s'était posé « la mauvaise question » et « a[vait] tranché une question qu'elle n'avait pas à trancher » (p. 435). Dans l'affaire *Bell*, notre Cour a jugé qu'une commission des droits de la personne avait outrepassé sa compétence en décidant d'enquêter sur une plainte de discrimination raciale portée contre un propriétaire. La Cour a conclu que la Commission avait mal interprété le terme « self-contained dwelling uni[t] » [unité d'habitation autonome] que l'on trouve à l'art. 3 de l'*Ontario Human Rights Code*, *1961-62*, S.O., 1961-1962, c. 93, et que, ce faisant, elle avait perdu sa compétence pour enquêter sur la plainte de discrimination (p. 767 et 775).

[209] Comme ces affaires l'illustrent, l'approche retenue dans l'arrêt *Anisminic* s'est avérée facilement manipulable et a permis aux cours de qualifier toute question de question « de compétence », se donnant ainsi la marge de manœuvre nécessaire pour substituer leur propre opinion quant à la réponse indiquée, sans égard à la décision ou au raisonnement du décideur initial. L'ère inaugurée par l'arrêt *Anisminic* et l'approche axée sur « l'erreur de compétence » ont fait et continuent de faire l'objet de vives critiques tant de la part des juges que des auteurs (*Alliance de la Fonction publique*, p. 650; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, p. 1335, motifs concordants de la juge Wilson; Beverley McLachlin, C.P., « "Administrative Law Is Not for Sissies" : Finding a Path through the Thicket » (2016), 29 *R.C.D.A.P.* 127, p. 129-130; Jocelyn Stacey et Alice Woolley, « Can Pragmatism Function in Administrative Law? » (2016), 74 *S.C.L.R.* (2d) 211, p. 215-216; R. A. Macdonald, « Absence of Jurisdiction : A Perspective » (1983), 43 *R. du B.* 307).

[210] En 1979, dans l'arrêt charnière *S.C.F.P.*, la Cour a amorcé un virage en proposant une démarche davantage axée sur la déférence en matière de contrôle judiciaire. Dans cet arrêt, la Cour a remis en question le modèle de l'« erreur de compétence » et a posé les jalons d'une conception résolument canadienne du droit administratif. Dans un passage souvent cité, le

that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

> . . . legislatures and courts in . . . Canada have come to settle on the idea that the functional capacities of administrative agencies — their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change — justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

juge Dickson, qui écrivait au nom d'une Cour unanime, a formulé la mise en garde selon laquelle : « les tribunaux devraient éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard » (p. 233; ce passage a été repris dans près de 20 décisions de notre Cour, dont les arrêts *Dunsmuir*, par. 35; *Canada (Citoyenneté et Immigration) c. Khosa*, [2009] 1 R.C.S. 339, par. 45; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, [2011] 3 R.C.S. 654, par. 33; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, [2018] 2 R.C.S. 230, par. 31). La Cour préconisait plutôt une approche qui respectait la décision du législateur de confier, dans certains domaines, les questions de politiques juridiques à des décideurs spécialisés non judiciaires. La Cour a reconnu que les textes de loi pouvaient être « hérissé[s] d'ambiguïtés » et que les choix faits par les tribunaux administratifs en matière d'interprétation méritaient le respect des cours de justice, surtout lorsque, comme dans l'affaire *S.C.F.P.*, la décision était protégée par une clause privative (p. 230 et 234-236).

[211] En préconisant la retenue judiciaire envers les organismes administratifs, l'arrêt *S.C.F.P.* adoptait « une compréhension plus subtile du rôle des tribunaux administratifs dans l'État canadien moderne » (*National Corn Growers*, p. 1336, motifs concordants de la juge Wilson; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756, p. 800). Ainsi qu'un auteur l'a fait observer :

> [TRADUCTION] . . . les législatures et les tribunaux canadiens en sont venus à s'entendre sur l'idée que les capacités fonctionnelles des organismes administratifs — leur expertise, le temps et l'énergie qu'ils consacrent à comprendre les circonstances concrètes en jeu, leur ouverture à la participation et leur grande faculté d'adaptation aux changements politiques — justifiaient non seulement leurs pouvoirs en matière d'élaboration du droit, mais également la déférence des tribunaux judiciaires à l'égard de leurs interprétations et de leurs décisions. *L'élaboration et l'interprétation du droit sont des entreprises communes au sein de l'État administratif.* [Italique ajouté.]
>
> (Stack, p. 310)

[212] In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

[213] A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 *Queen's L.J.* 859, at p. 866).

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

[212] Pour expliquer pourquoi les cours doivent parfois s'en remettre aux acteurs administratifs, l'arrêt *S.C.F.P.* accueillait deux fondements essentiels connexes justifiant la conception canadienne du droit administratif : l'un fondé sur le choix explicite du législateur de confier à un organisme administratif le soin de trancher les questions découlant de son mandat, l'autre motivé par la reconnaissance des avantages institutionnels du système de justice administrative au chapitre de la proximité, de l'efficacité et de l'expertise spécialisée (David Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy » dans Michael Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304).

[213] Il s'est ainsi tissé entre les cours et les acteurs administratifs de nouveaux liens institutionnels fondés sur [TRADUCTION] « une perception du rôle de l'expertise au sein de l'État administratif moderne [qui] reconnaît [. . .] que les juges ne sont pas toujours les mieux placés pour interpréter les règles de droit en cause » (l'honorable Frank Iacobucci, « Articulating a Rational Standard of Review Doctrine : A Tribute to John Willis » (2002), 27 *Queen's L.J.* 859, p. 866).

[214] Dans les décennies qui ont suivi, la Cour a tenté de concilier la déférence préconisée par l'arrêt *S.C.F.P.* avec le concept persistant d'« erreur de compétence ». Dans l'arrêt *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, la Cour a adopté la « méthode pragmatique et fonctionnelle » pour décider dans quels cas une affaire relevait de la compétence d'un organisme administratif. Au lieu de qualifier la compétence de question préliminaire ou accessoire, le critère énoncé dans l'arrêt *Bibeault* enjoignait aux cours de révision d'examiner le libellé de la disposition législative conférant compétence à l'organisme administratif, l'objet de la loi créant le tribunal administratif, la raison d'être de ce dernier, le champ d'expertise de ses membres et la nature de la question que le tribunal était appelé à trancher, le tout dans le but de déterminer si le législateur « voul[ait] qu'une telle matière relève de la compétence conférée au tribunal » (p. 1087; voir aussi p. 1088). Dans l'affirmative, la décision du tribunal ne pouvait être annulée que si elle était « manifestement déraisonnable » (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> . . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision . . . [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there

[215] Même si elle était encore ancrée dans une recherche formaliste d'erreurs de compétence, l'analyse pragmatique et fonctionnelle reconnaissait que les législateurs avait attribué des rôles distincts aux cours judiciaires et aux décideurs administratifs, et que la spécialisation et l'expertise des décideurs administratifs méritaient la déférence. Dans l'arrêt *National Corn Growers*, la juge Wilson fait observer dans ses motifs concordants que le fait de se détacher du cadre d'analyse de Dicey pour arriver à une compréhension plus poussée du rôle des tribunaux administratifs :

> . . . s'est traduit notamment par une reconnaissance accrue de la part des cours de justice qu'il se peut qu'elles soient simplement moins en mesure que les tribunaux ou organismes administratifs de statuer dans des domaines que le Parlement a choisi de réglementer par l'intermédiaire d'organismes exerçant un pouvoir délégué, comme, par exemple, les relations de travail, les télécommunications, les marchés financiers et les relations économiques internationales. Une gestion prudente de ces secteurs nécessite souvent le recours à des experts ayant à leur actif des années d'expérience et une connaissance spécialisée des activités qu'ils sont chargés de surveiller. [p. 1336]

[216] Au milieu des années 1990, la Cour a accepté que la spécialisation et la volonté du législateur de laisser aux décideurs administratifs le soin de trancher certaines questions étaient des facteurs indissociables et essentiels dans l'analyse de la norme de contrôle applicable. Elle a souligné que « [l']expertise [du tribunal] est de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal [. . .] [m]ême lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel » (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335). Parmi les facteurs dont on pouvait tenir compte pour établir la norme de contrôle applicable, l'expertise a été jugée « le plus important » (*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 50).

[217] Conformément à ces arrêts, notre Cour a invoqué l'expertise spécialisée d'une commission des valeurs mobilières afin d'expliquer la raison pour laquelle les décisions de cette dernière avaient droit

was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

à la déférence dans le cadre d'un contrôle judiciaire, même lorsqu'il existait un droit d'appel prévu par la loi. S'exprimant au nom de la Cour à l'unanimité, le juge Iacobucci a expliqué que « le concept de la spécialisation des fonctions exige des cours de justice qu'elles fassent preuve de retenue envers l'opinion du tribunal spécialisé sur des questions qui relèvent directement de son champ d'expertise » (*Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591; voir également *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1745-1746). Fait crucial, la volonté de la Cour de faire preuve de déférence démontrait que la spécialisation l'emportait sur les droits d'appel conférés par la loi en tant qu'indicateur le plus révélateur de l'intention du législateur.

[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[218] Dans *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, la Cour a reformulé l'analyse pragmatique et fonctionnelle, en faisant intervenir quatre facteurs légèrement différents de ceux énoncés dans *Bibeault*, à savoir : (1) l'existence d'une clause privative ou, à l'inverse, d'un droit d'appel; (2) l'expertise du décideur sur la question en cause par rapport à la cour de révision; (3) l'objet de la loi dans son ensemble et de la disposition en cause; (4) la nature du problème, c'est-à-dire à savoir s'il s'agit d'une question de droit, de fait ou d'une question mixte de droit et de fait (par. 29-37). Au lieu de recourir à ces facteurs pour répondre à la question de savoir si la question touchait à la compétence, la Cour les a employés dans *Pushpanthan* pour discerner le degré de déférence que le législateur entendait accorder à une décision administrative en contrôle judiciaire. L'arrêt *Pushpanathan* a confirmé trois normes de contrôle : la norme de la décision manifestement déraisonnable, la norme de la décision raisonnable *simpliciter* et la norme de la décision correcte (par. 27; voir également *Southam*, par. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory

[219] Fait significatif, l'arrêt *Pushpanathan* n'a pas modifié la conclusion reprise dans l'arrêt *Southam* suivant laquelle l'expertise spécialisée était le facteur le plus important pour déterminer si une norme commandant la déférence s'appliquait. L'expertise spécialisée a donc continué à jouer un rôle essentiel

rights of appeal (see *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative choices to leave some matters in the hands of

pour discerner la volonté du législateur, même en présence d'un droit d'appel prévu par la loi (voir *Barreau du Nouveau-Brunswick c. Ryan*, [2003] 1 R.C.S. 247, par. 21 et 29-34; *Cartaway Resources Corp. (Re)*, [2004] 1 R.C.S. 672, par. 45; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, [2007] 1 R.C.S. 650, par. 88-92 et 100).

[220] Vint ensuite l'arrêt *Dunsmuir*, qui visait à simplifier l'analyse pragmatique et fonctionnelle tout en préservant le respect de l'expertise spécialisée des décideurs administratifs. La Cour a fusionné les trois normes de contrôle en deux : celle de la décision raisonnable et celle de la décision correcte. L'arrêt *Dunsmuir* a tissé le fil conducteur de toute la jurisprudence de la Cour en droit administratif en énonçant une présomption de contrôle empreint de déférence pour certaines catégories de questions, y compris celles pour lesquelles le décideur possède une expertise ou interprète sa loi constitutive (par. 53-54, les juges Bastarache et LeBel; et par. 124, motifs concordants du juge Binnie). Certaines catégories de questions demeuraient assujetties à la norme de la décision correcte, notamment les questions constitutionnelles touchant au partage des pouvoirs, les véritables questions de compétence, les questions de droit qui étaient à la fois d'une importance capitale pour le système juridique dans son ensemble et étrangères au domaine d'expertise du décideur, et les questions concernant la délimitation des compétences respectives des tribunaux administratifs (par. 58-61). Si la jurisprudence n'avait pas déjà établi de façon satisfaisante la norme de contrôle applicable, on pouvait encore tenir compte des quatre facteurs contextuels suivants pour déterminer la norme de contrôle applicable : l'existence ou l'inexistence d'une clause privative, la raison d'être du tribunal administratif, son expertise et la nature de la question en cause (par. 64).

[221] Fait intéressant à signaler, l'arrêt *Dunsmuir* ne mentionnait pas les droits d'appel prévus par la loi au nombre des facteurs contextuels et n'a pas modifié le rôle secondaire réservé à ces facteurs dans l'analyse de la norme de contrôle. La Cour a plutôt affirmé explicitement les liens qui existaient entre la déférence, l'expertise spécialisée des décideurs administratifs et l'intention du législateur. Les juges LeBel et Bastarache ont déclaré que « la déférence commande

administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of*

[. . .] le respect de la volonté du législateur de s'en remettre, pour certaines choses, à des décideurs administratifs, de même que des raisonnements et des décisions fondés sur une expertise et une expérience dans un domaine particulier, ainsi que de la différence entre les fonctions d'une cour de justice et celles d'un organisme administratif dans le système constitutionnel canadien » (par. 49). Ils ont fait remarquer que [TRADUCTION] « dans beaucoup de cas, les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause » (par. 49, citant David J. Mullan, « Establishing the Standard of Review : The Struggle for Complexity? » (2004), 17 *C.J.A.L.P.* 59, p. 93).

[222] Dans sa jurisprudence post-*Dunsmuir*, notre Cour a continué d'insister sur le fait que l'expertise spécialisée des décideurs administratifs était la raison pour laquelle ces derniers, et non les cours, constituaient l'instance appropriée pour trancher les questions relevant de leur mandat (voir *Khosa*, par. 25; *R. c. Conway*, [2010] 1 R.C.S. 765, par. 53; *McLean* c. *Colombie-Britannique (Securities Commission)*, [2013] 3 R.C.S. 895, par. 30-33). S'inspirant du concept de l'expertise spécialisée, les décisions rendues par la Cour après l'arrêt *Dunsmuir* ont expressément confirmé la présomption d'application de la norme de la décision raisonnable lorsqu'un décideur administratif interprète sa loi constitutive ou des lois qui y sont étroitement liées (voir *Alberta Teachers' Association*, par. 39-41). Ainsi que le juge Gascon l'a expliqué dans l'arrêt *Mouvement laïque québécois c. Saguenay (Ville)*, [2015] 2 R.C.S. 3, par. 46 :

> Lorsque le Tribunal agit à l'intérieur de son champ d'expertise [. . .] la déférence s'impose (*Saskatchewan (Human Rights Commission) c. Whatcott*, 2013 CSC 11, [2013] 1 R.C.S. 467, par. 166-168; *Mowat*, par. 24). Dans *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30, 34 et 39, la Cour rappelle que, lors du contrôle judiciaire de la décision d'un tribunal administratif spécialisé qui interprète et applique sa loi constitutive, il y a lieu de présumer que la norme de contrôle est la décision raisonnable (*Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 55; *Front des artistes canadiens*

Canada, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer . . . . [E]xpertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions." [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

c. Musée des beaux-arts du Canada, 2014 CSC 42, [2014] 2 R.C.S. 197 (« *MBA* »), par. 13; *Khosa*, par. 25; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 26 et 28; *Dunsmuir*, par. 54).

[223] Dans l'arrêt *Edmonton (Ville) c. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 R.C.S. 293, la majorité a reconnu ce qui suit :

> La présomption d'application de la norme de la décision raisonnable repose sur le choix du législateur de confier à un tribunal administratif spécialisé la responsabilité d'appliquer les dispositions législatives, ainsi que sur l'expertise de ce tribunal en la matière. L'expertise découle de la spécialisation des fonctions des tribunaux administratifs qui, comme le Comité, appliquent un régime législatif qui leur est familier [. . .] C'est [. . .] quelque chose d'inhérent au tribunal administratif en tant qu'institution : « . . . sur le plan institutionnel, on peut présumer que les arbitres [. . .] possèdent une expertise relative dans l'interprétation de la loi dont ils tiennent leur mandat ainsi que des dispositions législatives connexes qu'ils sont souvent appelés à appliquer dans l'exercice de leurs fonctions. » [Référence omise; par. 33.]

[224] La présomption de déférence a par conséquent permis d'employer le principe de « l'expertise spécialisée » qui était reconnu depuis longtemps par la jurisprudence de notre Cour, confirmant ainsi le principe de la déférence dont le juge Dickson avait posé les jalons dans l'arrêt *S.C.F.P.*

[225] Pour ce qui est des droits d'appel conférés par la loi, ils ont continué d'être perçus comme un facteur non pertinent dans l'analyse de la norme de contrôle ou comme un facteur qui devait céder le pas à l'expertise spécialisée. Ce principe était si fermement ancré que, dans des arrêts comme *Bell Canada c. Bell Aliant Communications régionales*, [2009] 2 R.C.S. 764, *Smith c. Alliance Pipeline Ltd.*, [2011] 1 R.C.S. 160, *ATCO Gas and Pipelines Ltd. c. Alberta (Utilities Commission)*, [2015] 3 R.C.S. 219, et *Canada (Procureur général) c. Igloo Vikski Inc.*, [2016] 2 R.C.S. 80, la Cour a appliqué la norme de la décision raisonnable sans même *mentionner* l'existence d'une disposition conférant un droit d'appel. Et, lorsqu'elle a *effectivement* parlé des dispositions prévoyant un droit d'appel, la Cour a systématiquement confirmé qu'elles n'excluaient pas l'application des principes du contrôle judiciaire.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language . . . a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal . . . . [para. 38]

[227] In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

[226] Dans l'arrêt *Khosa*, le juge Binnie a explicitement souscrit à l'arrêt *Pezim* et rejeté « la thèse selon laquelle il faut, en l'absence d'une disposition législative expresse ou nécessairement implicite, que la cour de révision "applique la norme de la décision correcte, comme elle le fait normalement en appel" » (par. 26). Ce raisonnement a été suivi dans l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, [2011] 3 R.C.S. 471 (« *Mowat* »), dans lequel la Cour a confirmé qu'« il faut se garder de [. . .] confondre » le contrôle judiciaire et l'appel (par. 30; voir également par. 31). Dans l'arrêt *McLean*, rendu deux ans après la décision *Mowat*, la majorité a cité l'arrêt *Pezim* et d'autres décisions à l'appui de la proposition suivant laquelle « les principes généraux de droit administratif s'appliquent tout de même » en cas d'appel prévu par la loi (voir par. 21, note en bas de page 2). De façon similaire, dans l'arrêt *Mouvement laïque*, le juge Gascon a affirmé que

> [l]orsqu'une cour de justice contrôle la décision d'un tribunal administratif spécialisé, la norme d'intervention doit être déterminée en fonction des principes du droit administratif. C'est le cas lorsque le contrôle s'exerce par suite d'une demande de révision judiciaire, mais aussi lorsqu'il procède par voie d'appel prévu par une loi . . . [par. 38]

[227] Dans l'affaire *Edmonton East*, la Cour a examiné — et de nouveau rejeté — l'argument voulant que les appels prévus par la loi doivent constituer une nouvelle catégorie révisable selon la norme de la décision correcte. Selon la majorité, « il serait contraire à la jurisprudence bien établie de la Cour de considérer — comme l'a fait la Cour d'appel en l'espèce — que les questions se soulevant dans le cadre d'un appel prévu par la loi forment une nouvelle catégorie de questions à laquelle s'applique la norme de la décision correcte » (par. 28). Dans l'arrêt *Edmonton East*, même s'ils estimaient qu'il appert du libellé de la disposition législative prévoyant un droit d'appel et de l'économie de la loi que la norme applicable était celle de la décision correcte, les juges dissidents ont néanmoins déclaré sans équivoque qu'« un droit d'appel statutaire ne forme pas une nouvelle "catégorie" à laquelle s'applique la norme de la décision correcte » (par. 70).

[228] By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*'s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" . . . . After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

[229] In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the

[228] Au moment où les présents pourvois ont été entendus, les facteurs contextuels avaient pratiquement disparu de l'analyse de la norme de contrôle pour être remplacés par une présomption de déférence, sous réserve seulement des exceptions relatives à l'application de la norme de la décision correcte énoncées dans l'arrêt *Dunsmuir* — qui *n'*incluaient explicitement *pas* les droits d'appel conférés par la loi. En d'autres termes, la Cour était en bonne voie de réaliser la promesse d'une analyse simplifiée qu'elle avait faite dans l'arrêt *Dunsmuir*. C'est bien ce qu'a reconnu le juge Gascon l'an dernier dans l'arrêt *Commission canadienne des droits de la personne* :

> *Cette approche contextuelle devrait être appliquée avec parcimonie*. Comme l'ont déclaré les juges majoritaires de la Cour dans l'arrêt *Alberta Teachers*, il est inapproprié de « revenir à l'analyse exhaustive lorsqu'une démarche sommaire permet de déterminer la norme de contrôle » [. . .] En effet, le « recours à une analyse contextuelle peut être source d'incertitude et d'interminables litiges au sujet de la norme de contrôle applicable » (*Capilano* [*Edmonton East*], par. 35). La présomption d'application de la norme de la décision raisonnable et les catégories déjà énumérées suffiront généralement pour déterminer la norme de contrôle applicable. Dans les cas exceptionnels où il serait justifié de recourir à une analyse contextuelle pour repousser la présomption, celle-ci n'a pas à être longue et détaillée (*Capilano* [*Edmonton East*], par. 34). Dans les situations où tel était le cas, ou lorsqu'il en a été question par le passé, l'analyse ne portait que sur les facteurs déterminants qui révélaient une intention claire du législateur justifiant la réfutation de la présomption (voir, p. ex., *Rogers*, par. 15; *Tervita*, par. 35-36; voir également *Saguenay*, par. 50-51). [Italique ajouté; par. 46.]

[229] En somme, pendant quatre décennies, notre jurisprudence en matière de norme de contrôle a été claire et constante en ce qui concerne le rôle essentiel de l'expertise spécialisée et le rôle limité des droits d'appel conférés par la loi. La seule zone d'ombre qui subsiste a trait à la pertinence des facteurs contextuels énoncés dans l'arrêt *Dunsmuir*, au sens de l'expression « questions touchant vraiment à la compétence » et à la meilleure façon de procéder à un contrôle selon la norme de la décision raisonnable. C'est dans ce contexte que les présents pourvois ont été entendus

whole script, reassigning to the courts the starring role Dicey ordained a century ago.

et plaidés. Mais au lieu d'ajouter une nouvelle scène simplifiée au film, les présents pourvois ont servi de prétexte pour récrire tout le scénario et réattribuer aux cours judiciaires le rôle principal que Dicey leur avait confié il y a un siècle.

The Majority's Reasons

[230] The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise . . . institutional experience . . . proximity and responsiveness to stakeholders . . . prompt[ness], flexib[ility], and efficien[cy]; and . . . access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

Les motifs de la majorité

[230] Le cadre établi par la majorité repose sur une conception du contrôle judiciaire qui est à la fois erronée et incomplète et qui néglige sans raison valable l'expertise spécialisée des décideurs administratifs. Bien que la majorité emploie des termes cautionnant une « présomption d'application de la norme de la décision raisonnable », cette présomption repose maintenant sur une compréhension totalement nouvelle de l'intention du législateur et de la primauté du droit. En interdisant toute prise en compte des postulats pourtant bien établis du principe de la déférence, comme « [l']expertise [. . .] l'expérience institutionnelle [. . .] la proximité des décideurs et des intervenants ainsi que la réceptivité de ces derniers [. . .] la rapidité, la souplesse et l'efficacité et [. . .] l'accès à la justice », la majorité fait fi des fondements de la conception moderne de l'intention du législateur en droit administratif.

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

[231] En particulier, cette approche ne tient pas compte de la possibilité que la spécialisation fasse partie intégrante, avec d'autres avantages, du choix du législateur de déléguer certaines questions à des décideurs administratifs. Pour donner l'effet voulu à la volonté du législateur de « déléguer des pouvoirs » aux décideurs administratifs, il faut comprendre les *avantages* que peut comporter l'exercice, par ces décideurs, de leur mandat (*Dunsmuir*, par. 49). Comme le juge Iacobucci l'a fait observer dans l'arrêt *Southam* :

> Si le Parlement confie l'examen de certaines questions à un tribunal administratif plutôt qu'aux tribunaux ordinaires (du moins en première instance), *il est permis de présumer que c'est parce que le tribunal administratif apporte un certain avantage que les juges ne sont pas en mesure d'offrir*. Pour cette seule raison, le contrôle des décisions d'un tribunal administratif doit souvent se faire non pas en regard de la norme de la décision correcte, mais en fonction d'une norme exigeant de faire montre de retenue. [Italiques ajoutés; par. 55.]

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q*, at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

[233] All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages

[232] Parmi ces avantages, mentionnons au premier chef l'expertise institutionnelle et la spécialisation inhérentes à l'exécution quotidienne d'un mandat particulier. Les personnes nommées pour siéger à des tribunaux administratifs sont souvent choisies précisément parce que leurs antécédents et leur expérience cadrent avec le mandat qu'elles sont appelées à remplir (Van Harten et autres, p. 15; Régimbald, p. 463). Certains régimes administratifs assujettissent précisément la nomination de nouveaux membres à la possession par ceux-ci d'un certain degré d'expertise (*Edmonton East*, par. 33; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, par. 29; Régimbald, p. 462). En tant qu'institutions, les organismes administratifs ont l'avantage de se spécialiser au fur et à mesure qu'ils sont appelés à appliquer « un régime législatif qui leur est familier » (*Edmonton East*, par. 33) et qu'ils « se prononce[nt] sur des questions de façon répétée » (*Parry Sound (District), Conseil d'administration des services sociaux c. S.E.E.F.P.O., section locale 324*, [2003] 2 R.C.S. 157, par. 53). La spécialisation et l'expertise sont encore renforcées par la formation continue et par des réunions où les membres des organismes administratifs discutent de politiques et de pratiques exemplaires (Finn Makela, « Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review : The Case of Grievance Arbitrators and Human Rights Law » (2013), 17 *C.L.E.L.J.* 345, p. 349). En outre, la composition mixte de certains tribunaux administratifs favorise le développement d'une compétence institutionnelle particulière pour régler les différends « polycentriques » (*Pushpanathan*, par. 36; *Dr. Q*, par. 29-30; *Pezim*, p. 591-592 et 596).

[233] Les décideurs administratifs sont ainsi outillés pour s'attaquer aux questions de droit relevant de leur mandat. Lorsqu'ils interprètent leur loi habilitante, par exemple, les acteurs administratifs sont particulièrement bien placés pour saisir avec justesse les conséquences concrètes d'interprétations juridiques particulières, le contexte législatif, les objectifs qu'une disposition ou un régime législatifs sont censés viser et la terminologie spécialisée employée dans leur domaine administratif. Lorsqu'on y ajoute la reconnaissance par notre Cour du fait que les dispositions législatives se prêtent souvent

stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H. W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

[234] Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique

à de multiples interprétations raisonnables, les avantages conférés par la spécialisation et l'expertise constituent une raison convaincante de faire preuve de déférence envers les décideurs administratifs sur les questions juridiques relevant de leur mandat (*S.C.F.P.*, p. 236; *McLean*, par. 37). Ainsi que l'a dit le professeur H. W. Arthurs :

> [TRADUCTION] Il n'y a aucune raison de croire que le juge appelé une seule fois dans sa vie à interpréter une loi de nature réglementaire — peut-être dans des conditions très peu enviables — soit en mesure de l'interpréter en respectant davantage l'objet de la loi que ne le ferait l'administrateur qui s'est engagé à faire respecter cet objet, qui s'efforce chaque jour de le faire et qui est bien conscient de l'effet qu'auront sur la réalisation de l'objet les différentes interprétations possibles. Il n'y a aucune raison de croire qu'un juge ayant une formation juridique est mieux qualifié pour décider de l'existence d'éléments de preuve se rapportant à un point donné ou pour se prononcer sur leur caractère suffisant ou leur pertinence que ne l'est l'économiste ou l'ingénieur de formation, l'arbitre choisi par les parties ou simplement le membre expérimenté d'un tribunal administratif appelé à trancher quotidiennement de tels cas. Il n'y a aucune raison de croire qu'un juge ayant consacré toute sa carrière à régler un seul litige à la fois possède une aptitude à trancher des questions qui, souvent, naissent du fait qu'un organisme administratif qui traite des affaires en grand nombre est conçu pour d'établir un juste équilibre entre l'efficacité et les droits effectifs de participation.
>
> (« Protection against Judicial Review » (1983), 43 *R. du B.* 277, p. 289)

[234] Des juges de notre Cour ont souscrit à ce passage, ainsi qu'à l'idée plus générale suivant laquelle la spécialisation et l'expertise justifient la déférence due aux décideurs administratifs (*National Corn Growers*, p. 1343, motifs concordants de la juge Wilson). Déjà dans l'arrêt *S.C.F.P.*, le juge Dickson fusionnait l'expertise et l'intention du législateur en expliquant que l'expertise spécialisée d'un organisme administratif pouvait s'avérer essentielle à la réalisation des objectifs du régime législatif en cause :

> Cette loi établit un équilibre délicat entre le besoin de maintenir des services publics et le besoin de préserver la négociation collective. Pour atteindre ce double but,

expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381, at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

les membres de la Commission doivent donc faire preuve d'une grande sensibilité à ces questions et d'une habileté unique. [p. 236]

[235] Avec le temps, l'expertise spécialisée est devenue la principale raison invoquée pour justifier la déférence envers les décideurs administratifs (*Bradco Construction*, p. 335; *Southam*, par. 50; Audrey Macklin, « Standard of Review : Back to the Future? » dans Colleen M. Flood et Lorne Sossin, dir., *Administrative Law in Context* (3e éd. 2018), 381, p. 397-398). Depuis l'arrêt *Dunsmuir*, la Cour n'a cessé de confirmer le rôle central que jouent la spécialisation et l'expertise, de confirmer le lien entre celles-ci et l'intention du législateur et de reconnaître qu'elles confèrent aux décideurs administratifs un « privilège en matière d'interprétation » sur les questions de droit (*McLean*, par. 40; voir également *Conway*, par. 53; *Mowat*, par. 30; *Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, [2011] 3 R.C.S. 708, par. 13; *Doré c. Barreau du Québec*, [2012] 1 R.C.S. 395, par. 35; *Mouvement laïque*, par. 46; *Khosa*, par. 25; *Edmonton East*, par. 33).

[236] Même si l'approche préconisée par la majorité prône le respect des « choix d'organisation institutionnelle » du législateur, elle n'accorde aucun poids aux avantages institutionnels que possèdent les décideurs administratifs du fait de leur spécialisation et de leur expertise lorsqu'il s'agit de trancher des questions de droit. Ce faisant, la majorité ne tient pas compte de la raison historiquement reconnue *pour laquelle* le législateur souhaitait déléguer des pouvoirs à des acteurs administratifs.

[237] Nous ne sommes pas non plus convaincues par l'affirmation des juges majoritaires suivant laquelle « s'il est tenu pour acquis que le décideur administratif possède une expertise spécialisée en ce qui concerne l'ensemble des questions dont il est saisi, la notion d'expertise ne permet plus à la cour de révision de distinguer les questions auxquelles il y a lieu d'appliquer la norme de la décision raisonnable de celles auxquelles il n'y a pas lieu de l'appliquer ». En l'espèce, la majorité propose un faux dilemme : soit l'expertise doit être évaluée au cas par cas, soit elle ne joue aucun rôle dans la théorie du contrôle judiciaire.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that . . . those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

[239] The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

[240] In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions

[238] Nous sommes en désaccord. Bien que les décideurs ne possèdent pas tous nécessairement une expertise sur chacune des questions soulevées dans une procédure administrative, les cours de révision ne procèdent pas à une évaluation individualisée, au cas par cas, de la spécialisation et de l'expertise. La théorie de la déférence repose non seulement sur le choix du législateur de déléguer certaines décisions, mais aussi sur l'expertise institutionnelle et sur le fait que « les personnes qui se consacrent quotidiennement à l'application de régimes administratifs souvent complexes possèdent ou acquièrent une grande connaissance ou sensibilité à l'égard des impératifs et des subtilités des régimes législatifs en cause » (*Khosa*, par. 25; voir également *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, [2011] 3 R.C.S. 616, par. 53; *Edmonton East*, par. 33).

[239] L'évacuation, par les juges majoritaires, de l'expertise, de la spécialisation et d'autres avantages institutionnels de leur cadre d'analyse ne pose pas problème seulement sur le plan théorique. La suppression du « fondement conceptuel » qui justifie actuellement la déférence ouvre les portes à un contrôle judiciaire élargi fondé sur la norme de la décision correcte. La « présomption » de déférence de la majorité ne s'inclinera que trop facilement devant les raisons invoquées pour justifier un cadre axé sur la norme de la décision correcte.

[240] Selon le cadre proposé par la majorité, la déférence est éclipsée chaque fois que la « primauté du droit » l'exige. La façon dont la majorité conçoit la primauté du droit découle toutefois d'une conception judiciarisée de celle-ci dont les origines remontent au XIX^{e} siècle, plus précisément aux théories de Dicey.

[241] La primauté du droit n'est pas la primauté des cours. Une conception pluraliste de la primauté du droit reconnaît que les cours ne sont pas les gardiens exclusifs du droit et que d'autres acteurs dans l'arène de la justice — dont les décideurs administratifs — ont également la responsabilité de l'élaborer. L'arrêt *Dunsmuir* a adhéré à cette vision plus inclusive de la primauté du droit en reconnaissant qu'il fallait « temp[érer] la conception judiciarisée de la primauté du droit [. . .] par la reconnaissance du fait

of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> . . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.

(Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

que les cours de justice n'ont pas le pouvoir exclusif de statuer sur toutes les questions de droit » (par. 30). Comme la Cour l'a expliqué dans l'arrêt *Dunsmuir*, la primauté du droit signifie que les décideurs administratifs prennent des décisions juridiques dans le cadre de leur mandat et non que seuls les juges peuvent trancher des questions de droit et ont carte blanche pour substituer leur opinion à celle des acteurs administratifs par le biais d'un contrôle selon la norme de la décision correcte (voir McLachlin, « Tribunaux administratifs et tribunaux judiciaires : une relation en évolution »; l'hon. Thomas A. Cromwell, « What I Think I've Learned About Administrative Law » (2017), 30 *R.C.D.A.P.* 307, p. 308; *Wilson c. Énergie atomique Canada Ltée.*, [2016] 1 R.C.S. 770, par. 31, la juge Abella).

[242] De plus, un des aspects essentiels de toute définition de la primauté du droit est l'accès équitable et efficace à un mécanisme de règlement des différends propre à rendre justice en temps opportun (*Hryniak c. Mauldin*, [2014] 1 R.C.S. 87, par. 1). Il s'agit d'un objectif important pour tous les justiciables, des consommateurs avertis de la justice administrative jusqu'aux citoyens les plus vulnérables — et de manière plus significative pour ces derniers (Angus Grand et Lorne Sossin, « Fairness in Context : Achieving Fairness Through Access to Administrative Justice », dans Colleen M. Flood et Lorne Sossin, dir., *Administrative Law in Context* (3e éd. 2018), 341, p. 342). Pour cette raison, l'accès à la justice est au cœur du choix du législateur d'instaurer un système de droit administratif solide (Grant et Sossin, p. 342 et 369-370; Van Harten et autres, *Administrative Law*, p. 17; Régimbald, p. 2-3; McLachlin, *Administrative Tribunals and the Courts : An Evolutionary Relationship*). Comme le juge d'appel Morissette l'a fait observer :

> [TRADUCTION] . . . les objectifs du droit administratif [. . .] sont en règle générale axés sur la promotion de l'accès à la justice. Parmi les moyens envisagés, mentionnons les mesures peu coûteuses, simples et expéditives, l'expertise des décideurs, la cohérence des motifs, l'uniformité des résultats et le caractère définitif des décisions.

(Yves-Marie Morissette, « What is a "reasonable decision"? » (2018), 31 *R.C.D.A.P.* 225, p. 236)

[243] These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

[244] The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room . . . for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

[245] We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness

[243] Ces objectifs sont compromis lorsqu'on invoque une conception étroite de la « primauté du droit » pour imposer l'hégémonie judiciaire aux décideurs administratifs. Ce faisant, on pervertit l'objectif d'établir un système parallèle de justice administrative et on augmente inutilement les coûts et la complexité pour le public.

[244] Les juges majoritaires vont même jusqu'à réclamer une reformulation de la catégorie des « questions d'importance capitale » tirée de l'arrêt *Dunsmuir* qui permettrait aux cours de substituer leur opinion à celle des décideurs administratifs sur des questions qui sont « d'importance capitale pour le système juridique dans son ensemble », même si ces questions relèvent nettement du mandat et de l'expertise du décideur administratif. Tel que la Cour l'a signalé dans *Commission canadienne des droits de la personne*, le contrôle selon la norme de la décision correcte n'était permis que pour les questions « d'importance capitale pour le système juridique *et* qui échappent au domaine d'expertise de l'arbitre » (par. 28 (en italique dans l'original)). Étendre cette catégorie par rapport à son acception initiale a pour conséquence d'étendre indûment les questions pour lesquelles les cours peuvent substituer leur propre opinion à celle des décideurs administratifs. En théorie, les enjeux de discrimination, de droits des travailleurs et de réglementation économique des marchés des valeurs mobilières (pour n'en mentionner que quelques-uns) soulèvent des questions qui revêtent une importance vitale pour le Canada et son système juridique. Mais en ignorant l'expertise des décideurs administratifs sur les questions susmentionnées, cette catégorie fera immanquablement augmenter le [TRADUCTION] « risque d'erreurs et de manipulation » (Andrew Green, « Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law » (2014), 47 *U.B.C. L. Rev.* 443, p. 483). Nous estimons qu'il n'y a pas lieu de modifier la définition de cette catégorie proposée dans l'arrêt *Dunsmuir*[1].

[245] Nous sommes également en désaccord avec la reformulation de la notion de « l'intention du législateur » proposée par la majorité, qui invite pour

[1] Other than one of the two *amici*, no one asked us to modify this category.

[1] À part l'un des deux *amici curiae*, personne ne nous a demandé de modifier cette catégorie.

review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

la première fois les cours de révision à appliquer la norme de contrôle de la décision correcte à des questions de droit lorsqu'un régime administratif prévoit un droit d'appel. Nous ne voyons pas en quoi l'existence de droits d'appel crée un « régime institutionnel différent » qui commanderait un contrôle plus fouillé. Le simple fait qu'une loi envisage la possibilité pour une cour de justice d'exercer un contrôle ne permet pas de tirer de conclusions quant au *degré de déférence* requis lors du contrôle en question. Les droits d'appel reflètent les divers choix faits par diverses législatures pour permettre le contrôle judiciaire, pour diverses raisons, notamment le contrôle des questions de fait, des questions de droit, des questions mixtes de fait et de droit et de la façon dont a été exercé un pouvoir discrétionnaire. Le fait d'accorder aux parties un droit d'appel peut servir plusieurs fins totalement étrangères à la norme de contrôle, notamment préciser quelle cour sera saisie de l'appel (parfois, il peut s'agir d'une cour de révision différente de celle habituellement chargée de statuer sur les demandes de contrôle judiciaire), qui est admissible, quand les documents doivent être déposés, sous quelle forme ils doivent être présentés, les pouvoirs de la cour de révision en appel, les exigences à respecter pour obtenir l'autorisation d'interjeter appel et les moyens d'appel dont les parties peuvent se prévaloir. En prévoyant ce type de structure et de balises, les dispositions législatives en matière d'appel permettent aux législatures de promouvoir l'efficacité et l'accès à la justice d'une manière qui n'aurait pas été possible si l'on s'en était remis exclusivement au contrôle judiciaire.

[246] In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

[246] En réalité, même si, au chapitre des droits d'appel conférés par la loi, la majorité évoque le « respec[t] [des] choix d'organisation institutionnelle du législateur », sa position repose presque exclusivement sur un argument textuel suivant lequel la présence du mot « appel » indique que le législateur voulait que les cours de révision appliquent les mêmes normes de contrôle que celles que les cours d'appel appliquent dans leurs arrêts en matière civile.

[247] The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how

[247] Le fait que la majorité invoque la « présomption d'uniformité d'expression » en se fondant uniquement sur le mot « appel » est malavisé et néglige les distinctions institutionnelles qui sont reconnues

courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

[249] In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

[2] The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

depuis longtemps en ce qui concerne le mode de fonctionnement des cours et des décideurs administratifs. Les mots employés dans chaque contexte sont différents, les mandats sont différents et les considérations de principe sont différentes. L'idée selon laquelle il faut appliquer de façon inflexible l'arrêt *Housen c. Nikolaisen*, [2002] 2 R.C.S. 235, à tous les droits d'« appel » accordés par une loi sans égard aux objectifs plus larges du régime législatif ou aux conséquences pratiques d'une plus grande intervention judiciaire dans ce régime ne trouve aucun appui dans notre jurisprudence.

[248] De plus, l'affirmation de la majorité suivant laquelle le législateur « ne parle pas pour ne rien dire » est inconciliable avec son interprétation des clauses privatives, qui ne jouent aucun rôle dans son cadre d'analyse de la norme de contrôle. Si, comme la majorité le prétend, le choix du Parlement de conférer des droits d'appel doit influencer l'analyse de la norme de contrôle, il n'y a aucune raison de principe pour laquelle la décision du Parlement d'*interdire* les appels au moyen de clauses privatives ne devrait pas avoir d'effet comparable[2].

[249] En tout état de cause, les législatures canadiennes savent depuis au moins 25 ans, depuis l'arrêt *Pezim*, que notre Cour ne considère pas les droits d'appel accordés par une loi comme une expression déterminante de l'intention du législateur en ce qui concerne la norme de contrôle applicable (*Pezim*, p. 590). Face à cette réalité, l'emploi systématique du terme « appel » par les législatures ne saurait s'expliquer par l'intention que la majorité lui prête rétroactivement; cette façon de procéder est incompatible avec le principe suivant lequel les législatures sont présumées adopter des lois conformément aux règles de common law existantes (Ruth Sullivan, *Statutory Interpretation* (3e éd. 2016), p. 315).

[2] Les « préoccupations constitutionnelles » citées par la majorité ne constituent pas une solution à ce dilemme : rien dans l'arrêt *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220, n'empêche les clauses privatives d'influencer la *norme* de contrôle, comme c'était le cas pendant des années selon l'analyse pragmatique et fonctionnelle, ainsi que dans l'arrêt *S.C.F.P.* (David Dyzenhaus, « Dignity in Administrative Law : Judicial Deference in a Culture of Justification » (2012), 17 *R. études const.* 87, p. 103; David Mullan, « Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — the Top Fifteen! » (2013), 42 *Adv. Q.* 1, p. 21).

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, [2019] 4 S.C.R. 845, that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

[251] The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations

[250] Ces législatures ont d'ailleurs compris, à la lumière de notre jurisprudence, que notre Cour s'était engagée à respecter les *normes* de contrôle prescrites par la loi, un choix législatif qui n'a été exercé que par la Colombie-Britannique[3]. Nous souscrivons à la position du procureur général du Canada dans les pourvois connexes *Bell Canada c. Canada (Procureur général)*, [2019] 4 R.C.S. 845, selon laquelle, sauf en présence de circonstances exceptionnelles, un droit d'appel conféré par la loi n'écarte pas la présomption d'application de la norme de la décision raisonnable[4]. La majorité a toutefois retenu, pour une raison inconnue, le modèle proposé par les *amici curiae*[5], qui recommandent une refonte complète de notre vision de l'intention du législateur et de la manière dont nous déterminons la norme de contrôle applicable.

[251] Le résultat auquel arrive la majorité signifie que des centaines de décideurs administratifs soumis à différents types de droit d'appel conférés par la loi — certains dans des domaines hautement spécialisés comme la radiodiffusion, la réglementation des valeurs mobilières et le commerce international — seront désormais assujettis à une présomption irréfragable d'application de la norme de la décision correcte. Cela risque de provoquer une avalanche de litiges. Il sera désormais loisible aux cours de révision de réexaminer à leur guise des questions de droit portant sur des enjeux qui relèvent carrément de l'expertise des décideurs administratifs, même si leurs conséquences ne débordent pas le cadre du régime administratif de ces décideurs. Même si les

[3] See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

[4] The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

[5] Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

[3] Voir *l'Administrative Tribunal Act*, S.B.C. 2004, c. 45. La tentative récente du Québec d'adopter une loi semblable est un autre exemple d'une législature qui a compris qu'elle était libre d'établir des normes de contrôle et que la simple existence d'un droit d'appel ne dictait pas la nature des normes en question. Voir le projet de loi 32, *Loi visant principalement à favoriser l'efficacité de la justice pénale et à établir les modalités d'intervention de la Cour du Québec dans un pourvoi en appel*, 42e lég., 1re sess., 2019.

[4] L'idée selon laquelle la volonté du législateur trouve son expression la plus éloquente dans les droits d'appel prévus par une loi ne trouve appui dans aucune des observations formulées par quatre des cinq procureurs généraux qui ont comparu devant nous.

[5] Même les *amici curiae* ne sont pas allés jusqu'à affirmer que *toutes* les dispositions créant un droit d'appel témoignaient de l'intention du législateur de permettre aux cours de substituer leur opinion à celle des décideurs administratifs sur des questions de droit.

responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

décideurs spécialisés proposent des interprétations valables de lois très techniques avec lesquelles ils travaillent quotidiennement, même s'ils proposent des interprétations intrinsèquement cohérentes qui tiennent compte des observations des parties et qui sont conformes au texte, au contexte et à l'objet du régime applicable, ainsi qu'aux pratiques et décisions antérieures de l'organe administratif, à la common law, aux décisions judiciaires antérieures et au droit international, ces interprétations pourront toujours être écartées par la cour de révision qui a simplement un point de vue différent sur la loi applicable. Cela risque de compromettre l'intégrité des procédures administratives chaque fois que la loi prévoit un droit d'appel et de réduire les procédures administratives à guère plus qu'une répétition générale en vue d'un appel judiciaire, ce qui est le contraire de l'intention du législateur de créer un régime spécialisé et de confier à des acteurs non judiciaires certaines questions de politique et de droit.

[252] Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; the Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling

[252] Ironiquement, la démarche proposée par la majorité créera un obstacle à la réalisation de sa promesse de simplicité. En élevant des dispositions créant un droit d'appel au rang d'indicateurs d'un contrôle assujetti à la norme de la décision correcte, on crée un système de droit administratif à deux vitesses dans lequel on aurait, d'une part, un système dans le cadre duquel les juges s'en remettent à l'expertise des décideurs administratifs lorsqu'il n'existe pas de dispositions d'appel et, d'autre part, un autre système selon lequel l'existence de telles dispositions permettrait au juge de substituer à l'opinion du décideur administratif sa propre opinion sur les questions de droit au cœur même du mandat de ces décideurs. Dans ce dernier cas, l'application des principes de droit en matière d'appel créera inévitablement de la confusion en favorisant le fractionnement du contrôle judiciaire (*Mouvement laïque*, par. 173, motifs concordants en partie de la juge Abella; voir également Paul Daly, « Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness » (2016), 62 *R.D. McGill* 527, p. 542-543; l'hon. Joseph T. Robertson, « Identifying the Review Standard : Administrative Deference in a Nutshell » (2017), 68 *R.D. U.N.-B.* 145, p. 162). Il reviendra aux cours de déceler les erreurs manifestes et déterminantes dans le cas des questions de fait, à

within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

[253] The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

[254] But the aspect of the majority's decision with the greatest potential to undermine both the integrity

dissocier les questions de droit des questions mixtes de fait et de droit, à procéder à un examen *de novo* des questions de droit et éventuellement à se voir contraints d'appliquer de façon interchangeable les normes du contrôle judiciaire et les normes d'appel lorsqu'un demandeur conteste dans la même instance plusieurs aspects de la décision administrative dont certains relèvent d'une disposition créant un droit d'appel et d'autres non. Il s'agit d'une incitation à la complexité et d'un obstacle à l'accès à la justice.

[253] Les motifs de la majorité nous font « retourner à l'époque où certains tribunaux judiciaires s'attribuaient, en matière administrative, certaines compétences et connaissances qu'ils se sont en fait avérés ne pas posséder » (*Khosa*, par. 26). La majorité élève les droits d'appel prévus par la loi au rang de facteurs déterminants en appliquant une approche formaliste qui néglige la volonté du législateur de laisser à des décideurs administratifs spécialisés le soin de trancher certaines questions de droit et de politique. Cet effritement d'une conception canadienne du droit administratif qui a été élaborée avec soin et qui repose sur la déférence nous ramène à la démarche fondée sur des « règles de droit immuables » que l'on trouve notamment dans l'arrêt *Anisminic* et dans des affaires comme *Metropolitan Life*, où des décideurs spécialisés étaient à la merci des décisions souveraines d'un ou d'une juge. Plutôt que de s'appuyer sur l'arrêt *Dunsmuir*, qui reconnaissait que la spécialisation était indissociable de la volonté du législateur de déléguer certaines questions à des décideurs administratifs, les motifs de la majorité évacuent totalement l'expertise de l'analyse relative à la norme de contrôle, ouvrant ainsi la porte à la création d'une multitude de nouvelles catégories de normes de contrôle fondées sur la décision correcte dont la portée risque elle aussi d'être élargie. L'approche de la majorité affaiblit non seulement la présomption de déférence, mais mine aussi la confiance envers l'existence — et l'opportunité — de favoriser une [TRADUCTION] « participation commune [des cours et des décideurs administratifs] au fonctionnement de l'État administratif en ce qui concerne l'élaboration et l'interprétation du droit » (Stack, p. 310).

[254] Mais l'aspect de la décision de la majorité qui risque le plus de compromettre l'intégrité des

of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Robinson*, [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled . . . .*
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

décisions de notre Cour et d'ébranler la confiance du public à l'égard de la stabilité du droit est son mépris des précédents et de la règle du *stare decisis*.

[255] La règle du *stare decisis* limite considérablement la capacité de notre Cour d'infirmer ses propres précédents. Le juge Rothstein a précisé certaines de ces limites dans l'arrêt *Canada c. Craig*, [2012] 2 R.C.S. 489, qui est la décision relative à l'application de la règle du *stare decisis* par une juridiction du même degré sur laquelle la majorité se fonde :

> Notre Cour a récemment examiné, dans *Ontario (Procureur général) c. Fraser*, 2011 CSC 20, [2011] 2 R.C.S. 3, si elle devait écarter l'une de ses propres décisions. Au paragraphe 56, la juge en chef McLachlin et le juge LeBel soulignent, dans leurs motifs conjoints pour la majorité, qu'il ne convient pas d'écarter un précédent à la légère. *C'est particulièrement vrai lorsque le précédent exprime l'avis réfléchi de majorités claires* (par. 57).
>
> Il est malgré tout arrivé à plusieurs reprises que la Cour écarte ses propres décisions. (Voir *R. c. Chaulk*, [1990] 3 R.C.S. 1303, p. 1353, le juge en chef Lamer pour la majorité; *R. c. B. (K.G.)*, [1993] 1 R.C.S. 740; *R. c. Robinson*, [1996] 1 R.C.S. 683.) *Il lui faut toutefois être convaincue, pour des raisons impérieuses, que la décision est erronée et qu'elle devrait être écartée . . .*
>
> La prudence est de mise lorsqu'il s'agit de décider de rompre avec une décision antérieure. Dans *Queensland c. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), p. 599, le juge Gibbs a articulé de façon concise l'approche qui s'impose :
>
> > [TRADUCTION] Nul juge ne peut ignorer les décisions et le raisonnement de ses prédécesseurs et arriver à ses propres conclusions comme si la jurisprudence n'existait pas, ou qu'une décision cessait d'être opposable dès l'ajournement d'une session. Contrairement au législateur, le juge ne peut entreprendre une réforme qui réduit à néant les décisions antérieures et les principes établis précédemment. Ce n'est qu'après avoir examiné la décision antérieure de la cour le plus attentivement et le plus respectueusement possible, et après avoir dûment considéré toutes les circonstances, que le juge peut faire primer sa propre opinion sur elle. [Italiques ajoutés, par. 24-26.]

[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of* Justice, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality*

[256] À l'étranger, certaines des juridictions les plus élevées ont également souligné la nécessité de faire preuve de prudence et d'invoquer des raisons impérieuses avant de s'écarter d'un précédent. La Cour suprême des États-Unis refuse d'écarter ses propres décisions à moins qu'il existe une [TRADUCTION] « justification spéciale », qui doit être plus que la simple conviction qu'une décision antérieure était mal fondée (*Kimble c. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), p. 2409; voir aussi *Halliburton Co. c. Erica P. John Fund, Inc.*, 573 U.S. (2014), p. 266; *Kisor c. Wilkie*, 139 S. Ct. 2400 (2019), p. 2418 et 2422; Bryan A. Garner et autres, *The Law of Judicial Precedent* (2016), p. 35-36).

[257] De même, la Chambre des lords [TRADUCTION] « exige bien davantage qu'un doute sur le bien-fondé d'une [décision antérieure] pour justifier de s'en écarter » (*Fitzleet Estates Ltd. c. Cherry* (1977), 51 T.C. 708, p. 718), une approche à laquelle souscrit toujours la Cour suprême du Royaume-Uni (*R. c. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, par. 19; *Willers c. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, par. 7; *Knauer c. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, par. 22-23).

[258] Pour sa part, la Cour suprême de la Nouvelle-Zélande considère [TRADUCTION] « la prudence, souvent une prudence considérable » comme la « pierre angulaire » de l'application de la règle du *stare decisis* par une juridiction du même degré, ajoutant qu'elle refuse d'écarter un précédent « pour la simple raison que, si la question était jugée de nouveau, la Cour pourrait adopter un point de vue différent » (*Couch c. Attorney General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, par. 105, le juge Tipping, et par. 209, le juge McGrath).

[259] La retenue et le respect des précédents guident également la Haute Cour de l'Australie et la Cour constitutionnelle de l'Afrique du Sud dans l'application de la règle du *stare decisis* (*Lee c. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, par. 62-66 et 70; *Camps Bay Ratepayers' and Residents' Association c. Harrison*, [2010] Z.A.C.C. 19, 2011 (4) S.A. 42, p. 55-56;

v. Asla Construction (Pty) Ltd., [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., "*Stare Decisis* and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

[261] Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde v. Wal-Mart Canada Corp.*, [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term.

Buffalo City Metropolitan Authority c. Asla Construction (Pty) Ltd., [2019] Z.A.C.C. 15, 2019 (4) S.A. 331, par. 65).

[260] Les vertus de l'application de la règle du *stare decisis* par une juridiction du même degré sont largement reconnues. La doctrine [TRADUCTION] « favorise le développement uniforme, prévisible et cohérent des principes de droit, favorise la confiance envers les décisions judiciaires et contribue à l'intégrité, réelle et perçue, du processus judiciaire » (*Kimble*, p. 2409, citant *Payne c. Tennessee*, 501 U.S. 808 (1991), p. 827). Notre Cour a reconnu l'importance que revêt la règle du *stare decisis* pour assurer la « certitude du droit » (*Canada (Procureur général) c. Bedford*, [2013] 3 R.C.S. 1101, par. 38; *R. c. Bernard*, [1988] 2 R.C.S. 833, p. 849; *Ministre des Affaires indiennes et du Nord c. Ranville*, [1982] 2 R.C.S. 518, p. 527). D'autres cours ont qualifié la règle du *stare decisis* de [TRADUCTION] « pierre d'assise de la primauté du droit » (*Michigan c. Bay Mills Indian Community*, 572 U.S. 782 (2014), p. 798; *Kimble*, p. 2409; *Kisor*, p. 2422; voir également *Camps Bay*, p. 55-56; Jeremy Waldron, « *Stare Decisis* and the Rule of Law : A Layered Approach » (2012), 111 *Mich. L. Rev.* 1, p. 28; Lewis F. Powell, Jr., « *Stare Decisis* and Judicial Restraint » (1990), 47 *Wash. & Lee L. Rev.* 281, p. 288).

[261] Le respect des précédents préserve également la légitimité institutionnelle de notre Cour. Les décisions de notre Cour ne perdent pas leur valeur de précédent « avec le départ de l'un ou de plusieurs des juges qui y ont participé » (*Plourde c. Wal-Mart Canada Corp.*, [2009] 3 R.C.S. 465, par. 13). Des idées similaires ont été évoquées dans la jurisprudence américaine :

[TRADUCTION] Au-delà d'un certain point, si la Cour infirme fréquemment ses décisions, sa bonne foi risque d'être mise en doute. Malgré les différentes raisons pouvant permettre de comprendre et de justifier une décision d'écarter un jugement précédent, il ne faut pas oublier que cette décision est habituellement perçue — à juste titre — comme, à tout le moins, une affirmation du fait qu'une décision antérieure était erronée. Il y a une limite aux erreurs qui peuvent vraisemblablement être imputées aux tribunaux ayant siégé avant la formation actuelle. Si cette limite devait être franchie, la modification d'une décision précédente

The legitimacy of the Court would fade with the frequency of its vacillation.

(*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

[262] Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.

("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

[263] The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence

serait considérée comme une preuve du fait que le réexamen légitime de principes a cédé devant la volonté d'obtenir un résultat particulier à court terme. La Cour perdrait de sa légitimité en raison de la fréquence de ses hésitations.

(*Planned Parenthood of Southeastern Pennsylvania c. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), p. 866; voir également *Florida Department of Health and Rehabilitative Services c. Florida Nursing Home Association*, 450 U.S. 147 (1981), p. 153, motifs concordants du juge Stevens.)

[262] Plusieurs universitaires ont exprimé un point de vue semblable (voir, p. ex., Michael J. Gerhardt, *The Power of Precedent* (2008), p. 18; Garner et autres, p. 391). Selon Aharon Barak,

[TRADUCTION] l'abandon d'un précédent ternit la perception qu'a le public du rôle de la magistrature et mine son respect et sa confiance envers elle. Le précédent ne devrait pas ressembler à un billet valide le jour de l'achat seulement.

(« Overruling Precedent » (1986), 21 *Is.L.R.* 269, p. 275)

[263] À notre avis, les motifs de la majorité ne tiennent pas compte du critère rigoureux auquel il faut satisfaire pour pouvoir écarter l'une des décisions de notre Cour. La majorité justifie son abandon de la conception bien établie de notre Cour quant à l'effet des dispositions législatives créant un droit d'appel sur l'analyse de la norme de contrôle en affirmant que cette approche était « non fondé[e] en principe » et qu'elle avait fait l'objet de critiques tant de la part des juges que des auteurs. La majorité avance aussi l'idée que les décisions de notre Cour ont établi un système de contrôle judiciaire « inapplicable et indûment complexe ». De l'avis de la majorité, l'abandon de ces décisions irait de pair avec les valeurs qui sous-tendent la doctrine du *stare decisis*, soit « la clarté et [. . .] la certitude du droit ». Ce faisant, la majorité ne tient pas compte de plusieurs des principes fondamentaux établis par notre Cour en droit administratif.

[264] La majorité n'explique pas dans ses motifs l'aspect le plus important de son rejet de la

in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

> . . . an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent. Or otherwise said, it is not

jurisprudence de notre Cour, à savoir sa décision de modifier tout le « fondement conceptuel » du contrôle judiciaire en excluant de l'analyse la spécialisation, l'expertise et d'autres avantages institutionnels. L'absence totale de raisons justifiant ce revirement majeur — que la majorité invoque à maintes reprises pour racheter l'abandon de précédents — décrédibilise ses affirmations quant à son respect des principes du *stare decisis*.

[265] La majorité explique sa décision d'écarter les jugements antérieurs de notre Cour portant sur des dispositions législatives créant un droit d'appel en affirmant que « rien ne saurait justifier [ces jugements] de façon satisfaisante ». Elle n'avance toutefois aucun argument différent de ceux qu'ont entendus et rejetés pendant des décennies d'autres formations de notre Cour dont les décisions sont aujourd'hui écartées. La majorité remplace plutôt cette jurisprudence constante par l'approche qu'elle privilégie en matière d'interprétation des droits d'appel conférés par la loi — approche qui a été rejetée par plusieurs formations antérieures de notre Cour dans une série de décisions qui s'étirent sur trois décennies et qui ont été confirmées de manière explicite *pas moins de quatre fois au cours des dix dernières années* (*Khosa*, par. 26; *Mowat*, par. 30-31; *Mouvement laïque*, par. 38; *Edmonton East*, par. 27-31; voir également *McLean*, par. 21).

[266] L'abandon de ces jugements bafoue les principes du *stare decisis* qui interdisent aux cours d'écarter des décisions antérieures qui [TRADUCTION] « représentent simplement une solution antérieurement retenue à laquelle la formation actuelle ne souscrit pas » (*Couch*, par. 105; voir aussi *Knauer*, par. 22; *Casey*, p. 864). [TRADUCTION] « [L]e principe du *stare decisis* tient à l'idée que les juges ne devraient pas pouvoir infirmer une décision pour la seule et unique raison qu'ils ne l'ont jamais aimé au départ » (*Knick c. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), p. 2190, motifs dissidents de la juge Kagan). Ainsi que la Cour suprême des États-Unis l'a souligné dans l'arrêt *Kimble* :

> [TRADUCTION] . . . l'argument selon lequel quelque chose nous a échappé — si valable soit-il — ne saurait à lui seul justifier l'abandon d'un précédent établi. En d'autres mots,

alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification" — over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a

il ne suffit pas de dire que nous en arriverions à une décision différente de celle que nous avions prise à l'époque. Pour faire marche arrière, nous devons également pouvoir invoquer ce que nous avons appelé une « justification spéciale » — qui est plus que la simple conviction que « la décision précédente était erronée ». [Référence omise; p. 2409.]

[267] Cependant, c'est le rejet en bloc sans précédent de tout un arsenal jurisprudentiel qui est particulièrement troublant. Les arrêts touchés sont trop nombreux pour qu'on en dresse la liste ici. Au nombre de ceux-ci figurent de nombreuses décisions rendues aux termes d'un contrôle fondé sur la déférence en dépit de l'existence d'un droit d'appel conféré par la loi (*Pezim*; *Southam*; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos Ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents immobiliers du Québec c. Proprio Direct inc.*, [2008] 2 R.C.S. 195; *Nolan c. Kerry (Canada) Inc.*, [2009] 2 R.C.S. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*), ainsi que des arrêts fondamentaux confirmant la pertinence de l'expertise administrative tant pour l'analyse de la norme de contrôle que pour la déférence envers l'interprétation donnée par les tribunaux administratifs à leur « loi constitutive » (voir *S.C.F.P.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Commission canadienne des droits de la personne*, parmi tant d'autres).

[268] La plupart de ces décisions ont été rendues par des formations unanimes ou par de fortes majorités. Cependant, la majorité ne reconnaît nulle part en l'espèce la grande réticence de notre Cour à renverser des précédents qui « exprime[nt] l'avis réfléchi de majorités claires » (*Craig*, par. 24; *Ontario (Procureur général) c. Fraser*, [2011] 2 R.C.S. 3, par. 57; voir également *Nishi c. Rascal Trucking Ltd.*, [2013] 2 R.C.S. 438, par. 23 et 24), ou des décisions à « caractère récent » (*Fraser*, par. 57; voir également *Nishi*, par. 23). En revanche, les décisions sur lesquelles s'appuie la majorité concernaient des situations dans lesquelles un seul précédent avait

34-year-old precedent; *R. v. Henry*, [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

[270] The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle

[6] R.S.B.C. 1996, c. 418, s. 159.

été écarté et, le plus souvent, une décision plus ancienne; l'arrêt *Craig* infirme une décision remontant à 34 ans; l'arrêt *R. c. Henry*, [2005] 3 R.C.S. 609, infirme une décision remontant à 19 ans (et une autre, écartée en partie, remontant à 15 ans), et, dans l'arrêt *Bernard*, les juges dissidents auraient infirmé une décision rendue une dizaine d'années plus tôt.

[269] La décision de la majorité de renverser une jurisprudence risque également de bousculer les interprétations établies de nombreuses lois prévoyant un droit d'appel. Suivant l'approche de la majorité, chaque interprétation existante de ces lois par un organisme administratif qui a été confirmée en appliquant la norme de contrôle de la décision raisonnable sera susceptible d'être remise en question. Par exemple, dans l'arrêt *McLean*, notre Cour a reconnu qu'un délai de prescription prévu par la *Securities Act*[6] de la Colombie-Britannique se prêtait à deux interprétations valables, mais elle a retenu celle que la Commission privilégiait, en procédant à un contrôle empreint de déférence. Nous ne voyons aucune raison qui empêcherait une personne se trouvant dans la même situation que M^me^ McLean de solliciter le réexamen de la décision de notre Cour en exerçant le droit d'appel accordé par la *Securities Act* et en demandant avec insistance à une cour de cours de révision d'offrir *sa propre* interprétation définitive du délai de prescription pertinent, dès lors que les dispositions législatives conférant un droit d'appel sont désormais interprétées de façon à permettre aux cours de substituer leur décision à celle qu'ils examinent plutôt que de procéder au contrôle de cette décision selon le principe de la déférence.

[270] La majorité ne propose aucune solution pour contrer le chaos que cette incertitude juridique engendrerait pour celles et ceux qui se fient aux interprétations établies des lois administratives pour organiser leurs affaires, même si la nécessité de protéger ses intérêts liés à une confiance raisonnable constitue une raison particulièrement impérieuse et bien reconnue de respecter les précédents (Garner et autres, p. 404-411; Neil Duxbury, *The Nature and Authority of Precedent* (2008), p. 118-119; *Kimble*, p. 2410-2411). En modifiant complètement le *statu*

[6] R.S.B.C. 1996, c. 418, art. 159.

upon which the common law relies" (*Bedford*, at para. 38; see also Cromwell, at p. 315).

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by

quo, l'approche de la majorité porte un dur coup au principe de la « certitude du droit », soit « l'assise fondamentale de la common law » (*Bedford*, par. 38; voir aussi Cromwell, p. 315).

[271] Par ailleurs, si notre Cour s'était, pendant plus d'une trentaine d'années, méprise fortement sur l'objet des voies d'appel prévues par la loi en ne reconnaissant pas ce que la majorité *en l'espèce* a finalement saisi — c'est-à-dire le fait qu'en adoptant ces mécanismes, le législateur confiait sans équivoque aux cours de justice le mandat de procéder à un examen *de novo* de chaque question de droit dont traite un organisme administratif, indépendamment de l'expertise de cet organisme —, il aurait alors été loisible aux législatures de l'ensemble du Canada de clarifier cette interprétation et d'adopter l'approche privilégiée par la majorité au moyen d'une modification législative. Étant donné la possibilité — et l'absence continue — d'intervention du législateur, les arguments militant en faveur du renversement de nos décisions antérieures sont encore moins convaincants (*Binus c. The Queen*, [1967] R.C.S. 594, p. 601; voir également *Kimble*, p. 2409; *Kisor*, p. 2422-2423; *Bilski c. Kappos, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), p. 601-602).

[272] La Cour suprême des États-Unis, dans l'arrêt *Kisor*, a récemment approuvé chacune des raisons invoquées pour respecter les précédents : la constance, les intérêts liés à la confiance raisonnable et la possibilité d'intervention législative. Dans cet arrêt, la Cour a invoqué la règle du *stare decisis* pour confirmer deux précédents en matière de droit administratif qui exhortaient les cours de révision à faire preuve de déférence à l'égard de l'interprétation, par les organismes administratifs, de dispositions ambiguës de leurs règlements (*Bowles, Price Administrator c. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer c. Robbins*, 519 U.S. 452 (1997)). S'exprimant au nom de la majorité sur la question de la règle du *stare decisis*, la juge Kagan a expliqué en long et en large les raisons pour lesquelles la doctrine empêchait la Cour d'infirmer les arrêts *Auer* et *Seminole Rock*. D'abord, elle a rappelé l'importance de la règle du *stare decisis* et la nécessité d'établir une justification spéciale permettant d'outrepasser ses

lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> . . . even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23.]

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have*

exigences. Elle a ensuite expliqué que la règle du *stare decisis* revêtait encore plus d'importance que d'habitude lorsqu'elle s'appliquait à deux décisions confirmées par [TRADUCTION] « une jurisprudence constante » remontant à au moins 75 ans et qui avait par ailleurs été citée des milliers de fois par des juridictions inférieures (p. 2422). Elle a ajouté que l'abandon des précédents contestés soulèverait des doutes quant à une foule d'interprétations législatives établies et favoriserait la remise en question des décisions (p. 2422). Enfin, la juge Kagan a fait remarquer qu'il était loisible au Congrès d'annuler la jurisprudence si la Cour avait mal interprété l'intention du législateur :

> [TRADUCTION] . . . même si nous avons tort au sujet de l'arrêt *Auer*, « il est toujours loisible au Congrès de modifier notre décision ». En matière constitutionnelle, seule notre Cour peut corriger ses erreurs. Cependant, telle n'est pas la situation qui se présente en l'espèce. Lorsque nous optons pour la retenue à l'égard d'une décision, la balle est dans le camp du Congrès, qui est libre d'accepter ou non notre décision. Jusqu'à maintenant du moins, le Congrès a choisi de l'accepter. Il aurait pu modifier l'APA ou une loi spécifique afin d'exiger le type de contrôle *de novo* des interprétations des règlements que Kisor privilégie. Or, pendant près d'un siècle, le Congrès a plutôt permis que notre régime axé sur la déférence fonctionne de pair avec l'APA et les nombreuses lois qui délèguent un pouvoir de réglementation à des organismes administratifs. Le Congrès a continué d'agir ainsi même après que nous eûmes précisé que nos décisions en matière de déférence traduisaient une présomption concernant l'intention du Congrès, et même après que des juges de notre Cour eurent commencé à exprimer des doutes au sujet de la doctrine. Compte tenu de ce passé — et de la possibilité qui s'offre encore au Congrès de reprendre les arguments de Kisor —, nous aurions besoin d'une « justification spéciale » particulièrement importante pour écarter maintenant l'arrêt *Auer*. [Références omises; p. 2422-2423.]

[273] Au vu de ces raisons impérieuses de respecter les précédents, dont bon nombre ont trouvé écho dans la jurisprudence de notre Cour, l'argument des « critiques judiciaires et doctrinales » invoqué par la majorité est très loin de supplanter les exigences de la règle du *stare decisis*. Il est difficile de comprendre pourquoi les remarques incidentes de quelques juges canadiens citées par la majorité devraient être déterminantes, ou même convaincantes. La majorité

voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87; the Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at p. 79; the Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

[274] A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor. . . . *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in

passe sous silence l'avis des juges et des universitaires qui *se sont* prononcés en faveur de l'existence d'une forte présomption d'application de la norme de la décision raisonnable, sans dire que notre vision des droits d'appel statutaires a de quoi inquiéter (Dyzenhaus, « Dignity in Administrative Law : Judicial Deference in a Culture of Justification », p. 109; Green, p. 489-490; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, « The Time Has Come : Standard of Review in Canadian Administrative Law » (2017), 68 *R.D. U.N.-B.* 87; Cromwell, « What I Think I've Learned About Administrative Law », p. 314-316; l'hon. John M. Evans, « Standards of Review in Administrative Law » (2013), 26 *R.C.D.A.P.* 67, p. 79; l'hon. John M. Evans, « Triumph of Reasonableness : But How Much Does It Really Matter? » (2014), 27 *R.C.D.A.P.* 101; Jerry V. DeMarco, « Seeking Simplicity in Canada's Complex World of Judicial Review » (2019), 32 *R.C.D.A.P.* 67).

[274] Un assortiment sélectif de critiques ne constitue pas une preuve de critiques généralisées ou d'inapplicabilité. Notre Cour est fréquemment appelée à statuer sur des affaires très contestées et médiatisées qui donnent lieu à des divergences d'opinions marquées et persistantes. Le public s'en remet à nous pour trancher définitivement ces litiges, peu importe la composition de la Cour. Ainsi que l'a expliqué le juge Hayne dans l'arrêt *Lee* :

[TRADUCTION] Dire que les jugements de notre Cour sont susceptibles de réexamen chaque fois qu'un nouvel argument est jugé plus intéressant que le principe exposé dans une décision précédente revient à occulter le rôle que doit jouer un tribunal d'appel de dernier ressort appelé à définir le droit. Lorsqu'il s'agit de domaines de droit complexes, les divergences d'opinions juridiques sont inévitables; devant un tribunal d'appel de dernier ressort, le choix entre des solutions juridiques opposées dépend dans bien des cas de l'importance que chacun des juges accorde à un facteur plutôt qu'à un autre. [. . .] *En pareil cas, la décision elle-même permet de déterminer laquelle des solutions est la bonne, eu égard à l'état actuel du droit*. Il n'est pas utile de soutenir ultérieurement que, si l'on fait abstraction de la décision en cause, une autre solution bénéficie d'appuis plus solides dans la doctrine. *Cette approche saperait l'autorité et le caractère définitif des jugements de notre Cour.* Étant donné qu'il appartient

subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.

Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]

(paras. 65-66, citing *Baker v. Campbell* (1983), 153 C.L.R. 52 (H.C.A.), at pp. 102-3.)

[275] This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect, is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one

à la Cour, plutôt qu'aux juges qui la composent, de définir le droit, ses décisions seront suivies dans les affaires subséquentes portées à son attention, quelle que soit sa composition, sous réserve du pouvoir exceptionnel de la Cour d'en permettre le réexamen.

En conséquence, comme un auteur l'a souligné, « la décision précédente doit être considérée comme la prémisse de base dont découleront d'autres arguments, et non simplement comme une prémisse possible parmi un ensemble de prémisses opposées ». [En italique dans l'original; note en bas de page omise.]

(par. 65-66, citant *Baker c. Campbell* (1983), 153 C.L.R. 52 (H.C.A.), p. 102-103.)

[275] Notre Cour a en fait mentionné clairement que « la critique d'un jugement ne saurait justifier son renversement » (*Fraser*, par. 86). Les divergences d'opinions d'ordre juridique et public découlent naturellement d'arrêts litigieux tels que *R. c. Jordan*, [2016] 1 R.C.S. 631, ou même *Housen*, qui, comme la reconnu notre Cour, avait été appliqué au départ par les cours d'appel avec « un enthousiasme variable » (*H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, par. 76; voir aussi Paul M. Perell, « The Standard of Appellate Review and the Ironies of Housen v. Nikolaisen » (2004), 28 *Adv. Q.* 40, p. 53; Mike Madden, « Conquering the Common Law Hydra : A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review » (2010), 36 *Adv. Q.* 269, p. 278-279 et 293; Paul J. Pape et John J. Adair, « Unreasonable Review : The Losing Party and the Palpable and Overriding Error Standard » (2008), 27 *Adv. J.* 6, p. 8; Geoff R. Hall, « Two Unsettled Questions in the Law of Contractual Interpretation : A Call to the Supreme Court of Canada » (2011), 50 *Rev. can. dr. comm.* 434, p. 436).

[276] Pour justifier le fait de contourner la jurisprudence de notre Cour, la majorité prétend que les précédents renversés s'écartent *eux-mêmes* de la manière dont l'analyse pragmatique et fonctionnelle aborde les droits d'appel conférés par la loi. Avec égards, cette affirmation est inexacte. Depuis l'arrêt *Bell Canada (1989)* et dans plusieurs décisions subséquentes décrites précédemment dans les présents motifs, les droits d'appel accordés par la loi ne sont presque pas ou pas du tout entrés en ligne de compte

factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

dans l'analyse relative à la norme de contrôle. De surcroît, dans les arrêts antérieurs à *Dunsmuir*, les droits d'appel conférés par la loi n'étaient encore perçus que comme un facteur parmi d'autres et *non* comme des indices sans équivoque d'un contrôle selon la norme de la décision correcte (voir, par exemple, *Canada (Sous-ministre du Revenu national) c. Mattel Canada Inc.*, [2001] 2 R.C.S. 100, par. 27-33; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, par. 23-24; *Harvard College c. Canada (Commissaire aux brevets)*, [2002] 4 R.C.S. 45, par. 149-151). Tant nos décisions qui ont précédé l'arrêt *Dunsmuir* que celles qui l'ont suivi sur les droits d'appel conférés par la loi ont eu en commun l'engagement indéfectible à déterminer la norme de contrôle applicable dans une instance administrative au moyen des principes de droit administratif, même lorsque les droits d'appel entrent en jeu.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

[277] Pour la majorité, l'élimination des facteurs contextuels semble justifier un remaniement de fond en comble de l'ensemble du cadre d'analyse du contrôle judiciaire. Pourtant, l'élimination de l'analyse contextuelle était pratiquement achevée dans notre jurisprudence post-*Dunsmuir* et elle ne justifie pas les modifications fondamentales apportées au contrôle judiciaire par les juges majoritaires. Ni ces changements ni l'affirmation de la majorité selon laquelle notre jurisprudence n'est « pas clair[e] et [est] indûment complex[e] » ne permettent du jour au lendemain d'affirmer qu'on peut légitimement remettre en question *toutes* les décisions que nous avons rendues en droit administratif — même celles qui n'ont rien à voir avec les problèmes d'ordre pratique engendrés par l'application de l'arrêt *Dunsmuir*.

[278] This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

[278] Notre Cour provoque ainsi un revirement jurisprudentiel qui concerne l'ensemble d'un domaine du droit en écartant une longue série de précédents bien établis et récemment confirmés, dont plusieurs arrêts rendus à l'unanimité ou à forte majorité. Il n'existe aucune raison logique justifiant une rupture aussi nette avec la jurisprudence existante de la Cour.

Going Forward

[279] In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is . . . a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

[280] Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

> . . . it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]

(See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, [2008] 1 S.C.R. 456, at paras. 14-16, per LeBel J., and 73-74, per Binnie J., concurring.)

Un regard vers l'avenir

[279] À notre avis, il y a lieu, lorsque vient le temps de modifier nos décisions antérieures, d'adopter une approche plus modeste qui ne prévoit la modification que de ce qui est nécessaire — et pas plus — pour clarifier le droit et son application. [TRADUCTION] « [L]orsqu'un tribunal choisit d'écarter ses propres précédents, il doit le faire avec prudence et modération et en tenant dûment compte de toutes les considérations importantes qui sous-tendent la doctrine » (Garner et autres, p. 41-42). Cette approche en matière de modification de la jurisprudence préserve l'intégrité du processus judiciaire et, sur un plan plus théorique, celle du droit lui-même en tant que construit social. Michael J. Gerhardt résume cette approche avec éloquence :

> [TRADUCTION] La modestie judiciaire est [. . .] une disposition à respecter les précédents (qui incarnent les opinions d'autrui), par la volonté de tirer des leçons de leur expérience et de celle des autres, et à trancher les affaires de façon progressive pour minimiser toute contradiction avec les opinions antérieures de la Cour ou d'autres acteurs constitutionnels. [p. 7]

[280] La modestie judiciaire favorise une évolution responsable de la common law. Lord Bingham a expliqué cette conception dans son ouvrage célèbre, *The Rule of Law* (2010) :

> [TRADUCTION] . . . c'est une chose de poursuivre la tendance déjà entamée par le droit ou encore d'adapter celui-ci aux perspectives et aux réalités actuelles; c'en est une autre de chercher à reformuler le droit d'une manière radicalement novatrice ou hasardeuse : on rend ainsi le droit incertain et imprévisible, des éléments qui sont l'antithèse de la primauté du droit. [p. 45-46]

(Voir également Robert J. Sharpe, *Good Judgment : Making Judicial Decisions* (2018), p. 93; Beverley McLachlin, « The Role of the Supreme Court of Canada in Shaping the Common Law », dans Paul Daly, dir., *Apex Courts and the Common Law* (2019), 25, p. 35; *R. c. Salituro*, [1991] 3 R.C.S. 654, p. 670; *Friedmann Equity Developments Inc. c. Final Note Ltd.*, [2000] 1 R.C.S. 842, par. 42; *R. c. Kang-Brown*, [2008] 1 R.C.S. 456, par. 14-16, le juge LeBel, et par. 73-74, motifs concordants du juge Binnie.)

[281] Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir.* These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by

[281] Il ressort des propos de lord Bingham qu'on doit trouver un équilibre subtil entre le maintien de la stabilité de la common law et l'assurance que le droit est suffisamment souple et réceptif pour s'adapter à de nouvelles réalités et à l'évolution des normes sociales. La règle du *stare decisis* joue un rôle essentiel pour maintenir cet équilibre et assurer le respect de la primauté du droit. Lorsque la règle du *stare decisis* est respectée, la jurisprudence agit comme une force stabilisatrice : elle offre une certitude quant à l'état du droit, assure une uniformité qui permet aux justiciables d'organiser leurs affaires en conséquence, et garantit une pérennité qui permet aux justiciables de se fier aux conséquences juridiques qu'elle prévoit. La règle du *stare decisis* est au cœur du développement itératif de la common law, ce qui favorise son évolution progressive, graduelle et responsable.

[282] Alors, que suggérons-nous? Nous sommes en faveur d'un cadre d'analyse de la norme de contrôle qui repose sur une règle de déférence significative et fondée *à la fois* sur le choix du législateur de déléguer des pouvoirs décisionnels à des acteurs administratifs *et* sur l'expertise spécialisée que ces décideurs possèdent et acquièrent au fur et à mesure qu'ils s'acquittent de leur mandat. Exception faite des trois catégories qui demeurent assujetties à la norme de la décision correcte établies dans l'arrêt *Dunsmuir* — et à défaut de directives claires et explicites du législateur sur la *norme* de contrôle applicable —, c'est la norme de la décision raisonnable qui s'applique au contrôle judiciaire des décisions administratives. À l'instar de la majorité, nous sommes en faveur de l'élimination de la catégorie des « questions touchant véritablement à la compétence » et de l'abandon des facteurs contextuels évoqués dans l'arrêt *Dunsmuir*. Ces propositions incorporent des changements progressifs dans notre cadre d'analyse de contrôle judiciaire tout en respectant ses principes sous-jacents et en laissant au législateur le soin de modifier les normes de contrôle, s'il le souhaite.

[283] Nous sommes d'accord pour dire qu'il faut prendre au sérieux les réserves exprimées par certains intervenants représentant des groupes particulièrement vulnérables au sujet de la qualité des décisions administratives. Mais la solution ne passe pas selon nous par la possibilité pour des juges généralistes

generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review.[7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

[285] Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that

[7] Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

qui n'ont pas l'expertise nécessaire pour exécuter ces mandats délicats de s'immiscer encore plus dans la justice administrative. On ne corrige pas ce que l'on estime être une lacune dans la prise de décisions administratives en permettant aux cours de procéder à un examen *de novo* de chaque décision juridique et, ce faisant, en allongeant les délais et en augmentant les frais engagés pour obtenir une décision définitive. La solution réside plutôt dans le fait de s'assurer que les décideurs administratifs possèdent les qualifications et la formation requises. À l'instar des cours, les acteurs administratifs sont tout à fait en mesure d'améliorer la qualité de leur processus décisionnel et il leur incombe de le faire, améliorant du coup l'accès à la justice administrative.

[284] Nous reconnaissons également que notre Cour devrait fournir des balises supplémentaires quant à la façon de procéder à un contrôle judiciaire fondé sur la norme de la décision raisonnable[7]. Nous craignons toutefois que la liste multifactorielle et non limitative des « contraintes » à la prise de décisions administratives dressée par la majorité n'incite les cours de révision à disséquer les motifs administratifs et à se lancer dans « une chasse au trésor, phrase par phrase, à la recherche d'une erreur » (*Syndicat canadien des communications, de l'énergie et du papier, Local 30 c. Irving Pulp & Paper, Ltd*, [2013] 2 R.C.S. 458, par. 54). En pratique, ces « contraintes » risquent de se transformer en un vaste catalogue d'erreurs hypothétiques qui peuvent servir à justifier l'annulation d'une décision administrative et devenir une liste de contrôle offrant des similitudes troublantes avec la série d'« erreurs de compétence » énoncées dans l'arrêt *Anisminic* lui-même.

[285] Cette façon de structurer le contrôle selon la norme de la décision raisonnable astreint effectivement les décideurs administratifs à une norme de justification plus exigeante que celle qui s'applique aux juges de première instance. Cette approche sape la déférence et ravive, à l'égard des décisions administratives, une attitude de méfiance qui avait été

[7] Pour répondre aux vœux formulés par certains commentateurs et certains des intervenants en l'espèce, dont l'Association du Barreau canadien et le Conseil des tribunaux administratifs canadiens (voir aussi Mullan, p. 76-78).

administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

[287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

[288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and

[8] Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

mise au rancart depuis longtemps. Nous sommes par ailleurs préoccupés par la mise en garde de la majorité selon laquelle les décideurs administratifs ne peuvent « s'arroger des pouvoirs que le législateur n'a jamais voulu [leur] conférer », une évidence inutile qui risque de réintroduire sous un autre vocable le concept tortueux d'« erreur de compétence ».

[286] Nous préconisons le maintien d'une conception du contrôle judiciaire selon la norme de la raisonnabilité qui est centrée sur le principe de la *déférence* et sur ce qui est exigé des cours de révision. Après tout, la retenue judiciaire est *la* marque distinctive du contrôle selon la norme de la décision raisonnable et ce qui le distingue de la norme de la décision correcte, laquelle permet à la cour de substituer son opinion à celle du décideur administratif. Le choix d'une norme de contrôle particulière — qu'on la qualifie de norme de la décision « correcte » ou « raisonnable » ou autrement — consiste essentiellement à déterminer si la cour de révision « devrait ou non faire montre de déférence »[8] à l'égard d'une décision administrative (voir *Dunsmuir*, par. 141, motifs concordants du juge Binnie; Régimbald, p. 539-540). Par conséquent, pour que les cours puissent mener à bien un contrôle « fondé sur la norme de la décision raisonnable », elles doivent bien comprendre le sens du mot « déférence ».

[287] À notre avis, le principe de la déférence soumet à trois exigences les cours de révision qui procèdent à un contrôle selon la norme de la décision raisonnable. Il influence l'attitude que la cour de révision doit adopter à l'égard du décideur administratif; il influence la façon dont la cour formule la question à laquelle elle doit répondre lorsqu'elle est saisie d'une demande de contrôle judiciaire et il influe sur la façon dont elle évalue la contestation dont fait l'objet la décision administrative.

[288] D'abord et avant tout, la déférence est « une attitude de la cour » qui effectue un contrôle selon la norme de la décision raisonnable (*Dunsmuir*, par. 48). Le principe de la déférence commande le respect du choix du législateur de confier à des

[8] Mémoire de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés, par. 5; mémoire de l'intervenant le Conseil des tribunaux administratifs canadiens, par. 24-26.

for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]

acteurs administratifs plutôt qu'aux cours de justice le soin de rendre certaines décisions et la reconnaissance du rôle important que jouent les décideurs administratifs pour faire respecter et appliquer le principe de la primauté du droit (*Toronto (Ville) c. S.C.F.P., section locale 79*, [2003] 3 R.C.S. 77, par. 131, motifs concordants du juge LeBel). Le principe de la déférence commande aussi le respect des décideurs administratifs, de leur expertise spécialisée et du cadre institutionnel dans lequel ils évoluent (*Dunsmuir*, par. 48-49). Les cours de révision doivent accorder une « attention respectueuse » aux motifs donnés à l'appui d'une décision administrative, s'efforcer sincèrement de comprendre la décision et interpréter la décision de façon équitable et généreuse, en tenant compte de l'ensemble du dossier (*Newfoundland Nurses*, par. 11-14 et 17).

[289] En deuxième lieu, le principe de la déférence influe sur la façon dont une cour formule la question à laquelle elle doit répondre lorsqu'elle effectue un contrôle judiciaire. La cour de révision ne cherche pas à savoir comment elle aurait résolu la question, mais plutôt s'il a été démontré que la réponse donnée par le décideur administratif était déraisonnable (*Khosa*, par. 59, 61-62; *Dunsmuir*, par. 47). En circonscrivant ainsi l'examen, on s'assure que l'analyse est bel et bien centrée sur la décision administrative à l'examen.

[290] Notre Cour a souvent cautionné cette vision du contrôle judiciaire selon la norme de la décision raisonnable. Dans l'arrêt *Ryan*, par exemple, le juge Iacobucci explique :

> . . . lorsqu'elle décide si une mesure administrative est déraisonnable, la cour ne doit à aucun moment se demander ce qu'aurait été la décision correcte. [. . .] La norme de la décision raisonnable n'implique pas que l'instance décisionnelle dispose simplement d'une « marge d'erreur » par rapport à ce que la cour estime être la solution correcte.
>
> . . . À la différence d'un examen selon la norme de la décision correcte, il y a souvent plus d'une seule bonne réponse aux questions examinées selon la norme de la décision raisonnable. [. . .] Même dans l'hypothèse où il y aurait une réponse meilleure que les autres, le rôle de la cour n'est pas de tenter de la découvrir lorsqu'elle doit décider si la décision est déraisonnable. [par. 50-51]

(See also *Volvo Canada Ltd. v. U.A.W., Local 720*, [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 67, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, [2012] 1 S.C.R. 5, at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J.

(Voir également *Volvo Canada Ltd. c. T.U.A., local 720*, [1980] 1 R.C.S. 178, p. 214; *Toronto (Ville) c. S.C.F.P.*, par. 94-95, motifs concordants du juge LeBel; *VIA Rail*, par. 101; *Mason c. Canada (Citoyenneté et Immigration)*, 2019 FC 1251, par. 22 (CanLII), le juge Grammond; Régimbald, p. 539; Sharpe, p. 204 et 208; Paul Daly, « The Signal and the Noise in Administrative Law » (2017), 68 *R.D. U.N.-B.* 67, p. 85; Evans, « Triumph of Reasonableness : But How Much Does It Really Matter? », p. 107.)

[291] Troisièmement, le contrôle fondé sur le principe de la déférence influence la façon dont la cour de révision évalue la contestation dont fait l'objet la décision administrative. La déférence fait reposer sur les épaules du demandeur le fardeau de démontrer que la décision faisant l'objet du contrôle judiciaire est déraisonnable (*Williams Lake Indian Band c. Canada (Affaires autochtones et Développement du Nord)*, [2018] 1 R.C.S. 83, par. 108; *Établissement de Mission c. Khela*, [2014] 1 R.C.S. 502, par. 64; *May c. Établissement Ferndale*, [2005] 3 R.C.S. 809, par. 71; *Ryan*, par. 48; *Southam*, par. 61; *Northern Telecom c. Travailleurs en communication*, [1980] 1 R.C.S. 115, p. 130). Limiter ainsi l'analyse à la question de savoir si le demandeur a démontré que la décision est déraisonnable renforce le rôle essentiel que jouent les décisions administratives dans le cadre d'un contrôle dûment axé sur le principe de la déférence et confirme que le décideur n'a pas à convaincre la cour de justice que sa décision est raisonnable.

[292] L'évaluation du caractère raisonnable d'une décision nécessite également une évaluation qualitative. La raisonnabilité est un concept omniprésent dans notre droit, mais difficile à définir avec précision (*Dunsmuir*, par. 46). Ce concept exige, de par sa nature même, une analyse factuelle qui implique une certaine compréhension des réalités courantes. Le caractère raisonnable ne peut être réduit à une formule ou à une liste de facteurs, dont bon nombre ne s'appliqueront pas à une décision particulière. En fin de compte, la question de savoir si une décision administrative est raisonnable dépend du contexte (*Catalyst Paper Corp. c. North Cowichan (District)*, [2012] 1 R.C.S. 5, par. 18). Le

colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

> . . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate.

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

droit administratif englobe une diversité infinie de décisions et de contextes décisionnels, comme l'a expliqué de façon imagée le juge LeBel dans l'arrêt *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, para. 158 (dissident en partie, mais pas sur ce point) :

> . . . les organismes administratifs diffèrent les uns des autres. En fait, c'est le moins qu'on puisse dire. À première vue, un conseil des relations de travail, une commission de police et un office de contrôle laitier peuvent paraître avoir autant de points en commun qu'une ligne d'assemblage, un policier et une vache! Les organismes administratifs ont évidemment certaines caractéristiques en commun, mais en raison de la diversité de leurs attributions, de leur mandat et de leur organisation, il peut être totalement inapproprié d'appliquer les mêmes normes d'un contexte à l'autre.

[293] Selon nous, le principe de la déférence commande que l'on considère chaque décision administrative comme un cas d'espèce et qu'on tienne compte du contexte qui lui est propre. Nous tenons toutefois à préciser qu'il n'y a aucune corrélation entre le caractère foncièrement contextuel du contrôle judiciaire effectué selon la norme de la décision raisonnable et le degré d'attention avec lequel la cour de révision effectue son examen (*Alberta Teachers' Association*, par. 47; *Wilson*, par. 18). La nature contextuelle du contrôle judiciaire signifie simplement que, lorsqu'elle est saisie d'une contestation portant sur une décision administrative, la cour de révision doit tenir compte de toutes les circonstances pertinentes, y compris les motifs invoqués au soutien de la décision, le dossier, le régime législatif et les questions particulières soulevées par le demandeur, parmi d'autres facteurs (voir, par exemple, *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, par. 40; *Newfoundland Nurses*, par. 18; Van Harten et autres, p. 794). Sans ce contexte, il est impossible de déterminer ce qui constitue une justification suffisamment convaincante pour annuler une décision à l'issue d'un contrôle judiciaire selon la norme de la décision raisonnable. Le contexte peut influer sur le degré de persuasion de la contestation dont fait l'objet la décision administrative, mais il n'a aucune incidence sur l'attitude de déférence que doit conserver la cour de révision (*Suresh*, par. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

[295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.[9]

[296] The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

[297] Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13;

[9] Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 43.

[294] La déférence ne suppose pas pour autant que la cour de révision se dérobe à son devoir de contrôler la décision. Dès lors qu'elle maintient une attitude de respect, qu'elle cerne correctement la question à trancher dans le cadre du contrôle judiciaire et qu'elle exige qu'on lui soumette des raisons impérieuses avant d'annuler une décision, il lui est loisible d'analyser en profondeur la décision administrative dont elle est saisie. Ce faisant, elle ne procède pas à un contrôle « déguisé selon la norme de la décision correcte », pour reprendre l'expression employée par certains. Après tout, la déférence est la marque d'une attitude de respect et non le signe d'un manque d'attention aux détails.

[295] Dans cette optique, nous aimerions proposer quelques pistes qui, selon nous, pourraient baliser le contrôle judiciaire selon la norme de la décision raisonnable. Nous commencerons par les situations où la décision en question doit être motivée[9].

[296] La décision administrative est le point de mire du contrôle judiciaire. Pour déterminer si le décideur a agi raisonnablement, la cour de révision doit d'abord, cela va de soi, examiner les motifs, s'il en est, qui ont été exposés (*Williams Lake*, par. 36). En se penchant d'abord sur les motifs de la décision, à la lumière du contexte qui l'entoure et des arguments invoqués pour la contester, la cour de révision procède à un véritable contrôle tout en respectant la légitimité du processus décisionnel des autorités administratives spécialisées.

[297] Les cours de révision devraient aborder les motifs dans un esprit de respect envers les décideurs spécialisés, le rôle important qui leur a été confié et le contexte institutionnel choisi par le législateur. Elles devraient interpréter les motifs de façon généreuse, en respectant leur teneur, et se garder de reconsidérer les incidences concrètes, les difficultés d'ordre pratique et les connaissances de terrain invoquées pour justifier la décision administrative. Elles doivent également demeurer attentives aux concepts ou termes spécialisés employés dans une décision administrative que les juges généralistes

[9] Pour respecter l'obligation d'équité procédurale selon l'arrêt *Baker c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1999] 2 R.C.S. 817, par. 43.

Igloo Vikski, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

[298] Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

[299] Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their

connaissent peut-être moins bien (*Newfoundland Nurses*, par. 13; *Igloo Vikski*, par. 17 et 30). Lorsque les mots employés ou le raisonnement ne leur sont pas familiers, les juges devraient reconnaître que ces différences constituent une conséquence inévitable et inestimable du choix délibéré du législateur de confier la question au système de justice administrative. Ces particularités peuvent conférer une très grande force à une décision administrative et, du coup, affaiblir la contestation dont celle-ci fait l'objet. La cour de révision qui analyse la décision d'un organisme administratif selon la norme de la décision raisonnable devrait donc se rappeler que l'organisme jouit d'un « privilège [. . .] en matière d'interprétation » (*McLean*, par. 40).

[298] Tout au long du contrôle fondé sur le principe de la déférence, la cour doit examiner les allégations d'erreur administrative avec prudence, en tenant compte du contexte et de la nécessité d'éviter de substituer son opinion à celle des personnes qui sont habilitées à répondre aux questions en litige et mieux outillées qu'elle pour le faire. Étant donné que le principe de la déférence lui interdit de substituer son opinion à celle du décideur, la cour de révision doit évaluer avec circonspection les arguments que le demandeur invoque pour contester une décision administrative afin de s'assurer qu'ils concernent le caractère *raisonnable* de celle-ci.

[299] Sans surprise, on constate qu'il est rare que les demandeurs formulent leur contestation d'une décision administrative comme une invitation explicite adressée aux cours de révision de substituer leur opinion à celle des acteurs administratifs. En conséquence, les cours doivent examiner attentivement la contestation d'une décision administrative afin de déterminer si cette contestation tient essentiellement à une simple divergence d'opinions quant à la façon dont le décideur a soupesé ou apprécié les différents facteurs qui entrent en ligne de compte dans le cadre du processus décisionnel. Un examen plus approfondi peut révéler que les allégations d'erreur reflètent simplement l'approche différente légitimement retenue par le décideur administratif. En écartant et en rejetant ces contestations, les cours respectent l'angle distinct et précieux sous lequel les organismes administratifs apportent des réponses à

statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration . . . than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local*

des questions de droit, forts de la grande connaissance et de la sensibilité qu'ils acquièrent en accomplissant leur mandat et en appliquant au quotidien des régimes législatifs complexes. La compréhension éclairée des acteurs administratifs rehausse la qualité du processus décisionnel et permet davantage d'atteindre un résultat [TRADUCTION] « qui favorise l'efficacité des politiques et de l'administration publique [. . .] [que les] connaissances limitées, [le] détachement et [les] modes de raisonnement qui caractérisent normalement les cours de justice » (*National Corn Growers*, p. 1336-1337 (soulignement omis), motifs concordants de la juge Wilson, citant J. M. Evans et autres, *Administrative Law : Cases, Text and Materials* (3e éd. 1989), p. 414).

[300] Lorsqu'ils sont saisis d'une contestation d'une décision administrative, les cours de révision doivent également tenir compte de la *gravité* des erreurs dont serait entaché le raisonnement du décideur. Dans le cadre du contrôle judiciaire fondé sur la norme de la décision raisonnable, une erreur ne suffit pas nécessairement en soi à justifier l'annulation d'une décision. La gravité de l'erreur dépend invariablement de la mesure dans laquelle elle influe sur la décision. L'erreur ne peut servir de fondement à une demande de contrôle judiciaire lorsqu'elle est secondaire au regard du raisonnement du décideur administratif ou mineure par rapport aux arguments plus solides invoqués pour justifier le résultat souhaité. En fin de compte, le rôle de la cour de révision consiste à examiner la décision dans son ensemble pour savoir si elle est raisonnable (*Dunsmuir*, par. 47; *Khosa*, par. 59). La prise en compte de la gravité des erreurs reprochées fait naturellement partie de cette opération et de l'examen des motifs de la décision « en corrélation avec le résultat » (*Newfoundland Nurses*, par. 14).

[301] L'examen de la décision dans son ensemble est d'autant plus essentiel lorsque le demandeur soutient qu'une décision administrative est entachée de graves omissions. Fait important à souligner, ainsi que notre Cour l'a fait remarquer à maintes reprises, les décideurs administratifs ne sont pas tenus d'examiner et de commenter dans leurs motifs chaque argument soulevé par les parties (*Construction Labour Relations c. Driver Iron Inc.*, [2012] 3 R.C.S. 405, par. 3; *Newfoundland Nurses*, par. 16, citant *Union internationale*

No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history

des employés des services, Local no. 333 c. Nipawin District Staff Nurses Association, [1975] 1 R.C.S. 382, p. 391). De plus, l'examen qu'effectue la cour de révision ne se limite pas à la teneur même des motifs écrits de la décision; lorsqu'elle constate l'existence d'une lacune dans les motifs, la cour doit examiner le dossier pour savoir s'il permet de mieux comprendre la décision (*Williams Lake*, par. 37; *Delta Air Lines Inc. c. Lukács*, [2018] 1 R.C.S. 6, par. 23; *Newfoundland Nurses*, par. 15; *Alberta Teachers' Association*, par. 53 et 56).

[302] Certains théoriciens se sont penchés sur l'utilisation du dossier et d'autres éléments contextuels pour compléter les motifs exposés par le décideur (voir, par exemple, Mullan, p. 69-74). Nous sommes quant à nous en faveur de la possibilité de compléter les motifs, car cette démarche va de pair avec l'approche souple qui sert à déterminer si la décision administrative doit ou non être motivée et tient compte « de la réalité quotidienne des organismes administratifs » (*Baker*, par. 44), laquelle se prête peut-être mal à la production de motifs « d'archives » s'apparentant aux décisions judiciaires (par. 40, citant Roderick A. Macdonald et David Lametti, « Reasons for Decision in Administrative Law » (1990), 3 *R.C.D.A.P.* 123).

[303] Afin de combler les lacunes que comporte la décision administrative dont elle est saisie, la cour de révision pourrait consulter, par exemple, le dossier des actes de procédure officiels, les documents portés à l'attention du décideur, les décisions antérieures de l'organisme administratif, ainsi que les politiques ou lignes directrices élaborées pour l'aider dans sa démarche (voir Matthew Lewans, « Renovating Judicial Review » (2017), 68 *R.D. U.N.-B.* 109, p. 137-138). Après avoir consulté ces documents, la cour sera peut-être davantage en mesure de comprendre, « par déduction », pourquoi un décideur administratif est parvenu à un certain résultat (*Baker*, par. 44; voir également *Williams Lake*, par. 37; *Mills c. Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, par. 38-39). Il pourra aussi y trouver d'autres éléments contextuels qui viennent corroborer le raisonnement suivi par le décideur. Ces éléments pourraient démontrer, par exemple, que l'interprétation proposée par le décideur en ce qui concerne l'objet

(*Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács*, at para. 24).

[304] The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the

du mandat que lui a confié la loi trouve appui dans l'historique législatif de la disposition (*Celgene Corp. c. Canada (Procureur général)*, [2011] 1 R.C.S. 3, par. 25-29). En consultant le dossier, la cour pourra également trouver des réponses aux arguments spécifiques invoqués par le demandeur au soutien de sa demande de contrôle judiciaire, c'est-à-dire des réponses qui « [vont] dans le même sens [que] le raisonnement suivi par le décideur » (*Igloo Vikski*, par. 45). Voilà comment les cours de révision peuvent légitimement compléter les motifs écrits sans « supplanter l'analyse de l'organisme administratif » (*Lukács*, par. 24).

[304] En d'autres termes, l'« insuffisance » des motifs « [ne] permet [pas] à elle seule de casser une décision » (*Newfoundland Nurses*, par. 14). Ainsi que notre Cour l'a affirmé à maintes reprises, les motifs doivent plutôt « être examinés en corrélation avec le résultat et ils doivent permettre de savoir si celui-ci fait partie des issues possibles » (*Newfoundland Nurses*, par. 14; *Halifax (Regional Municipality) c. Canada (Travaux publics et Services gouvernementaux)*, [2012] 2 R.C.S. 108, par. 44; *Agraira c. Canada (Sécurité publique et Protection civile)*, [2013] 2 R.C.S. 559, par. 52; *Williams Lake*, par. 141, motifs dissidents du juge Rowe, mais non sur ce point). Cette approche privilégie le fond plutôt que la forme dans les situations où le fondement de la décision rendue par un acteur administratif spécialisé est évident au vu du dossier, mais n'est pas exposé clairement dans ses motifs écrits. L'annulation des décisions dans ces circonstances va à l'encontre de l'objet du principe de la déférence et fait entrave à l'accès à la justice en entraînant un gaspillage des ressources administratives et judiciaires.

[305] En conséquence, à notre avis, si le demandeur reproche au décideur administratif de ne pas avoir tenu compte d'un facteur pertinent pour en arriver à sa décision, la cour de révision doit examiner les arguments et le dossier dont le décideur était saisi, ainsi que l'importance relative de l'omission par rapport à la décision rendue. Si le décideur a omis, par exemple, de mentionner une disposition législative précise ou l'ensemble du dossier factuel complet porté à son attention, la cour de révision n'a pas automatiquement le droit de procéder à un examen *de novo* de la décision contestée. L'analyse

burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

doit se limiter à déterminer si le demandeur s'est déchargé du fardeau qui lui incombait d'établir que l'omission rend la décision contestée déraisonnable.

[306] Nous reconnaissons qu'il est particulièrement difficile pour les juges de respecter la ligne de démarcation entre la norme de la décision raisonnable et celle de la décision correcte lorsqu'ils sont appelés à réviser l'interprétation que des décideurs administratifs ont donnée à leur mandat statutaire. Les juges interprètent quotidiennement des lois et ils ont mis au point une grille dont ils se servent pour analyser les mots dans ce contexte. Ils doivent toutefois conserver la même attitude de déférence dont nous avons déjà parlé lorsqu'ils interprètent une disposition législative. Lorsqu'elle révise une décision administrative portant sur l'interprétation d'une disposition législative, la cour de révision ne devrait pas évaluer la décision en tentant de déterminer l'interprétation qui, à son avis, serait raisonnable. Pareille attitude [TRADUCTION] « met en péril la déférence » (Paul Daly, « Unreasonable Interpretations of Law » (2014), 66 *S.C.L.R.* (2d) 233, p. 250).

[307] Nous convenons avec le juge Evans que [TRADUCTION] « dès lors que la cour se lance dans sa propre interprétation de la loi pour déterminer si la décision du tribunal administratif était raisonnable, il semble y avoir peu de place pour la déférence » (Evans, « Triumph of Reasonableness : But How Much Does It Really Matter? », p. 109; voir également *Mason*, par. 34; Dyzenhaus, « Dignity in Administrative Law : Judicial Deference in a Culture of Justification », p. 108; Daly, « Unreasonable Interpretations of Law », p. 254-255). Ajoutons qu'une interprétation *de novo* d'une loi, effectuée avant un contrôle effectué selon le principe de la déférence, occulte nécessairement un élément essentiel du processus d'interprétation : le point de vue de l'organisme administratif spécialisé qui applique régulièrement le régime législatif en question (Dyzenhaus, « Politics of Deference : Judicial Review and Democracy », p. 304; Paul Daly, « Deference on Questions of Law » (2011), 74 *Mod. L. Rev.* 694). En plaçant ce point de vue au cœur de leur analyse, les cours de justice témoignent de leur respect à l'endroit des compétences et connaissances spécialisées des organismes administratifs ainsi qu'à l'égard du choix du législateur de déléguer le traitement de certaines questions à des organismes non judiciaires.

[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

[310] Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the

[308] À l'inverse, en imposant leur propre interprétation d'une disposition législative, les cours de justice *dénaturent* l'intention du législateur de confier un mandat au décideur. Dans presque tous les cas, il est nécessaire d'interpréter les dispositions d'une loi pour les appliquer, de sorte que le mandat que le législateur confie aux décideurs administratifs comporte foncièrement une fonction d'interprétation. Le décideur qui applique la loi est la principale personne chargée d'en interpréter les dispositions afin de s'acquitter efficacement de son mandat.

[309] Lorsqu'ils interprètent des dispositions législatives, les décideurs administratifs devraient donc être autorisés à tabler sur leur compétence spécialisée et sur la connaissance qu'ils ont des réalités pratiques de leur régime administratif. Assez souvent, les mots et les termes ont une signification tout à fait différente de leur « sens ordinaire » lorsqu'ils sont employés dans un domaine spécialisé. Dans certains cas, les règles de droit et les politiques sont si étroitement liées entre elles qu'elles confèrent aux mots d'une loi un sens unique qui est propre à un contexte particulier (*National Corn Growers*, p. 1336, motifs concordants de la juge Wilson; *Domtar Inc.*, p. 800). Qui plus est, non seulement les dispositions législatives peuvent-elles parfois se prêter à plusieurs interprétations raisonnables, mais elles peuvent aussi avoir été rédigées de manière générale ou [TRADUCTION] « délibérément ambiguë » afin de pouvoir être adaptées à des circonstances ultérieures inconnues (voir Felix Frankfurter, « Some Reflections on the Reading of Statutes » (1947), 47 *Colum. L. Rev.* 527, p. 528). Pour toutes ces raisons, il est impératif que les cours de révision évitent d'imposer des normes judiciaires aux décideurs administratifs ou d'insister de façon dogmatique sur le formalisme. Lorsque le décideur peut expliquer sa décision de manière adéquate, cette décision devrait être confirmée (Daly, « Unreasonable Interpretations of Law », p. 233-234, 250 et 254-255).

[310] Les motifs de la décision qu'a rendue le juge Brown dans l'affaire *Igloo Vikski* constituent un bon exemple d'une attitude de déférence à privilégier en matière d'interprétation législative. Cette affaire portait sur l'interprétation du *Tarif des douanes*, L.C. 1997, c. 36, à l'égard de gants de gardien de

gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, [2018] 2 S.C.R. 293,

but pour le hockey. L'Agence des services frontaliers du Canada avait classé les gants comme des « gants, mitaines et moufles ». Igloo Vikski soutenait qu'ils auraient dû être classés comme des articles de sport. Le Tribunal canadien du commerce extérieur (« TCCE ») a confirmé la classification initiale, mais la Cour d'appel fédérale a infirmé la décision.

[311] Reconnaissant que « l'expertise spécialisée » du TCCE donnait à celui-ci un avantage sur la cour de révision relativement à certaines questions de droit, le juge Brown a décidé que la norme de contrôle était celle de la décision raisonnable. S'exprimant au nom de sept autres membres de la Cour, il a soigneusement passé en revue les motifs de la décision du TCCE et la façon dont le Tribunal avait analysé les arguments d'Igloo Vikski, avant de se pencher sur les erreurs invoquées par celle-ci et par la Cour d'appel fédérale. Reconnaissant que les motifs de la décision du TCCE n'étaient pas « parfaitement limpides », le juge Brown a néanmoins conclu que l'interprétation du Tribunal était raisonnable. Tout en convenant avec Igloo Vikski qu'une autre interprétation que celle donnée par le TCCE était possible, il a précisé que, compte tenu de sa formulation générale, la loi applicable avait une portée suffisamment large pour englober l'interprétation raisonnable faite par le TCCE. L'arrêt *Igloo Vikski*, dans lequel le juge Brown résume d'abord les motifs exposés au soutien de l'interprétation, puis les arguments invoqués pour la contester, eu égard au contexte, représente un excellent exemple d'un contrôle judiciaire respectueux et empreint de la déférence souhaitable.

[312] Nous concluons notre examen du contrôle selon la norme de la raisonnabilité en passant aux situations dans lesquelles le décideur n'est pas tenu de motiver sa décision ou dans lesquelles il est impossible d'obtenir les motifs de la décision aux fins de contrôle judiciaire. En pareil cas, la cour de révision devrait s'en tenir à la question de savoir s'il a été établi que la décision est déraisonnable. Le caractère raisonnable de la décision peut être démontré à l'aide de décisions antérieures de l'organisme administratif (voir *Edmonton East*, par. 38, 44-46; *Alberta Teachers' Association*, par. 56-64). Dans d'autres cas, la cour de révision devra peut-être s'en remettre au contexte procédural entourant

at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

la décision pour apprécier le caractère raisonnable du résultat (voir *Law Society of British Columbia c. Trinity Western University*, [2018] 2 R.C.S. 293, par. 51-56; *Edmonton East*, par. 48-60; *Catalyst Paper Corp.*, par. 32-36). Dans tous les cas, la question à trancher demeure celle de savoir si la partie qui conteste la décision a démontré que celle-ci est déraisonnable.

[313] En résumé, le contrôle judiciaire selon la norme de la décision raisonnable commande la déférence à l'égard des décideurs administratifs et le respect de l'intention du législateur de leur confier un mandat. La déférence doit éclairer l'attitude de la cour de révision et la nature de l'analyse qu'elle mènera : il ne s'agit pas pour elle de déterminer comment elle aurait tranché la question dont le décideur administratif était saisi, mais plutôt de se demander si celui-ci a agi de façon raisonnable. À cette fin, elle examine d'abord les motifs exposés au soutien de la décision administrative à la lumière du contexte et des arguments invoqués par la partie qui affirme qu'elle n'est pas raisonnable. La cour de révision doit faire porter son analyse principalement sur le caractère raisonnable de la décision examinée dans son ensemble, à la lumière du dossier, en tenant compte de la gravité des erreurs dont serait entaché le raisonnement du décideur. En appliquant comme il se doit la norme de la décision raisonnable lors du contrôle judiciaire des décisions contestées devant eux, les juges assurent une surveillance minutieuse et concrète du système de justice administrative tout en respectant la légitimité de celui-ci et le point de vue des décideurs spécialisés de première ligne.

Application à M. Vavilov

[314] Alexander Vavilov conteste la décision de la greffière de la citoyenneté d'annuler son certificat de citoyenneté. La greffière a conclu que M. Vavilov n'était pas un citoyen canadien et que, par conséquent, il n'avait pas droit à un certificat de citoyenneté canadienne parce que, même s'il est né au Canada, ses parents étaient [TRADUCTION] « représentant[s] ou au service d'un gouvernement étranger » au sens de l'al. 3(2)a) de la *Loi sur la citoyenneté*, L.R.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing

[315] La première question à trancher est de savoir quelle est la norme de contrôle applicable. Nous convenons avec la majorité que la norme de la décision raisonnable s'applique.

[316] La seconde question à trancher est de savoir s'il était raisonnable pour la greffière de conclure que l'exception à la règle de la citoyenneté canadienne prévue à l'al. 3(2)a) s'appliquait non seulement aux parents qui bénéficient de privilèges et d'immunités diplomatiques, mais aussi aux agents du renseignement d'un gouvernement étranger. Il incombe donc à M. Vavilov de convaincre la cour de révision que la décision était déraisonnable. À notre avis, il s'est acquitté de ce fardeau.

[317] Monsieur Vavilov est né au Canada en 1994. Ses parents, Elena Vavilova et Andrey Bezrukov, des citoyens russes, sont entrés au Canada quelque temps avant sa naissance, ont usurpé l'identité de deux Canadiens décédés et ont obtenu frauduleusement des passeports canadiens. Après avoir quitté le Canada pour aller vivre en France, M. Vavilov et sa famille ont déménagé aux États-Unis. Pendant qu'ils se trouvaient aux États-Unis, les parents de M. Vavilov ont acquis la citoyenneté américaine grâce à leur fausse identité canadienne. Monsieur Vavilov et son frère aîné ont également obtenu la citoyenneté américaine.

[318] En juin 2010, des agents du Federal Bureau of Investigation des États-Unis ont arrêté les parents de M. Vavilov et les ont accusés de complot en vue d'agir en tant qu'agents non accrédités d'un gouvernement étranger et en vue de se livrer au blanchiment d'argent. Les parents de M. Vavilov ont plaidé coupable à des accusations de complot en juillet 2010 et ont été renvoyés en Russie dans le cadre d'un échange d'espions. Vers la même période, M. Vavilov et son frère se sont rendus en Russie. Le gouvernement américain a subséquemment révoqué le passeport et la citoyenneté de M. Vavilov, qui s'est vu délivrer, en décembre 2010, un passeport et un acte de naissance russes.

[319] De 2010 à 2013, M. Vavilov a tenté à de nombreuses reprises d'obtenir un passeport canadien. En décembre 2011, les autorités ontariennes lui

his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

[322] The Federal Court ([2016] 2 F.C.R. 39) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

ont délivré un nouvel acte de naissance qui indiquait les vrais noms et lieux de naissance de ses parents. Sur la foi de cet acte de naissance, M. Vavilov a demandé et obtenu un certificat de citoyenneté canadienne en janvier 2013. À l'aide de ces documents, M. Vavilov a demandé la prolongation du délai de validité de son passeport canadien au début de l'année 2013. Le 18 juillet 2013, la greffière a écrit à M. Vavilov pour l'informer qu'il y avait lieu de croire que son certificat de citoyenneté avait été délivré par erreur et l'a invité à fournir des renseignements supplémentaires.

[320] Le 22 avril 2014, M. Vavilov a fait parvenir à la greffière de longues observations écrites dans lesquelles il soutenait que l'exception restreinte prévue au par. 3(2) de la Loi ne s'appliquait pas à lui. Comme il était né au Canada, il avait droit à la citoyenneté canadienne. Monsieur Vavilov a également fait valoir que la greffière n'avait pas respecté les exigences de l'équité procédurale.

[321] Dans une lettre datée du 15 août 2014, la greffière a informé M. Vavilov qu'elle annulait son certificat de citoyenneté canadienne. À son avis, étant donné que M. Vavilov tombait sous le coup des deux restrictions énoncées au par. 3(2) de la Loi, il n'était pas un citoyen canadien. En premier lieu, lorsque M. Vavilov est né au Canada, ses parents n'avaient qualité ni de citoyens canadiens ni de résidents permanents. En second lieu, à titre d'agents non officiels travaillant pour le Service des renseignements extérieurs russe, les parents de M. Vavilov étaient [TRADUCTION] « représentant[s] ou au service d'un gouvernement étranger » au sens de l'al. 3(2)a).

[322] La Cour fédérale ([2016] 2 R.C.F. 39) a rejeté la demande de contrôle judiciaire de M. Vavilov. Elle a conclu que la greffière avait respecté les exigences de l'équité procédurale et, appliquant la norme de la décision correcte, elle a jugé que la greffière avait interprété correctement l'al. 3(2)a). La Cour fédérale a par la suite examiné l'application de cet alinéa selon la norme de la décision raisonnable et jugé qu'il était raisonnable de la part de la greffière de conclure que les parents de M. Vavilov travaillaient au Canada en qualité d'agents d'infiltration du gouvernement russe au moment de sa naissance.

[323] The Federal Court of Appeal ([2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

Persons who are citizens

3 (1) Subject to this Act, a person is a citizen if

(a) the person was born in Canada after February 14, 1977;

. . .

Not applicable to children of foreign diplomats, etc.

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

[323] La Cour d'appel fédérale ([2018] 3 R.C.F. 75) a fait droit à l'appel et a cassé la décision par laquelle la greffière avait annulé le certificat de citoyenneté de M. Vavilov. S'exprimant au nom de la majorité, le juge Stratas a reconnu que les exigences de l'équité procédurale avaient été respectées, mais a estimé que l'interprétation donnée à l'al. 3(2)a) par la greffière n'était pas raisonnable. À son avis, seules les personnes qui jouissent de privilèges et d'immunités diplomatiques étaient visées par l'exception prévue à l'al. 3(2)a). Le juge Stratas est parvenu à cette conclusion après avoir examiné le contexte et l'objet de la disposition, son origine législative et les principes du droit international relatifs à la citoyenneté et aux privilèges et immunités diplomatiques.

[324] En règle générale, il faut contrôler judiciairement les décisions administratives pour juger de leur caractère raisonnable. Aucune des exceptions justifiant le recours à la norme de la décision correcte ne s'applique à l'interprétation par la greffière de la Loi en espèce. En conséquence, la norme de contrôle applicable est celle de la décision raisonnable.

[325] Les dispositions suivantes de la *Loi sur la citoyenneté* sont pertinentes en l'espèce :

Citoyens

3 (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

a) née au Canada après le 14 février 1977;

. . .

Inapplicabilité aux enfants de diplomates étrangers, etc.

(2) L'alinéa (1)a) ne s'applique pas à la personne dont, au moment de la naissance, les parents n'avaient qualité ni de citoyens ni de résidents permanents et dont le père ou la mère était :

a) agent diplomatique ou consulaire, représentant à un autre titre ou au service au Canada d'un gouvernement étranger;

> **(b)** an employee in the service of a person referred to in paragraph (a); or
>
> **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents

> **b)** au service d'une personne mentionnée à l'alinéa a);
>
> **c)** fonctionnaire ou au service, au Canada, d'une organisation internationale — notamment d'une institution spécialisée des Nations Unies — bénéficiant sous le régime d'une loi fédérale de privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a).

Suivant la règle générale énoncée à l'al. 3(1)a) de la Loi, les personnes nées au Canada ont qualité de citoyens canadiens. Le paragraphe 3(2) prévoit une exception à cette règle, de sorte que, si cette disposition s'applique à M. Vavilov, celui-ci n'a jamais été citoyen canadien.

[326] La question précise à trancher en l'espèce est de savoir si l'interprétation que la greffière a donnée à l'exception prévue par la Loi à la règle de la citoyenneté était raisonnable. Le contrôle effectué en fonction de la norme de la décision raisonnable commande la déférence à l'endroit du décideur et nous débutons notre analyse en examinant les motifs invoqués par la greffière à la lumière du contexte et des moyens plaidés.

[327] Dans le cas qui nous occupe, la greffière a résumé, dans la lettre qu'elle a adressée à M. Vavilov, les principaux motifs à l'appui de sa décision. En concluant que M. Vavilov n'avait pas droit à la citoyenneté canadienne, la greffière a fait sienne les recommandations d'une analyste qui travaillait pour Citoyenneté et Immigration Canada. Ce rapport fait partie à juste titre des motifs à l'appui de la décision de la greffière.

[328] Dans son rapport, l'analyste a tenté de répondre à la question de savoir si un certificat de citoyenneté canadienne avait été délivré par erreur à M. Vavilov. Elle a également précisé que la question clé à trancher en l'espèce était celle de savoir si le père ou la mère de M. Vavilov était un « représentant à un autre titre ou au service » d'un gouvernement étranger au sens de l'al. 3(2)a). Une bonne partie du rapport traite de questions qui ne sont pas contestées

in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

Not applicable to children of foreign diplomats, etc.

(3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent

(*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and

(*b*) is

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,

(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or

(iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain

dans le présent pourvoi, dont celle du statut juridique des parents de M. Vavilov au Canada et de leur emploi comme agents du renseignement russes.

[329] L'analyste a débuté son analyse par un examen du libellé de l'al. 3(2)a). Pour conclure que cette disposition avait pour effet d'empêcher M. Vavilov d'obtenir la citoyenneté canadienne, elle a invoqué deux arguments tirés du texte. D'abord, elle a comparé la version actuelle de l'al. 3(2)a) actuel à une version antérieure de l'exception énoncée au par. 5(3) de la *Loi sur la citoyenneté canadienne*, S.R.C. 1970, c. C-19 :

Ne s'applique pas aux enfants de diplomates étrangers, etc.

(3) Le paragraphe (1) ne s'applique pas à une personne si, au moment de la naissance de cette personne, son parent responsable

a) était un étranger n'ayant pas été licitement admissibilité au Canada pour y résider en permanence; et

b) était

(i) un agent diplomatique ou consulaire étranger ou un représentant d'un gouvernement étranger accrédité auprès de Sa Majesté,

(ii) un employé d'un gouvernement étranger, attaché à une mission diplomatique ou à un consulat au Canada, ou au service d'une telle mission ou d'un tel consulat, ou

(iii) un employé au service d'une personne mentionnée au sous-alinéa (i).

[330] L'analyste a affirmé que la suppression des mentions d'accréditation officielle et de mission diplomatique permettait de penser que l'ancienne exception avait une portée plus étroite que l'exception actuelle prévue à l'al. 3(2)a). Elle a ensuite souligné que la définition du terme « agent diplomatique ou consulaire » figurant au par. 35(1) de la *Loi d'interprétation*, L.R.C. 1985, c. I-21, associe clairement cette personne à un poste diplomatique. Étant donné que la version actuelle de l'al. 3(2)a) n'associe pas les « représentant[s] à un autre titre ou au service au

that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular*

Canada d'un gouvernement étranger » à une mission diplomatique, l'analyste a conclu [TRADUCTION] « [qu']il est raisonnable de soutenir que cette disposition est censée englober les personnes qui ne sont pas visées par la définition du terme "[personnel] diplomatique et consulaire" ». Enfin, l'analyste a souligné que l'expression « représentant à un autre titre ou au service au Canada d'un gouvernement étranger » n'avait pas encore été interprétée par les cours.

[331] Hormis le rapport de l'analyste, le dossier renferme peu d'éléments étoffant les motifs de la greffière. Il n'y a aucun élément de preuve permettant de savoir si la greffière a déjà appliqué cette disposition à des personnes comme M. Vavilov, dont les parents ne jouissaient pas de privilèges ou d'immunités diplomatiques. Il ne semble pas y avoir non plus de politiques, de lignes directrices ou d'avis juridiques internes qui auraient pu aider la greffière à prendre ce type de décision.

[332] Pour contester la décision de la greffière, il incombe à M. Vavilov de démontrer pourquoi cette décision n'est pas raisonnable. Devant notre Cour, M. Vavilov a soutenu que l'analyste s'est fondée uniquement sur le texte de l'exception à la règle de la citoyenneté. De l'avis de M. Vavilov, si l'analyste avait tenu compte des objectifs plus larges de l'al. 3(2)a), elle aurait conclu que les mots « représentant » et « au service » ne s'appliquent qu'aux personnes qui jouissent de privilèges et d'immunités diplomatiques.

[333] Dans les arguments qu'il a présentés à la greffière, M. Vavilov a invoqué trois raisons pour lesquelles le libellé du par. 3(2) devait être interprété à la lumière des règles du droit canadien et du droit international concernant le rôle et les fonctions des diplomates.

[334] D'abord, M. Vavilov a expliqué que l'al. 3(2)a) devrait être interprété en corrélation avec la *Loi sur les missions étrangères et les organisations internationales*, L.C. 1991, c. 41 (la *LMEOI*). Cette loi incorpore en droit canadien des aspects de la *Convention de Vienne sur les relations diplomatiques*, R.T. Can. 1966, nº 29, ann. I de la *LMEOI*, et de la *Convention de*

Relations, Can. T.S. 1974 No. 25, Sched. II to the *FMIOA*, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Hon. J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)* (2007), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges

Vienne sur les relations consulaires, R.T. Can. 1974, nº 25, ann. II de la *LMEOI*, qui portent sur les privilèges et immunités diplomatiques. Monsieur Vavilov a soutenu que le par. 3(2) empêchait les enfants de diplomates d'acquérir la citoyenneté, parce que les privilèges et immunités diplomatiques, y compris l'immunité contre les poursuites criminelles et la responsabilité civile, étaient incompatibles avec les obligations et les responsabilités de la citoyenneté. Étant donné que les parents de M. Vavilov ne bénéficiaient pas de privilèges et d'immunités de cette nature, il ne servirait à rien d'empêcher leurs enfants nés au Canada de devenir des citoyens canadiens.

[335] En deuxième lieu, M. Vavilov a remis à la greffière des procès-verbaux de réunions de comités publiés dans le Hansard, comme les explications qu'avait données l'hon. J. Hugh Faulkner, secrétaire d'État, lors du dépôt des modifications proposées au par. 3(2), et selon lesquelles le législateur avait récrit la disposition afin de limiter la portée de l'exception à la règle de la citoyenneté.

[336] En troisième lieu, M. Vavilov a cité des décisions judiciaires pour soutenir : (i) que l'exception à la règle de la citoyenneté devrait être interprétée de façon restrictive, parce qu'elle supprime des droits substantiels (*Brossard c. Québec*, [1988] 2 R.C.S. 279, p. 307), (ii) que l'al. 3(2)a) devait recevoir une interprétation fonctionnelle et fondée sur son objet (*Medovarski c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2005] 2 R.C.S. 539, par. 8), et (iii) que, étant donné que les parents de M. Vavilov ne bénéficiaient pas de l'immunité à l'égard des poursuites criminelles et civiles, ils n'étaient pas visés par le par. 3(2) (*Greco c. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (C.S.J.); *R. c. Bonadie* (1996), 109 C.C.C. (3d) 356 (C.J. Ont.); *Al-Ghamdi c. Canada (Ministre des Affaires étrangères et du Commerce international*), 2007 CF 559).

[337] La décision que la Cour fédérale a rendue dans l'affaire *Al-Ghamdi*, qui portait sur la constitutionnalité de l'al. 3(2)a), est particulièrement pertinente. Dans cette décision, le juge Shore a écrit en effet que l'al. 3(2)a) s'appliquait uniquement aux « enfants de personnes ayant le statut diplomatique » (par. 5 et 65). Le juge Shore a ajouté ce qui suit :

accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

« [c]'est précisément en raison de la vaste gamme de privilèges dont jouissent les diplomates et leur famille, privilèges qui sont de par leur nature même incompatibles avec les obligations de la citoyenneté, qu'une personne qui jouit du statut diplomatique ne peut acquérir la citoyenneté » (par. 63).

[338] The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

[338] Dans ses motifs, la greffière n'a pas répondu aux arguments abondants et convaincants que M. Vavilov a invoqués au sujet des objectifs de l'al. 3(2)a). Il semble que l'analyste ait mal compris les arguments de M. Vavilov sur ce point. Commentant la portée du par. 3(2), l'analyste s'est exprimée comme suit : [TRADUCTION] « l'avocat soutient que [Citoyenneté et Immigration Canada] ne peut invoquer le par. 3(2), parce que le Ministère n'a pas demandé ou obtenu une vérification auprès du Bureau du protocole d'Affaires étrangères afin de prouver que les parents de M. Vavilov détenaient un statut diplomatique ou consulaire auprès de la Fédération russe pendant qu'ils résidaient au Canada ». Il semble donc que l'analyste n'a pas reconnu que l'argument de M. Vavilov revêtait un caractère plus fondamental, soit que les objectifs du par. 3(2) exigent une interprétation restrictive des mots « représentant » et « au service ». Pendant son interrogatoire préalable, l'analyste a effectivement reconnu que sa recherche ne lui avait pas permis de déterminer l'objectif de politique générale qui sous-tend l'al. 3(2)a) ou les raisons pour lesquelles les mots « représentant » et « au service » avaient été inclus dans la Loi. Il semble également que l'analyste n'ait pas saisi la pertinence possible de la décision *Al-Ghamdi*, étant donné qu'elle a mentionné dans son rapport que [TRADUCTION] « les décisions rendues jusqu'à maintenant concernent uniquement les personnes dont, au moment de la naissance, les parents détenaient un statut diplomatique au Canada ».

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to

[339] En fin de compte, la greffière a donné une interprétation large à l'al. 3(2)a) en se fondant sur l'analyse purement textuelle que l'analyste en avait faite, notamment en le comparant avec le texte de la version antérieure. Cette interprétation des mots « représentant à un autre titre ou au service » n'était raisonnable que si l'on examinait le texte en faisant abstraction de son objectif. L'historique de la disposition n'indique nullement que le législateur fédéral

s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

avait l'intention d'en élargir le champ d'application. Ainsi que le souligne M. Vavilov, les modifications apportées au par. 3(2) en 1976 semblent plutôt refléter celles qui ont été intégrées dans la *Convention de Vienne sur les relations diplomatiques* et dans la *Convention de Vienne sur les relations consulaires*, toutes deux incorporées en droit canadien en 1977. La façon dont les cours ont interprété cette disposition, notamment les remarques formulées dans la décision *Al-Ghamdi* au sujet de la portée restreinte de l'al. 3(2)a) et de l'incompatibilité entre la citoyenneté et les privilèges et immunités diplomatiques, indique elle aussi qu'il faut interpréter restrictivement l'exception à la règle de la citoyenneté.

[340] Qui plus est, ainsi que l'a fait remarquer la majorité de la Cour d'appel fédérale, le libellé de l'al. 3(2)c) peut être perçu comme sapant l'interprétation de la greffière. Cette disposition nie le droit à la citoyenneté aux enfants nés de personnes bénéficiant de « privilèges et immunités diplomatiques que le ministre des Affaires étrangères certifie être équivalents à ceux dont jouissent les personnes visées à l'alinéa a) ». Ainsi que l'a souligné le juge Stratas, ce texte laisse croire que l'al. 3(2)a) *ne* vise donc *que* les personnes « au service au Canada d'un gouvernement étranger » qui jouissent de privilèges et immunités diplomatiques.

[341] En ignorant les objectifs de la disposition, la greffière a rendu une décision déraisonnable. Plus précisément, la prise en compte des arguments appuyant une interprétation selon laquelle le par. 3(2) s'applique uniquement aux personnes jouissant de privilèges et d'immunités diplomatiques aurait vraisemblablement modifié l'issue de l'affaire.

[342] Monsieur Vavilov nous a convaincues que la décision de la greffière est déraisonnable. En conséquence, la Cour d'appel a cassé à bon droit la décision par laquelle la greffière avait annulé le certificat de citoyenneté de M. Vavilov, qui a donc droit à un certificat de citoyenneté canadienne.

[343] Par conséquent, nous rejetterions le pourvoi avec dépens devant toutes les cours en faveur de M. Vavilov.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals

Pourvoi rejeté avec dépens dans toutes les juridictions.

Procureur de l'appelant : Procureur général du Canada, Toronto.

Procureurs de l'intimé : Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenante la procureure générale du Québec : Procureure générale du Québec, Québec.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Procureur de l'intervenant le Conseil canadien pour les réfugiés : The Law Office of Jamie Liew, Ottawa.

Procureur de l'intervenant le Centre ontarien de défense des droits des locataires - Programme d'avocats de service en droit du logement : Centre ontarien de défense des droits des locataires, Toronto.

Procureur des intervenantes la Commission des valeurs mobilières de l'Ontario, British Columbia Securities Commission et Alberta Securities Commission : Ontario Securities Commission, Toronto.

Procureur de l'intervenante Ecojustice Canada Society : Ecojustice Canada Society, Toronto.

Procureur des intervenants le Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail (Ontario), Workers' Compensation Appeals Tribunal (Territoires du Nord-Ouest et Nunavut), le Tribunal d'appel des décisions de la

Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Commission des accidents du travail de la Nouvelle-Écosse, Appeals Commission for Alberta Workers' Compensation et le Tribunal d'appel des accidents au travail (Nouveau-Brunswick) : Workplace Safety and Insurance Appeals Tribunal, Toronto.

Procureurs de l'intervenante British Columbia International Commercial Arbitration Centre Foundation : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intervenant le Conseil des tribunaux administratifs canadiens : Lax O'Sullivan Lisus Gottlieb, Toronto.

Procureurs des intervenantes National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association et la Conférence des arbitres du Québec : Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Procureurs de l'intervenant le Congrès du travail du Canada : Goldblatt Partners, Toronto.

Procureurs de l'intervenante l'Association nationale des organismes de réglementation de la pharmacie : Shores Jardine, Edmonton.

Procureurs de l'intervenante Queen's Prison Law Clinic : Stockwoods, Toronto.

Procureurs de l'intervenant Advocates for the Rule of Law : McCarthy Tétrault, Vancouver.

Procureur de l'intervenant Parkdale Community Legal Services : Parkdale Community Legal Services, Toronto.

Procureurs de l'intervenant Cambridge Comparative Administrative Law Forum : Cambridge University — The Faculty of Law, Cambridge, R.-U.; White & Case, Washington, D.C.

Procureurs de l'intervenante la Clinique d'intérêt public et de politique d'internet du Canada Samuelson-Glushko : Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Procureurs de l'intervenante l'Association du Barreau canadien : Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Procureurs de l'intervenante l'Association canadienne des avocats et avocates en droit des réfugiés : Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Procureur de l'intervenant Community & Legal Aid Services Programme : Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Procureurs de l'intervenante l'Association québécoise des avocats et avocates en droit de l'immigration : Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

Procureurs de l'intervenante la Société de soutien à l'enfance et à la famille des Premières Nations du Canada : Stikeman Elliott, Ottawa.

TAB 7

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

Ontario

INTERIM RATE ORDER

EB-2022-0200

ENBRIDGE GAS INC.

Enbridge Gas Inc. Application for 2024 Rates – Phase 1

BEFORE: **Patrick Moran**
Presiding Commissioner

Emad Elsayed
Commissioner

Allison Duff
Commissioner

April 11, 2024

Background

Enbridge Gas Inc. (Enbridge Gas) filed an application with the Ontario Energy Board (OEB) under section 36 of the *Ontario Energy Board Act*, *1998* (OEB Act) seeking approval for changes to the rates that Enbridge Gas charges for natural gas distribution, transportation and storage, beginning January 1, 2024. Enbridge Gas also applied for approval of an incentive rate-making mechanism for the years 2025 to 2028.

The OEB is reviewing the application in phases. The OEB approved a settlement proposal between the applicant and intervenors on some Phase 1 issues with the remaining issues going to hearing. In its Decision and Order issued on December 21, 2023, the OEB made a determination on all the remaining issues in Phase 1 of the proceeding (Phase 1 Decision).

The Phase 1 Decision required Enbridge Gas to file a draft rate order that included a proposed Rate Handbook, accounting orders, customer bill impacts and detailed supporting information showing the calculation of interim 2024 rates and the associated rate adjustment rider for the period from January 1, 2024 to the implementation date. As determined in the Phase 1 Decision, the OEB approved the establishment of interim 2024 rates to reflect that the application is being reviewed in phases and the interim 2024 rates may be further adjusted as of January 1, 2024 to reflect the full impacts of determinations made in Phase 2 of the proceeding.

Enbridge Gas filed a draft rate order on February 16, 2024 reflecting the OEB's findings in the Phase 1 Decision. The draft rate order was based on January 1, 2024 rates as approved in the January 1, 2024 Quarterly Rate Adjustment Mechanism (QRAM) proceeding[1] updated for the Phase 1 Decision. OEB staff and intervenors filed comments on the draft rate order on March 1, 2024. Enbridge Gas filed its reply submission on March 15, 2024. Also on March 15, 2024, Enbridge Gas filed an updated draft rate order that reflected the most recent rate changes approved in the April 1, 2024 QRAM proceeding[2] and other corrections. On April 9, 2024, Enbridge Gas filed updated portions of the draft rate order that corrected a minor error which affects the monthly charge for some general service and contract rate customers. In this Interim Rate Order, any reference to the updated draft rate order is to the March 15, 2024 version, as corrected by the April 9, 2024 updates.

The OEB finds that Enbridge Gas appropriately reflected the OEB's Phase 1 Decision in the updated draft rate order, with one exception relating to the accounting treatment of

[1] EB-2023-0330
[2] EB-2024-0093

proceeds from the disposition of depreciable property. The updated draft rate order, inclusive of the corrections made by Enbridge Gas, is approved, with modifications to the accounting orders for the Disposition of Property Deferral Account and the Site Restoration Costs Variance Account.

Draft Rate Order

The updated draft rate order reflects Enbridge Gas's most recently approved rates,[3] a correction to Rider E,[4] a change to the implementation of the $50 million reduction to the operations and maintenance (O&M) budget,[5] and a correction that affects the monthly charge for some general service and contract rate customers.

As set out in the updated draft rate order, the 2024 revenue deficiency is $116.0 million after incorporating the OEB's findings in its Phase 1 Decision. The 2024 revenue deficiency decreased by approximately $72.1 million relative to the revenue deficiency resulting from the OEB-approved settlement proposal.[6]

The 2024 bill impacts for individual customers resulting from the updated draft rate order vary by rate zone and rate class.

For a typical residential sales service customer, the interim 2024 rates reflecting the Phase 1 Decision result in an annual bill increase for 2024 of:

- $22.18 (or 1.8% of total bill) for a Rate 1 customer in the Enbridge Gas Distribution rate zone
- $32.97 (or 2.5% of total bill) for a Rate 01 customer in the Union North rate zone
- $22.33 (or 2.1% of total bill) for a Rate M1 customer in the Union South rate zone

The residential bill impacts will be offset by the clearance of deferral and variance accounts. The deferral and variance accounts will be cleared by way of a prospective rate rider effective May 1, 2024, for a period of eight months. The 2024 annual bill impact for the clearance of the deferral and variance accounts for a typical residential sales service customer is a refund of:

3 EB-2024-0093
4 Rider E is the rate adjustment rider calculated to recover the revenue variance between the approved effective date of January 1, 2024 and the implementation date of May 1, 2024.
5 In response to intervenor comments, Enbridge Gas agreed to change its approach to implementing the $50 million reduction to the O&M budget resulting from the OEB-approved settlement proposal. This resulted in a reduction to the revenue deficiency of approximately $0.9 million.
6 Updated Draft Rate Order, March 15, 2024, p.1

- $38.37 (or 3.1% of total bill) for a Rate 1 customer in the Enbridge Gas Distribution rate zone
- $42.25 (or 3.2% of total bill) for a Rate 01 customer in the Union North rate zone
- $35.01 (or 3.3% of total bill) for a Rate M1 customer in the Union South rate zone[7]

The net effect is a reduction in rates in 2024 for a typical residential sales service customer.

OEB staff and intervenors filed comments on the February 16, 2024 version of the draft rate order. OEB staff was generally satisfied with the calculations to derive interim 2024 rates. However, OEB staff and intervenors raised certain issues. Enbridge Gas responded to these comments. The comments of OEB staff and intervenors as well as Enbridge Gas's responses are summarized in the sections below. The OEB's findings on those issues are also set out in the sections below.

Regulated O&M Adjustment

In its original draft rate order, dated February 16, 2024, Enbridge Gas increased the revenue requirement by $0.9 million to reflect the allocation of the settled $50 million reduction to O&M between its regulated and unregulated businesses.[8]

The Industrial Gas Users Association (IGUA), London Property Management Association (LPMA) and School Energy Coalition (SEC) objected to the adjustment noting that the $50 million reduction to O&M that was agreed to in the settlement proposal was for the regulated business and not the unregulated business.

In its reply submission, Enbridge Gas acknowledged the objection of intervenors and accepted that a reduction of the $50 million in net O&M was agreed to in the settlement. Accordingly, Enbridge Gas removed the $0.9 million adjustment from the updated draft rate order.

7 Updated Draft Rate Order, March 15, 2024, Cover Letter
8 Draft Rate Order, February 16, 2024, Table 1

Findings

The OEB accepts the updated allocation of the $50 million reduction to O&M based on the removal of the allocation to Enbridge Gas's unregulated business, as it appropriately reflects the OEB-approved settlement proposal.

Integration Capital Reduction

In the Phase 1 Decision, the OEB determined that $119 million of undepreciated integration capital was not recoverable from ratepayers. Accordingly, this amount could not be included in the 2024 rate base opening balance.

In the updated draft rate order, Enbridge Gas noted that the $119.0 million was an estimate of the undepreciated value of the integration assets calculated by applying OEB-approved depreciation rates to the cost of integration assets. Enbridge Gas clarified that the $119 million did not represent the forecast net book value embedded in opening rate base because it is not possible to isolate the net book values of individual assets under group depreciation. The majority of the integration assets were classified as computer software and Enbridge Gas indicated that the computer software plant accounts had large accumulated depreciation balances. Consequently, Enbridge Gas noted that only $91.0 million of the net book value related to integration assets was remaining to be written off. Accordingly, Enbridge Gas reduced 2024 rate base by $91.0 million instead of the $119.0 million ordered by the OEB.

OEB staff, Canadian Manufacturers and Exporters (CME), IGUA, LPMA, SEC and the Vulnerable Energy Consumer Coalition (VECC) objected to such a late adjustment to the net book value. OEB staff and these intervenors noted that the $119 million was the amount referred to throughout the proceeding and the amount was not revised even though Enbridge Gas knew that the inclusion of integration capital was a contested issue. LPMA and IGUA argued that the revised integration capital amount was new information and parties have not had the opportunity to examine it. IGUA, LPMA and SEC submitted that it was inappropriate for Enbridge Gas to update the integration capital amount after the Phase 1 Decision has been rendered. OEB staff submitted that unless Enbridge Gas can provide convincing evidence to corroborate the revised amount, and a satisfactory explanation of why this amount could not have been revised earlier, the OEB should reject Enbridge Gas's adjustment and revert to the original disallowed amount of $119.0 million.

In its reply submission, Enbridge Gas reiterated that the $119 million referred to in the proceeding was an estimate as it was not possible to isolate the net book values of individual assets under group depreciation. The assets in the computer software plant

account were already fully expensed through depreciation. Enbridge Gas explained that an adjustment of $28 million was required to correct the negative net book value in the computer software plant account to bring the balance to zero, resulting in a net rate base reduction of $91 million at the time of the write-off. Enbridge Gas submitted that using $119 million as the integration capital amount would have resulted in a negative plant balance and stated that applying the negative plant balance against other assets would not be in compliance with US GAAP.

Enbridge Gas further argued that requiring Enbridge Gas to remove $119 million from rate base for integration capital with the knowledge that there is no further integration capital in rate base is punitive. Doing so would effectively require Enbridge Gas to write down assets from rate base that have not been disallowed.

Findings

The OEB accepts Enbridge Gas's explanation for reducing the original $119 million of proposed integration capital to $91 million. Enbridge Gas originally sought to include $119 million in rate base. Given that Enbridge Gas knew at the time that it filed its application that the integration capital included information technology assets that are typically depreciated in an accelerated manner, the OEB is surprised that Enbridge Gas failed to use the correct amount from the beginning, and only made the correction at the very end of the process, in the draft rate order. This does not instill confidence in the accuracy of Enbridge Gas's evidence and oral testimony

Capital Budget Reduction

In the Phase 1 Decision, the OEB ordered a reduction of $250.0 million to Enbridge Gas's proposed 2024 capital budget. Accordingly, Enbridge Gas applied a $250 million envelope reduction to the budget. SEC raised the question of whether the Phase 1 Decision may have required the $250 million reduction to the system renewal component of the budget and not the entire capital budget. Accordingly, LPMA and SEC sought clarity from the OEB regarding the allocation of the reduction. In a letter dated March 8, 2024, the OEB confirmed that the $250 million reduction applied to the entire 2024 capital envelope.

Enbridge Gas implemented a reduction of $250.0 million to its entire 2024 capital budget and this resulted in a reduction to 2024 rate base of $75.0 million. OEB staff noted that the reduction to rate base resulted in a counterintuitive increase to the revenue requirement. Accordingly, OEB staff requested that Enbridge Gas outline the reasons for the increase in revenue requirement resulting from the reduction to rate base.

In its reply submission, Enbridge Gas noted that the capital expenditure reduction of $250 million was implemented in a manner that converted the capital expenditure reduction to in-service reductions on a monthly basis in the same manner as the original in-service additions were calculated. The in-service capital reduction, according to Enbridge Gas, results in a reduction to required return on investment and a reduction to depreciation expense which are both more than offset by the removal of the favourable tax implications of accelerated capital cost allowance deductions on the in-service capital.

Findings

The OEB accepts the methodology Enbridge Gas used to implement the Phase 1 Decision. The capital budget reduction is intended to ensure that Enbridge Gas refocuses its approach to capital spending to maximize life extension through inspection and repair and prioritize its capital spending to implement the reduction. Given the OEB's direction for Enbridge Gas to focus its capital spending plans on the inspection, repair and life extension of its assets, the OEB requires Enbridge Gas to provide a report on the steps that it has taken to achieve the capital reduction based on those principles, as part of its evidence filing for Phase 3 of this proceeding.

Overhead Capital Reduction

In the Phase 1 Decision, the OEB directed Enbridge Gas to reduce the capitalized indirect overheads by $50 million in 2024 and add the $50 million to its 2024 O&M. IGUA requested Enbridge Gas to provide an explanation as to why a reduction of $50 million in overhead capitalization resulted in a reduction of only $14 million to rate base.

In its reply submission, Enbridge Gas noted that the rate base impact of the $50 million reduction in gross overheads is an average of monthly averages calculation where the gross reductions to in-service capital are profiled monthly in the same manner as the amounts were initially included in rate base. Enbridge Gas provided a table that illustrated the impact of the average of monthly averages and the derivation of the $14 million reduction to rate base.[9]

SEC noted that Enbridge Gas had only provided a table to show the impact of the $250 million capital envelope reduction and the $50 million reduction to overhead capitalization. SEC observed that Enbridge Gas had not provided updated gross Property Plant & Equipment (PP&E), accumulated depreciation and net PP&E continuity

[9] Enbridge Gas Reply Submission, March 15, 2024, Table 3.

schedules as well as the tables that show the specific adjustments. SEC submitted that the information was required to ensure that Enbridge Gas had accurately implemented the Phase 1 Decision and the rate base had been appropriately calculated. SEC further suggested that the OEB should require Enbridge Gas to provide the required information and allow for further comments. If the additional steps are problematic from a timing perspective, SEC recommended that the OEB consider the review as part of Phase 2 of the proceeding.

Enbridge Gas provided the detailed schedules requested by SEC as attachments to its reply submission.

Findings

The OEB accepts the methodology used by Enbridge Gas to implement the reduction to capitalized indirect overheads. As directed in the Phase 1 Decision, Enbridge Gas will provide its plan for subsequent annual reductions to the capitalized indirect overheads during the proposed IRM term in Phase 2 of the proceeding.

In its reply submission, Enbridge Gas provided the continuity schedules and the associated accumulated depreciation. Enbridge Gas also provided changes in gross PP&E and accumulated depreciation between the capital update and the updated draft rate order. The OEB is satisfied with the information provided and does not see a need for further review of the information related to continuity in Phase 2 of the proceeding.

Demand Side Management (DSM) Budget Costs

In its updated draft rate order, Enbridge Gas allocated the DSM budget costs based on the forecast DSM budget spend by rate class for 2024. Enbridge Gas also implemented the uniform residential DSM unit rates in the draft rate order. The implementation of uniform residential DSM unit rates in the updated draft rate order is in response to the OEB's Decision and Order on the DSM Plan Draft Rate Order, which required the recovery of 2024 residential DSM budget amounts through a uniform rate.[10]

OEB staff accepted Enbridge Gas's approach to calculating DSM rates. However, OEB staff requested that Enbridge Gas provide supporting calculations used to derive the forecast 2024 DSM budget spend by rate class, including the calculations showing the escalation methodology used to increase the 2023 DSM budget.

[10] EB-2021-0002, Decision and Order, March 2, 2023.

In its reply submission, Enbridge Gas provided a description of the 2024 DSM budget by rate class and supporting calculation including an explanation of the escalation methodology used to increase the 2023 DSM budget.

Findings

The OEB finds that the 2024 DSM budget, including the derivation of a uniform rate, was implemented correctly. The OEB is satisfied with the additional information provided to support the recovery of DSM costs in Enbridge Gas's reply submissions.

Depreciation Expense

In its updated draft rate order, Enbridge Gas provided the recalculation of depreciation expense to reflect the OEB's findings in the Phase 1 Decision.

IGUA requested that Concentric (Enbridge Gas's consultant) provide a reconciliation of the draft rate order tables to Concentric's initial tables, identifying changes in both capital amounts and depreciation rates to enable the validation of depreciation costs included in 2024 rates.

In its reply submission, Enbridge Gas provided a continuity of impacts and the variance at each iteration outlining changes from the initial application to the settlement and to the Phase 1 Decision.

Findings

The OEB is satisfied with the additional information provided and finds that the depreciation expense set out in the updated draft rate order appropriately reflects the OEB's findings in the Phase 1 Decision.

Site Restoration Costs Variance Account

In the Phase 1 Decision, the OEB directed Enbridge Gas to discontinue using site restoration amounts collected through rates to offset other costs. Starting in 2024, the OEB directed Enbridge Gas to start funding the site restoration cost liability with the amounts collected through rates. The OEB explained that a tracking account could be established to record the amounts collected through rates and to track actual spending related to site restoration.[11]

[11] EB-2022-0200, Decision and Order, Page 94.

In the updated draft rate order, Enbridge Gas requested approval for a Site Restoration Costs Variance Account (SRCVA) that will record and track the amount of site restoration costs collected through depreciation in rates and actual spending related to site restoration, net of any proceeds.

Enbridge Gas stated that the balance in the account will not be brought forward for annual disposition since the purpose of the funds to be recorded in the account is to offset future decommissioning, abandonment or site restoration costs. In the event that a deficit balance occurs in the variance account as a result of site restoration costs exceeding amounts recovered through rates, Enbridge Gas proposed that the deficit will be offset to the cumulative pre-2024 site restoration costs liability, of approximately $1.6 billion, currently reflected in accumulated depreciation.

OEB staff submitted that the account met the OEB's causation, materiality and prudence tests for deferral and variance accounts. However, OEB staff was concerned that Enbridge Gas's proposed approach may result in a double recovery of site restoration costs – once when the amount was recovered through depreciation and again through increased rate base.

In its reply submission, Enbridge Gas clarified that its proposal was not to actually debit accumulated depreciation in the event of a debit balance in the SRCVA. The balance in the SRCVA would only be combined with the $1.6 billion balance included in accumulated depreciation upon approval from the OEB. Enbridge Gas explained that it was simply noting that the balance in the SRCVA (debit or credit) and the $1.6 billion in accumulated depreciation should be considered in aggregate for the proposes of determining the net salvage component of depreciation rates in future depreciation studies.

Enbridge Gas further explained that the advance collection of site restoration costs over the life of assets provides for, and is expected to be offset by, the actual costs of retirement. Accordingly, the debiting of costs of retirement to accumulated depreciation, which on their own increase rate base, is the historic approach and would continue. Enbridge Gas submitted that the debit to accumulated depreciation offsets the over-depreciation that occurred over the life of the asset and simply removes the carrying charge benefit that was provided by the advance collection and would not result in double recovery.

Enbridge Gas further proposed that a net positive balance in the variance account will be set aside and maintained in a distinct interest-bearing bank account for the duration of the incentive rate-setting mechanism (IRM) term. Enbridge Gas stated that it will contact multiple Canadian financial institutions to ensure the balance in the account

gets the best available rate of interest. Enbridge Gas indicated that the proposed establishment of an interest-bearing bank account is an interim step until an appropriate investment policy can be reviewed by the OEB. Enbridge Gas expects to present an investment policy that describes the investment goals, objectives, strategies, risk tolerances and liability requirements at the time of its next rebasing application. OEB staff supported Enbridge Gas's proposed approach.

SEC submitted that an interest-bearing bank account would provide an interest rate that is materially lower than Enbridge Gas's weighted average cost of capital, and the OEB should set the interest rate at the higher end of the actual bank rate or 5%. SEC stated that such an approach would fairly compensate ratepayers in the interim and incentivize Enbridge Gas to develop a long-term investment plan as soon as possible.

IGUA submitted that there is no reason to wait until the next rebasing application to identify appropriate investment vehicles that earn more than typical savings accounts. IGUA submitted that the OEB should direct Enbridge Gas to come forward in its next annual rate adjustment application with a proposal for low-risk investment options that will provide a return above savings account rates on funds set aside to cover future site restoration costs. Environmental Defence submitted that Enbridge Gas should be required to submit an investment policy in Phase 2 of the rebasing proceeding to ensure that the funds set aside are appropriately invested as soon as possible.

In its reply submission, Enbridge Gas disagreed with intervenors' suggestion that the OEB should direct Enbridge Gas to bring forward an investment policy for review earlier than the next rebasing application. Enbridge Gas maintained that the accelerated timelines proposed by the intervenors would limit Enbridge Gas's ability to develop a well-informed investment strategy that appropriately considers the investment goals, objectives, strategies, risk tolerances, time horizons, expected liability obligations and funding amounts collected from customers over the life of the portfolio. Enbridge Gas explained that sufficient time is required to develop a sound investment policy that meets the expected obligations as they come due and is in the best interest of both Enbridge Gas and ratepayers.

Enbridge Gas further stressed the importance of maintaining sufficient liquidity in the near term, which may be required to fund periodic shortfalls in amounts collected from customers compared to actual amounts spent, before a sizeable balance is accumulated. Enbridge Gas reiterated that its proposal to invest the funds in an interest-bearing bank account is an appropriate interim step to maintain liquidity and to avoid potential risk of investment losses from implementing a hasty, or inappropriate, investment strategy.

Enbridge Gas also disagreed with SEC's proposal to set the interest rate at the higher end of the actual bank rate or 5%. Enbridge Gas argued that there was no evidence in this proceeding to support an annual interest rate of 5%. Enbridge Gas submitted that arbitrarily selecting an interest rate unfairly burdens Enbridge Gas as it has no control over the interest rates set by Canadian financial institutions.

Findings

The OEB approves the establishment of the SRCVA as proposed by Enbridge Gas, subject to the OEB's findings relating to the proceeds from the disposition of depreciable property addressed in the next section of this Interim Rate Order. Regarding the OEB's direction to segregate monies collected through rates for site restoration beginning in 2024, the OEB is satisfied that Enbridge Gas's short-term strategy to invest in interest bearing accounts is appropriate. Enbridge Gas will provide its long-term investment strategy for the site restoration funds in the next rebasing proceeding taking into account the results of its short-term investment strategy.

Disposition of Property Deferral Account

The Phase 1 Decision approved the establishment of a deferral account to track any proceeds from property dispositions with the objective that non-depreciable property dispositions will be shared 50/50 between Enbridge Gas and ratepayers, and 100% of the benefits from depreciable property disposition continue to accrue to ratepayers.

Accordingly, in the updated draft rate order, Enbridge Gas proposed to establish the Disposition of Property Deferral Account (DPDA) to record 50% of the grossed-up after tax gain/loss resulting from the disposition of non-depreciable land. Enbridge Gas further proposed that 100% of the net proceeds from the disposition of depreciable buildings continue to benefit ratepayers and be recorded as a credit to the SRCVA.

OEB staff opposed Enbridge Gas's proposed approach of recording the net proceeds from the disposition of depreciable buildings in the SRCVA. Historically, Enbridge Gas debited 100% of the costs and credited 100% of the proceeds from the retirement or disposition of depreciable assets (including buildings) to accumulated depreciation, consistent with the treatment prescribed in the Uniform System of Account for Class A Gas Utilities. OEB staff was of the view that mixing costs and proceeds of depreciable assets in the SRCVA would increase the complexity of that account and distort the intended purpose. Accordingly, OEB staff submitted that the reference to the SRCVA should be removed from the accounting order for the DPDA.

SEC noted that the SRCVA is primarily for recording site restoration of utility pipeline infrastructure while the proceeds from the sale of a building are of a different nature. SEC submitted that the OEB should require Enbridge Gas to record the amounts in the proposed DPDA. LPMA suggested a similar approach stating that parties have not had an opportunity to question the difference between the two approaches (recording disposition proceeds in the SRCVA versus DPDA) at this time.

Enbridge Gas disagreed with OEB staff's position on where to record the disposition of depreciable buildings. Enbridge Gas submitted that the SRCVA is proposed to capture net salvage activity for 2024 and beyond, instead of being recorded as accumulated depreciation, such that any surplus in net recoveries over amounts incurred can be set aside to fund future net salvage liabilities. Enbridge Gas argued that the disposition of depreciable buildings should be consistent with the treatment of net salvage amounts realized on disposition or retirement of all other depreciable assets. Enbridge Gas noted that the consistent treatment of building net salvage amounts also creates a delineation between net salvage activity up to 2024 versus 2024 onwards, which could provide better clarity to the future review of net salvage amounts. According to Enbridge Gas, recording both pre-2024 and 2024 onward building net salvage amounts in accumulated depreciation obscures that delineation.

In the event that the OEB did not accept Enbridge Gas's position, Enbridge Gas stated that OEB's staff's proposal to follow the historic treatment would be more appropriate than intervenor suggestions that net proceeds from depreciable building dispositions be recorded in the DPDA.

With regards to comments received from SEC and LPMA that suggested that net proceeds on the disposition of depreciable buildings should be recorded in the DPDA, possibly for disposition, as opposed to the SRCVA, Enbridge Gas disagreed. Enbridge Gas submitted that net proceeds from depreciable buildings should not be disposed of through the DPDA because the proceeds may be needed to offset the undepreciated portion of a building upon disposition during its expected life, or to offset anticipated proceeds that were reflected and credited to ratepayers through prior net salvage depreciation rates. Enbridge Gas explained that returning proceeds through the DPDA could mean that a positive net book value for a building could be left in rate base that needs to be subsequently recovered.

Findings

The OEB approves the establishment of the DPDA with a modification to the operation of the account relative to Enbridge Gas's proposal. The OEB does not agree that net proceeds from depreciable property should be recorded as a credit to the SRCVA.

Historically, Enbridge Gas debited 100% of the costs and credited 100% of the proceeds from the retirement or disposition of depreciable assets, including buildings, to accumulated depreciation, consistent with the treatment prescribed in the Uniform System of Accounts for Class A Gas Utilities. Enbridge Gas has not provided a sufficient rationale to depart from this historical approach. These proceeds have not been previously credited against the large unfunded liability associated with site remediation. Mixing costs and proceeds of depreciable assets in the SRCVA would unnecessarily increase the complexity of that new account and distort its intended purpose to stop further growth in the unfunded liability.

The OEB directs Enbridge Gas to follow the historic approach and record 100% of the proceeds from disposition of depreciable assets to accumulated depreciation. Accordingly, the OEB has made changes to the wording of the accounting orders for the DPDA and the SRCVA. If Enbridge Gas has any concerns with the modification made to the SRCVA, it may file comments for the OEB's consideration.

Implementation

Enbridge Gas's February 16, 2024 draft rate order was based on January 1, 2024 rates as approved in the January 1, 2024 QRAM updated for the Phase 1 Decision. Enbridge Gas proposed to implement the interim 2024 rates and the rate adjustment rider on May 1, 2024. OEB staff supported an implementation date of May 1, 2024.

On March 15, 2024, Enbridge Gas filed an updated draft rate order that reflected the most recent rate changes from the April 2024 QRAM.[12] On April 9, 2024 Enbridge Gas filed a further update to portions of the draft rate order.

Findings

The OEB approves the updated draft rate order, with modifications to the DRPA and the SRCVA accounting order as described previously.

The OEB accepts Enbridge Gas's proposed approach for implementation of interim rates and approves an implementation date of May 1, 2024.

Enbridge Gas proposed a rate adjustment rider to recover the revenue variance between the approved effective date of January 1, 2024, and the implementation date of May 1, 2024. The proposed rate adjustment rider includes demand and/or volumetric charges, consistent with the rate design of each rate class. Enbridge Gas also proposed

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a one-time adjustment to recover the revenue variance from ex-franchise contract rate classes, consistent with past practice for the former Union Gas rate zones. The OEB approves Enbridge Gas's proposed approach to recover the forgone revenue from January 1, 2024 to April 30, 2024.

Cost Awards

On June 23, 2023, the OEB issued Procedural Order No. 6, in which it set out the process for filing interim cost claims, among other matters.

In its Decision and Order on Interim Cost Awards, dated August 18, 2023, the OEB granted interim cost awards to a number of intervenors.

The OEB will establish a process for final cost claims in a separate procedural order.