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**File No. 025001.00106**

November 25, 2024

**BY RESS**
**registrar@oeb.ca**

Ms. Nancy Marconi, Registrar
Ontario Energy Board
PO Box 2319
26th Floor, 2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Capital Power Corporation, Thorold CoGen L.P., Portlands Energy Centre L.P. dba Atura Power, St. Clair Power L.P., TransAlta (SC) L.P. (the "NQS Generation Group")**
**Application for Review of Amendments to the Independent Electricity System Operator ("IESO") Market Rules – EB-2024-0331 ("Application")**

On November 19, 2024, the Ontario Energy Board ("**OEB**") issued Procedural Order No. 1 ("**PO1**") setting out a variety of matters for the pre-hearing conference related to intervention and cost eligibility requests, cost responsibility, the issues list, evidentiary matters and the proceeding schedule. The NQS Generation Group is providing this letter and attachments to set out its position on each of these issues in advance of the pre-hearing conference.

The NQS Generation Group also provides the attached written submission in advance of the pre-hearing conference that expands on some of the issues below.

## 1. Cost Responsibility

The OEB is proposing in PO1 that the IESO will bear the OEB's costs of this proceeding and that the NQS Generation Group will bear its own costs as well as the costs of intervenors that are granted cost eligibility.

The NQS Generation Group strenuously objects to this proposal as there is no precedent for this arrangement. Prior cases have diverged on cost eligibility of applicants, but the OEB has ordered cost

responsibility upon the IESO in every proceeding related to a section 33 and 35 *Electricity Act, 1998* review, including OEB and eligible intervenor costs.[1]

Specifically, in PO1 the OEB cites EB-2013-0010/EB-2013-0029 for the proposition that applicants "should generally be expected to bear the regulatory costs associated with the market rule amendment process, as they represent their private commercial interests."

However, a review of the OEB's Decision on Cost Eligibility and Procedural Order No. 6 (issued March 4, 2013, and corrected March 5, 2013) reveals that this decision was made in the context of the RES Generators seeking to recover their own costs in connection with bringing their Section 33 application. The OEB rejected the RES Generators' request, finding that they have represented their private interests and consequently should bear their own costs.

The NQS Generation Group has not requested recovery of its own costs in this Application on the basis of this prior OEB decision.

Respectfully, the OEB's proposal for the NQS Generation Group to be responsible for intervenors' costs is a significant departure from prior decisions. The OEB has already rejected the IESO's argument on **several occasions** that applicants are responsible for paying the review proceeding costs, including when wind generators brought an application in EB-2013-0010/EB-2013-0029:[2]

> The IESO shall be responsible for the costs of this proceeding. The Board does not agree with the IESO that it would be "unjust" for the IESO to bear the cost of defending its market rule amendments. Rather, **the Board finds that having the IESO bear the costs of this proceeding is consistent with the overall legislative scheme. The review process under section 33 of the Electricity Act is part of the overall market rule amendment process**. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review. [Emphasis added]

[1] **Section 33 Review (Ramp Rate):** EB-2007-0040, Procedural Order No. 2, March 9, 2007, pg. 5, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/45099/File/document> [TAB 1]; EB-2007-0040, Decision and Order, April 12, 2007, pg. 28, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/381172/File/document> [TAB 2]; **Section 33 Review (Wind Gen):** EB-2013-0010/EB-2013-0029, Decision on Costs and Confidentiality Requests and Procedural Order No. 4, February 28, 2013, pg.6, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/384908/File/document> [TAB 3]; EB-2013-0010/EB-2013-0029, Decision on Cost Eligibility and Procedural Order No. 6, March 4, 2013, pg. 4, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/385249/File/document> [TAB 4]; EB-2013-0010/EB-2013-0029, Decision and Order on Cost Awards, April 29, 2013, pg. 4, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/394350/File/document> [TAB 5]; **Section 33 Review (AMPCO):** EB-2019-0242, Decision on Cost Responsibility & Cost Eligibility 3 November 12, 2019, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/658562/File/document> [TAB 6]; EB-2019-0242, Decision and Order on Cost Awards, February 26, 2020, pgs. 3-4, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/668860/File/document> [TAB 7]; **Section 35 Review (Resolute):** EB-2019-0206, Decision on Cost Responsibility and Cost Eligibility, February 5, 2020, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/666968/File/document> [TAB 8]; EB-2019-0206, Notice of Discontinuance & Costs Order, April 3, 2020, pg. 2, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/673601/File/document> [TAB 9].

[2] EB-2013-0010/EB-2013-0029, Decision on Costs and Confidentiality Requests and Procedural Order No. 4, February 28, 2013, pg. 6, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/384908/File/document> [TAB 3]

In ordering cost responsibility upon the IESO, the OEB has also previously held that the IESO has ongoing responsibility for operating the wholesale markets and it is appropriate that it also be responsible for dealing with issues associated with market operations and the underlying market rules.[3]

Considering the foregoing, the NQS Generation Group submits that the following sentence in PO1 requires the following modifications to properly align with the OEB decisions cited at footnote 2:

> However, in previous applications, the OEB determined that ~~applicants~~ **market participants** should generally be expected to bear the**ir own** regulatory costs associated with the market rule amendment process, as they represent their private commercial interests.

The NQS Generation Group submits that the IESO should bear the costs of this proceeding. The NQS Generation Group is of the view that this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments.[4]

Finally, and without limiting the foregoing, the Application also clearly raises public interest issues for the OEB's consideration. This includes, without limitation, the jurisdiction of the OEB in considering section 33 review applications as well as the relevance of IESO contracts to the OEB's section 33 review process. The NQS Generation Group notes that both APPrO and FirstLight have cited this issue explicitly in their requests for intervention. The NQS Generation Group should not be forced to bear the costs of the determination of these important public policy questions.

## 2. Intervention Requests

Assuming the OEB revises its determination on cost responsibility in the manner set out above, the NQS Generation Group takes the following positions on the intervention requests by HQ Energy Marketing Inc. ("**HQEM**"), the Consumers Council of Canada ("**CCC**"), the School Energy Coalition ("**SEC**"), H2O Power Limited Partnership ("**FirstLight**"), and the Association of Power Producers of Ontario ("**APPrO**"):

(a) HQEM does not have a substantial interest in this proceeding. The intervention request lacks specificity on what material interest of HQEM is within the scope of this proceeding. HQEM has not met the test under section 22.02 of the OEB *Rules of Practice and Procedure*.

(b) The NQS Generation Group takes no position on the intervention requests of FirstLight, APPrO, SEC, and CCC.

Should the OEB not revise its determination on cost responsibility in this matter, the NQS Generation Group reserves the right to object to all intervenors.

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[3] EB-2019-0206, Decision on Cost Responsibility and Cost Eligibility, February 5, 2020, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/666968/File/document> [TAB 8]

[4] EB-2019-0242, Decision on Cost Responsibility & Cost Eligibility 3 November 12, 2019, pg. 3, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/658562/File/document> [TAB 6]

## 3. Issues List and Scope of Proceeding

The NQS Generation Group filed a letter with the OEB on November 22, 2024 regarding this matter. We have no further submissions regarding the same.

## 4. Evidentiary Matters

The NQS Generation Group objects to the OEB's characterization of the information requests in Schedule A of the Application as being only related to the "out of market contracts" between the IESO and the NQS Generation Group.

The requested information is necessary for the OEB to assess the level of rigour and reasoning the IESO undertook to ensure the Market Rule amendments would not be unjustly discriminatory towards the NQS Generation Group or inconsistent with the purposes of the *Electricity Act, 1998* especially given the concerns raised by the NQS Generation Group prior to Market Rule publication.

Section 33 of the *Electricity Act, 1998* grants the power of "review" to the OEB for market rule amendments published by the IESO. Since "review" is unqualified in any way, it must be taken in its broadest sense that anything underlying, any information or documents relating to the IESO's decision to implement the Market Rule amendments are reviewable by the OEB.[5] The power to review includes the power for the OEB to reconsider and substitute its own opinion, as stated by the Ontario Court of Appeal:[6]

> On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loathe to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down.

The NQS Generation Group submits that the OEB must consider all relevant information to the Application from the IESO to discharge its "review" function, including the information requested at Schedule A of the Application. Ignoring evidence in a material way that affects the outcome of a decision can render the resulting decision unreasonable.[7]

Finally, the NQS Generation Group will not be providing an outline of the proposed evidence, as requested by the IESO, unless directed by the OEB. Notably, the IESO did not offer to provide an outline of its responding evidence and is already requesting an extension to the proceeding schedule for filing evidence. The NQS Generation Group is not requesting cost recovery from the OEB for its

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[5] *Saskatchewan Action Foundation v. Saskatchewan* (1992), 86 D.L.R. (4th) 57, [1992] 2 W.W.R. 97 7 (Sask. C.A.), at para 31, online: <https://www.canlii.org/en/sk/skca/doc/1992/1992canlii8300/1992canlii8300.pdf> [TAB 10]

[6] *Russell v. Toronto (City)*, 2000 CarswellOnt 4876, [2000] O.J. No. 4762, 101 A.C.W.S. (3d) 1188 (ONCA), at paras 14-15, leave to appeal to SCC refused: S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413, online: <https://www.canlii.org/en/on/onca/doc/2000/2000canlii17036/2000canlii17036.pdf> [TAB 11]

[7] *Suncor Energy Inc. v. Unifor, Local 707A*, 2016 CarswellAlta 921, 2016 ABQB 269, 2016 C.L.L.C. 220-043, 266 L.A.C. (4th) 1, 38 Alta. L.R. (6th) 381 (Alta. Q.B.), at para 88, online: <https://www.canlii.org/en/ab/abqb/doc/2016/2016abqb269/2016abqb269.pdf> [TAB 12]

evidence and the OEB has not yet ruled on the section 21 OEB Act request. The OEB can assess the relevance of the evidence to the issues in this proceeding once it is filed.

## 5. Procedural Schedule

The NQS Generation Group is proposing two modifications to the schedule proposed by the IESO on November 20, 2024. First, the NQS Generation Group requires disclosure of the materials requested in Schedule A of the Application well in advance of the filing date of its evidence. This disclosure will need to be provided with sufficient time for the NQS Generation Group to review, analyze, and incorporate into the evidence filing due December 11, 2024.

Second, as the applicant, the NQS Generation Group should have the final right of reply.[8] The OEB states that the burden of proof in demonstrating whether market rule amendments pass or fail the statutory tests in section 33(9) of the *Electricity Act* is on the applicant.[9] Courts have held that denying a complainant a right of reply is tantamount to procedural unfairness.[10] The NQS Generation Group submits that the OEB should make a similar finding here – procedural fairness dictates that the party bearing burden of proof should have the final right of reply.

| **Event** | **Date Proposed by OEB** | **Date Proposed by IESO** | **Date Proposed by NQS** |
|---|---|---|---|
| Pre-Hearing Conference | Nov 26, 2024 | Nov 26, 2024 | Nov 26, 2024 |
| IESO s. 21 Disclosure | | | Dec 4, 2024 |
| Applicant Evidence | Dec 11, 2024 | Dec 11, 2024 | Dec 11, 2024 |
| OEB staff and intervenor evidence | Dec 18, 2024 | Dec 18, 2024 | Dec 18, 2024 |
| IESO's responding evidence | Dec 31, 2024 | Jan 6, 2025 | Jan 6, 2025 |
| Technical Conference | Jan 6 - 7, 2025 | Jan 9 - 10, 2025 | Jan 9 - 10, 2025 |
| Hearing | Jan 13 – 15, 2025 | Jan 15 – 17, 2025 | Jan 15 – 17, 2025 |

[8] See for example, Canada Energy Regulator, OF-Fac-Oil-T260-2013-03 61 / OF-Fac-Oil-T260-2013-03 63, 9 July 2020, Ruling on Coldwater Indian Band (Coldwater) 7 July 2020 request for leave to file sur-reply, online: <https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3947810> [TAB 13]

[9] EB-2019-0242, Decision and Order - Application to review amendments to the market rules made by the Independent Electricity System Operator, January 23, 2020, pg. 8, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/665860/File/document> [TAB 14]

[10] *Islam v. Nova Scotia (Human Rights Commission)*, 2012 NSSC 67, at para 24, online: <https://www.canlii.org/en/ns/nssc/doc/2012/2012nssc67/2012nssc67.pdf>

| | | | |
|---|---|---|---|
| Deadline for Undertakings Responses | Jan 20, 2025 | Jan 20, 2025 | Jan 20, 2025 |
| Applicant's argument | Jan 27, 2025 | Jan 27, 2025 | Feb 10, 2025 |
| Staff and intervenor submissions | Feb 3, 2025 | Feb 3, 2025 | Feb 3, 2025 |
| IESO reply argument | Feb 10, 2025 | Feb 10, 2025 | Jan 27, 2025 |
| Presentation of oral argument | | Feb 14, 2025 | Feb 14, 2025 |
| OEB Final Decision | By Mar 7, 2025 | By Mar 7, 2025 | By Mar 7, 2025 |

Please contact the undersigned with any questions.

Yours truly,

**BORDEN LADNER GERVAIS LLP**

Colm Boyle

JV/CB

# INDEX

# Tab 1

Ontario Energy Board

Commission de l'Énergie de l'Ontario

**EB-2007-0040**

**IN THE MATTER OF** the *Electricity Act, 1998*, S.O.1998, c.15 (Schedule B);

**AND IN THE MATTER OF** an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

## PROCEDURAL ORDER NO. 2

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* seeking the review of an amendment to the market rules made by the Independent Electricity System Operator (the "IESO") on January 18, 2006. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market dispatch algorithm within the IESO-administered markets (the "Amendment").

On February 9, 2007, the Board issued its Notice of Application and Oral Hearing in relation to the Application. By Order dated February 9, 2007, the Board stayed the operation of the Amendment pending completion of the Board's review of the Amendment.

On February 16, 2007, the Board issued its Procedural Order No. 1. In addition to establishing the process and timelines for this proceeding, Procedural Order No. 1 also:

- identified the issues to be considered in this proceeding;
- indicated that cost awards would be made available in this proceeding to eligible intervenors, and solicited written submissions on the issue of the party from whom cost awards should be recovered; and
- directed the IESO to file materials associated with the development and adoption of the Amendment.

**Cost Awards: Party From Whom Cost Awards Should be Recovered**

In response to Procedural Order No. 1, four parties made submissions in relation to the issue of the party from whom cost awards should be recovered. The submissions may be summarized as follows.

The IESO submitted that the nature of this proceeding warrants a "costs follow the cause" approach, particularly in regard to responsibility for payment of intervenor cost awards. Both the merits of the application and the conduct of the parties throughout the proceeding are relevant considerations in assessing cost responsibility and eligibility of both the IESO and AMPCO. Accordingly, the Board should defer determination of the appropriate party from whom costs will be recovered until the merits of the application are decided:

- If the Board were to determine that the Amendment is deficient relative to the criteria listed in the *Electricity Act, 1998* (the "Act"), it may be appropriate for the IESO to be responsible for cost awards to eligible intervenors and there may in that case be "special circumstances" under which the Board could make AMPCO eligible for an award of costs and perhaps make the IESO responsible for payment of a cost award in AMPCO's favour. However, such an award should only be made in exceptional circumstances, as ordinarily the review process before the Board should be considered part of the customary regulatory costs which participants in the market incur and which are not passed along to others.

- If the Board were to uphold the Amendment, the normal rule that the applicant pays costs to eligible intervenors should prevail. The process undertaken by the IESO in relation to the Amendment was comprehensive and led to a fair result. Market participants have already paid for this review and ought not to have to pay again through cost awards against the IESO in favour of intervenors, and certainly not unless and until the amendment is found to be inconsistent with the objectives of the Act or unjustly discriminatory.

The IESO also submitted that, given the nature of this proceeding and the lack of prior experience with applications to review market rule amendments, the Board should leave open the possibility of ordering that each of the IESO and AMPCO bear its own costs.

AMPCO relied on the submissions made in its Application in relation to its request for eligibility for an award of costs and for those costs to be recovered from the IESO. AMPCO also expressed its objections to the IESO's approach, mentioned initially in the IESO's notice of intervention and more fully articulated in its written submissions as described above. Specifically, AMPCO argued as follows:

- cost awards are critical to AMPCO's ability to participate in Board proceedings affecting its membership;

- AMPCO's role in this proceeding is identical to its role as an intervenor in proceedings commenced by other parties and in relation to which it is normally eligible to apply for an award of costs; namely, to represent the direct interests of Ontario's large industrial consumers in relation to regulated services. However, in the instant case AMPCO had no choice but to proceed as an applicant to challenge the Amendment;

- the IESO is more akin to an applicant than to an intervenor in proceedings of this nature;

- the IESO's approach to cost awards will have the effect of stifling legitimate dissent and alternatives in an evolving wholesale market, particularly in cases where effective consultation was not achieved or carried out in a manner consistent with the IESO's own policies, and should be recognized by the Board as little more than an attempt to intimidate market participants into not questioning the actions of the IESO;

- the IESO's approach to cost awards is inconsistent with the accessibility inherent in the administrative tribunal structure, as tribunals for the most part do not find winners or losers but find what best serves the public interest;

- the IESO is not normally eligible for an award of costs under the Board's *Practice Direction on Cost Awards*; and

- the IESO already recovers its costs through Board-approved fees, and these costs (which are paid by market participants including AMPCO members) presumably include costs associated with the defence of market rule amendments, such that a cost award in favour of the IESO would appear to represent double recovery.

The Vulnerable Energy Consumers Coalition ("VECC") submitted that cost awards should be recovered from the IESO in a case such as this where the applicant would otherwise be considered eligible under the Board's *Practice Direction on Cost Awards* and where the subject of the application (the IESO) would not normally be considered eligible. To defer a decision on cost responsibility until after the determination of the application, as suggested by the IESO, would be unreasonable as AMPCO (or others that have no ability to recover the costs of a proceeding from ratepayers or market participants) would be exposed to the risk of unbearable costs. To defer a decision on the matter could also be seen to discourage parties from initiating applications to bring legitimate concerns to the Board. AMPCO can still ultimately be denied its costs, or held responsible for the costs of others, if the Board determines that AMPCO has been frivolous and/or vexatious in initiating the review. This should be sufficient to discourage parties from initiating wasteful applications.

The Association of Power Producers of Ontario ("APPrO") submitted that the costs of the application should be borne by the IESO and AMPCO equally. There should be a balance between a stakeholder's right to be heard on market rule amendments and the IESO's rights and obligations to develop market rules in the context of the applicable legislative framework. The Board should exercise its discretion in a way that does not inhibit market participants from challenging a rule amendment of considerable import and impact and that does not thwart the efficient operation of the sector by encouraging numerous and specious applications that frustrate the role of the IESO in developing and implementing market rules for the efficient operation of the sector. If the applicant

is required to pay where numerous parties intervene, costs may act as a prohibitive deterrent and frustrate the checks and balances of the Board's market rule review process. If the IESO is required to pay all of the costs, the number and frequency of challenges to rule amendments may increase and frustrate the intended processes and IESO operations for an efficiency and reliability sector. Such inefficiencies would ultimately be borne by consumers and generators that are required to pay the IESO's costs through uplift.

The Board has considered the submissions of the parties and has determined that it is not appropriate in this case to defer its decision on cost awards as requested by the IESO. The Board has also determined that cost awards in this proceeding should be recovered from the IESO. This is the first application of its nature that will be heard by the Board, and appears to raise legitimate issues for the Board's consideration in relation to the criteria set out in section 33(9) of the Act. The Board also notes that, as market participants, members of AMPCO are in fact participating in the funding of cost awards in this matter through their payment of the IESO's administrative costs in accordance with the market rules. As such, the Board considers that this is an appropriate case in which to exercise its discretion in a manner that differs from the more typical approach of stipulating that costs be recovered from the applicant. The fact that costs are to be recovered from the IESO in relation to this proceeding should not, however, be understood as tacit recognition that this should necessarily be the case in relation to all future market rule amendment review applications that may come before the Board. The Board also takes this opportunity to remind all of the parties that, as in all cases, parties are expected to act responsibly and that the Board retains discretion to address irresponsible or inappropriate participation through the cost award process.

**Cost Awards: Eligibility**

In addition to the IESO's submission that it should receive an award of costs in the event that AMPCO's application is unsuccessful, requests for cost eligibility have been received from AMPCO, VECC and APPrO. TransAlta Energy Corp. and TransAlta Cogeneration L.P. have reserved their right to apply for an award of costs should special circumstances arise in the proceeding.

VECC represents the interests of consumers and, as such, is normally eligible for an award of costs under the Board's *Practice Direction on Cost Awards*. The Board has determined that VECC is eligible for an award of costs in this proceeding.

AMPCO represents the interests of consumers and, on that basis and as an intervenor, would also normally be eligible for an award of costs under the Board's *Practice Direction on Cost Awards*. In this proceeding, however, AMPCO's status as the applicant would make it *prima facie* ineligible absent special circumstances. The Board has determined that, for the same reasons as expressed above in relation to the issue of cost recovery from the IESO, AMPCO is eligible for an award of costs in this proceeding.

APPrO represents the interests of generators and, on that basis, would normally not be eligible for an award of costs under the Board's *Practice Direction on Cost Awards* absent special circumstances. In support of its request for cost eligibility, APPrO noted that:

- it represents a critical public interest relative to the Board's mandate in ensuring sufficient reliable electricity supply;

- its members represent a distinct stakeholder group with a direct interest in the IESO markets and the Amendment;

- its participation will facilitate review of the Amendment and its impact on the matters referred to in the Board's objectives; and

- it has previously been found to be eligible to receive an award of costs.

APPrO has also reserved the right to apply for cost eligibility in light of any special circumstances that may arise as this proceeding develops. Generators constitute a class of participants in the IESO-administered markets that will be directly affected by the outcome of this proceeding. The Board believes that the views of generators with respect to the Amendment will be important to the Board's determination of how the Amendment may fare relative to the criteria set out in section 33(9) of the Act. Thus, the Board has determined that APPrO is eligible for an award of costs in this proceeding.

The Board's determinations as to the eligibility of VECC, APPrO and AMPCO for an award of costs is subject to any objections that the IESO may wish to make for consideration by the Board, in accordance with the deadline set out below for this purpose.

**Adequacy of the IESO's Filing**

In Procedural Order No. 1, the Board directed the IESO to file materials associated with the development and adoption of the Amendment. The IESO made its filing by the date required.

By letter dated March 2, 2007, AMPCO alleged that the IESO's filing is deficient in a number of respects. Specifically, according to AMPCO the following material appears to be missing from the IESO's filing:

i. all of the material in the IESO's possession, whether in the context of the ramp rate initiative, other initiatives such as the Day Ahead Commitment Process ("DACP"), the Day Ahead Market ("DAM"), or generally, that either supports or which the IESO has relied upon in suggesting that generators are currently under-compensated in Ontario's wholesale markets;

ii. material prepared by the IESO in the context of the DAM and/or the DACP initiative that directly relates to ramp rate;

iii. copies of all e-mail exchanges and other written communication between the IESO, stakeholders and their associations in relation to the Amendment or the subject matter of the Amendment;

iv. internal memos, e-mail and other written communication among IESO staff and between staff and the IESO Technical Panel and/or Board of Directors, stakeholders, their respective associations, the Ontario Energy Board, the Ontario Power Authority and the Province of Ontario; and

v. the transcript of Mr. David Butters presentation during the September 13, 2006 meeting of the Stakeholder Advisory Committee.

By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there is no merit to AMPCO's allegations and that the IESO has produced all of the materials required by the Board's Procedural Order No. 1. The IESO also provided a response with respect to each category of alleged deficiency identified by AMPCO.

*Items (i) and (v)*

In seeking the production referred to in item (i), AMPCO noted that the IESO has suggested that the ramp rate change is justified because it will, among other things, provide necessary extra revenue to generators that incur costs to provide ramping service, and provide incentives to generators to retain existing capabilities and invest in new ramping capabilities. In response, the IESO has stated that AMPCO's allegations misstate the IESO's position regarding justification for the Amendment, but that in any event it has no documentation that addresses the issue.

With respect to item (v) above, while denying the relevance of the transcript in question the transcript has now been provided by the IESO.

Accordingly, the Board does not believe that anything further is required in relation to these two items.

*Item (ii)*

In seeking the production referred to in this item, AMPCO noted that it is clear from both its own materials and from materials prepared by the IESO that generators or their association have linked their support for the IESO's DACP initiative to the removal of the 12x ramp rate. Generator support for the Amendment having been linked to the DACP, material prepared by the IESO in the context of the DAM and/or the DACP initiative that relates to ramp rate should also be produced. In response, the IESO denied the existence of a "conspiracy" in which the IESO has proposed the Amendment as a *quid pro quo* for generator support on another initiative, and further stated that the IESO has no materials in connection with the DAM or DACP "that are relevant to this proceeding".

In Procedural Order No. 1, the Board directed the IESO to file, among other things, "all materials prepared by the IESO in relation to the Amendment or the subject-matter of

the Amendment". The Board notes that materials prepared by the IESO in the context of the DAM or the DACP and that refer to the ramp rate issue fall within the ambit of materials "in relation to the subject matter of the Amendment" and should therefore be produced by the IESO if they exist. The Board recognizes, however, that the relevance of these materials to the criteria set out in section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Given the statutory deadline for making a determination on AMPCO's application and the imminence of the next steps in this proceeding, it is not feasible for the Board to hear submissions on and make a ruling with respect to the relevance of these materials prior to ordering their production. The Board would, however, like to receive written submissions on this issue in advance of the date of the oral hearing, which is scheduled to commence on March 29, 2007.

*Items (iii) and (iv)*

In seeking the production referred to in these items, AMPCO submitted that "materials prepared by the IESO in relation to the Amendment or the subject matter of the Amendment" includes internal memos, e-mail and other written communications. AMPCO also noted that the IESO's filing includes few if any copies of e-mail exchanges between the IESO and other stakeholders. Among other things, these exchanges could provide insight as to the origins of the Amendment and the considerations taken into account by the IESO to advance the Amendment as the preferred outcome. In response, the IESO stated that it is entirely inconsistent with the test set out in the Act, the issues list established by the Board and the 60-day timeline established by legislation for AMPCO to attempt to embark on a full-blown discovery exercise to obtain every individual note or e-mail created or received by an IESO staff member that mentions the ramp rate issue in any context. The IESO further stated that such material is entirely irrelevant to the merits of this proceeding, even if it was possible to locate.

The Board considers that the materials referred to in these items do, to the extent that they were prepared by the IESO and relate to the development or adoption of the Amendment, fall within the ambit of the production required by Procedural Order No. 1 and should therefore be produced by the IESO.

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

**THE BOARD ORDERS THAT:**

1. Any written objections that the Independent Electricity System Operator may wish to make in relation to the eligibility of the Association of Major Power Consumers in Ontario, the Association of Power Producers of Ontario or the Vulnerable Energy Consumers Coalition for an award of costs shall be filed with the Board and delivered to all parties on or before **Friday, March 16, 2007**.

2. The Independent Electricity System Operator shall file with the Board and deliver to all parties on or before **Friday, March 16, 2007**:

   i. a copy of any further materials that have not been produced to date and that are captured under headings "*Item (ii)*" or "*Items (iii) and (iv)*" above; or

   ii. written confirmation that no such further materials exist, if that is the case.

3. Any party that wishes to make written submissions on the issue of the relevance to this proceeding of materials that are captured under the heading "*Item (ii)"* above, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1, shall file those submissions with the Board and deliver a copy to all other parties on or before **Friday, March 23, 2007.**

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

**DATED** at Toronto, March 9, 2007.

ONTARIO ENERGY BOARD

*Original signed by*

Peter H. O'Dell
Assistant Board Secretary

# Tab 2

Ontario Energy Board

Commission de l'énergie de l'Ontario

**EB-2007-0040**

**IN THE MATTER OF** the *Electricity Act, 1998*, S.O.1998, c.15 (Schedule B);

**AND IN THE MATTER OF** an Application by the Association of Major Power Consumers in Ontario under section 33 of the *Electricity Act, 1998* for an Order revoking an amendment to the market rules and referring the amendment back to the Independent Electricity System Operator for further consideration, and for an Order staying the operation of the amendment to the market rules pending completion of the Board's review.

**DECISION AND ORDER**
**(Issued April 10, 2007 and as corrected on April 12, 2007)**

**BEFORE:** Gordon Kaiser
Presiding Member and Vice Chair

Pamela Nowina
Member and Vice Chair

Bill Rupert
Member

## The Application

On February 9, 2007, the Association of Major Power Consumers in Ontario ("AMPCO") filed with the Ontario Energy Board (the "Board") an Application under section 33(4) of the *Electricity Act, 1998* (the "Act") seeking the review of an amendment to the market rules approved by the Independent Electricity System Operator (the "IESO") on January 17, 2007. The Board has assigned file number EB-2007-0040 to the Application.

The amendment that is the subject matter of the Application is identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and relates to the ramp rate assumption used in the market pricing algorithm within the IESO-administered markets (the "Amendment").

The specific relief sought in the Application is the following:

- an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment;

- an order under section 33(9) of the Act revoking the Amendment and referring the amendment back to the IESO for further consideration; and

- an award of costs, such costs to be payable by the IESO.

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

Under section 33(6) of the Act, the Board is required to issue an order that embodies its final decision in this proceeding within 60 days after receiving AMPCO's application.

This is the first application of its kind to proceed to a hearing before, and a decision by, the Board. An earlier application by a different applicant and in relation to a different amendment to the market rules was subsequently withdrawn.

Although the Board has considered the entirety of the record in this proceeding, the Board has summarized the record only to the extent necessary to provide context for those findings.

**The Amendment**

The Amendment relates to the calculation of the energy price (the market clearing price or "MCP" that is calculated in five-minute intervals) in the real-time energy market administered by the IESO and, more specifically, to a change (from 12x to 3x) in the assumption that is made about the ramping capabilities of generation facilities when determining market prices.

The algorithm that is used to compute MCP – known as the "market schedule" and sometimes referred to as the unconstrained schedule – contains a parameter (the "TradingPeriodLength") that specifies the ramp rate multiplier to be used in determining energy market prices. Ramp rate, which is usually expressed in MW per minute, indicates how quickly the output of a generation facility can be increased or decreased.

Prior to the Amendment, the market rules authorized the IESO (then known as the Independent Electricity Market Operator or IMO)[1] to establish the "TradingPeriodLength" parameter for the pricing algorithm but did not define its value. Prior to market opening, the value of the parameter was set at 60 minutes, which is the equivalent of a 12x ramp rate. Most generation facilities, and in particular those that typically set market prices, can change their output from minimum levels to full output in roughly one hour. The result of the 12x ramp rate multiplier is that the market schedule has since market opening assumed that generation facilities are able to ramp output up or down 12 times faster than is, in fact, the case. It is widely acknowledged that use of the 12x ramp rate multiplier was implemented as a temporary solution to address extreme price excursions that were experienced during testing prior to opening of the wholesale market.

Further examination of the ramp rate multiplier issue was initiated by the IESO in December, 2005. Stakeholder consultations ensued, principally through the Market Pricing Working Group as well as through the IESO's Stakeholder Advisory Committee.

At the end of this examination, the IESO proposed to amend the market rules by setting the value of the "TradingPeriodLength" parameter at 15 minutes, which is the equivalent of a 3x ramp rate. To that end, on December 27, 2006, the IESO published the Amendment for comment. Five submissions were received in response; one from AMPCO opposing the Amendment and four from generators supporting the Amendment as a move in the right direction albeit not as the preferred solution. The Board of Directors of the IESO approved the Amendment on January 17, 2007, and it was published on January 19, 2007. The Amendment was scheduled to go into effect on February 10, 2007, the earliest date permitted by section 33(1) of the Act.

[1] For convenience, this Decision and Order will refer throughout to the IESO even though, at the time relevant to the point under discussion, it may have been called the IMO.

Once implemented, the Amendment would result in the market schedule assuming that generation facilities are able to ramp output up or down 3 times faster than is, in fact, the case.

It is to be noted that the 3x ramp rate multiplier relates solely to the calculation of energy prices. The physical dispatch algorithm (known as the "real-time schedule" and sometimes referred to as the constrained schedule), which is used by the IESO to dispatch facilities to meet market demand in any given interval, reflects the actual ramping capabilities of generation facilities (in other words, the value of the "TradingPeriodLength" parameter is set at 5 minutes, equivalent to a 1x ramp rate).

The role played by, and the impact of, the ramp rate multiplier in the determination of real-time energy prices is discussed further below under the heading "Pricing and Dispatch in the Real-time Energy Market".

**The Proceeding**

A brief description of the issues and the orders issued by the Board is summarized below.

1. *Stay of Operation of the Amendment*

The Amendment had an effective date of February 10, 2007. AMPCO's arguments in support of its application for an order under section 33(7) of the Act staying the operation of the Amendment pending completion of the Board's review of the Amendment were that: (i) it is in the public interest to order the stay; (ii) there are legitimate concerns with respect to the Amendment that should be considered by the Board; and (iii) the balance of convenience favours a stay.

On February 9, 2007, the IESO filed a letter with the Board indicating that it consented to the stay of the operation of the Amendment, such consent being without prejudice to any arguments that the IESO might make in relation to the Board's review of the Amendment. The IESO noted that it had given due consideration to the balance of convenience and the short duration of the stay given the Board's statutory deadline for completion of its review of the Amendment.

By Order dated February 9, 2007, the Board stayed the operation of the Amendment pending completion of the Board's review of the Amendment and issuance by the Board

of its order embodying its final decision on AMPCO's application for review of the Amendment. The Board noted in particular that the balance of convenience favoured a stay of the operation of the Amendment, particularly given the long history of the ramp rate issue in the IESO-administered markets.

*2. Intervenors*

The following parties requested and were granted intervenor status in this proceeding: the Association of Power Producers of Ontario ("APPrO"); Coral Energy Canada Inc. ("Coral Energy"); the Electricity Market Investment Group ("EMIG"); Hydro One Networks Inc. ("Hydro One"); the IESO; Ontario Power Generation Inc. ("OPG"); TransAlta Energy Corp. and TransAlta Cogeneration L.P. (collectively "TransAlta"); TransCanada Energy Ltd. ("TransCanada"); and the Vulnerable Energy Consumers Coalition ("VECC").

In addition, the Board received on March 30, 2007 a letter of comment filed by Constellation Energy.

3. *Procedural Order No. 1*

On February 16, 2007, the Board issued its Procedural Order No. 1. In addition to establishing the process and timelines for this proceeding, Procedural Order No. 1 also:

- indicated that cost awards would be made available in this proceeding to eligible intervenors, and solicited written submissions on the issue of the party from whom cost awards should be recovered;

- directed the IESO to file materials associated with the development and adoption of the Amendment; and

- identified the following as the issues to be considered in this proceeding:

    (i) is the Amendment inconsistent with the purposes of the Act?

    (ii) does the Amendment unjustly discriminate against or in favour of a market participant or a class of market participants?

4. *Cost Awards*

Requests for eligibility for an award of costs were made by AMPCO, VECC and APPrO. TransAlta reserved its right to apply for an award of costs should special circumstances arise in the proceeding. In its letter of intervention, the IESO also indicated that it would seek an award of costs.

In response to Procedural Order No. 1, four parties made submissions in relation to the issue of the party from whom cost awards should be recovered. The submissions are summarized in the Board's Procedural Order No. 2 issued on March 9, 2007.
The Board determined that cost awards in this proceeding should be recovered from the IESO, for the reasons stated in Procedural Order No. 2. The Board also determined that VECC, APPrO and AMPCO are eligible for an award of costs in this proceeding, subject to any objections that the IESO might wish to make for consideration by the Board. By letter dated March 16, 2007, the IESO indicated that while it accepts and respects the Board's decision regarding cost eligibility, it reserved the right to ask the Board to limit the amount of costs recoverable by parties objecting to the Amendment in the event that it appears, at the end of the proceeding, that some or all of the grounds for the objection ought not to have been advanced.

5. *Production of Materials by the IESO*

As noted above, among other things Procedural Order No. 1 directed the IESO to file materials associated with the development and adoption of the Amendment. By letter dated March 2, 2007, AMPCO alleged that the IESO's filing in response to Procedural Order No. 1 was deficient in a number of respects. By letter also dated March 2, 2007, the IESO replied to the allegations contained in AMPCO's letter, stating that there is no merit to AMPCO's allegations and that the IESO had produced all of the materials required by Procedural Order No. 1.

In its Procedural Order No. 2, the Board among other things ordered the IESO to produce certain materials, including material prepared by the IESO in the context of the Day Ahead Commitment Process and/or the Day Ahead Market initiative that directly relates to ramp rate (the "DAM/DACP Materials"). In ordering the IESO to produce the DAM/DACP Materials, the Board expressly recognized that the relevance of those Materials to the criteria set out in section 33(9) of the Act, which form the basis of the issues list set out in Procedural Order No. 1, is not clear. Procedural Order No. 2 thus also invited parties to make submissions on the issue of the relevance to this

proceeding of the DAM/DACP Materials, and more specifically to the criteria set out in section 33(9) of the Act and the issues list set out in Procedural Order No. 1.

On March 12, 2007, the IESO filed a letter with the Board in response to Procedural Order No. 2. In that letter, the IESO stated that the nature and extent of the task involved in satisfying the document production requirements of Procedural Order No. 2 makes completion of the task within anything remotely close to the specified timeframe completely impractical. Without waiving any of its rights or accepting the relevance to this proceeding of the materials identified in Procedural Order No. 2, the IESO put forward a proposed plan to meet the Board's information requirements within the requisite timeframes. On March 14, 2007, AMPCO filed a letter with the Board expressing its concerns regarding the IESO's proposed plan. The concerns related principally to the scope of the IESO's production in respect of the subject matter and time period to be covered.

On March 14, 2007, the Board issued its Procedural Order No. 3. The effect of Procedural Order No. 3 was to revise the nature of the production required of the IESO under Procedural Order No. 2, generally in line with the proposed plan submitted by the IESO in its letter of March 12, 2007 but with the exception that the production should cover a longer period than that proposed by the IESO.

6. *Technical Conference*

Procedural Order No. 1 made provision for a technical conference to be held in this proceeding. On March 20, 2007, and in response to inquiries received by certain parties, Board staff communicated with the parties to confirm whether they wished to proceed with the technical conference. Based on the responses received to that communication, the Board decided to cancel the technical conference and the parties were so advised by Board staff on March 21, 2007.

7. *Submissions on the "Relevance Issue"*

On March 21, 2007, AMPCO filed with the Board a letter setting out a proposal for submissions on the issue of the relevance of certain materials to this proceeding. As noted above, in its Procedural Order No. 2 the Board invited parties to make submissions on the relevance of the DAM/DACP Materials. AMPCO's proposal, made with the consent of the IESO, was to the effect that AMPCO would provide the Board and all parties with a "comprehensive submission on the relevance of materials

produced by the IESO in relation to a central theme contained in AMPCO's application: "that the Amendment violates fundamental principles of procedural fairness". The proposal also suggested that, rather than filing submissions in accordance with Procedural Order No. 2, parties should await production of AMPCO's comprehensive submission and respond to that document.

On March 22, 2007, the Board issued its Procedural Order No. 4 setting out the timeframe for the filing of AMPCO's submissions on relevance. The Board encouraged intervenors to make written submissions in response to those of AMPCO but, given the imminence of the commencement of the oral hearing, indicated that it would allow all intervenors to make oral submissions on the relevance issue at the beginning of the oral hearing.

Written submissions on relevance were filed by AMPCO, the IESO, APPrO and Coral Energy. The positions of the parties are summarized below under the heading "The Board's Mandate".

8. *The Oral Hearing and Final Written Argument*

The Board held an oral hearing in this proceeding, commencing on March 29, 2007 and concluding on March 30, 2007. The first day of the hearing was devoted almost exclusively to submissions by the parties on the "relevance issue", as described in greater detail below under the heading "The Board's Mandate". On the second day of the hearing, witnesses gave evidence on behalf of AMPCO, the IESO, APPrO and TransCanada, principally in relation to the nature and impact or effect of the Amendment. The position of the parties in this regard is discussed in greater detail below under the heading "The Impact of the Amendment".

During the hearing, proposals were also made by certain of the parties in relation to the filing of final written argument, and these were accepted by the Board. AMPCO filed its final written argument on April 2, 2007. VECC filed its final written argument on April 3, 2007. The following parties filed their final written argument on April 4, 2007: the IESO; APPrO; and TransCanada. OPG filed a letter with the Board indicating its support for the final argument filed by APPrO. Coral Energy did not file final written argument, but did indicate during the oral hearing that it would address the substantive issues associated with the Amendment through APPrO. AMPCO filed its written reply argument on April 5, 2007.

**The Board's Mandate**

The "relevance issue", as it has been referred to in this proceeding, arose initially in relation to the DAM/DACP Materials. As stated in Procedural Order No. 4, the issue is relevance of materials – and hence of the position or argument that the materials support – relative to the criteria set out in section 33(9) of the Act. This issue, of necessity, requires consideration of the scope of the Board's mandate on applications to review amendments to the market rules under section 33 of the Act.

As the proceeding progressed, it became clearer that AMPCO's views as to the scope of the Board's mandate differs markedly from the views of other parties. A number of the concerns raised by AMPCO regarding the Amendment relate not to the impact or effect of the Amendment, but rather to the process by which the Amendment was made by the IESO. Many of the materials filed by the IESO in response to the Board's Procedural Orders are relevant to those concerns, but have little or no relevance to the issue of the impact or effect of the Amendment.

The position of the parties in relation to the scope of the Board's mandate, as expressed in the written submissions filed in response to Procedural Order No. 4 and/or in oral submissions made at the commencement of the oral hearing, may be summarized as follows.

AMPCO's position is that the Board's mandate is not limited to the grounds set out in section 33(9) of the Act. Rather, the Board has a "plenary review jurisdiction" that would allow the Board to address what AMPCO alleges as significant failures of procedural fairness by the IESO. In support of its position, AMPCO referred to and relied on sections 33(4), 33(5) and 33(6) of the Act, on section 19(4) of the *Ontario Energy Board Act, 1998*, on the Board's authority to determine all questions of law and fact in all matters within the Board's jurisdiction, and on the Board's public interest role. On that basis, in AMPCO's view the criteria expressed in section 33(9) of the Act are better understood as the two instances in which the legislature has directed the Board on how it must exercise its review discretion, leaving the Board otherwise able to exercise its review discretion as the Board sees fit.

By contrast, the position of the IESO, APPrO, Coral, OPG and TransCanada is that the Board's mandate is limited by section 33(9) of the Act to a determination of whether (a) the amendment is inconsistent with the purposes of the Act; or (b) the amendment unjustly discriminates against or in favour of a market participant or a class of market

participants. On that basis, whether the IESO has, and breached, a common law duty of procedural fairness or acted in a manner giving rise to a reasonable apprehension of bias (both of which allegations were denied by the IESO), are not matters for consideration by the Board on a market rule amendment review application under section 33 of the Act. Materials produced by the IESO that are relevant only to the IESO's processes in making the Amendment should therefore be disregarded. The IESO also specifically requested that the Board strike AMPCO's March 26, 2007 submission from the record.

On March 29, 2007, the Board rendered an oral decision on this issue. Specifically, the Board determined that its mandate under section 33 of the Act is limited to an examination of the market rule amendment against the criteria set out in section 33(9) the Act. The Board also ordered that any evidence relating to the IESO's stakeholdering process, including AMPCO's March 26, 2007 submission, be struck from the record. An excerpt from the transcript of the oral hearing that contains the Board's decision and order in this regard is set out in Appendix A to this Decision and Order.

The parties agreed to, and filed with the Board, a list of the materials affected by the Board's decision (i.e., those to be struck from the record and those to remain on the record).

**The Impact of the Amendment**

It remains for the Board to determine whether the Amendment is inconsistent with the purposes of the Act or unjustly discriminates against or in favour of a market participant or a class of market participants.

A brief summary of the position of the parties is set out below, followed by the Board's findings.

In order to better understand the position of the parties, however, it is necessary to provide some further context around the setting of prices in the IESO-administered energy market and the role that the ramp rate multiplier plays, if only at a high and simplified level.

1. *Pricing and Dispatch in the Real-time Energy Market*

The MCP, which is calculated in five-minute intervals, is determined using a market schedule (pricing algorithm) that calculates the price based on the most economical offers submitted by generators that would satisfy the demand for energy in a particular five-minute interval. Dispatchable generators receive the MCP for their output, and dispatchable loads pay MCP for the energy they consume. All other generators and loads receive or pay, respectively, the Hourly Ontario Energy Price ("HOEP"). HOEP is a simple average of the 12 MCPs determined for the hour. Ontario currently has a uniform pricing system and MCP (and thus HOEP) are the same everywhere in the province. The introduction of locational marginal pricing for the province, which has long been the subject of discussion, is not expected to occur at least in the short term. However, the IESO does calculate what the prices would be in different locations were locational marginal pricing to be in place. These are referred to as "shadow prices".

Three aspects of the market schedule are of particular relevance to this proceeding:

- the market schedule is "myopic", in that it ignores expected demand in future intervals and sets the MCP based solely on demand conditions in each five-minute interval;

- the market schedule ignores transmission constraints, and assumes for pricing purposes that the cheapest available generation facility anywhere in Ontario is available to satisfy demand in any interval when, in fact, it may be unavailable due to transmission constraints; and

- the market schedule assumes for pricing purposes that generation facilities are able to ramp output up or down faster than they might actually be able to do so (by a factor of 12 currently or by a factor of 3 under the Amendment).

By contrast, the algorithm used by the IESO to dispatch facilities has the following characteristics:

- the dispatch algorithm has, since 2004, incorporated multi-interval optimization ("MIO"), which "looks ahead" to expected demand in future five-minute intervals;

- the dispatch algorithm takes account of all physical constraints on the system; and

- the dispatch algorithm respects the actual ramping capabilities of generation facilities.

The result is that MCP does not necessarily reflect what the prices would have been had the prices been determined on the basis of the offers submitted by generation facilities that are actually dispatched to provide energy to meet demand in a given five-minute interval. The ramp rate multiplier allows the market schedule to set prices on the basis of generation facilities that are cheaper but unavailable due to actual ramping restrictions, and as a result reduces both price volatility and the average level of prices. The same can be said for the market schedule assumption that the system is unconstrained.

A consequence of the lack of complete alignment between the pricing algorithm and the dispatch algorithm is that generation facilities that were assumed by the market schedule to be supplying energy in a five-minute interval might not in fact be dispatched due to the presence of transmission or ramping constraints. A generation facility may have to be dispatched even though it had offered to supply electricity at a price that is higher than HOEP. These generation facilities will be "constrained on", and under the market rules are entitled to an additional payment referred to as a Congestion Management Settlement Credit ("CMSC") payment. Similarly, when a cheaper generation facility is not dispatched due to the presence of transmission constraints or because it can ramp down more quickly than a more expensive generation facility, the cheaper facility will be "constrained off" and also entitled to a CMSC payment. In both cases, the CMSC payment reflects the difference between HOEP and the offer made by the generation facility that has been constrained on or constrained off, as the case may be. CMSC payments are not reflected in the energy price, but are recovered through uplift charges from wholesale market participants on a pro-rata basis based on their energy consumption at the time at which the CMSC payments were incurred.

*2. Position of the Parties on the Impact of the Amendment*

The following summary is based principally on the final arguments filed by the parties. For the most part, these largely reflect the tenor of each party's participation in this proceeding.

The position of the parties to this proceeding fall into two distinct camps: AMPCO and VECC oppose the Amendment while the IESO, APPrO, Coral Energy (through APPrO),

OPG and TransCanada support it. The letter of comment received from Constellation Energy also supports the Amendment. TransAlta was not an active participant in this proceeding, but is one of the generators that indicated its support for the Amendment as an interim solution in response to the IESO's request for submissions referred to above. EMIG (of which Coral Energy and Constellation Energy Group Inc. are members) was also not an active participant in this proceeding, but noted in its letter of intervention its belief that "in order to support new private investment in generation, Ontario must transition towards a competitive market where prices reflect the true cost of power". Hydro One did not take a position in this proceeding.

A number of the arguments made by AMPCO and VECC challenge the validity or reliability of the IESO's assessment of the costs and benefits associated with the Amendment, and are therefore better understood if the position of the parties supporting the Amendment is presented first.

Parties Supporting the Amendment

Active participants in this proceeding that support the Amendment assert that the Amendment is consistent with the purposes of the Act and does not unjustly discriminate against or in favour of a market participant or a class of market participants. Certain parties have added that the evidence in this proceeding is overwhelmingly to that effect.

The IESO's position is that the Amendment is consistent with, and will promote, a number of the purposes of the Act. Specifically, the IESO submits that the Amendment will: enhance overall reliability, better protecting the interests of consumers in that regard (sections 1(a) and 1(f) of the Act); encourage conservation and demand management (sections 1(b) and 1(c) of the Act); promote economic efficiency (section 1(g) of the Act); and cultivate a financially viable electricity industry (section 1(i) of the Act). According to the IESO, the Amendment will contribute to the achievement of these objectives by: more closely aligning the dispatch and pricing algorithms; resulting in more accurate price signals for consumers and producers; reducing uneconomic exports out of Ontario with resulting efficiency gains realized through the mechanism of export arbitrage; providing immediate efficiency gains for the Province; reducing fossil fuel generation; and achieving a significant improvement in efficiency for the Ontario market.

The IESO further submits that the Amendment, a superior solution to the available alternatives (including incorporation of MIO in the pricing algorithm), will be simple and inexpensive to implement and will achieve the noted benefits with minimal, if any, impact on average prices for consumers. The IESO has estimated that the impact of the Amendment on HOEP will be an average 2.6 percent increase. However, the IESO has also estimated that the impact on consumer bills will be mitigated by: the export arbitrage response that is expected to follow implementation of the Amendment; the global adjustment; the rebate that is currently paid out on revenues earned by OPG on its non-prescribed assets (the "OPG Rebate"); savings in CMSC payments; and savings in Intertie Offer Guarantee payments (these being payments made to importers to reduce price risks for imports that result from the fact that they are scheduled based on pre-dispatch prices but settled on the basis of real-time prices). After accounting for such mitigation, and based on 2006 market prices, the impact of the Amendment would, according to the IESO, vary from a net cost of $6.68 million or 0.004 cents/kWh (assuming an export arbitrage response of 50%, which the IESO considers conservative) to a net saving of approximately $13 million or 0.008 cents/kWh (assuming an export arbitrage response of 100%). As a supplementary mitigation measure, the IESO intends to disburse surplus funds from the transmission rights clearing account (the "TR Clearing Account") over 12 consecutive months to begin in conjunction with implementation of the Amendment.

With respect to the issue of unjust discrimination, the IESO argues that discrimination, in the context of a market for electricity, refers to economic discrimination. As such, more must be involved than an economic advantage accruing to one party rather than the other. The IESO further states that, by lessening subsidies and better aligning prices and dispatch costs, the Amendment plainly lessens inappropriate economic treatment of market participants.

Similar to the IESO, APPrO submits that improvements resulting from implementation of the Amendment are consistent with the purposes set out in sections 1(b), 1(c), 1(f), 1(g) and 1(i) of the Act. According to APPrO, the Amendment addresses many of the challenges and inefficiencies resulting from the use of the 12x ramp rate multiplier by creating just price signals for generators and loads, and does so with minimal, if any, customer cost impacts. APPrO also argues that the effects resulting from the 12x ramp rate multiplier are prejudicial to, and discriminate against, consumers and suppliers. APPrO states that, by more closely aligning the pricing algorithm with the dispatch algorithm, the Amendment would mitigate those prejudicial and discriminatory effects

(such effects including that consumers are not paying the true cost of the electricity they consume and are paying for inefficiencies through uplift charges).

TransCanada's position is that the Amendment will improve the operation of Ontario's competitive electricity market and, since many of the purposes of the Act have as their object the promotion of a competitive market, improvements to the market support the purposes of the Act. According to TransCanada, by moving the market closer to real prices, the Amendment will also specifically encourage conservation (section 1(b) of the Act) and promote the use of cleaner energy sources (section 1(d) of the Act). TransCanada also submits that market efficiency will be promoted by: more closely aligning the pricing and dispatch algorithms; increasing the internal consistency of the market rules; improving price signals and inducing more efficient investment; and improving price transparency and reducing less transparent uplift payments (by reducing CMSC payments). While not a perfect solution, in TransCanada's view the Amendment represents an important step in the right direction.

On the issue of unjust discrimination, TransCanada agrees with the view expressed by Coral Energy in submissions made before and during the oral hearing to the effect that "unjust" discrimination equates with "inefficient" discrimination.

Parties Opposing the Amendment

AMPCO and VECC take the position that the Amendment fails when considered in light of the criteria set out in section 33(9) of the Act, and should therefore be revoked and referred back to the IESO for further consideration.

AMPCO's position is that the Amendment is inconsistent with certain of the purposes of the Act. The purposes of the Act that underlie this position are: (i) ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand (section 1(a) of the Act); and (ii) protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service (section 1(f) of the Act). AMPCO also submits that the Amendment unjustly discriminates against consumers (by increasing prices) and in favour of generators (by providing "windfall profits" to generators – such as nuclear generators – that are unable to respond quickly to changing demand conditions).

In support of its position, AMPCO submits that the IESO is not at liberty to pick and choose the purposes of the Act that it will further while ignoring others in favour of perceived improvements in efficiency. The Act does not assign differing weights or priorities to the various purposes of the Act and, if anything, the protection of the interests of consumers has been given priority.

AMPCO also submits that the IESO's estimates of the costs and benefits of moving to a 3x ramp rate multiplier in terms of determining the wealth transfer implied by the Amendment are unreliable. According to AMPCO, the efficiency gains flowing from the Amendment, as articulated by the IESO and other parties, are: (i) not supported by economic theory having regard to the "Theory of the Second Best"; (ii) based on the mistaken view that uneconomic exports are principally the result of the 12x ramp rate multiplier rather than being largely attributable to Ontario's uniform pricing structure; and (iii) overstated. AMPCO states that, by contrast, the impact of the Amendment on consumers – a price impact variously estimated by the IESO at approximately $225 million, $197 million, $112 million and $100 million depending on whether the effect of arbitrage is taken into account – has been understated. AMPCO notes that a number of the price mitigation mechanisms identified by the IESO are of short (the OPG Rebate and the disbursement of funds from the TR Clearing Account) or uncertain (the global adjustment) duration or are speculative (export arbitrage), and a longer term price mitigation strategy is required. AMPCO also notes that the 3x ramp rate multiplier solution is inferior to incorporation of MIO in the pricing algorithm, which is a superior solution that could be implemented at a modest cost, and is not the preferred option identified by any market participant.

In its reply argument, AMPCO submits that the evidence in this proceeding does not, contrary to the position expressed by APPrO, answer the question of whether the Amendment will result in a HOEP that more closely approximates the price that would result were the pricing and dispatch algorithms perfectly aligned. AMPCO also submits that the evidence does not address what the "true cost" of electricity might be, nor how such notion compares based on the current HOEP versus HOEP calculated on the basis of the Amendment. Moreover, given the hybrid nature of the market, prices are not in AMPCO's view expected to have more than a marginal impact on investment decisions. AMPCO also notes that, contrary to the view articulated by TransCanada, the Act does not have as one of its objectives the promotion of a competitive market.

VECC's position is that the Amendment unjustly discriminates against consumers because it results in a pricing algorithm that moves away from, rather than towards, the

prices generated by the IESO's dispatch algorithm, resulting in overall inefficiency in the setting of HOEP by unjustifiably increasing the prices consumers pay on a province-wide basis. While agreeing that the Board's role is not to "remake" the IESO's decision in relation to the Amendment, VECC submits that the Board must determine whether the decision-making process was sound and led to a reasonable result in that: the issue was clearly defined; the criteria used by the IESO were comprehensive and consistent with the purposes of the Act; and the criteria were applied on a consistent and balanced basis throughout the decision-making process. VECC argues that the IESO's characterization of the issue changed over time from a focus on the differences between the pricing algorithm and the dispatch algorithm to a focus on inefficient exports. According to VECC, there is no confidence that the Amendment is the best way to address the newly framed issue without unjustly discriminating against consumers. In VECC's view, the IESO should therefore be directed to reconsider alternative solutions to the inefficient export issue that do not unjustly discriminate against consumers by inexplicably raising domestic prices.

VECC also expressed concern regarding use of the IESO's cost/benefit analysis as the measure of economic efficiency for changes in rules dealing with the market schedule and the determination of energy prices, noting that: uneconomic exports are largely the result of the fact that Ontario has uniform pricing; the IESO has narrowly redefined the issue of economic efficiency as reducing exports to New York; certain of the benefits that the IESO has identified in relation to the Amendment are unsubstantiated; and any amendment to the market rules that increased market prices would be judged as economically efficient when based on the IESO's analytical framework.

3. *Position of the Parties on the Burden of Proof*

An issue that arose most squarely in the exchange of final written argument is the question of which party bears the burden of proof in an application under section 33 of the Act.

Certain references in the IESO's final written argument make it clear that, in the IESO's view, in an application under section 33 of the Act the burden of proof is on the applicant to demonstrate that the market rule amendment is inconsistent with the purposes of the Act or is unjustly discriminatory.

AMPCO takes a different view, and submits that the burden of proof is ultimately on the IESO to show that the market rule amendment at issue in fact satisfies the test to be

applied by the Board as set out in section 33(9) of the Act. In support of that view, AMPCO notes that a market rule amendment review is fundamentally different from a more typical proceeding before the Board in that, among other things, applicants have no ability to pursue the relief of their choice by seeking an alternative or different amendment to the one adopted by the Board of Directors of the IESO. AMPCO also notes that the 60-day timeline within which the Board must issue its order on an application under section 33 of the Act supports AMPCO's position on the burden of proof issue. It would be patently unreasonable to expect that any applicant could develop a traditional applicant's filing complete with a full array of econometric and other analyses in the time allowed.

4. *Board Findings*

a. The Burden of Proof

In applications before the Board, the burden of proof is typically on the applicant to satisfy the Board that the requested relief should be granted. The Board certainly expects that the IESO will participate fully in proceedings relating to applications under section 33 of the Act in support of the amendment that is under review. However, the Board has heard no compelling reason that would cause it to take a different approach and place the burden of proof on the IESO in the circumstances of this case.

b. The Merit of Addressing the 12x Ramp Rate Multiplier Issue

Before turning to an examination of the impact or effect of the Amendment, the Board considers it useful to provide further context regarding the history and impact of the 12x ramp rate multiplier in the marketplace. Several parties noted that, as the wholesale market was designed for implementation at market opening, inputs to both the pricing algorithm and the dispatch algorithm were aligned in relation to the value to be used to reflect the ramping capabilities of generation facilities (in both algorithms, the value of the "TradingPeriodLength" was set at 5 minutes). To this day, that remains the case for the dispatch algorithm. As noted above, however, prior to market opening the market rules were amended to allow the IESO to set a different value for the "TradingPeriodLength" parameter in the pricing algorithm as a temporary measure to address extreme real-time price excursions that occurred during market testing. This is reflected in the "Explanation for Amendment" contained in market rule amendment proposal MR-00189-R00, dated April 16, 2002, which proposed the amendment to the

market rules that would allow the IMO the discretion to set the value of the TradingPeriodLength parameter in the pricing algorithm:

> The proposed amendment would permit the IMO to establish a longer Trading Period Length in the market schedule (unconstrained) to overcome the [price excursion] problems identified above. With a longer Trading Period Length within the market schedule (unconstrained), generation facilities will have large ramping capability and there will be less need to select additional higher cost resources to meet the increasing demand. As a result, less extreme price excursions will occur.
>
> The real-time schedule (constrained) will continue to use the 5 minute Trading Period Length. Therefore, discrepancies will increase between the real-time schedule and the market schedule (unconstrained). As a consequence, congestion management settlement credit (CMSC) payments will increase. However, the decreases in energy prices, resulting from the change in the ramp time in the market schedule, are expected to offset increases in CMSC payments.
>
> It should be noted that using a longer Trading Period Length in the determination of the market schedule is judged to be a transitional provision. It is expected that a longer term solution will need to be considered which could include a day-ahead market with unit commitment, increased generator self-scheduling, contracted ramp capability, or multi-period optimization.

The Board has not heard any evidence in this proceeding that would point to the introduction of the 12x ramp rate multiplier as having a basis rooted in market economics. To the contrary, the evidence in this proceeding is that the 12x ramp rate multiplier distorts wholesale market prices downwards and engenders adverse consequences for the marketplace in the form of generation and demand side inefficiencies. For example, dampened wholesale prices diminish incentives for conservation, load management and demand side management. The evidence in this proceeding is also that the 12x ramp rate multiplier contributes to inefficient exports. Inefficient exports, in turn, can increase the need for coal-fired generation to meet Ontario demand and thereby contribute to increased emissions. These adverse consequences were identified and discussed at some length in the evidence filed by, and the testimony given on behalf of, the IESO and APPrO, and are also discussed in the evidence filed by TransCanada. That adverse consequences flow from the 12x ramp rate multiplier was not seriously contested by evidence to the contrary filed by

AMPCO, although AMPCO did challenge the strength of any causal connection between the 12x ramp rate multiplier and inefficient exports.

The Board also notes that the 12x ramp rate multiplier issue has been the subject of comment by the Market Surveillance Panel. Specifically, the potential adverse market impact of the 12x ramp rate multiplier has been referred to or discussed in the following Market Surveillance Panel semi-annual monitoring reports, which were referred to by a number of parties to this proceeding: December 13, 2003 (covering May 2002 to October 2003); December 13, 2004 (covering the period May to October 2004); June 9, 2005 (covering the period November 2004 to April 2005); June 14, 2006 (covering the period November 2005 to April 2006); and December 13, 2006 (covering the period May to October 2006).

For example, after concluding that a significant portion of the difference between the constrained and unconstrained real-time prices, and of the remaining difference between HOEP and the unconstrained pre-dispatch price, is due to the 12x ramp rate assumption, the Market Surveillance Panel stated as follows in its December 13, 2004 report (at page 66):

> The Panel is of the view that the continued understatement of the HOEP leads to inefficient decisions by both loads and generators in both the short-term and the long-term. This takes the form of an inefficient load profile and of under-investment in both conservation and generation.
>
> With respect to the argument that the assumption that ramp rates are 12-times their true value results in a more stable HOEP, the Panel recognizes that price stability can be beneficial to market participants. The Panel observes, however, that it is open to market participants to insulate themselves contractually from price variation. Moreover, price volatility presents a profit opportunity for more price responsive generation and loads. To the extent that it is efficient to do so, volatility can be reduced by the actions of market participants. This is much better, in the Panel's view, than suppressing price variation by artificial means, especially when this has the side effect of understating the average price. The Panel strongly recommends that actual ramp rates be used to determine the HOEP.

Eighteen months later, the Market Surveillance Panel further commented on the issue in its June 14, 2006 report (at page 79) as follows:

> For these and possibly other reasons, arbitrage between Ontario and New York is focused on the HOEP. The result is inefficient exports and the effective extension of the cross-subsidy inherent in Ontario's uniform price regime to New York loads. This problem has been exacerbated by market rules that, other things being equal, would have reduced the HOEP relative to prices in the constrained schedule. For example, the 12 times ramp rate assumption, which has the appearance of systematically lowering the HOEP (i.e., because it removes ramp effects in price), may simply lead to more exports than would otherwise occur.

In its most recent report, dated December 13, 2006, the Market Surveillance Panel stated as follows on page 106:

> There are two major causes of socially inefficient exports from Ontario to New York. First, like privately inefficient exports, the lack of accurate price signals or information can lead to "guessing wrong" and hence socially inefficient exports ex post. Improvements in price signals should result in a higher frequency of socially efficient exports. Socially inefficient exports can also occur, however, if there are defects in the market design. Ontario's uniform pricing regime is poorly designed in the sense that it admits to the possibility that the prices that exporters pay do not reflect the incremental cost of supply. Other aspects of the unconstrained pricing algorithm such as the 12 times ramp rate assumption can further misalign the HOEP and the relevant nodal prices thereby contributing to the potential for ex post socially inefficient exports… (footnote omitted)

And again at pages 147 and 148:

> Moreover, with the Global Adjustment dampening the redistributive effects of changes in HOEP and mitigating any harm that might be said to be visited upon consumers from potentially higher HOEP, the Panel contends that there may be no better time than now to address the remaining sources of inefficiency in the design of the Ontario spot market. Artificially reducing the HOEP, as is the outcome under the current market design, simply means that consumers pay more (or receive a smaller rebate) through the Global Adjustment, all the while inducing market inefficiencies from which all Ontarians lose.

The real-time price signals generated by an efficient wholesale market are central to the economic success of the new hybrid market for several reasons:

- First, the real time production and consumption decisions of many wholesale market participants will continue to be guided by real-time prices. If these price signals continue to ignore certain system realities such as transmission constraints or the actual ramping capabilities of generation facilities, they will at times induce these participants to make decisions that reduce the short-term dispatch efficiency. As we have indicated in Chapter 3, factors such as the uniform pricing system and the 12 times ramp rate assumption create a wedge between the HOEP and local shadow prices. This can result in inefficient production and consumption decisions such as the inefficient exports from Ontario to New York that we began documenting in our last report….(footnote omitted)

- Second, even though long-term investment will be guided through central planning in the near term, price signals from an efficient wholesale market can and should play an important role in guiding this planning process…Furthermore, as we have argued above, attempts to subsidize consumers by suppressing real-time prices leads to over-consumption and could ultimately lead to over-investment by the planners at [the Ontario Power Authority].

These comments reinforce the evidence in this proceeding as to the inefficiencies to which the 12x ramp rate multiplier contributes.

The observations of the Market Surveillance Panel in its most recent (December 13, 2006) report also support the assertion made by the IESO and others that addressing efficiency of the market remains a relevant objective even in the context of the hybrid framework under which Ontario's electricity sector operates at this time. Even AMPCO's expert witness, Dr. Murphy, who questioned the relevance or merits of the Amendment in light of the evolution of the market to a hybrid structure, conceded on cross-examination that improvements in wholesale market efficiency and accurate price signals are important even in a hybrid market.

The Board accepts that the 12x ramp rate multiplier, introduced as a temporary measure, has price distorting effects that can and do engender inefficiencies. The Board therefore also accepts that, in principle, there is merit in addressing the 12x ramp

rate multiplier issue if and to the extent that efficiency improvements can be expected to result, and that this is so even in the context of the hybrid market.

c. Evaluation of the Amendment as a Solution

The IESO has put forward credible evidence that the Amendment will result in greater efficiency in the IESO's real-time market as compared to the status quo. The benefits from this improved efficiency include, but are not limited to, reduced uneconomic exports to New York. The impact of this latter benefit is quantifiable, and has been quantified by the IESO. The other benefits are less easily quantified, but bear consideration nonetheless.

The Board does not agree with AMPCO's argument that the Amendment is inconsistent with the purposes of the Act and that the IESO has selectively chosen the purposes of the Act it will further while ignoring others. AMPCO asserts that the Amendment is contrary to section 1(a) of the Act ("responsible planning and management of electricity resources, supply and demand"). The Board concurs with the IESO's view that greater economic efficiency will further that objective. AMPCO also argues that the Amendment is inconsistent with section 1(f) of the Act ("protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service"). As discussed more fully below, the Board finds that the IESO has carefully considered the impact of the Amendment on consumers' average bills and determined that the impact is likely to be relatively modest. It may even be positive. The IESO has also noted that, while there may be a modest impact on consumers' bills, the Amendment is consistent with the purpose of protecting the interests of consumers with respect to the adequacy and reliability of supply.

There is no evidence before the Board in this proceeding that would lead the Board to take issue with the assertion made by the IESO and others that improvements in the economic efficiency of the electricity system in Ontario will promote adequacy and reliability of supply by providing more accurate price signals and triggering more appropriate price responsive behaviour. The same can be said for the assertions that the Amendment will encourage conservation, load management and demand side management and will, by reducing inefficient exports, also reduce the need for coal-fired generation to meet Ontario demand and thereby contribute to a lessening of emissions.

AMPCO and VECC both assert that the "3x myopic" Amendment is, by the IESO's own submission, inferior to a "1x MIO" solution. They support this view by reference to

documents that were prepared by the IESO at various times in the Amendment development process. They submit that this is a valid basis on which the Board should revoke the Amendment.

The Board does not accept that view. Although it is obvious that the IESO reviewed several alternatives in the course of developing the Amendment, it has consistently taken the position in this proceeding that a "3x myopic" rule is superior to a "1x MIO" option. This conclusion appears in the document issued by the Board of Directors of the IESO when the Amendment was approved, and it is supported by the IESO's and APPrO's experts. Other than referring to earlier assessments that the IESO does not currently support, AMPCO and VECC provided no evidence that "1x MIO" is a superior solution.

d. The Anticipated Impact on Consumer Bills

The Board has also considered the possible impact of the Amendment on consumers' electricity bills.

As noted above, the IESO has calculated that the net annual cost to consumers of adopting the 3x ramp rate assumption in the pricing algorithm is $6.68 million, or 0.004 cents/kWh. That calculation is based on the following assumptions and estimates:

- an average annual HOEP of $49 per MWh (the average price in 2006);
- an increase of 2.6% in the average HOEP as a result of the Amendment, before consideration of mitigating factors;
- mitigation of 50% of the estimate increase in HOEP due to "export arbitrage";
- mitigation of 80% of the net price increase (that is, after the export arbitrage effect) due to the global adjustment and the OPG Rebate; and
- reductions in CMSC payments and Intertie Offer Guarantees that are paid through uplift charges.

In its calculation of the net consumer impact, the IESO also takes into account a planned distribution to consumers of approximately $54 million from the IESO's TR Clearing Account. The Board does not believe that this particular distribution is

appropriately considered as a mitigation measure in relation to the Amendment. Elimination of this particular mitigation measure does not affect the Board's overall assessment of the Amendment.

Dr. Rivard of the IESO testified that, on the basis of additional analysis on the elasticity of export response, the export arbitrage effect on HOEP would likely be higher than 50%, which would reduce further the net cost of the Amendment to consumers. He noted that were the export arbitrage effect to reach approximately 65%, and keeping the other assumptions the same, the impact of the Amendment would be a net reduction in consumers' bills.

AMPCO disputes most of the assumptions and estimates that underlie the IESO's calculations. It claims that the IESO's estimates are unreliable, although it provided little evidence about the estimates it believes should be used.

Predicting the net effect of the Amendment on consumer's bills is a complex exercise and is not something the Board believes can be done with precision. The Board does, however, view the IESO's calculation as an indicator of the order of magnitude of the net effect of the Amendment. The Board agrees with AMPCO that the base price of $49 per MWh, which is the starting point of the IESO's calculation, is low by historical standards. The Board notes, however, that the IESO provided additional information on a range of net consumer costs using higher average HOEPs. The Board also acknowledges AMPCO's comment that the OPG Rebate is scheduled to expire in two years. Even if the OPG Rebate is discontinued at that time, the IESO has estimated that the global adjustment would still provide significant price mitigation, approximately 60% compared to the current 80% from the combined global adjustment and OPG Rebate.

The Board finds that the expected impact on consumers' bills is relatively modest. The IESO's published calculation shows a very minor impact – just 0.004 cents/kWh – based on estimates that the IESO considers to be conservative. Even if a higher base price were used (an average annual HOEP of $70 per MWh based on 2005 prices), and assuming no replacement for or extension of the OPG Rebate in two years, the estimated net impact would be larger but still relatively small. The difference resulting from the use of a higher base price relative to use of the lower one would be much less than 1/10$^{th}$ of a cent/kWh.

e. Conclusions

The Board concludes that the efficiency benefits that are anticipated to arise as a result of the Amendment are consistent with the purpose of the Act that speaks to promoting economic efficiency in the generation, transmission, distribution and sale of electricity. The Amendment also supports the purposes that relate to encouraging electricity conservation, demand management and demand response; ensuring the adequacy, safety, sustainability and reliability of electricity supply in Ontario; and protecting the interests of consumers in relation to the adequacy and reliability of electricity service. While the Board acknowledges that the Amendment may result in an increase in average consumer bills, that increase is anticipated to be modest.

The Board is also of the view that, in the context of its mandate under section 33 of the Act, unjust discrimination means unjust economic discrimination.

Based on the record of this proceeding, the Board finds that the Amendment is consistent with the purposes of the Act. The Board also finds that the Amendment does not unjustly discriminate for or against a market participant or a class of market participants.

**Other Matters**

1. *Stay of the Amendment Pending Appeal*

By the terms of the Board's February 9, 2007 Order, the stay of the operation of the Amendment applies pending completion of the Board's review of the Amendment. Issuance of this Decision and Order completes the Board's review, and has by the terms of the Order the effect of lifting the stay. For greater certainty, however, the Board will include an order to that effect in this Decision and Order.

In its final written argument, AMPCO requested that, in the event that the Board does not revoke the Amendment, the Board order a stay of the Amendment pursuant to section 33(6) of the *Ontario Energy Board Act, 1998* pending appeal to the Divisional Court.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application and is out of time. While the IESO therefore did not address this request in its final written argument, the IESO did in its

letter express the view that the Board does not have jurisdiction to grant such relief, and that if AMPCO wants a stay it must apply to the Divisional Court. APPrO's position is to the same effect.

In the circumstances of this case, the Board has decided not to extend its February 9, 2007 order staying the operation of the Amendment.

The Board understands that the IESO may wish to proceed with implementation of the Amendment on a timely basis, and that parties that are supportive of the Amendment would be equally supportive of prompt implementation. However, the Board does not believe that it is in the best interests of the wholesale electricity marketplace to face the prospect of the Amendment being implemented one day and suspended shortly thereafter further to the invocation of a judicial process. The Amendment is not urgently required for reasons such as reliability and the ramp rate issue is one that has been outstanding for several years. In the circumstances, the Board expects that the IESO will act responsibly by allowing AMPCO a reasonable opportunity to request judicial recourse prior to taking whatever steps may be required to implement the Amendment. The Board similarly expects that AMPCO will act responsibly by ensuring that any request for a stay of the operation of the Amendment that it may wish to make to the Divisional Court is made without undue delay.

2. *New Obligations for IESO under its Licence*

In its final written argument, AMPCO requested that the Board require the following, either under an existing condition of the IESO's licence or by way of a new licence condition:

- that the IESO prepare and submit to the Board, for every proposed market rule and market rule amendment, a report supported by appropriate analysis and available to the public, that explains how the proposed rule or amendment is consistent with the objects of the IESO and promotes the purposes of the Act; and

- that, in relation to the Amendment and such other market rules or market rule amendments as the Board considers appropriate, the IESO report publicly on an annual basis with respect to whether and the extent to which the amendments have met the IESO's objectives and provided the benefits anticipated by the IESO at the time each of the amendments were made.

In the letter accompanying its final written argument, the IESO noted that this request for relief was not included in the Application, is out of time, was not dealt with in any way in this proceeding and is entirely inappropriate.

Whatever the Board may think of AMPCO's request on the merits, the Board does not consider it appropriate to address the request at this stage in the proceeding. The issue of new reporting requirements for the IESO in relation to amendments to the market rules was not raised by AMPCO on a timely basis, and the other parties to this proceeding will not have had a fair opportunity to consider and respond to the request. AMPCO may, if it so wishes, pursue this matter further outside the context of this proceeding.

3. *Cost Awards*

Parties eligible for an award of costs, as identified in Procedural Order No. 2, shall submit their cost claims by April 24, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on the IESO. The cost claims must comply with section 10 of the Board's *Practice Direction on Cost Awards*.

The IESO will have until May 8, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

A party whose cost claim was objected to will have until May 15, 2007 to make a reply submission as to why its cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on the IESO.

The Board will issue its decision on cost awards at a later date once the above process has been completed.

**THE BOARD ORDERS THAT:**

1. The Application by the Association of Major Power Consumers in Ontario for an order under section 33(9) of the *Electricity Act, 1998* revoking the market rule amendment identified as MR-00331-R00: "Specify the Facility Ramping Capability in the Market Schedule" and referring the amendment back to the IESO for further consideration is denied.

2. The stay of the operation of the market rule amendment identified as MR-00331-R00: “Specify the Facility Ramping Capability in the Market Schedule”, as ordered by the Order of the Board dated February 9, 2007, is lifted.

**DATED** at Toronto, April 10, 2007.

ONTARIO ENERGY BOARD

*Original signed by*

Kirsten Walli
Board Secretary

**APPENDIX A**

**to**

**Decision and Order**
**April 10, 2007**

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

**Excerpt from Transcript of Oral Hearing Held March 29, 2007**

**(see attached document)**

our binder. I apologize, it might just be me, but the record, the decision does not bear out the quote that that included.

MR. RUPERT: Mr. Rodger, I was going to mention, I think the page 5 reference, at least as I read it here, didn't refer to the page that was doing what you thought it did. Maybe there is a cross-reference issue in your submissions.

MR. RODGER: I'll certainly check that. Sorry, Mr. Rupert.

MR. KAISER: Why don't you have a look now, and see if you can help us.

MR. RODGER: Mr. Chair, we'll endeavour to get copies during the lunch break.

MR. KAISER: All right. We'll take the lunch break now. We'll come back at 2 o'clock.

--- Recess taken at 12:34 p.m.

--- On resuming at 2:11 p.m.

**DECISION:**

MR. KAISER: Please be seated.

The Board has decided to issue a decision now on the matter of the relevance of the evidence with respect to the process, rather than deferring it, as Mr. Rodger suggested, in order that we can proceed with the case in a more orderly manner.

We are dealing with an application by AMPCO under section 33(4) of the *Electricity Act* for review of the three times ramp rate market rule amendment. In that

context there has been a discussion and a concern about the scope of the case, and particularly whether evidence regarding the process by which the IESO reached this rule is relevant.

AMPCO submits that the three times ramp rate market rule amendment should be revoked by this Board and referred back to the IESO for stakeholder consultation, based on the following grounds: First, that the process followed by the IESO in the three times ramp rate stakeholder consultation process violated IESO's common-law duty of procedural fairness, by breaching AMPCO's legitimate expectation that the IESO would follow its published stakeholder engagement process and apply its stakeholder engagement principles, and raising a reasonable apprehension of bias that the IESO favoured the interests of generators; secondly, that the integrity of the statutorily-mandated consultation process has been undermined. They say this is inconsistent with the purposes of the *Electricity Act* and unjustly discriminates against Ontario consumers in favour of Ontario generators.

They also allege certain substantive failures, as well, which are not at issue in the proceeding this morning.

Accordingly, AMPCO argues that the materials produced by IESO relating to procedural matters are relevant both to the issue of procedural fairness and also the substantive issues.

The starting point in this discussion is section 33(9)

of the *Electricity Act*. It has been referred to by virtually everyone this morning. It provides that:

> "If, on completion of its review, the Board finds that the amendment is inconsistent with the purposes of this *Act*, or unjustly discriminates against or in favour of a market participant or a class of market participants, then the Board shall make an order revoking the amendment on the date specified by the Board and referring the amendment back to the IESO for further consideration."

AMPCO argues that all of the IESO materials are relevant because they demonstrate that the IESO failed to follow procedural fairness in developing the amendment. According to AMPCO, the lack of procedural fairness demonstrates that the amendment unjustly discriminates against its members in favour of generators.

In other words, AMPCO argues that it has rights of natural justice in IESO rule-making and that those rights should be enforced by the Board in the market review amendment process.

All of the other parties appearing before us this morning state that this is an incorrect interpretation of section 33(9), because it equates the term "unjustly discriminates" with a violation of the rules of natural justice and it equates the Board's review process with a judicial review application.

They argue that the purpose of the Board's review in a

market review amendment should be aimed at economic efficiency and not natural justice.

They say that the OEB should be reviewing an amendment to the IESO rules and not the IESO stakeholdering process; that the scope of the Board's review should be aimed at the rule itself, and the impact of that rule, not the process by which the amendment was made.

In other words, it's argued before us that the issue is whether the rule is unjustly discriminatory. The Board agrees with that position.

Sections 19(1) and 20 of the *OEB Act*, read together, provide that the Board has general authority to determine any question of law or fact arising in any matter before it except where that authority is limited by statutory provision to the contrary.

In the case of a market rule amendment, another statutory provision does limit the Board's jurisdiction. Section 33(9) of the *Electricity Act* specifically sets out certain grounds on which the Board may make an order.

Accordingly, we find that section 33(9) of the *Electricity Act* is a jurisdiction-limiting provision, not another jurisdiction-granting provision. That is, with respect to a market rule amendment, the Board's jurisdiction is not as broad as suggested by section 20 of the *OEB Act*, but limited by section 33(9) of the *Electricity Act*.

In this regard, the Board has also considered the submissions of various parties, and agrees, that the 60-day

time limit for disposing of this review is consistent with the conclusion that the Board's scope of review is limited to the criteria set out in section 33(9).

The legislature can be taken as having known that an exhaustive review of the process would render it impossible to meet these timelines.

We then come to what can be seen as a second and distinct issue. That is whether there is a common-law principle of administrative law that the IESO has violated in the course of this market rule amendment process which yields a separate and distinct remedy.

The IESO says the common-law principles of administrative law do not assist AMPCO in extending the jurisdiction of the Board to review the details of the stakeholdering process. They say that the IESO is a statutory corporation whose affairs are managed and supervised by an independent board of directors, and the functions carried out by the IESO under the review at issue in this proceeding is a rule-making function and is essentially a legislative function.

They rely upon the Supreme Court of Canada's 1980 decision in the Inuit Tapirisat as support for the proposition that in legislative functions these rules do not apply.

AMPCO takes a different view and it relies upon the Supreme Court of Canada 1990 decision in Baker, as well as the Divisional Court decision in Bezaire.

The aspects of the decision that AMPCO relies upon can

be found at pages 15 and 14, where the Court stated that one of the criteria that must be looked at in determining whether the rules of natural justice apply to a process is whether the parties had a legitimate expectation that those rules would be followed. The Court states, in part:

> "Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstance."

They go on to say:

> "This doctrine as applied in Canada is based on the principle that the circumstances affecting procedural fairness take into account the promises or regular practices of administrative decision-makers and it would generally be unfair for them to act in contravention of representations as to procedure or to backtrack on substantive promises without according significant procedural rights."

The Court also noted that another factor to be considered in determining the nature and extent of the duty of fairness that's owed to the parties is the importance of the decision to individuals involved.

As has been pointed out, there's no question that there's a significant amount of money involved in this decision; it's an important decision. With respect to the expectations of the parties, there is a provision in section 13.2 of the *Electricity Act* requiring the IESO to

establish processes by which consumers, distributors and generators may provide advice. AMPCO makes the point that a framework was established to govern the process by which these rules would be amended and implemented. They say that this procedure, despite the expectation they were entitled to, has not been followed.

That may or may not be the case, but this Panel is of the view that that is not a matter for our consideration. Mr. Vegh in his submissions questioned whether the Board should be a parallel Divisional Court. We don't think it should be.

IESO may or may not have followed the rules of natural justice. And they may or may not have been required to do so based upon the different authorities that have been cited by the different parties. But that, we believe, is a matter to be determined by the Divisional Court, not the Ontario Energy Board.

Mr. Rodger did refer us to a decision of this Board on September 20th, 2005. That appears at tab 11 of Ms. DeMarco's brief. I'm reading in part:

> ”The Board concludes that stakeholder concerns have been substantially met. The true test will, however, be the experience of stakeholders in the new process. Stakeholders and the Board will have opportunities to review how well the process works over time as they are implemented. The Board therefore approves the IESO proposals on its stakeholdering process. It should be noted,

however, that this approval relates to the processes that the IESO has proposed. It does not change the Board's obligation to review IESO programs that have implications for IESO fees, expenses and revenue requirements, even when these programs have been subjected to the IESO stakeholdering process."

Mr. Rodger's submission was that having approved the stakeholdering process it was incumbent upon the Board to follow through and police, if you will, the rule-making process.

We differ on that. The two are distinct functions. The review at question is a judicial review and best reserved for the courts.

That leads us to the Order requested. Pursuant to this decision, the Board will order that any evidence relating to the stakeholdering process be struck. That would include Mr. Rodger's submission of March 26th. If the parties are unable to agree on what evidence is to be excluded or not excluded, the Board may be spoken to.

That completes the Board's ruling in this matter.

**PROCEDURAL MATTERS:**

Mr. Rodger and Mr. Mark, we were going to suggest, subject to your convenience, that you may want to adjourn for the rest of the day and regroup in light of that.

MR. MARK: It probably makes sense.

MR. KAISER: Unless there be some debate and discussion as to what evidence is to be struck and what

# Tab 3

**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2013-0010**
**EB-2013-0029**

**IN THE MATTER OF** the *Electricity Act, 1998*, S. O. 1998, c.15, Schedule A;

**AND IN THE MATTER OF** an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

# DECISION ON COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

**February 28, 2013**

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (the "OPA") in respect of wind generation facilities (the "Applicants") collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act, 1998* (the "Electricity Act") seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator (the "IESO") (the "Application"). The market rule amendments in question (the "Renewable Integration Amendments") deal with the dispatching of, and the establishment of floor prices for, variable generation facilities, defined as all wind and solar photovoltaic resources with an installed capacity of 5MW

or greater,[1] or all wind and solar photovoltaic resources that are directly connected to the IESO-controlled grid.

On January 28, 2013, the Board issued its Notice of Application and Oral Hearing in relation to the Application. The Board issued its Procedural Order No. 1 on January 29, 2013 and its Procedural Order No. 2 on February 4, 2013.

On February 11, 2013, the Board heard a motion by the Applicants for the production of further materials from the IESO. On February 12, 2013, the Board issued its Decision on Motion for the Production of Evidence and Procedural Order No. 3.

This Decision and Procedural Order addresses two matters: first, the issue of the entity from whom cost awards and the Board's costs should be recovered in this proceeding; and, second, the requests made by the OPA, the Ministry of Energy, the IESO and the Ontario Electricity Financial Corporation ("OEFC") for the confidential treatment of documents.

On February 26, 2013, the Board received a request for late intervenor status from the Canadian Manufacturers & Exporters ("CME"). The Board will accept CME's request for late intervenor status subject to CME accepting the record as it stands. CME also requested cost eligibility. Cost eligibility is addressed below.

## A. Recovery of the Costs of this Proceeding

The Board received requests for cost award eligibility from five parties: the Applicants; the Building Owners and Managers Association of Greater Toronto ("BOMA"); Energy Probe; the School Energy Coalition ("SEC"); and CME.

In Procedural Order No. 2, the Board:

i. determined that any costs awarded in this proceeding, as well as any Board costs, will be recovered from the Applicants, the IESO or a combination of the two;

[1] Wind and solar photovoltaic resources that are embedded (i.e., not directly connected to the IESO-controlled grid) are captured by the Renewable Integration Amendments only if they are registered market participants.

ii. indicated that it would benefit from submissions by the parties as to which of the two entities should most appropriately bear the costs of this proceeding and, if both, in what proportion;
iii. established a schedule for the filing of submissions and reply submissions by all parties on the issue of cost awards;[2]
iv. indicated that the Applicants and the IESO should include in their submissions any objections they might have to any of the cost eligibility requests made in this proceeding; and
v. stated that all requests for cost eligibility will be determined at the end of this proceeding.[3]

**Positions of the Parties**

The Board received submissions on the issue of cost recovery from the Applicants, the IESO, BOMA, Energy Probe and SEC, as well as reply submissions from the Applicants and the IESO. A number of those submissions made reference to the Board's decision on responsibility for costs in the only prior proceeding in which the Board has reviewed a market rule amendment (the "Ramp Rate Review").[4]

In their submission, the Applicants reiterated that they should be eligible for the recovery of their costs in this proceeding from the IESO, and that the IESO should be required to pay its own costs and the costs of intervenors. The Applicants' arguments in support of that position can be summarized as follows:

i. the Application raises legitimate and important public interest issues in relation to the criteria set out in section 33(9) of the Electricity Act that go beyond the commercial impact of the Renewable Integration Amendments on variable generators; namely, how the IESO should, in making amendments to the market rules, take into account the purposes of the Electricity Act, the interaction between the market rules and procurement contracts and the

[2] During the hearing of the Applicants' motion on February 11, 2013, the Board extended the deadline for the filing of the initial submissions by one day, to February 13, 2013.
[3] SEC's request for intervenor status and cost award eligibility was filed late. By letter dated February 5, 2013, the Board confirmed that the approach set out in Procedural Order No. 2 applies equally to SEC's cost eligibility request.
[4] EB-2007-0040. This was an application filed by the Association of Major Power Consumers in Ontario to review a market rule amendment pertaining to the operation of the "three times" ramp rate.

IESO's responsibilities to market participants in light of its relationship with the OPA;

ii. the Applicants' perspective on these issues would be of benefit to the Board;

iii. the Board has granted cost award eligibility to generators where they are directly affected by the outcome of a proceeding and provide a useful perspective on the issues, as was the case in the Ramp Rate Review among others;

iv. the Applicants have acted responsibly and with a view to minimizing costs; and

v. the IESO has known for several years that a review of the Renewable Integration Amendments was likely, and it would therefore have been prudent to budget for its own costs and those of other parties in relation to such a review.

SEC, Energy Probe and BOMA also submitted that the costs of this proceeding should be borne by the IESO.

SEC submitted that a proceeding to review a market rule amendment is a broad inquiry that involves a consideration of the effects of the amendment against the criteria set out in the Electricity Act. According to SEC, responsibility for cost awards should lie with the IESO in relation to a proceeding that is essentially a continuation of the IESO-initiated process to make the Renewable Integration Amendments. SEC also noted that ratepayers already contribute to the IESO's Board-approved fees, which presumably include the costs of market rule amendment reviews, including intervenor cost awards.

Energy Probe's submission was along similar lines.

BOMA's arguments were to the effect that the IESO is a not-for-profit public institution whose decision to make the Renewable Integration Amendments is the driver of this proceeding; that the issues raised in market rule amendment review proceedings affect the broad public interest; that the IESO was required to bear the costs of the Ramp Rate Review and that this should be the case in the normal course in order to avoid time-consuming disputes in future cases over responsibility for costs; and that requiring the Applicants to pay all or part of the costs of this proceeding could have a chilling effect on the willingness of market participants to challenge market rule amendments, which in turn would be harmful to the Ontario market.

The IESO stated that it would be "manifestly unjust" if the IESO, as the effective "respondent" in this proceeding, were forced to defend its market rules, pay all cost awards and receive no contribution to its costs regardless of the outcome of the proceeding. The IESO also submitted that a decision by the Board that costs should be borne by the IESO in a case such as this, where special circumstances do not exist, would effectively establish a practice to that effect. In the IESO's view, such a practice would be inappropriate and would establish incentives that could encourage unmeritorious applications for market rule amendment reviews. For these reasons, the IESO's position is that the Board should adopt a "costs follow the cause" approach and defer its determination until the merits of the application are decided and all matters regarding the conduct of the hearing that could be relevant to costs are known.

In their reply submissions, the Applicants took issue with the IESO's statement that it would be "manifestly unjust" for the IESO to bear the costs of this proceeding. The Applicants noted that the Board required the IESO to pay costs in the Ramp Rate Review, consistent with the Board's practice in most of proceedings. Although the IESO is not the applicant in this proceeding by reason of the formal structure of section 33 of the Electricity Act, it is the proponent of the Renewable Integration Amendments and, in the Applicants' view, it is therefore appropriate for the IESO to be responsible for the costs of reviewing those Amendments. The Applicants also disagreed with the IESO's assertions regarding the precedential impact of deciding that the IESO should bear the costs of this proceeding. In the Applicants' view, the Board has tools that can be used to discourage unmeritorious reviews, and the "slippery slope" referred to by the IESO is only a hypothetical risk given that this is only the second time that the Board has conducted a review under section 33 of the Electricity Act.

In its reply submission, the IESO submitted that the Board should not address the issue of cost awards based on the view, expressed by the Applicants and intervenors, that market rule amendment reviews are always conducted under a public interest mandate. While acknowledging that market rule amendments may involve some questions of interest beyond the parties, the IESO noted that the Electricity Act regime is one where market rule amendment reviews are the exception and not the rule. The IESO also argued that the Board should not make its decision based on the premise that the IESO is required to submit to a public review process as part of its mandate and hence should anticipate and account for the costs of such reviews in its application for Board approval

of its fees. The question is whether ratepayers who pay the IESO's fees should have to bear the burden of funding the costs of the Applicants, who have a commercial interest in the outcome, or the costs of intervenors.

As noted above, in Procedural Order No. 2 the Board stated that that all requests for cost eligibility will be determined at the end of this proceeding. BOMA and SEC included in their submissions a request that the Board reconsider that approach and determine their cost award eligibility at this time, as is the Board's usual practice. In its reply submission, the IESO encouraged the Board not to accede to those requests.

**Board Findings on Cost Responsibility for the Proceeding**

The IESO shall be responsible for the costs of this proceeding. The Board does not agree with the IESO that it would be "unjust" for the IESO to bear the cost of defending its market rule amendments. Rather, the Board finds that having the IESO bear the costs of this proceeding is consistent with the overall legislative scheme. The review process under section 33 of the Electricity Act is part of the overall market rule amendment process. On that basis, it is appropriate for the IESO, rather than the Applicants, to bear the costs of this review. The Board understands the IESO's concern about unmeritorious applications; however, no such allegation has been made in this proceeding and the Board has a variety of tools to address such a situation should it arise. The Board notes that it has not yet determined whether the Applicants will be eligible for an award of costs.

As indicated earlier, the Board will determine cost eligibility for the Applicants, BOMA, SEC, Energy Probe and CME at the conclusion of the proceeding.

## B. Requests for Confidential Treatment

Eleven of the documents filed by the IESO on January 31, 2013 are the subject of requests for confidential treatment in this proceeding. For ten of those documents (the "OPA Documents"), the request is made by the OPA, while both the OPA and the Ministry of Energy are seeking confidential treatment in respect of the eleventh document (the "Ministry/OPA Document").[5] The OPA Documents have all been

[5] The confidentiality request made by the OPA initially covered only 9 documents, of which one was the Ministry/OPA Document. However, in its February 20, 2013 reply submission, the OPA confirmed that its

redacted to a greater or lesser degree, whereas the Ministry/OPA Document has been redacted in its entirety.

The history regarding these confidentiality requests, and the Board's process for dealing with them, is set out in Procedural Order No. 2[6] and is described in some detail in Board staff's February 15, 2013 submission. For convenience of reference, the eleven documents are listed in Appendix A to this Decision and Procedural Order.

In its February 12, 2013 Decision on Motion for the Production of Evidence and Procedural Order No. 3, the Board ordered the IESO to produce further materials and, where applicable, to do so in accordance with Rule 10 of the Board's *Rules of Practice and Procedure* and the *Practice Direction on Confidential Filings* (the "Practice Direction"). The Board also stated that any material in respect of which a confidentiality claim is being made could be filed by the IESO, the OPA or the Ministry of Energy, if considered appropriate by the relevant parties.

In the February 22, 2013 letter accompanying its further production, the IESO gave notice of confidentiality claims in respect of fifteen documents. Confidentiality is being requested by the IESO in relation to eight documents (the "IESO Documents"), by the OPA in relation to six documents (the "Additional OPA Documents") and by OEFC in relation to one document (the "OEFC Document"). For convenience of reference, the fifteen documents are listed in Appendix B to this Decision and Procedural Order.

**Positions of the Parties on the OPA Documents and Additional OPA Documents**

The OPA Documents are presentations to the Ministry of Energy, made either by the OPA alone or jointly with the IESO. According to the OPA, it is in settlement negotiations with the Applicants regarding their procurement contracts. The OPA's submissions on the confidential treatment of the OPA Documents are two-fold: first, that the OPA Documents are protected under the doctrine of settlement privilege; and, second, that the disclosure of the OPA Documents would prejudice settlement negotiations between the OPA and the Applicants. In its February 13, 2013

confidentiality request, and the grounds for it, also extends to two further documents. The OPA has filed un-redacted copies of these two documents with the Board.

[6] At the hearing on the Applicants' motion for the production of further materials from the IESO, the Board confirmed that submissions on the confidentiality claims would be in writing and also confirmed the schedule for the filing of those submissions.

submission, the OPA stated that its confidentiality claim, as well as the grounds for that claim, should be understood as also extending to the Ministry/OPA Document.

The OPA objected to disclosure of the un-redacted OPA Documents even to counsel that have provided a Declaration and Undertaking, since such disclosure would result in a breach of settlement privilege and would prejudice settlement negotiations with the Applicants. The OPA stated that it is particularly concerned with disclosure to counsel for the Applicants, since that counsel also represents one of the Applicants in the settlement negotiations.

By letter dated February 22, 2013, the OPA confirmed that the grounds for its confidentiality request in respect of the Additional OPA Documents are the same as apply to the OPA Documents, and further confirmed that it also objects to the disclosure of the un-redacted Additional OPA Documents even to counsel for a party that has filed a Declaration and Undertaking, noting again that counsel for the Applicants represents one of the Applicants in the settlement negotiations. Two of the Additional OPA Documents are spreadsheets in respect of which the OPA is claiming confidentiality over the whole of the Documents. The OPA has provided all parties with a non-confidential description or summary of those two Documents. The OPA has also provided all parties with redacted versions of the other four Additional OPA Documents.

*Settlement Privilege*

The OPA identified the rationale for settlement privilege as expressed by the courts, and submitted that the three conditions that must be met in order for settlement privilege to apply are met in this case:

i. A litigious dispute must be in existence or within contemplation: the OPA Documents make it clear that litigation was within contemplation. As an example, one of the Documents refers to “litigation potential”.
ii. The communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed: this is evident both from the nature of the contents of the OPA Documents, and from the explicit wording on the Documents, such as “Confidential”, “Confidential Advice to Government” and “Commercially Confidential – Not for Distribution”.

iii. The purpose of the communication must be to attempt to effect a settlement: insofar as the OPA Documents and communications are concerned, it is apparent that the OPA's motivating purpose was to attempt to effect a settlement.

The OPA further submitted that, because settlement privilege is a "class" privilege, the onus is on the party seeking disclosure of the material to establish that the case falls within an exception to the privilege. In the OPA's view, there is nothing before the Board that would satisfy the onus on the Applicants to establish an exception to settlement privilege.

In their respective submissions, the Applicants, SEC and Board staff generally agreed with the OPA's statement of the rationale for, and of the three conditions applicable to, a claim of settlement privilege, although SEC raised a question as to whether the privilege is treated as a class privilege or a case-by-case privilege in Ontario. However, those submissions then either asserted that the conditions have not been met in this case, or raised some question in that regard.

The Applicants stated that settlement privilege clearly does not apply here because none of the OPA Documents consist of settlement communications between the parties. The Applicants submitted that, in order for settlement privilege to apply, the communication in question must be made between the parties to the settlement negotiations. That is not the case here, as the OPA Documents were produced prior to the date on which the OPA advised the Applicants that it was prepared to enter into settlement negotiations, and none of those Documents were communicated to the Applicants by the OPA. Instead, the OPA Documents were shared with the IESO and the Ministry of Energy, neither of whom is involved in any settlement negotiations with the OPA. In the Applicants' view, the OPA's position is based on a mischaracterization of the law of settlement privilege, and the Board should order the production of the un-redacted OPA Documents.

SEC similarly submitted that settlement privilege does not apply in this case. SEC did note that there is an outstanding question as to whether settlement privilege is a "class" or case-by-case privilege in Ontario. SEC also added that, even if settlement privilege does apply in this case, disclosure is nonetheless permissible where the documents in question have relevance apart from establishing the liability of a party or a weakness in

a party's claim. SEC stated that, in this proceeding, the Board is not determining, nor is it interested in, any potential liability that the OPA may or may not believe that it has towards the Applicants. In SEC's view, the redacted information should be disclosed because it may be useful in the Board's inquiry insofar as it quantifies the financial impact of the Renewable Integration Amendments on the Applicants. That, in turn, will be important in assessing whether the Renewable Integration Amendments further the purpose of the Electricity Act that speaks to the protection of consumer interests with respect to price.

BOMA submitted that settlement privilege has no application to the intervenors in this case, even if it has application to counsel for the Applicants. In BOMA's view, to characterize the OPA's discussions with the Applicants as private commercial discussions related to settling a dispute "mischaracterizes the nature of their relationship, and the activities". BOMA offered a number of observations in that regard, including: financial negotiations between individual generators and the OPA will be conducted by them directly with their own counsel rather than through a group effort, and presumably the OPA's offer to each of them will be similar; the information sought is aggregated information that is the best information available with which to judge the economic and financial impacts of the Renewable Integration Amendments; and it is clear that the IESO and the OPA have been working in tandem with the Ministry of Energy on the Renewable Integration Amendments, and the combined effect of their actions have financial and economic effects that need to be disclosed in order for the Board to determine the issues in this proceeding. BOMA also submitted that there is no information on the record to date about the impact of the Renewable Integration Amendments on ratepayers. In BOMA's submission, information that has been redacted from the OPA Documents and that goes to the issue of ratepayer impacts needs to be disclosed to intervenors.

Energy Probe took no position on whether settlement privilege is applicable in this case.

Referring to two earlier decisions of the Board regarding privilege, Board staff submitted that the Board has authority to hear and determine privilege claims and further suggested that the Board is required to apply common law evidentiary principles in adjudicating such claims. Board staff also submitted the following: that in considering whether settlement privilege applies, the courts distinguish between true "settlement" negotiations in a litigious context and the more general and common "commercial"

negotiations occurring in the normal course, where litigation may always be said to be a possibility; that it is at least questionable whether Board proceedings constitute litigation for the purposes of the application of settlement privilege; and that the courts normally require the party claiming privilege to file evidence – rather than submissions or argument – establishing that all relevant requirements pertaining to the privilege are met. Board staff noted that the OPA's submissions do not identify the nature of the contemplated litigation in question, nor do they identify the relationship between the contemplated litigation, the negotiations in question and the information contained in the OPA Documents.

Board staff also addressed two further issues. First, noting that an un-redacted copy of one of the OPA Documents had been inadvertently disclosed, Board staff submitted that the inadvertent disclosure of a document that is privileged as a matter of evidence law does not operate as a waiver of the privilege. Board staff did note, however, that the same considerations would not necessarily apply in respect of the inadvertent disclosure of a document where a claim is based on confidentiality as opposed to privilege. Second, noting that the OPA Documents have been shared with third parties, Board staff submitted that such sharing, if done subject to suitable restrictions, does not operate to waive or eliminate a privilege if the test for common interest is met. In Board staff's view, the concept of common interest could also be applied to a claim based on confidentiality.

In its reply submission, the OPA submitted as an "over-arching response" to the submissions of the other parties and of Board staff that, if documents or other communications substantiating or "lying behind" explicit settlement communications were to be required to be disclosed, settlement privilege would prove to be meaningless since the disclosing party would be placed at a negotiating disadvantage. In the OPA's view, legal precedent and the common law policy of promoting the settlement of disputes overwhelmingly support a much broader interpretation of settlement privilege that focuses on the substance of the communication in order to protect a party's right to keep confidential documents that have been prepared in furtherance of settlement.

In response to the submissions of the Applicants and SEC, the OPA submitted that communications or documents created or produced for the purpose of settlement negotiations do not need to have been disclosed to the parties subject to the negotiations in order to attract the protection of settlement privilege; in other words, the

fact that the OPA Documents were shared with third parties and not the Applicants cannot at law preclude the Board from making a finding that those Documents are privileged. The OPA noted that the Applicants and SEC have agreed that the modern legal test for settlement privilege is as enunciated in *The Law of Evidence in Canada*,[7] referring specifically to the three conditions identified in the OPA's earlier submission. The OPA then submitted that the jurisprudence confirms that settlement privilege protects both communications and documents created for the purposes of settlement negotiations from production to the party(ies) and to strangers, citing *Middlekamp* v. *Fraser Valley Real Estate Board*[8] as well as court and tribunal cases that have followed or referred to that decision. The OPA also cited *Middlekamp* and another decision[9] as confirming that the courts make no distinction about the form of the document or communication that a party claims as privileged, and in particular that the communication does not have to contain an actual settlement offer in order to attract the privilege.

In response to Board staff's submission, the OPA noted that there is precedent for Ontario tribunals considering and applying the common law doctrine of settlement privilege to applications properly within their statutory jurisdiction.[10]

*Confidentiality*

The OPA's second argument in support of its confidentiality request is that disclosure of the OPA Documents would prejudice settlement negotiations between the OPA and the Applicants. The OPA referred to the fact that Appendix A of the Practice Direction includes, as a factor to be considered by the Board in determining confidentiality claims, the potential harm that could result from the disclosure of the information, including whether the information could interfere significantly with negotiations being carried out by a party.

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[7] Bryant et. Al, *The Law of Evidence in Canada*, 3rd Ed. (Lexis Nexis Canada, 2009) at page 103, endorsed by the Ontario Court of Appeal as the test for settlement privilege in *Losenno* v. *Ontario Human Rights Commission*, 2005 CANLII 36441, at paragraph 19.

[8] (1992) 71 B.C.L.R. (2d) 276 (B.C.C.A.), at paragraphs 17-18.

[9] *Linear S.R.L.* v. *CCC-Canadian Communication Consortium Inc.*, [2000] B.C.J. No. 2491 (B.C.S.C.), at paragraph 9.

[10] *Starnino Holdings Ltd.* v. *Ontario (Ministry of the Environment)*, [2007] O.E.R.T.D. No. 68, Case No. 05-153 (Ontario Environmental Review Tribunal), at paragraph 132 (decision dated November 29, 2007), and *Mattamy Realty Ltd.* v. *Oakville (Town),* [2012] O.M.B.D. Case No. PL100041 (Ontario Municipal Board), at paragraph 3 (decision dated April 12, 2012).

The Applicants stated that it is difficult to respond to the OPA's position because the OPA has not offered any evidence in support of how it may be prejudiced, nor has it offered a summary of the OPA Documents. In the Applicants' view, the bare allegation made by the OPA is not sufficient, and the OPA should be required to provide at least some evidence to substantiate its position. The Applicants also submitted that the OPA had not provided any precedent or authority for its request that counsel be denied access to the un-redacted OPA Documents, and the Board should therefore deny that request.

SEC submitted that the OPA's claim of prejudice is an overstatement since financial impacts to the Applicants outlined in the OPA Documents would seem to be made on an aggregate basis, whereas any contract negotiations would have to be completed on an individual basis. By contrast, in SEC's view it is clear that non-disclosure will prejudice all parties, as they will not have relevant information about the financial impact of the Renewable Integration Amendments. SEC therefore submitted that the balance between the potential prejudice to the OPA of disclosure, on the one hand, and the definite prejudice to all parties of non-disclosure on the other, is best met by providing the un-redacted OPA Documents to external counsel and consultants for the parties. SEC also suggested that all parties be reminded that the Board's form of Declaration and Undertaking requires that confidential information be used exclusively for duties performed in respect of this proceeding.

Energy Probe submitted that the Board should not be constrained by any claims of confidentiality beyond those contemplated by the Practice Direction, especially where such claims result in restrictions on access to, and use of, critical and important information. Energy Probe noted that acceptance of the OPA's position will severely limit the utility of the highly redacted OPA Documents in the discovery and hearing phase of this proceeding. Energy Probe also submitted that the Board cannot proceed to carry out its mandate without information on the impact of the Renewable Integration Amendments on generators and consumers. Energy Probe suggested that, if the Board were to accept the OPA's position, the redactions to the OPA Documents should be held to a minimum to accord with the criteria in the Practice Direction. Energy Probe did not accept that this has been done by the OPA, and requested that the Board direct the OPA to review the OPA Documents and significantly reduce the extent of redactions.

Board staff submitted that the factors listed in Appendix A of the Practice Direction are simply factors to be considered by the Board, and that even if disclosure of a document could result in one of the listed harms it remains for the Board to determine whether the public interest in transparency and openness outweighs the harm that is being alleged (or vice versa). Board staff further submitted that, to the extent that there is genuine potential harm in the disclosure of some or all of the information that has been redacted from the OPA Documents, there is merit in according confidential treatment to that information. Board staff noted, however, that the OPA's submissions do not articulate with specificity how harm would ensue from the disclosure of the redacted information in the OPA Documents, whether in whole or in part.

Board staff suggested two approaches that might be used in the event that the Board was to determine that confidential treatment is warranted in respect of some or all of the redactions in the OPA Documents. First, the OPA could be ordered to provide, for the public record, a non-confidential summary of the redacted information. Second, if and to the extent that the potential harm exists solely in relation to disclosure to counsel for the Applicants, it would be open to the Board to direct that un-redacted copies of the OPA Documents be provided to counsel for all parties, other than counsel for the Applicants. Board staff did note that this latter approach would be unusual, and would create information asymmetry as between the parties.

In its reply submission, the OPA reiterated that disclosure of the redacted information contained in the OPA Documents will result in actual harm by placing the OPA at a negotiating disadvantage. The OPA submitted that it is impossible to quantify the magnitude of, or otherwise specify, the harm that will ensue if production of the OPA Documents is ordered by the Board as it is impossible to predict the outcome of the settlement negotiations. The OPA further submitted that what is known at this time is that it would not be in the interests of fairness to force any party into a negotiating disadvantage by requiring the disclosure of confidential information relating to settlement strategy and confidential settlement negotiations. In the OPA's view, it has provided the Board with requisite proof that harm will ensue if the un-redacted OPA Documents are ordered to be disclosed.

**Board Findings on the OPA Documents and Additional OPA Documents**

There was no dispute as to the three conditions which should be met for a claim of settlement privilege:

1. A litigious dispute must be in existence or within contemplation.
2. The communication must be made with the express or implied intention that it would not be disclosed in a legal proceeding in the event negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement.

The Board finds that, at a minimum, the OPA has not met the third condition.

The OPA's submission in support of the third condition is that "it is apparent that the motivating purpose of the OPA, insofar as the documents and communications are concerned, was to attempt to effect a settlement". The OPA has provided no evidence to substantiate this assertion. The Board accepts that the OPA is involved in negotiations with certain generators. However, that does not mean that all documents created by the OPA on this topic have as their purpose to effect a settlement. That this is the purpose must be demonstrated clearly.

The most obvious example of a communication that has settlement as its purpose would be a communication by the OPA to one or more wind generators. This is clearly the context contemplated in the passage from *Middlekamp* v. *Fraser Valley Real Estate Board* quoted by the OPA in its argument:

> …I find myself in agreement with the House of Lords that the public interest in the settlement of disputes general requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "'blanket', prima facie, common law or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the

> other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

To the extent that the OPA relies on the above quotation as authority for the proposition that communications do not need to be between the negotiating parties in order to attract settlement privilege, the Board disagrees. The issue in the *Middlekamp* case was whether communications between two parties to a settlement negotiation should be produced to and at the instance of a third party. The latter part of the above quotation clearly refers to communications between negotiating parties: "…a party communicating a proposal relating to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlement will not be served". The Board also notes the reference to settlement privilege protecting "the class of communications exchanged in the course of" settlement negotiations.

In the current proceeding, settlement privilege would potentially apply to communications between the OPA and the Applicants (either individually or as a group). The documents at issue are not communications from the OPA to one or more of the Applicants. They are presentations to the Ministry of Energy prepared by the OPA either individually or jointly with the IESO.

Even if the Board accepts that there may be documents that can be the subject of settlement privilege notwithstanding that they were not exchanged between negotiating parties, it would nonetheless need to be established that the documents were created for the purpose of effecting settlement. As noted above, the documents are presentations to the Ministry of Energy, made either by the OPA alone or jointly with the IESO, and the OPA has provided no evidence to substantiate its assertion that the documents were prepared for the purposes of settlement. The Board has inspected the un-redacted documents in question and cannot discern how they could be said to have been produced for the purpose of settlement negotiations. In the Board's view, the purpose of the documents is to inform the Ministry of Energy in a number of areas:

- surplus baseload generation
- IESO work in amending the market rules
- potential implications for various types of generators
- OPA negotiations

So while the documents may be related to the negotiations, the Board does not believe that they have as their purpose to effect a settlement. The Board therefore concludes that the OPA Documents and the Additional OPA Documents are not protected by settlement privilege.

The OPA also claims that disclosure of the documents would prejudice settlement negotiations by placing it at a disadvantage in its negotiations with certain generators. The Board understands that the OPA is in negotiations with certain generators in parallel with the current Board proceeding, and that the OPA Documents and Additional OPA Documents contain information which could provide an advantage to parties to those negotiations. However, the Board is conducting a public hearing process, and the information is potentially relevant to the review of the Renewable Integration Amendments. The material is potentially relevant to the issues before the Board and must therefore be available to the parties. Negotiations are ongoing and therefore confidentiality is warranted. These conflicting goals must be resolved in a fair and pragmatic way. The Board will therefore grant confidential status to the documents and they will only be made available to the external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking.

The OPA objects to counsel for the Applicants receiving the material because he also represents one of the generators in negotiations with the OPA. The Board accepts that, to the extent that confidentiality is warranted by reason of potential prejudice to the OPA's negotiating position, it follows that the material must not be disclosed to any individual that is participating in the current negotiations. Therefore, the Board will only accept a Declaration and Undertaking from external counsel (or consultants) who also confirm that they will not hereafter be involved in the ongoing negotiations with the OPA.

**Positions of the Parties on the Ministry/OPA Document**

According to the Ministry of Energy, the Ministry/OPA Document was originally authored by Ministry staff and came into the possession of the IESO through an e-mail. That e-mail referenced the specific use that the Ministry intended to make of that Document, specifically as a policy development tool to inform a technical discussion. The Ministry of Energy also noted that the fact that the word "confidential" appears on each page of the Ministry/OPA Document makes it clear that the Document was intended to be treated as confidential.

As noted above, the OPA's submissions on the confidential treatment of the Ministry/OPA Document are the same as those made in respect of the OPA Documents.

The Ministry of Energy, for its part, identified three bases for its confidentiality request in respect of the Ministry/OPA Document as follows:

i. The Document comprises advice to government and, in particular, advice to executive decision-makers on sensitive and ongoing policy matters. The government should be permitted to undertake policy analysis free from public scrutiny at early junctures in the policy development process. The Board should consider the potential detrimental effect on the deliberative process of public policy making should disclosure be ordered. The instances where the Board has required the disclosure of government briefing materials are rare, and in the only recent Board decision on this point (in proceeding EB-2010-0184)[11] the policy development process had run its course, which is not the case here. The importance of confidentiality in the policy development process is supported by section 13 of the *Freedom of Information and Protection of Privacy Act* (Ontario) ("FIPPA"), under which records may be withheld if they would reveal "advice or recommendations of a public servant, or any other person employed in the service of an institution or a consultant retained by an institution", and by the Information and Privacy Commissioner's expression of the purpose of that section in Order P-1398.[12] In this regard, the Board should not feel bound to strict definitions of the terms "advice" and "recommendation", but rather should take a broad approach and include background information, options and analysis leading to the development of recommendations.

ii. The disclosure of the information contained in the Document has the potential to interfere with the on-going negotiations of the OPA with its counterparties, could be prejudicial to the OPA's interests and may have broader implications for other entities involved in current and sensitive

[11] The Decision and Order in question was issued on June 8, 2011 in the context of a proceeding to determine a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998.*

[12] May 22, 1997, upheld on judicial review.

negotiations with the government or its agencies. These implications are either negative or not fully understood at this time.

iii. The disclosure of the Document could undermine the economic or other interests of Ontario, in part because negotiations between the OPA and various counterparties with vested interests in the outcome of this proceeding are ongoing and in part because other strategic positions of the government are at play. The disclosure of the information in the Document could provide counterparties and competing jurisdictions with unintended insight and economic and strategic advantages, to the detriment of the Province's negotiating position or to that of the government's agencies.

The Ministry further argued that the balance of interests favours non-disclosure of the Ministry/OPA Document. In the Ministry's view, the benefits of disclosure are purely speculative, whereas disclosure has the potential to undermine the free and frank development of energy policy going forward. The Board should therefore only disclose the Ministry/OPA Document to the parties in response to a focused inquiry in relation to specific information, and not in response to a general inquiry for information. In the alternative, if the Board does order the disclosure of the Ministry/OPA Document, it would be more appropriate to disclose a version of the Document that has been redacted in a manner consistent with the redactions sought by the OPA.

The Applicants submitted that the Ministry of Energy has not substantiated its request for confidential treatment and that the Board should order that the Ministry/OPA Document be disclosed. The Applicants noted that the Board has unambiguously determined that briefing notes, of which the Ministry/OPA Document is one, are not confidential for the purposes of disclosure. The Applicants referred in this regard to the same Board decision as that cited by the Ministry of Energy (from proceeding EB-2010-0184), wherein the Board stated that a briefing note does not meet the test set out in *Carey* v. *Ontario*[13] of being part of the decision-making level of government.

The Applicants also noted that the Ministry of Energy is not seeking the formal protection of claiming public interest immunity, and that it has not offered any certificate or evidence in support of its assertion that disclosure could undermine the economic

[13] [1986] 2 S.C.R. 637.

and other interests of Ontario. Rather, the Ministry of Energy has offered vague and unsubstantiated assertions that the information in the Ministry/OPA Document must be confidential because it addresses issues around surplus baseload generation ("SBG"). In effect, the Ministry of Energy is arguing that a proceeding aimed at determining whether a market rule allegedly aimed at SBG should be sheltered from information on alternative means to address SBG that were considered by the Ministry, the OPA and the IESO. In the Applicants' view, if the Board accepts the Ministry of Energy's submission, it will effectively make it impossible to ever order disclosure from the Ministry and will be prejudicial to a critical evaluation of the IESO's own positions on alternatives to addressing SBG. The Applicants also cautioned the Board that it is very easy to exaggerate the importance of ensuring that advice to government is free and frank, as noted by the Supreme Court in *Carey* v. *Ontario.*

SEC submitted that certain portions of the Ministry/OPA Document should be treated as confidential, but that the un-redacted Document should be provided to counsel for the parties. In SEC's view, the Board's form of Declaration and Undertaking is sufficient protection in respect of confidential information, and only in the most exceptional circumstances is the nature of the document such that it should be completely secret, so that no parties see it. According to SEC, this proceeding is not an example of such exceptional circumstances.

SEC noted that the Board is not bound by FIPPA, and that the FIPPA exemptions relied upon by the Ministry are only a guide to the Board in determining confidentiality requests under the Practice Direction. Further, SEC stated that the Board should, if anything, construe the reference to "advice or recommendations" narrowly rather than broadly as suggested by the Ministry of Energy. In SEC's view, based on the non-confidential summary of the Ministry/OPA Document provided by the Ministry, a number of pieces of information appear to be neither advice nor recommendations, and should therefore be placed on the public record. SEC noted, in this regard, that section 13 of FIPPA does not permit the withholding of factual material. With respect to the pieces of information that could be considered advice or recommendations, SEC's view was that the harm that the Ministry of Energy claims will occur from disclosure is overstated. Again, the form of Declaration and Undertaking is more than adequate to protect the information from the harms asserted by the Ministry in any event.

BOMA stated that it was unable to find the Ministry/OPA Document, and hence was unable to make submissions in relation to that Document.

Energy Probe did not express a position in relation to the Ministry of Energy's argument regarding the non-disclosure of advice to government, but disagreed with the Ministry's other arguments. In Energy Probe's view, the arguments relating to the economic and other interests of Ontario and to the balance of interests are nothing more or less than a statement of the public interest, which *inter alia* is what the Board is to determine as it relates to the Renewable Integration Amendments. Further, the Ministry of Energy has not disputed the relevance of the Ministry/OPA Document to this proceeding. According to Energy Probe, an examination of the Ministry's role in the events leading up to this proceeding is important. Energy Probe also stressed that any information on the impact of the Renewable Integration Amendments on the Applicants and on electricity consumers that the Board feels is relevant and that is requested by the parties should be produced under the terms of the Practice Direction. The utility of the Ministry's non-confidential summary of the Ministry/OPA Document is, in Energy Probe's view, *de minimis*.

Board staff noted that the Ministry of Energy's arguments could be read as advancing a claim for public interest immunity, as described in *Carey* v. *Ontario*, and submitted that the analytical approach to making a determination on public interest immunity lends itself well to the determination of the Ministry's claim under the Practice Direction. Board staff acknowledged that Appendix A of the Practice Direction includes "any other matters relating to FIPPA or FIPPA exemptions" as a factor that may be considered by the Board in determining a request for confidentiality. Board staff also acknowledged that sections 13 and 18 of FIPPA allow (but do not require) records to be withheld in respect of, respectively, advice or recommendations to government and information the disclosure of which could reasonably be expected to be injurious to the economic and other interests of Ontario. However, Board staff noted that both of these exemptions are subject to the "compelling public interest" override set out in section 23 of FIPPA.

Board staff submitted that, to the extent that the Ministry/OPA Document comprises information in the nature of advice or recommendations to the government (including the identification and assessment of different available options), there is a public interest in according confidential treatment to that information. Further, the same holds true of information the disclosure of which could reasonably be expected to be injurious to the

economic and other interests of Ontario. If the Board were to accept this view, the Board would then need to consider whether the public interest in non-disclosure is outweighed by other factors. However, Board staff also submitted that the public interest argument in relation to advice to government should not extend to information of a factual nature that is provided to support the policy decision-making process. This latter point, in Board staff's view, finds support in the fact that section 13 of FIPPA specifically excludes a record that contains factual material (among others) from the exemption that otherwise applies in respect of advice or recommendations to government.

In its reply submission, the Ministry of Energy agreed that the Board's determination should be based on a balancing of the public interests in non-disclosure and disclosure, as well as the probative value of disclosure to other parties, and urged the Board to find that the balance favours non-disclosure of the Ministry/OPA Document. The Ministry of Energy touched on a number of the arguments made in its earlier submissions, and also made the following additional submissions:

i. The Ministry need not, as suggested by the Applicants, assert a claim of Cabinet privilege in order to establish the confidential nature of the Ministry/OPA Document.
ii. Ordering disclosure of confidential government policy documents, particularly in a proceeding where the government is not a party, would impede the dissemination of information between government and its agencies and be particularly problematic where the government relies on its agencies for support in respect of the data and technical information required for effective policy development.
iii. The potential value of the Ministry/OPA Document in this proceeding is limited and disclosure is unwarranted given: (a) the Ministry's limited role in this proceeding; (b) the Ministry's lack of involvement in the market rule amendment process, and notably that the Ministry has not provided policy direction to the IESO or the OPA in relation to the Renewable Integration Amendments; (c) the scope of this proceeding, which is limited to economic issues as opposed to reputational risks or other interests; and (d) the fact that the production of documents by the IESO is extensive and sufficient to allow parties to present their cases and to allow the Board to determine the issues.

iv. The decision of the Court of Appeal in *Ontario (Minister of Finance)* v. *Ontario (Information and Privacy Commissioner)*[14] clarifies that the exemption from disclosure under section 13 of FIPPA includes advice and recommendations in drafts and other records relating to the deliberative process whether or not provided to the ultimate decision maker, as well as all options and related analysis (as opposed to simply the recommended options).

v. The circumstances of this case are vastly different than the earlier case in which the Board ordered the production of government documents. Specifically, the government was an intervenor in that case, which was a proceeding involving a constitutional challenge in respect of which Ministry of Energy policies were directly at issue. Such is not the case here.

**Board Findings on Ministry/OPA Document**

The Board finds that the Ministry/OPA Document will be disclosed, but that it will be held confidential and will only be provided to external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking and who further confirm that they will not hereafter be involved in the ongoing negotiations with the OPA.

The Board has reviewed the Ministry/OPA Document. The document contains much of the same information contained in the OPA Documents, including:

- factual information about surplus baseload generation
- the IESO market rule amendment process
- contractual provisions in various agreements between the OPA and generators
- options to address various issues

The Board reaches the same conclusion it did in proceeding EB-2010-0184, namely that the Ministry/OPA Document does not meet the test set out in *Carey* v. *Ontario* of being part of the decision-making level of government. It is a briefing to unnamed senior officials; not to Cabinet and not to the Minister.

The Ministry draws a distinction between the two proceedings on the basis that it is not active in this proceeding. The Board finds that this distinction is not relevant. What is relevant is that the material was in the possession of the IESO, the proponent of the

[14] (2012) ONCA 125.

Renewable Integration Amendments, and the material contains information which is potentially relevant to the issues before the Board.

The Ministry also distinguishes between the two cases on the basis that the policy in question in the current proceeding is still under development. The Board finds that this distinction supports a finding that the material should be treated as confidential, not that it should be completely undisclosed.

The Ministry also claims that competitive harm will come from disclosure. Again, the Board finds that this concern is adequately addressed by treating the information as confidential and limiting its disclosure to representatives of parties that have signed a Declaration and Undertaking and confirm that they will not be involved in the ongoing negotiations with the OPA.

**IESO Confidentiality Claim**

The documents over which the IESO is asserting confidentiality are ancillary services contracts with different market participants. According to the IESO, these contracts all specifically provide that certain information is to be kept confidential. The IESO submitted that it would be prohibited from disclosing the information that has been redacted from the IESO Documents under section 17 of FIPPA, which prohibits an institution from disclosing a record that reveals commercially sensitive third party information. Although disclosure on consent is permitted under section 17 of FIPPA, the IESO stated that it has contacted each of the counterparties to the contracts and they have all advised that they do not consent to disclosure. The IESO noted that third party information as described in section 17 of FIPPA is the type of information that the Board has previously determined should be kept confidential as contemplated in Appendix B to the Practice Direction. The IESO also submitted that the Board should have regard to various items listed in Appendix A to the Practice Direction, including those pertaining to certain harms that could result from disclosure and to the existence of a legislative requirement to maintain confidentiality. Given that the information redacted from the IESO Documents is subject to a FIPPA prohibition against disclosure, in the IESO's view it would not be appropriate for any person to be afforded the opportunity to review the un-redacted versions of those Documents even if a Declaration and Undertaking has been provided by their counsel or representative.

### Board Findings on IESO Documents

The Board finds that the IESO Documents will be treated as confidential, and will only be provided to external counsel and consultants from whom the Board has accepted an executed Declaration and Undertaking and who further confirm that they will not hereafter be not involved in the ongoing negotiations with the OPA.

The Board has reviewed the IESO Documents and agrees that they contain commercially sensitive information. However, the information goes directly to one of the areas of enquiry, namely what compensation the IESO pays to other market participants for certain services. The information is therefore potentially relevant to the issues before the Board and therefore the Board concludes that the IESO Documents should be made available to the parties with suitable protections so as to maintain confidentiality.

### OEFC Confidentiality Claim

On February 22, 2013, OEFC filed a letter with the Board indicating that redacted and un-redacted versions of the OEFC Document were being filed by the IESO, and outlining the grounds for OEFC's confidentiality request in respect of that Document. According to OEFC, disclosure of some of the information that has been redacted from the OEFC Document would prejudice OEFC's competitive position in negotiating and minimizing the cost of curtailments with the non-utility generators ("NUGs") with whom OEFC has contracts. In addition, some of the information has been redacted due to concerns about disclosing the "OEFC timing and notice parameters for reasons of commercial confidentiality" and to avoid affecting ongoing curtailment negotiations with the NUGs. OEFC also stated that minimizing the NUG curtailment costs is to the benefit of ratepayers, as costs under the NUG contracts are recovered through the Global Adjustment. OEFC did not specifically identify whether it objected to disclosure of the un-redacted OEFC Document to counsel or consultants that have signed a Declaration and Undertaking.

### Board Findings on OEFC Document

The Board accepts OEFC's claim of confidentiality. The OEFC Document will only be provided to external counsel and consultants from whom the Board accepts an executed Declaration and Undertaking and who further confirm that they will not hereafter be involved in the ongoing negotiations with the OPA or in any ongoing negotiations between OEFC and NUG generators.

The Board has reviewed the OEFC Document and agrees that it contains information which is commercially sensitive and which could potentially adversely impact OEFC's negotiating position. The Board therefore agrees that the information should not be publicly disclosed. However, the Board also finds that the information is potentially relevant to the current proceeding and should therefore be provided under confidentiality protections.

## C. Access to Un-redacted Documents

The Board has received a Declaration and Undertaking from representatives of all of the parties other than Ontario Power Generation, the IESO and CME. For the reasons set out above, the Board will not accept any Declaration and Undertaking without confirmation in writing that the person signing same will not represent a party in the ongoing negotiations with the OPA or OEFC. To be clear, such confirmation is a condition of the Board's acceptance of a Declaration and Undertaking. The process for requesting and obtaining access to the un-redacted documents is set out below. The Board will notify all parties of the persons from whom the Board has accepted a Declaration and Undertaking, and will require the IESO to provide copies of the un-redacted documents to those persons.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

**THE BOARD ORDERS THAT**:

1. A representative of a party that wishes to have access to un-redacted copies of any of the OPA Documents, the Additional OPA Documents, the Ministry/OPA Document, the IESO Documents and the OEFC Document shall, to the extent that it has not already done so, file with the Board and deliver to all other parties a Declaration and Undertaking in the form set out in the Practice Direction no later than **12:00 p.m. (noon)** on **Friday, March 1, 2013.**

2. A representative of a party that has filed a Declaration and Undertaking and that wishes to have access to any of the un-redacted documents referred to in paragraph 1 shall, no later than **12:00 p.m. (noon)** on **Friday, March 1, 2013,** file with the Board and deliver to all other parties confirmation in writing that the

representative will not represent a party in the current negotiations between the OPA and wind generators or between OEFC and the NUGs on or after the date of filing of such confirmation.

3. The IESO shall, no later than at the commencement of the Technical Conference on **Monday, March 4, 2013**, deliver a copy of the un-redacted documents referred to in paragraph 1 to each person from whom the Board has confirmed that it has accepted a Declaration and Undertaking.

All filings to the Board must quote file number EB-2013-0029, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/ and, except as noted above, shall consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry.

If the web portal is not available, parties may e-mail their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below. Except as noted above, filings must 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, Edik Zwarenstein at Edik.Zwarenstein@ontarioenergyboard.ca and the Board's Associate General Counsel, Martine Band at Martine.Band@ontarioenergyboard.ca.

**ADDRESS**
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

**DATED** at Toronto, February 28, 2013

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

**Attachment:** Appendix A: Confidentiality Requests Related to IESO's January 31, 2013 Filing
Appendix B: Confidentiality Requests Related to IESO's February 22, 2013 Filing

# APPENDIX A

# TO

# DECISION ON COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

## Renewable Energy Supply Generators

## Board File No: EB-2013-0010/EB-2013-0029

## February 28, 2013

## Confidentiality Requests Related to IESO's January 31, 2013 Filing

The documents are identified using the document identification numbers from the IESO's February 1, 2013 and February 6, 2013 letters. Documents shaded in grey are documents that appear to have been prepared jointly by the IESO and the OPA, whereas the others bear only the OPA's name.

| OPA Documents | | Ministry/OPA Document | |
|---|---|---|---|
| Document No. | Title | Document No. | Title |
| IESO0003497 | Renewable Dispatch – Ministry of Energy (October 11, 2011) | IESO0003910 | Managing Surplus Generation (May 14, 2012) |
| IESO0003503.1 | Renewable Dispatch – Ministry of Energy (October 11, 2011) | | |
| IESO0003548 | Integration of Renewables and Recommendations for | | |

| OPA Documents | | Ministry/OPA Document | |
|---|---|---|---|
| Document No. | Title | Document No. | Title |
| | Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 13, 2012) | | |
| IESO0003602 | Integration of Renewables: RES and FIT – Ministry of Energy Update (October 29, 2010) | | |
| IESO0003687 | Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update (November 25, 2010) | | |
| IESO0003786 | Potential Surplus Energy: A Summary – Briefing jointly prepared by IESO and OPA – Confidential (March 1, 2012) | | |
| IESO0003854 | Integration of Renewables and Recommendations for Dispatch Management – Update to Ministry of Energy – Confidential Advice to Government (August 15, 2012) | | |
| IESO0003701 | Integration of Renewables: RES and FIT Contracts – Ministry of Energy Update (November 29, 2010) | | |

| **OPA Documents** | | **Ministry/OPA Document** | |
|---|---|---|---|
| Document No. | Title | Document No. | Title |
| IESO0003589 | Addressing Dispatch and Curtailment of Renewable Facilities – Joint OPA and IESO Presentation (July 13, 2010) | | |
| IESO0003634 | Integration of Renewables: RES and Fit (October, 2010) | | |

# APPENDIX B

# TO

# DECISION ON COSTS AND CONFIDENTIALITY REQUESTS AND PROCEDURAL ORDER NO. 4

## Renewable Energy Supply Generators

## Board File No: EB-2013-0010/EB-2013-0029

## February 28, 2013

## Confidentiality Requests Related to IESO's February 22, 2013 Filing

The documents are identified based on the description set out in the IESO's February 22, 2013 letter.

### IESO Documents

Reactive Support and Voltage Control: Brookfield
Reactive Support and Voltage Control: Brookfield Great Lakes Power
Reactive Support and Voltage Control: Bruce Power
Reactive Support and Voltage Control: Lower Matagami Limited Partnership
Reactive Support and Voltage Control: OPG
Reactive Support and Voltage Control: Shell Energy North America
Reactive Support and Voltage Control: TransAlta Sarnia
Operating Reserve: OPG

### Additional OPA Documents

Update to Ministry on Contract Implications of Renewable Integration (December 2010)
Overview of Curtailment and OPA Contracts (March 29, 2011)
Hourly Potential Surplus Energy with Pickering Continued Operations (October 6, 2011)
Hourly Potential Surplus Energy without Pickering Continued Operations (October 7, 2011)
Integration of Renewables: OPA Recommendations for Dispatch Management (June 26, 2012)
Renewable Contract Amendments for Dispatch Management (September 7, 2012)

**OEFC Document**

NUG Protocol with OEFC (November 19, 2010)

# Tab 4

**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2013-0010**
**EB-2013-0029**

**IN THE MATTER OF** the *Electricity Act, 1998*, S. O. 1998, c.15, Schedule A;

**AND IN THE MATTER OF** an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

# DECISION ON COST ELIGIBLITY AND PROCEDURAL ORDER NO. 6

**March 4, 2013**

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (the "OPA") in respect of wind generation facilities (the "Applicants") collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act, 1998* (the "Electricity Act") seeking the review of certain amendments to the market rules made by the Independent Electricity System Operator (the "IESO") (the "Application"). The market rule amendments in question (the "Renewable Integration Amendments") deal with the dispatching of, and the establishment of floor prices for, variable generation facilities, defined as all wind and solar photovoltaic resources with an installed capacity of 5MW or greater,[1] or all wind and solar photovoltaic resources that are directly connected to the IESO-controlled grid.

[1] Wind and solar photovoltaic resources that are embedded (i.e., not directly connected to the IESO-controlled grid) are captured by the Renewable Integration Amendments only if they are registered market participants.

On January 28, 2013, the Board issued its Notice of Application and Oral Hearing in relation to the Application. The Board issued its Procedural Order No. 1 on January 29, 2013 and its Procedural Order No. 2 on February 4, 2013. Among other things, Procedural Order No. 2 established a schedule for the filing of submissions and reply submissions by all parties on the issue of cost awards.

On February 11, 2013, the Board heard a motion by the Applicants for the production of further materials from the IESO. On February 12, 2013, the Board issued its Decision on Motion for the Production of Evidence and Procedural Order No. 3.

On February 28, 2013, the Board issued a Decision on Costs and Confidentiality Requests and Procedural Order No. 4 in which it determined that the IESO would be responsible for the costs of this proceeding and reiterated that cost eligibility requests would be determined at the conclusion of this proceeding.

On March 1, 2013, the Applicants gave notice that they were withdrawing their Application. On the same day, the Board issued its Procedural Order No. 5 to provide intervenors with an opportunity to make submissions if they wished to request that the Board consider continuing this proceeding. The Board written received confirmation from a number of intervenors that they did not intend to make such submissions. No submissions were received from the remaining intervenors by the deadline established for that purpose in Procedural Order No. 5.

Earlier today, the Board issued a Notice advising that this proceeding is being discontinued, subject only to addressing outstanding requests for cost award eligibility and cost claims.

**Board Findings on Cost Eligibility Requests**

The Board received requests for cost award eligibility from five parties: the Applicants; the Building Owners and Managers Association of Greater Toronto (“BOMA”); Energy Probe Research Foundation (“Energy Probe”); the School Energy Coalition (“SEC”); and Canadian Manufacturers & Exporters (“CME”).

The Board finds that CME, BOMA, Energy Probe and SEC are eligible for an award of costs. Each of these parties represents a group of ratepayers, which are potentially

affected by the Renewable Integration Amendments and which ultimately pay the IESO's costs.

The Board finds that the Applicants are not eligible for an award of costs.

In support of their request for cost award eligibility, the Applicants made reference to the record of the only prior proceeding in which the Board has reviewed a market rule amendment (the "Ramp Rate Review"),[2] in which the Board determined that the applicant (the Association of Major Power Producers in Ontario) and an intervenor representing generators (the Association of Power Producers of Ontario) were eligible for an award of costs.

In their February 13, 2013 submission in response to Procedural Order No. 2, the Applicants reiterated that they should be eligible for the recovery of their costs in this proceeding from the IESO. The Applicants' arguments in support of that position can be summarized as follows:

- the Application raises legitimate and important public interest issues in relation to the criteria set out in section 33(9) of the Electricity Act that go beyond the commercial impact of the Renewable Integration Amendments on variable generators; namely, how the IESO should, in making amendments to the market rules, take into account the purposes of the Electricity Act, the interaction between the market rules and procurement contracts and the IESO's responsibilities to market participants in light of its relationship with the Ontario Power Authority;
- the Applicants' perspective on these issues would be of benefit to the Board; and
- the Board has granted cost award eligibility to generators where they are directly affected by the outcome of a proceeding and provide a useful perspective on the issues, as was the case in the Ramp Rate Review among others.

The Applicants acknowledged that, unlike the applicant in the Ramp Rate Review, they do not ultimately pay the IESO's costs. However, the Applicants noted that "any person" may bring an application under section 33 of the Electricity Act, and submitted that it would be inappropriate for there to be a systematic bias in favour of consumers in challenging market rule amendments. The Applicants also noted that industrial consumers are commercial entities that ultimately pursue their own commercial

[2] EB-2007-0040.

interests, and that there is therefore no public interest reason to prefer them over generators in terms of cost issues.

In support of its position that the Applicants should bear their own costs in this proceeding, the IESO argued the following in their February 13, 2013 submission in response to Procedural Order No. 2:

- the Applicants are prima facie ineligible for an award of costs under the Board's *Practice Direction on Cost Awards* (the "Practice Direction");
- the Applicants do not contribute to the payment of the IESO's Board-approved costs under the market rules; and
- market participants should be expected to bear their regulatory costs (including the cost of participating in market rule amendment development and review processes) save only in exceptional circumstances.

Under the Board's Practice Direction, the Applicants are prima facie not eligible for an award of costs: first, because they are in the role of applicant; and second, because they are generators. The Practice Direction contemplates that a party that is prima facie ineligible for costs may nonetheless be found eligible for costs in special circumstances. As noted above, the Board has already found that, given the nature of this proceeding, the IESO and not the Applicants will be responsible for the Board's costs and for intervenor costs. What remains to be determined is whether there are special circumstances in this case which would favour a determination that the Applicants are eligible for costs.

The Board finds that the Applicants have represented their private interests as generators in this proceeding. Although the Applicants submitted that the Application raised public interest issues, the Applicants have withdrawn their Application and have not pursued these public interest issues. The Board has therefore received no benefit from the Applicants in that regard. The Board finds that it would be inappropriate for the IESO, and the ratepayers that ultimately pay the IESO's costs, to bear the costs of the Applicants in the circumstances of this case. The Board also agrees with the IESO that market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process. This is consistent with the Board's Decision on Costs and Confidentiality Requests and Procedural Order No. 4, where the Board stated that section 33 of the Electricity Act is part of the overall market rule amendment process. The Board concludes that there are no special circumstances

in this proceeding which would support making the Applicants eligible for an award of costs.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

**THE BOARD ORDERS THAT**:

1. BOMA, CME, Energy Probe and SEC (the "eligible parties") shall submit their cost claims by **Monday, March 18, 2013**. The cost claim must be filed with the Board and one copy is to be served on the IESO. The cost claims must be completed in accordance with the Practice Direction**.**

2. The IESO will have until **Thursday, March 28, 2013** to object to any aspect of the costs claimed. The objection must be filed with the Board and one copy must be served on the eligible party against whose claim the objection is being made.

3. The eligible party whose cost claim was objected to will have until **Thursday, April 4, 2013** to make a reply submission as to why its cost claim should be allowed. The reply submission must be filed with the Board and one copy is to be served on the IESO.

Service of cost claims, objections and reply submissions on other parties may be effected by courier, registered mail, facsimile or e-mail.

All filings to the Board must quote file number EB-2013-0029, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/ and, except as noted above, shall consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at http://www.ontarioenergyboard.ca/OEB/Industry.

If the web portal is not available, parties may e-mail their documents to the address below. Those who do not have internet access are required to submit all filings on a CD

in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below. Filings must 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, Edik Zwarenstein at Edik.Zwarenstein@ontarioenergyboard.ca and the Board's Associate General Counsel, Martine Band at Martine.Band@ontarioenergyboard.ca.

**ADDRESS**
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
E-mail: Boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656

**DATED** at Toronto, March 4, 2013

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

# Tab 5

**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2013-0010**
**EB-2013-0029**

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

**AND IN THE MATTER OF** an Application made collectively by entities that have renewable energy supply procurement contracts with the Ontario Power Authority in respect of wind generation facilities for an Order revoking amendments to the market rules and referring the amendments back to the Independent Electricity System Operator for further consideration.

**BEFORE:** Cynthia Chaplin
Presiding Member and Vice-Chair

Paula Conboy
Member

Cathy Spoel
Member

# DECISION AND ORDER ON COST AWARDS
## April 29, 2013

## Background

On January 24, 2013, a number of entities that have renewable energy supply procurement contracts with the Ontario Power Authority (the "OPA") in respect of wind generation facilities (the "Applicants") collectively filed with the Ontario Energy Board an application under section 33(4) of the *Electricity Act, 1998* (the "Electricity Act") seeking the review of certain amendments to the market rules made by the Independent

Electricity System Operator (the "IESO") (the "Application"). The market rule amendments in question (the "Renewable Integration Amendments") deal with the dispatching of, and the establishment of floor prices for, variable generation facilities, defined as all wind and solar photovoltaic resources with an installed capacity of 5MW or greater,[1] or all wind and solar photovoltaic resources that are directly connected to the IESO-controlled grid. The Board assigned File Number EB-2013-0010/0029 to the application.

On March 4, 2013, the Board issued its Decision on Cost Eligibility and Procedural Order No. 6, granting the Building Owners and Managers Association of Greater Toronto ("BOMA"), Canadian Manufacturers & Exporters ("CME"), Energy Probe Research Foundation ("Energy Probe") and School Energy Coalition ("SEC") intervenor status and cost award eligibility. The Board also set out the process for intervenors to file their cost claims and to respond to any objections raised by the IESO.

The Board received cost claims from BOMA, CME, Energy Probe and SEC.

On March 27, 2013, the IESO filed comments stating that it has no objections to Energy Probe's cost claim. The IESO objected to CME's cost claim due to CME's extremely late intervention, its failure to identify an issue of direct and material interest and the excessive number of hours claimed for preparation for the technical conference (which did not proceed), including 3.5 hours on the day the parties were notified of the termination of the proceeding. The IESO asked that the CME be denied costs of this proceeding.

On April 2, 2013, the IESO filed comments stating that is has no objections to BOMA's cost claim.

## Board Findings

The Board has reviewed all the cost claims.

[1] Wind and solar photovoltaic resources that are embedded (i.e., not directly connected to the IESO-controlled grid) are captured by the Renewable Integration Amendments only if they are registered market participants.

BOMA

BOMA claimed 33.2 hours (including 27.2 hours of preparation, 3 hours of attendance settlement conference and 3 hours of attendance motion hearing). The Board notes that BOMA did not make a submission on the motion by the deadline, and therefore attendance at the motion hearing was not necessary. The Board will therefore reduce BOMA's cost claim by 5.5 hours to remove the time claimed for preparation and attendance at the motion hearing.

Energy Probe

Energy Probe claimed 37 hours (including 33.5 hours of preparation, 1.5 hours of attendance settlement conference and 2 hours case management). The Board notes that Energy Probe made no submission on the motion by the deadline, and therefore attendance at the motion hearing was not necessary. The Board will therefore reduce Energy Probe's cost claim by 2.75 hours to remove the time claimed for preparation and attendance at the motion hearing.

CME

CME claimed 9.2 hours of preparation. The IESO has objected to this claim. The Board will allow the claim. The Board accepts that CME had a reasonable interest in this case (as the representative of ratepayers) and the claim is modest.

SEC

SEC claimed 93.3 hours (including 85.5 hours preparation, 4.3 hours attendance settlement conference and 3.5 hours attendance motion hearing). The Board will reduce the claim by 46 hours (4 hours of Mr. Shepherd's time and 42 hours of Mr. Rubenstein's time).

There are two reasons for this reduction. First, SEC has declared a dual interest as a representative of schools as ratepayers and as a representative of schools as generators. SEC has identified this interest as a reason for the more detailed role it took, and by implication, as reason for the higher costs. This interest was not declared in SEC's request for intervenor status. Generators are an excluded category under the Board's practice direction on cost awards. The Board therefore finds that the costs associated with this interest as a generator are not eligible. Given the interests were described as "dual", the Board concludes that the costs associated with SEC's interest as a generator would be approximately half. The Board will make this reduction from

Mr. Rubenstein's time only. Second, the Board finds there is excessive duplication of time between the junior and senior counsel. SEC explains that Mr. Shepherd "took an active supervisory role" due to the importance of the issues. It is reasonable to claim some time for supervision, but the claim in this case is excessive. The Board will reduce the time claimed by Mr. Shepherd from 9.3 hours to 5.3 hours (a reduction of 4 hours).

The Board finds that all parties are eligible for 100% of their reasonably incurred costs of participating in this proceeding. The Board finds that the claim of CME is reasonable as are the adjusted claims of BOMA, Energy Probe and SEC and each of these cost claims shall be reimbursed by the IESO.

**THE BOARD THEREFORE ORDERS THAT:**

1. Pursuant to section 30 of the Ontario *Energy Board Act, 1998*, the IESO shall immediately pay:

    - Building Owners and Managers Association Toronto $10,397.07;
    - Canadian Manufacturers & Exporters $2,976.42;
    - Energy Probe Research Foundation $11,235.11; and
    - School Energy Coalition $8,889.00.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, the IESO shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

**DATED** at Toronto, April 29, 2013.

**ONTARIO ENERGY BOARD**

*Original Signed By*

Kirsten Walli
Board Secretary

# Tab 6

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

**EB-2019-0242**

**Association of Major Power Consumers in Ontario**

**Application to Review Amendments to the Market Rules made by the Independent Electricity System Operator**

# DECISION ON COST RESPONSIBILITY & COST ELIGIBILITY

**November 12, 2019**

On September 26, 2019, the Association of Major Power Consumers in Ontario (AMPCO) filed a Notice of Appeal (Application) asking the Ontario Energy Board (OEB) to review and issue an order revoking amendments to the market rules made by the Independent Electricity System Operator (IESO) (MR-00439-R00 to -R05) (Amendments), and referring the Amendments back to the IESO for further consideration. The Amendments enable the evolution of the IESO's Demand Response Auction into a Transitional Capacity Auction (TCA), including allowing participation by certain generators. The Application was filed under section 33 of the *Electricity Act*, *1998*, S.O. 1998, c. 15, (Schedule B) (Act).

AMPCO also filed a Notice of Motion requesting an order of the OEB staying the operation of the Amendments pending the completion of the OEB's review (Motion).

On October 18, 2019, the OEB issued Procedural Order No. 2 (PO 2) which indicated, among other things, that the OEB will make cost awards available in this proceeding to eligible parties and granted intervenor status to all parties that requested it, as follows:

- Advanced Energy Management Alliance (AEMA)
- Association of Power Producers of Ontario (APPrO)
- Capital Power Corporation (Capital Power)
- Kingston CoGen Limited Partnership (KCLP)
- Rodan Energy Solutions Inc. (Rodan)
- School Energy Coalition (SEC)
- TransAlta Corporation (TransAlta)
- IESO (filed on October 17, 2019)

In its Application, AMPCO requested eligibility to seek recovery of its reasonably incurred costs of the Application and the Motion. APPrO and SEC also applied for cost award eligibility in their Notices of Intervention. KCLP, in its Notice of Intervention, submitted that, if AMPCO is granted cost award eligibility, it should also be eligible for an award of costs.

In PO 2, the OEB stated that it intends for the IESO to bear the costs of this proceeding, as this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments. The OEB also noted that this was the outcome in the two preceding applications before the OEB to review market rule amendments: EB-2013-0029 / EB-2013-0010 (RES Proceeding) and EB-2007-0040 (Ramp Rate Proceeding).

The OEB did, however, allow the IESO an opportunity to make a submission if it wished to object to bearing the costs of this proceeding, and if it wished to object to any of the requests for cost award eligibility made by AMPCO, APPrO, SEC and KCLP. Provision was also made for a reply submission by any party whose request for cost award eligibility was the subject of an objection by the IESO.

## Cost Responsibility

### Submissions of the Parties

*IESO Submission*

On October 23, 2019, the IESO filed its submission (IESO Submission) stating, among other things, that the OEB should defer its determination of who should be responsible for costs until the end of this proceeding, when the OEB will be better positioned to decide whether ‘special circumstances’ have been demonstrated that warrant a departure from the presumptive rule that (i) applicants bear their own costs, and (ii) parties pursuing their own commercial interests are not eligible for cost awards.

The IESO submitted that the two earlier market rule review proceedings are not dispositive with respect to cost responsibility in an application under section 33 of the Act, and further submitted that it disagreed with the OEB’s view, as expressed in PO 2, that making the IESO responsible for costs is consistent with the legislative scheme. The IESO Submission also noted that the decision on cost responsibility in the RES Proceedings was deferred until later in the proceeding after submissions by the parties.

*AMPCO Submission*

AMPCO filed its reply to the IESO Submission on October 29, 2019 (AMPCO Submission) in which it submitted, among other things, that in the two previous proceedings considering market rule amendments - the RES Proceeding and the Ramp Rate Proceeding - the OEB determined that the IESO should bear the costs of the proceeding. AMPCO noted that, in the Ramp Rate Proceeding, the OEB determined that it would not be appropriate to defer its decision on cost responsibility and made the same determination in the later RES Proceeding. The AMPCO Submission stated that, if the OEB defers determination of who should bear the costs of this proceeding, AMPCO would be forced to abandon the Application as it is not set up or funded to absorb the costs of a regulatory proceeding.

*APPrO Submission*

On October 29, 2019, APPrO filed its submission (APPrO Submission) in response to the IESO Submission. APPrO stated that deferring a decision on cost responsibility until after the determination of the Application would be unreasonable as APPrO (and other entities that have no ability to recover costs from ratepayers or market participants) would be exposed to uncertain cost risk, which will hamper its participation in this proceeding. APPrO also stated that deferring a decision on cost responsibility could discourage intervenors from seeking intervenor status to bring legitimate concerns and important perspectives to the OEB in other proceedings.

## OEB Findings

The OEB has determined that the IESO shall bear the costs of this proceeding. The OEB remains of the view that this is consistent with the overall legislative scheme, which contemplates a review by the OEB as a potential last step in relation to market rule amendments.

The OEB acknowledges that the IESO is responsible for making and amending the market rules, but the fact remains that market rule amendments are subject to oversight by the OEB under section 33 of the Act (among others) and that this oversight is part of the legislative scheme even if as a proceeding separate from the IESO's market rule amendment process.

Based on the above, the OEB also does not see any compelling reasons to defer its decision on cost responsibility, as requested by the IESO.

## Cost Award Eligibility

### Submissions of the Parties

*IESO Submission*

The IESO objected to the cost award eligibility requests made by AMPCO, APPrO and KCLP on the basis that these parties are pursuing their own commercial interests and are *prima facie* not eligible for cost awards under the OEB's *Practice Direction on Cost Awards* (Practice Direction). Alternatively, the IESO requested that the OEB defer its decision on cost award eligibility until the end of the proceeding, as it had done in the RES Proceeding.

*AMPCO Submission*

In its submission, AMPCO referred to the Ramp Rate Proceeding where it was found eligible for recovery of its reasonably incurred costs on the basis that:

(a) Its application raised legitimate issues for the OEB's consideration.
(b) As market participants, members of AMPCO are in fact participating in the funding of cost awards in the matter through their payment of the IESO's administrative costs in accordance with the market rules.

The AMPCO Submission argued that the same is true of the Application.

The AMPCO Submission conceded that, in this Application, AMPCO is primarily acting in the interests of its members who offer, or who might offer, Demand Response resources, but noted that AMPCO is also advocating the interests of its members – including those who do not offer Demand Response resources – as electricity consumers. AMPCO submitted that the observations in the Ramp Rate Proceeding regarding AMPCO are instructive and analogous in respect of AMPCO's cost eligibility in this proceeding.

*APPrO Submission*

APPrO noted that it is a representative of generators who are directly impacted by this proceeding. APPrO submitted that it is uniquely positioned to provide the OEB with useful context as to how its members view the TCA, their ability to participate in it and other issues of asset utilization tied to the TCA. APPrO further stated that there are therefore special circumstances that warrant a finding that it should be afforded cost eligibility in accordance with section 3.07 of the Practice Direction.

*SEC and KCLP*

Two other intervenors also requested cost award eligibility in their Notices of Intervention – SEC and KCLP – although these two parties did not make submissions in response to PO 2 or the IESO Submission.

The IESO did not object to SEC's request for cost award eligibility.

In its Notice of Intervention, KCLP stated that if AMPCO is granted cost award eligibility, the OEB should do the same for KCLP in light of special circumstances under section 3.07 of the Practice Direction; namely, to ensure that one category of capacity resources (Demand Response resources) do not receive preferential treatment in this process over another competing category of capacity resources (electricity generators), given that both resources are direct competitors in the upcoming TCA.

## OEB Findings

The OEB has determined that SEC, as a representative of ratepayers, is eligible for an award of costs under section 3.03 of the Practice Direction.

By contrast, all other parties requesting cost award eligibility are *prima facie* not eligible for an award of costs under section 3.05 of the Practice Direction, AMPCO by reason of being the applicant, and KCLP and APPrO by reason of being or representing, respectively, generators. However, section 3.07 of the Practice Direction contemplates that a party that falls into one of the categories listed in section 3.05 can be eligible in special circumstances.

The OEB has determined that AMPCO is eligible for an award of costs despite being the applicant. This is consistent with the OEB's view that the review process under section 33 of the Act is part of the overall market rule amendment process. The OEB also notes that, as market participants, members of AMPCO are participating in the funding of cost awards in this case through their payment of the IESO's fees in accordance with the market rules.

The OEB believes that, in this case, the views of generators with respect to the Amendments will be important to the OEB's determination of how the Amendments may fare relative to the criteria set out in section 33(9) of the Act. The OEB has therefore determined that APPrO is also eligible for an award of costs.

Although KCLP is also a generator, the OEB has determined that it is not eligible for an award of costs. The OEB is of the view that, given its broad membership, APPrO should be in a position to provide the OEB with generator perspectives on the Amendments, including the perspective of KCLP's owner Northland Power, which according to APPrO's website is a member of APPrO. Even if and to the extent that KCLP's current situation is different from the situation of other generators, it does not appear to the OEB based on KCLP's intervention letter that such difference translates to a unique perspective on the Amendments that speaks directly to the determinations to be made by the OEB on an application under section 33 of the Act.

Being eligible to apply for an award of costs is not a guarantee of recovery of any costs claimed. Cost awards are made by way of OEB order at the end of a hearing. Cost eligible parties should be aware that the OEB will not generally allow the recovery of costs for the attendance of more than one representative of any party, unless a compelling reason is provided when cost claims are filed.

The OEB also takes this opportunity to remind all of the parties that, as in all cases, parties are expected to act responsibly and that the OEB retains discretion to address irresponsible or inappropriate participation through the cost award process.

Parties should not engage in detailed exploration of items that do not appear to be relevant or material. In making its decision on costs, the OEB will consider whether parties made reasonable efforts to ensure that their participation in the hearing was focused on relevant and material issues.

**DATED** at Toronto, **November 12, 2019**

**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long
Registrar and Board Secretary

# Tab 7

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

# DECISION AND ORDER ON COST AWARDS

## EB-2019-0242

## ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO

**Application to review amendments to the market rules made by the Independent Electricity System Operator**

**BEFORE: Cathy Spoel**
Presiding Member

**Emad Elsayed**
Member

**Susan Frank**
Member

**February 26, 2020**

## INTRODUCTION AND SUMMARY

This is a decision of the Ontario Energy Board (OEB) on cost claims filed with respect to a proceeding under section 33 of the *Electricity Act, 1998,* S.O. 1998, c. 15, (Schedule B) (Act).

On September 26, 2019, the Association of Major Power Consumers in Ontario (AMPCO) filed a Notice of Appeal (Application) asking the OEB to review and issue an order revoking amendments to the market rules made by the Independent Electricity System Operator (IESO) (MR-00439-R00 to -R05) (Amendments), and referring the Amendments back to the IESO for further consideration. The Amendments enable the evolution of the IESO's Demand Response Auction into a Transitional Capacity Auction (TCA), including allowing participation by certain generators.

AMPCO also filed a Notice of Motion requesting an order of the OEB under section 33(7) of the Act staying the operation of the Amendments pending the completion of the OEB's review (Motion).

The OEB granted intervenor status to a number of parties including the Association of Power Producers of Ontario (APPrO), Kingston CoGen Limited Partnership (KCLP) and the School Energy Coalition (SEC).

On October 18, 2019, the OEB issued Procedural Order No. 2 in which it stated that it intends for the IESO to bear the costs of this proceeding. The OEB did, however, allow the IESO an opportunity to make a submission if it wished to object to bearing the costs of this proceeding, and if it wished to object to any of the requests for cost award eligibility made by AMPCO, APPrO, SEC and KCLP. Provision was also made for a reply submission by any party whose request for cost award eligibility was the subject of an objection by the IESO. On November 12, 2019, the OEB issued its Decision on Cost Eligibility and Cost Responsibility in which it determined that the IESO shall bear the costs of this proceeding, granted cost award eligibility to AMPCO, APPrO and SEC, and denied cost award eligibility to KCLP.

On January 23, 2020, the OEB issued its Decision and Order in which it set out the process for parties eligible for an award of costs to file their cost claims, for the IESO to object to the claims, and for parties eligible for an award of costs to respond to any objections raised by the IESO.

The OEB received cost claims from AMPCO, APPrO, KCLP and SEC. On February 13, 2020, the IESO filed a letter stating that it is of the view that counsel and consultants

acted reasonably and efficiently in this proceeding and made efforts to allocate responsibilities so as to promote efficiency and avoid duplication. The IESO did not object to the costs submitted by AMPCO, APPrO and SEC. With respect to KCLP's cost claim, the IESO submitted that the expert retained by KCLP, Dr. Brian Rivard, professionally discharged his obligations as an independent expert and provided evidence that was useful to the OEB. However, the IESO submitted that KCLP was not entitled to recover its costs in this proceeding for reasons earlier stated in the IESO's cost submissions and as determined by the OEB in its Decision on Cost Eligibility and Cost Responsibility.

**Findings**

The OEB has reviewed the claims filed to ensure that they are compliant with the OEB's *Practice Direction on Cost Awards*.

The OEB approves the cost claims as filed for all cost eligible parties. KCLP was not found eligible for costs. However, since the OEB found the testimony of Dr. Rivard helpful, the OEB will award KCLP an honorarium of $15,000.

The claim of SEC requires a minor adjustment due to automatic rounding for printing disbursements.

The OEB finds that AMPCO and APPrO are eligible for 100% of their reasonably incurred costs of participating in this proceeding. The OEB finds that the claims of AMPCO, APPrO, and the adjusted claim of SEC are reasonable. The OEB also finds that KCLP shall be awarded an honorarium of $15,000. Each of these claims shall be reimbursed by the IESO.

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, the IESO shall immediately pay the following amounts to the parties for their costs:

| | |
|---|---|
| • Association of Major Power Consumers in Ontario | $124,087.15 |
| • Association of Power Producers of Ontario | $32,676.22 |
| • Kingston CoGen Limited Partnership | $15,000.00 |
| • School Energy Coalition | $22,542.99 |

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, the IESO shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

**DATED** at Toronto February 26, 2020

**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long
Registrar and Board Secretary

# Tab 8

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

**EB-2019-0206**

**Resolute FP Canada Inc.**

**Application by Resolute FP Canada Inc. for an order directing the Independent Electricity System Operator to amend the Market Rules relating to the qualifications for participating in Demand Response Auctions**

# DECISION ON COST RESPONSIBILITY AND COST ELIGIBILITY

**February 5, 2020**

On August 7, 2019, Resolute FP Canada Inc. (Resolute) applied to the Ontario Energy Board (OEB), pursuant to section 35 of the Electricity Act, 1998 (Act), for an order directing the Independent Electricity System Operator (IESO) to amend sections 18.2.1 and 19.2.1 of Chapter 7 of the IESO's Market Rules (Application). These market rules address the qualifications for participating in the IESO's Demand Response Auctions.

This Decision sets out OEB's determinations on cost responsibility and cost award eligibility in this proceeding. Below is an overview of the procedural steps and filings that relate specifically to these questions.

In its Application, Resolute asked that it be eligible to recover its costs of the Application. An intervenor, the Association of Major Power Consumers in Ontario (AMPCO), also requested cost award eligibility.

In Procedural Order No. 1 issued on October 22, 2019, it was noted that the OEB panel hearing the application will make a determination on cost responsibility and cost award eligibility at a future date, but provision was also made for the filing of objections to the cost award eligibility requests of Resolute and AMPCO. The IESO filed a letter on October 25, 2019 objecting to both requests for cost award eligibility, and requesting the opportunity to make additional submissions on costs at a later stage of this proceeding.

On December 6, 2019, the OEB issued a Decision on Issues List and Procedural Order No. 2 which, among other things, made provision for the filing of submissions on cost responsibility and cost award eligibility.

Submissions were filed by Resolute, the IESO and OEB staff, and reply submissions were filed by Resolute, the IESO and AMPCO.

## COST RESPONSIBILITY

### Submissions of the Parties

Resolute, OEB staff and AMPCO submitted that the IESO should be responsible for the costs of this proceeding.

Resolute relied on the cost responsibility decisions made in the three market rule amendment proceedings (MRA Reviews)[1] to date under section 33 of the Act, in which the OEB determined that the IESO was responsible for the costs of the proceeding. Resolute argued that costs should be dealt with in the same way in section 35 cases as in section 33 cases, as both sections are part of the overall legislative scheme with respect to the market rule process. The submissions of OEB staff and AMPCO were to similar effect, and both also noted that responding to challenges to the market rules under either section 33 or section 35 is part of effectively operating the market.

Resolute also argued that the IESO has the ability and the incentive to increase the costs to a customer that is challenging the IESO's market rules, and such incentive will be mitigated if the IESO is made responsible for the cost of the proceeding. Resolute further submitted that, like the Ramp Rate proceeding, this is the first application of its kind and there are legitimate issues to be determined. In reply, the IESO stated that this is not sufficient reason in and of itself to require that the IESO be responsible for the costs of this proceeding.

The IESO argued that applications under section 35 are different from applications under section 33, and that this difference should be recognized in determining cost responsibility. The IESO pointed to differences in the process between market rule reviews and market rule amendment reviews, noting that the section 33 process regarding market rule amendments is a process initiated by the IESO when it provides the OEB with a copy of the amendment for its review. By contrast, an application under section 35 of the Act is neither a step in any other IESO-initiated process nor is it part of a review of a market rule that is already before the OEB, but rather is a "separate,

[1] EB-2007-0040 (Ramp Rate proceeding), EB-2013-0010/EB-2013-0029 (RES proceeding) and EB-2019-0242 (TCA proceeding)

distinct, and exceptional proceeding initiated by the applicant."[2] Resolute disagreed with this claim, stating in reply that in both section 33 and section 35 reviews the OEB is exercising its regulatory authority over IESO market rules and the market participant is exercising a statutory right and pursuing the only path to challenge and review an IESO market rule before an independent and impartial tribunal.

The IESO also argued that requiring Resolute, as the applicant, to bear the costs of its Application is consistent with the legislative scheme of section 35 of the Act, and there is nothing in section 35 of the Act that requires or implies that the IESO be responsible for the costs of market rule review applications. The IESO also pointed out that the OEB's decision to assign cost responsibility to the IESO in the Ramp Rate proceeding expressly stated that its determination in that instance "should not…be understood as tacit recognition that this should necessarily be the case in relation to all future market rule amendment review applications that may come before the Board."[3]

The IESO further submitted that the OEB should defer its decision with respect to cost responsibility until the end of the proceeding, once it has heard all the evidence and arguments and has observed the conduct of the parties. AMPCO disagreed, stating that cost matters will influence the extent to which it is able to participate. AMPCO also noted that Resolute is a member of AMPCO and that AMPCO cannot ultimately recover costs from its own member.

OEB staff noted that in none of the three MRA Reviews did the OEB consider it appropriate to defer a decision on cost responsibility until the conclusion of the proceeding.

## Findings

The OEB does not see any compelling reason to defer its decision on cost responsibility, and has determined that IESO will be responsible for the costs of this proceeding. The IESO has ongoing responsibility for operating the wholesale markets and it is appropriate that it also be responsible for dealing with issues associated with market operations and the underlying market rules.

For cost responsibility purposes, there is no fundamental difference in the OEB's view between proceedings to review an existing market rule (section 35 of the Act) and proceedings to review a market rule amendment (section 33 of the Act); both are part of the overall legislative scheme relating to the OEB's oversight of the market rules.

[2] IESO submission, filed December 18, 2019 (IESO submission) at page 2 and IESO reply submission, filed January 8, 2020 (IESO reply submission) at paras 4-5
[3] IESO submission, at pages 2-3, referring to the Ramp Rate proceeding, Procedural Order No. 2, page 5

# COST AWARD ELIGIBILITY

Resolute's Cost Award Eligibility

Resolute argued that, despite the presumption of ineligibility for cost awards for an applicant under section 3.05 of the OEB's *Practice Direction on Cost Awards* (*Practice Direction*), it should be eligible for a cost award. Resolute noted that in two of the three MRA Reviews (the Ramp Rate proceeding and the TCA proceeding), the applicant (AMPCO in both cases) was granted cost award eligibility on the basis that the associations represented load-side market participants and as such were "participating in the funding of cost awards through their payments of the IESO's fees in accordance with the market rules."[4] Resolute argued that it is similarly situated in the current proceeding. Resolute noted that in the one case where the OEB did not award costs to the applicants (the RES proceeding), its reason for doing so was that they had withdrawn their application and the OEB found that it had "therefore received no benefit from the Applicants in that regard."[5]

Resolute also pointed out that section 35(4) of the Act requires an applicant to first make use of the provisions of the market rules relating to the review of market rules, which Resolute has done at its own cost. Resolute's reply argued one further point; namely, that failing to approve Resolute's cost award eligibility could have a "chilling effect", discouraging other market participants from submitting legitimate applications under section 35 of the Act. The fact that no other market participant has ever commenced such a review in Resolute's view indicates that there are financial and other barriers to doing so.

In its submission, the IESO referred to and relied on its letter of October 25, 2019, in which it stated that an Applicant, such as Resolute, is presumptively ineligible for a cost award absent "special circumstances" under sections 3.05 and 3.07 of the *Practice Direction*. In the IESO's view, Resolute has not demonstrated any "special circumstances" for departing from this general rule. The IESO further submitted that the OEB should also defer its decision on cost eligibility until the end of the proceeding to

[4] Resolute submission, filed December 18, 2019 (Resolute submission) at para 6, referring to the TCA proceeding, Decision on Cost Responsibility & Cost Eligibility, at page 5 and the Ramp Rate proceeding, Procedural Order No. 2, at page 5

[5] Resolute submission, at para 7, referring to the RES proceeding. In its Decision and Order on Cost Eligibility and Procedural Order No. 6 in the RES proceeding, the OEB stated (at page 4), "The Board finds that the Applicants have represented their private interests as generators in this proceeding. Although the Applicants submitted that the Application raised public interest issues, the Applicants have withdrawn their Application and have not pursued these public interest issues. The Board has therefore received no benefit from the Applicants in that regard."

determine whether there are any circumstances warranting departure from the *Practice Direction*.

The IESO and OEB staff both referred to the RES proceeding where the OEB ultimately decided that the applicants were not eligible for an award of costs and where the OEB noted, among other things, that "market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process".[6]

OEB staff also submitted that the public interest aspect of an application is relevant to a determination of whether the applicant should be eligible for a cost award and, given that the costs borne by the IESO are ultimately paid by ratepayers, it would not be appropriate to impose costs on ratepayers unless there is a public interest engaged by the application.[7] OEB staff concluded that there is merit in deferring a decision on Resolute's cost award eligibility until the conclusion of the proceeding at which time the OEB will be better positioned to determine whether the public interest has benefitted from the OEB's review of the market rule provisions at issue in the proceeding.

AMPCO's Cost Award Eligibility

AMPCO stated that its participation in this proceeding was requested and approved on the basis that it is a representative of major electricity loads in the province, i.e. as customers of the regulated market operator. AMPCO relied on section 3.03(a) of the *Practice Direction* which provides that a party in an OEB process is eligible to apply for a cost award where the party "primarily represents the direct interest of consumers (e.g. ratepayers) in relation to services that are regulated by the Board". In its intervention request, filed with the OEB on October 10, 2019, AMPCO stated:

> AMPCO's interest in this Application is as an Association representing major electricity loads in the province of Ontario. AMPCO takes the position that all entities that participate in the Ontario electricity market incur significant costs to modify their equipment, operations and processes in such a way as to facilitate their participation. They do so with the belief that the market rules will govern their participation fairly and that those rules (and any interpretation thereof) will not be changed unilaterally, retroactively and without appropriate justification in a way that harms a market participant's ability to participate. AMPCO wishes to ensure that such a situation did not take place.

[6] IESO submission, at page 3, and OEB staff submission, at page 5, both referring to the RES proceeding, Procedural Order No. 6 at pages 3-4
[7] OEB staff submission at page 5, referring to the RES proceeding, Decision and Order on Cost Eligibility and Procedural Order No.6 at page 4

AMPCO stated that it relies on cost recovery and requires a cost eligibility determination at the outset of a proceeding to determine whether it can participate fully in the proceeding, and that it cannot risk an after-the-fact denial of cost recovery.

In its submission, the IESO referred to and relied on its letter of October 25, 2019, in which it stated that it is premature to determine whether AMPCO's participation in this proceeding is primarily as a representative of ratepayers' interests or on behalf of its members' commercial self-interest or whether their intervention is deserving of a costs award.

As noted above, the IESO also submitted that the OEB should defer its decision on cost eligibility until the end of the proceeding to determine whether there are any circumstances warranting departure from the *Practice Direction*. AMPCO disagreed, noting that conduct is a matter relevant not to eligibility, but rather to the recovery of approved costs.

## Findings

The OEB finds that there is no compelling reason to depart from the *Practice Direction* by deferring a decision on cost award eligibility until a later stage in the proceeding. The OEB has determined that Resolute and AMPCO are not eligible for cost awards.

As the applicant, Resolute is *prima facie* not eligible for a cost award pursuant to section 3.05 of the *Practice Direction*, absent special circumstances.

The *Practice Direction* also provides, in section 3.04, that in determining cost award eligibility, the OEB may consider, in the case of a commercial entity, whether the entity primarily represents its own commercial interest (other than as a ratepayer), even if the entity may be in the business of providing services that can be said to serve an interest or policy perspective relevant to the OEB's mandate and to the proceeding.

As noted in the RES proceeding, market participants should generally be expected to bear their regulatory costs associated with the market rule amendment process, and the OEB finds that the same should be expected in relation to the costs associated with seeking the review of an existing market rule.

The OEB finds that Resolute is a commercial entity representing its private commercial interest in this proceeding. The OEB does not consider Resolute's participation in this proceeding to be driven by public interest or policy perspective.

With respect to AMPCO's request for cost award eligibility, the OEB finds that the interests that AMPCO proposes to represent in this proceeding are sufficiently represented by Resolute.

**DATED** at Toronto, **February 5, 2020**
**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long
Registrar and Board Secretary

# Tab 9

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

**EB-2019-0206**

**Resolute FP Canada Inc.**

**Application by Resolute FP Canada Inc. for an order directing the Independent Electricity System Operator to amend the Market Rules relating to the qualifications for participating in Demand Response Auctions**

# NOTICE OF DISCONTINUANCE & COSTS ORDER
**April 3, 2020**

On August 7, 2019, Resolute FP Canada Inc. (Resolute) applied to the Ontario Energy Board (OEB), pursuant to section 35 of the Electricity Act, 1998, for an order directing the Independent Electricity System Operator (IESO) to amend sections 18.2.1 and 19.2.1 of Chapter 7 of the IESO's Market Rules (Application). These market rules address the qualifications for participating in the IESO's Demand Response Auctions.

In its Application, Resolute asked that it be eligible to recover its costs of the Application. An intervenor, the Association of Major Power Consumers in Ontario (AMPCO), also requested cost award eligibility.

On February 5, 2020, the OEB issued its Decision on Cost Responsibility and Cost Eligibility in which the OEB determined that the IESO would be responsible for the costs of this proceeding and that Resolute and AMPCO are not eligible for cost awards.

On April 1, 2020, Resolute filed a letter stating that Resolute and the IESO have agreed to settle the matter and, as a result, that Resolute is withdrawing its Application.

The OEB accepts Resolute's withdrawal of its Application and is therefore giving notice that this proceeding is being discontinued.

It is necessary to make provisions for the following matters related to this proceeding:

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998,* the IESO shall pay the OEB's costs of and incidental to this proceeding immediately upon receipt of the OEB's invoice.

**DATED** at Toronto, **April 3, 2020**

**ONTARIO ENERGY BOARD**

*Original signed by*

Christine E. Long
Registrar and Board Secretary

# Tab 10

**Saskatchewan Court of Appeal**

Citation: Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)
Date: 1992-01-02
Docket: File No. 667

Between:
Saskatchewan Action Foundation for the Environment Inc. (appellant/applicant)
and
Grant Milton Hodgins, Minister of the Environment and Public Safety, Saskatchewan (respondent/respondent) and Saskatchewan Power Corp., Souris Basin Development Authority and Saferco Products Inc. (intervenors/intervenors)

Cameron, Wakeling and Sherstobitoff, JJ.A.

Counsel:
H.R. Kloppenburg, Q.C., John Hardy and Ann Hardy, for the appellant
Barry Hornsberger, for the respondent Minister of Environment and Public Safety
L. Leblanc and L. Andrychuk, for the respondent Saferco Products Inc.
R.G. Kennedy, for the respondent Souris Basin Development Authority

[1] Sherstobitoff, J.A.: The main issue in this appeal is whether and to what extent members of the public have a right of access to documents in the possession of the Minister of the Environment and Public Safety, Saskatchewan, documents related to projects or developments which have undergone, or are undergoing, or are liable to undergo, assessment under the provisions of the *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1.

[2] The appeal, taken by the Saskatchewan Action Foundation for the Environment Inc. ("SAFE") is from a decision in the Court of Queen's Bench dismissing an application by SAFE for an order in the nature of mandamus compelling the Minister of the Environment and Public Safety for Saskatchewan (the "Minister") to produce for public inspection all documents in his possession relating to each of four major projects which are at various stages of advancement: the Rafferty-Alameda Dam Project ("Rafferty-Alameda"), the Island Falls Dam Construction Project ("Island Falls"), the Meadow Lake Pulp Mill Project ("Meadpulp") and the Saferco Fertilizer Plant Project ("Saferco").

[3] In addition to the main issue, the appeal raises issues of standing, remedy, timeliness, and mootness.

## The Facts

[4] SAFE is a nonprofit corporation established under the *Non-Profit Corporations Act*, S.S. 1979, c. N-4.1. It was established to promote the protection of the environment

through the taking of whatever lawful action it might see fit. One of SAFE'S major objectives is to promote proper environmental assessment including full disclosure by government and business in such a way that the public will be included in the decisionmaking process. Included in its membership are a number of provincial and national environmental organizations as well as individual members who are concerned about the environment.

[5] On March 29, 1990, Mr. R. MacDonald, a director of SAFE, wrote to the Minister demanding the production of all documents in the possession of the Minister relating to the Rafferty-Alameda, Island Falls, Meadpulp and Saferco projects. On receiving no reply, a second letter reiterating the demand, dated April 30, 1990, was sent. There was no response to these demands.

[6] By Notice of Motion dated May 28, 1990, SAFE applied for an order compelling the Minister to produce the documents it had demanded. On June 19, 1990, the Minister issued an order ("the Minister's first order"), purportedly pursuant to section 7 of the *Environmental Assessment Act.* In effect, the order barred disclosure to SAFE, or any other party, of the documents and information sought by the motion. The motion came before the chambers judge on June 28, 1990, who adjourned it to August 8, 1990.

[7] On August 1, 1990, a second order was issued by the Minister ("the Minister's second Order") pursuant to the *Act.* It provided that, with certain exceptions, the documents with respect to Island Falls and Saferco would be released for public inspection. Copies of both orders by the Minister had been filed in court and were served earlier on counsel for SAFE.

[8] The motion was later argued and the decision dismissing the application was made on August 23, 1990.

## The Issues As Defined By The Parties

[9] The appellant says that it is entitled to an order compelling the Minister to make full disclosure of all documents and information relating to the four projects which have been subject, to varying extents, to the environmental assessment process prescribed by the *Act.* The appellant supports its claim on two footings.

[10] First, SAFE argues that since the Minister neither claimed nor demonstrated that the documents at issue enjoy public interest immunity, they are subject to disclosure and production just as they would be in a civil action against the Crown. The argument relies on case law which has severely limited Crown privilege, now termed public interest immunity, on the basis of protecting the public's interest in litigation. The appellant claims, by way of analogy, that the courts should take the same approach in cases such as this one where, as yet, no action has been commenced.

[11] Second, the appellant argues that its right to production and disclosure is

contemplated in the *Environmental Assessment Act* itself. SAFE claims that under the broad definition of "person" stated in the *Act*, any resident of the province, including any corporate resident, is entitled to be granted access to all documents and information related to the environmental review process under the *Act.*

[12] The positions of the respondents are various. They can be summarized in this way. First, the appellant has no right, either at common law or under the statute, to disclosure of documents or information except as specifically provided for by s. 11(2) of the *Act.* Second, the *Act* does not create private rights, only public rights, and accordingly the appellant has no locus standi to bring any action, let alone this application which was brought without any action having been commenced. Third, that mandamus does not lie. And fourth, that the matter is moot and the application untimely.

[13] Since the *Environmental Assessment Act* lies at the centre of the dispute, it will be appropriate to begin with a review of the statute, its origin, purpose and scheme, and those of its enacting parts as are in issue.

## Historical And Present Day Context Of The Act

[14] To determine the purpose of the *Act*, it is useful to consider its history and present day standing. These may be gleaned from a recent review of the legislation done at the request of the Minister.

[15] By ministerial order made on August 9, 1990, the Minister appointed a Commission, the Saskatchewan Environmental Assessment Review Commission, to review the *Environmental Assessment Act* and the current Saskatchewan Environmental Assessment and Review process. He requested recommendations for changes to the legislation and the process, asked for the background and rationale for each suggestion, and suggested that a report be submitted as early as possible in the new year. The Commission submitted its report to the Minister under cover of letter dated February 27, 1991.

[16] The report of the Commission, entitled "Environmental Challenges, the Report of the Saskatchewan Environmental Assessment Review Commission" sets out the historical context of environmental legislation in Saskatchewan as follows at (pp. 7-8):

> "Environmental law in Canada, and more particularly, Saskatchewan, has passed through a series of stages (Estrin, 1972) since it emerged as a unique area of the law in the late 1950's. Canadians first recognized the seriousness of problems of environmental degradation in the late '50s and early '60s. Their immediate response to solve such problems as air and water pollution was to stop the offending activity by law, restore the damaged resource and then prevent further degradation by licensing 'acceptable levels' of discharge. On an issue by issue, often crisis by crisis basis, society responded to growing environmental problems. Between 1956 and 1970, every province in Canada adopted two or more

environmental statutes.

"The second stage in Canadian environmental law was to address the increasing body of environmental legislation in a more comprehensive manner. Some provinces simply compiled the statutes which had been passed to date, while others, including Saskatchewan, established a department within Government to protect and promote environmental concerns.

"Despite these efforts, environmental law failed to meet the growing challenge of environmental protection. Problems continued to emerge and issues outpaced laws. A new approach to environmental protection was essential: a pro-active rather than reactive approach, to prevent environmental problems, rather than just trying to clean them up.

"In seeking a solution, Canada turned to the United States and the *National Environmental Policy Act* of 1969. This *Act* introduced environmental assessment to North America. It was not long before Canada tested EA for itself. In 1973 the Federal Government, pursuant to an earlier Cabinet Directive, introduced the Environmental Assessment Review Process (EARP). Saskatchewan kept pace with national activities, and, in 1976, the provincial government introduced its own environmental assessment policy and created the Environmental Assessment Branch.

"Environmental assessment was originally intended as a planning tool. It was designed to describe and evaluate all possible environmental impacts of a proposed action before irreversible decisions regarding the future of the proposal were made.

"It seemed, if not a panacea, at least a reasonable response to many of the shortcomings in environmental protection to date. With EA, the government could predict, mitigate and prevent environmental degradation -- a new approach which could lessen the impact before-the-fact.

"Environmental assessment offered many other advantages over the previous approach to environmental protection. Consulting and involving the public was considered fundamental to its efficiency. The definition of 'environment' was expanded to include social and economic considerations. Each proposal would be assessed, and state-of-the-art technology could be demanded to ensure the environment was protected.

"Initial attempts at using the EA process were encouraging. The results seemed to ensure Saskatchewan's future well-being. Some 50 full environmental impact assessments (EIAs) were undertaken between 1976 and 1980, including the Key Lake Mine and the Nipawin Hydro Project assessments. Four were not approved; a number were deferred by the proponent. The success of these assessments prompted the *Environmental Assessment Act* to be passed in 1980 -- an *Act* which

remains virtually unchanged today. Environmental Assessment now has the full force of law.

"Since the passage of that legislation, approximately 636 projects have been screened through the process and 80 have required full EIAs. (See Appendix II for more information). Of those projects, all but two have been given Ministerial approval to proceed, or to proceed subject to conditions. As well, only on one EIA (Rafferty-Alameda dams project) did the Minister deem it necessary to establish a Board of Inquiry."

[17] As to the present-day situation, the Commission said at pp. 2-3:

"Environmental assessment (EA) has been law in Saskatchewan for almost 11 years. When the *Act* was first proclaimed, lawmakers were justifiably proud of this statute which set the standard for EA legislation across the country. But since then, the promise of the *Environmental Assessment Act* has failed to meet, or keep up with, the environmental expectations of the public.

"The reasons for this are many and address the shortcomings of both the procedure and content of the present legislation and practice. Concerns range from assessing policy to stakeholder funding; from scope of the process to confidentiality of information. All are legitimate issues and warrant our specific attention.

"These individual issues aside, the real justification for the Commission was simply that it was time to review the EA statute and practice. …

"The other driving force behind EA reform was the will of the public. The level of concern and commitment to the environment has dramatically increased over the past 11 years. The people of Saskatchewan appreciate their natural environment and have consistently supported initiatives to protect and preserve the province's natural resources. When environmental concerns are overlooked or not given the priority they deserve, the majority now demand to know why. The public has come to expect that their own commitment will be reflected in the executive decision-making of their elected representatives.

"As people are becoming more environmentally aware, they are scrutinizing planning processes like environmental assessment more rigourously. The public recognizes that, without such safeguards, their vested interest in a sustainable future may well be jeopardized."

[18] The report made recommendations for sweeping changes in the environmental review process, and the legislation authorizing it. While these recommendations are, strictly speaking, not relevant to these proceedings, it is worth noting that the recommendations do address the very issues raised by this case.

[19] In very general terms, the Commission recommended that administration of the

legislation be put into the hands of a body independent of the government, to be named the Environmental Assessment Commission. The formal recommendation as to public participation is as follows:

> "7.1 The public must have standing at a number of points in the EA process. Public participation must not only be encouraged, but must be guaranteed by the *EA Act."*

As to disclosure of information, the recommendations were as follows:

> "7.13 All information pertaining to a proponent's request for confidentiality must be forwarded to the EAC at the earliest possible opportunity in the EA process. The EAC will determine if it is confidential and should be withheld from the public.
>
> "7.14 In the event a full EIA is necessary, proponents shall completely disclose all information related to the environmental impacts of their proposed activity to the ARC. [Activity Review Committee established by the EAC]"

The only concern of the report was to protect confidentiality when demanded by a proponent for commercial or technical reasons such as when necessary to protect secret processes which permit a continued advantage over competitors in their industry, etc. Otherwise, the report assumed that all information should be made public.

## The Purposes Of The Act

[20] The purpose of the *Act* is three-fold.

[21] Its first purpose is to ensure that there are adequate and acceptable safeguards and protections for the environment in respect of all new developments within the Province. A "development" is defined, in s. 2(d) of the *Act*, as:

> "… any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:
>
> (i) have an affect [sic] on any unique, rare or endangered feature of the environment;
>
> (ii) substantially utilize any provincial resource and in so doing pre-empt the use, or potential use, of that resource for any other purpose;
>
> (iii) cause the emission of any pollutants or create byproducts, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
>
> (iv) cause widespread public concern because of potential environmental

changes;

(v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or

(vi) have significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment."

"Environment", for the purposes of the environmental assessment process, is defined in s. 2(e) as:

"(i) air, land and water;

"(ii) plant and animal life, including man; and

"(iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in subclauses (i) and (ii)."

[22] The *Act*, therefore, is broadly based. Its breadth can be noted further by the fact that the *Act* "binds the Crown" (s. 3), making the Crown as equally subject to its reach as are members of the general public. As well, developments may be exempted from the *Act's* application only the Lieutenant Governor-in-Council, and then only in the case of an emergency (s. 4).

[23] Its second purpose is to ensure that there will be someone, with adequate powers, to oversee the protection of the environment. The watchdog role is assigned to the Minister. His office is given specific powers with regard to conducting research and studies, gathering, publishing and disseminating information, appointing committees, and making any tests and examinations "for the purpose of administering and enforcing this Act" (s. 5). Before a "proponent", the person intending to undertake a development, can proceed, approval from the Minister must be obtained. Subsection 8(1) reads as follows:

"8(1) Notwithstanding the requirements of any other Act, regulation or bylaw relating to any licence, permit, approval, permission or consent, a proponent shall obtain ministerial approval to proceed with a development, and no person shall proceed with a development until he has received ministerial approval."

The Minister can impose terms and conditions on any approval given or may refuse approval altogether:

"15(1) Where the minister is satisfied that a proponent has met all the requirements of this Act, he shall, within a reasonable time after making his decision:

(a) give ministerial approval to proceed with the development and may impose

any terms and conditions that he considers necessary or advisable; or

(b) refuse to approve the development."

If approval is made subject to terms and conditions, those must be strictly adhered to:

"17. No person shall proceed with a development for which he has received ministerial approval, except in accordance with the terms and conditions of the ministerial approval."

[24] Where a proponent of a development which is lawfully proceeding intends to make a change which is not in conformity with the terms and conditions contained in the Minister's initial approval, further approval must be obtained with respect to the change. Section 16(2) and (3) state:

"16(2) Where the minister has received notice of a proposed change, he shall:

(a) give ministerial approval of the proposed change and may impose any terms and conditions that he considers advisable;

(b) refuse to approve the change in the development; or

(c) direct the proponent to seek approval for the proposed change in the manner prescribed in sections 9 to 15.

"(3) No person shall proceed with a change in a development until he has been given ministerial approval to proceed."

[25] If a development is proceeding in violation of the *Act*, either without ministerial approval or in disregard of any terms and conditions imposed, the Minister may seek redress in the Court of Queen's Bench in the form of injunctive relief (s. 18). The Minister may also conduct his own investigation in order to determine, should a suspicion be raised, whether the terms and conditions of ministerial approval are being complied with (s. 19). Persons acting in contravention of the requirements of the *Act* are subject to prosecution and are liable on summary conviction to a fine of up to $5,000 or more, if the offence continues (s. 21).

[26] The third purpose of the *Act* is to engage the public in ensuring environmental protection. The *Act* provides a mechanism whereby the members of the public can actively participate in the process of identifying and evaluating the environmental issues surrounding proposed developments within the Province. Theoretically, any person can work jointly with proponents and authorities in order to reduce any potential risks. A "person" under the *Act* includes:

"2(j) … a body corporate or other legal entity, an unincorporated association, partnership or other organization, a municipality and the Crown, a Crown corporation or an agency of the Crown."

The *Act* requires that environmental impact statements submitted by proponents of developments to the Minister, and the subsequent departmental reviews, be available for "public inspection" (s. 11). It further provides that "any person" may, following that inspection, submit written comments within a 30-day period (s. 12). The concept of meaningful public involvement is fundamental to the entire process.



## The Scheme Of The Act

[27] Section 9(1) of the *Environmental Assessment Act* provides that:

> "9(1) The proponent of a development shall, in accordance with the regulations:
>
> (a) conduct an environmental impact assessment of the developments; and
>
> (b) prepare and submit to the minister an environmental impact statement relating to the development."

[28] To date, no regulations have been enacted, although, by s. 27, the lieutenant Governor-in-Council is empowered to enact regulations respecting any requirement relating to an assessment or a statement (subsection (a)) and specifying the grounds on which the Minister may withhold or limit disclosure of any information, matter or document relating to a development (subsection (e)). As a matter of policy, the department screens project proposals to determine whether or not ministerial approval under the *Act* will be required for a particular project. If the screening indicates that approval will be required, in other words, that the project proposal is a "development" as defined by the *Act*, then s. 9(1) applies.

[29] Section 10 requires the Minister, on becoming aware that an environmental impact assessment is about to be conducted, to give public notice of it.

[30] Once the Minister receives an environmental impact statement, he and the department must conduct a review, and when finished, must make the review, as well as the statement, available to the public. Section 11(1) and (2) of the Act read as follows:

> "11(1) The minister shall cause a review to be prepared of each statement that he receives.
>
> "(2) When the review mentioned in subsection (1) is completed, the minister shall:
>
> (a) make the statement and review available for public inspection: and
>
> (b) give notice, in the manner prescribed in the regulations, of the locations at which the statement and the review may be inspected, and may prescribe any conditions relating to the inspection that he considers appropriate." (emphasis added)

This section imposes two duties on the Minister, duties which are owed to the public in general within the province. Since the Minister is bound to carry out those duties, it follows that any person, as a member of the public, may, as of right, have access to the environmental impact statement and the documents making up the review of it for inspection.

[31] A third and related duty imposed on the Minister becomes apparent when s. 11(2) is read in conjunction with s. 7 of the *Act.* Section 7 states:

> "7. Where, in the opinion of the minister, it is in the public interest or in the interest of any person, the minister may, subject to the regulations, withhold or limit production, public inspection or discovery of any information or document that relates to a development, other than any information or document that relates to pollutants, public health or human safety."

Since "review" under s. 11 is unqualified in any way, it must be taken in its broadest sense to mean that anything that underlies it, any information or documents relating to a development in the possession of the Minister, must be made available for public inspection. Section 7 confirms that view in that it allows for only one exemption from public inspection or discovery of information or documents relating to a development, that being nondisclosure in specific instances when it is in the public interest. The section goes on, however, to limit the exemption. Information or documents relating to pollutants, public health, or human safety cannot, under any circumstances, be withheld. Therefore, when making an EIS and the subsequent, required review available for public inspection, the Minister must not, by law, withhold or limit production of any documents unless it is done in the general public interest.

[32] Under s. 12, any "person" may:

> "(a) inspect a statement and review that is available for public inspection pursuant to subsection 11(2);
>
> "(b) make a written submission to the minister within 30 days from the date when the minister first gives notice pursuant to subsection 11(2), or, if the minister considers it appropriate, within an additional period of 30 days."

[33] To clarify, it is well to stop and examine this stage in the assessment and review process, whereby the Minister will now have received all the relevant and required documentation and information from the proponent. At this point the Minister will have heard the proponent's side of the issue as to whether ministerial approval to proceed with the development under s. 15 should be granted or not: the project and the existing environmental conditions will have been described, the potential effects on the environment will have been evaluated, and the steps that the proponent will need to mitigate any adverse effects will have been outlined.

[34] Given that one of the purposes of the *Act* is to put the Minister in the position of

a regulator, manager or watchdog for environmental concerns within the Province, it is therefore incumbent upon him to hear both sides of the issue, not only the side of a proponent, but also that of any opponent. Section 12(b) of the *Act* empowers "any person", any member of the public, to oppose a potential development. Therefore, by implication, under the provisions of the legislation, the Minister must hear and take into account all views, including those opposed to the grant of ministerial approval.

[35] Sections 13 and 14 of the *Act* further reinforce the view that there must be meaningful public input into the process. These sections allow the Minister, prior to making his final decision, to hold an information meeting (s. 13(a)) and to require the proponent to make experts available at that public meeting (s. 13(b)). The Minister also has the option of appointing a Board of Inquiry, the terms of reference to be set by the Minister. An inquiry provides the means by which to further assess the probable implications of proceeding with a proposed development by, at least in part, soliciting additional public comment (s. 14). When a ministerial decision is finally made at the completion of the assessment process, notice of the decision and written reasons must go to "both sides", the proponent and the identified opponents of a proposed development (s. 15(2)).

[36] The provisions of the *Act* are unequivocal in their meaning: only after receiving public input on any proposed development can the Minister make the decision that he is required by law to make. The scheme of the *Environmental Assessment Act* is unmistakably adversarial; it allows for a proponent, and for an opponent or opponents; and the Minister, as decision maker, is placed squarely in between.

[37] Public consultation and informed debate have been made an integral part of the environmental assessment process with a view not only to decision-making which is more environmentally sound, but also that which is more publicly acceptable. Such informed public participation is possible only if all participants are given full access to all available information except that specifically exempted by statutory authority.

[38] Public participation in the process is all the more important because the Government of Saskatchewan may have an interest, direct or indirect, in the advancement of a development, or developments, as it does in this case. Accordingly, the Minister, being the person charged under the *Act* with granting approval, and at the same time being a member of the Government, is placed in a position of potential conflict. Public participation in the process is important to avoid the appearance of partiality.

## The Right To Disclosure And The Duty To Disclose

[39] In light of the foregoing the appellant's position on the main issue, so far as its position is founded in statute, is well taken: there exists generally a statutory right in persons to obtain disclosure, and a corresponding duty in the Minister to make disclosure, of all documents and information in his possession relating to a development. Only when it is not "in the public interest or in the interest of any

person" within the meaning of s. 7 of the *Act*, does the right and the corresponding duty not exist.

[40] On this view of the statute it is unnecessary to consider the appellant's contention that the common law is to the same effect.

## Locus Standi

[41] When ss. 11, 12, 2(j) and 7 are read together, the issue of the appellant's "standing" in these proceedings, or its "status" under the *Act* -- really one and the same question -- is resolved. The appellant has status since the very nature and purpose of the legislation is to allow for public consultation following a required EIA and review.

[42] The many authorities referred to by the respondents for the proposition that the appellant has no locus standi as a private person seeking to enforce a public right are simply irrelevant in this case. First, although the judge below did not specifically deal with the issue of standing, it is evident that he granted standing to the appellant since he dealt with the application on its merits. There was no appeal by the respondents against that decision. Secondly, this is not a case of a private citizen seeking to enforce a public right. It is a case of a statute which confers upon the Minister a duty to make disclosure of certain documents and information to any member of the public who seeks access to that information and which confers upon members of the public the right to those documents and information. The holder of the right, in this case, the appellant SAFE, has status to enforce the corresponding duty.

## Remedy Of Mandamus

[43] Mandamus is a discretionary remedy which compels the performance of a statutory duty owed to an applicant. The appellant claims that mandamus should be available to it in this case in order that SAFE, a member of the public and a "person" as defined by the *Act*, may have access, a right given to it under the *Act*, to certain documents and information relating to developments affecting the environment in this Province.

[44] In light of the duties which the *Act* imposes on the Minister -- the duty to do a review of an EIS, to make the review available for public inspection, and further, to make all the documents forming the review available, subject to limited exception in specific cases -- viewed within the context of the purpose and scheme of the *Act*, mandamus is a remedy which is available to the appellant in this case.

## Mootness

[45] The four projects for which SAFE is demanding access to documents are at varying stages of completion.

[46] Rafferty-Alameda is a southeastern Saskatchewan dam project. The Souris Basin Development Authority ("SBDA"), an intervenor in the matter before the Court, is the Crown Corporation which has been responsible for the project's development. As of this date, the Rafferty Dam is completed and the Alameda Dam is under construction. The SBDA carried out the required procedures under the *Environmental Assessment Act* in 1987. As a result, Rafferty-Alameda was found to be a "development" and the EIS and the subsequent review by the Minister were made available to the public at that time. In addition, the Minister, acting pursuant to s. 14 of the *Act*, appointed the Rafferty-Alameda Board of Inquiry which provided for further public involvement. The SBDA received ministerial authorization to proceed with construction on February 15, 1988. This project has been, and continues to be, the subject of other litigation in both provincial and federal courts. The documents filed with the Minister during the assessment process are on record in the other litigation. In the Minister's view, Rafferty-Alameda is a completed transaction and all relevant documents have been disclosed.

[47] Island Falls, a second project involving construction of a dam, was announced by the Saskatchewan Power Corporation, the project's proponent, in September 1989. The dam was to be located at the Island Falls hydro station, replacing the existing dam near Sandy Bay in northeastern Saskatchewan. However, in February 1990, SaskPower decided not to proceed with the project, but instead to make certain repairs which will serve to maintain the present structure. The department originally had determined that the project did not require ministerial approval as it was not a new development according to the *Act's* definition. There seems to be little happening with regard to this project and counsel for the appellant is satisfied with the disclosure made of documents relating to Island Falls. SaskPower did not appear or make representations in this Court.

[48] According to the affidavit evidence of Mr. MacDonald, a director of the appellant, the Meadpulp project is a development within the meaning of the *Act* and is therefore subject to the *Act.* While this project is still in issue, no information as to its current status has been given to the Court. The appellant's counsel indicated that his understanding was that some components of the construction of the project had been commenced. Meadpulp originally applied for intervenor status in these proceedings. However, the application was later withdrawn.

[49] Saferco Products Inc. is an intervenor in these proceedings and is the proponent for Saferco, the fourth project at issue. Incorporated in 1988, the principal shareholders of the corporation are Cargill Limited/Cargill Limitée, CIC Industrial Interests Ltd. (Crown Investments Corporation of Saskatchewan) and CMB Fertilizers Ltd. Saferco is a nitrogen fertilizer manufacturing plant currently under construction near Belle Plaine. In October 1988 Saferco submitted a draft of a project proposal to the Minister in compliance with the department's environmental assessment process. In May of 1989 the Government of Saskatchewan and Cargill announced their intention to build the plant. Later that year, in August, Saferco submitted a final project proposal to the Minister which was subsequently reviewed by an Environmental Assessment Review Panel. Saferco was notified by the

Minister in September 1989 that it could proceed with the project without further compliance with the *Act* since it had been determined that Saferco was not a "development" and, therefore, was not required to obtain the approval of the Minister under s. 15 of the *Act.*

[50] Following the commencement of these proceedings the Minister and Saferco made an agreement whereby Saferco agreed to carry out a full EIS for the project while being allowed to continue on with construction. The Minister, on June 1, 1990, made available to the public some of the documents relating to the review of the proposals which had been conducted earlier. Saferco submitted an "Updated Project Proposal" for the Belle Plaine plant to the Minister in July 1990, pursuant to their May 1990 agreement.

[51] Saferco has now been given ministerial approval to proceed under s. 15(1)(a) of the *Act.* The full EIS submitted by Saferco and the review which followed were made available to the public in compliance with the *Act.* The Minister now contends that pursuant to the Minister's second order of August 1, 1990, every relevant document with respect to Saferco has been disclosed and is available for inspection with the exception of 11 identified documents containing confidential proprietary information. In respect of those materials, it is claimed that they contain information concerning processes developed by third parties who have a right to protection because the processes are not as yet within the public domain.

[52] The Minister's position as to what documents should be disclosed with respect to each project may be derived from four ministerial orders issued by him since June 19, 1990.

[53] The Minister's first order held that all documents with respect to Rafferty-Alameda and Meadpulp, except those relating to pollution, public health or human safety as per s. 7 of the *Act*, would be withheld from SAFE or any other party. It also stated that neither Island Falls nor Saferco were developments, thereby avoiding any need for an EIA and review and the subsequent disclosure of those documents under the *Act.* The order further stated that should Island Falls and Saferco be held to be "developments", all documents, with the above exceptions, would, nonetheless, be withheld.

[54] The Minister's second order essentially reversed the first in respect of disclosure of Island Falls and Saferco documentation. All information and documentation in the case of Island Falls would be made available except for three categories which are of no consequence to this appeal. Regarding Saferco, all documents were to be made public with 11 named exceptions, each containing confidential proprietary information.

[55] Two additional ministerial orders followed. The third acknowledged the May 28, 1990, agreement made between the Minister and Saferco and the disclosure that ensued, discussed above, and stated that ministerial approval had been given for Saferco to proceed. By his fourth order, the Minister amended the second order to

the effect that the production of documents ordered for Island Falls and Saferco included all the information or documents which were within the Minister's possession. In light of the Minister's orders, as well as the production of information and documents made by him as required during the assessment process, the respondents submit that the appellant's application is moot in that there is no longer "a live controversy or concrete dispute".

[56] The appellant, however, does not accept the Minister's position that full disclosure has taken place. Nor does it accept the conclusion reached by the chambers judge that SAFE did not put in issue the Minister's right to withhold disclosure of proprietary information with regard to Saferco. SAFE claims that its view and understanding of "proprietary information" may be very different from that of the Minister. SAFE further claims that the Minister's "certified" full disclosure on the Saferco project is, in reality, something less, since on analysis, a number of "gaps" have been revealed, likely denoting the existence of other, as yet, undisclosed files and documents. The appellant opines that this demonstrated inadequacy of the disclosure with regard to Saferco puts the Minister's purported disclosure in respect of the other three projects in serious doubt.

[57] It is apparent that there is a serious lack of trust between the parties. Although the appellant did not claim lack of partiality on the part of the Minister, it obviously mistrusts the Minister and the Department because the Government, of which it is a part, has an interest in each of the projects which are the subject of this application. On the other hand, the Minister and Saferco accuse SAFE of improper motives in bringing these proceedings because it has received financial contributions from a lobby group of other nitrogen fertilizer manufacturers opposed to construction of the Saferco plant. These are but two examples of the almost overt hostility that prevails amongst the parties. In light of the foregoing, the matter may or may not be moot, depending on whether the Minister has in fact made full disclosure. In the atmosphere of mistrust that prevails, it is appropriate to require the Minister to file an affidavit verifying his complete and full disclosure of the information and documents contemplated by the *Act* with regard to the four identified projects.

## The Application Of The Act To The Island Falls & Saferco Projects

[58] The Minister has taken the position that the *Environmental Assessment Act* does not apply with respect to these two projects. As discussed in detail earlier, both the projects were initially determined not to be developments within the definition in s. 2(j) of the *Act.*

[59] SAFE has acknowledged its satisfaction with the production of documents regarding Island Falls, and the issue of the determination of that project as not falling within the *Act* has not been placed before this Court.

[60] As for Saferco, although the project has now undergone the assessment and review process, has been held to have met the statutory requirements of the *Act*, and has been given ministerial approval to proceed, its proponent argues that the

development/no development determination is the responsibility of the Minister and his department alone. It further claims that if the decision is reviewable at all in a court of law, it is reviewable only on jurisdictional grounds.

[61] Their arguments are as follows: while the appellant's application is, on its face, seemingly directed to the production of documents pursuant to s. 7 et seq. of the *Act*, it is really an attempt to procure a judicial determination that Saferco is a development as defined by the *Act.* It claims that the remedy of mandamus is inappropriate and should not be made available where an appellant, as in this case, is attempting to conduct a collateral attack on a decision of the Minister made by him under authority of the *Act.*

[62] Although the Minister and Saferco say that s. 7 of the *Act* does not impose a positive duty of disclosure on the Minister, they reason that if the section did impose or confirm the existence of such a duty, thus making the Minister subject to mandamus, the duty would only arise in relation to a "development". Since the Saferco plant was originally determined not to be a development, and the Minister has not conceded that an error was made in holding that view, then, under these circumstances, mandamus is not appropriate and does not lie.

[63] Offered in support of the claim against the availability of mandamus is the administrative law principle that in supervising the exercise of a power by the Minister under the authority of the *Act*, the court cannot exercise an appellate jurisdiction or substitute its own opinion on the merits of the issue for that of the tribunal.

[64] In support of that proposition they cite *Shiell v. Amok Ltd. et al.* (1988), 58 Sask.R. 141; 27 Admin. L.R. 1 (Sask. Q.B.) and *Association of Stop Construction of Rafferty Alameda Project Inc. v. Saskatchewan* (1988), 68 Sask.R. 52 (Sask. Q.B.). Those cases involved attacks on decisions made by the Minister under the *Act*, in the first case, giving ministerial approval to proposed changes in a project under s. 16(2) of the *Act* and, in the other case, giving ministerial approval to proceed with the development under s. 15(1)(a) of the Act. The Court in each case held that the Minister had made a decision authorized by the *Act* and that his decision was subject to judicial review only on very limited grounds. The decisions under attack were decisions which the *Act* specifically authorized the Minister to make.

[65] These judgments did not address the issue presently before us, that is, whether or not the Minister has power under the *Act* to decide, so as to bind the parties concerned, whether a project is a development within the meaning of the *Act.*

[66] The respondents say that the power to do so on the part of the Minister is found by necessary inference from the provisions of s. 8(1) of the *Act* which requires that a proponent obtain Ministerial approval to proceed with the development before doing so. They say that before the Minister can make a decision as to whether to grant approval or not, he must make a decision as to whether or not the project is a development. Unfortunately, the *Act* is silent on the issue. While the *Act* explicitly

authorizes the Minister to make a decision, in the case of a development, as to whether to grant authorization to proceed or not, it does not explicitly grant the power to determine whether or not a project is a development. And that decision is of great importance. If the Minister has the power suggested by the respondents, he has the power to exempt any project from the application of the *Act.*

[67] An examination of the rest of the *Act* does not support the position taken by the respondents. Section 5, which outlines the powers of the Minister for the purpose of administering and enforcing the *Act* and the regulations, is silent as to decision-making powers with respect to the question of what constitutes a development under the *Act.* Under s. 27 of the *Act*, the Lieutenant Governor-in-Council may make regulations with respect to certain matters, but the enumerated matters do not deal with the question of what constitutes a development under the *Act.* Furthermore, no regulations have been enacted.

[68] Section 4 of the *Act* which permits the Lieutenant Governor-in-Council, in the case of an emergency, to exempt any development, any class of developments, or any proponent from the application of all or any part of the *Act* or the regulations, does not support the position of the respondents. The section would be superfluous if the Minister had power under s. 8(1) to determine that any project was not a development within the meaning of the *Act.*

[69] Nor do the enforcement provisions of the *Act* support the position of the respondents. Section 18 permits the Minister to apply to the Court of Queen's Bench for an order enjoining any person from proceeding with a development contrary to the Act. Section 21 makes any person who contravenes s. 8(1) guilty of an offence and liable on summary conviction to a fine of not more than $5,000 and in the case of a continuing offence to a further fine of not more than $1,000 for each day during which the offence continues. Section 23 renders any person who proceeds with a development for which ministerial approval is required without being given ministerial approval or being exempted under s. 4 liable to any person who suffers loss, damage or injury as a result of the development without proof of negligence or intention to inflict loss, damage or injury. Under each of these enforcement provisions a court would have to determine whether or not there was a development within the meaning of the *Act.* There is no provision that a determination of the question by the Minister under the provisions of s. 8(1) would be binding on the Court or conclusive of the question. In the absence of such a provision, the legislators must be deemed to have left the question, in the case of a dispute, to be determined by the courts.

[70] All of the foregoing indicates that the issue of development or no development, in the case of a dispute between interested parties, should be resolved, as in all other cases of statutory interpretation, by the courts, unless the authority to make that decision has been expressly conferred upon some other body. Since the necessary authority has not been explicitly confided to the Minister under the terms of the *Act*, the decision must rest with the courts.

[71] Accordingly, the decisions by the Minister that Saferco and Island Falls were not developments within the meaning of the *Act* are not binding upon the appellant for the purposes of this application and, accordingly, the appellant may rely upon the provisions of the *Act* to demand access to the documents in question. It should be carefully noted that the scope of this finding is limited to this application and the question of production of documents. The Court has not considered or pronounced upon, and does not intend to consider or pronounce upon, the merits of the decisions made by the Minister as to whether each project was a development or not.

## Timeliness

[72] In the case of Rafferty-Alameda and Meadpulp, the environmental assessment procedure had been carried out, and ministerial approval granted, prior to the commencement of these proceedings. The respondents concerned with these projects took the position that, assuming that the appellant was entitled to production of documents, the purpose of that production was to make the written submissions contemplated by s. 12(b) of the *Act* or to permit representations to be made to an inquiry contemplated by s. 14 of the *Act.* Since the time for such public input into the environmental review process had passed, the respondents took the position that the right of access to documents was exhausted. To put it another way, they took the position that this application was out of time because the *Act* did not contemplate any public participation in the process after the grant of ministerial approval.

[73] The appellant, on the other hand, took the position that the public had a continuing interest in the matter of whether a proponent proceeded with a development in accordance with the ministerial approval, and in the matter of any proposed changes for which ministerial approval might be sought under s. 16 of the *Act.* It further maintained that the public has an interest in possible proceedings under sections 17 to 22 of the *Act.*

[74] The *Act* is silent as to any time limitation on the right of access to documents and information. Having found that the public has a right of access to documents and information under the terms of the *Act*, it is logical to conclude that, in the absence of any specific time limitation on that right in the *Act*, the right is a continuing one so long as the development remains subject to the terms of the *Act.*

## Conclusion

[75] If the environmental assessment process in Saskatchewan is to fulfil the potential originally envisioned for it, all the intended participants must work to satisfy the purpose and scheme of the *Act.* Through mechanisms which are defined by law, participation by the public is required in order that the planning and management of environmental development and protection can be both objective and effective. In order to make that requirement meaningful, the public must be empowered with a right of access to information, all information which forms part of any environmental

assessment within the province.

[76] For the reasons outlined above, the appellant, SAFE, or its duly authorized representative, has a statutory right of access to all information or documents it seeks and it is the duty of the Minister to make what has been requested available.

[77] Accordingly, the appeal is allowed and the matter remitted to the Court of Queen's Bench, subject to the following direction. Regarding Rafferty-Alameda, Saferco, and Island Falls, in respect of which the Minister takes the position that he has disclosed all relevant documents, the Minister shall file an affidavit verifying that all such documents have been disclosed and produced. In respect of Meadpulp, the Minister shall, within 30 days of the date of this order, make available for inspection to the appellant all documents and information in his possession and shall simultaneously file an affidavit verifying that all documents and information in his possession have been so disclosed and produced. In the case of all of the projects, if the Minister wishes to claim an exemption by reason of solicitor-client privilege, or under the provisions of s. 7 of the *Act*, he shall, within the 30 day period, notify the appellant and supply it with a list of the documents in respect of which the exemption is claimed. In the event the interested parties cannot agree as to the entitlement of any documents to exemption, the matter shall be determined by a judge of the Court of Queen's Bench upon application by any of the interested parties. Upon the filing of such a notice, all documents in respect of which the exemption is claimed shall be filed with the Court for review by the judge. The documents shall be held under seal and shall not be made available to anyone but the judge unless and until he or she otherwise orders.

[78] The appellant shall have its costs under double Column V.

[79] *Wakeling, J.A.* [dissenting]: This is an appeal taken by the Saskatchewan Action Foundation for the Environment Inc. (SAFE) from the decision of Dielschneider, J., which rejected SAFE'S application for a writ of mandamus to compel the Minister of the Environment to disclose all documents in his possession relative to the following Saskatchewan projects:

Saferco Products Inc. (Saferco);

Meadow Lake Pulp Mill (Meadpulp);

Rafferty-Alameda Dams (Rafferty-Alameda); and

Island Falls Dam (Island Falls).

These are major projects in the province which are at various stages of completion. For instance, the Alameda Dam is completed, the Rafferty Dam is under construction, the Island Falls Dam is virtually abandoned, Meadpulp is perhaps in the early stages of construction, and Saferco is currently under construction.

[80] SAFE had earlier made demand upon the Minister for the production of these documents and the response of the Minister had been varied, not necessarily as an indication of an inconsistent ministerial policy but more likely because the projects are obviously quite different with different backgrounds and at varied stages of development.

[81] These projects have been the subject of four ministerial orders made by the Minister under the purported authority of s. 7 of the *Environmental Assessment Act* (The *Act*), S.S. 1978-80, c. E-10.1. These orders are lengthy and it is sufficient for these purposes to summarize their purpose and effect.

"First Order

"It was ordered that:

(1) Neither Island Falls nor Saferco were developments within the meaning of the *Act.* As a consequence, there was no requirement for the filing of a statement or preparation of a review.

(2) All documents relating to Meadpulp and Rafferty-Alameda be withheld, except those relating to pollution, public health or human safety.

(3) All documents relating to Island Falls and Saferco are similarly withheld if it should be ordered that s. 7 applies to these projects.

(4) The order will be reviewed and rescinded or replaced as circumstances dictate.

"Second Order

"It was ordered that:

(1) With respect to Island Falls, all information and documentation would be available except three named categories which are not of consequence to this appeal.

(2) With respect to Saferco, all documents shall be made public except 11 identified documents which contain confidential proprietary information.

(3) Nothing in this order shall be construed as an acknowledgment that Island Falls or Saferco are developments.

(4) If s. 7 of the *Act* is ever determined to be applicable to Island Falls or Saferco, none of the documents being withheld relate to pollutants, public health or human safety.

"Third Order

"It was recognized that Saferco had filed a statement and pursuant to an agreement the Minister made this statement and the review available to the public under s. 11 of the *Act.* Further, as Saferco has met all the requirements of the *Act*, approval was given under s. 15(1)(a) of the *Act* to proceed with the project subject to certain conditions which have no application to these proceedings.

"Fourth Order

"It was stated that the second order be amended to indicate that the production ordered for Island Falls and Saferco covered all the information or documents that are within the Minister's power or possession."

[82] The Rafferty-Alameda Dam project was given ministerial authorization almost three years ago and counsel for the Souris Basin Development Authority pointed out that there are many volumes of information and material which have been and are currently available. In fact, the Minister considers the project a completed transaction and indicates he has disclosed every relevant document and none remains which would be subject to an order for disclosure if it was to be made by this Court.

[83] A similar position has been adopted by the Minister in respect of Saferco. It is his contention that every relevant document has been disclosed and is available for inspection, with the exception of the 11 documents referred to in the second order. These excepted documents are described as proprietary in nature because their contents contain information about processes or procedures developed by third parties which are not yet in the public domain and should therefore be protected.

[84] Nothing seems to have proceeded on the Island Falls project and counsel for SAFE accepted the documents relating to this project were no longer an issue.

[85] The Meadpulp Project is still an issue but no information was available as to its current status. Counsel for SAFE indicated that he understood some elements of construction had commenced but that was the extent of his information. It seems no other orders have been made by the Minister and no documents have so far been produced to the applicant.

[86] The trial judge disposed of this application by concluding that full disclosure had been made by the Minister in respect of Saferco and that issue was therefore moot. That if disclosure relative to Alameda and Meadpulp was not complete, then the Crown privilege which gave the Minister a discretion as to what documents should be disclosed had not been extended by the *Act* and as there was neither a common law nor a statutory right of disclosure to support the mandamus application, it must be dismissed.

[87] On the appeal to this Court, several preliminary issues were raised by the respondents. It was first alleged the appellant had no standing to bring the

application; second, the issue was moot insofar as Saferco was concerned; and third, mandamus was not the appropriate remedy. Only the issue of mootness was dealt with by the chambers judge, so it is assumed he decided the other issues favourably to the appellant. I propose to deal with these issues in a rather abbreviated fashion as a detailed analysis is not required to support the conclusions I have reached.

[88] As for the allegation of lack of standing, the respondent referred to cases such as Shiell v. Amok Ltd. and S.M.D.C. et al. (1988), 58 Sask.R. 141 (Q.B.); and Association of Stop Construction of Rafferty-Alameda Project Inc. v. Minister of Environment and Public Safety et al. (1988), 68 Sask.R. 52, which are decisions of the Queen's Bench where status had not been accepted. I do not need to consider whether they were correctly decided, but I do agree it is impractical and illogical to expose projects such as these to what amounts to continued harassment through the need to respond to the demand of each individual who seeks to enforce a right to be informed. This right of an individual to be informed is not to be set aside simply because it creates a nuisance to the Crown, but it must also be balanced against the public's right to have a project proceed without endless interruption by continued individual applications where the project enjoys a large degree of public support and the Crown after due deliberation has found it be in the public interest to proceed. The question of who enjoys status to bring a motion of this nature serves to at least assist in providing a reasonable balance between these conflicting interests.

[89] Fortunately, an understanding of what constitutes status in cases of this nature has been greatly advanced by a detailed review contained in *Finlay v. Canada*, [1986] 2 S.C.R. 607; 71 N.R. 338. Le Dain, J., on behalf of the Court, analyzed the law on this subject and concluded a direct personal interest is required to support a claim of standing as of right. He went on, however, to indicate that the courts do have the opportunity to grant standing where the right has not been clearly established but there is sufficient reason to warrant the exercise of a judicial discretion in favour of granting status. The existence of this judicial discretion was recognized and applied by this Court in *Bury v. S.G.I.*, 91 Sask.R., 39; 75 D.L.R.(4th) 449 at 453, where the trial judge decided it was an appropriate case to grant standing and this Court found no reason to interfere with the exercise of that discretion.

[90] Although the basis for the exercise of the chamber judge's discretion to grant standing in this case is not apparent from his judgment, the adoption of the same approach as taken by this Court in *Bury* seems warranted. This is an instance where individuals and groups have joined together to advance a common interest based legitimate concerns, such as protection of the environment. There is an understandable reluctance to say to such a group, particularly at this stage of the proceedings when so much time and money has already been expended, that they do not even have the right to raise the issue quite aside from the right to have the answers. It is therefore reasonable that this Court accept that there is a basis to support the exercise of the chamber judge's discretion when he concluded that the appellant should have standing to advance its case.

[91] I should like to add however that special circumstances prevail in respect of the Rafferty-Alameda project. A rather convincing argument was presented that there could be no reasonable basis for opening this matter up to further scrutiny given the nature of that project, the previous delivery of massive amounts of documents, the litigation that has gone on and the time that has elapsed since approval was granted by the Minister after apparent compliance with the *Act.* For these reasons, had Rafferty-Alameda been dealt with alone, exercise of a judicial discretion to grant status would have been much more difficult to accept. In light of the result I have come to on the principal issue of disclosure, I do not find it necessary to consider status with respect to the Rafferty-Alameda project in isolation from the others.

[92] As for the issue of mootness, it seems clear that the appellant is not satisfied with the answer it has received from the Minister. It still takes the position that the order is required to obtain the result it seeks. The evidence indicates that since the application was launched much of the information which the appellant sought has been obtained, but I cannot conclude that no issue remains. That conclusion requires a finding of fact which cannot be appropriately addressed within the framework of an application such as this. The issue cannot therefore be set aside on this basis.

[93] The suitability of the writ of mandamus as an adequate remedy was questioned for the reason that it does not apply where the action they want to enforce has already been taken. To utilize mandamus in such circumstances is not to enforce compliance with a public duty but to seek an indirect right of appeal by way of a review of an administrative decision already made. Reliance was placed on the following portion of the judgment of Culliton, C.J.S., in *Oil, Chemical & Atomic Workers International Union, Local 9-649 et al. v. Nichol et al.* (1965), 52 W.W.R. 434 (Sask. C.A.), at p. 439:

> "Moreover, mandamus is not the remedy to remove something which has been done, or to review what has been done … No authority is needed for the statement that the court cannot exercise an appellate jurisdiction under the guise of mandamus."

This position was affirmed by the later decision of this Court in *McNutt v. International Woodworkers of America and Moose Jaw Sash and Door Co.* (1963) Ltd. (1980), 5 Sask.R. 48.

[94] I accept the validity of this argument but its application is predicated on the assumption that full disclosure has been granted so that there is no remaining unfulfilled duty of the Minister. This fact is not accepted by the appellants. They contend that they have shown a public duty to disclose, a failure to completely fulfil that duty, and a right to have the problem as it relates to the remaining undisclosed documents addressed by an order of mandamus. I am prepared in this case to accept the position of the appellants as I am not able to conclude positively that all relevant material has been disclosed so as to conclude that the Minister's duty has been completely fulfilled. In any event, it seems somewhat of a reversal of logic to

consider whether the process is appropriate rather than to accept the process and determine whether the essential elements, such as a ministerial duty to disclose, have been made out. This is not then a judicial review of an administrative decision; it is a question of determining what legal duty of disclosure has been placed upon the Minister under either the common law or the *Act*, and if there is a duty SAFE has a right to an order assuring ministerial compliance with that order. The extent to which compliance has already occurred is a question of fact for subsequent determination.

[95] This then advances the matter to the primary issue, namely, the appellant's right to have an order compelling the Minister to make full disclosure.

[96] It is perhaps useful at this point to indicate that all parties to this appeal recognize that if litigation was involved the Crown would be required to disclose all relevant material, excepting where it could be shown that disclosure was contrary to the public interest. In those circumstances, the description of the documents not disclosed and the nature of the public interest would have to be identified, and if no agreement prevailed, the issue of what need be disclosed would be judicially resolved. This is a system which seems to function well and to provide litigants with adequate protection of their right to obtain all relevant information. What is at issue here is a right of a different nature. It is the right of the public to have access to documents generally without any of the guideposts of relevancy which litigation provides. The applicant cannot say what it is looking for; it does not know what is there and consequently wants to look through it all.

[97] The right to obtain disclosure in this fashion has not been recognized to date by the common law. The Crown has traditionally enjoyed an immunity which has been only marginally reduced over recent years. Lorden's recent text entitled *Crown Law* describes this immunity in the following way at p. 529:

> "Historically, access to government information was very limited, the view being that the information belonged to the government and that the government had the discretion to disclose information as it wished 'apart from limited obligations to, for example, maintain public registers of various kinds and any rights of discovery applicable to the Government in the context of litigation.'"

[98] The applicant relied extensively upon a review of those cases which have severely limited what constitutes Crown immunity based on the protection of the public interest in the litigation process. This was done with a view to suggesting that by analogy the same restrictive approach should be taken by the courts in reviewing the general concept of Crown immunity in cases such as this where no litigation is involved.

[99] What SAFE seeks to accomplish is a major transformation of the current common law. It really advocates a common law doctrine which would supplant the need for freedom of information legislation now in existence in Canada and some provinces. To support his position it points to such cases as *Norwich Pharmacal v.*

*Customs and Excise*, [1973] 2 All E.R. 943 (H.L.), where the House of Lords found that the government (customs officials) had to disclose the names of certain importers in order that the intended plaintiff could determine which parties had damaged it by importing goods in breach of its patent rights. This decision has supported a line of cases relating to obtainment of information of a very singular and specific nature from third parties in order to support intended litigation (i.e., *Pochuk v. Gov't of Manitoba* (1984), 28 Man.R.(2d) 34).

[100] I can accept that *Norwich Pharmacal* represents a crack in or perhaps a chip off the basic principle that the Crown enjoys an absolute immunity from disclosure, but it is nothing more than that. It does not represent a basis upon which this Court could determine the common law right of immunity has been set aside or even that the House of Lords intended its decision as the forerunner of such a result.

[101] The law is still as stated by John Swaigen in his text *Environmental Rights*:

> "In the absence of any statutory right of access, there is, by definition, no duty upon a Minister or Board to produce the document requested. Therefore, the remedy of mandamus is not available to compel disclosure."

This statement is supported by decisions such as *McAuliffe v. Metropolitan Toronto Board of Commissioners of Police* (1976), 9 O.R.(2d) 583 (Ont. Div. Ct.) at pp. 589-590, 592 and 596; *Rossi v. The Queen* (1974), 1 F.C.R. 531 (Fed. Ct., Trial Div.) at pp. 535-536.

[102] This immunity from disclosure is not a new or startling proposition. It is one of the traditional Crown prerogatives, and while a number of the others are gradually being eroded, this prerogative has remained almost completely intact, except to the extent it is being legislatively reduced or eliminated in some jurisdictions. There is no doubt in my mind that legislation constitutes the more suitable process for any revision of this long-standing Crown immunity. In any event, it is not timely for the courts to seek to change this common law concept when legislation dealing with this immunity now exists or is being currently considered in many jurisdictions, including our own.

[103] The net result is that this application cannot be founded upon a common law right of disclosure of Crown documents.

[104] The applicant's alternative position is that the right of disclosure is to be found in the *Act.* Counsel for SAFE admitted that if there was a single direct section which could provide a foundation for the application he would have so indicated in his notice of motion. Rather, it is the general tenor and effect of the *Act* which he relies upon. Those sections which were alleged to be the most supportive of this position are the following:

> "7. Where, in the opinion of the minister, it is in the public interest or in the interest of any person, the minister may, subject to the regulations, withhold or limit

production, public inspection or discovery of any information or document that relates to a development, other than any information or document that relates to pollutants, public health or human safety.

. . . . .

"11(1) The minister shall cause a review to be prepared of each statement that he receives.

"(2) When the review mentioned in subsection (1) is completed, the minister shall:

(a) make the statement and review available for public inspection; and

(b) give notice, in the manner prescribed in the regulations, of the locations at which the statement and the review may be inspected, and may prescribe any conditions relating to the inspection that he considers appropriate.

"12. Any person may:

(a) inspect a statement and review that is available for public inspection pursuant to subsection 11(2);

(b) make a written submission to the minister within 30 days from the date when the minister first gives notice pursuant to subsection 11(2), or, if the minister considers it appropriate, within an additional period of 30 days."

[105] Opposing counsel find support for diametrically opposite positions as a result of a review and consideration of these sections. One position relies on the fact that s. 11(2)(a) is the only one which indicates what is to be disclosed and that is specifically identified as the impact statement (statement) and the review. The only other reference to disclosure is in s. 7 and it gives authority to the Minister to restrict production and inspection of documents. There is nothing in these sections to suggest the traditional Crown immunity is no longer applicable, either generally or insofar as it relates to this *Act.* The other opposite position is that there is no need to give the Minister, the power to prevent the disclosure of documents, as is done by s. 7, unless the other sections of the *Act* have by implication given a right of disclosure. After all, what is the purpose in giving the Minister the right to make regulations restricting production of documents unless there is a corresponding right of access which has been provided for, if not explicitly then by implication, in the remaining provisions of the *Act.*

[106] Perhaps the only point upon which some degree of uniformity can be recognized when assessing the merits of these two positions is the need for review and revision of this legislation. It has some rather obvious shortcomings. For instance, if the statement and review must be disclosed, what is the position in respect of documents which the Department has in its possession which have reference to the conclusions or recommendations contained in the statement or

review? If one takes a purposive approach to the interpretation of the legislation, it must be assumed that the object is to permit the public a full and fair examination of the statement provided by the applicant and the review which has been done by the Department. If that is so, a restrictive interpretation of ss. 11 and 12 so as to limit what the public can see or know to the statement and review would appear inappropriate. But does this purposive approach go so far as to support the conclusion the legislation has provided a full and complete right of disclosure, despite apparent wording to the contrary? If it does support that conclusion, is that the reason why the power given to the Minister in s. 7 was thought to be necessary?

[107] I confess that I have difficulty in understanding why the power given the Minister in s. 7 was thought to be necessary. Perhaps it was intended to authorize a restricted right of access to some portion of the statement or review which was not in the public interest to disclose. Whatever the purpose, it is obvious the intent was to restrict rather than liberalize the public's right of access to documents in the possession of the Crown. That being so, it is hard to conclude that its existence can be seen as supportive of an argument in favour of the public's unrestricted right to production of Crown documents.

[108] For my part, considerations such as this do little more than provide support for the conclusion that the legislation is not without its problems. They do not, however, go so far as to make the case for the applicant. I cannot see in this *Act* a legislative intent to provide a sweeping right of disclosure which overrides the Crown immunity which otherwise prevails. Indeed, the legislation is better described as being restrictive, given the fact the reference to what will be disclosed relates to only two documents which are readily identifiable. That specific description of what is to be disclosed, plus the right of a further restriction contained in s. 7, does not lead me to conclude the Legislature was intent on providing a legislated end to the Crown immunity pertaining to the disclosure of its documents.

[109] I do not find it reasonable to conclude that legislation which was intended to make such a sweeping change by eliminating the Crown's traditional immunity would be drafted in such a way that the change would only be apparent to those who could see through and behind the words and draw a meaning based upon inference and indirection which the language would not otherwise support. Such a traditional Crown right should only be ignored by the courts when clear language has been employed to indicate that is the intended result. It will be apparent that I find much to agree with in the comment of Tallis, J.A., in *Farley v. Badley* (1991), 97 Sask.R. 21; 12 W.A.C. 21.

> "This common law principle is well established. It can only be abrogated by legislation, and will only be taken to have been abrogated where the statutory purpose and object to that effect is clear. Courts do not have free rein to impose rules of repayment priority, as a matter of policy. The question is not whether the Crown's impugned prerogative is wise, but whether having regard for the statutes and controlling authorities bearing on it, it continues to exist."

[110] I do not see any reason to conclude that the legislators intended to provide the public with the right of access to any documents other than the statement and the review as indicated in s. 11. It may be that they did not see the Minister as being in a position of conflict required to adjudicate on the competing interests of the developer and the public. Rather, they may have seen the Minister as an elected officer of the Crown with a mandate from the public to carry out or promote projects perceived by the Government to be in the public interest, subject to a limited right of public participation which was satisfied by the opportunity to have access to the statement and the review. Whatever the reason they may have had for casting the legislation in the form they did, it was their exclusive mandate to select the form and it was this Court's mandate to interpret the words they employed but that mandate does not go so far as to permit the Courts to direct a more significant degree of public participation then the legislation has provided.

[111] In the result, I have concluded that there is neither a common law nor statutory right of disclosure sufficient to support this application.

[112] A further reference to the interpretation to be given the enactment as it relates to a development is required. At the hearing, some considerable time was devoted to the powers of the Minister to arbitrarily decide what is a development within the meaning of the *Act.* The purpose of this concern was to determine whether the Minister had the right to make the *Act* inapplicable simply by declaring that any project was not a development. I have concluded these considerations need not be dealt with as they do not assist in the determination of this issue. If the Minister has no power to make the orders under s. 7, then the orders are invalid and do not exist for purposes of this application, but the right of SAFE is not by reason thereof advanced in any measure. It must rely exclusively on the provisions of the *Act* which I have already indicated provide for disclosure of specific documents but makes no reference to the production of documents generally. On the other hand, if the power to make the orders does exist, then they are valid but again they do not serve to advance SAFE'S position. Granting these orders their most liberal interpretation, they do not support a general right of access to Crown documents.

[113] For the above reasons, the appellant's claim to mandamus must fail as it has not established the breach of a lawful duty of disclosure. The appeal is dismissed with costs on double Column V.

Appeal allowed.

# Tab 11

Russell v. Shanahan et al.; Ontario Municipal Board, intervenor*

[Indexed as: Russell v. Toronto (City)]

52 O.R. (3d) 9
[2000] O.J. No. 4762
Docket Nos. C33545 and C33549

Court of Appeal for Ontario
Finlayson, Labrosse and Weiler JJ.A.
December 19, 2000

* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs August 9, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28428. S.C.C. Bulletin, 2001, p. 1413.

Administrative law--Boards and tribunals--Power to review --Ontario Municipal Board--Jurisdiction--Power to review and reconsider decision--Municipality passing by-law having effect of prohibiting development on ravine lots - Landowner's appeal for exemption dismissed--Landowner applying for review hearing --Review Panel granting exemption to zoning by-law--Review Panel having jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

Planning--Zoning--Exemptions--Ontario Municipal Board --Jurisdiction--Power to review and reconsider decision --Municipality passing by-law having effect of prohibiting development on ravine lots--Landowner's appeal for exemption dismissed--Landowner applying for review hearing--Review Panel granting exemption to zoning by-law--Review Panel having

jurisdiction to substitute its decision for decision of First Panel--Board having wide power to review and reconsider its decisions--Divisional Court erring in setting aside decision of Review Panel--Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 43.

In 1995, R purchased a vacant ravine lot in the City of Toronto, and the day after he applied for a building permit to build a home, the City passed an interim control by-law prohibiting all uses on his lot and three others for one year. In 1997, the City enacted a new ravine control by-law that effectively prohibited construction on the four ravine lots. R and D, another ravine lot owner, appealed to the Ontario Municipal Board for exemptions to the new by-law. After a three-week hearing, their appeal was dismissed, the Board concluding that the by-law had been enacted for the valid planning purposes of protecting ravines from development. R and D sought a review of the Board's decision pursuant to s. 43 of the Ontario Municipal Board Act, which provides that "the Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it." After a one-day hearing, the Review Panel granted the application on the basis that the First Panel had ignored the long-standing policy of the Board that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public, then the zoning will not be approved unless the appropriate authority is prepared to acquire the lands within a reasonable time or the municipality can justify the drastic result of the by-law. R's neighbours and the City appealed only the R decision to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of manifest error on the part of the First Panel, the Review Panel was not entitled to substitute its own decision. R and the Board both appealed the judgment of the Divisional Court.

Held, the appeals should be allowed.

The Review Panel had the jurisdiction to substitute its opinion for the First Panel. On the whole, courts have been mindful of the uniqueness of the power to review in

administrative proceedings and have been loath to interpret the power narrowly. Section 43 confers a broad jurisdiction on the Board to review its decisions. To say that the Review Panel had the power to review an earlier decision, but without the ability to reconsider it, amounted to no power at all. The Divisional Court erred because it failed to appreciate the distinction between the Review Panel's wide plenary power under s. 43 of the Ontario Municipal Board Act to rehear or review with the Board's self-imposed directive that limited the exercise of that power to two main circumstances, that is, first, to correct typographical or clerical errors and, second, in circumstances of allegations of fraud, new evidence and failure of natural justice or material failure of fact or law. The Divisional Court did not appreciate that the requirement for the applicant for review to show a "manifest error" in the decision of the panel under review was an internal guideline of the Board, not a requirement of s. 43. It was up to the Review Panel to determine on the facts of each case when manifest error has occurred. Further, the Divisional Court erred in interpreting the reasons of the Review Panel. The reasons did not state that the municipality cannot "down-zone" property without providing compensation. The Board was not taking issue with the ability of the municipality to pass such a by-law; rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. The Review Panel's decision was within its jurisdiction under s. 43. In the exercise of its jurisdiction, it was not necessary for the Review Panel to make an express finding that the by-law as amended complied with the Official Plan, as required by s. 24 of the Planning Act, R.S.O. 1990, c. P.13.

Cases referred to

Canada Mortgage & Housing Corp. (Re) (1994), 31 O.M.B.R. 471 (sub nom. Canada Mortgage and Housing Corp. v. Vaughan (City)); Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 20 C.C.E.L. 236, 47 D.L.R. (4th) 477, 26 O.A.C. 387 (C.A.); Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696 (Ont. Div. Ct.); Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265, 33 D.L.R. (3d) 513 (Div. Ct.); Nepean (Township) Restricted Area By-law 73-76 (Re)

(1979), 10 O.M.B.R. 76 (Lieut. Gov. in Council), varg (1978), 9 O.M.B.R. 36; St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 (Ont. Gen. Div.)

Statutes referred to

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, ss. 43, 96
Planning Act, R.S.O. 1990, c. P.13, as am., ss. 24, 34(1), 38(4)

Authorities referred to

Reid, Administrative Law and Practice (Toronto: Butterworths, 1971)
Rogers, Law of Canadian Municipal Corporations, 2d ed. (Toronto: Carswell, 1971- ), vol. 2, loose-leaf

APPEAL from a judgment of the Divisional Court (MacFarland, Ferrier and Winkler JJ.) (1999), 5 M.P.L.R. (3d) 14 that set aside a decision of a Review Panel of the Ontario Municipal Board.

Stephen Diamond, for appellant.
Leo F. Longo, for respondents Shanahan, Triggs, McFayden and Clarke.
Leslie Mendelson and William Hawryliw, for respondent City of Toronto.
Leslie McIntosh, for the Ontario Municipal Board.

The judgment of the court was delivered by

[1] FINLAYSON J.A.:--Derek Russell ("Russell") and the Ontario Municipal Board (the "Board") appeal separately the judgment of the Divisional Court [reported (1999), 5 M.P.L.R. (3d) 14] setting aside the decision of a panel of the Ontario Municipal Board (the "Review Panel") dated September 3, 1998, and restoring an earlier decision of another panel of the

Ontario Municipal Board (the "First Panel") dated December 16, 1997. The Ontario Municipal Board was represented at the hearing before the Divisional Court pursuant to s. 96(2) of the Ontario Municipal Board Act, R.S.O. 1990, c. O.28 (the "Act"), and limited its submissions to jurisdictional issues.

Facts

[2] In 1995, Russell purchased a vacant ravine lot on Glen Road in Rosedale for $50,000 with the intention of building a home. To build a home, Russell needed to obtain a building permit from the City of Toronto. He applied for a permit on July 26, 1995. His plans and drawings complied with all the applicable zoning by-laws, but he needed City Council's approval pursuant to the City's ravine control by-law. The day after Russell made his application, the City's Land Use Committee directed the Planning Commissioner to conduct the study of four Rosedale properties located on the ravine. Russell's property was one of the four lots under study. On August 14, 1995, City Council enacted Interim Control By-law 1995-0550, prohibiting all uses on the four lots for one year.

[3] On December 23, 1996, the Planning Commissioner provided a report to City Council recommending that the existing residential zoning be retained for the four properties studied, allowing single-unit homes to be built. City Council rejected the recommendation and retained outside planning consultants. On July 14, 1997, the outside consultants' report was enacted by City Council in the form of a new ravine control by-law (Ravine Impact Boundary By-law 1997-0369) that effectively prohibited any construction on Russell's lands. The purported intention of the by-law was to protect ravines from development. The three other vacant Rosedale properties were likewise affected.

[4] Another Rosedale property owner, Vera Dickinson (who had owned a vacant ravine lot on Beaumont Road for 36 years), and Russell, appealed to the Board under the provisions of the Planning Act, R.S.O. 1990, c. P.13, as amended, for exemptions from the new by-law. There was a three-week hearing during which 12 experts were called. Opposing the appeals were the

City and several Rosedale ratepayers.

[5] The First Panel dismissed the appeals, finding that there was no reason to exempt the appellants from the application of the by-law, which had been enacted "for a valid planning purpose, to protect ravines from development". Russell and Dickinson sought a review of the First Panel's decision by a Review Panel of the Board pursuant to s. 43 of the [Ontario Municipal Board] Act. Section 43 provides: "The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it."

[6] After a one-day hearing, the Review Panel granted the review application on the basis that the First Panel had ignored the long-standing policy of the Board in dealing with this type of zoning by-law, which was first set out in its decision Re Nepean (Township) Restricted Area By-law 73-76 (1978), 9 O.M.B.R. 36 at p. 55:

> This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved. We do not wish or intend to depart from that general principle and we hope the solution suggested will allow the township to achieve its goals and at the same time be fair to the land-owner.

The Review Panel accordingly allowed the appeals and amended the by-law to exempt the two applicants' properties.

[7] Russell's neighbours and the City appealed only the Russell decision, with leave, to the Divisional Court. The Divisional Court allowed the appeal, holding that in the absence of "manifest error" on the part of the First Panel, the Review Panel was not entitled to substitute its own opinion. Specifically, MacFarland J. for the court stated [at p. 15 M.P.L.R.]:

We are of the view that all the questions posed for the opinion of the court must be answered in the affirmative. Even if the effect of the by-law was to sterilize the lands owned by the Respondent Russell, the Board erred in overturning the Hearing [Board] decision for that reason. The Planning Act clearly gives the municipality the right to pass the by-law in question and there is clear authority that such right does not carry with it a corresponding obligation to pay compensation absent bad faith on the part of the municipality or specific statutory obligation to this effect. As was stated by Estey J. in British Columbia v. Tener [[1985] 1 S.C.R. 533 at p. 557], a decision of the Supreme Court of Canada,

> Ordinarily in this country . . . compensation does not follow zoning either up or down.

In its hearing decision, the Board applied the existing authority to the facts as it found them and in our view it did so correctly. It is not open to the Board in a Section 43 review to substitute its opinion for that of the Board which heard the matter on the merits over a three-week hearing save in exceptional circumstances.

It is apparent that the Board on review simply preferred an approach other than the approach taken by the Hearing Board. This does not, in our view, constitute "manifest error" on the part of the Hearing Board which did as it is obliged to do in weighing the public and private interests and in result favoured the public interest over the private interest of Mr. Russell.

[8] The Divisional Court also faulted the Review Panel's decision on the basis that it failed to consider s. 24 of the Planning Act, dealing with an amendment to an official plan [at pp. 15-16 M.P.L.R.]:

> There is nothing in the Board's decision to indicate whether it considered the effect of its decision in relation to the mandatory provision of subsection 1 of Section 24 of the Planning Act. The decision in this respect is simply

silent and in the face of the mandatory requirement of subsection 1, that is not sufficient. The Board is obliged to consider this aspect and it did not do so and fell into error.

Relevant Statutory Provisions

Ontario Municipal Board Act

43. The Board may rehear any application before deciding it or may review, rescind, change, alter or vary any decision, approval or order made by it.

Planning Act

24(1) Despite any other general or special Act, where an official plan is in effect, no public work shall be undertaken and, except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform therewith.

(2) If a council or a planning board has adopted an amendment to an official plan, the council of any municipality or the planning board of any planning area to which the plan or any part of the plan applies may, before the amendment to the official plan comes into effect, pass a by-law that does not conform with the official plan but will conform with if the amendment comes into effect, and the by-law shall be conclusively deemed to have conformed with the official plan on and after the day it was passed if the amendment come into effect.

. . . . .

(4) If a by-law is passed under section 34 by the council of a municipality or a planning board in a planning area in which an official plan is in effect and, within the time limited for appeal no appeal is taken or an appeal is taken and the appeal is withdrawn or dismissed or the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity

with the official plan, except, if the by-law is passed in the circumstances mentioned in subsection (2), the by-law shall be conclusively deemed to be in conformity with the official plan on and after the day the by-law was passed, if the amendment to the official plan comes into effect.

. . . . .

34(1) Zoning by-laws may be passed by the councils of local municipalities:

. . . . .

3.2 For prohibiting any use of land and the erecting, locating or using of any class or classes of buildings or structures within any defined area or areas,

i. that is a significant wildlife habitat, wetland, woodland, ravine, valley or area of natural and scientific interest,

ii. that is a significant corridor or shoreline of a lake, river or stream, or

iii. that is a significant natural corridor, feature or area.

Issues

(1) Did the Divisional Court err in holding that it was not open to the Review Panel of the Board to substitute its opinion for that of the First Panel of the Board under s. 43 of the Act?

(2) Was the Review Panel correct in ruling that the First Panel had made a manifest error?

(3) Was it necessary for the second panel of the Board to hold a hearing to determine that the by-law as amended was in conformity with s. 24(1) of the Planning Act?

Analysis

Issue 1: Did the Review Panel have jurisdiction under s. 43 to substitute its opinion?

[9] In my opinion, the Divisional Court failed to appreciate the distinction between the statutory authority of the Review Panel to rehear or review its own decisions under s. 43 of the Act and the self-imposed directive of the Board on the exercise of that power.

[10] The Board has developed a general policy with respect to the exercise of its wide plenary power under s. 43. In Practice Direction 12, dated October 31, 1997, the Board stated that it would exercise its power under s. 43 in two main circumstances. The first, under Part A, is to correct "typographical or clerical errors and minor omissions". The second, in Part B, [is] where the Board sets out three "reasons for review" in addition to minor errors. They are an "allegation of fraud", "new evidence" and "failure of natural justice or material failure of fact or law".

[11] In Canada Mortgage and Housing Corp. v. Vaughan (City) (1994), 31 O.M.B.R. 471, the Board set out its jurisprudence with respect to s. 43 at pp. 474-75:

> The jurisprudence of the board in this regard has been most clear. The past decisions indicate that we are reluctant to grant a s. 43 review unless there is a jurisdictional defect, or where there has been a change of circumstances or new evidence available, or where there is a manifest error of decisions or if there is an apprehension of bias or undue influence. While the list may not be exhaustive and the board's discretion should not be fettered unduly on an a priori basis, there is a common thread running through all the cases dealing with this question of review. We cannot allow any of our decisions to be reviewed or retried for some flimsy or unsubstantial reasons. As an adjudicative tribunal which renders decisions that have profound effects on public and propriety interests, our decisions should be well-considered and must have some measure of finality. If a

> motion is launched on grounds other than those enumerated, it should be to the Divisional Court which has either the competence and the authority to overturn our findings of fact and law. It never has been nor would ever be our wont to constitute ourselves as an appellate body, routinely reviewing or rehearing our own decisions.

(Emphasis added)

[12] The question whether s. 43 empowers a review panel to rescind the decision of an earlier panel based on the misapplication of a planning principle was considered by a single judge of the Divisional Court on an application for leave to appeal from a decision of the Board in St. Catharines (City) v. Faith Lutheran Social Services Inc. (1991), 4 M.P.L.R. (2d) 225 at p. 236 (Ont. Gen. Div.). There, White J. held:

> . . . s. 42 [now s. 43 of the Act] contemplates the Board reviewing its own decision in the event that it is satisfied that in any previous decision it has misinterpreted the facts, or wrongly assessed them; that is, that it has misinterpreted the planning evidence, or wrongly assessed the planning evidence, or failed to apply good planning policy in the entire matter.
>
> . . . [T]he Board had full jurisdiction to grant a rehearing of the decisions of Mr. Cole on the basis that Mr. Cole had misapprehended the planning evidence, and had given a decision that reflected bad planning policy. The wisdom of that policy is entirely a matter for the Board. It is not the type of matter that a court is equipped to deal with. . . .

[13] In the case at bar, the Review Panel considered the First Panel to have committed a "manifest error" by placing "the public interest uppermost in [its] mind" and by failing to apply the planning "principle" concerning "down-zoning" developed in the Board's past policies and jurisprudence, which require a balancing of public and private interests when considering whether to approve zoning by-laws.

[14] The Divisional Court erred in ruling that s. 43 of the Act did not permit the Review Panel to substitute its decision for that of the First Panel. To say that the Review Panel has the power to review an earlier decision without the ability to reconsider it amounts to no power at all. In Merrens v. Metropolitan Toronto (Municipality), [1973] 2 O.R. 265 at p. 278, 33 D.L.R. (3d) 513 at p. 526 (Div. Ct.), Lacourcire J. referred to the following passage in Reid, Administrative Law and Practice (Toronto: Butterworths, 1971), at p. 103:

> The power to reconsider decisions is peculiar to tribunals. It is not found in the law-courts. Its existence is the consequence of a general lack of provisions for appeal, particularly on questions of fact, from tribunals, and of the regulatory nature of most tribunals. In both respects the tribunals differ from the courts. The power to reconsider thus appears to be an appropriate means both for the correction of errors in the absence of an appeal and to permit adjustments to be made as changes in the regulated activity occur. The importance of such a power has been recognized by the courts.

[15] On the whole, courts have been mindful of the uniqueness of the power of review in administrative proceedings and have been loath to interpret the power narrowly. For example, the Divisional Court has repeatedly stressed the wide nature of such powers and has refused to read them down: Merrens, supra, St. Catharines, supra, and Hall v. Ontario (Ministry of Community and Social Services) (1997), 154 D.L.R. (4th) 696.

[16] This court, in Commercial Union Assurance v. Ontario Human Rights Commission (1988), 63 O.R. (2d) 112, 47 D.L.R. (4th) 477, held that the power of reconsideration under the Ontario Human Rights Code is to be interpreted widely in order to prevent injustice. In their endorsement, Lacourcire, Zuber and McKinlay JJ.A. wrote at p. 479 D.L.R. [p. 114 O.R.]:

> We do not agree with counsel for the appellants that the broad power of reconsideration which results in a final decision requires that new facts be established: see Re Merrens and Municipality of Metropolitan Toronto [supra]. The

power is important and may be the only way to correct errors where no right of appeal is provided, or to allow for adjustments even if circumstances remain unchanged. That is the meaning to be given to the maintenance of the integrity of the administrative process.

[17] The above language with reference to analogous sections in the statute governing another administrative tribunal is helpful to our analysis of the Act in the case in appeal.

[18] My own view is that the Divisional Court in the instant case interpreted s. 43 in a manner which is supported neither by the legislation nor by the weight of judicial authority. Section 43 confers a broad jurisdiction on the Board for its review authority which is in contradistinction to the narrow right of appeal to the Divisional Court provided in s. 96 of the Act. Section 96 provides:

> 96(1) Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

[19] This narrow right of appeal supports an interpretation of the Board's reconsideration powers which is significantly broader than that stated by the Divisional Court. That court did not appear to appreciate that the requirement that an applicant for review show a "manifest error" in the decision of the panel under review is an internal guideline of the Board, not a requirement of s. 43 of the Act. The Board has seen fit to explain in Practice Direction 12 the circumstances under which it would exercise its powers on a review under s. 43 of the Act and expanded on those guidelines in Canada Mortgage and Housing Corp., supra, to say that it will correct errors on review where there is a manifest error. In my view it is up to the Review Panel to determine on the facts of each case when manifest error has occurred. Similarly, there is nothing in s. 43 of the Act that prevents a Review Panel from "substituting its own opinion" for that of the original panel. In holding otherwise, the Divisional Court departed from established case law.

[20] In the end, the Divisional Court committed its own manifest error by substituting its opinion for that of the Review Panel. In doing so, the Divisional Court entered into a policy-making role that is outside its jurisdiction. Moreover, the Divisional Court focused solely on the jurisdiction of the City to enact the by-law in dispute and failed to address the jurisdiction of the Board on a review of an appeal by affected property owners under the Planning Act from the City's exercise of that jurisdiction. One of the functions of the Board, acknowledged countless times by the courts, is to make and apply policies. In that regard, the Board is very different from a court. Here, the Review Panel applied a policy to a set of undisputed facts and on that basis granted the relief requested by Russell. The effect of the decision by the Divisional Court was to strip the Board of its policy-making role.

[21] In a leading text on local government law, Rogers, Law of Canadian Municipal Corporations, 2d ed., vol. 2, loose-leaf (Toronto: Carswell, 1971- ), the following statement is made in connection with the power of the Board to approve by-laws at p. 1502:

> Generally speaking, the Ontario Board has absolute discretion in giving or withholding its approval, and its decisions on applications for approval are not reviewable by the Divisional Court. For the most part its decisions involve questions of policy within its discretion with which the court will not interfere. In the exercise of its discretion where no statutory direction is given as to the matters which the Board is to consider when dealing with a question, then it must be taken that the legislature has left it entirely to the Board's discretion.

Issue 2: Manifest error

[22] The Divisional Court erred in its interpretation of the reasons of the Review Panel. The Review Panel did not, as the Divisional Court suggests, refuse to approve the by-law because it thought that the City could not sterilize the lands in question without providing compensation to the owners. The

First Panel's decision was reversed because it did not apply a long-standing Board policy that it will not approve a by-law that has such an effect unless the municipality in question can justify such a drastic result within the guidelines set out in earlier decisions of the Board.

[23] The Review Panel found that the entirety of the Dickinson premises and a good portion of the Russell premises would be rendered unfit for development by the by-law. It said:

> The Board finds that the effect of this by-law on the applicants of the motion is profound and inexorably devastating. The underlying residential rights of both these properties will be effectively removed and these two properties will be, for all intents and purposes, completely sterilized. [The Review Panel cites the proposition from Re Nepean (Township) at p. 55, that "if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved."]
>
> This oft-quoted dicta of Mr. A. J. L. Chapman, Q.C. [in Re Nepean (Township)] is the best enunciation of the Board's long standing tendency to ensure that privately owned lands will not be transformed to public purposes such as open-space or park by zoning instruments unless there is a concomitant commitment on behalf of the municipality to expropriate or to acquire the lands in question. This rule, like many traditional rules of the Board, must be subject to a number of exceptions. We will deal with the exceptions later.

[24] The Review Panel then reiterated its "strongly held belief" that planning decisions must not allow the concerns of the public good nor private interests to become the exclusive and singular goals, but rather the Board should be motivated by its time-honoured experience that planning is often a delicate balancing between these "two noble and sometimes competing objectives". This policy recognizes that planning decisions, no matter how benevolent or farsighted their intent, can easily

become "an unwitting and unquestioning tool to extinguish or debilitate the proprietary interests of an owner".

[25] Far from stating that a municipality cannot sterilize or "down-zone" private property without providing for compensation, the Review Panel asserted that the municipality can re-designate or re-zone for the public benefit to arrest a trend that is harmful or undesirable:

> Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. In the present case, we have not heard from the counsel from the City or from Mr. Longo that development of the applicants' lands will attract or invite such considerations.

[26] The Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action. This was completely within its jurisdiction under s. 43 to do so.

Issue 3: Section 24 of the Planning Act

[27] When City Council adopted Ravine Impact Boundary By-law No. 1997-0369, it imposed building restrictions on ravine lands encompassing some 170 Rosedale properties. The by-law was designed to indicate precisely where residential development will be permitted. Russell and Dickinson were denied building permits because of the effect of the building constraints in the by-law. They appealed to the Board under s. 38(4) of the Planning Act and asked for exceptions for the two residential properties. It was these appeals that were heard by the First Panel.

[28] Section 24(1) of the Planning Act provides that no public work shall be undertaken and no by-law shall be passed, and "except as provided in subsections (2) and (4), no by-law shall be passed for any purpose that does not conform

therewith". The First Panel heard the appeals and was very much alive to the need that the Ravine Impact Boundary By-law and the exceptions sought by Russell and Dickinson comply with the Official Plan. It expressly said so. However, after considering all the evidence taken over three weeks, particularly the extensive presentation by Russell, the First Panel declined to grant the exceptions and dismissed the appeals. It is common ground that in doing so it found that the by-law was in conformity with the Official Plan.

[29] The Review Panel reviewed the same evidence as the First Panel. It granted the application for a review under s. 43 of the Act, allowed the appeals under the Planning Act and amended By-Law 1997-0369 "so that the applicants lands are exempted". The suggestion that the Review Panel was not similarly aware of the need to find that the by-law as amended was in compliance with the Official Plan is to suggest that it was not aware of the basic provisions of the Planning Act, notably s. 24(4), that "where an appeal is taken and . . . the by-law is amended by the Municipal Board or as directed by the Board, the by-law shall be conclusively deemed to be in conformity with the official plan. . . ." As is apparent, it is not necessary for the Board to make an express finding of compliance.

Disposition

[30] For the above reasons, I would allow the appeal, set aside the judgment of the Divisional Court and order that judgment be entered restoring the decision of the Review Panel. The appellant Russell is entitled to its costs of the appeal, including the motion for leave to appeal, and of the hearing before the Divisional Court.

Order accordingly.

# Tab 12

# Court of Queen's Bench of Alberta

**Citation: Suncor Energy Inc v Unifor Local 707A, 2016 ABQB 269**

**Date:** 20160518
**Docket:** 1401 03831
**Registry:** Calgary



Between:

**Suncor Energy Inc.**

Applicant

- and -

**Unifor Local 707A**

Respondent

- and -

**Mining Association of Canada and Enform Canada**

Intervener

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**Reasons for Judgment**
**of the**
**Honourable Mr. Justice D.B. Nixon**

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## I. Introduction

[1] This is an application for judicial review of an arbitration concerning a grievance. The grievance is focused on the decision by Suncor Energy Inc. ("**Suncor**") to institute a random drug and alcohol testing policy. Unifor Local 707A ("**Unifor**") alleges that the proposed policy is contrary to Articles 1.01 and 4.01 of the Collective Agreement, to the common law and to applicable legislation.

[2] The random testing is proposed to occur in the context of a dangerous workplace. Underlying this random testing issue is an inherent tension between privacy and safety.

[3] While privacy and safety are important and sensitive issues, it is generally not the task of a reviewing court to reassess the elements and substitute its own view. Rather, it is the task of such a court to determine whether the decision of an arbitration board was appropriate in the circumstances.

## II. Background Facts

[4] Suncor is the Applicant. It has operations in the Athabasca oil sands (the "**Oil Sands Operations**") in the Regional Municipality of Wood Buffalo ("**Wood Buffalo Municipality**").

[5] The Oil Sands Operations are carried on in two locations. The first is a base plant (the "**Base Plant**") approximately 30 km north of Fort McMurray. The second is *in situ* operations at McKay River and Firebag, which are approximately 120 km north of Fort McMurray.

[6] The Oil Sands Operations are carried on twenty-four hours a day, every day, all year round. Most Suncor employees work twelve hour shifts, with three day shifts followed by three night shifts. That sequence is then followed by six days off.

[7] At any time, there can be almost 10,000 workers operating within the geographical area covered by the Oil Sands Operations. As mentioned above, Suncor and Unifor are parties to a Collective Agreement. Of those 10,000 workers, 3,383 are represented by Unifor.

[8] Suncor also employs 2,963 non-union employees. The remaining workers are employed by contractors. At any given time, there can be up to 3,400 contractors' employees working within the Oil Sands Operations.

[9] It is common ground that the Oil Sands Operations are, by their nature, dangerous. There are many hazards at the sites of the Oil Sands Operations, including heavy equipment, high voltage power lines, chemicals, radiation sources, high temperature steam, explosives, high pressure piping and high temperature, flammable liquids and gases.

[10] Some of the largest and most complex mining and industrial equipment in the world is used at these sites. The equipment includes heavy haul trucks, weighing in excess of 400 tons, and cable and hydraulic shovels, standing 21 metres tall.

[11] Much of the Base Plant is contained within a blast zone. At any particular time, thousands of workers may be working within the Base Plant. Further, the Oil Sands Operations are carried on close to communities and environmentally sensitive areas.

[12] For many years, Suncor has been concerned about safety hazards posed by alcohol and drugs use by individuals within the workplace. It has adopted various measures to address this concern, including the following:

- employee education and training;
- supervisor training;
- post-incident, reasonable cause, return to work and follow-up drug and alcohol testing;
- an Employee and Family Assistance Program;
- treatment for employees with dependencies;
- a Rapid Site Access Program for contractors' employees;
- a Drug Interdiction Procedure to detect drugs and alcohol at Suncor-owned accommodation facilities;
- an Alcohol Free Lodge Policy; and
- an extension of the Drug Interdiction Procedure that involves the use of sniffer dogs within Suncor's operating footprint.

[13] On June 20, 2012, Suncor announced that it was introducing additional measures. These measures included a Canada-wide harmonized alcohol and drug policy, and supporting standards.

[14] In addition, a random testing standard (the "**Random Testing Standard**") was announced on that date, applicable only to the Oil Sands Operations in the Wood Buffalo

Municipality. The Random Testing Standard provided for random drug and alcohol testing for employees in safety-sensitive positions.

[15] On July 19, 2012, Unifor grieved Suncor's implementation of the Random Testing Standard. No other aspect of the additional alcohol and drug measures implemented in 2012 was grieved.

[16] The extent of a problem with alcohol and drugs at the Oil Sands Operations is a matter of considerable debate. Suncor states that its evidence "demonstrates a pervasive problem that is unparalleled in any case in Canada". In contrast, Unifor describes the evidence advanced by Suncor as "unparticularized and unrefined". Amongst other issues, Unifor criticized the evidence because it made no distinction among union employees, non-union employees and contractors' employees.



## III. The Arbitration

[17] The arbitration was conducted over the course of 23 days in 2013 before an arbitration panel consisting of three individuals. The arbitration was lengthy, technical and complex. Suncor called 12 witnesses, including three experts. Unifor called 7 witnesses, including one expert.

[18] Ultimately, two of the arbitrators (the "**Majority**") found in favour of Unifor. One arbitrator (the "**Dissent**") found in favour of Suncor. See ***Unifor, Local 707A v Suncor Energy Inc Oil Sands (Random Testing Grievance)***, [2014] 242 LAC (4th) 1 (Hodges).

[19] Both the Majority and the Dissent referred to the decision of the Supreme Court of Canada in ***Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd***, 2013 SCC 34, 2 SCR 458 ("***Irving***"). The ***Irving*** decision was issued during the arbitration.

[20] Both sides in this arbitration accepted the finding by Supreme Court of Canada that a dangerous workplace does not automatically justify random testing. Rather, based on ***Irving*** and on ***Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*** (1965), 16 LAC 73 ("***KVP***"), it is clear that a balancing of interests is required. That balancing requires a determination of whether the rule sought to be imposed by the employer is proportionate to the concern it seeks to address.

[21] Where the Majority and the Dissent differ is in their approach to, and conclusion on, that balancing of interests. A review of the respective decisions by the Majority and by the Dissent (the "**Majority Decision**" and the "**Dissent Decision**", respectively) is appropriate for purposes of framing the issue under judicial review.

### A. Majority Decision

[22] The Majority considered alcohol and drug testing separately. They asserted that "...random alcohol testing and random drug testing have not run on parallel paths in the jurisprudence": Majority Decision, para 218.

#### 1. Alcohol Testing

[23] With respect to alcohol testing, the Majority noted that the ***Irving*** board had found breathalyzer testing "effects a significant inroad" on privacy: Majority Decision, para 227. The

Majority also noted that the Supreme Court had found that conclusion "unassailable". The Court in ***Irving*** stated the following at para 50:

> Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his human dignity" ... it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements".

[24] The Majority stated at para 236 that the Supreme Court in ***Irving*** upheld the decision of the board in that arbitration, "including the need to demonstrate a 'significant' or 'serious' problem, and its requirement of a causal connection to the accident, injury and near miss history at the plant – as reasonable" (underlining in Majority Decision). The Majority stated as follows at para 248:

> In upholding the [***Irving***] Board's decision as reasonable, the majority of the Supreme Court of Canada noted that the employer had not established a causal connection between the positive test results which the employer offered in that case and the safety record in the plant. As a result, in our view, in order to establish that its proposed policy of random testing serves a legitimate business interest in improving safety, the Employer must establish such a connection.
>
> [Underlining in Majority Decision]

[25] The Majority acknowledged that the Supreme Court gave little guidance as to what would be required to establish a "general problem in the workplace" or what would constitute "legitimate safety concerns": Majority Decision, para 239. In particular, they noted that while ***Irving*** gives some indication of what is not sufficient evidence, the Supreme Court did not provide a threshold for the determination of what is sufficient.

[26] Nevertheless, the Majority was not persuaded that Suncor met the necessary threshold in this grievance arbitration. They noted that the evidence showed "a declining 'for cause' testing experience": Majority Decision, para 250. That is, the percentage of positives among tests administered "for cause" had decreased from 2009 to 2012.

[27] The Majority also pointed out that while Suncor had provided evidence of 2,276 alcohol and drug "security incidents", the evidence did not indicate whether those incidents involved Unifor members, other Suncor employees or contractor employees: Majority Decision, para 254. Further, the Majority was critical of Suncor because the incidents were not broken down according to whether the employees involved were in safety-sensitive positions, were junior or senior employees, were located at the Base Plant or at Firebag, and so on.

[28] The Majority rejected Suncor's argument that its workforce is "integrated" with union, non-union and contractor employees working together such that the actions of each affect all the others. The Majority noted that this evidence was absent in ***Irving*** as well, stating at para 259 that "[i]t does not appear that an argument was made in that case of what makes up the "workforce" in that decision, but the Board did not appear to have accepted evidence of the workforce as an integrated whole in making its determination on the lack of a causal connection" (underlining in Majority Decision).

[29] The Majority took the position that they could consider only evidence specific to the bargaining unit, thereby excluding the non-union employees of Suncor and the contractors' employees working in the Oil Sands Operations. In this regard, the Majority stated the following at paras 264-5:

> As our jurisdiction derives from the collective agreement, and extends to the Employer and the bargaining unit members only, and as the impact on privacy rights will be felt by this bargaining unit by virtue of our decision and is binding only on them, it makes logical sense that this Board consider the cost/benefit analysis as it relates to this bargaining unit, and not its impact vis-à-vis the other two thirds of workers who are also present at the Oil Sands Operations. In our view, in weighing the "gain" to be achieved to this Employer by considering other arrangements the Employer may or may not have with other groups of employees or contractors, the Board would be exceeding its jurisdiction. This makes logical as well as labour relations sense. Taken to its logical conclusion, if in fact such arrangements could dictate the results of a proportionality assessment, that term would have no meaning: a group of employees could have their privacy invaded whether or not they pose any sufficient risk to an employer themselves – in order to gain access to require random testing of another group of employees outside the four corners of the collective agreement.
>
> In this Board's opinion, it must be the risk that this particular group poses – and therefore the gain from testing this particular group – that frames the inquiry. In the end, we find our jurisdiction is simply not broad enough to reach the end the Employer argues. We cannot agree that evidence of gains which do not relate to this bargaining unit are relevant to a determination of whether members of this bargaining unit should be subject to what the Supreme Court of Canada has determined are highly intrusive random tests on their bodily fluids.
>
> [Underlining in Majority Decision]

[30] The Majority concluded that "...the evidence does not demonstrate a culture at the Oil Sands Operations where the consumption of alcohol is so pervasive as to be accepted by employees, where employees go together to drink openly and where such activity is either condoned or encouraged by management's practices or inaction": Majority Decision, para 272.

**2. Drug Testing**

[31] Turning to drug testing, the Majority stated that the inability of urinalysis to demonstrate current impairment results in a different proportionality assessment: Majority Decision, para 275. The Majority further stated the following at paras 286 and 312:

> Unlike the jurisprudence relating to testing by breathalyzer, the jurisprudence relating to testing for drugs requires an assessment of the effectiveness of the testing methodology in meeting legitimate safety interests of the Employer... If the methodology does not do so, the balance cannot tip in the Employer's favour on a proportionality assessment.
>
> **...**

> As we have discussed, urinalysis does not demonstrate current impairment. It does indicate use, but not the quality, quantity or time of use. Given this evidentiary limitation, evidence of positive tests, without more, does not allow us to conclude that drug use by Suncor employees in the bargaining unit poses a safety risk of such a magnitude that would justify the imposition of random testing for safety sensitive positions. We find that the evidence tendered with respect to drug and alcohol security incidents does not demonstrate a serious drug issue among employees in this bargaining unit. Additionally, although the Employer has a sophisticated health and safety system, it did not present this Board with information that would link accident, injury and near miss incidents to drug use or abuse. On balance, we do not find random drug testing as proposed by the Employer to be a reasonable policy.

[32] Further, the Majority stated at para 306 that "[t]he ability to adulterate a test is a further failing of urinalysis". The Majority asserted at para 339 that "[e]vidence was given that oral fluid testing was available, was able to determine present impairment, and had the added advantage of being more difficult to adulterate or 'cheat' than urine testing". They acknowledged that "the taking of any bodily fluid is invasive", but asserted that "oral fluid is closely aligned to the long accepted breathalyzer". They stated at para 332 that "[b]y using urinalysis as the testing method, when other, more advanced methods exist and can determine present impairment, this Employer is in fact seeking to regulate the personal lifestyle and moral choices of its employees, on their own time".

[33] While only random alcohol testing, not random drug testing, was at issue before the Supreme Court of Canada in ***Irving***, the Court did refer at para 34 to the following comments by the arbitrator in ***Re Imperial Oil Ltd and CEP, Local 900*** (2006), 157 LAC (4th) 225 ("***Nanticoke***"):

> It may well be that the balancing of interests approach ... would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of "for cause" justification.

[34] The Majority, however, stated that the majority of the Supreme Court had quoted, but not applied this exception. In addition, the Majority stated at para 320 that the arbitrator in ***Nanticoke*** had posited this exception in respect of a time-limited policy:

> He did not contemplate – and the Supreme Court of Canada did not endorse – a policy that would have no time restrictions. In our view such a policy would also require evidence which serves to allow a Board to differentiate between various aspects of the workforce in this type of workplace which spans several worksites and types of living arrangements (those living in camps versus those living in Fort McMurray, for example), and further to differentiate between the workforce on the basis of longevity of employment, such that the Policy is targeted as narrowly as possible, at the offenders. In view of the rapidly expanding workforce in Fort McMurray, it could well be that it is the junior employees, who have not yet been integrated fully into Suncor's safety work culture – that are in fact the greatest

> offenders. Unfortunately, the "New Hire" evidence in Exhibit 63 did not allow the level of analysis that would be required to make that determination.

[35] The Majority rejected Suncor's argument that an out-of-control culture existed at the Oil Sands Operations. First, the Majority noted at para 304 that "[t]he difficulty for the Employer with respect to its paraphernalia and drug find evidence is that the majority of it cannot be attributed to any particular type of employee". Second, the Majority stated at para 309 that "...without evidence of some connection between drug use at this workplace and the accident and near miss history in this workplace and this group of Unionized Employees, an arbitration board cannot determine that random drug testing of these employees is a reasonable response to the risk they may pose in the workplace".

[36] The Majority held that the Random Testing Standard did not pass the ***KVP*** test. The KVP test provides that any rule or policy introduced unilaterally by an employer must be both reasonable and consistent with the collective agreement. That test has been used by courts and arbitrators in the application of the balancing of interests approach to determine whether the policy in question has appropriately considered the interests of the employer and the employee. In this arbitration, the Majority upheld the grievance, stating at para 336:

> In summary, at its very foundation, the random drug testing policy as explained to employees is unreasonable, lacks clarity and is not unequivocal, as required by *K.V.P., supra*. The inconsistencies and contradictions within the policy and training materials themselves are significant. In the absence of compelling evidence that urinalysis can detect impairment and not just "recent use", we do not find that the Employer's business interest which is served by random testing is sufficient to over-ride an employee's right to privacy with respect to his or her bodily fluids.

**B. The Dissent**

[37] In contrast to the Majority Decision, the Dissent would have dismissed the grievance and found that the implementation of the Random Testing Standard was a reasonable exercise of Suncor's management rights under the Collective Agreement. The Dissent was of the view that Suncor had demonstrated a "...profound and ongoing workplace problem with alcohol and drugs" at the Oil Sands Operations: Dissent Decision, para 2.

[38] The Dissent took issue with the Majority Decision in a number of respects. In particular, the Dissent criticized the Majority's approach in respect of the evidence before it**,** and stated at para 13:

> In allowing the Grievance, the Majority failed to consider material and relevant facts and was highly selective in its review of the evidence. The Majority also improperly considered evidence that was not before this Board. In addition, the Majority thoroughly reviewed the Union witnesses and expert in their examinations in chief but failed to review their cross-examination testimony. Similarly, the Majority neglected to outline most of the Suncor witnesses' examinations in chief, but focussed on their cross-examination testimony.

[39] The Dissent stated that the Majority had misapplied ***Irving***. Specifically, the Dissent asserted that the Majority elevated the test from evidence of a "general problem" with alcohol

and drugs in the "workplace" to extreme evidence of a "bargaining unit" problem with alcohol and drugs, as well as a causal link between alcohol and drugs and safety incidents: Dissent Decision, paras 29 and 63.

[40] In the Dissent's view, Suncor's evidence was compelling and clearly met the ***Irving*** test of a "general problem" with alcohol and drugs "in the workplace": Dissent Decision, para 123. He also found that Suncor had provided evidence demonstrating a clear causal link between alcohol and drugs, on one hand, and safety risks, on the other.

[41] The Dissent stated at para 153 that, even if the Majority were correct in their view that a "bargaining unit" problem with alcohol and drugs was required, there was evidence of just such a problem. In any event, the Dissent was of the view that the Majority was wrong to find that their jurisdiction was limited to hearing evidence regarding Unifor employees.

[42] Concerning this particular question, the Dissent noted that the Supreme Court referred in ***Irving*** to a "general workplace" problem, not to a bargaining unit problem. In his view, workplace alcohol and drug use affects all Suncor employees and, therefore, the entire "workplace" must be considered: Dissent Decision, para 161.

[43] The Dissent asserted that the "public interest" in this case is significant and found at para 176 that the Majority had failed to consider the compelling public interest at stake in this matter.

[44] The Dissent believed that the Majority exceeded their jurisdiction by commenting on the validity of urinalysis as a testing method. In his view, that issue was not before the Board.

[45] The Court also notes that the Dissent stated at para 208 that the Supreme Court in ***Irving*** referred to evidence demonstrating a general problem in the workplace, and not to evidence demonstrating impairment.

[46] The Dissent also took issue with the Majority's finding that safety concerns with respect to alcohol and drugs could be addressed using less intrusive measures. In particular, he noted at para 232 that Unifor had not provided the Board with evidence of effective alternative measures.

[47] The Dissent concluded that the Majority had erred in finding that Suncor had not met the test set out in ***Irving***. He found as follows at para 242:

> Suncor has overwhelmingly demonstrated evidence of a serious problem with alcohol and drug use in the workplace and an enhanced safety risk. Suncor has addressed the ongoing safety concerns with incremental measures over the last two decades. Further incremental steps are necessary. There are no less intrusive measures. Failure to implement the Random Testing Standard could result in potentially serious injuries, fatalities and potential environmental catastrophe.

## IV. Analysis

### A. What is the Standard of Review in this Application?

[48] As always on an application for judicial review, the starting point is a determination of the appropriate standard of review. In this case, the parties are not entirely *ad idem* on this issue.

[49] Suncor stated the following (Suncor Brief at paras 217 and 223, citations omitted):

> Labour arbitration decisions are generally subject to review on a standard of reasonableness. However, where legal errors go to issues of jurisdiction and matters of public importance, those errors are reviewable on a standard of correctness.
>
> **...**
>
> As will be discussed below, the Majority made a number of legal and jurisdictional errors in the Award that are reviewable on a standard of correctness. Further, the decision-making process lacked justification, transparency and intelligibility. The decision as a whole does not fall within a range of possible, acceptable outcomes that are defensible in respect of facts and law.

[50] In contrast, Unifor asserted that the appropriate standard is reasonableness. It stated the following (Unifor Brief at paras 48 and 54, citations omitted):

> Suncor intermittently acknowledges the reasonableness standard of review applies to the Board's decision on the merits. Yet, in repeatedly referring to the Board's "errors", citing the dissent and rearguing its case, Suncor invites this Court to apply a correctness standard. Because of this, the reasons for the application of the reasonableness standard, and the nature of that standard, are reviewed below.
>
> **...**
>
> Suncor argues that the correctness standard of review applies to the Board's decision on the scope of the grievance (Suncor Brief, paras 223-224). However, while the Supreme Court has held that correctness applies to true jurisdictional questions narrowly defined, the Board's decision regarding the scope of the grievance is not such a question. Rather, whether a labour arbitration board is determining the scope of a grievance, or the related question of whether a grievance is arbitral, the reasonableness standard of review applies. In answering such questions, a Board is acting within the core of its mandate by "interpreting a collective agreement and general principles of labour law and determining what the parties to the collective agreement intended"... . Moreover, the parties' Collective Agreement gave the Board jurisdiction over a grievance, defined as a dispute "concerning the interpretation, application, claim or breach or violation of this Agreement" ... .

[51] The framework for determining the standard of review was outlined by Supreme Court of Canada in ***Dunsmuir v New Brunswick***, 2008 SCC 9, 1 SCR 190. For purposes of this application, the guiding comments in ***Dunsmuir*** concerning the appropriate standard of review are at paras 54, 58 and 59 (citations omitted):

> Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity... . Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context... . Adjudication in labour law remains a good example of the relevance of this approach. **...**
>
> For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces

> in the *Constitution Act, 1867*... . Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution... .
>
> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction... . An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences ... . That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[52] Given that this application is a grievance under a Collective Agreement, this Court is further guided by comments in ***Alberta Health Services v AUPE***, 2013 ABCA 243, 556 AR 102. In that case, the Alberta Court of Appeal spoke specifically to the standard of review and stated the following at paras 10 and 15:

> Arbitral awards under a collective agreement are, as a general rule, subject to the reasonableness standard of review...
>
> The interpretation of the collective agreement is one of the matters that comes within the core expertise of the Board. As a result, it should be reviewed on the basis of reasonableness.

[53] The argument advanced by Suncor is that the grievance before the Board was limited to the Random Testing Standard. That being the case, Suncor asserted that the Board erred by expanding the scope of that grievance to include consideration of the propriety of the manner of testing, particularly urinalysis.

[54] Suncor’s position is that the use of breathalyzer testing for alcohol and urinalysis for drugs has been in place since 2003, and was addressed in a 2003 arbitration. That being the case, Suncor argued that those tests should not have been considered by this Board.

[55] In contrast, Unifor asserts that the grievance at issue here does not refer to a particular standard and that the Random Testing Standard is not an independent document. Therefore, its position is that all aspects of the 2012 Policy were properly before the Board. Further, it argues that the propriety of urinalysis was not determined in the 2003 arbitration and that the Board properly addressed the issues raised by the grievance.

[56] In the view of the Court, it was within the purview of the Board to determine the scope of the grievance before it and to determine what the parties to the Collective Agreement intended**.** Like other aspects of the Decision of the Board, it is reviewable on the reasonableness standard.

[57] The Court agrees with Unifor that the reasonableness of the Random Testing Standard must be determined in context. This includes consideration of the methods by which such testing is to be carried out.

[58] Given the above parameters, the Court finds that the decision of the Board falls to be reviewed on the reasonableness standard in its entirety. In coming to this conclusion, the Court is of the view that the Board was acting within the core of its mandate. That mandate is defined by the Collective Agreement and the general principles of labour law.

[59] In circumstances such as these, the Board is granted the authority to determine what the parties to the Collective Agreement intended. Indeed, the Collective Agreement gave jurisdiction to this Board over a grievance of precisely this nature, and this Court will not interfere with that jurisdiction unless there is a compelling need to do so. No such need exists in this case.



**B. Was the Decision of the Majority Reasonable?**

[60] The Supreme Court of Canada described the reasonableness standard in the well-known passage from ***Dunsmuir*** at para 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[61] The Supreme Court of Canada further articulated the reasonableness standard as follows in ***Canada (Citizenship and Immigration) v Khosa***, 2009 SCC 12 at para 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law." ... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. [Citation omitted.]

[62] In cases both before and after ***Dunsmuir***, the Supreme Court of Canada has cautioned that reviewing courts must not parse the tribunal decision too minutely. In ***Law Society of New Brunswick v Ryan***, 2003 SCC 20, the Court held at para 56:

> This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[63] In ***Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)***, 2011 SCC 62, the Court held at para 14 that the task of the reviewing court is to undertake "...a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The Supreme Court also cautioned in that case at para 17 that "[r]eviewing judges should pay 'respectful attention' to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."

[64] That said, the case law emanating from the Supreme Court of Canada makes it clear that applying the wrong legal test or misapplying the correct legal test will render the determination of a decision maker unreasonable: ***Housen v Nikolaisen***, 2002 SCC 33, [2002] 2 SCR 235 at para 39. This is so because the use of the wrong legal test or the improper application of the correct legal test goes to the foundation of the case. Like a foundation under a house, if the foundation of the case fails for one of these reasons, the administrative decision likely will not withstand the rigors of a judicial review.

[65] The decision in ***Lake v Canada (Minister of Justice)***, 2008 SCC 23, 1 SCR 761, was released shortly after ***Dunsmuir***. While ***Lake*** dealt with an extradition, the comments of the Supreme Court of Canada in that case provide guidance in respect of the concept of reasonableness and whether that test is met in the context of a judicial review. The following comments at para 41 are particularly instructive:

> Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that

> Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

[66] The importance of the factors was subsequently emphasized by the Supreme Court of Canada in ***Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)***, 2012 SCC 37, 2 SCR 345. The Supreme Court held as follows at para 37:

> Because the Board's finding of unfairness was based on what was, in my respectful view, a misapplication of the *CCH* factors, its outcome was rendered unreasonable.

[67] Similarly, the Supreme Court held as follows in ***Saskatchewan (Human Rights Commission) v Whatcott***, 2013 SCC 11, 1 SCR 467 at para 194:

> However, in my view, the Tribunal's decision with respect to Flyers F and G was unreasonable. The Tribunal erred by failing to apply s. 14(1)(b) in accordance with the *Taylor* directive (requiring feelings of an ardent and extreme nature so as to constitute hatred), or in accordance with the interpretation of s. 14(1)(b) prescribed in *Bell* (essentially reading out the words "ridicules, belittles or otherwise affronts the dignity of"). By failing to apply the proper legal test to the facts before it, the Tribunal's determination that those flyers contravened s. 14(1)(b) was unreasonable and cannot be upheld.

[68] This Court must determine whether the Majority Decision was reasonable within the framework that the above cases provide. In considering this question, the Court focused on the three issues central to the Majority Decision and has given each careful consideration within the context of the reasonableness standard. First, did the Majority elevate to an unwarranted threshold the ***Irving*** test concerning the degree of evidence necessary to establish a problem? Second, was it appropriate for the Majority to consider only evidence that demonstrated an alcohol and drug problem within the bargaining unit? An alternative way to pose this question is to ask whether the Majority should have considered the aggregate population of individuals who work within the Oil Sands Operations in the Wood Buffalo Municipality, including union employees, non-union employees and contractors' employees. Third, did the Majority fail to properly consider the evidence?

[69] Turning first to the ***Irving*** threshold concerning the degree of evidence necessary to establish a workplace problem, the Court finds that the Majority misapplied the ***Irving*** test by imposing more stringent requirements than those contemplated by the Supreme Court of Canada. While the Supreme Court in ***Irving*** indicated that random testing might be justifiable if the employer could adduce evidence of a general problem with alcohol and drugs in the workplace, the Majority stated that it required evidence of a "significant" or "serious" problem. In the view of this Court, that is an unwarranted elevation of the ***Irving*** test which was not endorsed by the Supreme Court.

[70] The dissenting minority in ***Irving*** expressly rejected this threshold. They stated at para 104 that "[i]n none of the cases of which we are aware... have we seen language requiring evidence of a 'significant' or 'serious' problem. Rather, the standard has been that evidence of *a* problem". The dissent stated in the same paragraph that "[t]he difference between the two approaches is obviously a marked one and it cannot be ignored".

[71] The majority in ***Irving*** approached the issue from a different angle, emphasizing that a dangerous workplace does not give an employer an automatic right unilaterally to impose random testing. That boundary outlined by the majority in ***Irving*** is understood by this Court. However, the flexibility inherent in ***Irving*** is also noted.

[72] Concerning that inherent flexibility, the majority in ***Irving*** went on to indicate at para 45 that if there was a demonstrated problem with alcohol use in dangerous work places, random testing might be justified. Without defining the parameters, the majority went on to suggest that random testing was not beyond the realm of possibility in extreme circumstances. Again, the definition of "extreme" was not defined by the majority in ***Irving***.

[73] As noted above, the Majority of the Board found that "...the evidence does not demonstrate a culture at the Oil Sands Operations where the consumption of alcohol is so pervasive as to be accepted by employees, where employees go together to drink openly and where such activity is either condoned or encouraged by management's practices or inaction." While this was the situation the board found in ***Greater Toronto Airports Authority v PSAC, Local 0004,*** [2007] LVI 3734-2, 2007 CarswellOnt 4531 (Ont Arb), the Court finds that the balancing exercise referred to in ***Irving*** does not require so egregious a situation to justify random drug testing.

[74] The Majority also stated that the Supreme Court in ***Irving*** upheld the decision of the arbitration board, including its requirement for a causal connection to the accident, injury and near-miss history at the plant. Accordingly, the Majority held that Suncor was obliged to demonstrate such a connection to establish a legitimate business interest in proving safety.

[75] Again, the Court does not read ***Irving*** as imposing such a threshold requirement. Indeed, the majority judgment in ***Irving*** makes no reference to such a causal connection. Rather, both the majority and the dissent in ***Irving*** referred to a balancing exercise to be undertaken on a case-by-case basis. The majority in Irving made the following comments at paras 4, 19 and 43.

> A substantial body of arbitral jurisprudence has developed around the unilateral exercise of management rights in a safety context, resulting in a carefully calibrated "balancing of interests" proportionality approach. Under it, and built around the hallmark collective bargaining tenet that an employee can only be disciplined for reasonable cause, an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees' privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.
>
> …
>
> But the reality is that the task of negotiating workplace conditions, both on the part of unions and management, as well as the arbitrators who interpret the resulting collective agreement, has historically — and successfully — included the delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy. Far from leaving the public at risk, protecting employees — who are on the front line of any danger — necessarily also protects the surrounding public. To suggest otherwise is a counter-intuitive dichotomy.
>
> …

> The board framed the question using the accepted KVP balancing of interests approach: Was the benefit to the employer from the random alcohol testing policy in this dangerous workplace proportional to the harm to employee privacy?

[76] The dissent in ***Irving*** made the following comments at para 82 in respect of the balancing exercise:

> Again, before this Court, neither party challenges the applicability or reasonableness of the balancing of interests test. They do, however, have divergent understandings as to what it actually requires in the circumstances of this case.

[77] To reiterate the point made above, this Court finds that the Majority misconstrued the ***Irving*** test by applying more rigorous requirements than those articulated by the Supreme Court of Canada. That elevation of the ***Irving*** test was unwarranted.

[78] Turning to the second issue, the Majority asserted that it could only consider evidence demonstrating an alcohol and drug problem within the bargaining unit. While it is true that the arbitration decision is binding only upon members of the bargaining unit, it does not follow that the Board could take account only of evidence tied directly to that bargaining unit.

[79] In the view of this Court, that is not what is required by ***Irving***. Such a narrow approach in respect of the workplace might be justified if there was evidence to suggest that alcohol and drug use within the bargaining unit differed in some meaningful way from that in the broader workforce. In this case, no such evidence was before the Board.

[80] Contrary to the position advanced by Unifor, the Collective Agreement does not stipulate that the members of the bargaining unit are the only relevant population. Indeed, the workplace in ***Irving*** encompassed all workers in the plant, including members of Unifor (formerly the Communications, Energy and Paperworkers Union), members of the International Brotherhood of Electrical Workers and non-union members. This is evidenced by the individuals tested and referred to by the board in ***Irving***: [2009] 189 LAC (4th) 218 (NBLabAdj) ("***Irving Arbitration***") at paragraph 112.

[81] The Court also notes that the board in ***Irving*** embraced the concept of safety within the workplace, and did so without regard to the status of the constituent individuals within that workplace. This is evident in the following statement by the board in ***Irving***: ***Irving Arbitration*** at paragraph 78:

> Unilaterally promulgated employer rules have to deal with workplace subject matters. This one does. The *Policy* as a whole is concerned with promoting the operation of a safe workplace, a worthwhile and important goal. The disinhibiting and impairing effects of alcohol are notorious and have obvious negative implications for the safe carrying out of any employer's work. Rules on alcohol possession, use and presence in the workplace are common and *prima facie*, not to say self-evidently, are a proper subject matter for the exercise of the employer's rule-making power. Since the union has not bargained a relevant limitation, it follows that the employer can make and enforce rules regarding alcohol in the workplace, but subject always to the *KVP* rules.

[82] Ultimately, the Supreme Court of Canada did not articulate a test requiring specific evidence of a problem within the bargaining unit. Instead, the Court directed that there be a

determination as to whether there is a general "workplace" problem with alcohol and drugs: ***Irving*** at paras 37 and 40.

[83] In conclusion, the Court is of the view that the use of the term "workplace" rather than the phrase "bargaining unit" throughout the ***Irving*** decision and arbitration is meaningful. Workplace safety is an aggregate concept, especially in a dangerous environment.

[84] The focus on the workplace in general rather than more narrowly on members of the bargaining unit is also consistent with the obligation that employers have to ensure the safety of their entire worksite. The Court is further comforted by the general workplace approach because it allows the dangerous environment to be considered in the context of the safety of everyone in that workplace.

[85] As a final point on this matter, it is important to recall that the only "workplace" relevant to this case are the locations of the Oil Sands Operations in the Wood Buffalo Municipality. These are relatively small and well defined areas that are, by their very nature, dangerous. Further, the Random Testing Standard at issue in this case applies only to workers in safety-sensitive positions within those locations. Therefore, considering the "workplace" in general does not, in the Court's view, result in an overbroad analysis.

[86] Turning to the third issue, did the Majority fail to properly consider the evidence? This raises a question of process, which has a substantive impact on a tribunal's decision**.**

[87] The failure of the Majority to discuss a relevant factor in depth, or at all, is not a basis, in and of itself, for this Court to find the Majority Decision unreasonable. An omission is a material error only if it gives rise to the reasoned belief that the Majority ignored or misunderstood the evidence in a manner that affected its decision. Absent such reasoned belief, this Court cannot interfere: ***Housen*** para 39.

[88] After considering the evidence carefully, the Court finds that it has a reasoned belief that the Majority ignored or misunderstood the evidence in a manner that affected its decision.

[89] An example of evidence that was effectively ignored are the "security incidents" that were recorded between September 3, 2004 and August 26, 2013. The gross number of security incidents recorded during that period was 2,276.

[90] The Majority was critical of the alcohol and drug "security incidents" for a number of reasons, including the assertion that the evidence did not indicate whether those incidents involved Unifor members, other Suncor employees or contractor employees. While the Majority acknowledged that there were a large number of security incidents, it then went on to parse the information by subjecting it to a flawed approach that narrowed the scope of the enquiry from the workplace focus to a bargaining unit focus. Under this analytical approach, Unifor took the position that only 12 of the 2,276 security incidents could be directly attributed to bargaining unit employees. This Court has already found above that the ***Irving*** test applies to the general workplace and is not to be limited to the bargaining unit employees.

[91] While some of the critiques by the Majority in respect of the security incidences had merit, many did not. The relevance of that "security incident" evidence was lost because it was taken out of context as a result of the overly narrow analytical approach applied by the Majority. For example, the Majority ignored the fact that the camp at Firebag is within the security perimeter of the operating environment, and thereby eliminated the security incidents that had been identified within that camp. While some of this security incident data was "unrefined", the

Court finds that the wholesale dismissal of this evidence gives rise to a reasoned belief that the Majority ignored or misunderstood that "security incident" evidence in a manner that affected its decision.

[92] The Majority also commented that "it could well be" that junior employees are more likely to be at risk for alcohol and drug use affecting the workplace. While the Majority acknowledged that the evidence before them did not permit them to draw this conclusion, the Court is concerned that such speculative possibilities affected their determination, detracting from the reasonable application of the ***Irving*** test.

[93] In a similar vein, while this Court has found that it was reasonable for the Majority to consider the merits of urinalysis in the course of the necessary balancing exercise, it finds that some of their reasoning was internally inconsistent in this regard. The Majority rejected random testing for both alcohol and drugs, notwithstanding their focus on the shortcomings of urinalysis.

[94] The Majority referred to "other, more advanced methods" of drug testing. However, this Court's review of the record indicates that Unifor did not provide the Board with any evidence of effective alternative measures. Further, the Majority appeared to indicate that oral fluid testing was superior to urinalysis, being "closely aligned to the long accepted breathalyzer", notwithstanding its rejection of random alcohol testing using that very method.

[95] Finally, by focussing only on the bargaining unit, the Majority expressly excluded consideration of relevant evidence. The Majority ignored evidence pertaining to some two-thirds of the individuals working in the Oil Sands Operations. Neglecting this evidence gives rise to a reasoned belief on the part of this Court that the Majority misunderstood the evidence in a manner that affected their decision.

[96] The Court is conscious of the admonition of the Supreme Court of Canada in ***Ryan, Newfoundland Nurses*** and ***Irving*** to the effect that the review of arbitral decisions must be an organic exercise, and not a "treasure hunt" for error. Nevertheless, taking that organic approach, the Court finds that the Majority's "threshold" approach to ***Irving*** and its incorrect elevation of that threshold forecloses virtually any possibility of random testing, regardless of circumstances. While the Supreme Court was clear that random testing will be difficult to justify, the Majority's approach runs counter to the statement at para 52 of ***Irving***:

> This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.

[97] The Court is of the view that the approach taken by the Majority falls into the trap identified by Rothstein and Moldaver JJ. in ***Irving***. While Rothstein and Moldaver JJ. were in dissent, all the judges in ***Irving*** agreed that a case-by-case inquiry is needed. Therefore, the Court is of the view that this comment from para 57 of the minority decision in ***Irving*** may be relied upon:

> In striking down the policy, we conclude that the board departed from an arbitral consensus that has attempted to strike a balance between competing interests in privacy and safety in the workplace. The board put its thumb on the scales and upset the careful balance established in the arbitral jurisprudence. In so doing, it came to an unreasonable decision.

[98] Taking all of the foregoing into account, the Court concludes that the evidentiary analysis of the Majority was unreasonable. Therefore, the decision of the Majority was also unreasonable.

## V. Remedy

[99] As the Majority's decision was unreasonable, the disposition of the arbitration cannot stand and is quashed. The normal result of this decision is that the matter must be sent back for rehearing.

[100] In limited circumstances, a reviewing court may substitute its own view for the quashed arbitral decision: see, for example, ***Giguère v Chambre des notaires du Québec***, 2004 SCC 1, 1 SCR 3 and ***Telus Communications Inc v Telecommunications Workers' Union***, 2013 ABQB 355, 62 Admin LR (5th) 253, aff'd 2014 ABCA 199, 575 AR 325. This, however, is appropriate only where the facts before the administrative decision maker permit of only one reasonable result and remitting the matter for re-arbitration would serve no useful purpose. In the view of this Court, that is not the case here.

[101] Accordingly, the application for judicial review is granted, the arbitration decision is quashed and the matter is remitted for arbitration. To avoid any apprehension of bias, the matter should be considered by a fresh panel.

[102] The parties may speak to costs within 60 days of the date of these Reasons. Written submissions on costs may be made, but those submissions are not to exceed five pages.

Heard on the 23rd and 24th days of October, 2014.
**Dated** at the City of Calgary, Alberta this 18th day of May, 2016.

**D.B. Nixon**
**J.C.Q.B.A.**

**Appearances:**
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# Tab 13

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9 July 2020

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Dear Mr. Stoness and Ms. Hume:

**Trans Mountain Pipeline ULC (Trans Mountain)**
**Trans Mountain Expansion Project (Project)**
**Completeness process for the Condition 39: Hydrogeological study at Coldwater Indian Reserve (IR) No. 1 (Condition 39) Report**
**Ruling on Coldwater Indian Band (Coldwater) 7 July 2020 request for leave to file sur-reply**

On 22 May 2020, the Commission of the Canada Energy Regulator (Commission) established a written process (C06433-1), the deadlines for which were subsequently extended (C06802-1), to accept comments on whether the Condition 39 Report is complete enough to proceed to assessment through the Coldwater Phase 2 hearing (C06433-1). Pursuant to that process, Coldwater and Natural Resources Canada filed comments on 19 July 2020 (C06920 and C06917, respectively) to which Trans Mountain replied on 3 July 2020 (C07148).

Coldwater filed a letter on 7 July 2020 (C07206) seeking leave from the Commission to respond to Trans Mountain by way of a sur-reply. Coldwater submits that Trans Mountain's reply is over 40 pages and makes a number of incorrect statements.

The Commission will not grant leave to Coldwater to file sur-reply. Sur-reply is typically permitted where filed reply evidence is improper.[1] Coldwater does not assert, nor does the Commission find, that Trans Mountain's reply is not responsive to Coldwater's submission or is otherwise improper. As the applicant, Trans Mountain has the final right of reply; the length of reply submissions or disagreement with the content of the reply does not negate that procedural right.

The Commission further notes that the sufficiency of the Condition 39 Report is not being assessed as part of the completeness process. As explained in the 22 May 2020 letter, a

…/2

[1] See, for example, National Energy Board Ruling No. 1 on MH-013-2018 (Coldwater 2017/18 detailed route hearing).

determination that the filing is ‘complete enough’ to proceed to assessment is **not** a finding that the filing fully satisfies the requirements of the condition or that no additional information is required. Rather, a finding of completeness in this context means that the Condition 39 Report contains the necessary information relating to the requirements outlined in Condition 39 to proceed with the Phase 2 hearing. The Phase 2 hearing, once set down, will allow for testing of the evidence and technical content of the Condition 39 Report to determine whether or not it meets the requirements of the Condition.

The Commission will not consider the submissions made in Coldwater’s 7 July 2020 letter when making its completeness determination or in the Coldwater Phase 2 hearing. Should Coldwater want the Commission to consider the information included in that letter for the purposes of determining whether the Condition 39 Report meets the requirements of the Condition, it must refile the information at the appropriate time during the Phase 2 hearing.

Yours sincerely,

*Original signed by*

Jean-Denis Charlebois
Secretary of the Commission

cc: Chief Lee Spahan, Coldwater Indian Band, Email lspahan@coldwaterband.org

Ms. Kimberly Lavoie, Phase IV Partnerships Office, TMEP, Natural Resources Canada, Email Kimberly.lavoie@canada.ca

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# Tab 14

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

# DECISION AND ORDER

## EB-2019-0242

## ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO

**Application to review amendments to the market rules made by the Independent Electricity System Operator**

**BEFORE: Cathy Spoel**
**Presiding Member**

**Emad Elsayed**
**Member**

**Susan Frank**
**Member**

**January 23, 2020**

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# 1 INTRODUCTION AND SUMMARY

This is the Decision and Order of the Ontario Energy Board (OEB) on an application filed by the Association of Major Power Consumers in Ontario (AMPCO) for an order revoking a set of amendments to the wholesale electricity market rules made by the Independent Electricity System Operator (IESO) (Amendments), and referring them back to the IESO for further consideration (Application). The Application was filed under section 33 of the *Electricity Act, 1998* (Act). AMPCO also filed a Notice of Motion requesting an order of the OEB under section 33(7) of the Act staying the operation of the Amendments pending the completion of the OEB's review.

The Amendments at issue (MR-00439-R00 to -R05) enable the evolution of the IESO's Demand Response Auction into a Transitional Capacity Auction, including notably to allow participation by generators that are neither under contract nor rate-regulated. The Amendments were published by the IESO on September 5, 2019 and had an effective date of October 15, 2019.

By Decision and Order dated November 25, 2019, the OEB stayed the operation of the Amendments pending completion of the OEB's review and issuance by the OEB of its order embodying its final decision in this proceeding. The OEB is required by section 33(6) of the Act to issue that order within 120 days of receipt of the Application.

The OEB has considered the Amendments against the statutory tests set out in section 33(9) of the Act, and has concluded that the Amendments: (i) are not inconsistent with the purposes of the Act; and (ii) do not unjustly discriminate against or in favour of a market participant or class of market participants. Accordingly, the Application is dismissed and the stay of the operation of the Amendments is lifted.

# 2 PROCESS

## 2.1 The Application

The Application was filed on September 26, 2019 by AMPCO, an organization that represents major power consumers in Ontario, some of whom participate in the IESO-administered markets as Demand Response Resources (DR Resources).

The Application concerns the IESO's new capacity market. The IESO developed a capacity auction (the Transitional Capacity Auction or TCA) to secure capacity commitments to participate in that market. Both DR Resources and dispatchable generating facilities that are neither under contract nor rate regulated are eligible for participation in the TCA. The TCA builds on the IESO's former Demand Response Auction (DRA), which has been in place since December 2015, in which only capacity offered from DR Resources was procured. The Amendments at issue in this proceeding enable that evolution.

The Application requests that the OEB revoke the Amendments and refer them back to the IESO for further consideration on the grounds that the Amendments are: (i) inconsistent with the purposes of the Act; and / or (ii) unjustly discriminatory to DR Resources. According to the Application, the inequity in treatment regarding payment terms for DR Resources and generation resources is unjustly discriminatory to the DR Resources, and will result in outcomes that are inconsistent with the Act. AMPCO's claim is that their capacity offers in the auction will not be able to compete with those of generation resources, since the latter receive an energy payment if dispatched in addition to an availability payment.

As part of its Application, AMPCO also filed a Notice of Motion requesting an order of the OEB staying the operation of the Amendments pending the completion of the OEB's review (Motion to Stay).

## 2.2 Notice of Hearing, Interventions, Cost Responsibility and Cost Award Eligibility

A Notice of Hearing was issued on October 1, 2019. The OEB attended to service of the Notice of Hearing on all electricity licensees as well as on all entities identified by the IESO as participants in the 2015, 2016, 2017 and 2018 DRAs.

In Procedural Order No. 1, issued on October 4, 2019, the OEB ordered AMPCO to file all affidavit material on which it intended to rely, whether in support of its Application or the Motion to Stay, by October 11, 2019. AMPCO filed affidavit material on that day.

In response to the Notice of Hearing, several interested parties requested intervenor status, the Ontario Energy Association requested observer status, and the Canadian Manufacturers & Exporters indicated that it would be monitoring the proceeding as it unfolded.

On October 18, 2019, the OEB issued Procedural Order No. 2, which established procedures and timelines for dealing with the Application and the Motion to Stay in parallel[1], and granted intervenor status to all those that requested it; namely:

- Advanced Energy Management Alliance (AEMA)
- Association of Power Producers of Ontario (APPrO)
- Capital Power Corporation (Capital Power)
- Kingston CoGen Limited Partnership (KCLP)
- Rodan Energy Solutions Inc. (Rodan)
- School Energy Coalition (SEC)
- TransAlta Corporation (TransAlta)
- IESO

AEMA, Capital Power, Rodan and TransAlta did not actively participate in this proceeding.

In Procedural Order No. 2, the OEB also stated that it intended for the IESO to bear the costs of this proceeding, but invited the IESO to make a submission if it wished to object to bearing the costs of this proceeding or to object to any of the requests for cost award eligibility made by AMPCO, APPrO, SEC and KCLP. After consideration of submissions filed by various parties, the OEB issued its Decision on Cost Responsibility & Cost Eligibility on November 12, 2019. In that Decision, the OEB determined that: (i) the IESO shall bear the costs of this proceeding; (ii) AMPCO, SEC and APPrO are eligible for an award of costs; and (iii) KCLP is not eligible for an award of costs.

## 2.3 Motion to Stay

In support of their positions on the Motion to Stay, evidence was filed by AMPCO, the IESO and KCLP. Submissions on the Motion to Stay were filed by AMPCO, the IESO, KCLP, APPrO and OEB staff. A Decision and Order staying the operation of the Amendments was issued on November 25, 2019.

[1] Subsequent procedural orders amended, revised or supplemented the procedures and timelines established in Procedural Order No.2.

## 2.4 Hearing of the Application

Evidence in respect of the Application was filed by AMPCO, the IESO, KCLP and OEB staff. The hearing on the Application commenced on November 25, 2019 and continued on November 28 and 29. Written summaries of planned oral arguments were filed by AMPCO, the IESO, KCLP, APPrO and OEB staff on December 9, 2019. Oral argument by these parties, as well as by SEC, was heard on December 12 and 13, 2019.

# 3 BACKGROUND

## The IESO-Administered Markets

The IESO-administered markets consist of several wholesale markets including energy and operating reserve, procurement markets for ancillary services and, most recently, a market to procure capacity.

The wholesale energy market is the cornerstone of the IESO's market architecture, and has operated since the market opened in 2002. Both generation and load facilities participate in the IESO's markets. Some generation and load facilities are dispatchable – that is, they have the capability to adjust their level of energy production or consumption in response to dispatch instructions received from the IESO. In the IESO's real-time energy market, dispatchable generators and loads make offers to supply and bids to consume energy, respectively. The IESO determines a market clearing price every five minutes, and also sends dispatch instructions to all dispatchable market participants every five minutes. Dispatchable generators are paid the market clearing price for the energy they produce and inject into the grid. Dispatchable loads pay the market clearing price for the energy they withdraw from the grid.

## The Developing Capacity Market

The IESO's energy market has been modified over time to incorporate contracted generating resources, to integrate significant amounts of renewable generation, and to support other changes. More recently, similar to other organized wholesale markets in North America, the IESO began to develop a market mechanism to procure capacity.

In 2015, the IESO launched the DRA to procure capacity from DR Resources, which commit to being available to reduce consumption based on market prices during a pre-defined commitment period. The DRA has been run each year in early December, and the associated commitment periods run from May 1 to October 31 for the summer period, and November 1 to April 30 for the winter period.

There are two types of DR Resources that can participate: dispatchable loads and Hourly Demand Response resources. The latter may be dispatched on an hourly basis for up to four hours. There are two types of Hourly Demand Response resources: physical resources, which are directly connected to the IESO-controlled grid; and virtual resources, which typically provide demand response capability through a portfolio of contributors connected at the distribution level.

DRA participants make capacity offers that consist of megawatts of capacity and prices at which they are willing to agree to a capacity commitment. The IESO decides how much DR capacity it wants to procure and at what price. The auction clears where supply

equals demand; this intersection determines the price paid for capacity for the upcoming commitment periods. All proponents whose capacity offer prices are equal to or lower than the auction clearing price are selected for capacity commitments. Regardless of their offer, each DR Resource receives the same auction clearing price for each megawatt of capacity they make available for curtailment upon dispatch from the IESO during the commitment period.

DR Resources make their capacity available by submitting bids to buy energy in each of the "availability window" hours within a business day. The energy bids identify the maximum prices DR Resources are willing to pay for energy. Market prices higher than a DR Resource's bid price results in that DR Resource being dispatched to curtail consumption. There is no payment provided to DRA participants when they are dispatched to curtail consumption, but at the same time they also do not pay for the electricity they are no longer consuming.

The TCA is designed to work in much the same way as the DRA, except that dispatchable generators that are neither under contract nor rate-regulated compete for capacity commitments alongside dispatchable loads and Hourly Demand Response resources. As with the DRA, the TCA design is such that all resources that clear the TCA receive the same availability payment for each megawatt of capacity made available during the commitment period. As with the DRA, DR Resources make their capacity available by submitting bids to buy energy, and are dispatched to curtail consumption to the extent that market prices are higher than their bid prices. Generators who are successful in the TCA have to offer supply into the energy market during the TCA commitment period. Like other generators, they are paid for energy injections at the prevailing market clearing price when dispatched to produce electricity, consistent with initial market design and market rules that pre-date the Amendments made by the IESO in respect of the TCA.

### Out-of-Market Payments

A significant feature of the IESO-administered markets is the range of supplemental payments made available outside of the IESO's energy market. These out-of-market payments (so called because the payments are not reflected in the market price for energy) are largely motivated by reliability imperatives that can at times require market participants to operate when it is otherwise uneconomic for them to do so. Different classes of market participants are eligible for different forms of out-of-market payments.

One particular form of out-of-market payment that received significant attention in this proceeding are payments made to generators under the real-time generation cost guarantee (GCG) program. The IESO created this program to manage the reliability risk of generators with large start-up costs opting not to run on days when they may not be

able to recover their costs through prevailing energy prices. In its current form, the GCG program guarantees non-quick start gas-fired generators recovery of their costs to start up and be available (e.g., fuel, incremental operating & maintenance) should market revenues fall short. Absent the GCG program, the only way for a non-quick start generator to attempt to recover these costs is to include an estimate of them in their energy offer prices.[2]

[2] KCLP oral argument, transcripts, v.4, p.120

# 4 THE STATUTORY TESTS

As set out in section 33(9) of the Act, the tests that apply when reviewing market rule amendments are whether they: (i) are inconsistent with the purposes of the Act; or (ii) unjustly discriminate against or in favour of a market participant or class of market participants.

There has been only one prior case under section 33 of the Act in respect of which the OEB issued a final decision. [3] In that case, the OEB determined that unjust discrimination in the context of section 33 of the Act means unjust *economic* discrimination.[4] That case also established that the burden of proof in demonstrating whether market rule amendments pass or fail the statutory tests is on the applicant.[5] All of the parties agreed that these principles are applicable in the current proceeding.

AMPCO's application initially contended that the Amendments failed both of the statutory tests, but later stated that inconsistency with the purposes of the Act flows from unjust discrimination, and that absent unjust discrimination there is no issue with consistency with the purposes of the Act.[6] Accordingly, the central issue in this case is whether the Amendments, by allowing generators and loads to compete in an expanded capacity auction, have the effect of being unjustly discriminatory to DR Resources. Parties made various submissions on whether or not the Amendments were unjustly discriminatory to DR Resources, but generally concurred with the definition of "unjust discrimination" suggested by OEB staff in its written summary of argument; namely, different treatment that is not justified by a difference in circumstances.[7]

While generally agreeing with OEB staff's definition, SEC submitted that the impact of the Amendments on ratepayers must be considered in assessing whether any economic discrimination is unjust.[8] The IESO argued that determining whether discrimination is 'unjust' requires consideration of the interests of others such as the IESO, consumers and generators.[9]

OEB staff submitted that the key underlying question is the degree to which generation and DR Resources are in substantially similar circumstances with respect to their characteristics and to the services they provide to the IESO-administered markets. In the event that their circumstances are found to be dissimilar, different treatment may be

[3] EB-2007-0040
[4] EB-2007-0040, Decision and Order, p.26
[5] EB-2007-0040, Decision and Order, p.18
[6] AMPCO oral argument, transcripts, v.4, p.1-2
[7] OEB staff written argument, p.4
[8] SEC oral argument, transcripts, v.4, p.96
[9] IESO written argument, para 10

discriminatory but would not be unjustly so. However, if their circumstances are substantially the same, different treatment in the broader economic context – that is, through the IESO's market design and its supporting rules – would result in the Amendments being unjustly discriminatory.[10]

There was disagreement among the parties as to whether the test for unjust discrimination is qualitative or quantitative. AMPCO argued that "unjust" discrimination in this statutory context means discrimination that is not economically justified and that it is a *qualitative – not a quantitative* – test.[11] SEC argued that the test for unjust discrimination is not entirely qualitative, and that there has to be some material negative impact, otherwise the question of what constitutes discrimination becomes an entirely theoretical discussion.[12] The IESO agreed with SEC's argument and also submitted that, if the risk of a DR Resource being activated (and incurring the related activation costs) is "infinitesimally small", then there is no unjustness.[13]

All parties, including the IESO, agreed that it was appropriate to consider the Amendments in the broader market context and not in a 'vacuum'.[14] However, the IESO's position was that AMPCO's requested remedy of revoking the Amendments because other market rules and the original market design may make the Amendments unjustly discriminatory to DR Resources amounts to an impermissible challenge to those other rules.[15]

AMPCO clarified its position that it was not asking the OEB to find whether or not the IESO should implement energy or activation payments for DR Resources and that there are other options and approaches that have been successfully and relatively easily implemented in the past.[16] In any event, AMPCO concluded that, while there are "fixes" available that do not involve disrupting existing market rules, it is not a problem for the OEB to solve but rather the IESO.

### Findings

The OEB finds that the question of consistency with the purposes of the Act is only relevant to the extent there is unjust discrimination. In no other manner are the Amendments inconsistent with the purposes of the Act.

[10] OEB staff written argument, p.4
[11] AMPCO written argument, paras 13-17 and oral argument, transcripts, v.4, p.36-37
[12] SEC oral argument, transcripts, v.4, p.95
[13] IESO oral argument, transcripts, v.4, p.170
[14] IESO oral argument, transcripts, v.4, p.153
[15] IESO oral argument, transcripts, v.4, p.152-153
[16] AMPCO oral reply argument, transcripts, v.5, p.19-20

On the matter of discrimination, the OEB finds that, as in the Ramp Rate case[17], discrimination means economic discrimination.

On the question of whether the Amendments are unjustly discriminatory, the OEB finds that three elements are required.

First, there must be economic discrimination. Discrimination can arise from differences in treatment and, in the context of the electricity markets, this can mean differences in treatment for different classes of market participants when considered in the context of the IESO-administered market as a whole.

Second, it must be shown that the difference in treatment is not justified by a difference in circumstances. This is not to say that differently situated parties cannot be treated differently; treatment can be unequal yet not inequitable or "unjust". It is only different treatment in the absence of material and relevant differences in the situation or characteristics among the affected market participants that raises the prospect of unjust discrimination.

Third, the claim of discrimination cannot be purely qualitative; it must have some quantitative aspect to it. The OEB appreciates that as the Amendments are prospective, quantification will be based on estimates and assumptions about the operation of the market, but within that context, the OEB requires adequate information on the nature and extent of the economic impacts in order to make a finding of unjust discrimination.

With respect to the IESO's argument that the OEB does not have jurisdiction to review the Amendments, as the OEB noted in its decision on the Motion to Stay, the fact that the lack of energy payments for DR Resources may be a circumstance that results in the Amendments being discriminatory does not mean that, in reviewing the Amendments, the OEB is conducting a review of the market rules relating to energy payments. The OEB maintains that view in this Decision.

[17] EB-2007-0040

# 5 POSITIONS OF THE PARTIES

## 5.1 Overview of the Parties' Evidence

Colin Anderson, in his capacity as president of AMPCO, was the witness for the applicant. Mr. Anderson's testimony described the reasons behind AMPCO's view that the absence of energy market payments to DR Resources for energy delivered via curtailment would put DR Resources at a competitive disadvantage in the TCA and would likely cause them to be replaced by generators. He provided examples involving a steel manufacturer as a DR Resource that incurs costs analogous to those of generators in order to deliver energy.

The IESO's witnesses were David Short, Director of Capacity Market Design, and Candice Trickey, Director of Demand Side Strategy. They described the operation of the IESO's markets, the Amendments that establish the TCA, the design of prior DR programs, and other features of the IESO's market programs such as the GCG program.

John Windsor, Vice President of Energy Services & Asset Management of Northland Power Inc. appeared as a witness on behalf of KCLP, a partnership that owns a gas-fired generator that would be eligible to participate in the TCA. Northland Power Inc. is an owner of KCLP. He provided background on the generation facility and described the significance of potential revenues through the TCA in any decision to continue to operate the facility in the Ontario market.

Brian Rivard appeared as an expert witness on behalf of KCLP. Dr. Rivard's testimony introduced the concept of horizontal equity and included detailed scenario analyses of the offer strategies of differently configured market resources in the presence or absence of energy payments for DR Resources.

OEB staff retained London Economics International (LEI), specifically A.J. Goulding and Adam Hariri, as expert witnesses, to prepare an independent report and provide testimony with a focus on how DR Resources are compensated in U.S. markets that are subject to the jurisdiction of the Federal Energy Regulatory Commission, including consideration of energy, capacity and other payments. LEI identified key contextual differences between the markets in Ontario and the U.S.; among others, those differences include the disconnect between wholesale electricity prices and fixed retail rates that presented a barrier to demand response in the U.S.

While APPrO and SEC participated actively in the cross examination of witnesses and argument, neither provided evidence or witnesses of their own.

## 5.2 Areas of Agreement

In addition to the areas of agreement amongst the parties noted in section 4 above, there also appeared to be general agreement among the parties that:

- The Amendments are not inconsistent with the purposes of the Act, except for the issue of unjust discrimination on which the parties were divided
- There is a need to retain additional capacity resources in order to maintain reliability
- The use of competition is an appropriate means to retain additional resource commitments
- DR Resources and generators are functionally equivalent regarding their ability to balance supply and demand upon dispatch in the energy market

An area about which there was partial agreement pertains to the costs of providing DR, and the differences in the kinds of costs that DR Resources may incur when doing so. Given the significance of the question of costs to the proceeding, the OEB sees benefit in describing these in further detail.

The first point of agreement pertains to the concept of the value of lost load, or VOLL – that for any given energy consumer, there is a maximum price for energy above which the consumer would rather forgo the opportunity to consume the energy than pay to continue consuming. It was not contested that this value can vary by consumer. A VOLL would be equal to the added value that a load derives from the energy as an input in the production of a product or service. This concept arose frequently in the hearing.

There also appeared to be no general disagreement among the parties that DR Resource costs could be categorized as follows:

- *Cost related to availability*: These are the costs that a DR Resource would incur in order to be a participant in the DRA, and be available in the event a DR activation arises.
- *Costs related to an activation event*: Such costs would parallel the start-up costs faced by a non-quick start generator.
- *Costs related to the amount of energy made available via an activation to curtail demand:* These costs parallel a generator's marginal costs of generating electricity.

There was also general agreement that the first type of costs (related to availability) are appropriately recovered via DR Resource offer prices in the TCA.

Parties further generally agreed that there are activation costs for both generation and DR Resources. However, there was no consensus as to the nature of those costs and

whether they should be included in offers made by DR Resources in the capacity market or in the bids they make in the energy market. Parties disagreed whether these costs could be managed by DR Resources via their TCA bids, should be compensated through the provision of energy payments like those made to generators or should be compensated by creating for DR Resources an out-of-market mechanism similar to the GCG program. The specific positions of the parties in relation to this matter are discussed below.

It was also noted that the latter two cost categories, which relate to DR activation costs, can arise out-of-market when DR Resources are either tested or activated to assist the IESO in responding to emergency conditions on the grid. Parties agreed that, since these are out-of-market activations, DR Resources cannot manage any resulting costs via their bid prices in the energy market. The IESO has recently adopted market rule amendments that will provide compensation to Hourly Demand Response resources for test and emergency activations.[18]

## 5.3 Disputed Matters

AMPCO's fundamental position in this proceeding is that the Amendments are unjustly discriminatory to DR Resources since they will be unable to compete on a level playing field with generation resources in their bidding in the TCA.

By contrast, the position of the intervenors that participated in the proceeding (IESO, KCLP, APPrO and SEC) was that the Amendments are not unjustly discriminatory for various reasons.

The positions of the parties and OEB staff on areas where there was no agreement are discussed further below.

***Do the Amendments have an unjustly discriminatory effect given the payments available to generators in the energy market? Do the Amendments have an unjustly discriminatory effect given payments available to generators outside of the energy market? Has there been an assessment of these issues?***

In this proceeding, an inquiry into the presence of economic discrimination requires an assessment of the kinds of payments resources are eligible for in the IESO-administered markets. As discussed in section 3 above, the two main categories of payment are energy payments (paid to generators upon dispatch) and out-of-market payments.

[18] The market rule amendments did not contain provisions to compensate DLs for test and emergency activations as they already benefit from the make whole payment program related to local prices that Ms. Trickey briefly described. Transcripts, v.3, p.30-31

*A. Absence of energy payments for DR Resources*

**AMPCO**

AMPCO argued that, while DR and generation resources clearing the TCA are each obligated to also participate in the energy market with daily bids and offers, respectively,[19] and both incur costs when activated in the energy market, only generators receive payments for activation. All generators receive energy payments, and some also receive payments under the GCG program.[20] [21] Generators therefore do not need to factor the risk of incurring costs of activation into their capacity offers.[22]

In contrast, DR Resources must include forecast activation costs in their TCA bids, or risk activation and incurring associated costs without compensation. AMPCO contends that the effect of the Amendments is therefore to create a TCA in which DR Resources must compete with generators at a disadvantage.[23]

AMPCO argued that, given the functional equivalence of the services provided by DR Resources and generation resources, there is no economic justification for DR Resources having to recover anticipated activation costs through their TCA bids, or risk losses, when generators can recover costs associated with their dispatch in the energy market through payment streams not available to DR Resources.[24] [25] The absence of economic justification for discriminating against DR Resources makes the discrimination "unjust" and AMPCO summed it up as follows:

> *Functional equivalence, different compensation, lack of economic justification; that is the 'unjust' component of the 'unjust discrimination' test under s.33 of the Act.*[26]

**IESO**

The IESO's position is that the Amendments are not unjustly discriminatory because they treat DR and generation resources equally in the TCA. That is, all DR and generation resources that successfully bid into the TCA receive the same availability payments

[19] AMPCO oral reply argument, transcripts, v.5, p.24
[20] AMPCO oral argument, transcripts, v.4, p.11
[21] Transcripts, v.2, p.29
[22] AMPCO oral argument, transcripts, v.4, p.34
[23] AMPCO oral reply argument, transcripts, v.5, p.12
[24] AMPCO written argument, paras 13–17 and oral argument, transcripts, v.4, p.36-37
[25] AMPCO oral argument, transcripts, v.4, p.11
[26] AMPCO oral argument, transcripts, v.4, p.11-12

irrespective of whether they are subsequently economically activated in the energy market.[27]

The IESO argued that there is no evidence that the current market design that treats generators and load participants differently in the energy market is defective or inequitable, and what evidence there is, is that there is no basis for making energy payments to DR Resources.[28]

The IESO further indicated whether DR resources should receive energy payments is an energy market design issue that is "irrelevant to the main point [at] issue [in this proceeding], which is, is there any competitive disadvantage in the capacity auction".[29] The IESO also noted that it is currently undertaking a stakeholder engagement process to assess whether DR Resources should receive energy payments. The IESO stated it will make a final decision on that matter in June 2020. The IESO agreed that the scope of that stakeholder engagement would be broadened to assess activation payments, as well as energy payments, given the amount of discussion related to out-of-market GCG payments to generators.[30]

### KCLP

KCLP supported the IESO's position that, under the TCA, DR and generation resources are treated exactly the same: they compete in an auction to provide a unit of capacity, and every participant that clears the auction receives exactly the same auction clearing price. Both DR Resources and generators are given a fairly high degree of discretion to establish their energy market bids or offers at a price which allows them to recover their VOLL or their variable costs of providing energy when activated.[31] KCLP referred to the evidence of Dr. Rivard, who noted that "not getting an energy payment right now, based on history seeing how often they would actually be activated is, in my words, *de minimus* in expectation, in which case they could offer in that capacity auction exactly the same that they would have had generators not been there".[32]

KCLP also argued that, if DR Resources received an energy payment for an economic activation, it would be a double benefit because the DR Resource avoids the cost of consuming and would also receive an energy payment from the IESO to avoid this cost.[33]

[27] IESO written argument, p.1
[28] IESO oral argument, transcripts, v.4, p.152-153
[29] Transcripts, v.5, p.28
[30] Transcripts, v.3, p.91-93
[31] KCLP written argument, paras 18-24
[32] Transcripts, v.2, p.191
[33] KCLP written argument, para 38

### APPrO

APPrO stated that it relied largely on the independent expert evidence filed by KCLP to establish that the Amendments afford fair and equitable treatment to auction participants and do not unjustly discriminate against DR resources.[34] APPrO also referred to the evidence of Dr. Rivard in support of its position that paying an energy payment to DR Resources for economic activations would afford a competitive advantage to DR Resources over generators in the TCA.[35]

### OEB Staff

OEB staff submitted that there are key differences in circumstances between generation and DR Resources. When generation is dispatched, it sells energy it owns into the market. When making energy available to other loads via a curtailment, a DR Resource is simply choosing not to buy energy.

Given the evident differences in the circumstances of generation and load resources, the difference in eligibility for energy payments to generation and DR Resources upon dispatch is not unjustly discriminatory. Further, an energy payment to DR Resources would constitute a double payment for the reduction in demand in addition to avoided costs.[36]

### SEC

SEC argued that, in order to show that the Amendments are unjustly discriminatory, AMPCO would need to demonstrate that there is a material negative impact and not just theoretically. If there is no discrimination, in fact, then there is no unjust discrimination.[37]

As a more general matter, SEC raised a concern that the IESO should have done the economic assessment on the issue of energy payments or activation payments to DR Resources before the Amendments were approved by the IESO Board of Directors. SEC noted that it is important to remember that only the IESO has the information to properly undertake such an empirical analysis.[38]

[34] APPrO written argument, para 3
[35] APPrO written argument, para 25
[36] OEB staff written argument, p.7
[37] SEC oral argument, transcripts, v.4, p.95
[38] SEC oral argument, transcripts, v.4, p.105-106

### *B. Absence of out-of-market payments to DR Resources*

As discussed in section 3, in addition to the payments that generators receive for the energy they supply, there are also some out-of-market 'make whole' payments that are currently available to some generators but not to DR Resources in the event of activation.[39]

#### AMPCO

During the oral hearing, AMPCO questioned witnesses about the GCG program, and about past IESO and Ontario Power Authority programs that provided compensation for activation for DR Resources. It argued that DR Resources are at a competitive disadvantage in the TCA relative to generation resources because they do not have access to such out-of-market compensation.[40]

AMPCO noted, if the OEB finds the Amendments create a TCA that is discriminatory against DR Resources, "it is not up to the Board to fix that problem. It is up to the IESO". AMPCO added that the IESO has already done this in respect of out-of-market test and emergency activations, where the IESO determined compensation for DR Resources was appropriate. There is therefore no bar to the IESO implementing activation payments in relation to DR Resources, as an alternative to energy payments, if appropriate.[41]

#### IESO

The IESO submitted that the evidence before the OEB is that it is entirely within DR Resources' control to manage the probability or risk of activation by including economic activation costs in their energy market bids; and if they do this, the risk and associated cost of being activated is remote and immaterial.[42]

The IESO further argued that, where there are costs caused by uneconomic activations of DR Resources due to testing, the IESO has a program that is similar to those available to generators in that it also provides for out-of-market compensation. The IESO noted those are the only costs that DR Resources are exposed to that they cannot avoid through their energy market bids and the only place to put them was in their capacity auction bid.[43]

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[39] KCLP oral argument, transcripts, v.4, p.119-120. KCLP discusses two generator cost guarantee programs introduced by the IESO: the real-time generation cost guarantee program in 2003 and the day-ahead cost guarantee program in 2006.
[40] AMPCO written argument, paras 5-7
[41] AMPCO oral reply argument, transcripts, v.5, p.20
[42] IESO written argument, paras 20-21, and the evidence of IESO's witnesses, transcripts v.3, p.23-24
[43] IESO oral argument, transcripts, v.4, p.165

### KCLP

KCLP noted that the GCG programs were created to address a deficiency in the energy markets to provide assurance to certain generators that had long start-up times. In order to minimize potential losses, they avoided starting up unless they could cover all of their costs. The result of the introduction of the GCG program was that generators no longer had to build these costs into their energy market offers and, as a result, could avoid those potential losses.[44]

KCLP's witness, Mr. Windsor, stated that the GCG program guarantees recovery of about 10% to 15% of the overall variable costs associated with running the generation unit for a typical period of time.[45]

### OEB Staff

OEB staff noted that both experts in this proceeding indicated that DR Resources can incur start-up costs that are akin to those recovered by eligible generators under the GCG program.[46]

OEB staff submitted that determining whether there is unjust discrimination absent a mechanism through which DR Resources can recover activation costs depends on the OEB's assessment of the similarity of circumstances between GCG-eligible generators and DR Resources.

OEB staff agreed that both DR and generation resources can provide capacity to the market on a functionally equivalent basis, and did not dispute that each resource type may incur certain costs, including start-up and variable costs. OEB staff noted that, while it is conceivable that some start-up costs could be incurred by some DR Resources, there was no evidence on the record that any DR Resource faces physical or operational constraints of a similar magnitude to those faced by GCG-eligible generators.[47]

OEB staff questioned IESO's suggestion that they have other "similar programs" to the GCG for DR Resources where the example provided was payments for out-of-market activations involving Hourly Demand Response resources. OEB staff noted that such payments are not similar in nature because they are "make-whole" payments for "testing" required by the IESO, rather than payments related to participating in the market.[48]

[44] KCLP oral argument, transcripts, v.4, p.119-120
[45] Transcripts, v.2, p.29
[46] OEB staff written argument, p.8
[47] OEB staff written argument, p.10
[48] OEB staff written argument, p.9

### *Does FERC Order 745 provide any guidance for Ontario?*

AMPCO's application referenced, among other things, the U.S. Federal Energy Regulatory Commission (FERC) Order 745, issued in 2011.[49] This Order established that DR Resources participating in organized wholesale energy markets would be compensated through the payment of the locational marginal price for curtailing their load if dispatched. In the Order, FERC concluded that it would be "unjust" and "unreasonable" to not pay DR Resources the same energy price as generators due to their functional equivalence in relation to balancing supply and demand. FERC Order 745 stated the following:

> *...when a demand response resource has the capability to balance supply and demand as an alternative to a generation resource ... payment by an RTO or ISO of compensation other than the [locational marginal price] is unjust and unreasonable. ... As stated in the NOPR, we believe that paying demand response resources the LMP will compensate those resources in a manner that reflects the marginal value of the resource to each RTO and ISO.*[50]

While AMPCO stated that the FERC Order neither should nor could be directly applied to the Ontario context, it submitted that the Order, given the hearing process that preceded it, could nevertheless provide a starting point for determining appropriate treatment for DR Resources.[51]

There was also general agreement, including among both experts (Mr. Goulding and Dr. Rivard), that FERC's actual approach in Order 745 involving paying the full locational marginal price to DR Resources that passed a net benefit test was not applicable to Ontario. Beyond the basic matter of FERC not having jurisdiction in Ontario, an additional practical reason for that is the Global Adjustment (GA), which is unique to Ontario.

Also, as discussed in LEI's report on DR programs in selected US markets (LEI Report)[52], a primary goal of FERC Order 745 was to address barriers to DR that FERC identified, such as the lack of a direct connection between wholesale market prices and fixed retail prices, and a lack of dynamic retail prices (i.e., retail prices that change as the marginal wholesale costs change). Due to this disconnect, "customers do not have the ability to respond to the often volatile price changes in the wholesale market and demonstrate the need for including demand response as part of wholesale market

[49] AMPCO Application, paras 36-43
[50] AMPCO written argument, para 37
[51] Transcripts, v.1, p.33-35
[52] LEI Report, 'Demand response programs in selected US markets', filed November 8, 2019

design." [53] Ontario does not have the same disconnect between wholesale market prices and retail prices.

### Findings

While useful as an example of an approach taken in another jurisdiction, the OEB finds that FERC Order 745 is not relevant to the determination of the issues in this proceeding given the differences in the markets.

### *Frequency of Dispatch/Activation*

***a) What is the risk of activation?***

***b) To what extent is the historical experience regarding activation indicative of future expectations?***

***c) Can DR Resources adequately address this activation risk?***

### AMPCO

a) AMPCO noted that the costs associated with activation (i.e., curtailment) are specific to each individual DR Resource in the auction based on a number of business and operational factors; no two DR Resources are likely to have the same characteristics, inputs or outcomes. As a result, the risk of activation differs across DR Resources.[54]

b) AMPCO argued that, as DR-related technologies change, so might the frequency of investment by DR Resources. Consequently, the past under one set of rules and conditions cannot be assumed to necessarily predict the future under another, more equitable set of rules.[55]

c) AMPCO responded to IESO's position that there is no activation risk for DR Resources that cannot be managed through their energy bids. AMPCO noted that the costs at risk are the costs of activation, and the only way for DR Resources to cover that risk is through their capacity offers because they are not getting any other payments upon activation. Generators recover their activation costs through their energy payments, so they do not have to manage that risk through their capacity offers. AMPCO added that despite what the IESO says, there is no bidding strategy that can protect DR Resources from this risk beyond including that risk in their capacity offers. In the TCA, there is only a

[53] LEI Report, p.14
[54] AMPCO Response to OEB staff IR #1
[55] AMPCO written argument, paras 13-17

protective bidding strategy for DR Resources and that is if they receive energy payments, so that the cost of activation would not need to be reflected in their capacity offers.[56] DR Resources were able to manage that risk, without energy payments, in the DRA by reflecting the activation costs in their capacity offers because they were all exposed to the same risk (i.e., no unfair competitive disadvantage).[57]

**IESO**

a) The IESO noted that DR Resources have been economically activated in the energy market in very limited circumstances since the DRA was launched in 2015 – once in 2019 for Hourly Demand Response resources, while dispatchable loads have been dispatched less than 1% of the time.[58] This is likely due to the relatively high prices at which DR Resources bid into the energy market.[59] The IESO also noted that it has not conducted any analysis to assess the reasons for the historical decline – from 244 to 64 – in annual DR activations since the DRA was created. [60]

b) The IESO stated that "based only on historical bids of dispatchable loads, the IESO would expect little change to the frequency of economic activations for DR resources in 2021, 2022, or 2023." [61]

c) According to the IESO, all of the activation costs that AMPCO alleges DR Resources are exposed to, when they are activated in the energy market, can be included in their energy market bids; in other words, they do not need to be included in their capacity offers in the TCA.[62] In the IESO's view, DR Resources are capable of entirely managing that risk by bidding high enough into the energy market, so that they do not get called upon and avoid incurring activation costs. It does not matter what the costs are called – value of lost load, activation costs, start-up costs, shutdown costs – that a DR Resource is potentially exposed to when activated in the energy market, they can manage those costs through their energy market bids.[63] IESO argued that AMPCO's claim is an abstract, theoretical claim of discrimination.[64]

[56] AMPCO oral reply argument, transcripts, v.5, p.16
[57] AMPCO oral reply argument, transcripts, v.5, p.5-12
[58] IESO Evidence, paras 36-39
[59] During this period, the HOEP has averaged about $25/MWh, while dispatchable load bid prices have averaged about $1,500/MWh and HDR bid prices have averaged about $1,700/MWh.
[60] IESO Response to OEB staff Supplemental IR #14
[61] IESO Response to OEB staff Supplemental IR #14
[62] Transcripts, v.5, p.13
[63] Transcripts, v.5, p.28-29
[64] Transcripts, v.5, p.31

### KCLP

KCLP argued that the IESO-administered markets provide market participants a fair degree of flexibility, in terms of deciding how they bid into those markets and deciding how they choose to compete in those markets. The fact that one market participant may choose to adopt what it called “an irrational or uncompetitive economic bidding strategy” and consequently lose out in a competitive market is not sufficient grounds to justify a finding of unjust economic discrimination, particularly if it can be shown that that market participant could have avoided the problem by adopting a different bidding strategy.[65]

### SEC

SEC referenced IESO's evidence that DR Resource activations are expected to remain infrequent in the future and submitted that, if that is the case, then there would be an extremely low need for a DR Resource to build anything into its capacity offer to recover the costs of activation. The test is not whether there is no risk that there will be activation, but that there has to be some meaningful risk which would have a meaningful impact on costs and a meaningful impact on the bids that DR Resources would make into the TCA. SEC therefore noted that, on the basis of the IESO’s evidence, there cannot be said to be any discrimination between DR Resources and generators in the TCA.[66]

### Findings

The OEB finds that the two classes of market participants, generators and DR Resources, will be treated differently if they successfully bid in the TCA. There was little disagreement in the proceeding that differences in treatment result from the different payments that different resources are eligible to receive if activated. These include energy payments and out-of-market payments such as the GCG. In this way, there at least appears to be discrimination.

In theory, these differences in treatment could result in unjust economic discrimination as the DR Resources, being ineligible for those payments, may have to substantially lower their offers to uneconomic levels if they wish to successfully compete in the TCA. For DR Resources, the costs associated with activation will not be recoverable in the current market.

[65] KCLP oral argument, transcripts, v.4, p.117
[66] SEC oral argument, transcripts, v.4, p.97

***Is there sufficient evidence to determine if there will be economic discrimination? Is there sufficient evidence to determine that any economic discrimination will be "unjust"?***

**AMPCO**

AMPCO acknowledged that it must demonstrate the basis for the OEB to find that the Amendments result in unjust discrimination or are contrary to the objectives of the legislation[67] but it took the position that extensive economic analysis is not necessary for AMPCO to discharge its burden.[68]

AMPCO argued that the test for unjust discrimination is a qualitative, rather than quantitative test and that "functional equivalence, different compensation, lack of economic justification; that is, the 'unjust' component of the 'unjust discrimination' test under section 33 of the Act".[69]

It was AMPCO's evidence that DR Resources incur real costs to curtail their load, and that these costs are beyond the cost of lost production.[70] AMPCO stated that the cost elements associated with curtailment are specific to each individual participant based on a number of business and operational factors and no two participants are likely to have the same characteristics, inputs or outcomes.[71] In testimony, AMPCO cited an example from the steel industry, but without quantifying any costs.[72]

**IESO**

IESO argued that the evidence before the OEB does not support energy payments for DR Resources. AMPCO has not provided any expert evidence to the contrary. Other than referencing FERC's Order 745 and its "net benefits" test, AMPCO has not provided any evidence to show that the absence of energy payments for DR Resources in Ontario is unjust.[73]

**KCLP**

KCLP argued that AMPCO has provided insufficient evidence to substantiate its allegation of discrimination and to fulfil this prong of the legal test. There is no direct

[67] AMPCO oral argument, transcripts, v.4, p.15
[68] AMPCO oral argument, transcripts, v.4, p.24
[69] AMPCO oral argument, transcripts, v.4, p.11-12
[70] AMPCO oral argument, transcripts, v.4, p.27
[71] AMPCO Response to OEB staff IR#1(a)
[72] Transcripts, v.1, p.16
[73] IESO written argument, paras 16-17

evidence from any AMPCO member or other DR Resource that they would be unjustly discriminated against.[74]

### APPrO

APPrO argued that AMPCO's evidence in this proceeding is deficient and falls short of discharging the burden of demonstrating that the Amendments unjustly discriminate against DR Resources. AMPCO has not advanced an analysis, study, or report that sets out the potential economic impacts of the Amendments on its members. The OEB should afford AMPCO's evidence the commensurate evidentiary value for what it is; that is, a theoretical concern from a non-market participant that is unsupported by experience, facts or data.[75]

### SEC

SEC said that it had no reason to doubt the steel manufacturer example that AMPCO provided with respect to incremental activation costs. However, there are a number of uncertainties. There is a broad array of DR Resources and it is not clear how relevant that type of incremental activation cost is in relation to other types of DR Resources and/or what the overall magnitude is. There was also evidence on Hourly Demand Response resources in this proceeding, but it is uncertain if they have any incremental costs.[76] Unfortunately, neither AMPCO, nor probably more importantly, the IESO provided any impartial analysis regarding the actual impact on customers of providing energy payments to DR Resources.[77]

### OEB Staff

OEB staff noted that, beyond anecdotal examples, there is no evidence on the record regarding the quantum and types of costs DR Resources may incur upon activation. Furthermore, there was little evidence on how widespread these costs are across the diverse group of DR Resources.[78]

### Findings

The OEB finds that there is insufficient evidence to make a finding that the Amendments will result in unjust discrimination.

[74] KCLP written argument, para 40
[75] APPrO written argument, paras 10, 12, 14
[76] SEC oral argument, transcripts, v.4, p.91-92
[77] SEC oral argument, transcripts, v.4, p.100
[78] OEB staff written argument, p.6

At Section 4 of this Decision, in describing the test to be applied to assess whether there is unjust discrimination, the OEB identified three elements: (i) there must be evidence of discrimination, in the form of different treatment; (ii) it must be shown that the different treatment is being applied to market participants despite an absence of material and relevant differences in their circumstances; and (iii) the economic impact of the different treatment must be quantified – it cannot be purely qualitative.

In the preceding sections, the OEB found that there is no question that different resources are treated differently, in the form of differences in eligibility for payments. For example, certain generators are eligible for activation payments and start-up costs as part of the GCG program. These payments are specific to the circumstances of each generator. DR Resources do not have access to these payments.

On the question of differences in circumstances between generation and DR Resources, the evidence before the OEB is that both generators and DR Resources incur activation costs, and that these costs vary among members of each of these two classes of market participants. Generation and DR Resources are functionally equivalent in balancing supply and demand in the energy market. Theoretically, there are no relevant differences in their circumstances.

On the third element of demonstration of unjust discrimination being the quantification of the economic impact, there was no evidence presented by any party on the range of costs incurred by any of these market participants. The only example of costs that might be incurred by any of AMPCO's members was that of an unidentified steel manufacturer. Even then, there was no evidence of what the costs might actually be. The absence of quantitative evidence on costs that different parties incur does not permit the OEB to conclude with certainty whether the circumstances between generators and DR Resources are in fact similar or different, and whether, as a consequence, different treatment could constitute unjust discrimination. In addition, the experience to date under the DRA indicated that there has been very limited activation of DR Resources, which suggests that there could have been very limited economic impact on the DR Resources. However, there was no data on the financial or economic cost to DR Resources or a forecast as to the frequency of activation over the next decade. Absent this information, the extent of the economic impact to DR Resources cannot be estimated.

Given the insufficiency of evidence, as described above, the OEB has no basis on which to make a positive finding of unjust discrimination and return the Amendments to the IESO for reconsideration.

The OEB is cognizant of AMPCO's members' reticence to share their economic data with each other, and other competitors. That said, there are methods by which this information

could be shared with the OEB without compromising the confidentiality of any individual market participant's information.[79]

***Could adjustments be made to the energy market rules or the capacity market rules to address the activation issue?***

While the OEB has no authority in this proceeding to require the IESO to make any changes to any of its market rules, and will make no findings on the appropriateness of any particular approach, there was considerable discussion about alternatives to the current payment structure in the context of bid activation.

The major threads of discussion on this issue related either to the eligibility for payments to DR Resources upon dispatch, the expansion of out-of-market provisions, or alternative approaches to the design of bids in the energy market.

**AMPCO**

While AMPCO has advocated for an energy payment (a payment to DR Resources upon activation equal to the prevailing energy price), its final argument in this proceeding noted that an energy payment is not the only way to rectify the alleged discrimination.

AMPCO noted that "there are several examples of historical programs in which DR Resources were provided with administratively set (rather than market determined) activation payments".[80] AMPCO also noted that, unlike energy payments to compensate DR Resources, such alternative mechanisms would involve changes to the market rules that would not result in disrupting the initial market design.[81] AMPCO urged the OEB, in referring the Amendments back to the IESO, to provide guidance to the effect that the IESO should provide a mechanism through which DR Resources will have a reasonable opportunity to recover their incremental costs of activation.[82]

**OEB Staff and KCLP**

As noted above, OEB staff and KCLP submitted that an energy payment made to DR Resources in order to compensate for variable costs of activation would constitute a

[79] The OEB's *Rules of Practice and Procedure* and its *Practice Direction on Confidential Filings* make provision for the confidential treatment of information in appropriate cases. In assessing requests for confidential treatment, the OEB considers (among other things) whether the information is commercially sensitive and the potential harm that could result from disclosure in terms of a person's competitive position.
[80] AMPCO written argument, para 27
[81] AMPCO oral reply argument, transcripts, v.5, p.20
[82] AMPCO written argument, para 43

double payment for the reduction in demand since it would provide revenue in addition to avoided costs.[83]

Dr. Rivard noted during cross examination that, if DR Resources have to raise their energy bid price above VOLL in order to reflect one-time costs of activation, it is not ideal from a market design standpoint.[84] He also noted that there is a potential that the DR Resource is at disadvantage in the sense that it is not offered exactly the same kind of guarantee for what is a same cost.[85]

In response to a question from the OEB during the oral hearing regarding whether all types of resources would need to get the same payment for energy (as well as capacity) for it to be a fair competitive market, Mr. Goulding explained that one might conclude that it is fair if all resources get the same energy payment (market clearing price) for the same service. However, the avoided cost associated with a DR Resource introduces a challenge, since that, itself, may or may not be considered a form of energy payment. Mr. Goulding expressed the view that it would be fair if the DR Resource is compensated at its short run marginal cost when activated. While doing so would require a host of new market rules, it gets away from the double payment issue.[86]

### Observations

The OEB acknowledges that the IESO has a study underway to determine what, if any, payments should be made to DR Resources. It is beyond the scope of this proceeding for the OEB to comment on this study or any potential changes that may arise from it.

However, the OEB believes some general observations might be helpful. When considering market changes, the IESO should examine the total costs and compensation available to capacity market participants, whether that compensation is in the capacity market or the energy market, and whether that compensation is an out-of-market payment or some form of energy payment. The priority is to ensure that there is no unjust discrimination for or against any class of market participants. This is particularly relevant as the capacity market continues to expand by adding other types of resources.

[83] OEB staff written argument, p.7
[84] Transcripts, v.2, p.141
[85] Transcripts, v.2, p.114-115
[86] Transcripts, v.1, p.164-165

# 6 ORDER

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. The Application by the Association of Major Power Consumers in Ontario for an order under section 33 of the *Electricity Act, 1998* revoking the market rule amendments identified as MR-00439-R00 to –R05: "Transitional Capacity Auction" and referring the amendments back to the IESO for further consideration is denied.

2. The stay of the operation of the market rule amendments identified as MR-00439 -R00 to –R05: "Transitional Capacity Auction", as ordered by the Decision and Order of the OEB dated November 25, 2019, is lifted.

3. Parties eligible for an award of costs shall submit their cost claims by February 6, 2020. A copy of the cost claim must be filed with the OEB and one copy is to be served on the IESO. The cost claims must comply with section 10 of the OEB's *Practice Direction on Cost Awards*.

4. The IESO will have until February 13, 2020 to object to any aspect of the costs claimed. A copy of the objection must be filed with the OEB and one copy must be served on the party against whose claim the objection is being made.

5. A party whose cost claim was objected to will have until February 20, 2020 to make a reply submission as to why its cost claim should be allowed. A copy of the submission must be filed with the OEB and one copy is to be served on the IESO.

All materials filed with the OEB must quote the file number, EB-2019-0242, be made in a searchable/unrestricted PDF format and sent electronically through the OEB's web portal at https://pes.ontarioenergyboard.ca/eservice. Two paper copies must also be filed at the OEB's address provided below. Filings must clearly state the sender's name, postal address and telephone number, fax number and email 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 the address below. Those who do not have computer access are required to file seven paper copies.

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, Michael Bell at Michael.Bell@oeb.ca and OEB Counsel, Ljuba Djurdjevic at Ljuba.Djurdjevic@oeb.ca.

ADDRESS

Ontario Energy Board
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Toronto ON M4P 1E4
Attention: Board Secretary

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Tel: 1-888-632-6273 (Toll free)

Fax: 416-440-7656

**DATED** at Toronto January 23, 2020

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long
Registrar and Board Secretary

# Tab 15

# SUPREME COURT OF NOVA SCOTIA

**Citation:** Islam v. Nova Scotia (Human Rights Commission), 2012 NSSC 67

**Date:** 20120213
**Docket:** Hfx No. 325019
**Registry:** Halifax



**Between:**

Dr. Rafiq Islam

Applicant

v.

The Nova Scotia Human Rights Commission and
Dalhousie University

Respondents

## LIBRARY HEADING

**Judge**: The Honourable Justice Glen G. McDougall

**Heard:** August 25, 2011 in Halifax, Nova Scotia

**Subject:** Refusal to grant an extension of time to file a complaint under the Nova Scotia *Human Rights Act*; exceptional circumstances; exercise of discretion by the Commission to grant an extension; procedural fairness.

**Summary:** The Applicant for judicial review requests the Court to order the Nova Scotia Human Rights Commission to grant an extension of time to file a complaint which was filed eight days beyond the one year period provided for in the *Human Rights Act*, R.S.N.S. 1989, c. 214. In refusing to grant an extra extension for exceptional circumstances the Commission=s designated representative took into consideration submissions made by the Applicant=s former employer B Dalhousie University B without providing the Applicant with the opportunity to reply.

***QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

**Issue:** (i) Was the Applicant denied procedural fairness by not being given the opportunity to reply to issues raised by his former employer beyond what they had been requested to do?

(ii) Was the Commission=s interpretation of s. 29(3), requiring exceptional circumstances to exist as a prerequisite to further consideration of the public interest and prejudice, reasonable?

**Result:** Although the Commission=s interpretation of s. 29(3) was one the provision can reasonably bear, its failure to provide the Applicant with the opportunity to reply to the issues pertaining to exceptional circumstances and the public interest raised by the Respondent B Dalhousie University B was a breach of procedural fairness.

# SUPREME COURT OF NOVA SCOTIA

**Citation:** Islam v. Nova Scotia (Human Rights Commission), 2012 NSSC 67

**Date:** 20120213
**Docket:** Hfx No. 325019
**Registry:** Halifax

**Between:**

Dr. Rafiq Islam

Applicant

v.

Nova Scotia Human Rights Commission and
Dalhousie University

Respondents

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** August 25, 2011, in Halifax, Nova Scotia

**Counsel:** Yavar Hameed, for the applicant
Rebecca Saturley and Michelle McCann, for the respondent Dalhousie University
Lisa Teryl, for the respondent Human Rights Commission

**By the Court**:

## INTRODUCTION

[1] The applicant, Dr. Rafiq Islam, seeks judicial review of a decision of the Nova Scotia Human Rights Commission denying his request for an extension of time to file a complaint against his employer, Dalhousie University.

## BACKGROUND

[2] Dr. Islam was suspended from his employment as a Professor of Engineering at Dalhousie University on June 9, 2008, after a period of non-disciplinary leave allegedly arising from the University's concerns about his ability to carry out his duties for health reasons. His counsel notified the Commission of his intention to file a complaint on June 17, 2009, and provided further particulars on July 10. On July 28, 2009, the Commission wrote to Dr. Islam's counsel, providing a Request for Extension form, and requesting that it be returned by August 18. Dr. Islam's counsel wrote to the Commission on August 19, providing further specifics. On August 26 the Commission requested that an intake form be filed within two weeks. The intake form, dated October 21, 2009, was filed with the Commission by letter dated October 26. The Commission requested that the applicant file a request for extension of time, which was filed on November 23, 2009. Before releasing its decision, the Commission invited Dalhousie to make submissions on any objection it had to the extension sought by Dr. Islam. After receiving a submission from Dalhousie, the Commission issued a decision rejecting the requested extension on January 26, 2010.

## THE *HUMAN RIGHTS ACT* AND THE DECISION UNDER REVIEW

[3] The procedure to be followed in filing a complaint under the *Human Rights Act*, R.S.N.S. 1989, c. 214, is set out at section 29, which provides, in part:

> **Procedure on complaint**
>
> 29 (1) The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where
>
> (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director....
>
> ....
>
> (2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

> (3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

[4] The Commission's decision under s. 29(3) is dated January 26, 2010. Gerald Hashey, Manager, Dispute Resolution, concluded that Dr. Islam "should not be granted an additional period of time to make a complaint." Mr. Hashey made note of the following facts that he had taken into account in reaching this decision:

> 1. Mr. Kenneth MacLean contacted the Commission in writing on June 17, 2009 to advise of Dr. Rafiq Islam's intention to file a Human Rights Complaint against Dalhousie University and the Dalhousie Faculty Association. This correspondence acknowledged the possibility that the Commission may require a request for extension under Section 29(3) of the Human Rights Act.
>
> 2. Through legal counsel, Dr. Islam submitted a complaint to the Human Rights Commission on October 21st, 2009.
>
> 3. Based on a description of events provided by Dr. Islam, intake staff determined that June 9, 2008, the date of Dr. Islam's suspension, constitutes the last date of discrimination.
>
> [...] On November 9, 2009 a request for extension form was provided to Dr. Islam via legal counsel. This form was completed and returned to the Commission on November 23rd, 2009.
>
> 4. In requesting an extension, Dr. Islam cites multiple family emergencies, including the deaths of both parents, and the critical illness of a sibling. Dr. Islam also attributes his need for an extension to the extensive time and effort required to prepare for grievance proceedings concerning his suspension from Dalhousie.
>
> 5. Dalhousie University objects to the granting of an extension of time.

[5] Mr. Hashey noted that granting an extension under s. 29(3) is within the Commission's discretion, and that three elements must be considered: the circumstances leading to the request for extension must be exceptional; the decision to grant an extension must be equitable with regard to any prejudice to the complainant or the respondent; and it must be in the public interest to grant an

extension. Finding that the term "exceptional circumstances ... suggests a very high standard against which reasons for an extension request are measured," he gave the following reasons for denying an extension:

> ... Although the family tragedies that have befallen Dr. Islam over the course of the last year are significant, the decision to be made is whether those events, and the effort Dr. Islam expended on his grievance, constitute exceptional circumstances.
>
> Influencing my views on this matter are two significant factors. First, Dr. Islam was on a paid leave of absence from the University throughout the one year period he had to file a complaint. This should have afforded him time to deal with issues as critical as the matter at hand. The second factor is that Dr. Islam had access to professional advice through independent legal counsel.

[6] As such, the Commission concluded that the request for an extension did not meet the requirement under s. 29(3) that the circumstances leading to the request be "exceptional," and that it was therefore not necessary to consider the second and third elements.

## THE JUDICIAL REVIEW APPLICATION

[7] Dr. Islam seeks judicial review on the following grounds:

1. The Nova Scotia Human Rights Commission committed an error of mixed law and fact when it determined that "multiple family emergencies, including the deaths of both parents, and the critical illness of a sibling," were not exceptional circumstances as contemplated by sections 29(3) of the *Human Rights Act*.

2. The Applicant was denied procedural fairness when the Nova Scotia Human Rights Commission conducted an investigation into the Applicant's request for an extension of time. During its investigation, the Nova Scotia Human Rights Commission consulted with Dalhousie University, a party against whom the Applicant intended to bring a Human Rights complaint, and the Applicant was not given an opportunity to respond.

3. The Nova Scotia Human Rights Commission erred when it determined that June 9, 2008, was the last date of discrimination; the Applicant

> continues to suffer from ongoing discrimination in contravention of the *Human Rights Act.*
>
> 4. The Nova Scotia Human Rights Commission committed an error of mixed law and fact when it determined that the Applicant's extensive participation in a grievance process that his union ultimately determined it would not participate in was not an exceptional circumstance as contemplated by sections 29(3) of the *Human Rights Act*....



[8] In his pre-hearing submission, counsel for Dr. Islam identifies three issues: (1) whether the Commission erred in law in interpreting the legal test for granting an extension of time pursuant to s. 29(3) of the *Human Rights Act*; (2) whether the Commission's decision to deny the request for an extension was unreasonable; and (3) whether the Commission violated procedural fairness by failing to provide the applicant an opportunity to respond to Dalhousie's submissions on the request for an extension of time. To further narrow the issues, I believe that they can be stated as follows, in the manner suggested by the University: (1) whether the applicant was accorded procedural fairness, and (2) whether the Commission's decision was reasonable. Dr. Islam's counsel confirmed at the hearing that he does not maintain the position that there was ongoing discrimination after June 9, 2008.

## STANDARD OF REVIEW

[9] Matters of procedural fairness are not subject to a standard of review analysis of the kind that applies to decisions on the merits: **Communications, Energy and Paperworkers Union of Canada, Local 141** v. **Bowater Mersey Paper Co. Ltd.**, 2010 NSCA 19, at para. 30. If a requirement of procedural fairness applies, the court decides whether the duty was violated, without deference: **Provincial Dental Board of Nova Scotia** v. **Dr. Clive Creager**, 2005 NSCA 9, at para. 25. The content of the duty of fairness "is context specific and depends on various factors, including the tribunal's delegated room to manoeuvre that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties": **Bowater Mersey**, *supra*, at para. 32.

[10] As to the Commission's interpretation of s. 29(3) of the *Human Rights Act*, there is no dispute that the standard is reasonableness. Deference will typically apply to a review of a discretionary decision: **Dunsmuir** v. **New Brunswick**, [2008] 1 S.C.R. 190, 2008 SCC 9, at para. 53. A decision as to whether to grant an

extension of time is, like a decision to advance an investigation to a Board of Inquiry, a discretionary decision "squarely within the Commission's mandate", to which the reviewing court owes deference: **Nova Scotia (Human Rights Commission)** v. **Halifax (Regional Municipality)**, 2010 NSCA 8, at para. 14.



## (1) Procedural Fairness

[11] The argument on procedural fairness relates to the correspondence between the Commission and Dalhousie after Dr. Islam's intake form and request for extension were filed. Dr. Islam's counsel had been advised, in the Commission's letter of August 26, 2009, that the Commission would "provide potential respondents with the opportunity to object to a complainant being granted an extension for the purpose of making a complaint." On December 8, 2009, Mr. Hashey wrote *ex parte* to Karen Crombie, University Legal Counsel, informed her of Dr. Islam's complaint, and particularly of his request for an extension of time. Recounting Dr. Islam's claim that " a series of personal family tragedies, including the overseas death of both parents and the overseas critical illness of a sibling, prevented him from being able to bring his complaint forward within the time limits," he wrote:

> Before the Commission makes a decision to grant an extension, respondents are provided with an opportunity to object to the investigation of an out-of-time Complaint on the grounds that the delay has prejudiced their ability to respond to the allegations.
>
> Should you wish to object to the Commission granting an extension to Dr. Rafiq Islam to file his Complaint, please complete the attached Objection to the granting of an Extension Form, the Commission will make a decision with respect to the Complainant's request for an extension....

[12] There was some confusion at the hearing as to whether the objection form B which provides a space for "concise, clear, specific reasons how the Complainant's delay in making a Complaint has prejudiced your ability to respond to his allegations" B was provided along with the letter. Given that Mr. Hashey's letter clearly specified submissions respecting the issue of prejudice to Dalhousie's ability to respond occasioned by the delay, I am not convinced that anything turns on this.

[13] Dalhousie's response took the form of a four-page letter, dated January 6, 2010. In this letter, Ms. Crombie submitted that there are no exceptional circumstances as contemplated by s. 29(3) of the *Human Rights Act*. She provided a detailed chronology of "the context for the circumstances" that Dalhousie claimed gave rise to Dr. Islam's allegations. Furthermore, while she accepted that "it is generally appropriate to extend time under Section 29(3) where a complainant has been impeded by personal or family difficulties throughout the 12 month period," she wrote that Dr. Islam's parents must have died at "the very end of the twelve month period," though admitting that Dalhousie had no direct knowledge of the date. She concluded that the family tragedies "do not provide an explanation as to why he was incapable of filing a human rights complaint for at least 11 of the 12 months. He was well represented by professional advisors throughout and was clearly focused on legal redress of his concerns." Dalhousie's position, therefore, was that "Dr. Islam has not provided adequate evidence of >exceptional circumstances' that would be in the public interest to allow the limitation period to be extended," and accordingly, the requested extension should be denied.

[14] It is not disputed that Dalhousie's submission failed to address any prejudice that would arise if an extension were granted, as had been requested. Nor is it disputed that this submission was not provided to Dr. Islam. He submits that Commission denied him procedural fairness by not giving him the opportunity to reply to Dalhousie's submission. He argues that by omitting to seek a reply, the Commission sacrificed the completeness of the record and denied him the ability to "fill in any issues that would assist the Commission's threshold determination." He adds that there is no compelling policy reason to deny him a right of reply; this is merely the practice the Commission has chosen to adopt.

[15] Both Dalhousie and the Commission submit that Dalhousie simply chose to rely on what it considered to be the strongest argument against an extension, thereby ignoring the issue on which it had been asked for submissions. Dalhousie notes that Dr. Islam's counsel had been advised that Dalhousie would be asked for submissions, and that the Commission did not specify that those submissions would be limited to the issue of prejudice. This makes little difference, given that the correspondence from the Commission to Dalhousie very clearly did specify that submissions were sought on prejudice. Counsel for the Commission adds that Dr. Islam did not request a right to reply, and emphasizes that the Commission

wishes to avoid a formal procedure of offering complainants a right of reply, apparently preferring an *ad hoc* approach to whether a reply should be permitted.

[16] The *Human Rights Act* does not set out any particular procedures for determining whether an extension should be granted. The content of the duty of procedural fairness is variable, as Brown and Evans point out in **Judicial Review of Administrative Action in Canada** (Toronto: Canvasback, looseleaf) at &7.1100:

> [B]ecause of the wide range of circumstances in which the duty of fairness applies, its content is not monolithic. In some situations it may call for a procedure that is barely distinguishable from that followed in the courts of law, including, for example, personal service of notice, full disclosure of relevant information, and an oral hearing before the decision-maker, with the right to be represented by counsel, to call witnesses, to produce evidence, and to cross-examine. In other settings, however, procedural fairness may be satisfied by an informal and simple procedure that could never be mistaken for a trial, such as an opportunity to make written submissions, or to have an interview with an official who will in turn report to the decision-maker.
>
> The contents of the procedural protections that an agency may be required to offer before taking administrative action should match in diversity the statutory powers to which the duty of fairness applies. In the absence of statutory rules, the task of prescribing for a particular agency a procedure that gives those affected a fair opportunity to participate in the decision-making process, and at the same time is consistent with the public interest in effective, expeditious and efficient decision-making, is among the most regularly-encountered and difficult issues in the law of administrative procedure. [Emphasis in original.]

[17] The authority of the Commission to deal with complaints at a preliminary stage was considered in **Green** v. **Nova Scotia (Human Rights Commission)**, 2011 NSCA 47, where the issue was whether there was a duty to give reasons when the Commission dismissed a complaint under s. 29(4)(b), which permits dismissal on the ground that the complaint is without merit. In affirming the chambers judge's decision that there was no duty to give reasons, Oland J.A. noted the Commission's screening authority, an administrative role where reasons were not required, as compared to a decision of a Board of Inquiry, where there was a requirement for reasons. She concluded, at para. 40:

> The absence of any legislative requirement for written or extensive reasons beyond those in s. 29(4) of the Act, the omission of any appeal process, the screening and administrative function performed by the Commission at this stage, and its inclusion of public policy considerations when it chooses, all support the Chambers judge's determination that the Commission is not obliged to give fuller reasons explaining its decision to dismiss a complaint.

The chambers judge had observed, at 2010 NSSC 242, para. 29:

> It is clear from the Act and Regulations that the Commission enjoys a discretion concerning whether or not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate....

[18] Dalhousie submits that the Director had broad discretion to determine the procedure by which the decision should be made. As gatekeeper over complaints at the preliminary stages, the Commission is required to consider timeliness, in view of the mandatory 12-month time limit under s 29(2). Subsection 29(3) then permits a discretionary 12-month extension. In this case, Dalhousie says, the Commission provided cogent reasons for its decision, meeting its procedural duty in the circumstances. Dalhousie was entitled to make submissions, but it submits that there was no right for Dr. Islam to respond to these submissions, in light of the limited content of the duty of fairness at the screening stage. Dalhousie says the Commission met its procedural duty by permitting Dr. Islam to make submissions on his request for an extension, and nothing more was required.

[19] Dalhousie cites **Brock** v. **Ontario (Human Rights Commission)**(2009), 245 O.A.C. 235, 2009 CarswellOnt 125 (Ont. Sup. Ct. J. (Div. Ct.)), where the applicant, who had a progressive disease requiring constant medical supervision, claimed that he lacked the necessary care in his community, but that such care was available for people with cognitive impairments. He alleged discrimination based on age and disability. The Ontario Human Rights Commission, in deciding not to refer the complaint to the tribunal, concluded that the comparator group had additional needs that the applicant did not share, and that the benefit he sought was not one that was assured to the comparator group or to any other group. The Commission upheld its original decision on a reconsideration. On judicial review, the applicant argued that he had been denied procedural fairness on the basis of "the failure to disclose material from the respondents, thus preventing him from

making a full response, and the failure to conduct a thorough investigation": para. 14. The court said, at paras. 15-19:

> The applicant submits that he was not provided with appendices to the respondents' original letter of response to his complaint, dated March 3, 2006, which provided evidence of types of services provided. However, there was reference to the missing Appendices in the letter, which would have alerted him to the missing material. In any event, the material was summarized in the Case Analyses, which he received, and was reproduced in the respondents' submissions to the Case Analyses, which he received.
>
> The applicant also submitted that he was not provided with the respondents' supplementary response dated July 19, 2006. However, the information and arguments were summarized in the Case Analyses and were reproduced in the respondents' submissions to the Case Analyses.
>
> The applicant also submits that he was denied an opportunity to respond to the Ministry response to his expert's opinion. This expert opinion had been filed by the applicant in response to the Ministry submissions responding to his response to the Case Analyses.
>
> In our view, there was no denial of procedural fairness. The Ministry submissions respecting the complaint and the Case Analyses were provided to the applicant for comment. He made submissions to the Case Analyses and to the respondents' submissions. All of the parties' submissions in response to the Case Analyses and in reply to each others' submissions were before the Commissioners when they made their decision under section 36 of the Code.
>
> The applicant had full notice of the facts and arguments upon which the Commission's decisions were based. In addition, he had the opportunity to make submissions in response. The Commission's duty of fairness is met when it advises the parties of the "facts, arguments and considerations upon which the decision is to be based" and provides the parties with an opportunity to make submissions. The Commission is not under a duty to disclose every detail, but rather to provide a "fair summary of the relevant evidence".

[20] As to the question of procedural fairness with respect to the application for reconsideration, the court said, at paras. 20-22:

> When, pursuant to section 37 of the Code, the applicant requested that the Commission reconsider its decision, the Commission carried out its procedural duty under section 37. It gave the applicant's application for reconsideration to the

> respondents and provided them with an opportunity to make written submissions with respect thereto.
>
> Section 37 of the Code does not contemplate that a respondent's response to an application for reconsideration be given to an applicant. Section 37 requires the Commission to advise the respondent of the application for reconsideration; permit the respondent to make a written submission; and make a decision on the reconsideration application.
>
> Here, the Commission went further. It provided the parties with a reconsideration report and allowed them to make submissions in response. This was not a situation similar to that found in *Mercier v. Canada (Human Rights Commission)* [1994 CarswellNat 850 (Fed. C.A.)], where, outside the Commission's time limit, comments were filed without an applicant's knowledge and the comments contained facts that did not previously appear in the file and which attacked the applicant's credibility.

As such, the court held that there was no denial of procedural fairness.

[21] Dalhousie also cites **Apotex** v. **Ontario (Minister of Health)**(1989), 71 O.R. (2d) 525, 1989 CarswellOnt 937 (Ont. S.C. (Div. Ct.)). In that case, the applicant sought judicial review of a Ministerial decision respecting classification of certain prescription drugs, alleging that the Minister breached the duty of procedural fairness by not disclosing advice given by the advisory committee that reviewed such applications and made a recommendation to the Minister. The applicant had an opportunity to respond to concerns of the committee before it made its recommendation to the Minister. The court held that there was no denial of procedural fairness, as the applicant was permitted to make submissions and to respond to concerns raised by the committee (para. 33.)

[22] Dalhousie cites these cases in support of the proposition that the Director, under the *Human Rights Act*, has the power to determine "when the dialogue stops."

[23] Dalhousie goes on to submit that Dr. Islam suffered no prejudice as a result of not being given the opportunity to respond to its submission, alleging that there were no new facts or allegations raised on the issue of exceptional circumstances and no attack on Dr. Islam's credibility. The Commission's decision, it says, was based primarily on Dr. Islam's submissions, and not on the Dalhousie response.

This is questionable. Mr. Hashey made a particular point in his decision of noting two "significant" influential factors in his analysis of exceptional circumstances: that Dr. Islam was on a paid leave of absence through the one-year period, and that he had access to professional advice through independent legal counsel. Both points were raised specifically in Dalhousie's letter. Dalhousie suggests that there were other ways for this information to have come to Mr. Hashey's attention, such as through references in correspondence to Dr. Islam being on medical leave. I am satisfied, however, that Mr. Hashey considered Dalhousie's submission in reaching his decision.

[24] The Commission is free to determine its own procedures. That being said, those procedures must meet minimal demands of procedural fairness. I am not satisfied that denying a right of reply in these circumstances accords with this standard. The distinguishing point is that Dalhousie's submission ignored the issue upon which it was invited to provide its views B prejudice to the University arising from an extension of time for Dr. Islam to file his complaint B and instead offered the university's views on exceptional circumstances and the public interest. I am satisfied that procedural fairness demanded that Dr. Islam be given an opportunity to reply to the University's position on these issues.

## (2) Interpretation of s. 29(3) of the Human Rights Act

### (a) exceptional circumstances

[25] The court considered the meaning of "exceptional circumstances" in **Vassallo** v. **Vassallo**, [1991] N.S.J. No. 68, 1991 CarswellNS 691 (S.C.), an application for leave to discover the respondent after the notice of trial had been filed, pursuant to Rule 28.05 of the **Civil Procedure Rules 1972**. Rule 28.05(3) provided that leave "shall be granted only in exceptional circumstances." In an oral decision, Goodfellow J. did not go into great detail about the circumstances, although he did indicate that "exceptional circumstances" would require "something unusual or out of the ordinary", a standard which he held was not met in that case. These comments were cited in **Fisher** v. **West Colchester Recreation Association**, 2010 NSSC 358, at para. 32, on an application to permit late amendments to a statement of claim. As the applicant points out, the issue in **Vassallo** was not filing an originating process, but whether a "procedural

indulgence" should be granted. Moreover, **Vassallo** does not elaborate on how "exceptional circumstances" are to be identified.

[26] The Court of Appeal considered "exceptional circumstances" in **Klain** v. **Klain** (1998), 165 NSR (2d) 58, 1998 CarswellNS 23, where the chambers judge denied leave to the appellant to apply to vary an interim child support order in a pending divorce proceeding, under the former Rule 28.05(3). Hallett J.A. said, at para. 22:

> Justice Hood did not make her decision based on the provisions of Rule 28.05(2) but rather, she founded her decision on the premise that there were no exceptional circumstances that warranted her exercising her discretion to grant leave as provided for in sub-Rule (3). In reaching this decision, Justice Hood did not apply any incorrect principle of law and the evidence supports her conclusion. Furthermore, there is no patent injustice in allowing the order of Justice Hood to stand. Child support of $775.00 per month is being paid as ordered by Justice Goodfellow. Pursuant to his Order it was open to the appellant to apply for a review of the support before May 1st, 1997; this was not done. It was open to the appellant pursuant to Rule 28.05(4) to object to the notice of trial; this was not done. Two months passed before the application to vary was filed.

[27] In **Bressmer** v. **M & F Handel Development Ltd.**, 2007 NSCA 76, another decision under Rule 28.05(2), Cromwell J.A., as he then was, said, "[i]n considering whether exceptional circumstances exist which justify granting leave, all relevant circumstances, viewed in the context of the underlying purpose of the Rule, must be considered" (para. 4).

[28] The applicant submits that the deaths of his parents in a short time was "unusual or out of the ordinary" and should be regarded as an "exceptional circumstance," an event which "could predictably be seen to have a devastating effect upon the psyche and mental well being of an average person" and which would reasonably have "a direct bearing on the performance and capacity of the complainant to act as a normal and reasonable person." He argues that the Commission "erred" by "applying a graduated standard of >significant' versus >exceptional' circumstances." He says the Commission measured the "exceptionality" of his circumstances not by the effect of the circumstances, but by whether he had an opportunity to file a complaint before the circumstances arose. The correct analysis, he argues, is to consider whether the circumstances prevented him from filing a complaint at some point prior to the deadline.

**(b) the analysis under s. 29(3)**

[29] The applicant argues that the Commission utilized an overly rigid and legalistic approach to s. 29(3) by treating "exceptional circumstances" as a prerequisite to the assessment of the public interest and prejudice to the respondent. He says a contextual analysis demonstrates that "the animating principles of what defines exceptional circumstances are in fact the very factors, which the Commission has compartmentalized and subordinated (i.e. public interest and prejudice to the parties)." The result of this bifurcation is to leave the term "exceptional circumstances ... without meaning or context."

[30] The applicant cites **Jollymore** v. **Jollymore Estate**, 2001 NSCA 116, where the Court of Appeal considered the test for an extension of time for filing a notice of appeal. Under that analysis, the applicant must demonstrate that there was a *bona fide* intention to appeal when the right to appeal existed; that the applicant has a reasonable excuse for the delay; and that "there are compelling or exceptional circumstances present which would warrant an extension of time, not the least of which being that there is a strong case for error at trial and real grounds justifying appellate interference" (para. 22). The ultimate question is "whether justice requires that the application be granted" in view of the circumstances of each case: **McCarron** v. **Houghton**, 2003 NSCA 148, at para. 5, citing **Tibbetts** v. **Tibbetts** (1992), 112 N.S.R. (2d) 173 (C.A.), at para. 14.

[31] In the applicant's submission, the analysis described in **Jollymore**, **McCarron** and **Tibbetts** indicates that, rather than a "rigid" focus on the question of exceptional circumstances, the court must consider the broader public interest, rather than "other subjective criteria" in its function as gate-keeper. It is therefore, he submits, a "perverse consequence" for the Commission to separate the public interest from the consideration of exceptional circumstances. He submits that the circumstances at the time he sought to file his complaint were *prima facie* deserving of an extension of time in the public interest, but the Commission did not consider the public interest.

[32] The true issue in assessing the decision on its merits is whether the Commission exercised its mandate under ss. 29(2) and (3) of the *Human Rights Act* in a reasonable manner, that is, whether the decision fell within a range of

reasonable outcomes. The applicant argues that the Commission's decision was unreasonable on the **Dunsmuir** standard. By effectively requiring the applicant to file his complaint at the earliest possible time within the limitation period, he says, the Commission rendered an unreasonable decision. He also suggests that he was occupied by a grievance process during the same time period.

[33] Dalhousie takes the position that the decision falls within a range of reasonable outcomes, and should therefore be held to be reasonable. According to Dalhousie, the interpretation of the requirements of s. 29(3) is "squarely within the mandate of the Commission." The provision is permissive; it does not require the Director to grant an extension of time when certain criteria are met. Rather, the Director has discretion to determine whether the circumstances call for an extension. Dalhousie submits that it is reasonable to interpret s. 29(3) as making "exceptional circumstances" a precondition to the other considerations. It was also reasonable, the Commission argues, to conclude that the personal tragedies Dr. Islam had experienced were significant but not exceptional circumstances, as well as concluding that he had the benefit of legal counsel. He was not, Dalhousie submits, "a self-represented party unfamiliar with the legal process." Further, it is argued, participation in another legal process, such as the grievance in which the applicant was involved, is not sufficient reason to extend a limitation period: **Fitzpatrick** v. **Barricks Gold Hemlo Mines**, 2011 HRTO 520, at para. 27.

[34] Dalhousie says it is not correct to suggest that the Commission denied an extension that would have been only eight days. While the initial contact by his counsel was on June 17, 2009, no request for extension was filed until November 23.

[35] I am satisfied that the *Human Rights Act* grants the Director the discretion to determine whether extensions of time should be granted. I am also satisfied that the Commission's interpretation of s. 29(3), requiring exceptional circumstances to exist as a prerequisite to further consideration of the public interest and prejudice, is one the provision can reasonably bear. The plain language of s. 29(3) clearly distinguishes the criterion of exceptional circumstances from the other considerations. Leaving aside the question of procedural fairness, which is decisive in this case, the Commission's interpretation of the Act, and the decision to deny an extension, were reasonable.

**CONCLUSION**

[36] The judicial review application is allowed on the basis of breach of procedural fairness. Absent the breach of procedural fairness, the Commission's decision would have been found to be reasonable. The Applicant should be given the opportunity to address the issues raised in Dalhousie University=s submissions on the request for an extension of time after which the Commission can decide if exceptional circumstances exist to warrant an extension in accordance with s. 29(3) of the *Act*.

[37] If the parties are unable to agree on costs they may make written submissions on the issue within 45 calendar days of the date of release of this decision.

McDougall, J.