

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Electricity Act*, 1998, S.O. 1998, c. 35 (the “**Electricity Act**” or “**Act**”);

AND IN THE MATTER OF an Application by Capital Power Corporation, Thorold CoGen L.P., Portlands Energy Centre L.P. dba Atura Power, St. Clair Power L.P., TransAlta (SC) L.P. (collectively, the “**NQS Generation Group**” or “**Applicants**”) for Review of Amendments to the Independent Electricity System Operator Market Rules

**BRIEF OF AUTHORITIES OF THE
INDEPENDENT ELECTRICITY SYSTEM OPERATOR**

February 10, 2025

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7.	<i>James C. Bonbright et al, Principles of Public Utility Rates (2nd Ed)</i> , (Arlington Public Utility Report, 1988)
8.	<i>Complex Consolidated Edison Co of NY, Inc v FERC</i> , 165 F3d 992, 1012, 334 US App. D.C. 205 (DC Cir 1999)
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Electricity Act, 1998

S.O. 1998, CHAPTER 15 Schedule A

Consolidation Period: From December 4, 2024 to the [e-Laws currency date](#).

Last amendment: 2024, c. 26, Sched. 3, s. 1.

Legislative History: 1999, c. 9, s. 102-104; 1999, c. 14, Sched. F, s. 3; 2000, c. 25, s. 46; 2000, c. 26, Sched. D, s. 1; 2000, c. 42, s. 22-43; 2001, c. 8, s. 205; 2001, c. 9, Sched. F, s. 1; 2001, c. 23, s. 67-69; 2002, c. 1, Sched. A (but see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*); 2002, c. 17, Sched. F, Table; 2002, c. 22, s. 61-63; 2002, c. 23, s. 3 (but see 2009, c. 33, Sched. 14, s. 3 and Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*); 2002, c. 24, Sched. B, s. 33; 2004, c. 8, s. 46, Table; 2004, c. 16, Sched. D, Table; 2004, c. 17, s. 32; 2004, c. 19, s. 12; 2004, c. 23, Sched. A; 2004, c. 31, Sched. 11; 2005, c. 31, Sched. 6; 2005, c. 33, s. 5-7; 2006, c. 3, Sched. B; 2006, c. 11, Sched. B, s. 4; 2006, c. 21, Sched. F, s. 136 (1); 2006, c. 32, Sched. C, s. 16; 2006, c. 33, Sched. Z.3, s. 9; 2006, c. 34, s. 12; 2006, c. 35, Sched. C, s. 31; 2007, c. 4, s. 29; 2007, c. 7, Sched. 12; 2007, c. 11, Sched. B, s. 3; 2007, c. 13, s. 42; 2008, c. 7, Sched. G; CTS 17 OC 08 - 1; 2008, c. 19, Sched. E; 2008, c. 19, Sched. V, s. 3; 2009, c. 12, Sched. B; 2009, c. 33, Sched. 10, s. 6; 2009, c. 33, Sched. 14, s. 2 (but see [Table of Public Statute Provisions Repealed Under Section 10.1 of the Legislation Act, 2006](#)); 2009, c. 33, Sched. 16, s. 4; 2009, c. 34, Sched. J, s. 28; 2010, c. 8, s. 37 (but see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*); 2010, c. 15, s. 223; 2011, c. 9, Sched. 12; 2011, c. 9, Sched. 27, s. 23; 2012, c. 8, Sched. 11, s. 46 (but see 2020, c. 14, Sched. 8, s. 21); 2013, c. 2, Sched. 4 (but see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*); 2014, c. 7, Sched. 7, s. 1-15; 2015, c. 20, Sched. 9; 2015, c. 38, Sched. 3; 2016, c. 10, Sched. 2, s. 1-10; [Table of Public Statute Provisions Repealed Under Section 10.1 of the Legislation Act, 2006](#); 2017, c. 2, Sched. 3, s. 2; 2017, c. 2, Sched. 10, s. 1; 2017, c. 8, Sched. 8; 2017, c. 16, Sched. 1, s. 43; 2017, c. 20, Sched. 8, s. 81; 2017, c. 34, Sched. 46, s. 13; 2018, c. 3, Sched. 5, s. 18 (but see 2019, c. 1, Sched. 3, s. 5); 2018, c. 8, Sched. 10; 2018, c. 16, s. 1, 2; 2018, c. 17, Sched. 14; 2019, c. 1, Sched. 4, s. 16; 2019, c. 6, Sched. 1, s. 1-5; 2019, c. 6, Sched. 3, s. 11; 2019, c. 14, Sched. 10, s. 6; 2020, c. 18, Sched. 6, s. 49; 2021, c. 2, Sched. 2, s. 10; 2021, c. 8, Sched. 3; 2021, c. 25, Sched. 5; 2021, c. 34, Sched. 9; 2022, c. 23, Sched. 1, s. 1-4; 2024, c. 26, Sched. 1, s. 1-6; 2024, c. 26, Sched. 3, s. 1; CTS 6 FE 25 - 1.

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PART I GENERAL

Purposes

1 The purposes of this Act include the following:

- (a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;
- (a.1) to establish a mechanism for energy planning;
- (a.2) to promote electrification and facilitate energy efficiency measures aimed at using electricity to reduce overall emissions in Ontario;
- (b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;
- (c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;
- (d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario;
- (e) to provide generators, retailers, market participants and consumers with non-discriminatory access to transmission and distribution systems in Ontario;
- (f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;
- (g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity;
- (g.1) to facilitate the alteration of ownership structures of publicly-owned corporations that transmit, distribute or retail electricity;
- (g.2) to facilitate the disposition, in whole or in part, of the Crown's interest in corporations that transmit, distribute or retail electricity, and to make the proceeds of any such disposition available to be appropriated for any Government of Ontario purpose;
- (h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;
- (i) to facilitate the maintenance of a financially viable electricity industry; and
- (j) to protect corridor land so that it remains available for uses that benefit the public, while recognizing the primacy of transmission uses. 2004, c. 23, Sched. A, s. 1; 2014, c. 7, Sched. 7, s. 1; 2015, c. 20, Sched. 9, s. 1; 2016, c. 10, Sched. 2, s. 1; 2024, c. 26, Sched. 1, s. 1.

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

O. Reg. 115/99, s. 1 - 01/04/1999

2002, c. 1, Sched. A, s. 1 - 27/06/2002; 2002, c. 23, s. 3 (1) - 09/12/2002

2004, c. 23, Sched. A, s. 1 - 01/01/2005

2014, c. 7, Sched. 7, s. 1 - 01/01/2015

2015, c. 20, Sched. 9, s. 1 - 04/06/2015

2016, c. 10, Sched. 2, s. 1 - 01/07/2016

2024, c. 26, Sched. 1, s. 1 - 04/12/2024

Interpretation

2 (1) In this Act,

“affiliate”, with respect to a corporation, has the same meaning as in the *Business Corporations Act*; (“membre du même groupe”)

“alternative energy source” means a source of energy,

(a) that is prescribed by the regulations or that satisfies criteria prescribed by the regulations, and

(b) that can be used to generate electricity through a process that is cleaner than certain other generation technologies in use in Ontario before June 1, 2004; (“source d’énergie de remplacement”)

“ancillary services” means services necessary to maintain the reliability of the IESO-controlled grid, including frequency control, voltage control, reactive power and operating reserve services; (“services accessoires”)

“Board” means the Ontario Energy Board; (“Commission”)

“charges” means, with respect to the IESO, amounts charged by the IESO, or by a predecessor within the meaning of section 4, to recover amounts paid or payable by the IESO or the predecessor to another person with respect to electricity; (“frais”)

“consumer” means a person who uses, for the person’s own consumption, electricity that the person did not generate; (“consommateur”)

“corridor land” means the real property transferred to Her Majesty in right of Ontario by section 114.2; (“biens-fonds réservés aux couloirs”)

“distribute”, with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less; (“distribuer”)

“distribution system” means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose; (“réseau de distribution”)

“distributor” means a person who owns or operates a distribution system; (“distributeur”)

“Electrical Safety Authority” means the person or body designated by the regulations as the Electrical Safety Authority; (“Office de la sécurité des installations électriques”)

“fees” means, with respect to the IESO, amounts charged by the IESO, or by a predecessor within the meaning of section 4, to recover its costs of operations; (“droits”)

“Financial Corporation” means Ontario Hydro Financial Corporation, as continued under Part V; (“Société financière”)

Note: Effective April 1, 1999, the name of the Ontario Hydro Financial Corporation has been changed by regulation to Ontario Electricity Financial Corporation in English and Société financière de l’industrie de l’électricité de l’Ontario in French. See: O. Reg. 115/99, s. 1.

“generate”, with respect to electricity, means to produce electricity or provide ancillary services, other than ancillary services provided by a transmitter or distributor through the operation of a transmission or distribution system; (“produire”)

“generation facility” means a facility for generating electricity or providing ancillary services, other than ancillary services provided by a transmitter or distributor through the operation of a transmission or distribution system, and includes any structures, equipment or other things used for that purpose; (“installation de production”)

“generator” means a person who owns or operates a generation facility; (“producteur”)

“Governance and Structure By-law” means the by-law maintained under subsection 22 (2); (“règlement de régie”)

“Hydro One Inc.” means the corporation incorporated as Ontario Hydro Services Company Inc. under the *Business Corporations Act* on December 1, 1998; (“Hydro One Inc.”)

“IESO” means the Independent Electricity System Operator continued under Part II; (“SIERE”)

“IESO-administered markets” means the markets established by the market rules; (“marchés administrés par la SIERE”)

“IESO-controlled grid” means the transmission systems with respect to which, pursuant to agreements, the IESO has authority to direct operations; (“réseau dirigé par la SIERE”)

“integrated power system” means the IESO-controlled grid and the structures, equipment and other things that connect the IESO-controlled grid with transmission systems and distribution systems in Ontario and transmission systems outside Ontario; (“réseau d’électricité intégré”)

“licence” means a licence issued under Part V of the *Ontario Energy Board Act, 1998*; (“permis”)

“market participant” means a person who is authorized by the market rules to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid; (“intervenant du marché”)

“market rules” means the rules made under section 32; (“règles du marché”)

“Market Surveillance Panel” means the Market Surveillance Panel continued under Part II of the *Ontario Energy Board Act, 1998*; (“comité de surveillance du marché”)

“Minister” means the Minister of Energy or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*; (“ministre”)

“Ontario Power Generation Inc.” means the corporation incorporated as Ontario Power Generation Inc. under the *Business Corporations Act* on December 1, 1998; (“Ontario Power Generation Inc.”)

“procurement contract” means a contract entered into by the IESO under section 25.32; (“contrat d’acquisition”)

“regulations” means the regulations made under this Act; (“règlements”)

“reliability standard” means a standard or criterion, including an amendment to a standard or criterion, relating to the reliable operation of the integrated power system that is approved by a standards authority; (“norme de fiabilité”)

“renewable energy generation facility” means a generation facility that generates electricity from a renewable energy source and that meets such criteria as may be prescribed by regulation and includes associated or ancillary equipment, systems and technologies as may be prescribed by regulation, but does not include an associated waste disposal site, unless the site is prescribed by regulation for the purposes of this definition; (“installation de production d’énergie renouvelable”)

“renewable energy project” means the construction, installation, use, operation, changing or retiring of a renewable energy generation facility; (“projet d’énergie renouvelable”)

“renewable energy source” means an energy source that is renewed by natural processes and includes wind, water, biomass, biogas, biofuel, solar energy, geothermal energy, tidal forces and such other energy sources as may be prescribed by the regulations, but only if the energy source satisfies such criteria as may be prescribed by the regulations for that energy source; (“source d’énergie renouvelable”)

“renewable energy testing facility” means devices or structures to be used to gather information about natural conditions at the location of the structures or devices and related infrastructure and that meet such criteria as may be prescribed by the regulations; (“installation d’évaluation du potentiel en énergie renouvelable”)

“renewable energy testing project” means the construction, installation, use, operation, changing or retiring of a renewable energy testing facility; (“projet d’évaluation du potentiel en énergie renouvelable”)

“retail”, with respect to electricity, means,

- (a) to sell or offer to sell electricity to a consumer,
- (b) to act as agent or broker for a retailer with respect to the sale or offering for sale of electricity, or
- (c) to act or offer to act as an agent or broker for a consumer with respect to the sale or offering for sale of electricity; (“vendre au détail”)

“retailer” means a person who retails electricity; (“détaillant”)

“security” has the meaning assigned by the *Securities Act*; (“valeur mobilière”)

“service area”, with respect to a distributor, means the area in which the distributor is authorized by its licence to distribute electricity; (“secteur de service”)

“smart grid” means the advanced information exchange systems and equipment described in subsection (1.3); (“réseau intelligent”)

“smart metering data” means data derived from smart meters, including data related to the consumers’ consumption of electricity; (“données des compteurs intelligents”)

“Smart Metering Entity” means the corporation incorporated, the limited partnership or the partnership formed or the entity designated pursuant to section 53.7 to accomplish the government’s smart metering initiative; (“Entité responsable des compteurs intelligents”)

“smart metering initiative” means those policies of the Government of Ontario related to its decision to ensure Ontario electricity consumers are provided, over time, with smart meters; (“initiative des compteurs intelligents”)

“standards authority” means the North American Electric Reliability Corporation or any successor thereof, or any other agency or body designated by regulation that approves standards or criteria applicable both in and outside Ontario relating to the reliability of transmission systems; (“organisme de normalisation”)

“subsidiary”, with respect to a corporation, has the same meaning as in the *Business Corporations Act*; (“filiale”)

“suite meter” has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; (“compteur individuel”)

“suite metering” has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; (“activités liées aux compteurs individuels”)

“suite meter provider” has the same meaning as in Part III of the *Energy Consumer Protection Act, 2010*; (“fournisseur de compteurs individuels”)

“transmission system” means a system for transmitting electricity, and includes any structures, equipment or other things used for that purpose; (“réseau de transport”)

“transmit”, with respect to electricity, means to convey electricity at voltages of more than 50 kilovolts; (“transporter”)

“transmitter” means a person who owns or operates a transmission system; (“transporteur”)

“voting security” has the same meaning as in the *Business Corporations Act*; (“valeur mobilière avec droit de vote”)

“waste disposal site” has the same meaning as in section 25 of the *Environmental Protection Act*. (“lieu d’élimination des déchets”) 1998, c. 15, Sched. A, s. 2 (1); 2002, c. 1, Sched. A, s. 2 (1-6); 2002, c. 23, s. 3 (2); 2004, c. 23, Sched. A, s. 2 (1-10); 2006, c. 3, Sched. B, s. 1; 2008, c. 7, Sched. G, s. 1; 2009, c. 12, Sched. B, s. 1 (1-4); 2010, c. 8, s. 37 (1); 2011, c. 9, Sched. 27, s. 23 (1); 2014, c. 7, Sched. 7, s. 2 (1-5); 2016, c. 10, Sched. 2, s. 2 (1); 2018, c. 16, s. 1; 2019, c. 6, Sched. 1, s. 1; 2022, c. 23, Sched. 1, s. 1.

Alternative energy source, exception

(1.1) Despite the definition of “alternative energy source” in subsection (1), an energy source is not an alternative energy source for the purposes of this Act in respect of a particular generation facility or unit if criteria prescribed by the regulations relating to the generation of electricity from the energy source are not satisfied. 2004, c. 23, Sched. A, s. 2 (11).

Renewable energy source, exception

(1.2) Despite the definition of “renewable energy source” in subsection (1), an energy source is not a renewable energy source for the purposes of this Act in respect of a particular generation facility or unit if criteria prescribed by the regulations relating to the generation of electricity from the energy source are not satisfied. 2004, c. 23, Sched. A, s. 2 (12).

Smart grid

(1.3) For the purposes of this Act, the smart grid means the advanced information exchange systems and equipment that when utilized together improve the flexibility, security, reliability, efficiency and safety of the integrated power system and distribution systems, particularly for the purposes of,

- (a) enabling the increased use of renewable energy sources and technology, including generation facilities connected to the distribution system;
- (b) expanding opportunities to provide demand response, price information and load control to electricity customers;
- (c) accommodating the use of emerging, innovative and energy-saving technologies and system control applications; or
- (d) supporting other objectives that may be prescribed by regulation. 2009, c. 12, Sched. B, s. 1 (5).

Procurement contracts, transition

(1.5) For the purposes of this Act, a procurement contract is deemed to include,

- (a) a contract entered into or assumed, pursuant to section 25.32, before the day section 7 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016* comes into force; and
- (b) a contract entered into, pursuant to section 25.35, before its repeal by section 8 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016*. 2016, c. 10, Sched. 2, s. 2 (2).

Procurement contracts, exceptions

(1.6) A transaction, arrangement or agreement entered into by the IESO based on the market rules is deemed not to be a procurement contract for the purposes of this Act. 2014, c. 7, Sched. 7, s. 2 (6).

Determinations of Board

(2) The definitions of “distribute”, “distribution system”, “distributor”, “transmission system”, “transmit” and “transmitter” in subsection (1) are subject to any determination made under section 84 of the *Ontario Energy Board Act, 1998*. 1998, c. 15, Sched. A, s. 2 (2).

References to Ontario Hydro

(3) Subject to the regulations, a reference in this or any other Act or in the regulations made under this or any other Act to Ontario Hydro shall be deemed, after section 54 comes into force, to be a reference to the Financial Corporation, unless the context requires otherwise. 1998, c. 15, Sched. A, s. 2 (3).

References to Financial Corporation

(4) A reference in this or any other Act or in the regulations made under this or any other Act to the Financial Corporation shall be deemed, before section 54 comes into force, to be a reference to Ontario Hydro, unless the context requires otherwise. 1998, c. 15, Sched. A, s. 2 (4).

References to Generation Corporation

(5) A reference to the Generation Corporation in the regulations made under this or any other Act, an order made under Part X or a statement made under section 124 shall be deemed to be a reference to Ontario Power Generation Inc. 2002, c. 1, Sched. A, s. 2 (7).

References to Services Corporation

(6) A reference to the Services Corporation in the regulations made under this or any other Act, an order made under Part X or a statement made under section 124 shall be deemed to be a reference to Hydro One Inc. 2002, c. 1, Sched. A, s. 2 (7).

References to Independent Electricity Market Operator

- (7) A reference in a statement mentioned in section 124 or in a regulation, order or rule made under this or any other Act,
- (a) to the Independent Electricity Market Operator shall be deemed to be a reference to the Independent Electricity System Operator, unless the context requires otherwise, and to the IMO shall be deemed to be a reference to the IESO, unless the context requires otherwise;
 - (b) to the IMO-administered markets shall be deemed to be a reference to the IESO-administered markets;
 - (c) to the IMO-controlled grid shall be deemed to be a reference to the IESO-controlled grid; and
 - (d) to the Ontario Power Authority or the OPA is deemed to be a reference to the Independent Electricity System Operator as continued under this Act unless the context requires otherwise. 2004, c. 23, Sched. A, s. 2 (13); 2007, c. 13, s. 42; 2014, c. 7, Sched. 7, s. 2 (7).

Corporations Tax Act references

(8) Any reference to the *Corporations Tax Act* in this Act shall be deemed to be a reference to that Act as it applied to corporations for taxation years under that Act ending on or before December 31, 2008. 2008, c. 19, Sched. V, s. 3.

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

O. Reg. 115/99, s. 1 - 01/04/1999

2002, c. 1, Sched. A, s. 2 (1-7) - 27/06/2002; 2002, c. 23, s. 3 (2) - 09/12/2002

2004, c. 23, Sched. A, s. 2 (1, 2, 4-7, 9-13) - 01/01/2005; 2004, c. 23, Sched. A, s. 2 (3, 8) - 20/12/2004

2006, c. 3, Sched. B, s. 1 - 03/05/2006

2007, c. 13, s. 42 - 04/06/2007

2008, c. 7, Sched. G, s. 1 (1, 2) - 14/05/2008; 2008, c. 19, Sched. V, s. 3 - 01/01/2009

2009, c. 12, Sched. B, s. 1 (1-5) - 09/09/2009

2010, c. 8, s. 37 (1) - 01/01/2011; 2010, c. 8, s. 37 (2) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2020

2011, c. 9, Sched. 27, s. 23 (1) - 06/06/2011

2014, c. 7, Sched. 7, s. 2 (1-7) - 01/01/2015

2016, c. 10, Sched. 2, s. 2 (1, 2) - 01/07/2016

2018, c. 16, s. 1 (1-3) - 01/01/2019

2019, c. 6, Sched. 1, s. 1 - 09/05/2019

2022, c. 23, Sched. 1, s. 1 - 15/03/2023

Municipal Act, 2001

3 (1) This Act applies despite the provisions of the *Municipal Act, 2001* relating to the production, manufacture, distribution or supply of a public utility by a municipality or a municipal service board. 1998, c. 15, Sched. A, s. 3; 2002, c. 17, Sched. F, Table.

City of Toronto Act, 2006

(2) This Act applies despite the provisions of the *City of Toronto Act, 2006* relating to the production, manufacture, distribution or supply of a public utility by the City or by a city board as defined in subsection 3 (1) of that Act. 2006, c. 11, Sched. B, s. 4 (1).

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

2002, c. 17, Sched. F, Table - 01/01/2003

2006, c. 11, Sched. B, s. 4 (1) - 01/01/2007

Minister's advisory committee

3.1 (1) The Minister shall establish an advisory committee to provide advice to the Minister on such matters relating to electricity as the Minister may specify. 2004, c. 23, Sched. A, s. 3.

Appointment

(2) The Minister shall appoint the members of the advisory committee. 2004, c. 23, Sched. A, s. 3.

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

2004, c. 23, Sched. A, s. 3 - 01/01/2005

PART II INDEPENDENT ELECTRICITY SYSTEM OPERATOR

Definitions

4 In this Part,

“Independent Electricity System Operator” means, unless the context requires otherwise, the corporation continued under subsection 5 (1); (“Société indépendante d’exploitation du réseau d’électricité”)

“Ontario Power Authority” means the corporation established under subsection 25.1 (1) as that subsection read immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force and “OPA” has a corresponding meaning; (“Office de l’électricité de l’Ontario”, “OEO”)

“predecessor” means either the predecessor Independent Electricity System Operator or the Ontario Power Authority; (“entité remplacée”)

“predecessor Independent Electricity System Operator” means the Independent Electricity System Operator as the corporation was continued under subsection 4 (1) as that subsection read immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force. (“ancienne Société indépendante d’exploitation du réseau d’électricité”) 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 4 (1, 2) - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Amalgamation of IESO and OPA

5 (1) The predecessor Independent Electricity System Operator and the Ontario Power Authority are amalgamated and shall continue as one corporation without share capital in accordance with this Part. 2014, c. 7, Sched. 7, s. 3 (1).

Name of corporation

(2) The name of the corporation formed under subsection (1) is the Independent Electricity System Operator in English and Société indépendante d'exploitation du réseau d'électricité in French. 2014, c. 7, Sched. 7, s. 3 (1).

Composition

(3) The IESO is composed of the members of its board of directors. 2014, c. 7, Sched. 7, s. 3 (1).

Separation of functions

(4) The board of directors shall take such steps as it considers advisable and appropriate to ensure that there is an effective separation of functions and activities of the IESO relating to,

- (a) its market operations; and
- (b) its procurement and contract management activities. 2014, c. 7, Sched. 7, s. 3 (1).

Prohibition

(5) The IESO shall not conduct the operations of the IESO-administered markets in any manner that,

- (a) unjustly advantages or disadvantages any market participant or class of market participants; or
- (b) is inconsistent with this Act. 2014, c. 7, Sched. 7, s. 3 (1).

Transmission-related information

(6) The IESO shall provide transmission-related information on an equal basis and in the same manner to all market participants. 2014, c. 7, Sched. 7, s. 3 (1).

Confidentiality

(7) The board of directors shall ensure that appropriate procedures are established and maintained so that confidential information that is in the possession or control of any officers or employees of the IESO, or any agent or third party working on its behalf, is not inappropriately communicated. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 5 (1-3) - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Objects

6 (1) The objects of the IESO are,

- (a) to exercise the powers and perform the duties assigned to it under this Act, the regulations, directions, the market rules and its licence;
- (b) to enter into agreements with transmitters to give it authority to direct the operation of their transmission systems;
- (c) to direct the operation and maintain the reliability of the IESO-controlled grid to promote the purposes of this Act;
- (d) to participate in the development by any standards authority of criteria and standards relating to the reliability of the integrated power system;
- (e) to establish and enforce criteria and standards relating to the reliability of the integrated power system;
- (f) to work with the responsible authorities outside of Ontario to co-ordinate the IESO's activities with the activities of those authorities;
- (g) to operate the IESO-administered markets to promote the purposes of this Act;
- (h) to engage in activities related to contracting for the procurement of electricity supply, electricity capacity, electricity storage, transmission systems or any part of such systems and conservation resources;
- (i) to engage in activities related to settlements, payments under a contract entered into under the authority of this Act and payments provided for under this Act or the *Ontario Energy Board Act, 1998*;

- (j) to engage in activities in support of the goal of ensuring adequate, reliable and secure electricity supply and resources in Ontario;
- (k) to forecast electricity demand and the adequacy and reliability of electricity resources for Ontario for the short term, medium term and long term;
- (l) to conduct independent planning for electricity generation, demand management, conservation and transmission;
- (m) to engage in activities to facilitate the diversification of sources of electricity supply by promoting the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources;
- (n) to engage in activities in support of system-wide goals for the amount of electricity to be produced from different energy sources;
- (o) to engage in activities that facilitate load management;
- (p) to engage in activities that promote electricity conservation and the efficient use of electricity;
- (p.1) to engage in activities that promote electrification and facilitate energy efficiency measures aimed at using electricity to reduce overall emissions in Ontario;
- (q) to assist the Board by facilitating stability in rates for certain types of consumers;
- (q.1) to exercise the powers and rights and to perform the duties and obligations assigned to it under the *Ontario Fair Hydro Plan Act, 2017* and to engage in activities to facilitate the implementation of the *Ontario Fair Hydro Plan Act, 2017*, including,
 - (i) entering into agreements or arrangements with any person for the purposes of the *Ontario Fair Hydro Plan Act, 2017*,
 - (ii) engaging in activities related to making payments to and receiving payments as contemplated under the *Ontario Fair Hydro Plan Act, 2017* and related settlement activities;
 - (iii) REPEALED: 2019, c. 6, Sched. 3, s. 11 (1).
- (r) to collect and make public information relating to the short term, medium term and long term electricity needs of Ontario and the adequacy and reliability of the integrated power system to meet those needs; and
- (s) to engage in such other objects as may be prescribed by the regulations. 2014, c. 7, Sched. 7, s. 3 (1); 2016, c. 10, Sched. 2, s. 3; 2017, c. 16, Sched. 1, s. 43 (1); 2019, c. 6, Sched. 3, s. 11 (1); 2024, c. 26, Sched. 1, s. 2.

Not for profit

(2) The business and affairs of the IESO shall be carried on without the purpose of gain and any profits shall be used by the IESO for the purpose of carrying out its objects. 2014, c. 7, Sched. 7, s. 3 (1).

Capacity

(3) The IESO has the capacity, rights, powers and privileges of a natural person for the purpose of carrying out its objects, except as otherwise limited by this Act. 2014, c. 7, Sched. 7, s. 3 (1).

Limitation on powers, financial

(4) The IESO's powers to borrow, to invest its funds and to manage its financial assets, liabilities and risks are subject to such rules and restrictions as may be prescribed by the regulations. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 6 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2016, c. 10, Sched. 2, s. 3 - 01/07/2016

2017, c. 16, Sched. 1, s. 43 (1) - 01/06/2017

2019, c. 6, Sched. 3, s. 11 (1) - 01/11/2019

2024, c. 26, Sched. 1, s. 2 - 04/12/2024

Dissolution

7 If the IESO is dissolved, any property of the IESO remaining after the payment of all of its debts and liabilities is vested in the Crown in right of Ontario. 2014, c. 7, Sched. 7, s. 3 (1).

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

2001, c. 9, Sched. F, s. 1 (1) - 08/08/2001

2004, c. 23, Sched. A, s. 7 - 05/02/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Not Crown agent

8 The IESO is not an agent of the Crown for any purpose, despite the *Crown Agency Act*. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 8 (1, 2) - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Obligation to provide information in French

9 (1) The IESO shall make information that is directed to the general public available in French, including information with respect to programs, services and general communications. 2014, c. 7, Sched. 7, s. 3 (1).

Board to ensure compliance

(2) The IESO's board of directors shall take all reasonable measures and make all reasonable plans to ensure that the obligation placed on the IESO to make information directed to the general public available in French is met. 2014, c. 7, Sched. 7, s. 3 (1).

Limitation, general

(3) The IESO's obligation to make information available in French is subject to the limits that are reasonable in the circumstances. 2014, c. 7, Sched. 7, s. 3 (1).

Limitations, rules, manuals, etc.

(4) The IESO's obligation to make information available in French does not apply to the following:

1. Rules, manuals, standards, procedures or communications relating to the operation of the IESO-administered markets or the IESO-controlled grid.
2. Rules, contracts or other program information related to the procurement of,
 - i. electricity supply, capacity or storage,
 - ii. changes in electricity demand,
 - iii. measures related to the conservation of electricity,
 - iv. the management of electricity demand, or
 - v. transmission systems or any part of such systems.
3. Registry rules made under Part II.1. 2014, c. 7, Sched. 7, s. 3 (1); 2016, c. 10, Sched. 2, s. 4 (1, 2); 2022, c. 23, Sched. 1, s. 2.

Application to microFIT program, etc.

(5) The exception in paragraph 2 of subsection (4) does not apply to information with respect to,

- (a) the microFIT Program; and
- (b) the rights and obligations of low-volume consumers under a conservation or demand management program. 2014, c. 7, Sched. 7, s. 3 (1).

Definitions

(6) In this section,

“low-volume consumer” has the same meaning as in section 56 of the *Ontario Energy Board Act, 1998*, as the definition reads on the day subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force; (“petit consommateur”)

“microFIT Program” means the micro Feed-in Tariff Program that is continued under subsection 25.32 (10) and that permits certain consumers of electricity to develop very small renewable energy projects. (“Programme de TRG pour les micro-projets”) 2014, c. 7, Sched. 7, s. 3 (1); 2016, c. 10, Sched. 2, s. 4 (3).

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

2004, c. 23, Sched. A, s. 9 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2016, c. 10, Sched. 2, s. 4 (1-3) - 01/07/2016

2022, c. 23, Sched. 1, s. 2 - 15/03/2023

Board of directors

10 (1) The IESO’s board of directors shall manage and supervise the management of the IESO’s business and affairs. 2014, c. 7, Sched. 7, s. 3 (1).

Composition

(2) The board of directors shall be composed of,

(a) the chief executive officer of the IESO; and

(b) at least eight and not more than 10 additional individuals appointed by the Minister. 2014, c. 7, Sched. 7, s. 3 (1).

Directors to be independent

(3) Each director shall hold office as an independent director and not as a representative of any class of persons. 2014, c. 7, Sched. 7, s. 3 (1).

Restriction on persons who may be directors

(4) For the purposes of clause (2) (b), no person who is a member of a class of persons prescribed by the regulations may hold office as a director of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Term of office and appointment

(5) A director appointed in accordance with clause (2) (b) shall hold office at pleasure for an initial term not exceeding two years and, subject to subsection (4), may be reappointed for successive terms not exceeding two years each. 2014, c. 7, Sched. 7, s. 3 (1).

Quorum

(6) A majority of the members of the board of directors constitutes a quorum of the board. 2014, c. 7, Sched. 7, s. 3 (1).

Chair

(7) The board of directors shall appoint one of its members as chair of the board. 2014, c. 7, Sched. 7, s. 3 (1).

Ceasing to hold office

(8) A director ceases to hold office in the circumstances specified in the Governance and Structure By-law. 2014, c. 7, Sched. 7, s. 3 (1).

Vacancy on board

(9) If there are one or more vacancies on the board of directors, the remaining directors may exercise all the powers of the board if they would constitute a quorum of the board, if there were no vacancies. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 10 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Chief executive officer

11 The board of directors shall appoint a chief executive officer of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 11 (1, 2) - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Director's duties

12 Every director of the IESO shall, in exercising and performing his or her powers and duties as a director,

- (a) act honestly and in good faith in the best interests of the IESO; and
 - (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 12 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Conflict of interest

13 The directors, officers, employees and agents of the IESO shall comply with any provisions relating to conflict of interest contained in the Governance and Structure By-law or any procedures, rules or codes established pursuant to the By-law. 2014, c. 7, Sched. 7, s. 3 (1).

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

2002, c. 1, Sched. A, s. 3 - 27/06/2002

2004, c. 23, Sched. A, s. 13 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

13.1-13.2 REPEALED: 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 14 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Board may establish policies, rules, etc.

14 (1) The board of directors may establish policies, rules, guidelines and codes, including codes of conduct, applicable to the directors, officers, employees and agents of the IESO and to members of panels established by the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Conflict

(2) Any provision of a policy, rule, guideline or code that conflicts with this Act, the regulations or the IESO's by-laws is void. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 15 (1, 2) - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

14.1 REPEALED: 2014, c. 7, Sched. 7, s. 3 (1).

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

2002, c. 1, Sched. A, s. 4 - 27/06/2002

2004, c. 23, Sched. A, s. 16 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Delegation of board's powers

15 (1) The board of directors may, in accordance with the Governance and Structure By-law,

- (a) delegate any of its powers or duties to a committee of the board or a panel established by the board or to one or more directors; and

- (b) delegate any of its powers to manage the business and affairs of the IESO to one or more officers of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Terms, conditions and restrictions

- (2) A delegation under subsection (1) is subject to any terms, conditions and restrictions set out in the delegation. 2014, c. 7, Sched. 7, s. 3 (1).

Same

- (3) A delegation under subsection (1) may be general or specific. 2014, c. 7, Sched. 7, s. 3 (1).

Exceptions

- (4) The board of directors shall not delegate its power to make by-laws or to approve the financial statements or annual reports of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 17 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Panels

- 16** (1) The board of directors may establish such panels as the board considers necessary for the purposes of this Act. 2014, c. 7, Sched. 7, s. 3 (1).

Testimony

- (2) A member of a panel established for the purpose of resolving or attempting to resolve a dispute between market participants, or a dispute between one or more market participants and the IESO, shall not be required in any civil proceeding to give testimony with respect to information obtained in the course of resolving or attempting to resolve the dispute. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 18 (1-6) - 01/01/2005

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Staff and assistance re panels

- 17** Subject to the by-laws of the IESO, a panel established by the board of directors may use the services of,

- (a) the IESO's employees, with the consent of the IESO; and
- (b) persons other than the IESO's employees who have technical or professional expertise that is considered necessary. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 19 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Stakeholder input

- 18** (1) The IESO shall establish one or more processes by which consumers, distributors, generators, transmitters and other persons who have an interest in the electricity industry may provide advice and recommendations for consideration by the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Same, direction by Minister

- (2) The Minister may direct the IESO to establish specific processes under subsection (1) and the IESO shall comply with such a direction. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 20 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Liability

19 (1) No action or other civil proceeding shall be commenced against a director, officer, employee or agent of the IESO or a member of a committee or panel established by the board of directors of the IESO for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under any Act, the regulations under any Act, the IESO's licence, the IESO's by-laws or the market rules, or for any neglect or default in the exercise or performance in good faith of such a power or duty. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(2) Subsection (1) does not relieve the IESO of any liability to which it would otherwise be subject in respect of a cause of action arising from any act, neglect or default referred to in subsection (1). 2014, c. 7, Sched. 7, s. 3 (1).

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

2002, c. 23, s. 3 (3, 5) - 09/12/2002; 2002, c. 23, s. 3 (4, 6) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2012

2004, c. 23, Sched. A, s. 21 - 01/01/2005

2009, c. 33, Sched. 14, s. 2 (1) - 15/12/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

19.1 REPEALED: 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 22 - 01/01/2005

2009, c. 33, Sched. 14, s. 2 (2) - 15/12/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Confidential information relating to market participants

20 (1) A record that contains information provided to or obtained by the IESO or a predecessor relating to a market participant and that is designated by the head of the IESO as confidential or highly confidential is deemed for the purpose of section 17 of the *Freedom of Information and Protection of Privacy Act* to be a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, the disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. 2014, c. 7, Sched. 7, s. 3 (1).

Definition

(2) In this section,

“head” means the person designated as the head of the IESO in the regulations made under the *Freedom of Information and Protection of Privacy Act*. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 8, s. 46, Table - 01/11/2005; 2004, c. 23, Sched. A, s. 23 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

20.1 REPEALED: 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 24 - 01/01/2005

2008, c. 7, Sched. G, s. 2 - 14/05/2008

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Liability of directors under the *Employment Standards Act, 2000*

21 Part XX of the *Employment Standards Act, 2000* does not apply to a director of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 25 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

By-laws

22 (1) The board of directors of the IESO may make by-laws regulating the business and affairs of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Governance and Structure By-law

(2) The board of directors shall ensure that it maintains a by-law dealing with matters of corporate governance and structure, including,

- (a) the appointment of the chief executive officer of the IESO;
- (b) the circumstances in which a director ceases to hold office;
- (c) the remuneration and benefits of the chair and the other members of the board;
- (d) conflict of interest;
- (e) the delegation of the IESO's powers and duties;
- (f) the establishment, composition and functions of panels;
- (g) such other matters as are prescribed by regulation or as are appropriate to the governance and structure of the corporation. 2014, c. 7, Sched. 7, s. 3 (1).

Amendment or repeal of Governance and Structure By-law

(3) A by-law that amends or repeals the Governance and Structure By-law shall be filed with the Minister by the board of directors. 2014, c. 7, Sched. 7, s. 3 (1).

Disallowance

(4) The Minister may disallow a by-law to which subsection (3) applies by written notice to the board of directors given within 60 days after the by-law is filed with the Minister. 2014, c. 7, Sched. 7, s. 3 (1).

Effective date

(5) A by-law to which subsection (3) does not apply comes into force on the day it is made or on such later date as may be specified in the by-law. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(6) Subject to subsections (4) and (7), a by-law to which subsection (3) applies comes into force on the earlier of the following dates:

1. The expiry of the 60-day period referred to in subsection (4).
2. The day on which the Minister notifies the board of directors in writing that he or she will not disallow the by-law. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(7) Subject to subsection (4), a by-law to which subsection (3) applies may specify that it comes into force on a day later than the day determined under subsection (6). 2014, c. 7, Sched. 7, s. 3 (1).

Conflict between by-laws

(8) In the event of a conflict between the Governance and Structure By-law and another by-law, the Governance and Structure By-law prevails. 2014, c. 7, Sched. 7, s. 3 (1).

Legislation Act, 2006, Part III

(9) Part III (Regulations) of the *Legislation Act, 2006* does not apply to by-laws made under this section. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 26 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Province may purchase securities, etc.

23 (1) The Lieutenant Governor in Council may by order authorize the Minister of Finance to purchase securities of or make loans to the IESO in the amounts, at the times and on the terms and conditions as the Minister of Finance may determine

subject to the maximum principal amount specified by the Lieutenant Governor in Council that may be purchased or advanced or that may be outstanding at any time and subject to any other terms and conditions that are specified by the Lieutenant Governor in Council. 2014, c. 7, Sched. 7, s. 3 (1).

Payment from C.R.F.

(2) The Minister of Finance may pay out of the Consolidated Revenue Fund any amount required for the purposes of subsection (1). 2014, c. 7, Sched. 7, s. 3 (1).

Delegation

(3) In an order under subsection (1), the Lieutenant Governor in Council may delegate any or all of the powers of the Minister of Finance under this section to,

- (a) a public servant employed under Part III of the *Public Service of Ontario Act, 2006* who works in the Ministry of Finance, other than in the office of the Minister of Finance;
- (b) the chief executive officer of the Ontario Financing Authority;
- (c) a public servant employed under Part III of the *Public Service of Ontario Act, 2006* who works in the Ontario Financing Authority;
- (d) a solicitor engaged to act for the Minister of Finance; or
- (e) a solicitor engaged to act for the Ontario Financing Authority. 2014, c. 7, Sched. 7, s. 3 (1).

Fees payable to Minister of Finance

(4) The IESO shall pay to the Minister of Finance such fees as are prescribed by the regulations in respect of securities purchased and sums loaned under this section. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 27 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Business plan

24 (1) At least 120 days before the beginning of each fiscal year, the IESO shall submit its proposed business plan for the fiscal year to the Minister for approval. 2014, c. 7, Sched. 7, s. 3 (1).

Minister's approval

(2) The Minister may approve the proposed business plan or refer it back to the IESO for further consideration. 2014, c. 7, Sched. 7, s. 3 (1).

Transition, business plan

(3) Despite subsection (1) and when requested to do so by the Minister, the IESO shall submit a business plan in respect of its first full or partial fiscal year that occurs after subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force within 30 days after the Minister requests the plan and the Minister may approve the proposed business plan or refer it back to the IESO for further consideration. 2014, c. 7, Sched. 7, s. 3 (1).

Transition, Minister's discretion

(4) The Minister shall exercise his or her discretion to request that the IESO submit a business plan under subsection (3), solely where, in the Minister's opinion, there is insufficient time for the IESO to comply with subsection (1). 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 28 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Review of requirements and fees

25 (1) The IESO shall, at least 60 days before the beginning of each fiscal year, submit its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review, but shall not do so until after the Minister approves the IESO's proposed business plan for the fiscal year under section 24. 2014, c. 7, Sched. 7, s. 3 (1).

Previous fees continued

(2) Until the Board approves the proposed expenditure and revenue requirements for the fiscal year and the fees the IESO proposes to charge during the fiscal year, the fees approved for the previous fiscal year remain in effect unless the Board orders otherwise. 2014, c. 7, Sched. 7, s. 3 (1).

Exception

(3) Where the IESO is unable to make its submission under subsection (1) within the time required under that subsection, the IESO shall file its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review as soon as possible after the Minister has approved its business plan under section 24. 2014, c. 7, Sched. 7, s. 3 (1).

Board's powers

(4) The Board may approve the proposed expenditure and revenue requirements and the proposed fees or may refer them back to the IESO for further consideration with the Board's recommendations. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(5) In reviewing the IESO's proposed expenditure and revenue requirements and proposed fees, the Board shall not take into consideration the remuneration and benefits of the chair and other members of the board of directors of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Changes in fees

(6) The IESO shall not, without the approval of the Board,

(a) establish, eliminate or change any fees it has established; or

(b) eliminate or change any fees established by a predecessor that remain in effect. 2014, c. 7, Sched. 7, s. 3 (1).

Hearing

(7) The Board may hold a hearing before exercising its powers under this section, but is not required to do so. 2014, c. 7, Sched. 7, s. 3 (1).

Transition, initial fiscal year

(8) Despite subsection (1), the IESO shall submit its proposed expenditure and revenue requirements for its first full or partial fiscal year that occurs after subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force and the fees it proposes to charge during that full or partial fiscal year to the Board for review not later than 30 days after the Minister approves the IESO's proposed business plan for that full or partial fiscal year under subsection 24 (3), but shall not submit its proposed expenditure and revenue requirements until after the Minister approves the proposed business plan. 2014, c. 7, Sched. 7, s. 3 (1).

Transition, fees

(9) Until the Board approves the proposed expenditure and revenue requirements for the IESO's first full or partial fiscal year that occurs after subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force and the fees the IESO proposes to charge during that full or partial fiscal year, the IESO shall continue to charge the fees that were approved by the Board and that applied to its predecessors immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force. 2014, c. 7, Sched. 7, s. 3 (1).

Transition, orders

(10) For greater certainty, the Board's orders relating to the predecessors' expenditure and revenue requirements and fees for their fiscal year that applied immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force continue to be in effect until the Board approves the first expenditure and revenue requirement and fees for the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 28 - 01/01/2005

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Fees

25.1 (1) The IESO may establish and charge fees to recover,

- (a) the costs of anything done in connection with the IESO-controlled grid or the IESO-administered markets;
- (b) the costs of doing anything the IESO is required or permitted to do under this or any other Act; and
- (c) any other type of expenditure the recovery of which is permitted by the regulations, subject to any limitations and restrictions set out in the regulations. 2014, c. 7, Sched. 7, s. 3 (1).

May recover costs of procurement contracts

(2) For greater certainty, the IESO may, subject to the regulations, establish and impose charges to recover from consumers its costs and payments related to procurement contracts. 2014, c. 7, Sched. 7, s. 3 (1).

Board deemed to approve recovery

(3) The IESO's recovery of its costs and payments related to procurement contracts is deemed to be approved by the Board. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Auditor

25.2 (1) The board of directors of the IESO shall appoint one or more auditors licensed under the *Public Accounting Act, 2004* to audit annually the accounts and transactions of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Auditor General

(2) The Auditor General may audit the accounts and transactions of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2009, c. 12, Sched. B, s. 2 - 09/09/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Annual report

25.3 (1) The IESO shall, within 90 days after the end of every fiscal year, submit to the Minister an annual report on its affairs during that fiscal year, signed by the chair of its board of directors. 2014, c. 7, Sched. 7, s. 3 (1).

Financial statements

(2) The audited financial statements of the IESO shall be included in the annual report. 2014, c. 7, Sched. 7, s. 3 (1).

Tabling

(3) The Minister shall submit the annual report to the Lieutenant Governor in Council and shall then table the report before the Assembly if it is in session or, if not, deposit the report with the Clerk of the Assembly. 2014, c. 7, Sched. 7, s. 3 (1).

Other persons

(4) The IESO may give its annual report to other persons before the Minister complies with subsection (3). 2014, c. 7, Sched. 7, s. 3 (1).

Transition, annual reports

(5) The board of directors shall prepare and deliver the annual report for the last fiscal year of each of the predecessor Independent Electricity System Operator and the Ontario Power Authority within 90 days after the day subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Other reports

25.4 (1) The IESO shall submit to the Minister such reports and information as the Minister may require from time to time and shall, if required by the Minister to do so, examine, report and advise on any question respecting electricity. 2014, c. 7, Sched. 7, s. 3 (1); 2016, c. 10, Sched. 2, s. 5.

Same

(2) The IESO shall submit to the Minister of Finance such reports and information as the Minister of Finance may require from time to time. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2016, c. 10, Sched. 2, s. 5 - 01/07/2016

Information to Board, etc.

25.5 (1) The IESO shall provide the Board and the Market Surveillance Panel with such information as the Board or Panel may require from time to time. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(2) Without limiting the generality of subsection (1), the IESO shall provide the Board and the Market Surveillance Panel with such information relating to any actual or potential conflict of interest related to the actions, operations or functions of the IESO as the Board or Panel may require from time to time. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Application of corporations statutes

25.6 Except as otherwise provided by the regulations, the *Business Corporations Act*, the *Not-for-Profit Corporations Act*, 2010 and the *Corporations Information Act* do not apply to the IESO. 2014, c. 7, Sched. 7, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015; 2014, c. 7, Sched. 7, s. 3 (2) - 19/10/2021

Statutory Powers Procedure Act

25.7 The *Statutory Powers Procedure Act* does not apply to a proceeding before the IESO, its board of directors or any committee, panel, person or body to which a power or duty has been delegated under this Part. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

TRANSITIONAL MATTERS

Transition, corporate matters

25.8 (1) The following occur when subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures)*, 2014 comes into force:

1. The predecessor Independent Electricity System Operator and the Ontario Power Authority cease to exist as entities separate from the IESO.
2. All rights, property and assets that belong to the predecessor Independent Electricity System Operator and the Ontario Power Authority immediately before the subsection comes into force become the rights, property and assets of the IESO.

3. All outstanding debts, liabilities and obligations of the predecessor Independent Electricity System Operator and the Ontario Power Authority immediately before the subsection comes into force become the debts, liabilities and obligations of the IESO.
4. The members of the boards of directors of the predecessor Independent Electricity System Operator and the Ontario Power Authority holding office immediately before the subsection comes into force cease to be members of their respective board of directors when the subsection comes into force, but nothing in this paragraph prevents them from being appointed to the board of directors of the IESO.
5. An individual who ceases to hold office as director by reason of paragraph 4 has no right of recourse against the Crown or any person.
6. The by-laws of the predecessor Independent Electricity System Operator in effect immediately before the subsection comes into force become the by-laws of the IESO.
7. Any licence issued by the Board to the predecessor Independent Electricity System Operator or the Ontario Power Authority in effect immediately before the subsection comes into force is deemed to be a licence issued by the Board to the IESO and remains in effect until amended or revoked.
8. An agreement, security, licence, approval, permit or other instrument to which the predecessor Independent Electricity System Operator or the Ontario Power Authority is a party immediately before the subsection comes into force has effect after the subsection comes into force as if,
 - i. the IESO were substituted for the predecessor Independent Electricity System Operator or the Ontario Power Authority, as the case requires, as a party to the agreement, security, licence, approval, permit or other instrument, and
 - ii. any reference in the agreement, security, licence, approval, permit or other instrument to the predecessor Independent Electricity System Operator or the Ontario Power Authority were a reference to the IESO.
9. The IESO is a party to each on-going proceeding to which the predecessor Independent Electricity System Operator or the Ontario Power Authority is a party immediately before the subsection comes into force, replacing the predecessor Independent Electricity System Operator or the Ontario Power Authority, as the case may be.
10. Any direction issued by the Minister under section 25.32 or 25.35, as those provisions read immediately before the subsection comes into force, remains in full force and in effect in respect of the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

Same, par. 3 of subs. (1)

(2) The operation of paragraph 3 of subsection (1),

- (a) does not constitute a breach, termination or repudiation of the debt, liability or obligation or the frustration of any agreement related to the debt, liability or obligation or an event of default or force majeure; and
- (b) does not constitute or give rise to any estoppel or any right to terminate or repudiate an agreement related to the debt, liability or obligation. 2014, c. 7, Sched. 7, s. 3 (1).

Same, par. 8 of subs. (1)

(3) The operation of paragraph 8 of subsection (1),

- (a) does not constitute a breach, termination or repudiation of the agreement, security, licence, approval, permit or other instrument or the frustration of the agreement or an event of default or force majeure; and
- (b) does not constitute or give rise to any estoppel or any right to terminate or repudiate an agreement, security, licence, approval, permit or other instrument. 2014, c. 7, Sched. 7, s. 3 (1).

Same, references

(4) A reference to the predecessor Independent Electricity System Operator or the Ontario Power Authority in any by-law, resolution, agreement or other document shall be read as if it were a reference to the IESO. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Transition, employment matters

25.9 (1) All individuals who were employees of the predecessor Independent Electricity System Operator or the Ontario Power Authority immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force become employees of the IESO when the subsection comes into force. 2014, c. 7, Sched. 7, s. 3 (1).

Agreements

(2) All employment agreements to which the predecessor Independent Electricity System Operator or the Ontario Power Authority was a party and that were in effect immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force continue in effect after the subsection comes into force as if the IESO were substituted for the predecessor Independent Electricity System Operator or the Ontario Power Authority, as the case may be, as a party to the agreement. 2014, c. 7, Sched. 7, s. 3 (1).

Same

(3) The operation of subsections (1) and (2) does not constitute a breach, termination, repudiation or the frustration of an employment agreement. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Transition, governance and other matters

25.10 (1) This section applies in respect of the governance of the IESO and other matters concerning the IESO on the day subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force. 2014, c. 7, Sched. 7, s. 3 (1).

Chief executive officer

(2) Despite sections 11 and 25.9, the chief executive officers of the predecessors cease to hold office on the day subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force and the Minister shall appoint the first chief executive officer of the IESO, but nothing in this subsection prevents the board of directors of the IESO from appointing any subsequent chief executive officer. 2014, c. 7, Sched. 7, s. 3 (1).

Panels

(3) A panel established under section 13 or 25.10 as they read immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force is continued after that subsection comes into force and is deemed to be a panel established by the IESO board of directors under subsection 16 (1). 2014, c. 7, Sched. 7, s. 3 (1).

Stakeholder input

(4) Any process established under section 13.2 or 25.12 as they read immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force is continued after that subsection comes into force and is deemed to be a process established by the IESO under section 18. 2014, c. 7, Sched. 7, s. 3 (1).

Fees

(5) Any fee payable to a predecessor that remains unpaid on the day subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force is payable to the IESO at the same time and on the same terms as if the IESO were the predecessor. 2014, c. 7, Sched. 7, s. 3 (1).

Market rules

(6) Any market rule established under section 32 as it read immediately before subsection 3 (1) of Schedule 7 to the *Building Opportunity and Securing Our Future Act (Budget Measures), 2014* comes into force remains in effect after that subsection comes into force and is deemed to be a market rule established by the IESO until it is amended or revoked in accordance with this Act. 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

PART II.1 CLEAN ENERGY CREDITS

Interpretation

25.11 In this Part,

“clean energy credit” means environmental attributes associated with the generation of one megawatt-hour of electricity that are recognized in the clean energy credit registry as a clean energy credit, following the submission of information to the registry in accordance with section 25.15; (“crédit pour l’énergie propre”)

“clean energy credit registry” means the registry established or designated, as the case may be, under section 25.22; (“registre des crédits pour l’énergie propre”)

“environmental attributes” means attributes or characteristics relating to the environmental benefits associated with electricity generated in Ontario from an energy source specified by the regulations, that,

- (a) unless otherwise specified by the regulations, are subject to transfer on their own without the electricity to which they are associated, and
- (b) meet any requirements specified by the regulations; (“attributs environnementaux”)

“registry rules” means the rules made under section 25.23; (“règles du registre”)

“regulations” means the regulations made under this Part, despite the definition of “regulations” in subsection 2 (1); (“règlements”)

“transfer” includes a transfer of ownership, with or without consideration; (“transfert”)

“transferee” means a person or entity who intends to purchase or acquire a clean energy credit; (“destinataire du transfert”)

“transferor” means a person or entity that makes environmental attributes available for transfer. (“auteur du transfert”) 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2009, c. 12, Sched. B, s. 3 - 09/09/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Requirement to make environmental attributes available for transfer

25.12 The following persons and entities shall make such environmental attributes as are specified by the regulations available for transfer in the time and manner specified by the regulations:

1. The IESO.
2. Ontario Power Generation Inc.
3. Any generator or other person or entity specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Restrictions on making environmental attributes available for transfer

25.13 If the regulations so provide, a generator or other person or entity specified by the regulations shall not make environmental attributes available for transfer except as provided for by the regulations. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Registration

Transferors

25.14 (1) A transferor shall register with the clean energy credit registry in accordance with the registry rules. 2022, c. 23, Sched. 1, s. 3.

Transferees

(2) A transferee shall register with the clean energy credit registry in accordance with the registry rules. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Information re environmental attributes to be submitted to registry

25.15 (1) A transferor that intends to transfer environmental attributes shall submit to the clean energy credit registry such information respecting the environmental attributes as is specified by the registry rules. 2022, c. 23, Sched. 1, s. 3.

Same

(2) The information referred to in subsection (1) shall be submitted in the time and manner specified by the registry rules. 2022, c. 23, Sched. 1, s. 3.

Restriction

(3) Information respecting any given environmental attributes may only be submitted to the clean energy credit registry once. 2022, c. 23, Sched. 1, s. 3.

Same

(4) Subsection (3) does not prevent the submission of information respecting environmental attributes in order to correct an error, add missing information, address a technical issue connected to the clean energy credit registry or otherwise ensure the correctness of the information submitted to the registry in respect of the environmental attributes. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Restrictions on transfer

25.16 (1) A transferor shall not transfer environmental attributes unless,

- (a) the environmental attributes are recognized in the clean energy credit registry as a clean energy credit, following the submission of information to the registry in accordance with section 25.15; and
- (b) the following conditions are met:
 - (i) the environmental attributes associated with the clean energy credit were generated within the period specified by the regulations,
 - (ii) the clean energy credit is to be transferred to a transferee who has an account with the IESO or a distributor with respect to the transferee's consumption of electricity, and who meets any other requirements specified by the regulations,
 - (iii) the clean energy credit is to be credited against electricity that was consumed by the transferee in Ontario within the period specified by the regulations,
 - (iv) the clean energy credit has not been previously transferred or retired, and
 - (v) any other conditions provided for by the regulations. 2022, c. 23, Sched. 1, s. 3.

Same

(2) The transfer shall be completed within the time and in the manner specified by the registry rules. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

2009, c. 12, Sched. B, s. 4 - 09/09/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Retirement of clean energy credits**Transferee**

25.17 (1) The transferee to whom a clean energy credit is transferred in accordance with section 25.16, or a person or entity acting on the transferee's behalf, shall indicate on the clean energy credit registry, in the time and manner specified by the registry rules, that the credit has been retired. 2022, c. 23, Sched. 1, s. 3.

Transferor

(2) If a transferor's clean energy credit is not transferred within the time described in subsection 25.16 (2) or otherwise in accordance with section 25.16, the transferor may indicate on the clean energy credit registry, in the time and manner specified by the registry rules, that the credit has been retired. 2022, c. 23, Sched. 1, s. 3.

Unauthorized retirement

(3) No person or entity shall indicate on the clean energy credit registry that a clean energy credit has been retired, except in accordance with subsection (1) or (2). 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Provision of information

25.18 Transferors, transferees and any other persons or entities specified in the regulations shall provide to the IESO or the Minister such information as the IESO or Minister specifies for the purposes of this Part, in the time and manner specified by the IESO or Minister. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 29 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Proceeds of transfer**IESO**

25.19 (1) The IESO shall apply its proceeds from the transfer of its clean energy credits in the time and manner specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

Ontario Power Generation Inc.

(2) Ontario Power Generation Inc. shall apply its proceeds from the transfer of its clean energy credits in the time and manner specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

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

1998, c. 15, Sched. A, s. 25.19 (3) - no effect - see 2004, c. 23, Sched. A, s. 30 - 31/01/2005

2004, c. 23, Sched. A, s. 30 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Application to partial credits

25.20 This Part applies with necessary modifications with respect to the transfer and retirement of a partial clean energy credit. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 31 (1, 2) - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Transition

25.21 (1) This Part applies with respect to the transfer of environmental attributes generated on or after the day section 3 of Schedule 1 to the *Progress on the Plan to Build Act (Budget Measures)*, 2022 comes into force, even if the transfer is the subject of a contract that was entered into before that day. 2022, c. 23, Sched. 1, s. 3.

Same

(2) If the regulations so provide, this Part applies with respect to the transfer of environmental attributes generated before the day section 3 of Schedule 1 to the *Progress on the Plan to Build Act (Budget Measures)*, 2022 came into force, to the extent and with any changes specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2009, c. 33, Sched. 14, s. 2 (3) - 15/12/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Registry

25.22 (1) The IESO shall, in accordance with the regulations if any, establish and maintain or designate a registry for the purposes of this Part that meets any requirements specified by the regulations and that is capable of,

- (a) accepting and displaying the registration of transferors and transferees;
- (b) accepting and displaying information respecting environmental attributes, and recognizing environmental attributes as clean energy credits;
- (c) accepting and displaying information respecting the transfer of clean energy credits, including information respecting the credits that are available for transfer;
- (d) accepting and displaying information respecting the retirement of clean energy credits; and
- (e) any other function specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

Direction re registry

(2) If the regulations direct the IESO to do so, the IESO shall, in accordance with any timing or other requirements specified by the regulations, establish and maintain or designate, as specified by the regulations, a registry that meets the requirements of subsection (1) that is to be used for the purposes of this Part instead of the registry established or designated under that subsection. 2022, c. 23, Sched. 1, s. 3.

Same

(3) Subsection (2) applies, with necessary modifications, with respect to a registry established or designated in accordance with regulations made for the purposes of that subsection. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2009, c. 33, Sched. 14, s. 2 (4) - 15/12/2009

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

Registry rules

25.23 (1) The IESO may, subject to any regulations made under clause 25.25 (1) (b), make rules,

- (a) governing the operation of any clean energy credit registry established by the IESO;
- (b) governing the participation of transferors and transferees in the clean energy credit registry for the purposes of this Part, including requiring the submission of specified information to the registry and specifying the time and manner of meeting the requirements;
- (c) requiring the payment of fees connected to the use of the clean energy credit registry, specifying their amounts, and specifying the time and manner of making the payments;
- (d) governing any other matter required or permitted in this Part or the regulations made under subsection 25.25 (1) to be provided for by the registry rules; and
- (e) respecting any matter that the IESO considers necessary or advisable in connection with the clean energy credit registry. 2022, c. 23, Sched. 1, s. 3.

Subdelegation

(2) A registry rule may authorize a person or entity to require, authorize or otherwise determine any matter that may be required, authorized or otherwise determined by the IESO under subsection (1). 2022, c. 23, Sched. 1, s. 3.

Incorporation by reference

(3) A registry rule may incorporate by reference another document, in whole or in part and with such changes as the IESO considers necessary, and may provide that the reference to the document include amendments made to the document from time to time. 2022, c. 23, Sched. 1, s. 3.

General or particular

(4) A registry rule may be general or particular in its application. 2022, c. 23, Sched. 1, s. 3.

Publication and inspection of registry rules

(5) The IESO shall make the registry rules available for public inspection on its website. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Reporting requirements

25.24 (1) The IESO shall, within the time specified by the regulations after the end of every calendar year, submit to the Minister a report that contains the following information respecting that year:

- 1. The total volume of electricity generated in the year by all generators directly connected to the IESO-controlled grid or a distributor's distribution system, broken down by energy source.
- 2. The total number of clean energy credits transferred in the year in accordance with section 25.16, broken down by energy source.
- 3. Any other information specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

Publication

(2) The IESO shall publish on its public website every report submitted to the Minister under subsection (1). 2022, c. 23, Sched. 1, s. 3.

Duty to provide information

(3) The IESO may require a distributor, transferor, transferee or any other person or entity specified by the regulations to give to the IESO, in the time and manner specified by the IESO, such information in relation to this Part as the IESO may specify for the purposes of preparing a report under this section. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2008, c. 7, Sched. G, s. 3 - 14/05/2008

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

Regulations

Minister

25.25 (1) The Minister may make regulations,

- (a) governing any matter required or permitted in this Part to be provided for by the regulations, other than in subsection (7);
- (b) governing the making of the registry rules, including specifying timing, criteria or methodology that must be included in or applied under the registry rules or specifying any other matters that must be included in the registry rules;
- (c) exempting any person or entity from subclause 25.16 (1) (b) (i), (iv) or (v), subject to such conditions or restrictions as may be specified by the regulations;
- (d) specifying or providing for methods for determining amounts that constitute all or any part of IESO's proceeds from the transfer of its clean energy credits for the purposes of clauses 25.33 (1) (c) and (2) (c);
- (e) defining, for the purposes of this Part, any word or expression used in this Part that is not defined in this Act or by regulations made under clause 114 (1) (n);
- (f) respecting any other matter that the Minister considers necessary or advisable in connection with this Part. 2022, c. 23, Sched. 1, s. 3.

Same

(2) In specifying environmental attributes for the purposes of section 25.12, the regulations may specify the number and type of environmental attributes, set out a manner for determining the number or type, specify maximums or minimums or impose ranges. 2022, c. 23, Sched. 1, s. 3.

Same

(3) Regulations made for the purposes of subsection 25.19 (1),

- (a) may require the IESO to transfer proceed amounts specified by or determined in accordance with the regulations to the Crown or any other person or entity; and
- (b) shall not include any amounts specified or provided for under clause (1) (d). 2022, c. 23, Sched. 1, s. 3.

Same

(4) Regulations made for the purposes of subsection 25.22 (2) may, for greater certainty, name a specific registry that meets the requirements of subsection 25.22 (1) that must be designated, and may provide for any transitional matters that arise as a result of the transition from the use of one registry to another. 2022, c. 23, Sched. 1, s. 3.

Same

(5) A regulation under subsection (1) may authorize a person or entity to require, authorize or otherwise determine any matter that may be required, authorized or otherwise determined by the Minister under that subsection. 2022, c. 23, Sched. 1, s. 3.

Rolling incorporation by reference

(6) A regulation under subsection (1) that incorporates another document by reference may provide that the reference to the document include amendments made to the document from time to time. 2022, c. 23, Sched. 1, s. 3.

Lieutenant Governor in Council, exemptions

(7) The Lieutenant Governor in Council may make regulations exempting any person or entity from any provision of this Part, other than a provision that may be the subject of a regulation made under clause (1) (c), subject to such conditions or restrictions as may be specified by the regulations. 2022, c. 23, Sched. 1, s. 3.

General or particular

(8) A regulation made under this section may be general or particular in its application. 2022, c. 23, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

2022, c. 23, Sched. 1, s. 3 - 15/03/2023

25.26-25.28 REPEALED: 2014, c. 7, Sched. 7, s. 3 (1).

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

2004, c. 23, Sched. A, s. 32 - 20/12/2004

2014, c. 7, Sched. 7, s. 3 (1) - 01/01/2015

**PART II.2
PLANNING, PROCUREMENT AND PRICING**

Integrated energy plans

25.29 (1) The Minister may, subject to the approval of the Lieutenant Governor in Council, issue an integrated energy plan setting out and balancing the Government of Ontario's goals and objectives respecting energy for the period specified by the plan. 2024, c. 26, Sched. 1, s. 3.

Same

- (2) For the purposes of subsection (1), an integrated energy plan may include goals and objectives respecting,
- (a) the affordability of energy for consumers and the cost-effectiveness of planned energy resources;
 - (b) the availability and reliability of the supply, transmission or distribution of energy to consumers;
 - (c) the enhancement and expansion of energy infrastructure and resources to support economic growth and trade;
 - (d) the role of electricity, natural gas, hydrogen and other energy resources, as well as energy efficiency, storage and demand management, in building a clean energy economy;
 - (e) the prioritization of nuclear power generation to meet future increases in the demand for electricity in a manner that is consistent with the policies of the Government of Ontario;
 - (f) the modernization of energy infrastructure systems and promotion of innovations that benefit consumers;
 - (g) the cost-effective procurement of electricity resources;
 - (h) the advancement of reconciliation with Indigenous communities, including early engagement in project planning, consultation and support for Indigenous leadership and participation in the energy sector;
 - (i) the engagement of interested persons, groups and communities in the energy sector; and
 - (j) any other related matter the Minister determines should be addressed. 2024, c. 26, Sched. 1, s. 3.

Consultation required

(3) The Minister shall, before issuing an integrated energy plan under subsection (1), consult with any consumers, distributors, generators, transmitters, Indigenous communities or other persons or groups that the Minister considers appropriate about the matters that are proposed to be addressed by the integrated energy plan, and the Minister shall consider the results of such consultation in developing the integrated energy plan. 2024, c. 26, Sched. 1, s. 3.

Timing

(4) The Minister shall begin the consultations described in subsection (3) on the second integrated energy plan and any subsequent plan on or before the fifth anniversary of the date on which the previous plan was issued. 2024, c. 26, Sched. 1, s. 3.

Notice

(5) The Minister shall publish notice of consultations under subsection (3), together with any relevant background materials or other information the Minister considers appropriate, in the environmental registry established under section 5 of the *Environmental Bill of Rights, 1993*. 2024, c. 26, Sched. 1, s. 3.

Participation

(6) The Minister shall take steps to promote the participation of the persons or groups with whom the Minister intends to consult under subsection (3), including scheduling one or more consultation meetings, where the Minister considers it appropriate to do so. 2024, c. 26, Sched. 1, s. 3.

Technical reports, etc.

(7) If required by the regulations, the Minister shall consider any prescribed technical reports or other reports, documents or information in the development of the integrated energy plan. 2024, c. 26, Sched. 1, s. 3.

Reports and documents to be publicly available

(8) The Minister shall make the reports, documents and information referred to in subsection (7) available to the public by posting them on a Government of Ontario website. 2024, c. 26, Sched. 1, s. 3.

Publication

(9) On issuing an integrated energy plan under subsection (1), the Minister shall post it on a Government of Ontario website and shall also post or publish any other information, such as key data and cost projections, used in the development of the integrated energy plan that the Minister determines should be made publicly available. 2024, c. 26, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 33 - 01/01/2005

2014, c. 7, Sched. 7, s. 4 (1, 2) - 01/01/2015

2016, c. 10, Sched. 2, s. 6, 7 - 01/07/2016

2024, c. 26, Sched. 1, s. 3 - 04/12/2024

Implementation directives

To the IESO

25.30 (1) The Minister may, subject to the approval of the Lieutenant Governor in Council, issue a directive to the IESO that sets out the Government of Ontario's requirements respecting the implementation of the integrated energy plan by the IESO and any other related requirements, other than matters listed in subsection 25.32 (2). 2024, c. 26, Sched. 1, s. 3.

To the Board

(2) The Minister may, subject to the approval of the Lieutenant Governor in Council, issue a directive to the Board that sets out the Government of Ontario's requirements respecting the implementation of the integrated energy plan in respect of matters falling within the Board's jurisdiction. 2024, c. 26, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 34 - 01/01/2005

2014, c. 7, Sched. 7, s. 5 (1-4) - 01/01/2015

2016, c. 10, Sched. 2, s. 7 - 01/07/2016

2024, c. 26, Sched. 1, s. 3 - 04/12/2024

25.31 REPEALED: 2024, c. 26, Sched. 1, s. 3.

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

2004, c. 23, Sched. A, s. 35 - 01/01/2005

2014, c. 7, Sched. 7, s. 6 (1-4) - 01/01/2015

2016, c. 10, Sched. 2, s. 7 - 01/07/2016

2024, c. 26, Sched. 1, s. 3 - 04/12/2024

Procurement contracts

25.32 (1) REPEALED: 2024, c. 26, Sched. 1, s. 4 (1).

Entering into contracts

(2) The IESO shall, if required to do so under a directive issued under subsection (5) or a direction continued under subsection (9) or (10), as amended, enter into contracts for the procurement of,

- (a) electricity supply, capacity or storage;
- (b) changes in electricity demand;
- (c) measures related to the conservation of electricity or the management of electricity demand;
- (d) transmission systems or any part of such systems, including the development of all or part of such systems; or
- (e) measures aimed at promoting electrification or using electricity to reduce overall emissions in Ontario. 2016, c. 10, Sched. 2, s. 7; 2019, c. 6, Sched. 1, s. 2; 2024, c. 26, Sched. 1, s. 4 (2, 3).

Transmitters

(3) Despite clause (2) (d), the IESO is not required to enter into a contract under subsection (2) in order to select a transmitter, unless a directive issued under subsection (5) provides otherwise. 2016, c. 10, Sched. 2, s. 7; 2024, c. 26, Sched. 1, s. 4 (4).

Resolution of procurement contract disputes

(4) The parties to a procurement contract shall ensure that the contract provides a mechanism to resolve any disputes between them with respect to the contract. 2016, c. 10, Sched. 2, s. 7.

Directives requiring IESO to undertake RFPs, etc.

(5) The Minister may, subject to the approval of the Lieutenant Governor in Council, issue directives requiring the IESO to undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to a matter listed in subsection (2). 2016, c. 10, Sched. 2, s. 7.

Directive issued under subs. (5) prevails

(6) A directive may be issued under subsection (5) regardless of any directive issued under section 25.30 and, in the event of a conflict, a directive issued under subsection (5) prevails. 2024, c. 26, Sched. 1, s. 4 (5).

Directions re consultation

(7) The Minister may direct the IESO to implement procedures for consulting Indigenous communities or other persons or groups that may be specified in the direction, on the planning, development or procurement of electricity supply, capacity, transmission systems or distribution systems, and the direction may specify the manner or method by which such consultations shall occur and the timing within which such consultations shall occur. 2016, c. 10, Sched. 2, s. 7; 2024, c. 26, Sched. 1, s. 4 (6).

Directions re programs or funding

(8) The Minister may direct the IESO to establish programs or funding to facilitate the participation and engagement in the electricity sector of Indigenous communities or any other persons or groups that may be specified in the direction. 2016, c. 10, Sched. 2, s. 7; 2024, c. 26, Sched. 1, s. 4 (7).

Transition, directions

(9) Any direction issued by the Minister under this section that was in force immediately before the day section 7 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016* came into force continues to apply, and any procurement, procedure, measure, program or other thing undertaken, implemented, established, developed or otherwise done in accordance with the direction that is in existence immediately before that day is unaffected. 2016, c. 10, Sched. 2, s. 7.

Transition, feed-in tariff programs

(10) Despite the repeal of section 25.35 by section 8 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016*, any direction issued by the Minister under section 25.35 that was in force immediately before the day section 8 of Schedule 2 to the *Energy Statute Law Amendment Act, 2016* came into force continues to apply, and any program or other thing established or otherwise done in accordance with the direction that is in existence immediately before that day is unaffected. 2016, c. 10, Sched. 2, s. 7.

Transition, ongoing power to amend, revoke

(11) A direction continued under subsection (9) or (10) may be amended or revoked by the Lieutenant Governor in Council. 2024, c. 26, Sched. 1, s. 4 (8).

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

2004, c. 23, Sched. A, s. 36 - 01/01/2005

2009, c. 12, Sched. B, s. 5 (1-3) - 09/09/2009

2014, c. 7, Sched. 7, s. 7 (1-15) - 01/01/2015

2016, c. 10, Sched. 2, s. 7 - 01/07/2016

2019, c. 6, Sched. 1, s. 2 - 09/05/2019

2024, c. 26, Sched. 1, s. 4 (1-8) - 04/12/2024

25.32.1 REPEALED: 2020, c. 18, Sched. 6, s. 49.

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

2016, c. 10, Sched. 2, s. 7 - 01/07/2016

2020, c. 18, Sched. 6, s. 49 - 22/02/2024

Electricity pricing to reflect costs

IESO to make adjustments

25.33 (1) The IESO shall, through its billing and settlement systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of market participants in Ontario that are prescribed by regulation reflect,

- (a) amounts paid to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998*;
- (b) amounts paid to entities with whom the IESO has or had a procurement contract, as determined under the procurement contract, other than amounts listed under subsection (2.1); and
- (c) the IESO clean energy credit proceed amounts determined by the regulations made by the Minister under clause 25.25 (1) (d). 2014, c. 7, Sched. 7, s. 8 (1); 2017, c. 16, Sched. 1, s. 43 (2); 2018, c. 17, Sched. 14, s. 1 (1); 2019, c. 6, Sched. 1, s. 3 (1); 2019, c. 6, Sched. 3, s. 11 (2); 2022, c. 23, Sched. 1, s. 4 (1).

Distributors and retailers to make adjustments

(2) Distributors and retailers shall, through their billing systems, make adjustments in accordance with the regulations that ensure that, over time, payments by classes of consumers in Ontario that are prescribed by regulation reflect,

- (a) amounts paid to generators, the Financial Corporation and distributors, whether the amounts are determined under the market rules or under section 78.1, 78.2 or 78.5 of the *Ontario Energy Board Act, 1998*;
- (b) amounts paid to entities with whom the IESO has or had a procurement contract, as determined under the procurement contract, other than amounts listed under subsection (2.1); and
- (c) the IESO clean energy credit proceed amounts determined by the regulations made by the Minister under clause 25.25 (1) (d). 2014, c. 7, Sched. 7, s. 8 (2); 2017, c. 16, Sched. 1, s. 43 (3); 2018, c. 17, Sched. 14, s. 1 (2); 2019, c. 6, Sched. 1, s. 3 (2); 2019, c. 6, Sched. 3, s. 11 (3); 2022, c. 23, Sched. 1, s. 4 (2).

Excluded amounts

(2.1) The following amounts are excluded from clauses (1) (b) and (2) (b):

1. Amounts funded under section 25.34.
2. Amounts paid under procurement contracts entered into under clause 25.32 (2) (d). 2019, c. 6, Sched. 1, s. 3 (3).

Exception

(3) Any adjustment that would otherwise be made under subsection (1) or (2) and that relates to electricity that is consumed by any of the following types of consumers shall instead be made in accordance with the regulations to one or more variance accounts established and maintained by the IESO:

1. REPEALED: 2009, c. 12, Sched. B, s. 6 (2).
2. A consumer whose rates are determined by the Board under section 79.16 of the *Ontario Energy Board Act, 1998*.
3. A consumer who is a member of a class of consumers prescribed by the regulations. 2004, c. 23, Sched. A, s. 37; 2009, c. 12, Sched. B, s. 6 (2); 2014, c. 7, Sched. 7, s. 8 (3).

Adjustments, payments, set-offs and credits

(4) The IESO, distributors and retailers shall,

- (a) make such adjustments in their accounts as may be required or permitted by the regulations to record adjustments described in subsections (1), (2) and (3); and
- (b) make and receive such payments, set-offs and credits as may be required or permitted by the regulations with respect to consumers described in subsection (3) or as may be required by a regulation made under this Act or the *Ontario Energy Board Act, 1998*. 2004, c. 23, Sched. A, s. 37; 2014, c. 7, Sched. 7, s. 8 (4); 2017, c. 16, Sched. 1, s. 43 (4); 2019, c. 6, Sched. 3, s. 11 (4).

Variance accounts

(5) The IESO shall establish and maintain such variance accounts as may be necessary to record all amounts payable or receivable by it under this section or under the *Ontario Energy Board Act, 1998*. 2004, c. 23, Sched. A, s. 37; 2014, c. 7, Sched. 7, s. 8 (5); 2017, c. 16, Sched. 1, s. 43 (5); 2019, c. 6, Sched. 3, s. 11 (5).

Compliance

(6) The Board shall ensure that adjustments, payments, set-offs and credits required or permitted under this section are made in accordance with the regulations. 2004, c. 23, Sched. A, s. 37.

Adjustment not assignable

(7) An adjustment made under subsection (1) or (2) is not assignable by a consumer in a contract with a retailer, whether the contract is entered into before or after this section comes into force. 2004, c. 23, Sched. A, s. 37.

No cause of action

(8) No cause of action against a consumer, a retailer or the Crown arises as the result of a contract or a term of a contract ceasing to have effect because of the operation of subsection (7). 2004, c. 23, Sched. A, s. 37.

Limitation period

(9) The adjustments referred to in this section to be made by the IESO, a distributor or a retailer under this section or under the regulations are subject to the limitation period provided for in the regulations, if any. 2021, c. 34, Sched. 9, s. 1.

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

2004, c. 23, Sched. A, s. 37 - 01/01/2005

2009, c. 12, Sched. B, s. 6 (1, 2) - 09/09/2009

2014, c. 7, Sched. 7, s. 8 (1-5) - 01/01/2015

2017, c. 16, Sched. 1, s. 43 (2-5) - 01/06/2017

2018, c. 17, Sched. 14, s. 1 (1, 2) - 06/12/2018

2019, c. 6, Sched. 1, s. 3 (1-3) - 09/05/2019; 2019, c. 6, Sched. 3, s. 11 (2-5) - 01/11/2019

2021, c. 34, Sched. 9, s. 1 - 01/01/2022

2022, c. 23, Sched. 1, s. 4 (1, 2) - 15/03/2023

Public funding of certain amounts related to procurement contracts

25.34 (1) The IESO shall pay all or any portion of the amounts described in subsection (2), as determined by the Minister, out of money appropriated for the purpose of this section by the Legislature, if any. 2018, c. 17, Sched. 14, s. 2.

Same

(2) Subsection (1) applies with respect to the following amounts:

1. Subject to the regulations, amounts required to be paid by the IESO to an entity as a result of the termination, in accordance with Order in Council 1003/2018 made on July 5, 2018, of a procurement contract to which the entity was a party.
2. The amounts prescribed by the regulations that are paid by the IESO to entities under such procurement contracts entered into under clause 25.32 (2) (a), (b), (c) or (e) as may be prescribed by the regulations. 2019, c. 6, Sched. 1, s. 4 (1); 2024, c. 26, Sched. 1, s. 5.

Note: On a day to be named by proclamation of the Lieutenant Governor, paragraph 2 of subsection 25.34 (2) of the Act is repealed. (See: 2019, c. 6, Sched. 1, s. 4 (2))

Variance accounts

(3) The IESO shall establish and maintain such variance accounts as may be necessary to record all amounts payable or receivable by it under this section. 2018, c. 17, Sched. 14, s. 2.

Information to be provided by IESO

(4) The IESO shall provide to the Minister the information specified by the Minister for the purposes of this section, in the time and manner specified by the Minister. 2018, c. 17, Sched. 14, s. 2.

Information to be provided by party to procurement contract

(5) A party to a procurement contract described in subsection (2) shall provide to the Minister the information specified by the Minister for the purposes of this section, in the time and manner specified by the Minister. 2018, c. 17, Sched. 14, s. 2.

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

2004, c. 23, Sched. A, s. 38 - 01/01/2005

2014, c. 7, Sched. 7, s. 9 - 01/01/2015

2018, c. 17, Sched. 14, s. 2 - 06/12/2018

2019, c. 6, Sched. 1, s. 4 (1) - 09/05/2019; 2019, c. 6, Sched. 1, s. 4 (2) - not in force

2024, c. 26, Sched. 1, s. 5 - 04/12/2024

PART II.3 CONSERVATION AND ENERGY EFFICIENCY

Definition

25.34.1 In this Part,

“Ministry” means the ministry of the Minister. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Permissive designation of goods, services and technologies

25.35 (1) The Lieutenant Governor in Council may, by regulation, designate goods, services and technologies in order to promote energy conservation. 2018, c. 16, s. 2.

Effect of designation

(2) A person is permitted to use designated goods, services and technologies in such circumstances as may be prescribed by regulation, despite any restriction imposed at law that would otherwise prevent or restrict their use, including a restriction established by a municipal by-law, a condominium by-law, an encumbrance on real property or an agreement. 2018, c. 16, s. 2.

Same

(3) A restriction imposed at law that would otherwise prevent or restrict the use of designated goods, services or technologies is inoperative to the extent that it would otherwise prevent or restrict the use. 2018, c. 16, s. 2.

Exception

(4) Subsections (2) and (3) do not apply with respect to a restriction imposed by an Act or regulation. 2018, c. 16, s. 2.

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

2009, c. 12, Sched. B, s. 7 - 09/09/2009

2014, c. 7, Sched. 7, s. 10 (1, 2) - 01/01/2015; 2014, c. 7, Sched. 7, s. 10 (3) - 24/07/2014

2016, c. 10, Sched. 2, s. 8 - 01/07/2016

2018, c. 16, s. 2 - 01/01/2019

Permissive designation of renewable energy projects, etc.

25.35.1 (1) The Lieutenant Governor in Council may, by regulation, designate renewable energy projects, renewable energy sources or renewable energy testing projects for the following purposes:

1. To assist in the removal of barriers to and to promote opportunities for the use of renewable energy sources.
2. To promote access to transmission systems and distribution systems for proponents of renewable energy projects. 2018, c. 16, s. 2.

Effect of designation

(2) A person is permitted to engage in activities with respect to a designated renewable energy project, a designated renewable energy source or a designated renewable energy testing project in such circumstances as may be prescribed by regulation, despite any restriction imposed at law that would otherwise prevent or restrict the activity, including a restriction established by a municipal by-law, a condominium by-law, an encumbrance on real property or an agreement. 2018, c. 16, s. 2.

Same

(3) A restriction imposed at law that would otherwise prevent or restrict an activity with respect to a designated renewable energy project, a designated renewable energy source or a designated renewable energy testing project is inoperative to the extent that it would otherwise prevent or restrict the activity. 2018, c. 16, s. 2.

Exception

- (4) Subsections (2) and (3) do not apply,
- (a) with respect to a restriction imposed by an Act or regulation; or
 - (b) with respect to by-laws, instruments or other restrictions that are prescribed by regulation or classes of by-laws, instruments or other restrictions that are prescribed by regulation. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Public agency, energy conservation and demand management plan

Definition

25.35.2 (1) In this section and section 25.35.3,

“public agency” means a ministry of the Government of Ontario or an entity, including a municipality, or class of entities that is prescribed by regulation as a public agency. 2018, c. 16, s. 2.

Plan

(2) The Lieutenant Governor in Council may, by regulation, require a public agency to prepare and submit to the Ministry an energy conservation and demand management plan. 2018, c. 16, s. 2.

Requirements

(3) The energy conservation and demand management plan must comply with any requirements prescribed by regulation and must include the following information:

1. A summary of annual energy consumption for each of the public agency’s prescribed operations.
2. A description and a forecast of the expected results of current and proposed activities and measures to conserve the energy consumed by the public agency’s prescribed operations and to otherwise reduce the amount of energy consumed by the public agency, including by employing such energy conservation and demand management methods as may be prescribed.
3. A summary of the progress and achievements in energy conservation and other reductions described in paragraph 2 since the previous plan.
4. Such additional information as may be prescribed by regulation. 2018, c. 16, s. 2.

Specified targets and standards, public agencies

(4) The Lieutenant Governor in Council may, by regulation, require a public agency to achieve targets prescribed by regulation and meet energy and environmental standards prescribed by regulation, including standards for energy conservation and demand management. 2018, c. 16, s. 2.

Implementation and publication

(5) The public agency shall,

- (a) implement the energy conservation and demand management plan and comply with any requirements prescribed by regulation respecting the implementation of the plan; and
- (b) publish the plan in accordance with any requirements prescribed by regulation. 2018, c. 16, s. 2.

Joint plans

(6) Two or more public agencies may prepare a joint energy conservation and demand management plan and may publish and implement it jointly. 2018, c. 16, s. 2.

Effect

(7) If the joint plan satisfies the requirements established under this section, the public agencies are not required to prepare, publish and implement separate energy conservation and demand management plans for the same period. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Prescribed person, reporting of energy consumption and water use

25.35.3 (1) The Lieutenant Governor in Council may, by regulation,

- (a) require a person prescribed by regulation, other than a public agency, to report to the Ministry, in the manner prescribed by regulation, energy consumption, water use, ratings or other performance metrics in respect of energy consumption and water use and such additional information as may be prescribed by regulation in respect of each of the person's properties prescribed by regulation;
- (b) prescribe circumstances in which the Minister may request that a person mentioned in clause (a) undertake verification, in the manner prescribed by regulation, of any information required to be reported under a regulation made under clause (a) or under a notice published under subsection (4); and
- (c) require a person mentioned in clause (a) to comply with a request by the Minister under clause (b). 2018, c. 16, s. 2.

Manner of reporting

(2) For the purposes of clause (1) (a), the regulations may require reporting through the use of a reporting system prescribed by regulation, including an electronic reporting system administered by a third party and a reporting system that generates ratings or other performance metrics in respect of energy consumption and water use. 2018, c. 16, s. 2.

Verification

(3) For the purposes of clause (1) (b), the regulations may specify that the verification must be conducted by a person prescribed by regulation. 2018, c. 16, s. 2.

Minister's notice, additional requirements

(4) The Minister may, by publishing notice in the registry under the *Environmental Bill of Rights, 1993*, require a person prescribed by regulation under clause (1) (a) to report to the Ministry, in the manner prescribed by regulation, energy consumption, water use, ratings or other performance metrics in respect of energy consumption and water use and any additional information in respect of each of the person's properties prescribed by regulation. 2018, c. 16, s. 2.

Same

(5) A notice published under subsection (4) may incorporate another document by reference and may provide that the reference to the document includes amendments made to the document from time to time after the notice is published. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Prescribed person, energy conservation and demand management plan

25.35.4 (1) The Lieutenant Governor in Council may, by regulation, require a person prescribed by regulation to prepare and submit to the Ministry an energy conservation and demand management plan. 2018, c. 16, s. 2.

Same

- (2) A regulation under subsection (1) may require that the person,
 - (a) prepare the plan in circumstances prescribed by regulation and in accordance with requirements prescribed by regulation; and

- (b) make the plan available to the public in accordance with requirements prescribed by regulation. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Minister may publish information

25.35.5 (1) Despite any other Act, the Minister may,

- (a) make available to the public any of the information required to be reported or submitted to the Ministry under sections 25.35.3 and 25.35.4; and
- (b) share any of the information required to be reported or submitted to the Ministry under sections 25.35.3 and 25.35.4 with another Ministry or agency of the Government of Ontario, or such other persons or entities as may be prescribed by regulation for the purposes of this section. 2018, c. 16, s. 2.

Information supplied in confidence

(2) If the Minister has not made information available to the public under clause (1) (a), the information is deemed, for the purposes of section 17 of the *Freedom of Information and Protection of Privacy Act*, to have been supplied in confidence to the Minister. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Distributors, requirement to provide information

Definition

25.35.6 (1) In this section,

“distributor” means,

- (a) a distributor within the meaning of section 3 of the *Ontario Energy Board Act, 1998*,
- (b) a gas distributor within the meaning of section 3 of the *Ontario Energy Board Act, 1998*, or
- (c) an owner or operator of a water works within the meaning of subsection 1 (1) of the *Ontario Water Resources Act*. 2018, c. 16, s. 2.

Information to be provided

(2) A distributor that has been prescribed by regulation for the purposes of this section shall, upon receiving a request from a person who is required to report under section 25.35.3 or to prepare a plan under section 25.35.4 in respect of a property that meets criteria prescribed by regulation, make available to that person, in the manner prescribed by regulation, information prescribed by regulation with respect to the consumption or use of electricity, gas or water distributed by the distributor to the property. 2018, c. 16, s. 2.

Same

(3) The requirements in subsection (2) are subject to any conditions prescribed by regulation. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Energy efficiency and efficient use of water

Definition

25.35.7 (1) In this section,

“prescribed appliance or product” means an appliance or product that has been prescribed by regulation. 2018, c. 16, s. 2.

Appliances and products, efficiency standards

(2) No person shall offer for sale, sell or lease a prescribed appliance or product unless,

- (a) the appliance or product meets the efficiency standard or requirement that has been prescribed by regulation with respect to the appliance or product; and
- (b) a label or other marking prescribed by regulation that confirms compliance with the efficiency standard or requirement that has been prescribed by regulation with respect to the appliance or product is affixed to the appliance or product or

provided with the appliance or product in the manner prescribed by regulation and under the circumstances prescribed by regulation. 2018, c. 16, s. 2.

Labels

(3) No person shall affix to or provide with a prescribed appliance or product a label or other prescribed marking prescribed by regulation unless the appliance or product meets the efficiency standard or requirement that has been prescribed by regulation with respect to the appliance or product. 2018, c. 16, s. 2.

Application of subs. (2)

(4) Subsection (2) does not apply to,

- (a) an appliance or product that is manufactured on or before a date prescribed by regulation and that is sold or leased on or before a date prescribed by regulation; or
- (b) a person who is not in the business of offering for sale, selling or leasing prescribed appliances or products. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Energy data

Definitions

25.35.8 (1) In this section,

“account holder” means a person or entity who has an account with an energy provider; (“détenteur de compte”)

“energy” means electricity and such other types of energy prescribed by regulation for the purposes of this section; (“énergie”)

“energy data” means such types or classes of data related to the consumption of energy as may be prescribed by regulation and such other data as may be prescribed by regulation; (“données énergétiques”)

“energy provider” means such persons or entities prescribed by regulation for the purposes of this section. (“fournisseur d’énergie”) 2018, c. 16, s. 2.

Requirement to make energy data available

(2) On and after the date prescribed by regulation, every energy provider shall, in accordance with the regulations, make the energy data in respect of an account holder available to the account holder or to such other persons or entities as may be authorized by the account holder. 2018, c. 16, s. 2.

Procurement

(3) If an energy provider enters into a procurement process, contract or arrangement in relation to the acquisition or development of systems or technology to meet the requirements of subsection (2), the procurement process, contract or arrangement shall meet such criteria or requirements as may be prescribed by regulation. 2018, c. 16, s. 2.

Additional requirements

(4) In addition to the matters set out in this section, an energy provider shall comply with such other requirements as may be prescribed by regulation for the purposes of this section. 2018, c. 16, s. 2.

Extension of time

(5) The Board may, in the circumstances prescribed by regulation and subject to the requirements prescribed by regulation, with or without a hearing, extend the time period for when an energy provider must comply with subsection (2). 2018, c. 16, s. 2.

Reports

(6) An energy provider shall submit to the Board or to the Minister such reports and information as the Board or the Minister, as the case may be, may require from time to time. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Regulations

25.35.9 (1) The Lieutenant Governor in Council may make regulations for the purposes of this Part prescribing anything that is required or permitted to be prescribed or that is required or permitted to be done in accordance with the regulations or as provided in the regulations. 2018, c. 16, s. 2.

Same

- (2) In addition to regulations mentioned in subsection (1), the Lieutenant Governor in Council may make regulations,
- (a) governing renewable energy testing facilities in relation to,
 - (i) planning, design, siting, buffer zones, notification and consultation, establishment, insurance, facilities, staffing, operation, maintenance, monitoring, record-keeping and improvement, and
 - (ii) the discontinuance of the operation of any part of the renewable energy testing facility;
 - (b) governing the location of renewable energy testing facilities, including prohibiting or regulating the construction, installation, use, operation or changing of renewable energy testing facilities in parts of Ontario;
 - (c) governing everything required under or provided for in or that may be prescribed under sections 25.35.2, 25.35.3 and 25.35.4, including,
 - (i) the periods that may be covered by plans and reports required under those sections and the intervals for which the plans and reports are required,
 - (ii) the submission of the plans, reports and other documents to the Ministry,
 - (iii) circumstances in which two or more buildings or structures may be treated as a single property for the purposes of clause 25.35.3 (1) (a),
 - (iv) generally governing how those sections are to be complied with;
 - (d) governing circumstances in which two or more buildings or structures may be treated as a single property for the purposes of section 25.35.6;
 - (e) with respect to prescribed appliances or products within the meaning of section 25.35.7,
 - (i) prescribing energy efficiency standards or requirements for the appliances or products,
 - (ii) prescribing water efficiency standards or requirements for the appliances or products that consume energy,
 - (iii) regulating the installation, testing, maintenance and repair of the appliances and products,
 - (iv) designating persons or organizations to test the prescribed appliances and products,
 - (v) providing for the placing of a prescribed label or mark on or with the appliances and products,
 - (vi) prescribing the contents of labels or marks that may be placed on or with the prescribed appliances and products,
 - (vii) prescribing fees to be paid to designated persons or organizations for the testing or labelling of the appliances and products and prescribing by whom the fees shall be paid,
 - (viii) providing for information to be reported by persons who manufacture, offer for sale, sell or lease the prescribed appliances or products, including the frequency, time and manner for reporting,
 - (ix) governing the keeping of information, records and documents by persons who manufacture, offer for sale, sell or lease prescribed appliances or products;
 - (f) governing everything required under or that may be prescribed under section 25.35.8 and generally how that section is to be complied with, including,
 - (i) prescribing types or classes of energy data, including prescribing different types or classes of energy data for different types or classes of energy or for different energy providers or classes of energy providers,
 - (ii) specifying or clarifying the meaning of “account holder” in section 25.35.8,
 - (iii) governing the manner in which energy data must be made available by energy providers,
 - (iv) prescribing requirements relating to how an account holder may authorize another person or entity to receive energy data,

- (v) prescribing criteria or requirements that the procurement process, contract or arrangement must meet for the purpose of subsection 25.35.8 (3),
- (vi) governing certification requirements relating to the implementation of the requirements under subsection 25.35.8 (2), including requiring energy providers to obtain a certification, prescribing the manner in which such certification may be obtained, the persons or entities that are authorized to provide the certification and any fees to be paid to those persons or entities for the certification,
- (vii) governing extensions of time that may be granted to energy providers by the Board under subsection 25.35.8 (5), including prescribing the maximum period for which an extension may be granted and the circumstances in which an extension may be granted,
- (viii) requiring and governing reports and information that energy providers or other persons or entities must provide to the Minister, to the Board or to other persons or entities, including prescribing the manner and form in which reports or information must be provided. 2018, c. 16, s. 2.

Incorporation of documents

(3) A regulation under this Part that incorporates another document by reference may provide that the reference to the document include amendments made to the document from time to time after the regulation is made. 2018, c. 16, s. 2.

Classes of persons, etc.

(4) A regulation under this Part may create different classes of persons, entities, appliances or products and may establish different entitlements for, or relating to, each class or impose different requirements, conditions or restrictions on, or relating to, each class. 2018, c. 16, s. 2.

Exemptions, etc.

(5) A regulation under this Part may exempt a class or a person, entity, appliance or product from a specified requirement imposed by this Part or a regulation or provide that a specified provision of this Part or a regulation does not apply to the class, person, entity, appliance or product and may prescribe conditions for the exemption. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

Regulations, transition

25.35.10 The Lieutenant Governor in Council may make regulations governing transitional matters that, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of amendments to this Act arising from the enactment of the *Green Energy Repeal Act, 2018* and to facilitate its implementation. 2018, c. 16, s. 2.

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

2018, c. 16, s. 2 - 01/01/2019

PART III THE ELECTRICITY MARKETS

ACCESS TO TRANSMISSION AND DISTRIBUTION SYSTEMS

Mandatory connection to transmission or distribution system

25.36 (1) A transmitter or distributor shall connect a renewable energy generation facility to its transmission system or distribution system in accordance with the regulations, the market rules and any licence issued by the Board if,

- (a) the generator requests the connection in writing; and
- (b) the applicable technical, economic and other requirements prescribed by regulation or mandated by the market rules or by an order or code issued by the Board have been met in respect of the connection. 2009, c. 12, Sched. B, s. 8.

Conflicts

(2) In the event of a conflict between a regulation referred to in subsection (1) and an order or code issued by the Board, the regulation prevails. 2009, c. 12, Sched. B, s. 8.

Regulations

(3) A regulation referred to in subsection (1) may specify requirements which must be met in relation to the connection of renewable energy generation facilities to a transmitter's transmission system or a distributor's distribution system. 2009, c. 12, Sched. B, s. 8.

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

2009, c. 12, Sched. B, s. 8 - 09/09/2009

25.37 REPEALED: 2021, c. 25, Sched. 5, s. 1.

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

2009, c. 12, Sched. B, s. 9 - 09/09/2009

2014, c. 7, Sched. 7, s. 11 - 01/01/2015

2021, c. 25, Sched. 5, s. 1 - 03/06/2021

Non-discriminatory access

26 (1) A transmitter or distributor shall provide generators, retailers, market participants and consumers with non-discriminatory access to its transmission or distribution systems in Ontario in accordance with its licence. 1998, c. 15, Sched. A, s. 26 (1); 2014, c. 7, Sched. 7, s. 12.

(1.1)-(1.3) REPEALED: 2021, c. 25, Sched. 5, s. 2.

Same

(2) Until subsection (1) comes into force, a transmitter or distributor prescribed by the regulations shall provide a generator, retailer or consumer prescribed by the regulations with non-discriminatory access to its transmission or distribution systems in Ontario in accordance with its licence. 1998, c. 15, Sched. A, s. 26 (2).

Previous contracts with Ontario Hydro

(3) Any contract entered into between Ontario Hydro and a municipal corporation or any other person before December 11, 1998 for the supply of electricity to the municipal corporation or other person ceases to have effect on the day subsection (1) comes into force. 1998, c. 15, Sched. A, s. 26 (3); 2002, c. 1, Sched. A, s. 5 (1).

Previous contracts with municipal corporation

(4) Any contract entered into between a municipal corporation and any person before December 11, 1998 for the supply of electricity to the person ceases to have effect on the day subsection (1) comes into force. 1998, c. 15, Sched. A, s. 26 (4); 2002, c. 1, Sched. A, s. 5 (2).

Low-volume consumers

(5) Subsections (3) and (4) do not apply to a contract for the supply of electricity to a low-volume consumer. 1998, c. 15, Sched. A, s. 26 (5).

Same

(6) A contract for the sale of electricity between a low-volume consumer and a person who, at the time the contract was entered into, was not authorized under the *Ontario Energy Board Act, 1998* to retail electricity ceases to have effect on the date subsection (1) comes into force unless, after the person becomes authorized under the *Ontario Energy Board Act, 1998* to retail electricity and before the date subsection (1) comes into force, the low-volume consumer re-affirms the contract in writing. 1998, c. 15, Sched. A, s. 26 (6).

No cause of action

(7) No cause of action arises as a result of a contract ceasing to have effect under subsection (3), (4) or (6). 1998, c. 15, Sched. A, s. 26 (7).

Return of prepayment

(8) Despite subsection (7), a person to whom electricity was to be supplied under a contract referred to in subsection (3) or (4), or a low-volume consumer to whom electricity was to be sold under a contract referred to in subsection (6), may recover any amount paid under the contract before the day the contract ceased to have effect in respect of electricity that was to be supplied on or after that day. 1998, c. 15, Sched. A, s. 26 (8).

Application of subss. (3), (4) and (6)

(9) Subsections (3), (4) and (6) do not apply to contracts prescribed by the regulations. 1998, c. 15, Sched. A, s. 26 (9).

Definition

(10) In this section,

“low-volume consumer” means a person who annually uses less than the amount of electricity prescribed by the regulations. 1998, c. 15, Sched. A, s. 26 (10).

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

2002, c. 1, Sched. A, s. 5 (1, 2) - 27/06/2002

2009, c. 12, Sched. B, s. 10 - 09/09/2009

2014, c. 7, Sched. 7, s. 12 - 01/01/2015

2021, c. 25, Sched. 5, s. 2 - 03/06/2021

Use of IESO-controlled grid

27 A person shall not cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid except in accordance with this Act and the market rules. 2004, c. 23, Sched. A, s. 39.

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

2004, c. 23, Sched. A, s. 39 - 01/01/2005

Distributor’s obligation to connect

28 A distributor shall connect a building to its distribution system if,

- (a) the building lies along any of the lines of the distributor’s distribution system; and
- (b) the owner, occupant or other person in charge of the building requests the connection in writing. 1998, c. 15, Sched. A, s. 28.

28.1

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

2010, c. 8, s. 37 (3) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2020

Distributor’s obligation to sell electricity

29 (1) A distributor shall sell electricity to every person connected to the distributor’s distribution system, except a person who advises the distributor in writing that the person does not wish to purchase electricity from the distributor. 1998, c. 15, Sched. A, s. 29 (1).

Same

(2) If, under subsection (1), a person has advised a distributor that the person does not wish to purchase electricity from the distributor, the person may at any time thereafter request the distributor in writing to sell electricity to the person and the distributor shall comply with the request in accordance with its licence. 1998, c. 15, Sched. A, s. 29 (2).

Same

(3) If a person connected to a distributor’s distribution system purchases electricity from a retailer other than the distributor and the retailer is unable for any reason to sell electricity to the person, the distributor shall sell electricity to the person. 1998, c. 15, Sched. A, s. 29 (3).

Exemptions

(4) The Board may exempt a distributor from any provision of this section if, after holding a hearing, the Board is satisfied that there is sufficient competition among retailers in the distributor’s service area. 1998, c. 15, Sched. A, s. 29 (4).

Same

(5) An exemption under subsection (4) may be subject to such conditions and restrictions as may be specified by the Board. 1998, c. 15, Sched. A, s. 29 (5).

Same

(6) The Board shall not exempt a distributor entirely from all the provisions of this section unless, after holding a hearing, the Board is satisfied that consumers in the distributor’s service area will continue to have access to electricity. 1998, c. 15, Sched. A, s. 29 (6).

Conservation measures

29.1 (1) Subject to section 71 of the *Ontario Energy Board Act, 1998* and such limits and criteria as may be prescribed by the regulations, a transmitter, distributor or the IESO may provide services that would assist the Government of Ontario in achieving its goals in electricity conservation, including services related to,

- (a) the promotion of electricity conservation and the efficient use of electricity;
- (b) electricity load management; or
- (c) the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources. 2004, c. 23, Sched. A, s. 40; 2014, c. 7, Sched. 7, s. 13.

Same

(2) Nothing in subsection (1) allows a distributor or transmitter to generate electricity by any means except through an affiliate approved by the Board under section 71 of the *Ontario Energy Board Act, 1998*. 2004, c. 23, Sched. A, s. 40.

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

2004, c. 23, Sched. A, s. 40 - 01/01/2005

2014, c. 7, Sched. 7, s. 13 - 01/01/2015

Allocation during emergencies, etc.

30 (1) If the supply of electricity to a distributor is interrupted or reduced as a result of an emergency or a breakdown, repair or extension of a transmission or distribution system, the distributor may allocate the available electricity among the consumers in its service area. 1998, c. 15, Sched. A, s. 30 (1).

No breach of contract

(2) An allocation of electricity under subsection (1) shall be deemed not to be a breach of any contract. 1998, c. 15, Sched. A, s. 30 (2).

30.1

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

2010, c. 8, s. 37 (4) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2020

Termination of service

31 (1) A distributor may shut off the distribution of electricity to a property if any amount payable by a person for the distribution or retail of electricity to the property pursuant to section 29 is overdue. 1998, c. 15, Sched. A, s. 31 (1).

Notice

(2) A distributor shall provide reasonable notice of the proposed shut-off to the person who is responsible for the overdue amount by personal service or prepaid mail or by posting the notice on the property in a conspicuous place. 1998, c. 15, Sched. A, s. 31 (2).

Recovery of amount

(3) A distributor may recover all amounts payable despite shutting off the distribution of electricity. 1998, c. 15, Sched. A, s. 31 (3).

Exception

(4) A distributor shall not shut off the distribution of electricity to a property under subsection (1) during the period that begins on the day this subsection comes into force and ends on March 31, 2003 or during any other period prescribed by the regulations. 2002, c. 23, s. 3 (7).

Restoration of electricity

(5) If a distributor shuts off the distribution of electricity to a property under subsection (1) after November 11, 2002 and before April 1, 2003, or during a period prescribed by the regulations, the distributor shall, as soon as possible,

- (a) restore, without charge, the distribution of electricity to the property; and
- (b) compensate any person who suffered a loss as a result of the shut-off of electricity. 2002, c. 23, s. 3 (7).

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

2002, c. 23, s. 3 (7), 6 - 09/12/2002

2010, c. 8, s. 37 (5) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2020

Emergency termination of service

31.1 (1) A distributor may shut off the distribution of electricity to a property without notice if the distributor has reason to believe that a condition exists in respect of the property that threatens or is likely to threaten,

- (a) the safety of any person; or
- (b) the reliability of all or part of the distribution system. 2005, c. 33, s. 5.

Notice

(2) The distributor shall,

- (a) give the Electrical Safety Authority written notice of the shut-off under subsection (1) as soon as possible afterwards; and
- (b) post a notice of the shut-off under subsection (1) in a conspicuous place on the property within 10 days afterwards. 2005, c. 33, s. 5.

Same

(3) The notices under subsection (2) shall set out the reasons for the shut-off and the notice posted under clause (2) (b) shall describe the right to a review by the Board, as provided by subsection (6). 2005, c. 33, s. 5.

Restoration of electricity

(4) At the request of the owner or occupier of the property to have the distribution of electricity to the property restored, the distributor shall assess the conditions existing in respect of the property and, subject to any requirements under Part VIII, shall restore the distribution of electricity to the property as soon as possible after the distributor is satisfied that neither of the conditions described in clauses (1) (a) and (b) exists in respect of the property. 2005, c. 33, s. 5.

Limit

(5) Despite subsection (4), the distributor is not required to assess the conditions existing in respect of the property more than once every five days. 2005, c. 33, s. 5.

Application for review

(6) The owner or occupier of the property may file an application in writing to the Board to have the distribution of electricity to the property restored, but may not file an application with the Board without first making a request to the distributor under subsection (4). 2005, c. 33, s. 5.

Same

(7) The Board shall forward a copy of an application filed under subsection (6) to the distributor before commencing its review. 2005, c. 33, s. 5.

Review by Board

(8) Upon receipt of an application under subsection (6), the Board shall review the matter and, upon the completion of its review, if it finds that the distributor acted unreasonably in shutting off the distribution of electricity to the property or in failing to restore the distribution of electricity to the property, may make an order directing the distributor to restore the distribution of electricity to the property, subject to any requirements under Part VIII. 2005, c. 33, s. 5.

Termination not a breach of contract

(9) If the Board finds that the distributor did not act unreasonably in shutting off the distribution of electricity to a property under subsection (1), the shut-off of the distribution of electricity to the property shall be deemed not to be a breach of any contract. 2005, c. 33, s. 5.

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

2005, c. 33, s. 5 - 01/08/2006

MARKET RULES

Market rules

32 (1) The IESO may make rules,

- (a) governing the IESO-controlled grid;
- (b) establishing and governing markets related to electricity and ancillary services; and
- (c) establishing and enforcing standards and criteria relating to the reliability of electricity service or the IESO-controlled grid, including standards and criteria relating to electricity supply generated from sources connected to a distribution system that alone or in aggregate could impact the reliability of electricity service or the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (1); 2004, c. 23, Sched. A, s. 41 (1, 2); 2009, c. 12, Sched. B, s. 11 (1).

Examples

(2) Without limiting the generality of subsection (1), the market rules may include provisions,

- (a) governing the making and publication of market rules;
- (b) governing the conveying of electricity into, through or out of the IESO-controlled grid and the provision of ancillary services;
- (c) governing standards and procedures to be observed in system emergencies;
- (d) authorizing and governing the giving of directions by the IESO, including,
 - (i) for the purpose of maintaining the reliability of electricity service or the IESO-controlled grid, directions requiring persons, including persons providing electricity supply generated from sources connected to a distribution system, within such time as may be specified in the direction, to synchronize, desynchronize, increase, decrease or maintain electrical output, to take such other action as may be specified in the direction or to refrain from such action as may be specified in the direction, and
 - (ii) other directions requiring market participants, within such time as may be specified in the direction, to take such action or refrain from such action as may be specified in the direction, including action related to a system emergency; and
- (e) authorizing and governing the making of orders by the IESO, including orders,
 - (i) imposing financial penalties on market participants,
 - (ii) authorizing a person to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid, or
 - (iii) terminating, suspending or restricting a person's rights to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid. 1998, c. 15, Sched. A, s. 32 (2); 2004, c. 23, Sched. A, s. 41 (2-6); 2009, c. 12, Sched. B, s. 11 (2).

General or particular

(3) A market rule may be general or particular in its application. 1998, c. 15, Sched. A, s. 32 (3).

Legislation Act, 2006, Part III

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the market rules or to any directions or orders made under the market rules. 1998, c. 15, Sched. A, s. 32 (4); 2006, c. 21, Sched. F, s. 136 (1).

Publication and inspection of market rules

(5) The IESO shall publish the market rules in accordance with the market rules and shall make the market rules available for public inspection during normal business hours at the offices of the IESO. 1998, c. 15, Sched. A, s. 32 (5); 2004, c. 23, Sched. A, s. 41 (7).

Notice to Board

(6) The IESO shall not make a rule under this section unless it first gives the Board an assessment of the impact of the rule on the interests of consumers with respect to prices and the reliability and quality of electricity service. 2004, c. 23, Sched. A, s. 41 (8).

Transition

(7) All rules made before subsection 4 (1) of Schedule A to the *Electricity Restructuring Act, 2004* comes into force remain in effect until amended or revoked in accordance with this Act. 2004, c. 23, Sched. A, s. 41 (8).

(8), (9) REPEALED: 2004, c. 23, Sched. A, s. 41 (8).

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

2002, c. 23, s. 3 (8) - 09/12/2002; 2002, c. 23, s. 3 (9) - no effect - see 2004, c. 23, Sched. A, s. 41 (8) - 01/01/2005

2004, c. 23, Sched. A, s. 41 (1-8) - 01/01/2005

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

2009, c. 12, Sched. B, s. 11 (1, 2) - 09/09/2009

Amendment of market rules

33 (1) The IESO shall, in accordance with the market rules, publish any amendment to the market rules at least 22 days before the amendment comes into force. 2004, c. 23, Sched. A, s. 42.

Notice to the Board

(2) The IESO shall give the Board a copy of the amendment and such other information as is prescribed by the regulations on or before the date the IESO publishes the amendment under subsection (1). 2004, c. 23, Sched. A, s. 42.

Board's power to revoke

(3) Despite section 4.1 of the *Statutory Powers Procedure Act* and section 35.1 of this Act, the Board may, not later than 15 days after the amendment is published under subsection (1) and without holding a hearing, revoke the amendment on a date specified by the Board and refer the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

Application for review

(4) Any person may apply to the Board for review of an amendment to the market rules by filing an application with the Board within 21 days after the amendment is published under subsection (1). 2004, c. 23, Sched. A, s. 42.

Application of *Ontario Energy Board Act, 1998*

(5) Subsection 19 (4) of the *Ontario Energy Board Act, 1998* applies to an application under subsection (4). 2004, c. 23, Sched. A, s. 42.

Review by Board

(6) The Board shall issue an order that embodies its final decision within 120 days after receiving an application for review of an amendment. 2004, c. 23, Sched. A, s. 42; 2017, c. 2, Sched. 10, s. 1.

Stay of amendment

(7) No application for review of an amendment under this section shall stay the operation of the amendment pending the completion of the Board's review of the amendment unless the Board orders otherwise. 2004, c. 23, Sched. A, s. 42.

Same

(8) In determining whether to stay the operation of an amendment, the Board shall consider,

- (a) the public interest;
- (b) the merits of the application;
- (c) the possibility of irreparable harm to any person;
- (d) the impact on consumers; and
- (e) the balance of convenience. 2004, c. 23, Sched. A, s. 42.

Order

(9) 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 class of market participants, the Board shall make an order,

- (a) revoking the amendment on a date specified by the Board; and
- (b) referring the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 42.

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

2002, c. 23, s. 3 (10, 12) - 09/12/2002; 2002, c. 23, s. 3 (11, 13) - no effect - see 2004, c. 23, Sched. A, s. 42 - 01/01/2005

2004, c. 23, Sched. A, s. 42 - 01/01/2005

2017, c. 2, Sched. 10, s. 1 - 22/03/2017

Urgent amendments

34 (1) Section 33 does not apply if the IESO files a statement with the Board indicating that, in its opinion, an amendment to the market rules is urgently required for one or more of the following reasons:

1. To avoid, reduce the risk of or mitigate the effects of conditions that affect the ability of the integrated power system to function normally.
2. To avoid, reduce the risk of or mitigate the effects of the abuse of market power.
3. To implement standards or criteria of a standards authority.
4. To avoid, reduce the risk of or mitigate the effects of an unintended adverse effect of a market rule.
5. A reason prescribed by the regulations. 1998, c. 15, Sched. A, s. 34 (1); 2002, c. 23, s. 3 (14); 2004, c. 23, Sched. A, s. 43 (1).

Publication of urgent amendment

(2) The IESO shall publish the amendment in accordance with the market rules at the same time or as soon as reasonably possible after the statement referred to in subsection (1) is filed. 1998, c. 15, Sched. A, s. 34 (2); 2004, c. 23, Sched. A, s. 43 (2).

Notice to the Board

(2.1) The IESO shall give the Board a copy of the amendment and such other information as may be prescribed by the regulations on or before the date the IESO publishes the amendment under subsection (2). 2004, c. 23, Sched. A, s. 43 (3).

Board's power to revoke

(2.2) Despite section 4.1 of the *Statutory Powers Procedure Act* and section 35.1 of this Act, the Board may, not later than 15 days after the amendment is published under subsection (2) and without holding a hearing, revoke the amendment on a date specified by the Board and refer the amendment back to the IESO for further consideration. 2004, c. 23, Sched. A, s. 43 (3).

Review by Board

(3) On application by a person who is directly affected by the amendment, the Board shall review the amendment. 1998, c. 15, Sched. A, s. 34 (3); 2002, c. 23, s. 3 (17).

Time for application

(4) The application must be filed within 21 days after the amendment is published under subsection (2). 1998, c. 15, Sched. A, s. 34 (4).

Effect of revocation by Board

(4.1) If the Board revokes the amendment under subsection (2.2),

- (a) subsection (3) ceases to apply to the amendment; and
- (b) the Board shall not proceed with any review that arises from an application that was made under subsection (3) before it revoked the amendment. 2009, c. 33, Sched. 14, s. 2 (5).

Stay of amendment

(5) An application under this section does not stay the operation of the amendment pending the completion of the review. 1998, c. 15, Sched. A, s. 34 (5).

Referral back to IMO

(6) 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 class of market participants, the Board,

- (a) shall make an order referring the amendment back to the IESO for further consideration; and
- (b) may make an order revoking the amendment on a date specified by the Board. 1998, c. 15, Sched. A, s. 34 (6); 2004, c. 23, Sched. A, s. 43 (4).

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

2002, c. 23, s. 3 (14, 15, 17, 18) - 09/12/2002; 2002, c. 23, s. 3 (16) - no effect - see 2004, c. 23, Sched. A, s. 43 (3) - 01/01/2005; 2002, c. 23, s. 3 (19) - no effect - see 2009, c. 33, Sched. 14, s. 3 - 15/12/2009

2004, c. 23, Sched. A, s. 43 (1-4) - 01/01/2005

2009, c. 33, Sched. 14, s. 2 (5) - 15/12/2009; 2009, c. 33, Sched. 14, s. 2 (6) - no effect - see [Table of Public Statute Provisions Repealed Under Section 10.1 of the Legislation Act, 2006](#) - 31/12/2019

Other reviews of market rules

35 (1) On application by a person who is directly affected by a provision of the market rules, the Board may review the provision. 2002, c. 23, s. 3 (20).

Exception

(2) Subsection (1) does not apply to a provision of the market rules that was reviewed by the Board under section 33 or 34 within the 24 months before the application. 1998, c. 15, Sched. A, s. 35 (2).

Review of market rule made by the Minister

(3) Subsection (1) does not apply to a provision of the market rules that was made by the Minister before May 1, 2002 unless the application is made before May 1, 2005. 2004, c. 23, Sched. A, s. 44 (1).

Restriction

(4) An application shall not be made under this section by a market participant unless the applicant has made use of the provisions of the market rules relating to the review of market rules. 1998, c. 15, Sched. A, s. 35 (4).

Stay of provision

(5) An application under this section does not stay the operation of the provision pending the completion of the review. 1998, c. 15, Sched. A, s. 35 (5).

Referral back to IMO

(6) If, on completion of a review under this section, the Board finds that the provision is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order directing the IESO to amend the market rules in a manner and within the time specified by the Board. 1998, c. 15, Sched. A, s. 35 (6); 2004, c. 23, Sched. A, s. 44 (2).

Publication

(7) The IESO shall, in accordance with the market rules, publish any amendment made pursuant to an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (7); 2004, c. 23, Sched. A, s. 44 (2).

Further reviews

(8) Sections 33 and 34 do not apply to an amendment made in accordance with an order under subsection (6). 1998, c. 15, Sched. A, s. 35 (8).

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

2002, c. 23, s. 3 (20) - 09/12/2002

2004, c. 23, Sched. A, s. 44 (1, 2) - 01/01/2005

Statutory powers of decision

35.1 The powers of the Board to make orders under sections 33, 34 and 35 shall be deemed to be statutory powers of decision for the purpose of the *Statutory Powers Procedure Act*. 2000, c. 26, Sched. D, s. 1 (1).

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

2000, c. 26, Sched. D, s. 1 (1) - 06/12/2000

Appeals from orders

36 (1) A person who is subject to an order made under the market rules may appeal the order to the Board if the order,

- (a) requires the person to pay a financial penalty or other amount of money that exceeds the amount prescribed by the regulations;
- (b) denies the person authorization to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid; or

- (c) terminates, suspends or restricts the person's rights to participate in the IESO-administered markets or to cause or permit electricity to be conveyed into, through or out of the IESO-controlled grid. 1998, c. 15, Sched. A, s. 36 (1); 2004, c. 23, Sched. A, s. 45 (1).

Other methods of resolution

- (2) An appeal shall not be commenced under subsection (1) unless the appellant has made use of the provisions of the market rules relating to dispute resolution. 1998, c. 15, Sched. A, s. 36 (2).

Time for appeal

- (3) The appeal must be filed within the time prescribed by the rules of the Board. 1998, c. 15, Sched. A, s. 36 (3).

Stay of order

- (4) An appeal does not stay the operation of the order pending the determination of the appeal unless the Board orders otherwise. 1998, c. 15, Sched. A, s. 36 (4).

Same

- (5) In determining whether to stay the operation of an order, the Board shall consider,

- (a) the public interest;
- (b) the merits of the appeal;
- (c) the possibility of irreparable harm to any person; and
- (d) the balance of convenience. 1998, c. 15, Sched. A, s. 36 (5).

Powers of Board

- (6) After considering the appeal, the Board may make an order,

- (a) dismissing the appeal;
- (b) revoking or amending the order appealed from; or
- (c) making any other order or decision that the IESO could have made. 1998, c. 15, Sched. A, s. 36 (6); 2004, c. 23, Sched. A, s. 45 (2).

Same

- (7) In addition to its powers under subsection (6), the Board may also make an order revoking, suspending or adding or amending a condition of the appellant's licence. 1998, c. 15, Sched. A, s. 36 (7).

- (8) REPEALED: 2000, c. 26, Sched. D, s. 1 (2).

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

2000, c. 26, Sched. D, s. 1 (2) - 06/12/2000

2004, c. 23, Sched. A, s. 45 (1, 2) - 01/01/2005

Exemptions from market rules

- 36.1** (1) A person may apply to the IESO for an exemption from any provision of the market rules. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (1).

Notice of application

- (2) The IESO shall, in accordance with the market rules, publish notice of the application. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (1).

Determined by panel of directors

- (3) The application shall be determined by a panel of at least two directors of the IESO assigned to the application by the chair of the IESO's board of directors. 2004, c. 23, Sched. A, s. 46 (2).

Written submissions

- (4) The panel is not required to hold a hearing but shall consider all written submissions made in accordance with the market rules in respect of the application. 2001, c. 9, Sched. F, s. 1 (2).

Exemption requires approval of two-thirds of panel

(5) An exemption shall not be granted unless the exemption is approved by at least two-thirds of the directors on the panel. 2004, c. 23, Sched. A, s. 46 (3).

Terms of exemption

(6) An exemption,

- (a) may be granted in whole or in part; and
- (b) may be granted subject to conditions or restrictions. 2001, c. 9, Sched. F, s. 1 (2).

Expiry of exemption

(7) If an exemption is granted, it shall specify that it expires,

- (a) on a date fixed by the panel; or
- (b) on the occurrence of an event specified by the panel. 2001, c. 9, Sched. F, s. 1 (2).

Same

(8) A date fixed for the expiry of an exemption under clause (7) (a) shall not be later than five years after the exemption takes effect, unless the panel is satisfied that the circumstances justify a later date. 2001, c. 9, Sched. F, s. 1 (2).

Reasons

(9) When the panel decides to grant or refuse to grant an exemption, it shall give written reasons for its decision. 2001, c. 9, Sched. F, s. 1 (2).

Notice of decision

(10) When the panel decides to grant or refuse to grant an exemption, the IESO shall, in accordance with the market rules, publish notice of the decision. 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (4).

Appeal

(11) A person who is directly affected by the panel's decision to grant or refuse to grant an exemption and who made written submissions to the panel may appeal to the Board within 14 days after publication of the notice of the decision. 2001, c. 9, Sched. F, s. 1 (2).

Short-term exemptions

(12) Subsection (11) does not apply to a decision to grant an exemption that expires less than 60 days after it is granted. 2001, c. 9, Sched. F, s. 1 (2).

Stay

(13) An appeal does not stay the decision of the panel pending the determination of the appeal. 2001, c. 9, Sched. F, s. 1 (2).

Powers of Board

(14) After considering the appeal, the Board may make an order,

- (a) dismissing the appeal; or
- (b) if the Board finds that the decision of the panel is inconsistent with the purposes of this Act,
 - (i) referring the application for the exemption back to the panel for further consideration,
 - (ii) revoking or amending the decision of the panel, or
 - (iii) making any decision that the panel could have made. 2001, c. 9, Sched. F, s. 1 (2).

Removal of exemption

(15) If the board of directors proposes to remove an exemption, subsections (2), (3), (4), (6), (9), (10), (11), (13) and (14) apply, with necessary modifications, and subsection (16) applies without modification. 2004, c. 23, Sched. A, s. 46 (5).

Appeal of removal of exemption

(16) If a decision is made to remove an exemption, the only person who may appeal under subsection (11) is the person in whose favour the exemption was granted. 2001, c. 9, Sched. F, s. 1 (2).

Previous exemptions

(17) An exemption from a provision of the market rules that was granted by the IESO before the day this subsection came into force in respect of a metering installation that was in service before April 17, 2000 or in respect of which the major components were ordered or procured before or within 30 days following April 17, 2000 shall be deemed to have been authorized by law and shall continue until it expires pursuant to its terms or until it is removed under subsection (15). 2001, c. 9, Sched. F, s. 1 (2); 2004, c. 23, Sched. A, s. 46 (6).

Rules

(18) The IESO's directors may make rules governing the practice and procedure before panels of directors under this section. 2004, c. 23, Sched. A, s. 46 (7).

Report

(19) The IESO shall, not later than May 1, 2007, submit a report to the Minister on the need for and operation of this section. 2004, c. 23, Sched. A, s. 46 (8).

Extension

(20) The Lieutenant Governor in Council may, before May 1, 2007, extend by not more than six months the date by which the report referred to in subsection (19) must be submitted. 2004, c. 23, Sched. A, s. 46 (8).

Tabling of report

(21) The Minister shall submit the report to the Lieutenant Governor in Council and shall then table the report in the Assembly. 2001, c. 9, Sched. F, s. 1 (2).

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

2001, c. 9, Sched. F, s. 1 (2) - 08/08/2001

2004, c. 23, Sched. A, s. 46 (1-8) - 01/01/2005

LIMITATION PERIOD

Limitation period

36.1.1 (1) Despite anything in this or any other Act or regulation, the market rules or any licence or code issued by the Board, but subject to the regulations made under this section and to subsections (7) and (8), no market participant, consumer, entity or person shall, more than two years or other prescribed period of time after the applicable date, be entitled to seek or receive any payment, adjustment or amount, or be required to make any payment or adjustment or to pay an amount, from or to the IESO, where the payment, adjustment or amount is based on an entitlement or a specified charge that arises under an Act or a regulation, or one or more provisions of an Act or a regulation, that is prescribed for the purposes of this subsection. 2021, c. 34, Sched. 9, s. 2.

Same, IESO

(2) For the purposes of subsection (1), and subject to subsections (7) and (8), the IESO shall not, in respect of an entitlement or specified charge described in subsection (1), make or receive any payment or adjustment of any amount to or from a market participant, consumer, entity or person, including settling or resettling such payments, adjustments or amounts, more than two years or other prescribed period of time after the applicable date referred to in that subsection. 2021, c. 34, Sched. 9, s. 2.

Greater certainty

(3) For greater certainty, subsection (1) does not apply to a payment, adjustment or amount in respect of an entitlement or specified charge that arises under an Act or a regulation, or under a provision of an Act or a regulation, that is not prescribed for the purposes of that subsection. 2021, c. 34, Sched. 9, s. 2.

Applicable date

(4) For the purposes of subsection (1), the applicable date is, with respect to a settlement of any payment, adjustment or amount that relates to an entitlement or a specified charge, and subject to the regulations, if any,

(a) the earlier of,

(i) the initial date on which the IESO would have the right or obligation to settle a transaction, or

(ii) the date the IESO issues an invoice; or

- (b) the alternative applicable date provided for in the regulations or determined by a method provided for in the regulations. 2021, c. 34, Sched. 9, s. 2.

Discoverability, etc.

(5) Subsection (1) applies whether or not the payment, adjustment or amount in respect of an entitlement or specified charge was capable of being identified or discovered within the applicable limitation period. 2021, c. 34, Sched. 9, s. 2.

IESO authority unaffected, market rules, etc.

(6) Subject to subsection (8), nothing in this section shall be read to remove, eliminate, limit or interfere with the IESO's authority that does not relate to or conflict with the matters provided for in subsection (1), including its authority to make or receive any payments or adjustments that arise under the market rules or to participate in any transactions or settlements that arise under the market rules or to undertake any other activities that arise under the market rules, and including the IESO's authority to,

- (a) make or amend the market rules in relation to settlements, payments, adjustments or charges including the timing and method for determining such settlements, payments, adjustments or charges, or any related matter;
- (b) commence or carry out compliance or enforcement activities arising under the market rules, including any audit, inquiry, investigation, monitoring or other supervisory activity or review related to the issuance or potential issuance of a financial penalty or other sanction under the market rules or in relation to any settlements, payments, adjustments or charges under the market rules;
- (c) make or adjust amounts paid or payable under the market rules, including amounts mentioned in clause (f);
- (d) suspend or terminate a market participant's authorization to participate in the IESO-administered markets, in accordance with the market rules;
- (e) make or receive a payment or pay or receive an amount that is attributable to,
 - (i) a decision, an order, a licence or a code made or issued by the Board, any form of compliance or enforcement activity, determination or direction of the Board or an assurance of voluntary compliance given to the Board under section 112.7 of the *Ontario Energy Board Act, 1998*,
 - (ii) an award, an order, a determination or a proceeding provided by an arbitrator, a court, the IESO or a tribunal other than the Board or by a compliance agreement or other agreement providing for the resolution of a matter arising from a compliance or enforcement activity,
 - (iii) an award, an order, a ruling or a determination of an arbitrator, a court or a tribunal in relation to a settlement, or
 - (iv) any contract entered into by the IESO;
- (f) make or adjust amounts paid or payable arising under the market rules, including settling or resettling such amounts as and when required or appropriate in accordance with the market rules;
- (g) issue, re-issue or amend settlement statements or any documentation that reflects settlements that arise under the market rules; or
- (h) make, receive or provide for a payment, adjustment or amount or participate in a transaction that is provided for in the regulations or to do any of those things in a manner that is determined by the regulations with a person or class of persons prescribed by the regulations. 2021, c. 34, Sched. 9, s. 2.

Non-application, subs. (1)

(7) Despite subsection (1), the IESO shall not be restricted from making or receiving any payment or adjustment of any amount to or from a market participant, a consumer, an entity or a person in respect of an entitlement or a specified charge to which that subsection applies where such payment or adjustment results from,

- (a) any form of compliance or enforcement activity, determination, ruling or decision arising under the market rules, including the issuance of any financial penalty or other sanction under the market rules or the making or adjusting of amounts paid or payable under the market rules or that are based on a payment or entitlement mentioned in subsection (1);
- (b) a decision, an order or a direction of the Board in respect of a variance account;
- (c) any form of compliance or enforcement activity, determination, direction, decision or order of the Board or an assurance of voluntary compliance given to the Board under section 112.7 of the *Ontario Energy Board Act, 1998*;
- (d) a decision or an order of a court arising from a matter mentioned in clause (b) or (c);

- (e) an award, an order, a decision, a ruling or a determination provided by a court, the Board, a tribunal or an arbitrator that relates to a compliance or enforcement activity undertaken by the IESO, including any agreement providing for the resolution of a matter entered into in the context of such proceedings; or
- (f) with respect to any matters that are not referred to in clauses (b), (c), (d) and (e), an award, an order, a decision, a ruling or a determination provided by the Board, a court, a tribunal other than the Board or an arbitrator, where the proceedings were initiated in the manner provided for in the regulations, and before the limitation period provided for in the regulations, if any. 2021, c. 34, Sched. 9, s. 2.

Board authority unaffected

(8) Subject to subsection (11), nothing in this section shall be read to remove, eliminate or interfere with the Board's authority under this or any other Act. 2021, c. 34, Sched. 9, s. 2.

No expropriation

(9) Nothing in this section and nothing done or not done in accordance with this section constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law. 2021, c. 34, Sched. 9, s. 2.

No compensation

(10) Despite any other Act or law, no person is entitled to any compensation for any loss or damages, including loss of an entitlement to a payment, an adjustment or an amount referred to in this section or the loss of revenues or loss of profit, that arises from the enactment, repeal or application of this section, the making, revocation or application of any regulation or order made under this section or anything done or not done in accordance with this section or a regulation or an order made under this section. 2021, c. 34, Sched. 9, s. 2.

Conflicts, etc.

(11) Where any conflict exists between an order of the Board, a code issued by the Board or a licence condition and this section or a regulation made under this section, this section or the regulation made under this section shall prevail to the extent of the conflict. 2021, c. 34, Sched. 9, s. 2.

Crown not liable, etc.

(12) No cause of action arises against the Crown, any current or former member of the Executive Council or any current or former employee or agent of or advisor to the Crown, or against the IESO or the Board or any of their current or former directors, officers, employees or agents, and in the case of the Board, any of its current or former chairs, vice-chairs, members or commissioners, as a direct or indirect result of,

- (a) the enactment, operation, administration or repeal of any provision of this section or the regulations made under it or that are consequential to its enactment; or
- (b) anything done or not done in order to comply with this section or the regulations made under it. 2021, c. 34, Sched. 9, s. 2.

Timing

(13) Subsection (12) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before, on or after the day this section came into force. 2021, c. 34, Sched. 9, s. 2.

Regulations

(14) The Lieutenant Governor in Council may make regulations,

- (a) providing for and governing situations to which subsection (1) does or does not apply, including prescribing Acts, regulations, or provisions of Acts or regulations to which subsection (1) does or does not apply;
- (b) providing for an alternative limitation period for the purposes of subsection (1), and providing for and governing situations where different limitation periods apply, including providing for the method or methods of determining such limitation periods;
- (c) prescribing payments, adjustments, amounts, entitlements and specified charges to which subsection (1) does or does not apply;
- (d) respecting what the applicable date is for the purposes of subsection (1), including providing for the alternative applicable date mentioned in clause (4) (b), or a method of determining the applicable date or the alternative applicable date, including providing for the application of or determination of different applicable dates in different circumstances;

- (e) defining “adjustment”, “amount”, “entitlement”, “invoice”, “payment”, “specified charge” and “variance account” for the purposes of this section, and providing for any criteria they must meet;
- (f) providing for criteria that must be met relating to the manner in which the proceedings referred to in clause (7) (f) are initiated and providing for different criteria that must be met in different circumstances;
- (g) providing for the limitation period referred to in clause (7) (f);
- (h) generally for governing the application of this section and providing for anything that is described in this section as being prescribed by, determined in or provided for in the regulations;
- (i) governing such transitional matters as the Lieutenant Governor in Council considers necessary or advisable to facilitate the implementation of this section. 2021, c. 34, Sched. 9, s. 2.

Retroactive

(15) A regulation under this section may apply to a period before it is made, if the regulation so provides. 2021, c. 34, Sched. 9, s. 2.

Definitions

(16) In this section,

“adjustment”, “amount”, “entitlement”, “invoice”, “payment”, “specified charge” and “variance account” have the meaning provided for in the regulations. 2021, c. 34, Sched. 9, s. 2.

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

2021, c. 34, Sched. 9, s. 2 - 01/01/2022

RELIABILITY STANDARDS

Reliability standards

Posting the standard

36.2 (1) Within seven days after the IESO receives notification of the approval of a reliability standard by a standards authority, the IESO shall post the standard on its public website together with any other information and materials that may be prescribed by regulation. 2008, c. 7, Sched. G, s. 4.

Other notice

(2) If required by regulation, the IESO shall give additional notice of the standard and of any information and materials that may be prescribed by regulation in such other manner and at the time or times prescribed by regulation. 2008, c. 7, Sched. G, s. 4.

Application for review

(3) Any person may apply to the Board for review of a reliability standard by filing an application with the Board within 21 days after the standard is posted under subsection (1). 2008, c. 7, Sched. G, s. 4.

Board-initiated review

(4) The Board on its own motion may initiate a review of a reliability standard within 21 days, or such longer period of time as may be prescribed by regulation, after the standard is posted under subsection (1). 2008, c. 7, Sched. G, s. 4.

Stay pending Board review

(5) No application for review under subsection (3) or initiation of a review by the Board under subsection (4) shall stay the operation of the reliability standard pending the completion of the Board’s review of the standard unless the Board orders otherwise. 2008, c. 7, Sched. G, s. 4.

Same

(6) In determining whether to stay the operation of a reliability standard, the Board shall consider,

- (a) the public interest;
- (b) the merits of the application;
- (c) the possibility of irreparable harm to any person;
- (d) the impact on consumers;

- (e) the balance of convenience;
- (f) the need to co-ordinate the implementation of the standard in Ontario with other jurisdictions;
- (g) the need to co-ordinate the review of the standard in Ontario with regulatory bodies in other jurisdictions that have reviewed, are reviewing or may review the standard and that have the authority to refer the standard back to the standards authority for further consideration; and
- (h) any other matter that may be prescribed by regulation. 2008, c. 7, Sched. G, s. 4.

Order re inconsistency or discrimination

(7) If, on completion of its review, the Board finds that the standard is inconsistent with the purposes of this Act or unjustly discriminates against or in favour of a market participant or class of market participants, the Board shall make an order,

- (a) revoking the operation of the standard in Ontario, if it is already operational, or disallowing the future operation of the standard in Ontario, on a date specified by the Board; and
- (b) referring the standard back to the standards authority for further consideration. 2008, c. 7, Sched. G, s. 4.

Order re co-ordination with other jurisdictions

(8) The Board may also make the order described in subsection (7) if, on completion of its review, the Board finds that there is a need to co-ordinate with other jurisdictions or with regulatory bodies in other jurisdictions regarding the reliability standard. 2008, c. 7, Sched. G, s. 4.

Order on prescribed grounds

(9) The Lieutenant Governor in Council may make regulations prescribing additional grounds on which the Board shall or may make the order described in subsection (7). 2008, c. 7, Sched. G, s. 4.

Application

(10) This section does not apply to a reliability standard approved by a standards authority before the day this section comes into force, but does apply to an amendment to a reliability standard, whether the reliability standard being amended was approved before, on or after the day this section comes into force, if the amendment to the reliability standard is approved on or after the day this section comes into force. 2008, c. 7, Sched. G, s. 4.

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

2008, c. 7, Sched. G, s. 4 - 14/05/2008

Appeals from sanction orders

36.3 (1) The IESO may appeal to the Board an order, finding or remedial action made or taken by a standards authority in respect of a violation of a reliability standard in Ontario, subject to such limitations as may be prescribed by regulation. 2008, c. 7, Sched. G, s. 4.

Other options to appeal

(2) An appeal shall not be commenced under subsection (1) unless the IESO has commenced all other reviews and appeals available to it and such reviews and appeals have been finally determined. 2008, c. 7, Sched. G, s. 4.

Time for appeal

(3) The appeal must be filed within the time prescribed by the rules of the Board. 2008, c. 7, Sched. G, s. 4.

Stay of order

(4) An appeal does not stay the operation of the order, finding or remedial action pending the determination of the appeal unless the Board orders otherwise. 2008, c. 7, Sched. G, s. 4.

Same

(5) In determining whether to stay the operation of an order, finding or remedial action, the Board shall consider,

- (a) the public interest;
- (b) the merits of the appeal;
- (c) the possibility of irreparable harm to any person; and
- (d) the balance of convenience. 2008, c. 7, Sched. G, s. 4.

Powers of Board

- (6) After considering the appeal, the Board may make an order,
- (a) dismissing the appeal;
 - (b) revoking or amending the order, finding or remedial action appealed from; or
 - (c) making any other order, finding or decision or taking any other remedial action that the standards authority could have made or taken. 2008, c. 7, Sched. G, s. 4.

Same

- (7) In addition to its powers under subsection (6), the Board may also make an order,
- (a) revoking or suspending a condition of the IESO's licence;
 - (b) amending a condition of the IESO's licence; or
 - (c) adding a condition to the IESO's licence. 2008, c. 7, Sched. G, s. 4.

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

2008, c. 7, Sched. G, s. 4 - 14/05/2008

Statutory powers of decision

36.4 The powers of the Board to make orders under sections 36.2 and 36.3 shall be deemed to be statutory powers of decision for the purpose of the *Statutory Powers Procedure Act*. 2008, c. 7, Sched. G, s. 4.

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

2008, c. 7, Sched. G, s. 4 - 14/05/2008

INVESTIGATIONS

Investigation by Market Surveillance Panel

37 (1) The Market Surveillance Panel may investigate any activity related to the IESO-administered markets or the conduct of a market participant. 2002, c. 1, Sched. A, s. 6; 2004, c. 23, Sched. A, s. 47 (1).

Right to examine

(2) For the purposes of an investigation under this section, the Panel may examine any documents or other things, whether they are in the possession or control of the person whose activities are being investigated or any other person. 2002, c. 1, Sched. A, s. 6.

Power to compel testimony

(3) For the purposes of an investigation under this section, the Panel has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions. 2002, c. 1, Sched. A, s. 6.

Contempt

(4) The Superior Court of Justice has the same power to punish for contempt a person who refuses to attend, testify or produce documents or other things when required to do so by the Panel under this section as it would if the person had disobeyed an order of the Court. 2002, c. 1, Sched. A, s. 6.

Rights of witness

(5) A person giving evidence under subsection (3) may be represented by counsel and may claim any privilege to which the person is entitled. 2002, c. 1, Sched. A, s. 6.

Inspection

(6) A person authorized in writing by the Panel may, on production of the authorization, enter any business premises, other than premises used as a dwelling, during business hours for the purposes of conducting an investigation under this section, where the person reasonably believes that relevant documents, records or other things may be found in the business premises. 2002, c. 1, Sched. A, s. 6.

Copies

(7) On giving a receipt, a person mentioned in subsection (6) may remove documents, records or other things for the purpose of making copies or extracts, and shall promptly return them to the person who produced them. 2002, c. 1, Sched. A, s. 6.

Documents in electronic form

(8) If a document, record or other thing is kept in electronic form, the person mentioned in subsection (6) may require that a copy of it be provided on paper or in a machine-readable medium or both. 2002, c. 1, Sched. A, s. 6.

Authorization to search

(9) For the purposes of an investigation under this section, a person authorized in writing by the Panel may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for a warrant authorizing the person or persons named in the warrant to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with according to law. 2002, c. 1, Sched. A, s. 6.

Grounds

(10) No authorization shall be granted under subsection (9) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable grounds to believe that there is in the building, receptacle or place to be searched anything that may reasonably relate to an investigation under this section. 2002, c. 1, Sched. A, s. 6.

Power to enter, search and seize

(11) A person named in a warrant under subsection (9) may, on production of the warrant, enter any building, receptacle or place specified in the warrant between 6 a.m. and 9 p.m. and search for and seize anything specified in the warrant. 2002, c. 1, Sched. A, s. 6.

Expiration

(12) Every warrant under subsection (9) shall name the day that it expires, which shall not be later than 15 days after the warrant is granted. 2002, c. 1, Sched. A, s. 6.

Dwellings

(13) For the purposes of subsections (9), (10) and (11),

“building, receptacle or place” does not include premises used as a dwelling. 2002, c. 1, Sched. A, s. 6.

Application

(14) Sections 159 and 160 of the *Provincial Offences Act* apply to searches and seizures under this section with such modifications as the circumstances require. 2002, c. 1, Sched. A, s. 6.

Report and recommendations

(15) On completion of an investigation, the Panel shall prepare a report that may include recommendations for amendment of the market rules or other recommendations. 2002, c. 1, Sched. A, s. 6.

Submission of report

(16) The Panel shall submit the report to the IESO, the Board and any other person that the Panel considers appropriate. 2004, c. 23, Sched. A, s. 47 (2).

Same

(17) The report shall be deemed, for the purpose of section 14 of the *Freedom of Information and Protection of Privacy Act*, to be a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law. 2002, c. 1, Sched. A, s. 6.

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

2000, c. 26, Sched. D, s. 1 (3-5) - 01/05/2002

2002, c. 1, Sched. A, s. 6 - 27/06/2002

2004, c. 23, Sched. A, s. 47 (1, 2) - 01/01/2005

Review of materials by Panel

37.1 (1) Every market participant shall deliver to the Market Surveillance Panel, at any time required by the Panel, any books, records or documents that are required to be kept by the market participant under the market rules or Ontario law. 2002, c. 1, Sched. A, s. 6.

Same

(2) The Panel may review and keep copies of any books, records or documents provided under subsection (1) for the purposes of market surveillance. 2002, c. 1, Sched. A, s. 6.

Inspection

(3) A person authorized in writing by the Panel may enter the business premises of any market participant, other than premises used as a dwelling, during business hours, and may examine and make copies of any books, records or documents mentioned in subsection (1) for the purposes of market surveillance. 2002, c. 1, Sched. A, s. 6.

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

2002, c. 1, Sched. A, s. 6 - 27/06/2002

No obstruction

37.2 (1) No person shall obstruct, hinder or interfere with a person who is acting pursuant to an authorization granted under subsection 37 (6) or (9) or 37.1 (3). 2002, c. 1, Sched. A, s. 6.

Penalty

(2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine not exceeding \$50,000. 2002, c. 1, Sched. A, s. 6.

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

2002, c. 1, Sched. A, s. 6 - 27/06/2002

Confidentiality

37.3 (1) All information and material that is not otherwise public and that is furnished to or received or obtained by the Panel or anyone acting on behalf of the Panel pursuant to section 37 or 37.1 is confidential, and no person shall communicate the information or allow access to or inspection of the material except in the ordinary course of his or her duties, unless,

- (a) the Panel has made an order under subsection (3);
- (b) the information or material was considered by the Panel in preparing a report under subsection 37 (15) and communication of the information or access to or inspection of the material is required by a summons or direction of the Board; or
- (c) the information is communicated to or access to or inspection of the material is allowed to a police service or other investigatory agency or to a regulatory agency. 2002, c. 1, Sched. A, s. 6; 2019, c. 1, Sched. 4, s. 16.

Not evidence in proceedings

(2) No document, record, copy or other thing obtained pursuant to section 37 or 37.1 is admissible in evidence in any proceeding, except a review by the Board under section 38, unless the Panel has made an order under subsection (3). 2002, c. 1, Sched. A, s. 6.

Disclosure by Panel

(3) The Panel shall make an order permitting the disclosure of information or material obtained pursuant to section 37 or 37.1 if, after giving the person from whom the information or material was obtained and any other person who, in the opinion of the Panel, is an interested party an opportunity to be heard, the Panel is of the opinion that disclosure is in the public interest. 2002, c. 1, Sched. A, s. 6.

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

2002, c. 1, Sched. A, s. 6 - 27/06/2002

2018, c. 3, Sched. 5, s. 18 - no effect - see 2019, c. 1, Sched. 3, s. 5 - 26/03/2019

2019, c. 1, Sched. 4, s. 16 - 01/04/2024

ABUSE OF MARKET POWER

Abuse of market power

38 (1) If the Market Surveillance Panel submits a report to the IESO and the Board under section 37 that contains recommendations relating to the abuse or possible abuse of market power, the IESO shall, within 30 days after receiving the report, inform the Board what action the IESO has taken or intends to take in response to the report. 1998, c. 15, Sched. A, s. 38 (1); 2004, c. 23, Sched. A, s. 48.

Review by Board

(2) After receiving the report of the Market Surveillance Panel and after receiving any information provided by the IESO under subsection (1), the Board may conduct a review to determine whether the market rules or the licence of any market participant should be amended. 1998, c. 15, Sched. A, s. 38 (2); 2004, c. 23, Sched. A, s. 48.

Minister's directive

(3) If directed to do so by the Minister under section 28 of the *Ontario Energy Board Act, 1998*, the Board shall, in accordance with the directive, conduct a review to determine whether the market rules or the licence of any market participant should be amended. 1998, c. 15, Sched. A, s. 38 (3).

Powers of Board

(4) On the completion of a review under subsection (2) or (3), the Board may, for the purpose of avoiding, reducing the risk of or mitigating the effects of an abuse of market power,

- (a) amend the licence of any market participant; or
- (b) make an order directing the IESO to amend the market rules in a manner and within the time specified by the Board. 1998, c. 15, Sched. A, s. 38 (4); 2004, c. 23, Sched. A, s. 48.

Publication

(5) The IESO shall, in accordance with the market rules, publish any amendment made pursuant to an order under clause (4) (b). 1998, c. 15, Sched. A, s. 38 (5); 2004, c. 23, Sched. A, s. 48.

Further reviews

(6) Sections 33 and 34 do not apply to an amendment made in accordance with an order under clause (4) (b). 1998, c. 15, Sched. A, s. 38 (6).

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

2004, c. 23, Sched. A, s. 48 - 01/01/2005

EMERGENCY PLANS

Emergency plans

39 (1) The Minister shall require the IESO to prepare and file with the Minister such emergency plans as the Minister considers necessary. 1998, c. 15, Sched. A, s. 39 (1); 2004, c. 23, Sched. A, s. 49 (1).

Same

(2) The Minister may require a market participant to prepare and file with the Minister such emergency plans as the Minister considers necessary. 1998, c. 15, Sched. A, s. 39 (2).

Co-ordination of plans

(3) The IESO shall assist in co-ordinating the preparation of plans under subsections (1) and (2). 1998, c. 15, Sched. A, s. 39 (3); 2004, c. 23, Sched. A, s. 49 (1).

Implementation

(4) The Minister may direct the IESO or a market participant to implement an emergency plan filed under subsection (1) or (2), with such changes as the Minister considers necessary. 1998, c. 15, Sched. A, s. 39 (4); 2004, c. 23, Sched. A, s. 49 (1).

Nuclear generation facilities

(5) Every generator that owns or operates a nuclear generation facility shall file with the Minister a copy of any emergency plans relating to the facility that are filed with the Canadian Nuclear Safety Commission. 1998, c. 15, Sched. A, s. 39 (5).

(6) REPEALED: 2004, c. 23, Sched. A, s. 49 (2).

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

2004, c. 23, Sched. A, s. 49 (1, 2) - 01/01/2005

POWERS OF ENTRY

Powers of entry

40 (1) A transmitter or distributor may, at reasonable times, enter land on which its transmission or distribution system is located,

- (a) to inspect, maintain, repair, alter, remove, replace or disconnect wires or other facilities used to transmit or distribute electricity; or
- (b) to install, inspect, read, calibrate, maintain, repair, alter, remove or replace a meter. 1998, c. 15, Sched. A, s. 40 (1).

Same: multi-unit buildings

(2) If a transmitter or distributor has the necessary consent of an owner or occupant to connect a line of its transmission or distribution system to part of a building and other parts of the building are owned by different owners or are in the possession of different occupants, the transmitter or distributor may, at reasonable times, enter on the other parts of the building to install, construct or maintain its transmission or distribution system, including anything necessary to make the connection. 1998, c. 15, Sched. A, s. 40 (2).

Same: common passages

(3) If a transmitter or distributor has the necessary consent of an owner or occupant to connect a line of its transmission or distribution system to land and the owner or occupant shares a mutual driveway or other common passage with the owners or occupants of neighbouring land, the transmitter or distributor may, at reasonable times, enter the common passage to install, construct or maintain its transmission or distribution system, including anything necessary to make the connection. 1998, c. 15, Sched. A, s. 40 (3).

Same: removal of obstructions

(4) A transmitter or distributor may enter any land for the purpose of cutting down or removing trees, branches or other obstructions if, in the opinion of the transmitter or distributor, it is necessary to do so to maintain the safe and reliable operation of its transmission or distribution system. 1998, c. 15, Sched. A, s. 40 (4).

Shutting off electricity

(5) For the purposes of this section, the transmitter or distributor may shut off or reduce the supply of electricity to the property or connect or disconnect equipment or open or close circuits. 1998, c. 15, Sched. A, s. 40 (5).

Employees, etc.

(6) If a person has a power of entry under this section, the power may be exercised by an employee or agent of the person who may be accompanied by any other person under the direction of the employee or agent. 1998, c. 15, Sched. A, s. 40 (6).

Identification

(7) A person exercising a power of entry under this section must on request display or produce proper identification. 1998, c. 15, Sched. A, s. 40 (7).

Notice, compensation, etc.

- (8) If a person exercises a power of entry under this section, the person shall,
- (a) provide reasonable notice of the entry to the occupier of the property;
 - (b) in so far as is practicable, restore the property to its original condition; and
 - (c) provide compensation for any damages caused by the entry. 1998, c. 15, Sched. A, s. 40 (8).

PROPERTY INTERESTS

Public streets and highways

41 (1) A transmitter or distributor may, over, under or on any public street or highway, construct or install such structures, equipment and other facilities as it considers necessary for the purpose of its transmission or distribution system, including poles and lines. 1998, c. 15, Sched. A, s. 41 (1).

Inspection, etc.

(2) The transmitter or distributor may inspect, maintain, repair, alter, remove or replace any structure, equipment or facilities constructed or installed under subsection (1) or a predecessor of subsection (1). 1998, c. 15, Sched. A, s. 41 (2).

Entry

(3) The transmitter or distributor may enter the street or highway at any reasonable time to exercise the powers referred to in subsections (1) and (2). 1998, c. 15, Sched. A, s. 41 (3).

Employees, etc.

(4) The powers of a transmitter or distributor under subsections (1), (2) and (3) may be exercised by an employee or agent of the transmitter or distributor, who may be accompanied by any other person under the direction of the employee or agent. 1998, c. 15, Sched. A, s. 41 (4).

No consent required

(5) The exercise of powers under subsections (1), (2) and (3) does not require the consent of the owner of or any other person having an interest in the street or highway. 1998, c. 15, Sched. A, s. 41 (5).

Identification

(6) A person exercising a power of entry under this section must on request display or produce proper identification. 1998, c. 15, Sched. A, s. 41 (6).

Notice, compensation, etc.

(7) If a transmitter or distributor exercises a power of entry under this section, it shall,

- (a) provide reasonable notice of the entry to the owner or other person having authority over the street or highway;
- (b) in so far as is practicable, restore the street or highway to its original condition; and
- (c) provide compensation for any damages caused by the entry. 1998, c. 15, Sched. A, s. 41 (7).

No compensation

(8) Subject to clause (7) (c), the transmitter or distributor is not required to pay any compensation in order to exercise its powers under subsections (1), (2) and (3), and the *Expropriations Act* does not apply in respect of anything done pursuant to those powers. 1998, c. 15, Sched. A, s. 41 (8).

Location

(9) The location of any structures, equipment or facilities constructed or installed under subsection (1) shall be agreed on by the transmitter or distributor and the owner of the street or highway, and in case of disagreement shall be determined by the Board. 1998, c. 15, Sched. A, s. 41 (9).

(10) REPEALED: 2016, c. 10, Sched. 2, s. 9.

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

2016, c. 10, Sched. 2, s. 9 - 01/07/2016

Telecommunications services

42 (1) If part of a transmission or distribution system is located on land with respect to which the transmitter or distributor has an easement or other right to use the land, the transmitter or distributor may,

- (a) use the land that is subject to the easement or other right for the purpose of providing telecommunications service; or
- (b) enter into agreements with other persons, including affiliates of the transmitter or distributor, authorizing them to use the land that is subject to the easement or other right for the purpose of providing telecommunications service. 1998, c. 15, Sched. A, s. 42 (1).

Same

(2) Except as provided under this section, subsection (1) applies despite any other Act and despite any agreement or instrument to the contrary. 1998, c. 15, Sched. A, s. 42 (2); 2021, c. 2, Sched. 2, s. 10 (1).

Same

(3) Clause (1) (a) is subject to section 71 of the *Ontario Energy Board Act, 1998*. 1998, c. 15, Sched. A, s. 42 (3).

No compensation

(4) The transmitter or distributor is not required to pay any compensation for attaching wires or other telecommunications facilities to a transmission or distribution pole pursuant to clause (1) (a). 1998, c. 15, Sched. A, s. 42 (4).

Same

(5) A person who is authorized to use land pursuant to an agreement entered into under clause (1) (b) is not required to pay any compensation, other than compensation provided for in the agreement, for attaching wires or other telecommunications facilities to a transmission or distribution pole pursuant to the agreement. 1998, c. 15, Sched. A, s. 42 (5).

Same

(5.1) Clause (1) (b) and subsection (5) are subject to Part VI.1 of the *Ontario Energy Board Act, 1998*. 2021, c. 2, Sched. 2, s. 10 (2).

Definition

(6) In this section,

“telecommunications service” has the same meaning as in the *Telecommunications Act* (Canada). 1998, c. 15, Sched. A, s. 42 (6).

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

2021, c. 2, Sched. 2, s. 10 (1, 2) - 01/01/2022

Easement: generators, transmitters and distributors

42.1 An easement in favour of a generator, transmitter or distributor for the purpose of generation, transmission or distribution does not have to be appurtenant or annexed to or for the benefit of any specific parcel of land to be valid. 2002, c. 1, Sched. A, s. 7.

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

2002, c. 1, Sched. A, s. 7 - 27/06/2002

Easement over lands sold for taxes

Transmitters and distributors

43 (1) Despite any other Act, if land that was or is subject to easements, ways, rights of way or entry, licences or rights to maintain property thereon, owned by or belonging to a transmitter or distributor, has been or is sold for taxes, or in respect of which a tax arrears certificate has been or is registered, such easements, ways, rights of way or entry, licences, or rights to maintain property shall be deemed not to have been or be affected by the sale or registration. 1998, c. 15, Sched. A, s. 43 (1).

Same: generators

(2) Despite any other Act, if land that was or is subject to flooding rights owned by or belonging to a generator has been or is sold for taxes, or in respect of which a tax arrears certificate has been or is registered, such flooding rights shall be deemed not to have been or be affected by the sale or registration. 1998, c. 15, Sched. A, s. 43 (2).

Easement: municipal public utilities

43.1 Section 91 of the *Municipal Act, 2001* or section 72 of the *City of Toronto Act, 2006*, as the case may be, applies, with necessary modifications, with respect to a corporation incorporated under section 142 and its subsidiaries as if the corporation or subsidiary, as the case may be, were a municipality and with respect to an easement in favour of a generator, transmitter or distributor for the purpose of generation, transmission or distribution as if it were an easement of a public utility under that section. 2002, c. 1, Sched. A, s. 8; 2006, c. 32, Sched. C, s. 16 (1).

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

2002, c. 1, Sched. A, s. 8 - 01/01/2003

2006, c. 32, Sched. C, s. 16 (1) - 01/01/2007

Ownership of fixtures

44 Despite any other Act, if property of a transmitter or distributor has been affixed to realty, the property remains subject to the rights of the transmitter or distributor as fully as it was before being so affixed and does not become part of the realty unless otherwise agreed by the transmitter or distributor in writing. 1998, c. 15, Sched. A, s. 44.

Exemption from seizure

45 Personal property of a transmitter or distributor that is used for or in connection with transmitting or distributing electricity to land is exempt from seizure,

- (a) against the owner or occupant of the land under the *Execution Act*; and
- (b) against a person with a leasehold interest in the land for overdue rent. 1998, c. 15, Sched. A, s. 45.

Unregistered rights

46 (1) If, immediately before the repeal of section 48 of the *Power Corporation Act* under the *Energy Competition Act, 1998*, land was subject to a right referred to in subsection 48 (2) or (3) of the *Power Corporation Act*, the land continues to be subject to the right until the right expires or until it is released by the holder of the right. 1998, c. 15, Sched. A, s. 46 (1).

Transfer of right

(2) A right referred to in subsection (1) may be transferred to,

- (a) Hydro One Inc.;
- (b) Ontario Power Generation Inc.;
- (c) a subsidiary of Hydro One Inc. that is authorized to transmit or distribute electricity;
- (c.1) a subsidiary of Ontario Power Generation Inc. that is authorized to generate electricity;
- (d) a corporation established pursuant to section 142 that is authorized to transmit or distribute electricity; or
- (e) a subsidiary of a corporation established pursuant to section 142, if the subsidiary is authorized to transmit or distribute electricity. 1998, c. 15, Sched. A, s. 46 (2); 2002, c. 1, Sched. A, s. 9.

Information

(3) On the request of the owner of land or a person intending to acquire an interest in land, the holder of a right referred to in subsection (1) shall make a search of its records and, within 21 days after receiving the request, shall inform the owner or person whether or not it has a right affecting the land that is not registered under the *Land Titles Act* or the *Registry Act* and, if it has such a right, shall also inform the owner or person of the term and extent of the right. 1998, c. 15, Sched. A, s. 46 (3).

Compensation

(4) A person who suffers loss or damage due to the failure of the holder of a right to comply with subsection (3) is entitled to compensation for the loss or damage from the holder of the right. 1998, c. 15, Sched. A, s. 46 (4).

Application of *Expropriations Act*

(5) The *Expropriations Act* applies with necessary modifications to a claim for compensation under subsection (4) as if it constituted injurious affection and, for the purpose,

- (a) a reference to the statutory authority shall be deemed to be a reference to the holder of the right; and
- (b) a reference to the owner shall be deemed to be a reference to the person mentioned in subsection (4). 1998, c. 15, Sched. A, s. 46 (5).

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

2002, c. 1, Sched. A, s. 9 - 27/06/2002

Transition

Use of land in connection with generation

46.1 (1) If, on March 31, 1999, the occupier of land used or could lawfully have used the land in connection with the generation of electricity, any occupier of the land may,

- (a) use the land in connection with the generation of electricity,
 - (i) for the use for which the land was used on March 31, 1999, or
 - (ii) for any use for which the land could lawfully have been used on March 31, 1999; and
- (b) use or erect on the land any building or structure in connection with a use of the land that is authorized by clause (a). 2001, c. 23, s. 67.

Same

(2) For the purpose of subsection (1), if, on March 31, 1999, land was used or could lawfully have been used in connection with a generation facility that used a type of fuel prescribed by the regulations to generate electricity and, with respect to that type of fuel, the regulations prescribe another type of fuel as a substitute fuel, it shall be deemed to have been lawful on March 31, 1999 to use the land in connection with a generation facility that used the substitute fuel to generate electricity. 2001, c. 23, s. 67.

Transition: use of land in connection with transmission or distribution

(3) If, on March 31, 1999, the occupier of land used or could lawfully have used the land in connection with the transmission or distribution of electricity, any occupier of the land may,

- (a) use the land in connection with the transmission or distribution of electricity,
 - (i) for the use for which the land was used on March 31, 1999, or
 - (ii) for any use for which the land could lawfully have been used on March 31, 1999; and
- (b) use or erect on the land any building or structure in connection with a use of the land that is authorized by clause (a). 2001, c. 23, s. 67.

Planning Act

(4) This section applies despite any provision of the *Planning Act* that was enacted before the day the *Responsible Choices for Growth and Fiscal Responsibility Act (Budget Measures)*, 2001 received Royal Assent and despite any by-law, regulation or order made under the *Planning Act* before that day. 2001, c. 23, s. 67.

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

2001, c. 23, s. 67 - 01/04/1999

Toronto land used by Ontario Hydro

46.2 (1) Despite section 46.1, if, before March 31, 1999, Ontario Hydro occupied and used land in the City of Toronto in connection with the generation of electricity using fossil fuels and for any ancillary use, any occupier of the land may,

- (a) use the land in connection with any one or more of the generation of electricity using a type of fuel prescribed by the regulations, the transmission of electricity and the distribution of electricity and for any ancillary uses; and
- (b) use or erect on the land any building or structure in connection with a use of the land that is authorized by clause (a). 2002, c. 23, s. 3 (21).

Conflict

(2) This section applies despite any provision of the *Planning Act* or any other Act and despite any by-law, regulation or order made under the *Planning Act* or any other Act. 2002, c. 23, s. 3 (21).

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

2002, c. 23, s. 3 (21) - 09/12/2002

Affixing signs, etc.

47 Every person who, without the consent of a transmitter or distributor, nails or otherwise attaches anything, or causes anything to be nailed or otherwise attached to or upon any wooden transmission or distribution pole of the transmitter or distributor is guilty of an offence and on conviction is liable to a fine of not more than \$200. 1998, c. 15, Sched. A, s. 47.

PART III.1 ELECTRIC VEHICLE CHARGING

Definitions

47.1 In this Part,

“electric vehicle”, “electric vehicle charging” and “electric vehicle charging station” have the same meaning as in the *Ontario Energy Board Act*, 1998. (“véhicule électrique”, “recharge des véhicules électriques”, “station de recharge pour véhicules électriques”) 2024, c. 26, Sched. 3, s. 1.

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

2024, c. 26, Sched. 3, s. 1 - 04/12/2024

Application of Act

47.2 (1) This Act, other than Part VIII, does not apply with respect to the distribution or retail of electricity for electric vehicle charging, except as may be provided by the regulations. 2024, c. 26, Sched. 3, s. 1.

Interpretation

(2) For greater certainty, except as may be provided by the regulations, a reference in a provision to the distribution or retail of electricity shall not be read as including the distribution or retail described in subsection (1), other than in Part VIII. 2024, c. 26, Sched. 3, s. 1.

No past application

(3) This Act, other than Part VIII, is deemed not to have applied with respect to the distribution or retail of electricity for electric vehicle charging before the day the *Affordable Energy Act, 2024* received Royal Assent. 2024, c. 26, Sched. 3, s. 1.

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

2024, c. 26, Sched. 3, s. 1 - 04/12/2024

Regulations

47.3 (1) The Lieutenant Governor in Council may make regulations,

- (a) clarifying the application of section 47.2;
- (b) providing for and governing the application of this Act, other than Part VIII, to the distribution or retail of electricity for electric vehicle charging, subject to such modifications in application as the regulations may specify. 2024, c. 26, Sched. 3, s. 1.

Same

(2) A regulation made under this section may be general or particular in its application. 2024, c. 26, Sched. 3, s. 1.

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

2024, c. 26, Sched. 3, s. 1 - 04/12/2024

PART IV HYDRO ONE INC.

Objects of Hydro One Inc.

48 (1) The objects of Hydro One Inc. include, in addition to any other objects, owning and operating transmission systems and distribution systems through one or more subsidiaries. 2002, c. 1, Sched. A, s. 10.

Status

(2) Hydro One Inc. and its subsidiaries are not agents of the Crown for any purpose, despite the *Crown Agency Act*. 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

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Statutory duties and restrictions

48.1 (1) Hydro One Inc. shall, through one or more subsidiaries, operate generation facilities and distribution systems in, and shall distribute electricity within, such communities as may be prescribed by regulation, whether or not the community is connected to the IESO-controlled grid, and shall do so in accordance with such conditions and restrictions as may be prescribed by regulation. 2010, c. 8, s. 37 (6).

Head office in Ontario

(2) Hydro One Inc. shall maintain its head office in Ontario. 2015, c. 20, Sched. 9, s. 2.

What constitutes “maintained in Ontario”

(3) For the purposes of subsection (2), Hydro One Inc. maintains its head office in Ontario if,

- (a) the principal executive office for Hydro One Inc. and its subsidiaries is located in Ontario;

- (b) the Chief Executive Officer and substantially all of the officers with strategic decision-making or management authority for Hydro One Inc. and its subsidiaries principally perform their duties at that principal executive office or elsewhere in Ontario and are resident in Ontario; and
- (c) substantially all of the strategic decision-making, corporate planning, corporate finance and other executive functions of Hydro One Inc. and its subsidiaries are carried out at that principal executive office or elsewhere in Ontario. 2015, c. 20, Sched. 9, s. 2.

Essential systems and features in Ontario

(4) Hydro One Inc. shall, directly or through its subsidiaries, at all times maintain in Ontario its centres of operation and control necessary for,

- (a) the control, monitoring and co-ordination of its transmission system that is regulated by the Board; and
- (b) the control, monitoring and co-ordination of its distribution system that is regulated by the Board. 2015, c. 20, Sched. 9, s. 2.

Saving

(5) Subsection (4) does not restrict Hydro One Inc., directly or through its subsidiaries, from selling, leasing, divesting or otherwise disposing of, any of the following where the sale, lease, divestiture or other disposition is not prohibited by subsection (6) or (7):

- 1. Any part of its transmission system that is regulated by the Board or the business, property or assets related to that transmission system.
- 2. Any part of its distribution system that is regulated by the Board or the business, property or assets related to that distribution system. 2015, c. 20, Sched. 9, s. 2.

Substantial divestment, transmission system

(6) Hydro One Inc. shall not, directly or indirectly, through its subsidiaries or otherwise, sell, lease, divest or otherwise dispose of all or substantially all of the business, property or assets related to its transmission system that is regulated by the Board. 2015, c. 20, Sched. 9, s. 2.

Substantial divestment, distribution system

(7) Hydro One Inc. shall not, directly or indirectly, through its subsidiaries or otherwise, sell, lease, divest or otherwise dispose of all or substantially all of the business, property or assets related to its distribution system that is regulated by the Board. 2015, c. 20, Sched. 9, s. 2.

Internal transactions

(8) Subsections (6) and (7) do not prevent or limit any transactions between Hydro One Inc. and any of its subsidiaries or between any of its subsidiaries. 2015, c. 20, Sched. 9, s. 2.

Continuance in another jurisdiction

(9) Hydro One Inc. shall not, directly or indirectly, through its subsidiaries or otherwise, apply for the continuance of Hydro One Inc. under the laws of a jurisdiction other than Ontario. 2015, c. 20, Sched. 9, s. 2.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2004, c. 23, Sched. A, s. 50 - 01/01/2005

2010, c. 8, s. 37 (6) - 01/01/2011

2015, c. 20, Sched. 9, s. 2 - 31/08/2015

Restriction on share ownership

48.2 (1) No person or entity, and no combination of persons or entities acting jointly or in concert, may beneficially own or exercise control or direction over more than 10 per cent of any class or series of voting securities of Hydro One Inc. However this restriction does not apply with respect to voting securities of Hydro One Inc. held by the Minister on behalf of the Crown in right of Ontario. 2015, c. 20, Sched. 9, s. 3.

Exception for underwriters

(2) Subsection (1) does not apply to an underwriter who holds voting securities solely for the purpose of distributing voting securities to purchasers who comply with subsection (1). 2015, c. 20, Sched. 9, s. 3.

If limits exceeded

(3) Where any person or entity or combination of persons or entities acting jointly or in concert beneficially owns or exercises control or direction over more than 10 per cent of any class or series of voting securities, Hydro One Inc. shall promptly take steps under its articles of incorporation to remedy the situation. 2015, c. 20, Sched. 9, s. 3.

Remedies, articles of incorporation

(4) The articles of incorporation of Hydro One Inc. shall include the restriction provided for in subsection (1) and provisions to enforce that restriction, which may include, without being limited to, provisions respecting,

- (a) the filing of declarations;
- (b) the suspension of voting rights;
- (c) the forfeiture of dividends;
- (d) the refusal of the issuance or registration of voting securities; and
- (e) the sale or redemption of voting securities held contrary to the restriction and the payment of the net proceeds to the person or entity entitled to them. 2015, c. 20, Sched. 9, s. 3.

Restrictions on Province's sale, etc.

(5) The Minister on behalf of the Crown in right of Ontario shall not sell, dispose of or otherwise divest any voting securities of Hydro One Inc. of any class or series of voting securities of Hydro One Inc. if the sale, disposal or divestment would result in the Minister on behalf of the Crown in right of Ontario owning less than 40 per cent of the outstanding number of voting securities of that class or series. 2015, c. 20, Sched. 9, s. 3.

Maintaining provincial ownership

(6) If as a result of the issuance of additional voting securities of any class or series by Hydro One Inc., the Minister on behalf of the Crown in right of Ontario owns less than 40 per cent of the outstanding number of voting securities of that class or series, then the Minister shall, subject to the approval of the Lieutenant Governor in Council and subject to the requirements set out in this section, take steps to acquire as many voting securities of that class or series of voting securities as are necessary to increase the Minister's ownership to not less than 40 per cent of the outstanding number of voting securities of that class or series. 2015, c. 20, Sched. 9, s. 3.

When may acquire voting securities

- (7) The Minister shall acquire voting securities in accordance with subsection (6) only if,
- (a) the Lieutenant Governor in Council has determined the manner by which, and the time by or within which, the voting securities shall be acquired and the Minister acquires them in accordance with that determination; and
 - (b) the Minister's actions and the acquisition comply with the *Securities Act* and any other applicable Act or regulation. 2015, c. 20, Sched. 9, s. 3.

Funding

(8) The money required for the purposes of subsection (6) shall be paid out of the money appropriated for those purposes by the Legislature. 2015, c. 20, Sched. 9, s. 3.

Reports

(9) The Minister shall table reports in the Assembly from time to time regarding the steps the Minister has taken under subsection (6). 2015, c. 20, Sched. 9, s. 3.

Issuing shares to employees

(10) Despite section 23 of the *Business Corporations Act*, the board of directors of Hydro One Inc. may authorize the issuance of shares of Hydro One Inc. to employees of Hydro One Inc. or of any of its subsidiaries, or for their benefit or on their behalf, for no consideration or for such consideration as the board of directors may approve. 2015, c. 20, Sched. 9, s. 3.

Same, stated capital account

(11) Despite section 24 of the *Business Corporations Act*, Hydro One Inc. may add to the appropriate stated capital account for shares issued under subsection (10) the amounts received by Hydro One Inc. for those shares. 2015, c. 20, Sched. 9, s. 3.

Non-application of Business Corporations Act, s. 42

(12) Section 42 of the *Business Corporations Act* does not apply to Hydro One Inc. 2015, c. 20, Sched. 9, s. 3.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2015, c. 20, Sched. 9, s. 3 - 31/08/2015

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Office of the ombudsman

48.3 The board of directors of Hydro One Inc. shall appoint an ombudsman for Hydro One Inc. and its subsidiaries to act as a liaison with customers and shall establish procedures for the ombudsman to inquire into and report to the board of directors of Hydro One Inc. on matters raised with the ombudsman by or on behalf of customers. 2015, c. 20, Sched. 9, s. 4.

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

2015, c. 20, Sched. 9, s. 4 - 04/06/2015

Rights of the Minister

49 (1) The Minister, on behalf of the Crown in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries subject to the restrictions set out in section 48.2. 2002, c. 1, Sched. A, s. 10; 2015, c. 20, Sched. 9, s. 5.

Agreements

(2) The Minister, on behalf of the Crown in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1). 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2015, c. 20, Sched. 9, s. 5 - 31/08/2015

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Corporations authorized re Hydro One Inc.

50 (1) The Lieutenant Governor in Council may cause corporations to be incorporated under the *Business Corporations Act* or the *Not-for-Profit Corporations Act, 2010* for the purpose of acquiring, holding, disposing of and otherwise dealing with securities or debt obligations of, or any other interest in, Hydro One Inc. or any of its subsidiaries. 2002, c. 1, Sched. A, s. 10; 2010, c. 15, s. 223.

Same

(2) The Minister, on behalf of the Crown in right of Ontario, may acquire, hold, dispose of and otherwise deal with securities or debt obligations of, or any other interest in, a corporation incorporated pursuant to subsection (1). 2002, c. 1, Sched. A, s. 10.

Agreements, etc.

(3) The Minister, on behalf of the Crown in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1) or (2). 2002, c. 1, Sched. A, s. 10.

Crown agent

(4) A corporation incorporated pursuant to subsection (1) is an agent of the Crown for all purposes. 2002, c. 1, Sched. A, s. 10.

(5) REPEALED: 2021, c. 8, Sched. 3, s. 1.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2010, c. 15, s. 223 - 19/10/2021

2021, c. 8, Sched. 3, s. 1 - 27/04/2021

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Corporations and other entities and arrangements to hold securities, etc.

50.1 (1) The Lieutenant Governor in Council may cause corporations or other entities to be established or arrangements to be made for the purpose of acquiring, holding, disposing of or otherwise dealing with, directly or indirectly,

- (a) securities, assets, liabilities, rights, obligations, revenues and income of Hydro One Inc. or any of its subsidiaries; and
- (b) interests in or entitlements to those securities, assets, liabilities, rights, obligations, revenues and income. 2002, c. 1, Sched. A, s. 10.

Status

(2) A corporation or other entity established under subsection (1) is not an agent of the Crown for any purpose, despite the *Crown Agency Act*. 2002, c. 1, Sched. A, s. 10.

Agreements, etc.

(3) The Minister, on behalf of the Crown in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1). 2002, c. 1, Sched. A, s. 10.

Direction by Minister

(4) If the Crown in right of Ontario or an agent of the Crown is the only holder of voting securities of Hydro One Inc., the Minister may direct it,

- (a) to transfer any of its securities, assets, liabilities, rights, obligations, revenues and income to any person or entity;
- (b) to transfer an interest in or entitlement to any of its securities, assets, liabilities, rights, obligations, revenues and income to any person or entity;
- (c) to transfer to any person or entity any securities, assets, liabilities, rights, obligations, revenues and income of any subsidiary of which Hydro One Inc. is the only holder, directly or indirectly, of voting securities; or
- (d) to transfer to any person or entity an interest in or entitlement to any securities, assets, liabilities, rights, obligations, revenues and income of any subsidiary of which Hydro One Inc. is the only holder, directly or indirectly, of voting securities. 2002, c. 1, Sched. A, s. 10.

Same

(5) The Minister may impose conditions and restrictions when giving a direction under subsection (4). 2002, c. 1, Sched. A, s. 10.

Types of entities

(6) Without limiting the generality of subsection (1), a trust or a partnership may be established under that subsection. 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

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Right of the Minister re corporations and other entities and arrangements

50.2 (1) The Minister, on behalf of the Crown in right of Ontario, may acquire, hold, dispose of or otherwise deal with securities or debt obligations of, or any other interest in, a corporation or other entity established under subsection 50.1 (1). 2002, c. 1, Sched. A, s. 10.

Same

(2) The Minister, on behalf of the Crown in right of Ontario, may acquire, hold, dispose of or otherwise deal with any interest in an arrangement made under subsection 50.1 (1). 2002, c. 1, Sched. A, s. 10.

Agreements, etc.

(3) The Minister, on behalf of the Crown in right of Ontario, may enter into any agreement or arrangement that the Minister considers necessary or incidental to the exercise of a power under subsection (1) or (2). 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

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Holding corporation

50.2.1 (1) Despite subsection 48.2 (5), if the Crown in right of Ontario is the only holder of voting securities of Hydro One Inc., the Minister may transfer all of those voting securities to a corporation established under section 50.1, and if the Minister does so, then the following rules apply on and from the completion of the transfer despite anything else in this Act, but subject to the regulations under subsection (2):

- 1 Every reference in this Part and in the regulations under this Part to Hydro One Inc. shall be deemed to be a reference to that corporation established under section 50.1.
2. Every other reference to Hydro One Inc. in this Act and in the regulations and in any other Act or regulation shall be deemed to include a reference to that corporation established under section 50.1. 2015, c. 20, Sched. 9, s. 6.

Regulations

(2) The Lieutenant Governor in Council may make regulations clarifying or modifying the application of the rules set out in paragraphs 1 and 2 of subsection (1). 2015, c. 20, Sched. 9, s. 6.

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

2015, c. 20, Sched. 9, s. 6 - 31/08/2015

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Proceeds of disposition

50.3 (1) This section applies if an amount is payable into the Consolidated Revenue Fund in respect of,

- (a) the disposition of any securities or debt obligations of, or other interest in, Hydro One Inc. or any of its subsidiaries, a corporation established under section 50, a corporation or other entity established under section 50.1 or an arrangement made under section 50.1; or
- (b) capital for any shares of Hydro One Inc. 2015, c. 20, Sched. 9, s. 7.

Payment to Financial Corporation

(2) The Minister of Finance shall pay to the Financial Corporation an amount equal to the proceeds payable to the Crown in respect of the disposition of securities, debt obligations or other interest described in clause (1) (a),

- (a) less any amount that the Minister considers advisable in connection with the acquisition of the securities, debt obligations or interest, including the amount of the purchase price, any obligations assumed and any other costs incurred by the Crown and any amounts which have been allocated by the Crown to the Financial Corporation in respect of the securities; and
- (b) less the amount of any costs incurred by the Crown in disposing of the securities, debt obligation or interest. 2015, c. 20, Sched. 9, s. 7.

Same

(3) The Minister of Finance shall pay to the Financial Corporation an amount equal to the amount payable to the Crown in respect of capital for any shares of Hydro One Inc. less any amount that the Minister considers advisable in connection with the acquisition of the shares, including the amount of the purchase price, any obligations assumed and any other costs incurred by the Crown. 2015, c. 20, Sched. 9, s. 7.

Payment methods

(4) The amounts payable to the Financial Corporation under subsections (2) and (3) are payable out of the Consolidated Revenue Fund and the Minister of Finance shall make the payments in cash, by set off, through the issuance of securities or debt obligations or in another form as determined by the Minister. 2015, c. 20, Sched. 9, s. 7.

Same

(5) The Minister's authority under subsection (4) to make a payment through the issuance of securities or debt obligations includes the authority to determine their terms and conditions. 2015, c. 20, Sched. 9, s. 7.

Same

(6) For greater certainty, the Minister's authority under subsection (4) includes making a payment by granting a remission of all or part of a debt owed by the Financial Corporation to the Crown in right of Ontario, and any remission so granted shall be reported to the Legislature in the Public Accounts. 2015, c. 20, Sched. 9, s. 7.

Repeal

(7) This section is repealed on the day on which Part V is repealed under section 84.1. 2015, c. 20, Sched. 9, s. 7.

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

1998, c. 15, Sched. A, s. 50.3 (4) - no effect - see 2015, c. 20, Sched. 9, s. 7 - 04/06/2015

1998, c. 15, Sched. A, s. 50.3 (7) - not in force - see 2015, c. 20, Sched. 9, s. 7 - 04/06/2015

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2015, c. 20, Sched. 9, s. 7 - 04/06/2015

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50.4 REPEALED: 2015, c. 20, Sched. 9, s. 8.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

2015, c. 20, Sched. 9, s. 8 - 15/10/2015

Non-application, *Financial Administration Act*, s. 28

51 Section 28 of the *Financial Administration Act* does not apply with respect to any transaction authorized by this Part. 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

Residual power of the Crown

52 Nothing in this Part restricts the powers of the Crown in right of Ontario or any member of the Executive Council at common law or under any Act, whether as a shareholder or otherwise. 2002, c. 1, Sched. A, s. 10.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

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Regulations

53 (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing communities for the purposes of subsection 48.1 (1);

(b) prescribing conditions and restrictions with respect to the statutory duties of Hydro One Inc. under subsection 48.1 (1).

(c), (d) **REPEALED:** 2015, c. 20, Sched. 9, s. 9 (1).

2002, c. 1, Sched. A, s. 10; 2015, c. 20, Sched. 9, s. 9 (1).

(2)-(5) **REPEALED:** 2015, c. 20, Sched. 9, s. 9 (2).

(6), (7) **REPEALED.** See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2012.

(8) **SPENT:** See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2012.

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

2002, c. 1, Sched. A, s. 10 - 27/06/2002

Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2012

2015, c. 20, Sched. 9, s. 9 - 31/08/2015

Regulations, smart grid

53.0.1 The Lieutenant Governor in Council may make regulations governing the smart grid and its implementation, including regulations,

- (a) in respect of the timeframe for the development of the smart grid;
- (b) assigning roles and responsibilities for the development, implementation and standardization of the smart grid;
- (c) prescribing the standards for communications and any other aspects in respect of the operation of the smart grid. 2009, c. 12, Sched. B, s. 12.

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

2009, c. 12, Sched. B, s. 12 - 09/09/2009

**PART IV.1
ONTARIO POWER GENERATION INC.**

Objects of Ontario Power Generation Inc.

53.1 (1) The objects of Ontario Power Generation Inc. include, in addition to any other objects, owning and operating generation facilities. 2002, c. 1, Sched. A, s. 11.

Same, *Ontario Fair Hydro Plan Act, 2017*

(1.1) In addition to the objects mentioned in subsection (1), the objects of Ontario Power Generation Inc. include exercising the powers and rights and performing the duties and obligations assigned to it under the *Ontario Fair Hydro Plan Act, 2017* and engaging in activities to facilitate the implementation of that Act, including entering into contracts and undertakings on behalf of the Fair Hydro Trust and performing other services on behalf of the Fair Hydro Trust. 2019, c. 6, Sched. 3, s. 11 (6).

Subsidiaries, etc.

(1.2) Ontario Power Generation Inc. may create or invest in one or more subsidiaries, trusts, partnerships, limited partnerships or special purpose entities in order to more efficiently conduct its activities or achieve its objects. 2017, c. 16, Sched. 1, s. 43 (6).

Deemed assets, non-subsidiary

(1.3) Despite any other provision of this Act, the *Business Corporations Act* or any other Act, and subject to section 8 of the *Ontario Fair Hydro Plan Act, 2017*, if the Fair Hydro Trust is not a subsidiary of Ontario Power Generation Inc.,

- (a) the assets and liabilities of the Fair Hydro Trust shall not form part of the assets and liabilities of Ontario Power Generation Inc. or any of its subsidiaries; and
- (b) the assets and liabilities of Ontario Power Generation Inc. or any of its subsidiaries shall not form part of the assets and liabilities of the Fair Hydro Trust. 2019, c. 6, Sched. 3, s. 11 (7).

Deemed assets, subsidiary

(1.4) Despite any other provision of this Act, the *Business Corporations Act* or any other Act, and subject to section 8 of the *Ontario Fair Hydro Plan Act, 2017*, if the Fair Hydro Trust is a subsidiary of Ontario Power Generation Inc.,

- (a) the assets and liabilities of the Fair Hydro Trust shall not form part of the assets and liabilities of Ontario Power Generation Inc. or any of its other subsidiaries; and
- (b) the assets and liabilities of Ontario Power Generation Inc. or any of its other subsidiaries shall not form part of the assets and liabilities of the Fair Hydro Trust. 2019, c. 6, Sched. 3, s. 11 (7).

Definition

(1.5) For the purposes of this section,

“Fair Hydro Trust” has the same meaning as in the *Ontario Fair Hydro Plan Act, 2017*. 2019, c. 6, Sched. 3, s. 11 (7).

Status

(2) Ontario Power Generation Inc. and its subsidiaries are not agents of the Crown for any purpose, despite the *Crown Agency Act*. 2002, c. 1, Sched. A, s. 11.

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

2002, c. 1, Sched. A, s. 11 - 27/06/2002

2017, c. 16, Sched. 1, s. 43 (6) - 01/06/2017

2019, c. 6, Sched. 3, s. 11 (6, 7) - 01/11/2019

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Rights of the Minister

53.2 The Minister, on behalf of the Crown in right of Ontario, may acquire and hold shares of Ontario Power Generation Inc. 2002, c. 1, Sched. A, s. 11.

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

2002, c. 1, Sched. A, s. 11 - 27/06/2002

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Corporations to hold shares

53.3 (1) The Lieutenant Governor in Council may cause corporations to be incorporated under the *Business Corporations Act* for the purpose of acquiring and holding shares in Ontario Power Generation Inc. 2002, c. 1, Sched. A, s. 11.

Same

(2) Shares in a corporation incorporated pursuant to subsection (1) may be acquired and held in the name of the Crown in right of Ontario by a member of the Executive Council designated by the Lieutenant Governor in Council. 2002, c. 1, Sched. A, s. 11.

Crown agent

(3) A corporation incorporated pursuant to subsection (1) is an agent of the Crown for all purposes. 2002, c. 1, Sched. A, s. 11.

Dividends paid to Crown agent

(4) If an agent of the Crown in right of Ontario is paid dividends in respect of shares of Ontario Power Generation Inc., the agent shall pay the dividends to the Financial Corporation, less any amount that it considers is required to pay obligations it has assumed under clause 122 (1) (a). 2002, c. 1, Sched. A, s. 11.

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

2002, c. 1, Sched. A, s. 11 - 27/06/2002

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Reporting requirements

53.4 (1) Ontario Power Generation Inc. shall, within 90 days after the end of every fiscal year, submit to the Minister an annual report on its affairs during that fiscal year, signed by the chair of the board of directors. 2002, c. 1, Sched. A, s. 11.

Same

(2) The Minister shall submit the annual report to the Lieutenant Governor in Council and shall then table the report in the Assembly. 2002, c. 1, Sched. A, s. 11.

Same

(3) Ontario Power Generation Inc. may give its annual report to other persons before the Minister complies with subsection (2). 2002, c. 1, Sched. A, s. 11.

Additional reports and information

(4) Ontario Power Generation Inc. shall give such other reports and information to the Minister of Finance or to the Minister as each of them may require from time to time. 2002, c. 1, Sched. A, s. 11.

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

2002, c. 1, Sched. A, s. 11 - 27/06/2002

Residual power of the Crown

53.5 Nothing in this Part restricts the powers of the Crown in right of Ontario or any member of the Executive Council at common law or under any Act, whether as a shareholder or otherwise. 2002, c. 1, Sched. A, s. 11.

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

2002, c. 1, Sched. A, s. 11 - 27/06/2002

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Power to acquire land and property

53.6 (1) Ontario Power Generation Inc. may, without any further approval and without the consent of the owner, enter upon, take possession of, expropriate and use such land, property, waters, water privileges, water powers, rights of access and roads, buildings and works as in its opinion are necessary for the purpose of the expeditious development and construction of works for the conveying of water by subsurface tunnels from the Niagara River to any existing or future power generation facilities and ancillary works at Niagara. 2004, c. 23, Sched. A, s. 51.

Same

(2) Subsection (1) applies,

- (a) despite any provision of this or any other Act;
- (b) despite the devotion or deemed devotion of the land or property to a municipal or other public use;
- (c) despite the power of the owner of the land or property to take land compulsorily;
- (d) despite the origin, nature or sources of the owner's title to or interest in the land or property; and
- (e) despite the manner by which the land or property was acquired by the owner or any of the owner's predecessors in title. 2004, c. 23, Sched. A, s. 51.

Easements continue until release

(3) Despite any provision of any other Act, if Ontario Power Generation Inc. acquires an easement through, over, under or otherwise affecting any land, the land shall continue to be subject to the easement and the easement shall be binding upon the owner and all subsequent owners of the land until Ontario Power Generation Inc. grants a release. 2004, c. 23, Sched. A, s. 51.

Acquisition of whole parcels

(4) Ontario Power Generation Inc. may acquire a whole parcel of land of which only a part may be acquired under the authority of this section, together with any right of way to it if the parcel is separated from the works, if Ontario Power Generation Inc. reasonably believes that the whole parcel may be obtained at a more reasonable price or there is a greater advantage to acquiring the whole parcel instead of only the part and Ontario Power Generation Inc. may later sell and convey all or part of the excess land as it considers expedient. 2004, c. 23, Sched. A, s. 51.

Expropriations Act application

(5) If a power exercised under subsection (1) does not constitute an expropriation, Ontario Power Generation Inc. shall provide compensation to the owner based on market value as provided by the *Expropriations Act*. 2004, c. 23, Sched. A, s. 51.

No court action

(6) No action or exercise of a power by Ontario Power Generation Inc. under this section shall be restrained by injunction or other process or proceeding in any court. 2004, c. 23, Sched. A, s. 51.

Definitions

(7) In this section,

“easement” means an easement, right of way, right or licence in the nature of an easement, profit à prendre or other incorporeal hereditament; (“servitude”)

“land” means any real property and includes any estate, term, easement, right or interest in, to, over, under or affecting real property; (“bien-fonds”)

“owner” includes a mortgagee, lessee, tenant, occupant, a person entitled to a limited estate or interest in land and a guardian, committee, executor, administrator or trustee in whom land or any property is vested; (“propriétaire”)

“property” means property of any kind, other than land, and includes any interest in property; (“bien”)

“works” includes all property, plant, machinery, buildings, erections, constructions, installations, materials, devices, fittings, apparatus, appliances and equipment for the generation, transformation, transmission, distribution, supply or use of power. (“ouvrages”) 2004, c. 23, Sched. A, s. 51.

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

2004, c. 23, Sched. A, s. 51 - 01/01/2005

PART IV.2
THE SMART METERING ENTITY

The Smart Metering Entity

- 53.7** (1) To accomplish the government's policies in relation to its smart metering initiative, the Minister,
- (a) may cause the Smart Metering Entity to be incorporated as a corporation under the *Business Corporations Act*;
 - (b) may cause the Smart Metering Entity to be formed as a limited partnership under the *Limited Partnerships Act*;
 - (c) may cause the Smart Metering Entity to be formed as a partnership; or
 - (d) may designate an entity by regulation as the Smart Metering Entity. 2006, c. 3, Sched. B, s. 2.

Name of the Smart Metering Entity

(2) Subject to the *Business Corporations Act*, the *Business Names Act* and the *Limited Partnerships Act*, as applicable, the Smart Metering Entity shall have the name prescribed for it by regulation and the regulation may require that the Smart Metering Entity maintain the prescribed name. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Objects or nature of the business of the Smart Metering Entity

53.8 The objects of the Smart Metering Entity, if it is a corporation, or the nature of its business activities, if the Smart Metering Entity is a limited partnership or a partnership, include, in addition to any other objects or business activities, the following:

1. To plan and implement and, on an ongoing basis, oversee, administer and deliver any part of the smart metering initiative as required by regulation under this or any Act or directive made pursuant to sections 28.3 or 28.4 of the *Ontario Energy Board Act, 1998*, and, if so authorized, to have the exclusive authority to conduct these activities.
2. To collect and manage and to facilitate the collection and management of information and data and to store the information and data related to the metering of consumers' consumption or use of electricity in Ontario, including data collected from distributors and, if so authorized, to have the exclusive authority to collect, manage and store the data.
3. To establish, to own or lease and to operate one or more databases to facilitate collecting, managing, storing and retrieving smart metering data.
4. To provide and promote non-discriminatory access, on appropriate terms and subject to any conditions in its licence relating to the protection of privacy, by distributors, retailers, the IESO and other persons,
 - i. to the information and data referred to in paragraph 2, and
 - ii. to the telecommunication system that permits the Smart Metering Entity to transfer data about the consumption or use of electricity to and from its databases, including access to its telecommunication equipment, systems and technology and associated equipment, systems and technologies.
5. To own or to lease and to operate equipment, systems and technology, including telecommunication equipment, systems and technology that permit the Smart Metering Entity to transfer data about the consumption or use of electricity to and from its databases, including owning, leasing or operating such equipment, systems and technology and associated equipment, systems and technologies, directly or indirectly, including through one or more subsidiaries, if the Smart Metering Entity is a corporation.
6. To engage in such competitive procurement activities as are necessary to fulfil its objects or business activities.
7. To procure, as and when necessary, meters, metering equipment, systems and technology and any associated equipment, systems and technologies on behalf of distributors, as an agent or otherwise, directly or indirectly, including through one or more subsidiaries, if the Smart Metering Entity is a corporation.
8. To recover, through just and reasonable rates, the costs and an appropriate return approved by the Board associated with the conduct of its activities.
9. To undertake any other objects that are prescribed by regulation. 2006, c. 3, Sched. B, s. 2; 2014, c. 7, Sched. 7, s. 14.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

2014, c. 7, Sched. 7, s. 14 - 01/01/2015

Status of the Smart Metering Entity

53.9 The Smart Metering Entity is not an agent of the Crown for any purpose and, if the Smart Metering Entity is a corporation, its subsidiaries are not agents of the Crown for any purpose, despite the *Crown Agency Act*. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

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Powers of Smart Metering Entity corporation

53.10 If the Minister incorporates or designates a corporation as the Smart Metering Entity, it shall have the powers of a natural person except as limited under this Act. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Mandatory provisions in articles

53.11 (1) If the Smart Metering Entity is a corporation, its articles of incorporation and of such of its subsidiaries as may be prescribed by regulation must contain the conditions, restrictions, criteria or requirements that are prescribed by regulation. 2006, c. 3, Sched. B, s. 2.

Application of *Business Corporations Act*

(2) Despite clause 2 (3) (a) of the *Business Corporations Act*, the *Business Corporations Act* applies to the Smart Metering Entity, if it is a corporation, except that a regulation made under this Act may provide for the non-application of provisions of the *Business Corporations Act* to the Smart Metering Entity. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Smart Metering Entity participation in partnerships, etc.

53.12 (1) Nothing in this Part prevents the Smart Metering Entity, if it is incorporated, from participating in partnerships, limited partnerships, joint ventures or any other transaction or arrangement that may be prescribed by regulation, subject to such conditions or restrictions as may be prescribed by regulation. 2006, c. 3, Sched. B, s. 2.

Same

(2) For the purpose of subsection (1), the Smart Metering Entity may participate in transactions or arrangements directly or indirectly as a partner, limited partner, general partner or as a participant in a joint venture or may hold an interest in, directly or through one or more subsidiaries, a partnership, limited partnership, joint venture or any other transaction or arrangement. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Reporting requirements

53.13 The Smart Metering Entity shall provide the reports and information to the Minister that the Minister requires. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Collection of consumer information

53.14 In carrying out its objects or business activities, the Smart Metering Entity,

- (a) may directly or indirectly collect information and data relating to the consumption or use of electricity from consumers, distributors or any other person; and
- (b) may manage and aggregate the data related to consumers' electricity consumption or use. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Reciprocal obligations concerning information

53.15 (1) Distributors, retailers and other persons shall provide the Smart Metering Entity with such information as it requires to fulfil its objects or conduct its business activities. 2006, c. 3, Sched. B, s. 2.

Restrictions on the Smart Metering Entity

(2) If the Smart Metering Entity has provided access to a distributor, retailer or another person to information under this Part, it shall not engage in a business activity prescribed by regulation if,

- (a) the person to whom access has been provided is also engaged in the business activity; and
- (b) the access was granted for the purpose of the person engaging in the business activity. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Obligations of distributors, etc., re: installing meters

53.16 (1) When a distributor or any person licensed by the Board to do so installs a smart meter, metering equipment, systems and technology and any associated equipment, systems and technologies or replaces an existing meter, the distributor or person shall use a meter, metering equipment, systems and technology and associated equipment, systems and technologies of a type, class or kind prescribed by regulation or that meets the criteria or requirements prescribed by regulation or mandated by a code issued by the Board or by an order of the Board for the classes of property or classes of consumers prescribed by regulation or required by the Board. 2006, c. 3, Sched. B, s. 2.

Same

(2) A regulation, code or order referred to in subsection (1) may require that a distributor or other person take certain actions and may require that the actions be taken within a specified time. 2006, c. 3, Sched. B, s. 2.

Exclusive authority of Board

(3) A regulation referred to in subsection (1) may provide the Board with exclusive authority to approve or authorize the meters, the metering equipment, systems and technology and associated equipment, systems and technologies after a prescribed date. 2006, c. 3, Sched. B, s. 2.

Obligations of distributors, etc., re: procurement, contracts or arrangements

(4) When a distributor or any person licensed by the Board to conduct the activities referred to in subsection (1) enters into a procurement process, contract or arrangement in relation to the smart metering initiative, the procurement process, contract or arrangement shall meet the criteria or requirements prescribed by regulation or mandated by a code issued by the Board or by an order of the Board. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

53.17 REPEALED: 2010, c. 8, s. 37 (7).

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

2010, c. 8, s. 37 (7) - 01/01/2011

Prohibition re: discretionary metering activities

53.18 (1) On and after November 3, 2005, no distributor shall conduct discretionary metering activities unless the distributor is authorized to conduct the activity by this Act, a regulation, the *Energy Consumer Protection Act, 2010*, an order of the Board or a code issued by the Board or it is required to do so under the *Electricity and Gas Inspection Act* (Canada). 2006, c. 3, Sched. B, s. 2; 2010, c. 8, s. 37 (8).

Definition

(2) For the purpose of this section,

“discretionary metering activity” means the installation, removal, replacement or repair of meters, metering equipment, systems and technology and any associated equipment, systems and technologies which is not mandated by the *Electricity*

and *Gas Inspection Act* (Canada), by regulation, by an order of the Board or by a code issued by the Board or authorized by a regulation made under this Act. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

2010, c. 8, s. 37 (8) - 01/01/2011

Procurement contracts, transition

53.19 (1) The Minister may direct the Smart Metering Entity to assume, as of the date the Minister considers appropriate, responsibility for exercising all powers and performing all duties of the Crown, including powers and duties to be exercised and performed through an agency of the Crown,

- (a) under any request for proposals, draft request for proposals, another form of procurement solicitation issued by the Crown or through an agency of the Crown or any other initiative pursued by the Crown or through an agency of the Crown, which relate to the government's smart metering initiative that was issued or pursued after November 3, 2005 and before January 1, 2008; and
- (b) under any contract that relates to a procurement that was entered into by the Crown or an agency of the Crown pursuant to a request for proposal, a draft request for proposal or another form of procurement solicitation referred to in clause (a). 2006, c. 3, Sched. B, s. 2.

Release of the Crown, etc.

(2) As of the day specified in the Minister's direction under subsection (1), the Smart Metering Entity shall assume responsibility in accordance with that subsection and the Crown and any Crown agency are released from any and all liabilities and obligations with respect to the matters for which the Smart Metering Entity has assumed responsibility. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Reimbursement of costs incurred by the Crown

53.20 (1) The Smart Metering Entity shall reimburse the Crown or, if so directed by the Minister, an agency of the Crown for costs relating to the Smart Metering Entity, a procurement contract or a matter within the objects of the Smart Metering Entity, if,

- (a) the costs were incurred by the Crown or an agency of the Crown after November 3, 2005 and before January 1, 2008; or
- (b) the liability of the Crown or an agency of the Crown for the costs arose during the period described in clause (a). 2006, c. 3, Sched. B, s. 2.

Payment of reimbursement

(2) The Smart Metering Entity shall make the reimbursement by making one or more payments in such amount or amounts at such time or times as may be determined by the Minister. 2006, c. 3, Sched. B, s. 2.

Minister's determinations final

(3) The determinations of the Minister under subsection (2) are final and conclusive and shall not be stayed, varied or set aside by any court. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

Regulations

53.21 (1) The Lieutenant Governor in Council may make regulations,

- (a) designating an entity as the Smart Metering Entity;
- (b) prescribing the name of the Smart Metering Entity;
- (c) governing the smart metering initiative;
- (d) authorizing the Smart Metering Entity to have exclusive authority to conduct the metering activities referred to in section 53.8;

- (e) prescribing objects for the purposes of section 53.8;
- (f) governing the collection, use and disclosure of information relating to consumers' consumption or use of electricity, including personal information;
- (g) prescribing, for the purposes of subsection 53.11 (1), conditions, restrictions, criteria or requirements to be included in the Smart Metering Entity's articles of incorporation and in the articles of incorporation of such of its subsidiaries as may be prescribed;
- (h) prescribing subsidiaries of the Smart Metering Entity for the purposes of subsection 53.11 (1);
- (i) prescribing provisions of the *Business Corporations Act* that do not apply to the Smart Metering Entity or to any of its subsidiaries that are prescribed;
- (j) prescribing transactions or arrangements for the purposes of subsection 53.12 (1) and conditions or restrictions that apply to them;
- (k) governing smart meters and the installation and maintenance of smart meters, metering equipment, systems and technology and any associated equipment, systems and technologies;
- (l) identifying actions to be taken by the Smart Metering Entity, distributors and other persons licensed by the Board in respect of the installation of prescribed meters, metering equipment, systems and technology and any associated equipment, systems and technologies at prescribed locations throughout Ontario or for prescribed classes of properties and prescribed classes of consumers in priority to other locations or classes of property or classes of consumers and prescribing the time within which such actions must be taken;
- (m) prescribing the date for the purpose of subsection 53.16 (3);
- (n) prescribing criteria or requirements that the procurement process, contract or arrangement must meet for the purpose of subsection 53.16 (4);
- (o), (p) REPEALED: 2010, c. 8, s. 37 (10).
- (q) authorizing activity as discretionary metering activity for the purpose of section 53.18;
- (r) prescribing measures to be taken by the Smart Metering Entity to facilitate the achievement of the targets associated with the smart metering initiative;
- (s) identifying specific objectives or criteria applicable to the Smart Metering Entity's metering and telecommunications technologies;
- (t) approving, with respect to a class of consumers, meters or a class of meters and metering equipment, systems and technology and associated equipment, systems and technologies to be installed by a distributor or a person licensed by the Board to do so, including approving or fixing the maximum costs of the meters and metering equipment, systems and technology and associated equipment, systems and technologies and specifying criteria which any one of them must meet. 2006, c. 3, Sched. B, s. 2; 2010, c. 8, s. 37 (9, 10).

General or specific

- (2) A regulation may be general or specific in its application. 2006, c. 3, Sched. B, s. 2.

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

2006, c. 3, Sched. B, s. 2 - 03/05/2006

2010, c. 8, s. 37 (9, 10) - 01/01/2011

PART V THE FINANCIAL CORPORATION

Ontario Hydro Financial Corporation

54 (1) Ontario Hydro is continued as a corporation without share capital under the name Ontario Hydro Financial Corporation in English and Société financière Ontario Hydro in French. 1998, c. 15, Sched. A, s. 54 (1).

Note: Effective April 1, 1999, the name of the Ontario Hydro Financial Corporation has been changed by regulation to Ontario Electricity Financial Corporation in English and Société financière de l'industrie de l'électricité de l'Ontario in French. See: O. Reg. 115/99, s. 1.

Regulations

- (2) The Lieutenant Governor in Council may make regulations changing the name of the Financial Corporation. 1998, c. 15, Sched. A, s. 54 (2).

Same

(3) Despite subsection 2 (3) but subject to the regulations, if a regulation is made changing the name of the Financial Corporation, a reference in this or any other Act or in the regulations made under this or any other Act to Ontario Hydro or to the Financial Corporation shall be deemed to be a reference to the new name, unless the context requires otherwise. 1998, c. 15, Sched. A, s. 54 (3).

Rights to Ontario Hydro name

(4) Despite subsections (1) and (2) but subject to any transfer order made under Part X, the Financial Corporation retains all rights to the name Ontario Hydro. 1998, c. 15, Sched. A, s. 54 (4).

Composition

(5) The Financial Corporation is composed of those persons who, from time to time, comprise its board of directors. 1998, c. 15, Sched. A, s. 54 (5).

Objects and character

55 (1) The objects of the Financial Corporation include, in addition to any other objects,

- (a) managing its debt;
- (b) receiving payments made to the Financial Corporation under this Act or pursuant to any other authority;
- (c) administering assets, liabilities, rights and obligations of the Financial Corporation and disposing or otherwise dealing with them as it considers appropriate or as the Minister of Finance directs under section 74;
- (d) exercising and performing powers and duties under Part VII;
- (e) effecting financings, including establishing trusts, corporations, partnerships or other entities for that purpose; and
- (f) such other objects as may be specified by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 55 (1); 2002, c. 1, Sched. A, s. 12 (1).

Managing debt

(2) For the purpose of this section, managing the Financial Corporation's debt includes,

- (a) servicing and retiring debt;
- (b) borrowing, including refinancing, renewing or replacing debt;
- (c) investing funds; and
- (d) managing financial assets, financial liabilities and financial risks. 1998, c. 15, Sched. A, s. 55 (2).

Capacity

(3) The Financial Corporation has the capacity and the rights, powers and privileges of a natural person. 1998, c. 15, Sched. A, s. 55 (3); 2002, c. 1, Sched. A, s. 12 (2).

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

2002, c. 1, Sched. A, s. 12 (1, 2) - 27/06/2002

Crown agent

56 The Financial Corporation is an agent of the Crown for all purposes. 1998, c. 15, Sched. A, s. 56.

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

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57 REPEALED. See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2011.

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

Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2011

Board of directors

58 (1) The Financial Corporation's board of directors shall manage or supervise the management of the Corporation's business and affairs. 1998, c. 15, Sched. A, s. 58 (1).

Composition

(2) The board of directors shall be composed of at least two and not more than 12 directors appointed by the Lieutenant Governor in Council on the recommendation of the Minister of Finance. 1998, c. 15, Sched. A, s. 58 (2).

Term of office

(3) A director shall hold office at pleasure for a term not exceeding three years and may be reappointed for successive terms not exceeding three years each. 1998, c. 15, Sched. A, s. 58 (3).

Chair

(4) The Lieutenant Governor in Council, on the recommendation of the Minister of Finance, shall designate one of the directors as the chair of the board of directors. 1998, c. 15, Sched. A, s. 58 (4).

Vice-chairs

(5) The Lieutenant Governor in Council, on the recommendation of the Minister of Finance, may designate one or more of the directors as a vice-chair of the board of directors. 1998, c. 15, Sched. A, s. 58 (5).

Powers and duties of vice-chair

(6) If the office of chair is vacant or if the chair is absent or unable to act, a vice-chair shall exercise the powers and perform the duties of the chair. 1998, c. 15, Sched. A, s. 58 (6).

Former directors cease to hold office

(7) A person who was a member of the board of directors immediately before subsection (2) comes into force ceases to be a member of the board of directors when subsection (2) comes into force, but nothing in this subsection prevents the person from being reappointed. 1998, c. 15, Sched. A, s. 58 (7).

Chief executive officer

59 The Lieutenant Governor in Council, on the recommendation of the Minister of Finance, may appoint a chief executive officer of the Financial Corporation. 1998, c. 15, Sched. A, s. 59.

Delegation

60 (1) Subject to its by-laws, the board of directors of the Financial Corporation may delegate any of its powers or duties to a committee of the board or to any one or more of the directors, subject to such conditions and restrictions as may be specified by the board of directors. 1998, c. 15, Sched. A, s. 60 (1).

Exceptions

(2) Subsection (1) does not permit the board of directors to delegate its power to make by-laws or to approve the financial statements or annual report of the Financial Corporation. 1998, c. 15, Sched. A, s. 60 (2).

By-laws

61 (1) The board of directors of the Financial Corporation may make by-laws regulating the business and affairs of the Corporation. 1998, c. 15, Sched. A, s. 61 (1).

Approval

(2) A by-law is not effective unless it has been approved in writing by the Minister of Finance. 1998, c. 15, Sched. A, s. 61 (2).

Investment powers

(3) The power of the Financial Corporation to borrow, invest funds and manage financial risks may only be exercised under the authority of a by-law. 1998, c. 15, Sched. A, s. 61 (3).

Legislation Act, 2006, Part III

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to by-laws made under this section. 1998, c. 15, Sched. A, s. 61 (4); 2006, c. 21, Sched. F, s. 136 (1).

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

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

Use of revenues

62 Despite the *Financial Administration Act*, the revenues received by the Financial Corporation do not form part of the Consolidated Revenue Fund and shall be used by the Corporation for the purpose of carrying out its objects. 1998, c. 15, Sched. A, s. 62.

Special purpose account

63 (1) If the Lieutenant Governor in Council authorizes the Crown in right of Ontario to assume obligations under clause 122 (1) (a), the Minister of Finance shall establish a special purpose account in the Consolidated Revenue Fund for the purposes of this section. 1998, c. 15, Sched. A, s. 63 (1).

Dividends

(2) Dividends paid to the Crown in right of Ontario in respect of shares of Hydro One Inc. and Ontario Power Generation Inc. shall be paid into the account, less any amount that the Minister of Finance considers is required to pay obligations assumed by Her Majesty under clause 122 (1) (a). 1998, c. 15, Sched. A, s. 63 (2); 2002, c. 1, Sched. A, s. 13.

Payment to Financial Corporation

(3) Money paid into the account shall be paid out, at such times as the Minister of Finance may direct, to the Financial Corporation. 1998, c. 15, Sched. A, s. 63 (3).

Closure of account

(4) Before this Part is repealed under section 84.1, the special purpose account shall be closed and any money remaining in the special purpose account shall be paid out to the Financial Corporation. 1998, c. 15, Sched. A, s. 63 (4); 2000, c. 42, s. 22.

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

2000, c. 42, s. 22 - 21/12/2000

2002, c. 1, Sched. A, s. 13 - 27/06/2002

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64 REPEALED: 2002, c. 1, Sched. A, s. 14.

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

2002, c. 1, Sched. A, s. 14 - 27/06/2002

Limitation on borrowing

65 The Financial Corporation shall not borrow money except as authorized under this or any other Act. 1998, c. 15, Sched. A, s. 65.

Authorization to borrow

66 (1) The Lieutenant Governor in Council may by order authorize the Financial Corporation to borrow such sums of money as the Corporation considers necessary for the purpose of carrying out its objects. 1998, c. 15, Sched. A, s. 66 (1).

Methods of borrowing

(2) The Financial Corporation may exercise the authority referred to in subsection (1) by the issuance of notes, bonds, debentures, deposit receipts, securities or other evidences of indebtedness, by giving short term security, by loan agreement or in any other manner approved by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 66 (2).

Approval by Minister of Finance

(3) The Lieutenant Governor in Council may authorize the Minister of Finance to approve the terms and conditions of the exercise by the Financial Corporation of the authority referred to in subsection (1), subject to the maximum principal amount and to any other terms and conditions that are specified by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 66 (3).

Short term securities

(4) If an order of the Lieutenant Governor in Council under subsection (1) expressly refers to this subsection and authorizes the Financial Corporation to borrow a maximum principal amount of money by the issue and sale of short term securities during a specified period not exceeding 25 years, the following terms and conditions apply:

1. Throughout the specified period, the Financial Corporation may issue, reissue, renew or replace securities issued under the order during the period if the maximum aggregate principal amount of the securities issued under the order and outstanding from time to time does not at any time exceed the maximum principal amount specified in the order.
2. Every security issued under the authority of the order shall bear a date of maturity not later than five years from its date of issue. 1998, c. 15, Sched. A, s. 66 (4).

Loans

(5) If an order of the Lieutenant Governor in Council under subsection (1) expressly refers to this subsection and authorizes the Financial Corporation to borrow a maximum principal amount of money for a period not exceeding five years from any bank, corporation, government, person or authority, the Financial Corporation may borrow from time to time such sums not exceeding at any one time the maximum principal amount specified by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 66 (5).

Application

(6) This section does not apply to money borrowed by the Financial Corporation pursuant to section 67 or 68. 1998, c. 15, Sched. A, s. 66 (6).

Province may purchase securities, etc.

67 (1) The Lieutenant Governor in Council may by order authorize the Minister of Finance to purchase securities of or make loans to the Financial Corporation at such times and on such terms and conditions as the Minister may determine, subject to,

- (a) the maximum principal amount specified by the Lieutenant Governor in Council that may be purchased or advanced or that may be outstanding at any time; and
- (b) any other terms and conditions that are specified by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 67 (1).

Payment from C.R.F.

(2) The Minister of Finance may pay out of the Consolidated Revenue Fund any amount required for the purposes of subsection (1). 1998, c. 15, Sched. A, s. 67 (2).

Province may raise funds

68 The Lieutenant Governor in Council may raise by way of loan in the manner provided by the *Financial Administration Act* such sums as the Lieutenant Governor in Council considers necessary for the purposes of the Financial Corporation, and the sums so raised shall be used to make advances to the Corporation by way of loan or to purchase securities issued by the Corporation on such terms and conditions as the Minister of Finance may determine. 1998, c. 15, Sched. A, s. 68.

Guarantee and indemnity

69 (1) The Lieutenant Governor in Council may by order authorize the Minister of Finance, on behalf of Ontario, to agree to guarantee or indemnify,

- (a) any debts, obligations, securities or undertakings of the Financial Corporation or a subsidiary of the Financial Corporation; or
- (b) any debts, obligations, costs or undertakings of any other person arising in connection with a guarantee or indemnity given under clause (a). 1998, c. 15, Sched. A, s. 69 (1).

Terms and conditions

(2) In respect of a guarantee or indemnity authorized under subsection (1), the Lieutenant Governor in Council may fix such terms and conditions as are considered advisable or may authorize the Minister of Finance, subject to any maximum liability specified for the guarantee or indemnity by the Lieutenant Governor in Council, to determine the terms, conditions and amount on which the guarantee or indemnity will be given. 1998, c. 15, Sched. A, s. 69 (2).

Delegation, order under ss. 66 to 69

70 In an order under section 66, 67, 68 or 69, the Lieutenant Governor in Council may delegate to an officer or employee of the Crown or an agency of the Crown or to a solicitor engaged to act for the Minister of Finance, any or all of the powers of the Minister of Finance under that section. 1998, c. 15, Sched. A, s. 70.

Fees payable to Minister of Finance

71 (1) The Financial Corporation shall pay to the Minister of Finance such fees as are prescribed by the regulations,

- (a) in respect of securities purchased and sums loaned under section 67;

(b) in respect of sums advanced or securities purchased under section 68; and

(c) in respect of guarantees and indemnities given under section 69. 1998, c. 15, Sched. A, s. 71 (1).

Application

(2) Subsection (1) applies in respect of sums advanced or applied and guarantees and indemnities given before or after the coming into force of this section. 1998, c. 15, Sched. A, s. 71 (2).

Subsidiaries

72 (1) The Financial Corporation may establish a subsidiary in Ontario or elsewhere only with the approval of the Minister of Finance. 1998, c. 15, Sched. A, s. 72 (1).

Subsidiary may act otherwise than as agent of Crown

(2) A subsidiary of the Financial Corporation may declare in writing in any of its contracts, securities or instruments that it is not acting as an agent of the Crown for the purposes of the contract, security or instrument. 1998, c. 15, Sched. A, s. 72 (2).

Same

(3) If a subsidiary makes a declaration in accordance with subsection (2), it shall be deemed not to be an agent of the Crown for the purposes of the contract, security or instrument and the Crown is not liable for any liability or obligation of the subsidiary under the contract, security or instrument. 1998, c. 15, Sched. A, s. 72 (3).

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

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Entities established for effecting financing

73 In addition to the restriction in subsection 72 (1) on establishing subsidiaries, the Financial Corporation may establish a trust, partnership or other entity in Ontario or elsewhere for the purpose of effecting a financing only with the approval of the Minister of Finance. 1998, c. 15, Sched. A, s. 73.

Directives

74 (1) The Minister of Finance may issue directives in writing to the Financial Corporation or any subsidiary of the Financial Corporation on matters relating to its exercise of powers and duties. 1998, c. 15, Sched. A, s. 74 (1).

Implementation

(2) The board of directors of the Financial Corporation or subsidiary shall ensure that directives under this section are implemented promptly and efficiently. 1998, c. 15, Sched. A, s. 74 (2).

Supervision

(3) A directive may, without limiting the generality of subsection (1), provide for the supervision, management and operation of the whole or any part of the business and affairs of the Financial Corporation or subsidiary by the Ontario Financing Authority or such other agency of the Crown as may be specified in the directive and may restrict, in whole or in part, the powers of the directors of the Financial Corporation or subsidiary to manage or supervise the management of the business and affairs of the Financial Corporation or subsidiary. 1998, c. 15, Sched. A, s. 74 (3).

Same

(4) An agency of the Crown specified in a directive referred to in subsection (3) has all the rights, powers, duties and liabilities of the board of directors of the Financial Corporation or subsidiary to the extent that the directive restricts the powers of the board of directors to manage or supervise the management of the business and affairs of the Financial Corporation or subsidiary and the directors of the Financial Corporation or subsidiary are relieved of their duties and liabilities to the same extent. 1998, c. 15, Sched. A, s. 74 (4).

Same

(5) Without limiting the powers and capacities of the Ontario Financing Authority, its objects shall include any activities described in a directive applicable to it under subsection (3). 1998, c. 15, Sched. A, s. 74 (5).

Subsidiaries

(6) Subsection (1) does not apply in respect of a contract, security or instrument with respect to which a subsidiary of the Financial Corporation has made a declaration in accordance with subsection 72 (2). 1998, c. 15, Sched. A, s. 74 (6).

Evidence of authority

75 A recital or declaration in any resolution of the Financial Corporation that a transaction is for the purpose of carrying out the Corporation's objects is conclusive evidence to that effect. 1998, c. 15, Sched. A, s. 75.

Employees

76 (1) Without limiting the power of the Financial Corporation to hire employees, such employees as are considered necessary for the proper conduct of the Corporation may be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2006, c. 35, Sched. C, s. 31 (1).

(2) REPEALED: 2006, c. 35, Sched. C, s. 31 (1).

Agreements to provide services

(3) Any minister of the Crown may enter into agreements with the Financial Corporation for the provision by employees of the Crown or any agency of the Crown of any service required by the Corporation. 1998, c. 15, Sched. A, s. 76 (3).

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

2006, c. 35, Sched. C, s. 31 (1) - 20/08/2007

Liability

77 (1) No action or other civil proceeding shall be commenced against a director, officer, employee or agent of the Financial Corporation or a subsidiary of the Financial Corporation, or of an agency of the Crown specified in a directive referred to in subsection 74 (3), for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under this Act, the regulations or the by-laws of the Corporation or subsidiary, or for any neglect or default in the exercise or performance in good faith of such a power or duty. 1998, c. 15, Sched. A, s. 77 (1).

Declaration under subs. 72 (2)

(2) Subsection (1) does not apply to any act, neglect or default in respect of a contract, security or instrument with respect to which a subsidiary of the Financial Corporation has made a declaration in accordance with subsection 72 (2). 1998, c. 15, Sched. A, s. 77 (2).

Actions against Crown

(3) No action or other civil proceeding shall be commenced against the Crown for any act, neglect or default by a person referred to in subsection (1) or for any act, neglect or default of the Financial Corporation, a subsidiary of the Financial Corporation or an agency of the Crown specified in a directive referred to in subsection 74 (3). 1998, c. 15, Sched. A, s. 77 (3).

Same

(4) Subsections (1) and (3) do not relieve the Financial Corporation, a subsidiary of the Financial Corporation or an agency of the Crown specified in a directive referred to in subsection 74 (3) of any liability to which it would otherwise be subject in respect of a cause of action arising from any act, neglect or default referred to in subsection (1). 1998, c. 15, Sched. A, s. 77 (4).

Same

(5) Subsection (3) does not relieve the Crown of any liability pursuant to a guarantee or indemnity under section 69 or a guarantee referred to in clause 130 (a). 1998, c. 15, Sched. A, s. 77 (5).

Definition

(6) In this section,

“employee” includes an employee employed under Part III of the *Public Service of Ontario Act, 2006*. 1998, c. 15, Sched. A, s. 77 (6); 2006, c. 35, Sched. C, s. 31 (2).

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

2006, c. 35, Sched. C, s. 31 (2) - 20/08/2007

Waiver of immunity

78 The Financial Corporation or any of its subsidiaries may waive any immunity to which it may be entitled outside Ontario as an agent of the Crown and may submit to the jurisdiction of a court outside Ontario. 1998, c. 15, Sched. A, s. 78.

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

Judgments against Financial Corporation

79 (1) The Minister of Finance shall pay from the Consolidated Revenue Fund the amount of any judgment against the Financial Corporation or a subsidiary of the Corporation that remains unpaid after it has made reasonable efforts, including liquidating its assets, to pay the amount of the judgment. 1998, c. 15, Sched. A, s. 79 (1).

Application

(2) Subsection (1) does not apply to a judgment in respect of a matter that arose before this section comes into force. 1998, c. 15, Sched. A, s. 79 (2).

Subsidiaries

(3) Subsection (1) does not apply to a judgment arising from a contract, security or instrument in respect of which a subsidiary has made a declaration in accordance with subsection 72 (2). 1998, c. 15, Sched. A, s. 79 (3).

Audits

80 The accounts and financial transactions of the Financial Corporation shall be audited annually by the Auditor General. 1998, c. 15, Sched. A, s. 80; 2004, c. 17, s. 32.

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

2004, c. 17, s. 32 - 30/11/2004

Annual report

81 (1) The Financial Corporation shall prepare an annual report, provide it to the Minister of Finance no later than 90 days after the Financial Corporation receives audited financial statements from the Auditor General and make it available to the public. 2017, c. 34, Sched. 46, s. 13.

Same

(2) The Financial Corporation shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

- (a) the form and content of the annual report; and
- (b) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 13.

Same

(3) The Financial Corporation shall include such additional content in the annual report as the Minister of Finance may require. 2017, c. 34, Sched. 46, s. 13.

Extension of time

(4) The Minister of Finance may extend the time for the Financial Corporation to provide its annual report for a fiscal year to a day that is not later than the day the Public Accounts for the fiscal year are submitted to the Lieutenant Governor in Council in accordance with Part 0.1 of the *Financial Administration Act*. 2017, c. 34, Sched. 46, s. 13.

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

2008, c. 19, Sched. E, s. 1 - 27/11/2008

2009, c. 34, Sched. J, s. 28 - 15/12/2009

2017, c. 34, Sched. 46, s. 13 - 01/01/2018

Tabling of annual report

81.1 The Minister of Finance shall table the Financial Corporation's annual report in the Assembly and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when to table it. 2017, c. 34, Sched. 46, s. 13.

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

2017, c. 34, Sched. 46, s. 13 - 01/01/2018

Other reports

82 The Financial Corporation shall submit such other reports and information to the Minister of Finance as he or she may require from time to time. 1998, c. 15, Sched. A, s. 82.

Application of corporations statutes

83 Except as otherwise provided by the regulations, the *Not-for-Profit Corporations Act, 2010* and the *Corporations Information Act* do not apply to the Financial Corporation. 1998, c. 15, Sched. A, s. 83; 2017, c. 20, Sched. 8, s. 81.

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

2017, c. 20, Sched. 8, s. 81 - 19/10/2021

Tax exemption

84 (1) Despite the *Assessment Act* or any other general or special Act, the Financial Corporation and its property are not subject to taxation for municipal or school purposes, except for local improvements. 1998, c. 15, Sched. A, s. 84 (1).

Annual payments to municipalities

(2) The Financial Corporation shall pay in each year to any municipality in which are situated lands owned by the Financial Corporation or buildings used exclusively for executive, administrative or commercial purposes and owned by the Financial Corporation or buildings owned by the Financial Corporation and rented by it to other persons, an amount equal to the taxes for municipal and school purposes that would be payable if the lands and buildings were taxable. 1998, c. 15, Sched. A, s. 84 (2).

Same

(3) In addition to the amounts payable under subsection (2), the Financial Corporation shall pay in each year to any municipality in which are situated generating station buildings or structures or transformer station buildings or structures owned by the Financial Corporation, an amount equal to the taxes for municipal and school purposes that would be payable if the buildings or structures were taxable and the assessed value were determined on the basis of \$86.11 for each square metre of inside ground floor area of the actual building or structure housing the generating, transforming and auxiliary equipment and machinery. 1998, c. 15, Sched. A, s. 84 (3).

Same

(4) In addition to the amounts payable under subsections (2) and (3), the Financial Corporation shall pay in each year, to any municipality in which land owned by it and described in paragraph 2 of subsection 315 (1) of the *Municipal Act, 2001* or paragraph 2 of subsection 280 (1) of the *City of Toronto Act, 2006*, as the case may be, is situate, an amount equal to the tax that would be imposed under section 315 of the *Municipal Act, 2001* or section 280 of the *City of Toronto Act, 2006*, as the case may be, on that land if the land were taxable. 2006, c. 32, Sched. C, s. 16 (2).

Same

(5) The Financial Corporation shall pay in each year to any municipality in which is situated land owned by it and used as a transmission or distribution corridor and leased to another person for rent or other valuable consideration, an amount equal to the taxes for municipal and school purposes that would be payable if the land were taxable and subsection (2) does not apply with respect to the land. 1998, c. 15, Sched. A, s. 84 (5).

Limitation

(6) Despite subsections (2) and (3), the total amount payable thereunder by the Financial Corporation to any municipality in any year shall not exceed 50 per cent of the total of the amounts required for the purposes of the municipality and of all of its local boards being raised by the imposition, rating and levying of all rates, assessments and taxation, except local improvement rates, upon rateable property in the municipality in that year. 1998, c. 15, Sched. A, s. 84 (6).

Use of valuations for computing rates

(7) The valuations made under this section shall be used for the purpose of computing upper-tier municipality rates, school rates and legislative grants in all respects as though the properties valued were not exempt from taxation for such purposes. 1998, c. 15, Sched. A, s. 84 (7); 2002, c. 17, Sched. F, Table.

Valuation

(8) The assessments and assessed values referred to in this section are valuations made in each year for the purposes of this section by the Municipal Property Assessment Corporation, and subject to subsections (2), (3) and (14), the valuation shall be made on the same basis as real property liable to municipal taxation in the municipality. 1998, c. 15, Sched. A, s. 84 (8); 2001, c. 8, s. 205 (1).

Minister of Finance's decision

(9) The decision of the Minister of Finance as to whether this section applies to any property of the Financial Corporation is final. 1998, c. 15, Sched. A, s. 84 (9).

Valuation notice

(10) The Municipal Property Assessment Corporation shall, on completion of the valuation of the Financial Corporation's property in a municipality, deliver or mail to the clerk of the municipality and to the Financial Corporation a notice setting out the valuations referred to in subsection (8). 1998, c. 15, Sched. A, s. 84 (10); 2001, c. 8, s. 205 (1).

Appeals

(11) The municipality or the Financial Corporation may appeal to the Assessment Review Board against the valuation and a notice of appeal to the Board under this subsection shall be sent by the party appealing, by registered mail, to the secretary of the Board within 90 days after the notice of the valuation has been delivered or mailed under subsection (10). 1998, c. 15, Sched. A, s. 84 (11).

Hearing

(12) Upon receipt of a notice of appeal under this section, the secretary of the Assessment Review Board shall arrange a time and place for hearing the appeal and shall send notice thereof to all parties concerned in the appeal at least 14 days before the hearing. 1998, c. 15, Sched. A, s. 84 (12).

Jurisdiction on appeal

(13) The Assessment Review Board upon appeal shall determine the amount at which the property in question shall be valued and its decision is final and binding and there is no appeal therefrom. 1998, c. 15, Sched. A, s. 84 (13).

Exemptions

(14) In making the valuations referred to in subsection (8), there shall be no value included for machinery whether fixed or not nor for the foundation on which it rests, works, structures other than buildings or structures referred to in subsection (2) or (3), substructures, superstructures, rails, ties, poles, towers, lines nor any of the things excepted from exemption from taxation by paragraph 17 of section 3 of the *Assessment Act*, nor for other property, works or improvements not referred to in subsection (2) or (3), nor for an easement or the right or use of occupation or other interest in land not owned by the Financial Corporation. 1998, c. 15, Sched. A, s. 84 (14).

(15) REPEALED: 2001, c. 8, s. 205 (2).

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

2001, c. 8, s. 205 (1, 2) - 29/06/2001

2002, c. 17, Sched. F, Table - 01/01/2003

2006, c. 32, Sched. C, s. 16 (2) - 01/01/2007

Repeal, Part V

84.1 (1) This Part is repealed on a day to be named by proclamation of the Lieutenant Governor. 2000, c. 42, s. 23.

Dissolution of Financial Corporation

(2) On the day this Part is repealed, the Financial Corporation is dissolved and its assets and liabilities are transferred to the Crown in right of Ontario. 2000, c. 42, s. 23.

Restriction on proclamation

(3) No proclamation shall be issued under this section unless, in the opinion of the Minister of Finance, substantially all the debts and other liabilities of the Financial Corporation have been retired or defeased. 2000, c. 42, s. 23.

Determination final

(4) The determination of the Minister of Finance that substantially all the debts and other liabilities of the Financial Corporation have been retired or defeased is final and conclusive and shall not be stayed, varied or set aside by any court. 2000, c. 42, s. 23.

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

2000, c. 42, s. 23 - 21/12/2000

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PART V.1
DEBT RETIREMENT CHARGE
THE DEBT RETIREMENT CHARGE

Charges to retire debt

85 (1) In this Part,

“collector” means a person appointed as a collector under subsection 85.3 (1); (“percepteur”)

“debt retirement charge” means, with respect to a user, the debt retirement charge payable by the user under subsection 85 (4); (“redevance de liquidation de la dette”)

“inspector” means a person appointed as an inspector under subsection 85.28 (1); (“inspecteur”)

“person” includes the Crown in right of Ontario, a partnership, a municipal corporation, a local board as defined in the *Municipal Affairs Act*, a police village, or a board, commission or authority established under an Act of the Assembly; (“personne”)

“self-generating user” means a person who generates electricity for his, her or its own consumption or for consumption by another person at the expense of the person who generates it; (“usager autoproducteur”)

“user” means,

- (a) a person who purchases or acquires electricity for his, her or its own consumption or for consumption by another person at the expense of the person who purchases or acquires it,
- (b) a person who purchases or acquires electricity on behalf of, or as agent for, a principal who wishes to acquire electricity for consumption by the principal or by other persons at the principal’s expense, and
- (c) a self-generating user. (“usager”) 1998, c. 15, Sched. A, s. 85 (1); 2000, c. 42, s. 25 (1); 2002, c. 17, Sched. F, Table; 2015, c. 38, Sched. 3, s. 1 (2).

(2), (3) REPEALED: 2015, c. 38, Sched. 3, s. 1 (3).

Duty to pay debt retirement charge

(4) Every user shall pay to the Financial Corporation a debt retirement charge in respect of the amount of electricity consumed in Ontario before April 1, 2018, to be calculated at the prescribed rate or rates. 2000, c. 42, s. 25 (2); 2015, c. 38, Sched. 3, s. 1 (4).

Determination re amount consumed

(4.1) For the purposes of subsection (4), the amount of electricity consumed in Ontario is to be determined in accordance with the regulations. 2000, c. 42, s. 25 (2).

Time and manner of payment

(5) The user shall pay the debt retirement charge at the time and in the manner specified by the regulations. 2000, c. 42, s. 25 (2).

Exemption from payment

(5.1) Such users or classes of users as may be prescribed are exempted from paying the debt retirement charge in such circumstances as may be prescribed. 2000, c. 42, s. 25 (2).

Same, under other Acts

(5.2) No person otherwise subject to the debt retirement charge is exempt from paying it by reason of an exemption granted to the person, or granted in respect of the personal or real property of the person, by or under any other Act unless the other Act expressly mentions this Act. 2000, c. 42, s. 25 (2).

(6)-(8) REPEALED: 2015, c. 38, Sched. 3, s. 1 (5).

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

2000, c. 42, s. 24, 25 (1) - 21/12/2000; 2000, c. 42, s. 25 (2) - 01/05/2002

2002, c. 17, Sched. F, Table - 01/01/2003

2015, c. 38, Sched. 3, s. 1 (1-5) - 10/12/2015

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Duty to meter consumption

85.1 Such users or classes of users as may be prescribed shall meter their consumption of electricity and shall do so in accordance with the regulations. 2000, c. 42, s. 26.

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

2000, c. 42, s. 26 - 01/01/2002

Exemptions

85.2 Such users or classes of users as may be prescribed are exempted from such obligations as are specified in the regulation in the circumstances described in the regulation. 2000, c. 42, s. 26.

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

2000, c. 42, s. 26 - 01/01/2002

REGISTRATION

Collectors of debt retirement charge

85.3 (1) Such persons as may be prescribed are appointed as collectors of the debt retirement charge. 2000, c. 42, s. 26.

Registration of collectors

(2) Every collector shall register with the Minister of Finance in accordance with the prescribed requirements and shall maintain his, her or its registration. 2000, c. 42, s. 26.

Duties of collectors

(3) Every collector shall do the following:

1. Levy and collect the debt retirement charge in accordance with the regulations.
2. Remit, in accordance with the regulations, the debt retirement charge collectable and payable by the collector.
3. Keep the prescribed records in accordance with the prescribed requirements.
4. Submit returns to the Minister of Finance in accordance with the prescribed requirements. 2000, c. 42, s. 26.

Status

(4) Every collector is an agent of the Financial Corporation for the purpose of levying and collecting the debt retirement charge. 2000, c. 42, s. 26.

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

2000, c. 42, s. 26 - 01/01/2002

Registration of self-generating users

85.4 (1) Every self-generating user shall register with the Minister of Finance in accordance with the prescribed requirements and shall maintain his, her or its registration. 2000, c. 42, s. 26.

Duties

(2) Every self-generating user shall do the following:

1. Remit, in accordance with the regulations, the debt retirement charge payable by the self-generating user.
2. Keep the prescribed records in accordance with the prescribed requirements.
3. Submit returns to the Minister of Finance in accordance with the prescribed requirements. 2000, c. 42, s. 26.

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

2000, c. 42, s. 26 - 01/01/2002

ASSESSMENT AND REASSESSMENT OF AMOUNTS OWING

Assessment payable by collector

85.5 (1) At any time the Minister of Finance considers reasonable, he or she may assess or reassess the debt retirement charge collected by a collector for which the collector has not accounted,

- (a) if the collector fails to submit a return or remittance as required by this Part; or

(b) if the collector's returns are not substantiated by the collector's records. 2000, c. 42, s. 27.

Assessment upon inspection

(2) If it appears to an inspector that a collector has not complied with this Part, the Minister of Finance may assess or reassess the amount of the debt retirement charge collected by the collector or the amount of the penalty authorized by subsection 85.6 (4), based on the inspector's calculation that is described in subsection (3). 2000, c. 42, s. 27.

Calculation of amount

(3) For the purposes of an assessment or reassessment under subsection (2), the inspector shall calculate the amount of the debt retirement charge or the amount of the penalty and shall make the calculation in the manner and form and using such procedures as the Minister of Finance considers adequate and expedient. 2000, c. 42, s. 27.

Deemed charge

(4) The amount assessed or reassessed by the Minister of Finance under this section shall be deemed to be a debt retirement charge collected by the collector. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Administrative penalties, collectors

85.6 (1) If a collector fails to submit a return to the Minister of Finance as required under this Part, the Minister of Finance may assess a penalty against the collector in an amount equal to the sum of 10 per cent of the amount collectable by the collector in respect of the period for which the return should have been submitted and 5 per cent of the amount payable by the collector in respect of that period. 2000, c. 42, s. 27.

Same, failure to pay

(2) If a collector submits a return to the Minister of Finance as required under this Part but fails to remit the full amount shown on the return as collectable or payable by the collector, the Minister of Finance may assess a penalty against the collector in an amount equal to the sum of 10 per cent of the amount collectable and not remitted by the collector and 5 per cent of the amount payable and not remitted by the collector. 2000, c. 42, s. 27.

Same, wilful non-compliance

(3) If the Minister of Finance makes an assessment or reassessment under subsection 85.5 (1) or (2) and if the Minister of Finance is satisfied that the non-compliance that gave rise to the assessment or reassessment was attributable to neglect, carelessness, wilful default or fraud, the Minister of Finance may assess a penalty against the collector equal to the greater of,

- (a) \$100; or
- (b) 25 per cent of the amount assessed or reassessed under subsection 85.5 (1) or (2), as the case may be. 2000, c. 42, s. 27.

Same, failure to collect

(4) If a collector fails to collect a debt retirement charge that the collector is required under this Part to collect, the Minister of Finance may assess a penalty against the collector in an amount equal to the amount that should have been collected. 2000, c. 42, s. 27.

Exception

(5) The Minister of Finance shall not assess a penalty under subsection (4) against the collector if the Minister of Finance has made an assessment or reassessment under section 85.7 against the user from whom the collector should have collected the amount. 2000, c. 42, s. 27.

Time limit

(6) The Minister of Finance shall not assess a penalty under subsection (4) with respect to an amount that should have been collected by the collector more than four years before the date of the assessment. 2000, c. 42, s. 27.

Exception, where misrepresentation, etc.

(7) Subsection (6) does not apply if the Minister of Finance establishes that the collector has made a misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in making a return or supplying information under this Part or in omitting to disclose information. 2000, c. 42, s. 27.

Administrative penalty, wilful failure to collect

(8) If a collector fails to collect a debt retirement charge that the collector is required under this Part to collect and if the Minister of Finance is satisfied that the failure is attributable to neglect, carelessness, wilful default or fraud, the Minister of Finance may assess a penalty against the collector,

- (a) in an amount equal to the greater of \$25 and 25 per cent of the amount that should have been collected, if a penalty has been assessed against the collector under subsection (4) for the failure to collect; or
- (b) in an amount equal to the greater of \$25 and 125 per cent of the amount that should have been collected, if no penalty has been assessed against the collector under subsection (4) for the failure to collect. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Assessments payable by users

85.7 (1) The Minister of Finance may assess or reassess any debt retirement charge payable by a user. 2000, c. 42, s. 27.

Time limit

(2) The assessment or reassessment under subsection (1) must be made,

- (a) in the case of a user that is not a self-generating user, within four years after the date on which the debt retirement charge became payable; and
- (b) in the case of a self-generating user, within four years after the end of the calendar year during which the debt retirement charge became payable. 2000, c. 42, s. 27.

Exception, where misrepresentation, etc.

(3) Subsection (2) does not apply if the Minister of Finance establishes that the user has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in making a return or supplying information under this Part or in omitting to disclose information. 2000, c. 42, s. 27.

Assessment upon inspection

(4) If it appears to an inspector that a user has not complied with this Part, the Minister of Finance may assess or reassess the amount of the debt retirement charge payable by the user, based on the inspector's calculation that is described in subsection (5). 2000, c. 42, s. 27.

Calculation of amount

(5) For the purposes of an assessment or reassessment under subsection (4), the inspector shall calculate the amount payable by the user and shall make the calculation in the manner and form and using such procedures as the Minister of Finance considers adequate and expedient. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Administrative penalties, users

85.8 If the Minister of Finance makes an assessment or reassessment under section 85.7 and if the Minister of Finance is satisfied that the non-compliance that gave rise to the assessment or reassessment was attributable to neglect, carelessness, wilful default or fraud, the Minister of Finance may assess a penalty against the user equal to the greater of,

- (a) \$100; or
- (b) 25 per cent of the amount assessed or reassessed under section 85.7. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Administrative penalty, self-generating user

85.9 (1) If a self-generating user fails to submit a return to the Minister of Finance as required under this Part, the Minister of Finance may assess a penalty against the user in an amount equal to 5 per cent of the debt retirement charge payable by the user in respect of the period for which the return should have been submitted. 2000, c. 42, s. 27.

Same, failure to remit payment

(2) If a self-generating user submits a return to the Minister of Finance but fails to remit the full amount shown on the return as payable by the user, the Minister of Finance may assess a penalty against the user in an amount equal to 5 per cent of the amount payable and not remitted. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Liability of corporate directors

85.10 (1) This section applies if a corporation fails to collect a debt retirement charge, fails to remit a debt retirement charge that it has collected or fails to pay any interest or penalty under this Part relating to such a charge. 2000, c. 42, s. 27.

Same

(2) The individuals who were directors of the corporation when the corporation failed to collect or remit the debt retirement charge or failed to pay the interest or penalty are jointly and severally liable, together with the corporation, to pay the charge, interest or penalty to the Financial Corporation. 2000, c. 42, s. 27.

Assessment

(3) The Minister of Finance may assess or reassess any individual for any amount payable by him or her under subsection (2). 2000, c. 42, s. 27.

Same

(4) Section 43 of the *Retail Sales Tax Act* applies, with necessary modifications, with respect to the liability of individuals under subsection (2), assessments or reassessments by the Minister of Finance under this section and the collection of amounts payable. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Assessment of interest payable

85.11 (1) The Minister of Finance may assess interest that is payable on a debt owing to the Financial Corporation under this Part and interest that is payable on a penalty imposed under this Part. 2000, c. 42, s. 27.

Calculation, re debt

(2) The interest on a debt is payable from the date on which the debt is due to the date on which the amount of the debt plus the interest is received by the Financial Corporation and it is to be calculated at the prescribed rate and in the prescribed manner. 2000, c. 42, s. 27.

Same, re penalty

(3) The interest on a penalty is payable from the date of the default to which the penalty relates to the date on which the amount of the penalty plus the interest is received by the Financial Corporation and it is to be calculated at the prescribed rate and in the prescribed manner. 2000, c. 42, s. 27.

Calculation of debt owing

(4) For the purposes of subsection (1), the amount of a debt owing by a person to the Financial Corporation on a particular date is the amount by which "A" exceeds "B" where,

"A" is the aggregate of,

- (a) the amount of the debt retirement charge collectable by the person as a collector or payable by the person as a user under this Part before that date,
- (b) all amounts or penalties or both assessed under this Part against the person before that date, and
- (c) the total of all amounts of interest assessed and payable under this section against the person in respect of a period of time before that date, and

"B" is the aggregate of,

- (a) the amount of the debt retirement charge remitted or paid by the person under this Part before that date,
- (b) all amounts or penalties or both assessed under this Part and paid by the person before that date, and

- (c) the total of all amounts of interest credited to the person in respect of a period of time before that date. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Notice of assessment

85.12 The Minister of Finance shall give a written notice of assessment or reassessment to a user, collector or individual who is assessed or reassessed under this Part. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Effect of information and returns

85.13 (1) The Minister of Finance is not bound by information given or by a return made by or on behalf of a person under this Part and may make assessments under this Part even though no information is given or return is made or even though the information or return is incomplete or incorrect. 2000, c. 42, s. 27.

Liability

(2) A person's liability to pay a debt retirement charge is not affected by an incorrect or incomplete assessment or by the fact that no assessment has been made. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

PAYMENTS, REFUNDS AND REBATES

Payment of assessed amounts

85.14 (1) Every person against whom an assessment is made under this Part shall pay to the Financial Corporation the amount assessed, whether or not an objection to the assessment or an appeal from the assessment is outstanding. 2000, c. 42, s. 27.

Status of assessment

(2) An assessment by the Minister of Finance under this Part shall be deemed to be valid and binding despite any error, defect or omission either in the assessment or in any proceeding under this Part relating to the assessment and the amount assessed shall be deemed to be conclusively established as a debt owing to the Financial Corporation. 2000, c. 42, s. 27.

Same

(3) Subsection (2) does not prevent the assessment from being varied or vacated on an objection or an appeal and does not prevent a reassessment being made. 2000, c. 42, s. 27.

Penalty

(4) If a person purports to pay or remit an amount owing under this Part by delivering anything other than legal tender within the meaning of subsection 8 (1) of the *Currency Act* (Canada) and if, as a result, the Financial Corporation fails to receive full and unconditional payment or settlement, the person is liable to pay to the Financial Corporation the additional fee that is prescribed and the Minister of Finance may assess the additional fee as a penalty. 2000, c. 42, s. 27.

Same

(5) A penalty assessed under subsection (4) cannot be appealed under this Part and an objection to it cannot be initiated under this Part. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Refunds and rebates

85.15 (1) An amount paid under this Part that is not payable as a debt retirement charge and that was not paid to discharge a liability under an assessment made under this Part shall be refunded. 2000, c. 42, s. 27.

Rebate

(2) A rebate of a debt retirement charge shall be paid in such circumstances and in accordance with such requirements as may be prescribed. 2000, c. 42, s. 27.

Interest on refund or rebate

(3) Interest is payable on the amount refunded or the amount of the rebate and shall be calculated at the prescribed rate and in the prescribed manner for the period beginning 21 days after the date on which the Minister of Finance receives the application for the refund or rebate to the date of the refund or rebate. 2000, c. 42, s. 27.

Time limit for refund

(4) A person is not entitled to a refund under subsection (1) unless application for the refund is made to the Minister of Finance within four years after the date on which the person paid the amount to be refunded or within such longer period as may be permitted by regulation. 2000, c. 42, s. 27.

Disallowance

(5) If an application for a refund or rebate is made in accordance with this Part and if the application is refused, in whole or in part, the Minister of Finance shall give the applicant a written statement of disallowance specifying the amount that is disallowed and the reasons for disallowing it. 2000, c. 42, s. 27.

Refund by collector

(6) A collector may refund to a user, in accordance with the regulations, all or part of a debt retirement charge collected from the user by the collector if the user was not required to pay the debt retirement charge and if the refund is made within four years after the user paid it. 2000, c. 42, s. 27.

Same

(7) The collector may deduct from subsequent remittances under this Part any amount refunded under subsection (6), if the collector makes the deduction within four years after making the refund to the user. 2000, c. 42, s. 27.

Refund by the Financial Corporation

(7.1) The Minister of Finance may authorize the Financial Corporation to make a refund under subsection (1) to a person if the Minister is satisfied that the amount to be refunded was wrongly paid and that it has not been refunded by a collector. 2002, c. 22, s. 61.

Error in refund or rebate

(8) If a person receives a refund or rebate to which the person is not entitled under this Part, the Minister of Finance may assess or reassess the amount to which the person was not entitled and shall give the person a written statement describing the reasons that the person was not entitled to the amount assessed or reassessed. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

2002, c. 22, s. 61 - 01/05/2002

Refund of overpayment

85.16 (1) If it is established in a manner described in subsection (2) that a person has paid more than the person is required to pay as or on account of the debt retirement charge under this Part, the amount of the overpayment shall be refunded together with interest calculated at the prescribed rate and in the prescribed manner from the date on which the overpayment arose. 2000, c. 42, s. 27.

Same

(2) An overpayment may be established as a consequence of an assessment or reassessment under this Part or as a consequence of a final decision of a court in proceedings commenced as a result of an appeal under this Part. 2000, c. 42, s. 27.

Refund by the Financial Corporation

(3) The Financial Corporation shall refund the amount described in subsection (1) to the person described in that subsection. 2002, c. 22, s. 62.

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

2000, c. 42, s. 27 - 01/01/2002

OBJECTIONS AND APPEALS

Objections and appeals

85.17 (1) Any of the following persons may object to, or appeal from, an assessment or a reassessment made under this Part, a statement of disallowance given under this Part or a penalty imposed under this Part:

1. A collector.
2. A user.
3. An individual against whom an assessment has been made under section 85.10. 2000, c. 42, s. 27.

Same

(2) Sections 24 to 30 of the *Retail Sales Tax Act* apply, with necessary modifications, with respect to objections and appeals under this section. 2000, c. 42, s. 27; 2011, c. 9, Sched. 12, s. 1.

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

2000, c. 42, s. 27 - 01/01/2002

2011, c. 9, Sched. 12, s. 1 - 12/05/2011

COLLECTION OF AMOUNTS OWING

Funds held in trust

85.18 (1) An amount collectable or collected by a collector as a debt retirement charge or on account of such a charge shall be deemed, despite any security interest in the amount,

- (a) to be held in trust for the Financial Corporation;
- (b) to be held separate and apart from the collector's property; and
- (c) to be held separate and apart from property held by any secured creditor that, but for any security interest, would be the collector's property. 2000, c. 42, s. 27.

Same

(2) Section 22 of the *Retail Sales Tax Act* applies, with necessary modifications, with respect to an amount described in subsection (1). 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Method of collection

85.19 Any amount payable to the Financial Corporation under this Part that remains unpaid after it becomes due and payable may be collected by the Minister of Finance on behalf of the Financial Corporation and, for that purpose, sections 23 and 36, subsections 37 (1), (1.1) and (2) and sections 37.1, 38 and 39 of the *Retail Sales Tax Act* apply, with necessary modifications. 2000, c. 42, s. 27; 2011, c. 9, Sched. 12, s. 2.

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

2000, c. 42, s. 27 - 01/01/2002

2011, c. 9, Sched. 12, s. 2 - 12/05/2011

OFFENCES

Offences

85.20 (1) Every person who contravenes or fails to comply with any of the following provisions is guilty of an offence and, on conviction, is liable to a fine of not less than \$100 for each day during which the offence continues:

1. Section 85.1 (duty to meter consumption).
2. Subsection 85.3 (2) (registration of collectors) or paragraph 4 of subsection 85.3 (3) (duty to submit returns, collectors).

3. Subsection 85.4 (1) (registration of self-generating users) or paragraph 3 of subsection 85.4 (2) (duty to submit returns, self-generating users).
4. Subsection 85.28 (3) (prohibition re inspection). 2000, c. 42, s. 27.

Same, re failure to collect

(2) Every collector who is required by paragraph 1 of subsection 85.3 (3) to levy and collect a debt retirement charge and who fails to do so is guilty of an offence and, on conviction, is liable to a fine equal to the sum of,

- (a) the amount of the debt retirement charge that should have been collected, as determined under subsection (3); and
- (b) an amount that is not less than \$50 and not more than \$2,000. 2000, c. 42, s. 27.

Determination of amount

(3) For the purposes of clause (2) (a), the Minister of Finance shall determine the amount of the debt retirement charge that should have been collected and shall issue a certificate setting out that amount. 2000, c. 42, s. 27.

Same

(4) The determination made under subsection (3) shall be based upon such information as is available to the Minister of Finance and, unless he or she considers that the collector has engaged in deliberate evasion of this Part, the Minister of Finance shall not consider information respecting a period of more than four years in making the determination. 2000, c. 42, s. 27.

Effect of certificate

(5) A certificate issued under subsection (3) is proof, in the absence of evidence to the contrary, of the amount of the debt retirement charge that should have been collected and of the authority of the person signing the certificate without any proof of appointment or signature. 2000, c. 42, s. 27.

Offence, re failure to remit

(6) Every collector who fails to remit an amount collected as, or on account of, a debt retirement charge as required by paragraph 2 of subsection 85.3 (3) is guilty of an offence and, on conviction, is liable to either or both of the following penalties in addition to any other penalty imposed under this Part:

1. A fine in an amount that is,
 - i. not less than the greater of \$100 and 25 per cent of the amount collected and not remitted, and
 - ii. not more than the greater of \$100 and double the amount collected and not remitted.
2. Imprisonment for a term of not more than two years. 2000, c. 42, s. 27.

Offence, re records

(7) Every collector who is required by paragraph 3 of subsection 85.3 (3) to keep records and who fails to do so in accordance with the regulations is guilty of an offence and on conviction is liable to a fine of not less than \$50 and not more than \$5,000. 2000, c. 42, s. 27.

Same, self-generating user

(8) Every self-generating user who is required by paragraph 2 of subsection 85.4 (2) to keep records and who fails to do so in accordance with the regulations is guilty of an offence and on conviction is liable to a fine of not less than \$50 and not more than \$5,000. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Offence, directors of a corporation

85.21 (1) Any officer, director or agent of a corporation or any other person who directs, authorizes, assents to, acquiesces in or participates in an action or omission by the corporation that is an offence under this Part is guilty of an offence. 2000, c. 42, s. 27.

Penalty upon conviction

(2) A person convicted of an offence under subsection (1) is liable to the penalty provided for the offence by the corporation, whether or not the corporation has been prosecuted for or convicted of the offence. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Offence, confidentiality

85.22 Every person who contravenes subsection 85.29 (1), (2), (5) or (6) is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Offences, false statements, etc., and fraud

85.23 (1) Every person who engages in any of the following acts or omissions is guilty of an offence:

1. Making, participating in, assenting to or acquiescing in the making of a false or deceptive statement in a return, statement or other document or in an answer required or submitted under this Part.
2. Destroying, altering, mutilating, hiding or otherwise disposing of information or records of a user or collector, for the purpose of evading payment of an amount under this Part.
3. Making, assenting to or acquiescing in the making of a false or deceptive entry of a material particular in a record of a user or collector.
4. Omitting to make or assenting to or acquiescing in the omission of an entry of a material particular in a record of a user or collector.
5. For the purpose of evading a payment under this Part, destroying, altering or otherwise causing a meter to inaccurately measure the consumption of electricity or to cease measuring the consumption of electricity or replacing a meter with another meter that is calculated to mislead.
6. Wilfully evading or attempting to evade, in any manner, payment of an amount under this Part or compliance with an obligation under this Part. 2000, c. 42, s. 27.

Penalty upon conviction

(2) A person convicted of an offence under subsection (1) is liable to either or both of the following penalties in addition to any other penalty imposed under this Part:

1. A fine in an amount that is,
 - i. not less than the greater of \$1,000 and 50 per cent of the amount that should have been remitted or that the person sought to evade, and
 - ii. not more than the greater of \$1,000 and double the amount that should have been remitted or that the person sought to evade.
2. Imprisonment for a term of not more than two years. 2000, c. 42, s. 27.

Offence, obtaining refund or rebate by fraud

(3) Every person who, by deceit, falsehood or any other fraudulent means, obtains or attempts to obtain a refund or rebate under this Part to which the person is not entitled is guilty of an offence and, on conviction, is liable to either or both of the following penalties:

1. A fine of not less than \$500 and not more than double the amount of the refund or rebate sought.
2. Imprisonment for a term of not more than two years. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

General offence

85.24 Every person who contravenes, by any act or omission, a requirement imposed under this Part is guilty of an offence and, on conviction, is liable, where no other penalty is provided for the offence, to a fine of not less than \$50 and not more than \$5,000. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Imprisonment, failure to pay fine

85.25 If a fine is imposed on an individual under section 85.20, 85.21, 85.22, 85.23 or 85.24 as a result of his or her conviction of an offence under this Part, a sentence of imprisonment for not more than one year in default of payment of the fine may also be imposed on the individual. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Limitation period and onus of proof

85.26 (1) A proceeding to prosecute an offence under this Part must be commenced within six years after the date on which the matter of the offence arose. 2000, c. 42, s. 27.

Onus of proof

(2) In a prosecution for a failure to pay, collect or remit a debt retirement charge, as the case may be, the accused has the onus of proving that the debt retirement charge was paid, collected or remitted. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Payment of fines

85.27 Fines imposed under sections 85.20, 85.21, 85.22, 85.23 and 85.24 are payable to the Minister of Finance on behalf of the Crown in right of Ontario. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

ADMINISTRATION

Inspection

85.28 (1) The Minister of Finance may appoint one or more inspectors who are authorized to exercise any of the powers and perform any of the duties of a person authorized by the Minister of Finance under subsection 31 (1) of the *Retail Sales Tax Act* for any purpose related to the administration and enforcement of this Part. 2000, c. 42, s. 27.

Same

(2) Subsections 31 (1), (2), (2.1) and (2.2) of the *Retail Sales Tax Act* apply, with necessary modifications, with respect to the administration and enforcement of this Part. 2000, c. 42, s. 27; 2011, c. 9, Sched. 12, s. 3.

Interference with inspection

(3) No person shall prevent or interfere with, or attempt to prevent or interfere with, an inspector doing anything that he or she is authorized to do under this section. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

2011, c. 9, Sched. 12, s. 3 - 12/05/2011

Confidentiality

85.29 (1) Except as authorized by this section, no person employed by the Government of Ontario shall,

- (a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister of Finance for the purposes of this Part; or
- (b) knowingly allow any person to inspect or have access to any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this Part. 2000, c. 42, s. 27.

Testimony

(2) No person employed by the Government of Ontario shall be required, in connection with any legal proceedings,

- (a) to give evidence relating to any information obtained by or on behalf of the Minister of Finance for the purposes of this Part; or

- (b) to produce any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this Part. 2000, c. 42, s. 27.

Exception

- (3) Subsections (1) and (2) do not apply in respect of,
- (a) criminal proceedings under an Act of the Parliament of Canada;
 - (b) proceedings in respect of the trial of any person for an offence under an Act of the Legislature; or
 - (c) proceedings relating to the collection of the debt retirement charge under this Part. 2000, c. 42, s. 27.

Communication

- (4) A person employed by the Government of Ontario may, in the course of duties in connection with the administration or enforcement of this Part,
- (a) communicate or allow to be communicated to another person employed by the Government of Ontario in the administration or enforcement of any law, information obtained by or on behalf of the Minister of Finance for the purposes of this Part; and
 - (b) allow another person employed by the Government of Ontario in the administration or enforcement of any law, to inspect or have access to any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this Part. 2000, c. 42, s. 27.

Reciprocal communication

- (5) A person who receives information or obtains access to any record or thing under subsection (4) has a duty to communicate or furnish to the Minister of Finance on a reciprocal basis any information, record or thing obtained by the person that affects the administration or enforcement of this Part. 2000, c. 42, s. 27.

Use of information

- (6) Any information, record or thing communicated or furnished under this Part may be used only for the administration or enforcement of this Part or an Act that is administered or enforced by the person receiving the information, record or thing. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Methods of giving notice

85.30 (1) When the Minister of Finance is required under this Part to give a person a document or to give notice to a person, he or she may do so by sending the document or notice by prepaid mail to the person at the person's last known address or by serving the document or notice on the person. 2000, c. 42, s. 27.

Same, partnership

- (2) If the document or notice is to be given to a partnership, the document or notice may be sent to or served on a partner, manager, agent or representative of the partnership. 2000, c. 42, s. 27.

Same, corporation

- (3) If the document or notice is to be given to a corporation, the document or notice may be sent to or served on the president, secretary or another director or on a manager, agent or representative of the corporation. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Proof of compliance

85.31 (1) An affidavit of the Minister of Finance, a person employed in the Ministry of Finance or a person employed by the Financial Corporation about whether this Part has, or has not, been complied with is proof in the absence of evidence to the contrary of the facts set out in the affidavit, without proof of the signature or office of the person making the affidavit. 2000, c. 42, s. 27.

Status

- (2) An affidavit described in subsection (1) may be introduced into evidence without notice, despite section 35 of the *Evidence Act*. 2000, c. 42, s. 27.

Right to cross-examine

(3) A party against whom an affidavit described in subsection (1) is adduced may, with the leave of the court, require the deponent to attend court to be cross-examined. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Evidence re collectors

85.32 (1) A copy of a person's application for registration as a collector that is filed with the Minister of Finance under this Part is proof, in the absence of evidence to the contrary, that the person is a collector and is required to remit to the Minister of Finance the debt retirement charge under this Part. 2000, c. 42, s. 27.

Same

(2) Subject to subsection (4), if a collector is described as a partnership on an application for registration as a collector that is filed with the Minister of Finance under this Part, a copy of the application is proof, in the absence of evidence to the contrary, that the persons named in it are members of the partnership. 2000, c. 42, s. 27.

Same

(3) Subject to subsection (4), a copy of a return filed by a person or a partnership as a collector is proof, in the absence of evidence to the contrary, that the person or partnership collected the debt retirement charge specified in the return. 2000, c. 42, s. 27.

Certification

(4) The copy of the application or return must be certified by an official of the Ministry of Finance who has access to the records that are maintained by the Ministry of Finance about the collector, and it may be a copy of an application or return made electronically and reproduced from original data stored electronically. 2000, c. 42, s. 27.

Evidence re self-generating users

(5) Subsections (1), (2) and (4) apply, with necessary modifications, with respect to applications and returns of a self-generating user. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Evidence re other documents

85.33 (1) For any purpose relating to the administration or enforcement of this Part, the Minister of Finance or a person authorized by him or her may reproduce from original data stored electronically any document previously issued under this Part or any information previously submitted in any form by a collector or a self-generating user, and the reproduction is admissible in evidence and has the same probative force as the original document or information would have had if it had been proved in the ordinary way. 2000, c. 42, s. 27.

Same

(2) If a book, record or other document is examined or produced under section 85.28 (inspection), the person by whom it is examined or to whom it is produced may make (or cause to be made) one or more copies of it, and a document purporting to be certified by the person to be a copy made under the authority of this subsection is admissible in evidence and has the same probative force as the original document would have had if it had been proved in the ordinary way. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Affidavits, etc.

85.34 (1) Any of the following documents may be sworn by any person who has authority to administer an oath or any person authorized for the purposes of this section by the Lieutenant Governor in Council:

1. A declaration or affidavit relating to a return made under this Part.
2. A statement of information given under section 85.28 (inspection). 2000, c. 42, s. 27.

Same

(2) A person authorized for the purposes of this section by the Lieutenant Governor in Council shall not charge a fee for swearing a document described in subsection (1). 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Forms

85.35 The Minister of Finance may approve the use of forms for any purpose of this Part and the forms may provide for such information to be furnished as the Minister of Finance may require. 2000, c. 42, s. 27.

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

2000, c. 42, s. 27 - 01/01/2002

Regulations, Parts V and V.I

86 (1) The Lieutenant Governor in Council may make regulations,

- (a) respecting the calculation of the fees referred to in subsection 71 (1) and respecting the manner in which, and the time at which, they are to be paid;
- (b) prescribing provisions of the *Business Corporations Act*, the *Not-for-Profit Corporations Act, 2010* or the *Corporations Information Act* that apply, with necessary modifications, to the Financial Corporation;
- (c), (d) REPEALED: 2015, c. 38, Sched. 3, s. 2.
- (e) prescribing one or more rates for the purposes of subsections 85 (4) and 85 (4.1), including rates applicable to particular users, classes of users or uses of electricity, prescribing the amount of electricity with respect to which a rate is applied and prescribing one or more methods for determining the amount of electricity consumed;
- (f) exempting particular users or classes of users from paying a debt retirement charge, specifying the circumstances in which the exemption applies and imposing conditions or restrictions with respect to an exemption;
- (g) providing for the rebate of the debt retirement charge in whole or in part, prescribing the circumstances in which and conditions under which rebates may be made and prescribing the method of determining the amount of a rebate;
- (h) respecting any other matter that the Lieutenant Governor in Council considers necessary or advisable in connection with this Part.
- (i) - l) REPEALED: 2000, c. 42, s. 28 (1).

1998, c. 15, Sched. A, s. 86 (1); 2000, c. 42, s. 28 (1); 2015, c. 38, Sched. 3, s. 2; 2017, c. 20, Sched. 8, s. 81.

Regulations, Minister of Finance

(1.1) The Minister of Finance may make regulations,

- (a) determining anything that the Minister of Finance is permitted or required by this Part to determine;
- (b) defining, for the purposes of this Part, any word or expression used in this Part;
- (c) exempting particular users or classes of users from one or more obligations under this Part, other than the obligation to pay a debt retirement charge, specifying the circumstances in which the exemption applies and imposing conditions or restrictions with respect to an exemption;
- (d) prescribing the time or times at which a particular user or class of users is required to pay a debt retirement charge;
- (e) prescribing, for the purpose of section 85.1, the users or classes of users that are required to meter the consumption of electricity and prescribing methods, procedures and requirements with respect to the metering of electricity;
- (f) governing the appointment, registration and duties of collectors;
- (g) governing the registration and duties of self-generating users;
- (h) prescribing methods of collecting and remitting a debt retirement charge and establishing requirements relating to the collection and remittance, including requirements about invoicing;
- (i) requiring the debt retirement charge to be paid or remitted in instalments, specifying when the instalments are to be paid or remitted, and requiring the payment of interest or administrative penalties or both for late payments;

- (j) prescribing the additional fee referred to in subsection 85.14 (4);
- (k) governing refunds by collectors;
- (l) prescribing procedures to be followed by collectors and users in connection with refunds and rebates under this Part;
- (m) prescribing, for the purpose of subsection 85.15 (4), a time limit for applying for a refund;
- (n) governing payments to a collector when the collector pays a debt retirement charge on behalf of a user and the user then defaults on paying the debt retirement charge to the collector;
- (o) prescribing a rate of interest or a method of determining a rate of interest for debts owing under this Part to the Financial Corporation and for amounts owing to a person as a refund or rebate under this Part;
- (p) prescribing the records to be kept by a collector or a self-generating user for the purposes of this Part. 2000, c. 42, s. 28 (2).

General or particular

- (2) A regulation made under this section may be general or particular in its application. 1998, c. 15, Sched. A, s. 86 (2).

Retroactivity

- (3) A regulation is, if it so provides, effective with reference to a period before it was filed. 2000, c. 42, s. 28 (2).

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

2000, c. 42, s. 28 (1, 2) - 21/12/2000

2015, c. 38, Sched. 3, s. 2 - 10/12/2015

2017, c. 20, Sched. 8, s. 81 - 19/10/2021

Repeal

87 (1) This Part is repealed on a day to be named by proclamation of the Lieutenant Governor. 1998, c. 15, Sched. A, s. 87 (1).

(2) REPEALED: 2000, c. 42, s. 29.

(3) REPEALED: 2000, c. 42, s. 29.

(4) REPEALED: 2000, c. 42, s. 29.

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

2000, c. 42, s. 29 - 21/12/2000

PART VI SPECIAL PAYMENTS

Definitions, Part VI

88 In this Part,

“municipal electricity utility” means,

- (a) a municipal corporation that generates, transmits, distributes or retails electricity directly,
- (b) a commission established under the *Public Utilities Act* or any other general or special Act through which a municipal corporation generates, transmits, distributes or retails electricity,
- (c) any other body, however established, through which a municipal corporation generates, transmits, distributes or retails electricity,
- (d) a corporation established pursuant to section 142 or a subsidiary of such a corporation, if a municipal corporation holds an interest, directly or indirectly, in one or more shares of such a corporation or subsidiary,
- (d.1) a corporation established after May 1, 2003 under sections 9, 10 and 11 of the *Municipal Act, 2001* in accordance with section 203 of that Act or established under sections 7 and 8 of the *City of Toronto Act, 2006* in accordance with sections 148 and 154 of that Act or a predecessor of those sections in either Act, for the purpose of directly or indirectly acquiring, holding, disposing of and otherwise dealing with shares of a corporation incorporated by a municipal corporation under section 142 of this Act,

- (d.2) any corporation or other entity through which, pursuant to subsection 144 (2), a municipal corporation, municipal service board, a city board or municipal services corporation generates electricity,
- (e) a police village that generates, transmits, distributes or retails electricity directly or indirectly, or a corporation or other entity owned by the members of a police village for the purpose of generating, transmitting, distributing or retailing electricity,
- (e.1) any corporation or other entity that is exempt under paragraph 149 (1) (c), (d), (d.1), (d.2), (d.3), (d.4), (d.5) or (d.6) of the *Income Tax Act* (Canada) from the payment of tax under that Act, and that generates, transmits, distributes or retails electricity in Ontario, other than,
 - (i) a band as defined in the *Indian Act* (Canada),
 - (ii) a corporation or other entity that is exempt under paragraph 149 (1) (d.5) of the *Income Tax Act* (Canada) from the payment of tax under that Act because not less than 90 per cent of the capital of the corporation or entity is owned by a band as defined in the *Indian Act* (Canada), or
 - (iii) a corporation that is exempt under paragraph 149 (1) (d.6) of the *Income Tax Act* (Canada) from the payment of tax under that Act because all of its shares or capital are owned by a corporation or entity described in subclause (ii),
- (f) a person or entity prescribed by the regulations; (“service municipal d’électricité”)

“taxation year” has the same meaning as in the *Income Tax Act* (Canada). (“année d’imposition”) 1998, c. 15, Sched. A, s. 88; 2000, c. 42, s. 30; 2004, c. 16, Sched. D, Table; 2004, c. 31, Sched. 11, s. 1; 2006, c. 32, Sched. C, s. 16 (3); 2007, c. 7, Sched. 12, s. 1; 2009, c. 12, Sched. B, s. 13; 2015, c. 38, Sched. 3, s. 3; 2017, c. 8, Sched. 8, s. 1.

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

2000, c. 42, s. 30 - 30/11/2000

2004, c. 16, Sched. D, Table - 01/01/2004; 2004, c. 31, Sched. 11, s. 1 - 02/05/2003

2006, c. 32, Sched. C, s. 16 (3) - 01/01/2007

2007, c. 7, Sched. 12, s. 1 - 01/01/2008

2009, c. 12, Sched. B, s. 13 - 09/09/2009

2015, c. 38, Sched. 3, s. 3 - 18/11/2015

2017, c. 8, Sched. 8, s. 1. - 17/05/2017

Payments in lieu of federal corporate tax

89 (1) If Hydro One Inc., a subsidiary of Hydro One Inc., Ontario Power Generation Inc. or a subsidiary of Ontario Power Generation Inc. is exempt under subsection 149 (1) of the *Income Tax Act* (Canada) from the payment of tax under that Act, it shall pay to the Financial Corporation in respect of each taxation year an amount equal to the amount of the tax that it would be liable to pay under that Act if it were a corporation to which that subsection did not apply. 1998, c. 15, Sched. A, s. 89 (1); 2002, c. 1, Sched. A, s. 15 (1); 2007, c. 7, Sched. 12, s. 2.

Corridor land

(1.1) The amount payable under subsection (1) by a person or entity from whom corridor land is transferred by section 114.2 shall be determined, for the taxation year in which the transfer occurs and for subsequent taxation years, as if the transfer did not occur. 2002, c. 1, Sched. A, s. 15 (2).

Payments to Minister of Finance

(2) After Part V is repealed under section 84.1, all payments required by this section shall be paid to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 89 (2); 2000, c. 42, s. 31.

Commencement of new taxation year

(3) A corporation that is required to make payments under this section shall be deemed, for the purposes of this section, to commence a new taxation year on the day this section comes into force. 1998, c. 15, Sched. A, s. 89 (3).

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

2000, c. 42, s. 31 - 21/12/2000

2002, c. 1, Sched. A, s. 15 (1, 2) - 27/06/2002

2007, c. 7, Sched. 12, s. 2 - 01/01/2008

Payments in lieu of provincial corporate tax

90 (1) If Hydro One Inc., a subsidiary of Hydro One Inc., Ontario Power Generation Inc. or a subsidiary of Ontario Power Generation Inc. is exempt under subsection 57 (1) of the *Corporations Tax Act* from the payment of tax under that Act for a taxation year that ends before January 1, 2009, it shall pay to the Financial Corporation in respect of each taxation year ending before that day an amount equal to the total amount of tax that it would be liable to pay under Parts II, II.1 and III of that Act for that year if it were a corporation to which that subsection did not apply. 2007, c. 7, Sched. 12, s. 3 (3).

Same

(1.0.1) If Hydro One Inc., a subsidiary of Hydro One Inc., Ontario Power Generation Inc. or a subsidiary of Ontario Power Generation Inc. is exempt under subsection 27 (2) of the *Taxation Act, 2007* from the payment of tax under that Act for a taxation year that ends after December 31, 2008, it shall pay to the Financial Corporation in respect of each taxation year ending after that day an amount equal to the total amount of tax that it would be liable to pay under Divisions B, C and E of Part III of that Act for the taxation year if it were a corporation to which that subsection did not apply. 2007, c. 7, Sched. 12, s. 3 (3).

Corridor land

(1.1) The amount payable under subsection (1) by a person or entity from whom corridor land is transferred by section 114.2 shall be determined, for the taxation year in which the transfer occurs and for subsequent taxation years, as if the transfer did not occur. 2002, c. 1, Sched. A, s. 16 (2).

Payments to Minister of Finance

(2) After Part V is repealed under section 84.1, all payments required by this section shall be paid to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 90 (2); 2000, c. 42, s. 32.

Commencement of new taxation year

(3) A corporation that is required to make payments under this section shall be deemed, for the purposes of this section, to commence a new taxation year on the day this section comes into force. 1998, c. 15, Sched. A, s. 90 (3).

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

2000, c. 42, s. 32 - 21/12/2000

2002, c. 1, Sched. A, s. 16 (1, 2) - 27/06/2002

2004, c. 16, Sched. D, Table - 01/01/2004

2007, c. 7, Sched. 12, s. 3 (3) - 01/01/2008

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Other payments

91 (1) If Hydro One Inc., a subsidiary of Hydro One Inc., Ontario Power Generation Inc. or a subsidiary of Ontario Power Generation Inc. is exempt under subsection 149 (1) of the *Income Tax Act* (Canada) from the payment of tax under that Act, the Lieutenant Governor in Council may from time to time order it to pay to the Financial Corporation an amount specified by the Lieutenant Governor in Council. 1998, c. 15, Sched. A, s. 91 (1); 2002, c. 1, Sched. A, s. 17 (1).

Restriction

(2) No payment may be required under subsection (1) if the payment would impair the ability of Hydro One Inc., a subsidiary of Hydro One Inc., Ontario Power Generation Inc. or a subsidiary of Ontario Power Generation Inc. to meet its financial liabilities or obligations as they come due or to fulfil its contractual commitments. 1998, c. 15, Sched. A, s. 91 (2); 2002, c. 1, Sched. A, s. 17 (2).

Payments to Minister of Finance

(3) After Part V is repealed under section 84.1, any order made under this section shall require payments to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 91 (3); 2000, c. 42, s. 33.

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

2000, c. 42, s. 33 - 21/12/2000

2002, c. 1, Sched. A, s. 17 (1, 2) - 27/06/2002

Allocation of Federal tax

91.1 (1) This section applies to any of the following corporations, if the corporation ceases at any time to be exempt under subsection 149 (1) of the *Income Tax Act* (Canada) from the payment of tax under that Act:

1. Hydro One Inc.
2. A subsidiary of Hydro One Inc.
3. A municipal electricity utility.
4. A successor of any of them. 2002, c. 1, Sched. A, s. 18.

Payment

(2) The Crown in right of Ontario shall pay to the Financial Corporation from the Consolidated Revenue Fund the amount, if any, that meets both of the following criteria:

1. The corporation is liable to pay the amount under the *Income Tax Act* (Canada) after ceasing to be exempt under subsection 149 (1) of that Act.
2. The Crown in right of Ontario receives the amount from, or is credited with the amount by, the Crown in right of Canada in respect of the liability described in paragraph 1. 2002, c. 1, Sched. A, s. 18.

Same, by corporation

(3) The specified corporation shall pay to the Financial Corporation the amount, if any, that meets all of the following criteria:

1. The corporation is liable to pay the amount under the *Income Tax Act* (Canada) after ceasing to be exempt under subsection 149 (1) of that Act.
2. The corporation receives the amount from, or is credited with the amount by, the Crown in right of Canada in respect of the liability described in paragraph 1.
3. The Crown in right of Canada intends that the corporation shall pay the amount to the Financial Corporation for the repayment of the debt of the Financial Corporation. 2002, c. 1, Sched. A, s. 18.

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

2002, c. 1, Sched. A, s. 18 - 27/06/2002

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Payment to Financial Corporation

91.2 (1) In each fiscal year of the Province, the Minister of Finance shall pay to the Financial Corporation from the Consolidated Revenue Fund an amount equal to the amount of tax payable under the *Taxation Act, 2007* by Hydro One Inc. or a subsidiary of Hydro One Inc. for the taxation year that ends in the fiscal year. 2015, c. 38, Sched. 3, s. 4.

Exception

(2) Subsection (1) does not apply in respect of tax payable by a prescribed subsidiary of Hydro One Inc. for a prescribed taxation year. 2015, c. 38, Sched. 3, s. 4.

Application of s. 50.2.1

(3) Section 50.2.1 does not apply to this section. 2015, c. 38, Sched. 3, s. 4.

Regulations

(4) The Minister of Finance may make regulations,

- (a) prescribing subsidiaries of Hydro One Inc. for the purposes of subsection (2);
- (b) prescribing taxation years for the purposes of subsection (2). 2015, c. 38, Sched. 3, s. 4.

Repeal

(5) **This section is repealed on the day on which Part V is repealed under section 84.1. 2015, c. 38, Sched. 3, s. 4.**

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

2015, c. 38, Sched. 3, s. 4 - 10/12/2015

Payments in lieu of additional municipal and school taxes

92 (1) Hydro One Inc. and each of its subsidiaries, Ontario Power Generation Inc. and each of its subsidiaries and every municipal electricity utility shall pay to the Financial Corporation in each year the difference between,

- (a) the amount of taxes that it would be liable to pay in the year for municipal and school purposes if the assessed value of land owned by it on which are situated generating station buildings or structures or transformer station buildings or structures were determined on the basis of the amount prescribed by the regulations for each square metre of inside ground floor area of the actual building or structure housing the generating, transforming and auxiliary equipment and machinery; and
- (b) the amount of taxes that it is liable to pay in the year for municipal and school purposes in respect of land owned by it on which are situated generating station buildings or structures or transformer station buildings or structures. 1998, c. 15, Sched. A, s. 92 (1); 2002, c. 1, Sched. A, s. 19 (1).

Subsequent owners

(1.1) If a generating station building or structure is owned by one of the persons referred to in subsection (1) on January 1, 2000 and is subsequently disposed of by that person, this section continues to apply to any subsequent owner. 2000, c. 25, s. 46 (1).

Notice to Financial Corporation

(2) When a notice of assessment is delivered under section 31 of the *Assessment Act* in respect of land described in subsection (1), the Municipal Property Assessment Corporation shall send a copy of the notice to the Financial Corporation. 1998, c. 15, Sched. A, s. 92 (2); 2001, c. 8, s. 205 (3).

Payments after Part V repealed

(3) After Part V is repealed under section 84.1, all payments required to be made under this section to the Financial Corporation shall instead be paid to,

- (a) one or more municipalities in the manner specified by the Minister of Finance, in respect of land located in a municipality; and
- (b) the Crown in right of Ontario, in respect of land located in territory without municipal organization. 2006, c. 33, Sched. Z.3, s. 9 (1); 2015, c. 38, Sched. 3, s. 5 (1).

(4) REPEALED: 2015, c. 38, Sched. 3, s. 5 (2).

(5) REPEALED: 2004, c. 31, Sched. 11, s. 2 (1).

Payments under the *Assessment Act* and *Provincial Land Tax Act, 2006*

(6) The references in subsection (1) to taxes for municipal and school purposes shall be deemed to include payments under section 27 of the *Assessment Act* and taxes under the *Provincial Land Tax Act, 2006*. 2006, c. 33, Sched. Z.3, s. 9 (2).

(7) REPEALED: 2001, c. 8, s. 205 (4).

(8) REPEALED: 2004, c. 31, Sched. 11, s. 2 (2).

Non-application

(9) This section, other than this subsection, does not apply to the following:

- 1. A hydro-electric generating station, as defined in subsection 92.1 (24), after December 31, 2000.
- 2. A wind turbine tower, as defined in subsection 45.4 (5) of Ontario Regulation 282/98 (General) made under the *Assessment Act*, after December 31, 2004. 2004, c. 31, Sched. 11, s. 2 (3).

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

1999, c. 9, s. 102 - 14/12/1999

2000, c. 25, s. 46 (1) - 04/12/2000; 2000, c. 42, s. 34 - 21/12/2000

2001, c. 8, s. 205 (3, 4) - 29/06/2001

2002, c. 1, Sched. A, s. 19 (1, 2) - 27/06/2002

2004, c. 16, Sched. D, Table - 01/01/2004; 2004, c. 31, Sched. 11, s. 2 (1-3) - 16/12/2004

2006, c. 33, Sched. Z.3, s. 9 (1, 2) - 01/01/2009

Tax and charges on hydro-electric stations

92.1 (1) The owner of a hydro-electric generating station shall pay in each year to the Crown in right of Ontario a tax computed at the rates specified in subsection (4) on the gross revenue from the generation of electricity. 2000, c. 25, s. 46 (2).

Payment to the Financial Corporation

(2) Despite subsection (1), the owner of a hydro-electric generating station shall pay to the Financial Corporation a charge computed at the rates specified in subsection (4) on the gross revenue from annual generation from the hydro-electric generating station if the hydro-electric generating station is owned by a person referred to in subsection 92 (1) or was owned at any time after March 31, 1999 by a person referred to in subsection 92 (1). 2004, c. 31, Sched. 11, s. 3 (1).

(2.1) REPEALED: 2006, c. 33, Sched. Z.3, s. 9 (3).

Payment to Ontario

(3) After Part V is repealed under section 84.1, all payments under subsection (2) are payable to the Crown in right of Ontario instead of to the Financial Corporation. 2000, c. 25, s. 46 (2); 2001, c. 9, Sched. F, s. 1 (3).

Rates

(4) For the purpose of subsections (1) and (2), the rates shall be calculated as follows:

1. 2.5 per cent on gross revenue from the first 50 gigawatt hours of annual generation from the generating station.
2. 4.5 per cent on gross revenue from annual generation from the generating station above 50 gigawatt hours up to and including 400 gigawatt hours.
3. 6.0 per cent on gross revenue from annual generation from the generating station above 400 gigawatt hours up to and including 700 gigawatt hours.
4. 26.5 per cent on gross revenue from annual generation from the generating station above 700 gigawatt hours. 2000, c. 25, s. 46 (2).

Additional charge

(5) In addition to the taxes or charges under subsection (1) or (2), the holder of a water power lease shall pay a water rental charge to the Crown in right of Ontario calculated at 9.5 per cent on gross revenue from annual generation from the hydro-electric generating station, and the holder's lease is hereby amended to substitute this charge for any water rental charge set out in the lease. 2000, c. 25, s. 46 (2).

Exception, water power lease under *Niagara Parks Act*

(5.1) Each prescribed holder of a water power lease under the *Niagara Parks Act* shall make such payments as may be prescribed to The Niagara Parks Commission, in the time and manner prescribed by regulation, and those payments reduce the amount of the charge payable by the holder under subsection (5). 2001, c. 23, s. 68 (1).

Exception

(6) There may be deducted, in determining the amount of gross revenue referred to in subsections (4) and (5), the amount of gross revenue resulting from the generation of electricity from eligible capacity, as determined by regulation, for the time period that is the longer of,

- (a) the first 120 months after the eligible capacity is put in service, as determined by regulation; and
- (b) such length of time, after the eligible capacity is first put in service, as the Minister of Finance may prescribe in the regulations. 2002, c. 23, s. 3 (22).

(7) REPEALED: 2009, c. 33, Sched. 16, s. 4.

Payment of taxes and charges

(8) The taxes and charges payable under this section shall be paid at the times and in the manner prescribed by regulation. 2000, c. 25, s. 46 (2).

(9) REPEALED: 2004, c. 31, Sched. 11, s. 3 (3).

Demand for information

(10) The Minister of Finance may, for any purpose related to the administration or enforcement of this section, by registered letter or by a demand served personally or delivered by courier service, require any person to provide any information or records to the Minister within such reasonable time as is stipulated in the letter or demand. 2000, c. 25, s. 46 (2).

Deemed receipt of registered letter

(10.1) A registered letter sent to a person under subsection (10) is deemed to have been received on the fifth day after the day of mailing unless the person establishes that, although acting in good faith, the person did not receive it or did not receive it until a later date. 2011, c. 9, Sched. 12, s. 4.

Offence

(11) Any person who fails to provide the information or records as required under subsection (10) is guilty of an offence and is on conviction liable to a fine of not more than \$100 for each day during which the default continues. 2000, c. 25, s. 46 (2).

Confidentiality

(12) Except as authorized by this section, no person employed by the Government of Ontario shall,

- (a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister of Finance for the purposes of this section; or
- (b) knowingly allow any person to inspect or to have access to any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this section. 2000, c. 25, s. 46 (2).

Testimony

(13) No person employed by the Government of Ontario shall be required, in connection with any legal proceedings,

- (a) to give evidence relating to any information obtained by or on behalf of the Minister of Finance for the purposes of this section; or
- (b) to produce any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this section. 2000, c. 25, s. 46 (2).

Exception

(14) Subsections (12) and (13) do not apply in respect of,

- (a) criminal proceedings under an Act of the Parliament of Canada;
- (b) proceedings in respect of the trial of any person for an offence under an Act of the Legislature; or
- (c) proceedings relating to the collection of taxes or charges under this section. 2000, c. 25, s. 46 (2).

Communication

(15) A person employed by the Government of Ontario may, in the course of duties in connection with the administration or enforcement of this section,

- (a) communicate or allow to be communicated to another person employed by the Government of Ontario in the administration or enforcement of any law, information obtained by or on behalf of the Minister of Finance for the purposes of this section; and
- (b) allow another person employed by the Government of Ontario in the administration or enforcement of any law, to inspect or have access to any record or thing obtained by or on behalf of the Minister of Finance for the purposes of this section. 2000, c. 25, s. 46 (2).

Reciprocal communication

(16) A person who receives information or obtains access to any record or thing under subsection (15) has a duty to communicate or furnish to the Minister of Finance on a reciprocal basis any information, record or thing obtained by the person that affects the administration or enforcement of this section. 2000, c. 25, s. 46 (2).

Use of information

(17) Any information, record or thing communicated or furnished under this section may be used only for the administration or enforcement of this section or an Act that is administered or enforced by the person receiving the information, record or thing. 2000, c. 25, s. 46 (2).

Offence

(18) Every person who contravenes subsection (12), (13), (14), (15), (16) or (17) is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. 2000, c. 25, s. 46 (2).

Gross lease recovery

(19) If the owner of the hydro-electric generating station is not the person who generates electricity from that facility and is unable to recover the liability imposed under this section under the terms of its contract or sublease with the person who generates electricity, the amount of such liability may be recovered from the person generating the electricity. 2000, c. 25, s. 46 (2).

Section 444.1 to apply

(20) The amount specified under subsection (19) may be recovered in the same manner as amounts are recovered under subsection 444.1 (2) of the *Municipal Act*, as that Act read immediately before its repeal by the *Municipal Act, 2001*, and subsections 444.1 (5), (6) and (8) of that Act apply in respect of the amount. 2000, c. 25, s. 46 (2); 2002, c. 17, Sched. F, Table.

Regulations

(21) The Minister of Finance may make regulations,

- (a) determining eligibility for a deduction under subsection (6);
- (b) prescribing one or more methods for determining gross revenue for the purposes of this section;
- (c) REPEALED: 2004, c. 31, Sched. 11, s. 3 (4).
- (d) providing for lower rates to be applied to specified hydro-electric generating stations for the purposes of subsections (4) and (5);
- (e) determining the annual generation for the purposes of subsections (4) and (5) pursuant to energy transfers or water transfers between a hydro-electric generating station in Ontario and a hydro-electric generating station in Ontario or in another jurisdiction;
- (e.1) prescribing a length of time longer than 120 months that applies to one or more hydro-electric generating stations for the purposes of subsection (6);
- (f) exempting any hydro-electric generating station from the tax or charge or a portion of the tax or charge under subsection (1), (2) or (5);
- (f.1) prescribing water power lease holders for the purposes of subsection (5.1), specifying the amount of the payments to be made under that subsection and the time and manner in which the payments are to be made;
- (g) defining any word or expression used in this section that is not already defined;
- (h) providing for compensation to be paid to municipalities in which a hydro-electric generating station is located in respect of revenues foregone as a result of the enactment of paragraph 28 of subsection 3 (1) of the *Assessment Act*. 2000, c. 25, s. 46 (2); 2001, c. 23, s. 68 (2); 2002, c. 23, s. 3 (23); 2004, c. 31, Sched. 11, s. 3 (4).

General or specific

(22) A regulation under subsection (21) may be general or specific and may apply to different hydro-electric generating stations and different owners differently. 2000, c. 25, s. 46 (2).

Retroactive

(23) A regulation made under this section is, if it so provides, effective with reference to a period before it is filed. 2000, c. 25, s. 46 (2).

Definitions

(24) In this section,

“holder of a water power lease” means a person who has entered into an agreement, lease or other writing respecting the use of water under subsection 42 (2) of the *Public Lands Act* or under the *Niagara Parks Act* or the *The St. Lawrence Development Act, 1952 (No. 2)* or who is required to enter into such agreement, lease or other writing in order to be entitled to occupy public lands; (“titulaire d’un bail pour l’exploitation de ressources hydro-électriques”)

“hydro-electric generating station” includes any building or structure in which electricity is generated through the use of water power or from the movement of water; (“centrale hydro-électrique”)

“owner” includes a tenant of land owned by the Crown or a municipality on which a hydro-electric generating station is located or a tenant of land owned by any other person if the tenant is the generator of electricity from the hydro-electric generating station. (“propriétaire”) 2000, c. 25, s. 46 (2).

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

2000, c. 25, s. 46 (2) - 01/01/2001

2001, c. 9, Sched. F, s. 1 (3) - 29/06/2001; 2001, c. 23, s. 68 (1, 2) - 01/01/2001

2002, c. 17, Sched. F, Table - 01/01/2003; 2002, c. 23, s. 3 (22, 23) - 09/12/2002

2004, c. 16, Sched. D, Table - 01/01/2004; 2004, c. 31, Sched. 11, s. 3 (1, 2) - 01/01/2001; 2004, c. 31, Sched. 11, s. 3 (3, 4) - 16/12/2004

2005, c. 31, Sched. 6, s. 1 - 01/01/2001

2006, c. 33, Sched. Z.3, s. 9 (3) - 01/01/2009

2009, c. 33, Sched. 16, s. 4 - 15/12/2009

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Municipal electricity utilities

Payments in lieu of federal corporate tax

93 (1) If a municipal electricity utility is exempt under subsection 149 (1) of the *Income Tax Act* (Canada) from the payment of tax under that Act, it shall pay to the Financial Corporation in respect of each taxation year an amount equal to the amount of the tax that it would be liable to pay under that Act if it were not exempt. 1998, c. 15, Sched. A, s. 93 (1).

Same: payments in lieu of provincial corporate tax

(2) If a municipal electricity utility is exempt under subsection 57 (1) of the *Corporations Tax Act* from the payment of tax under that Act in respect of a taxation year ending before January 1, 2009, it shall pay to the Financial Corporation in respect of each taxation year ending before that day an amount equal to the total amount of tax that it would be liable to pay under Parts II, II.1 and III of that Act for the year if it were a corporation to which that subsection did not apply. 2007, c. 7, Sched. 12, s. 3 (4).

Same

(2.1) If a municipal electricity utility is exempt under subsection 27 (2) of the *Taxation Act, 2007* from the payment of tax under that Act for a taxation year ending after December 31, 2008, it shall pay to the Financial Corporation in respect of each taxation year ending after that day an amount equal to the total amount of tax that it would be liable to pay for the taxation year under Divisions B, C and E of Part III of that Act if it were a corporation to which that subsection did not apply. 2007, c. 7, Sched. 12, s. 3 (4).

Payments to Minister of Finance

(3) After Part V is repealed under section 84.1, all payments required by this section shall be paid to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 93 (3); 2000, c. 42, s. 35.

Commencement of new taxation year

(4) A corporation that is required to make payments under this section shall be deemed, for the purposes of this section, to commence a new taxation year on the day this section comes into force. 1998, c. 15, Sched. A, s. 93 (4).

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

2000, c. 42, s. 35 - 21/12/2000

2004, c. 16, Sched. D, Table - 01/01/2004

2007, c. 7, Sched. 12, s. 3 (4) - 01/01/2008

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Municipal electricity property: transfer tax

94 (1) A municipal corporation or municipal electricity utility shall not transfer to any person any interest in real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity unless, before the transfer takes effect, it pays to the Financial Corporation the amount determined by multiplying the fair market value of the interest by the prescribed percentage or furnishes security in that amount to the Financial Corporation that meets such requirements as may be prescribed and that is satisfactory to the Financial Corporation. 2000, c. 42, s. 36 (1).

Forms of property

(1.1) For the purposes of subsection (1), real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity includes cash, amounts receivable, investments, customer lists, licences, goodwill and other intangible property used in connection with those activities. 2000, c. 42, s. 36 (1).

Same

(2) For the purpose of subsection (1), an interest in real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity shall be deemed to include any interest in a corporation, partnership or other entity that derives its value in whole or in part, directly or indirectly, from real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity. 1998, c. 15, Sched. A, s. 94 (2); 2017, c. 8, Sched. 8, s. 2 (1).

Deductions from amount payable

(3) Subject to subsection (5), the amount payable under subsection (1) in a taxation year by a municipal electricity utility may be reduced by the following amounts:

1. Any amount payable and paid by the municipal electricity utility under section 93 in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year.
2. Any amount payable and paid by the municipal electricity utility under Part II, II.1 or III of the *Corporations Tax Act* or Part III of the *Taxation Act, 2007* in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year.
3. Any amount that the municipal electricity utility would be liable to pay as tax under Part I of the *Income Tax Act* (Canada) in respect of the taxation year if that tax were computed on the basis that the municipal electricity utility had no income during the taxation year other than the capital gain realized on the transfer of its interest in the property.
4. Any amount that the municipal electricity utility would be liable to pay as tax under Part I of the *Income Tax Act* (Canada) in respect of the taxation year if that tax were computed on the basis that the municipal electricity utility had no income during the taxation year other than an amount included in income under paragraph 14 (1) (b) of the *Income Tax Act* (Canada) in respect of the transfer of its interest in the property. 1998, c. 15, Sched. A, s. 94 (3); 2000, c. 42, s. 36 (2); 2002, c. 22, s. 63 (1, 2); 2004, c. 16, Sched. D, Table; 2004, c. 31, Sched. 11, s. 4 (1); 2007, c. 7, Sched. 12, s. 3 (5).

Deductions from amount payable, interest in municipal electricity utility

(4) Subject to subsection (5), a municipal corporation or municipal electricity utility may reduce the amount payable under subsection (1) in a taxation year in accordance with the following rules with respect to each municipal electricity utility (a “subject municipal electricity utility”) in which it holds a direct or indirect interest immediately before the transfer:

1. Subject to paragraph 2, the amount of the reduction shall be calculated using the formula,

$$A \times B/C$$

in which,

“A” is the total of the amounts that are payable and paid by the subject municipal electricity utility,

- (a) under section 93 in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year, and
- (b) under Part II, II.1 or III of the *Corporations Tax Act* or Part III of the *Taxation Act, 2007* in respect of the part of the taxation year up to and including the date of the transfer or in respect of a previous taxation year,

“B” is the fair market value of the municipal corporation or municipal electricity utility’s direct or indirect interest in the shares of the subject municipal electricity utility immediately before the transfer, and

“C” is the aggregate fair market value of all issued and outstanding shares of the subject municipal electricity utility immediately before the transfer.

2. A municipal corporation may calculate its reduction under paragraph 1 as if it owned all of the subject municipal electricity utility’s issued and outstanding shares if, immediately before the transfer,
 - i. the municipal corporation and subject municipal electricity utility are related persons within the meaning of section 251 of the *Income Tax Act* (Canada), and

- ii. no other municipal corporation or municipal electricity utility holds a direct or indirect interest in the subject municipal electricity utility. 2017, c. 8, Sched. 8, s. 2 (2).

Restriction on reductions

(5) An amount referred to in subsection (3) or (4) may be applied under those subsections to reduce the amount payable by a municipal corporation or municipal electricity utility under subsection (1) only to the extent that it has not previously been applied to reduce an amount payable by a municipal corporation or municipal electricity utility under subsection (1). 2017, c. 8, Sched. 8, s. 2 (2).

(6), (6.1) REVOKED: 2017, c. 8, Sched. 8, s. 2 (2).

Refund

(7) Amounts paid under this section in respect of a transfer may be refunded in accordance with the regulations if the proceeds of the transfer are reinvested in the prescribed manner. 2004, c. 31, Sched. 11, s. 4 (2).

Same

(7.1) In such circumstances as may be prescribed, a municipal corporation or municipal electricity utility shall repay an amount refunded to it under subsection (7). 2004, c. 31, Sched. 11, s. 4 (2).

Same

(8) Subsection (1) does not apply to transfers prescribed by the regulations. 1998, c. 15, Sched. A, s. 94 (8).

(9) REPEALED: 2005, c. 31, Sched. 6, s. 2 (2).

(9.1) REPEALED: 2005, c. 31, Sched. 6, s. 2 (3).

Payments to Minister of Finance

(10) After Part V is repealed under section 84.1, payments referred to in subsection (1) must be paid to the Minister of Finance, instead of to the Financial Corporation. 1998, c. 15, Sched. A, s. 94 (10); 2000, c. 42, s. 36 (5).

Status of police village

(10.1) A police village shall be deemed to be a municipal corporation for the purposes of this section. 2000, c. 42, s. 36 (6).

(11) SPENT: 1998, c. 15, Sched. A, s. 94 (11).

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

1998, c. 15, Sched. A, s. 94 (11) - 07/11/2000

2000, c. 42, s. 36 (1) - 07/11/1998; 2000, c. 42, s. 36 (2-5) - 21/12/2000; 2000, c. 42, s. 36 (6) - 30/11/2000

2002, c. 22, s. 63 (1-5) - 21/12/2000

2004, c. 16, Sched. D, Table - 01/01/2004; 2004, c. 31, Sched. 11, s. 4 (1) - 07/11/1998; 2004, c. 31, Sched. 11, s. 4 (2) - 16/12/2004

2005, c. 31, Sched. 6, s. 2 (1, 2) - 07/11/1998; 2005, c. 31, Sched. 6, s. 2 (3) - 16/12/2004

2007, c. 7, Sched. 12, s. 3 (5) - 01/01/2008

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2017, c. 8, Sched. 8, s. 2 (1, 2) - 17/05/2017

Application of *Corporations Tax Act*

95 (1) Except as otherwise prescribed by the regulations, the Minister of Finance is responsible for enforcing the payment of amounts payable under this Part, including amounts payable under regulations made under this Part, and, for the purposes of this Part,

- (a) Parts V and VI of the *Corporations Tax Act* apply with necessary modifications and with such changes as may be prescribed by the regulations to amounts payable under this Part after November 6, 1998, other than amounts payable under section 92 or 92.1;
- (b) Divisions C, D, E and F of Part V and Part VI of the *Corporations Tax Act* apply with necessary modifications and with such changes as may be prescribed by the regulations to amounts payable under section 92 or 92.1 after November 6, 1998, including any penalties and interest on late payments;

- (c) any amount payable under this Part after November 6, 1998, other than under section 94, that remains unpaid after it becomes due, including any penalties and interest on late payments, may be collected as if it were tax payable under the *Corporations Tax Act*. 2004, c. 31, Sched. 11, s. 5; 2007, c. 11, Sched. B, s. 3 (1, 2).

Collection of amounts payable under s. 94

(2) In the application of Parts V and VI of the *Corporations Tax Act* for the purposes of enforcing the payment of any amount under section 94,

- (a) a reference to “a taxation year” or “the taxation year” shall be read as a reference to a transfer or a particular transfer, as the case may be;
- (b) a reference to a return shall be read as a reference to any notice given to the Minister for the purposes of section 94; and
- (c) a reference to a notice of assessment or reassessment shall be read as including a reference to correspondence prescribed by the regulations that is issued by the Minister for the purposes of section 94. 2004, c. 31, Sched. 11, s. 5.

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

1999, c. 9, s. 103 - 14/12/1999

2004, c. 16, Sched. D, Table - 01/01/2004; 2004, c. 31, Sched. 11, s. 5 - 16/12/2004

2007, c. 11, Sched. B, s. 3 (1, 2) - 04/06/2007

Order to remit, Financial Corporation

95.1 (1) On the recommendation of the Minister of Finance, the Lieutenant Governor in Council may order the Financial Corporation to remit an amount payable under Part V.1 or VI or under section 83.1 of the *Corporations Tax Act* if the Lieutenant Governor in Council considers it to be in the public interest to do so. 2000, c. 42, s. 37; 2002, c. 1, Sched. A, s. 20 (1); 2004, c. 16, Sched. D, Table.

Scope of remission

- (2) A remission ordered under subsection (1) may be total or partial, conditional or unconditional and may be made,
- (a) before, after or pending any suit or proceeding for the recovery of the amount in respect of which the remission is granted;
 - (b) before or after any payment of the amount payable under Part V.1 or VI or under section 83.1 of the *Corporations Tax Act* has been made or enforced by process or execution; or
 - (c) in any particular case or class of cases and before the liability to pay arises. 2000, c. 42, s. 37; 2002, c. 1, Sched. A, s. 20 (2); 2004, c. 16, Sched. D, Table.

Form of remission

- (3) A remission ordered under subsection (1) may be made,
- (a) by forbearing to institute a suit or proceeding for the recovery of the amount in respect of which remission is granted;
 - (b) by delaying, staying or discontinuing any suit or proceeding already instituted;
 - (c) by forbearing to enforce, staying or abandoning any execution or process upon any judgment;
 - (d) by the entry of satisfaction upon any judgment; or
 - (e) by repaying any sum of money paid to or recovered by the Financial Corporation. 2000, c. 42, s. 37.

Conditional remission

(4) If a remission ordered under subsection (1) is made subject to a condition and the condition is not performed, the amount remitted or to be remitted may be collected or all proceedings may be had as if there had been no remission. 2000, c. 42, s. 37.

Effect of remission

(5) An unconditional remission and, upon performance of the condition, a conditional remission have effect as if the remission was made after the amount in respect of which it was granted had been sued for and recovered. 2000, c. 42, s. 37.

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

2000, c. 42, s. 37 - 21/12/2000

2002, c. 1, Sched. A, s. 20 (1, 2) - 27/06/2002

2004, c. 16, Sched. D, Table - 01/01/2004

Regulations, Part VI

96 (1) The Minister of Finance may make regulations,

- (0.a) prescribing persons and entities for the purposes of clause (f) of the definition of “municipal electricity utility” in section 88;
 - (a) prescribing modifications to the method of calculating the amount of any payment required by section 89, 90 or 93;
 - (b) prescribing amounts for the purpose of clause 92 (1) (a);
 - (c) prescribing percentages for the purpose of subsection 94 (1) and prescribing modifications to the method of calculating the amount of the payment required by section 94;
 - (d) deeming a transaction or series of transactions, for the purpose of section 94, to be a transfer to a person of an interest in real or personal property that has been used in connection with generating, transmitting, distributing or retailing electricity;
 - (e) prescribing transfers to which subsection 94 (1) does not apply, subject to such conditions or restrictions as may be specified in the regulations;
- (e.1) prescribing requirements relating to security for the purposes of subsection 94 (1);
- (e.2) governing refunds authorized by subsection 94 (7);
- (e.3) prescribing circumstances for the purposes of subsection 94 (7.1);
- (e.4) REPEALED: 2005, c. 31, Sched. 6, s. 3.
 - (f) requiring payments under this Part to be paid in instalments, prescribing the times when the payments or instalments are required to be paid and requiring the payment of interest or penalties on late payments;
- (f.1) prescribing one or more provisions of Part V or VI of the *Corporations Tax Act* that do not apply in respect of an amount payable under one or more sections in this Part that are prescribed in the regulation;
- (f.2) prescribing changes to provisions in Part V or VI of the *Corporations Tax Act* that apply in respect of an amount payable under one or more sections in this Part that are prescribed in the regulation, including,
 - (i) prescribing a change to a time limit for issuing an assessment or reassessment in respect of an amount payable under this Part after November 6, 1998, and
 - (ii) prescribing a change to a time limit for the payment of a refund of an overpayment in respect of a period after November 6, 1998;
- (f.3) prescribing rules governing the application of one or more provisions of Part VIII of the *Taxation Act, 2007* with respect to an amount payable under one or more provisions of this Part that are prescribed by the rules;
- (g) prescribing procedures that must be followed in connection with any payment required by this Part;
- (h) respecting any other matter that the Minister of Finance considers necessary or advisable in connection with this Part. 1998, c. 15, Sched. A, s. 96 (1); 2000, c. 42, s. 38; 2004, c. 31, Sched. 11, s. 6; 2005, c. 31, Sched. 6, s. 3; 2007, c. 11, Sched. B, s. 3 (3).

General or particular

(2) A regulation made under this section may be general or particular in its application. 1998, c. 15, Sched. A, s. 96 (2).

Retroactivity

(3) A regulation made under this section is, if it so provides, effective with reference to a period before it is filed. 1999, c. 9, s. 104.

cl. (1) (f), previous payments

(4) In a regulation made under clause (1) (f), the Minister may provide that payments made in 1999 before the regulation is made have been properly made under that regulation. 1999, c. 9, s. 104.

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

1999, c. 9, s. 104 - 14/12/1999

2000, c. 42, s. 38 - 21/12/2000

2004, c. 31, Sched. 11, s. 6 - 16/12/2004

2005, c. 31, Sched. 6, s. 3 - 16/12/2004

2007, c. 11, Sched. B, s. 3 (3) - 04/06/2007

PART VII PENSION PLANS

Interpretation, Part VII

97 (1) In this Part,

“changeover date” means the date prescribed under subsection (3); (“date du changement”)

“commencement date” means, in relation to a successor pension plan, the date prescribed under subsection 102 (6); (“date d’effet”)

“FCPP” means the Ontario Hydro Financial Corporation Pension Plan; (“RRSF”)

Note: Effective April 1, 1999, the name of the Ontario Hydro Financial Corporation Pension Plan has been changed by regulation to Ontario Electricity Financial Corporation Pension Plan in English and Régime de retraite de la Société financière de l’industrie de l’électricité de l’Ontario in French. See: O. Reg. 115/99, s. 2 (1).

“former member” means a person who is a former member of a pension plan within the meaning of the *Pension Benefits Act* and includes any other person who is entitled to receive or is receiving a payment from the pension fund by virtue of the person’s relationship to the former member; (“ancien participant”)

“successor employer” means a person who is required to establish a pension plan under subsection 102 (1); (“employeur subséquent”)

“successor pension plan” means a pension plan established in accordance with section 102. (“régime de retraite subséquent”)
1998, c. 15, Sched. A, s. 97 (1).

Pension plans

(2) Expressions in this Part relating to pension plans have the same meaning as under the *Pension Benefits Act* unless the context requires otherwise. 1998, c. 15, Sched. A, s. 97 (2).

Changeover date

(3) The Lieutenant Governor in Council may, by regulation, prescribe the changeover date for the purposes of this Part and may do so after the date has passed. 1998, c. 15, Sched. A, s. 97 (3).

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

O. Reg. 115/99, s. 2 (1) - 01/04/1999

Financial Corporation Pension Plan

98 (1) The Ontario Hydro Pension and Insurance Plan is continued under the name Ontario Hydro Financial Corporation Pension Plan in English and Régime de retraite de la Société financière Ontario Hydro in French. 1998, c. 15, Sched. A, s. 98 (1).

Note: Effective April 1, 1999, the name of the Ontario Hydro Financial Corporation Pension Plan has been changed by regulation to Ontario Electricity Financial Corporation Pension Plan in English and Régime de retraite de la Société financière de l’industrie de l’électricité de l’Ontario in French. See: O. Reg. 115/99, s. 2 (1).

Fund continued

(2) The Pension and Insurance Fund of Ontario Hydro is continued as the pension fund for the FCPP under the name Ontario Hydro Financial Corporation Pension Fund in English and Caisse de retraite de la Société financière Ontario Hydro in French. 1998, c. 15, Sched. A, s. 98 (2).

Note: Effective April 1, 1999, the name of the Ontario Hydro Financial Corporation Pension Fund has been changed by regulation to Ontario Electricity Financial Corporation Pension Fund in English and Caisse de retraite de la Société financière de l’industrie de l’électricité de l’Ontario in French. See: O. Reg. 115/99, s. 2 (2).

Change of name

(3) The Lieutenant Governor in Council may, by regulation, change the name of the FCPP and the name of the pension fund for the FCPP. 1998, c. 15, Sched. A, s. 98 (3).

Status of plan

(4) The FCPP shall be deemed not to be a multi-employer pension plan for the purposes of the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 98 (4).

Administrator

(5) The Financial Corporation is the administrator of the FCPP. 1998, c. 15, Sched. A, s. 98 (5).

(6) REPEALED: 1998, c. 15, Sched. A, s. 98 (9).

Certain benefits

(7) On the day this section comes into force, the FCPP ceases to provide,

- (a) disability benefits that are being provided under a contract between the Financial Corporation and an insurer or a subsidiary of an insurer immediately before this section comes into force; and
- (b) life insurance that is being provided under an insurance contract between the Financial Corporation and an insurer or a subsidiary of an insurer immediately before this section comes into force. 1998, c. 15, Sched. A, s. 98 (7).

Same

(8) The amount held by the Pension and Insurance Fund of Ontario Hydro immediately before this section comes into force that was allocated for the provision of the benefits and insurance described in subsection (7) is payable to the Financial Corporation in trust for the provision of those benefits and that insurance. 1998, c. 15, Sched. A, s. 98 (8).

(9) SPENT: 1998, c. 15, Sched. A, s. 98 (9).

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

1998, c. 15, Sched. A, s. 98 (9) - 26/03/1999; O. Reg. 115/99, s. 2 (1, 2) - 01/04/1999

Employer contributions to FCPP

99 (1) The Financial Corporation shall contribute to the pension fund for the FCPP for a year the amount by which the normal cost of the FCPP exceeds the contributions to the pension fund made by the members, as determined by the FCPP actuary. 1998, c. 15, Sched. A, s. 99 (1).

Same

(2) If the FCPP has a surplus or a prior year credit balance or both, the Financial Corporation, in its sole discretion acting in its capacity as employer, may reduce or suspend the Corporation's contributions to the pension fund to the extent permitted under the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 99 (2).

Refund of contributions

(3) Despite subsection 78 (1) of the *Pension Benefits Act*, the administrator of the FCPP shall refund to the Financial Corporation, without interest, the contributions made by Ontario Hydro that were required to pay the normal cost of the pension plan in respect of service after March 31, 1998 and before the day that subsection (2) comes into force. 1998, c. 15, Sched. A, s. 99 (3).

Unfunded liability or solvency deficiency

(4) If a report on the FCPP filed with the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016* reveals a going concern unfunded liability or solvency deficiency or both, each successor employer shall pay to the pension fund for the FCPP, as its share of the total amount of each monthly special payment required as a result of the report, the amount determined by the plan actuary in accordance with the following formula:

$$(A/B) \times C$$

in which,

“A” is the total of the actuarial liabilities of the FCPP for the pension benefits and ancillary benefits of members and former members of the FCPP who will become members or former members of the successor plan established by the successor employer;

“B” is the total of the actuarial liabilities of the FCPP for the pension benefits and ancillary benefits of members and former members of the FCPP; and

“C” is the total amount of the monthly special payment required as a result of the report. 1998, c. 15, Sched. A, s. 99 (4); 2018, c. 8, Sched. 10, s. 1.

Definition

(5) In subsection (4),

“actuarial liabilities” means,

- (a) in the case of a going concern valuation, the going concern liabilities, and
- (b) in the case of a solvency valuation, the solvency liabilities. 1998, c. 15, Sched. A, s. 99 (5).

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

2018, c. 8, Sched. 10, s. 1 - 08/06/2019

Administrative costs of FCPP

100 The costs of administering the FCPP (including the costs of administering and investing the pension fund) are payable out of the pension fund. 1998, c. 15, Sched. A, s. 100.

Additional pension plans of Financial Corporation

101 (1) This section applies if the Financial Corporation establishes another pension plan in the circumstances described in section 80 or 81 of the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 101 (1).

Transfer of assets

(2) The Financial Corporation, in its sole discretion acting in its capacity as employer, may decide whether to transfer assets from the FCPP to the other pension plan and may decide upon all matters relating to the transfer, subject to the consent of the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016* as required under the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 101 (2); 2018, c. 8, Sched. 10, s. 2.

Requirements continued

(3) Subsections 98 (5) and 99 (2) and section 100 apply with respect to the other pension plan. 1998, c. 15, Sched. A, s. 101 (3).

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

2018, c. 8, Sched. 10, s. 2 - 08/06/2019

Successor pension plans

102 (1) The IESO, Hydro One Inc., Ontario Power Generation Inc. and the Electrical Safety Authority shall each establish a pension plan to provide pension benefits and ancillary benefits for the following persons:

1. Its employees whose employment is transferred to it by or pursuant to an order made under section 116 and who are, or are entitled to be, members of the FCPP before their employment is transferred.
2. Such other employees as it considers appropriate.
3. Such former members of the FCPP as the Financial Corporation, in its sole discretion acting in its capacity as employer, designates for transfer to the pension plan.
4. Such other persons as this Part may require. 1998, c. 15, Sched. A, s. 102 (1); 2002, c. 1, Sched. A, s. 21 (1); 2004, c. 23, Sched. A, s. 52.

Selection of former members

(2) In determining which former members of the FCPP are to be transferred to a successor pension plan, the Financial Corporation shall comply with the following rules:

1. All former members of the FCPP must be transferred to the successor pension plans.
2. The Financial Corporation shall consider which successor employer, if any, would most likely have become the employer of each former employee of Ontario Hydro (assuming, only for the purposes of this rule, that the former employee had been employed by Ontario Hydro immediately before the date on which employees of Ontario Hydro are transferred to the successor employers by or pursuant to orders made under section 116).

3. If the Financial Corporation concludes that a former employee would most likely have remained an employee of the Financial Corporation or a subsidiary of the Financial Corporation, the Financial Corporation shall transfer the former member to the successor pension plan established by Ontario Power Generation Inc. 1998, c. 15, Sched. A, s. 102 (2); 2002, c. 1, Sched. A, s. 21 (2).

Status of plan

(3) During the period that employees of the subsidiary of the Financial Corporation established under section 110 are members of the pension plan established under subsection (1) by Ontario Power Generation Inc., that plan shall be deemed not to be a multi-employer pension plan for the purposes of the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 102 (3); 2002, c. 1, Sched. A, s. 21 (3).

Administrator

(4) The successor employer is the administrator of the applicable successor pension plan. 1998, c. 15, Sched. A, s. 102 (4).

Commencement date

(5) Each successor pension plan comes into effect as of the prescribed commencement date for the plan. 1998, c. 15, Sched. A, s. 102 (5).

Regulation

(6) The Lieutenant Governor in Council may, by regulation, prescribe a commencement date for each successor pension plan. 1998, c. 15, Sched. A, s. 102 (6).

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

2002, c. 1, Sched. A, s. 21 (1-3) - 27/06/2002

2004, c. 23, Sched. A, s. 52 - 01/01/2005

2013, c. 2, Sched. 4, s. 1 - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2023

Members of successor plans

103 (1) An employee of a successor employer who has established a successor pension plan becomes a member of the successor pension plan on the following date:

1. If the employee was a member of the FCPP immediately before becoming employed by the successor employer, the later of the following dates:
 - i. The date on which he or she becomes employed by the successor employer.
 - ii. The commencement date for the plan.
2. If, under the terms of the successor pension plan, the employee is required to be a member of the plan, the latest of the following dates:
 - i. The date on which he or she becomes employed by the successor employer.
 - ii. The date on which, under the terms of the successor pension plan, he or she is required to become a member of the plan.
 - iii. The commencement date for the plan.
3. If, under the terms of the successor pension plan, the employee is required to become a member of the plan after meeting certain conditions, the later of the following dates:
 - i. The date on which he or she meets those conditions.
 - ii. The commencement date for the plan.
4. If, under the terms of the successor pension plan, the employee is entitled, but not required, to become a member of the plan after meeting certain conditions, the later of the following dates:
 - i. The date on which he or she becomes a member of the plan.
 - ii. The commencement date for the plan. 1998, c. 15, Sched. A, s. 103 (1).

Former members

(2) The former members described in paragraph 3 of subsection 102 (1) become former members of the successor pension plan on the changeover date. 1998, c. 15, Sched. A, s. 103 (2).

Employer contributions to successor plans

104 (1) A successor employer shall contribute to the pension fund for the applicable successor pension plan for a year the amount by which the normal cost of the plan exceeds the contributions to the pension fund made by the members, as determined by the plan actuary. 1998, c. 15, Sched. A, s. 104 (1).

Same

(2) If the plan has a surplus or a prior year credit balance or both, the successor employer, in its sole discretion acting in its capacity as employer, may reduce or suspend the employer's contributions to the pension fund to the extent permitted under the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 104 (2).

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

2013, c. 2, Sched. 4, s. 2 - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2023

Participation by affiliates in successor pension plans

104.1 (1) A successor employer may permit an affiliate to be a participating employer under a successor pension plan with respect to such employees of the affiliate, for such period and on such terms as the successor employer determines in its sole discretion acting in its capacity as an employer. 2000, c. 42, s. 39.

Contributions by participating affiliates

(2) The participating affiliate shall contribute to the pension fund for the plan for a year the amount determined by multiplying the rate described in subsection (4) by the pensionable earnings of the members of the plan who are employees of the affiliate, other than their pensionable earnings, if any, as employees of the successor employer. 2000, c. 42, s. 39.

Reduction in contributions of successor employer

(3) Despite subsection 104 (1), a successor employer who permits an affiliate to be a participating employer under the plan shall contribute to the pension fund for the plan for a year the amount determined by multiplying the rate described in subsection (4) by the pensionable earnings of the members of the plan who are employees of the successor employer, other than their pensionable earnings, if any, as employees of a participating affiliate. 2000, c. 42, s. 39.

Rate for employer contributions

(4) The rate for a year is determined by calculating the amount by which the normal cost in respect of all members of the plan exceeds the contributions made for the year to the pension fund for the plan by all members and dividing that amount by the pensionable earnings of all members of the plan for the year, as determined by the actuary of the plan. 2000, c. 42, s. 39.

Reduction, etc., in contributions

(5) If the plan has a surplus or a prior year credit balance or both, the successor employer, in its sole discretion acting in its capacity as an employer, may permit the participating affiliate to reduce or suspend its contributions to the pension fund to the extent permitted under the *Pension Benefits Act*, and the affiliate, in its sole discretion acting as employer, may do so. 2000, c. 42, s. 39.

Status of plan

(6) The plan shall be deemed not to be a multi-employer pension plan for the purposes of the *Pension Benefits Act*. 2000, c. 42, s. 39.

Definitions

(7) In this section,

“affiliate” means, in relation to a successor employer,

- (a) a corporation that is a subsidiary of the successor employer within the meaning of the *Business Corporations Act*, or
- (b) a corporation or partnership that is controlled by the successor employer, by the person who controls the successor employer or by a person who is controlled by the successor employer, as described in subsection (8); (“membre du même groupe”)

“participating affiliate” means, with respect to a successor employer and a successor pension plan, an affiliate permitted under subsection (1) to be a participating employer under the plan. (“membre du même groupe participant”) 2000, c. 42, s. 39.

Interpretation, control

(8) For the purposes of clause (b) of the definition of “affiliate” in subsection (7), a corporation or partnership is controlled by another person or by the successor employer if the person or successor employer holds the following, directly or indirectly, other than by way of security:

1. Voting securities carrying more than 50 per cent of the votes for the election of directors of the corporation.
2. An ownership or other interest that confers on the holder more than 50 per cent of the voting interest or other governance rights in the partnership or more than 50 per cent of the income of the partnership. 2000, c. 42, s. 39.

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

2000, c. 42, s. 39 - 01/04/1999

2013, c. 2, Sched. 4, s. 3 - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2023

Administrative costs of successor plans

105 The costs of administering a successor pension plan (including the costs of administering and investing the pension fund) are payable out of the pension fund. 1998, c. 15, Sched. A, s. 105.

Additional pension plans of successor employers

106 (1) This section applies if a successor employer establishes another pension plan in the circumstances described in section 80 or 81 of the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 106 (1).

Transfer of assets

(2) The successor employer, in its sole discretion acting in its capacity as employer, may decide whether to transfer assets from the successor pension plan to the other pension plan and may decide upon all matters relating to the transfer, subject to the consent of the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016* as required under the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 106 (2); 2018, c. 8, Sched. 10, s. 3.

Requirements continued

(3) Subsections 102 (4) and 104 (2) and sections 104.1 and 105 apply with respect to the other pension plan. 1998, c. 15, Sched. A, s. 106 (3); 2000, c. 42, s. 40.

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

2000, c. 42, s. 40 - 01/04/1999

2018, c. 8, Sched. 10, s. 3 - 08/06/2019

Reciprocal transfer agreements

107 (1) This section applies with respect to the pension plans referred to in subsections 101 (1), 102 (1) and 106 (1). 1998, c. 15, Sched. A, s. 107 (1).

Same

(2) The administrators shall ensure that reciprocal transfer agreements between each of the pension plans are entered into and filed under the *Pension Benefits Act*. 1998, c. 15, Sched. A, s. 107 (2).

Same

(3) The reciprocal transfer agreements may be bilateral or multilateral. 1998, c. 15, Sched. A, s. 107 (3).

Dispute resolution

(4) If the administrator of a pension plan fails to enter into a reciprocal transfer agreement with the administrator of another pension plan before the prescribed date, the matters remaining in dispute between them shall be resolved in accordance with such requirements as may be prescribed. 1998, c. 15, Sched. A, s. 107 (4).

Regulations

(5) The Lieutenant Governor in Council may make regulations,

- (a) prescribing, for the purpose of subsection (4), dates applicable to pension plans that are specified by the regulations;
- (b) governing the resolution of matters remaining in dispute between the administrators of specified pension plans after the prescribed date. 1998, c. 15, Sched. A, s. 107 (5).

Costs

(6) The costs of dispute resolution after the prescribed date shall be borne equally by the applicable pension plans and are payable out of the pension funds of those plans. 1998, c. 15, Sched. A, s. 107 (6).

FCPP membership temporarily extended

108 (1) In any of the following circumstances, an employee of a successor employer is a member of the FCPP until the commencement date for the applicable successor plan:

1. The employee was a member of the FCPP immediately before becoming employed by the successor employer.
2. The employee would be required to be a member of the FCPP, if the employee were employed by the Financial Corporation.
3. The employee would be required to be a member of the FCPP after meeting certain conditions, if the employee were employed by the Financial Corporation. The employee meets those conditions before the commencement date.
4. The employee would be entitled, but not required, to become a member of the FCPP after meeting certain conditions, if the employee were employed by the Financial Corporation. The employee becomes a member of the FCPP before the commencement date. 1998, c. 15, Sched. A, s. 108 (1).

Employee contributions

(2) An employee who is a member of the FCPP shall make employee contributions to the pension fund for the FCPP until the commencement date. 1998, c. 15, Sched. A, s. 108 (2).

Employer contributions re temporary members

109 (1) This section applies with respect to each year or part thereof in which employees of any successor employer are members of the FCPP under section 108. 1998, c. 15, Sched. A, s. 109 (1).

Obligation, successor employers

(2) Each successor employer shall contribute to the pension fund for the FCPP for a year the amount determined by multiplying the rate described in subsection (4) by the pensionable earnings of the members of the FCPP who are its employees, other than their pensionable earnings, if any, as employees of the Financial Corporation. 1998, c. 15, Sched. A, s. 109 (2).

Same, Financial Corporation

(3) Despite subsection 99 (1), the Financial Corporation shall contribute to the pension fund for the FCPP for a year the amount determined by multiplying the rate described in subsection (4) by the pensionable earnings of the members of the FCPP who are its employees, other than their pensionable earnings, if any, as employees of a successor employer. 1998, c. 15, Sched. A, s. 109 (3).

Rate

(4) The rate for a year is determined by calculating the amount by which the normal cost in respect of all members of the FCPP exceeds the contributions made to the pension fund for the FCPP by all members for the year and dividing this amount by the pensionable earnings of all members of the FCPP for the year, as determined by the FCPP actuary. 1998, c. 15, Sched. A, s. 109 (4).

Reductions

(5) Subsection 99 (2) applies, with necessary modifications, to the Financial Corporation and to each successor employer. 1998, c. 15, Sched. A, s. 109 (5).

Administrator

(6) Despite subsection 8 (1) of the *Pension Benefits Act*, the Financial Corporation is the sole administrator of the FCPP while the successor employers are required to make contributions under this section. 1998, c. 15, Sched. A, s. 109 (6).

Subsidiary to act as agent of Financial Corporation

110 (1) The Financial Corporation shall establish a subsidiary and shall retain the subsidiary to act as the agent of the Financial Corporation in its capacity as administrator of the FCPP. 1998, c. 15, Sched. A, s. 110 (1).

Application of s. 72

(2) Section 72 does not apply to the subsidiary established under subsection (1). 1998, c. 15, Sched. A, s. 110 (2).

Not an employee of the Crown

(3) An employee of the subsidiary is not and shall not be deemed to be an employee of the Crown. 2006, c. 35, Sched. C, s. 31 (3).

Application of subss. (5) and (6)

(4) Subsections (5) and (6) cease to apply when the subsidiary is no longer retained for the purpose referred to in subsection (1). 1998, c. 15, Sched. A, s. 110 (4).

Participation in FCPP

(5) The following rules apply until the commencement date for the successor pension plan established by the Generation Corporation:

1. The employees of the subsidiary are, or are entitled to be, members of the FCPP on the same basis as employees of the Financial Corporation.
2. The subsidiary is an employer who is required to make contributions to the pension fund for the FCPP.
3. Section 109 applies, with necessary modifications, with respect to the rights and duties of the Financial Corporation and the subsidiary. 1998, c. 15, Sched. A, s. 110 (5).

Participation in successor pension plan

(6) The following rules apply on and after the commencement date for the successor pension plan established by Ontario Power Generation Inc.:

1. The employees of the subsidiary are, or are entitled to be, members of the successor pension plan established by Ontario Power Generation Inc.
2. Section 103 applies, with necessary modifications, with respect to the employees of the subsidiary.
3. The subsidiary is an employer who is required to make contributions to the pension fund for the successor pension plan.
4. Section 109 applies, with necessary modifications, with respect to the rights and duties of Ontario Power Generation Inc. and the subsidiary. 1998, c. 15, Sched. A, s. 110 (6); 2002, c. 1, Sched. A, s. 22.

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

2002, c. 1, Sched. A, s. 22 - 27/06/2002

2006, c. 35, Sched. C, s. 31 (3) - 20/08/2007

Transfer agreements for successor plans

111 (1) The administrator of the FCPP and the administrator of each successor pension plan shall enter into an agreement governing the division and transfer of assets and liabilities from the FCPP to the successor pension plan. 1998, c. 15, Sched. A, s. 111 (1).

Transfer of assets

(2) The administrator of the FCPP shall transfer assets and liabilities from the FCPP to a successor pension plan in accordance with the transfer agreement relating to the successor pension plan. 1998, c. 15, Sched. A, s. 111 (2).

Value of assets

(3) Subject to subsection (4), the value of the assets to be transferred to a successor pension plan is calculated as of the changeover date using the formula,

$$[(A + B)/C] \times D$$

in which,

“A” is the total of the actuarial liabilities of the FCPP for the pension benefits and ancillary benefits of members of the FCPP who, on or after the commencement date and before the changeover date, become members of the successor pension plan and who, on the changeover date, become entitled to accrued pension benefits under the successor pension plan in respect of their employment before becoming members of the successor pension plan;

“B” is the total of the actuarial liabilities of the FCPP for the pension benefits and ancillary benefits of former members of the FCPP who, on the changeover date, become former members of the successor pension plan;

“C” is the total of the actuarial liabilities of the FCPP for the pension benefits and ancillary benefits of persons who, immediately before the changeover date, are members and former members of the FCPP; and

“D” is the value of the assets held in the pension fund of the FCPP.

1998, c. 15, Sched. A, s. 111 (3).

Same

(4) The amount calculated under subsection (3) is subject to such adjustments as the transfer agreement may permit. 1998, c. 15, Sched. A, s. 111 (4).

Same

(5) Subsections 80 (5) to (7) of the *Pension Benefits Act* apply with respect to the transfer of assets. 1998, c. 15, Sched. A, s. 111 (5).

Tax exemption

(5.1) The *Land Transfer Tax Act* and the *Retail Sales Tax Act* do not apply with respect to the transfer of assets. 2000, c. 42, s. 41.

Dispute resolution

(6) If the administrators do not enter into a transfer agreement before the prescribed date, the matters remaining in dispute between them shall be resolved in accordance with such requirements as may be prescribed. 1998, c. 15, Sched. A, s. 111 (6).

Regulations

(7) The Lieutenant Governor in Council may make regulations,

- (a) prescribing, for the purpose of subsection (6), dates applicable to pension plans that are specified by the regulations;
- (b) governing the resolution of matters remaining in dispute after the prescribed date. 1998, c. 15, Sched. A, s. 111 (7).

Costs

(8) The costs of dispute resolution after the prescribed date are payable out of the pension fund for the FCPP. 1998, c. 15, Sched. A, s. 111 (8).

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

2000, c. 42, s. 41 - 21/12/2000

Transfer of benefits to successor plans

112 (1) This section applies if the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016* consents to the transfer of assets described in section 111 from the FCPP to a successor pension plan. 1998, c. 15, Sched. A, s. 112 (1); 2018, c. 8, Sched. 10, s. 4.

Same

(2) The following changes occur as of the changeover date:

1. Members of the FCPP who become members of the successor pension plan on or after the commencement date and before the changeover date become entitled to pension benefits under the successor pension plan in respect of their employment before becoming members of the successor pension plan and they cease to be entitled to those benefits under the FCPP.
2. Former members of the FCPP who become former members of the successor pension plan on the changeover date become entitled to pension benefits under the successor pension plan in respect of the applicable person’s employment before the changeover date.
3. Those former members cease to be former members of the FCPP.
4. Those members and former members become entitled to credit in the successor pension plan for the period of membership of the member or the applicable former member in the FCPP, for the purpose of determining entitlement to ancillary benefits under the successor pension plan. 1998, c. 15, Sched. A, s. 112 (2).

Transfer of responsibility

(3) As of the changeover date, the successor employer assumes responsibility for the accrued pension benefits under the FCPP of the members and former members described in subsection (2), and the Financial Corporation ceases to be responsible for those accrued pension benefits. 1998, c. 15, Sched. A, s. 112 (3).

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

2018, c. 8, Sched. 10, s. 4 - 08/06/2019

PART VIII ELECTRICAL SAFETY

Definitions

112.1 In this Part,

“administrative penalty” means an administrative penalty imposed under subsection 113.18.1 (1); (“pénalité administrative”)

“Authority” means the Electrical Safety Authority; (“Office”)

“authorization” means a licence, certificate or registration issued under this Part, despite the definition of “licence” in subsection 2 (1); (“autorisation”)

“Director” means a person appointed as a Director under this Part; (“directeur”)

“inspector” means an inspector appointed under this Part; (“inspecteur”)

“investigator” means an investigator appointed under this Part; (“enquêteur”)

“person” means an individual, a corporation, an association, a partnership or any other entity; (“personne”)

“regulations” means the regulations made under this Part, despite the definition of “regulations” in subsection 2 (1). (“règlements”) 2004, c. 19, s. 12 (2); 2006, c. 34, s. 12 (1); 2021, c. 34, Sched. 9, s. 3.

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

2004, c. 19, s. 12 (1, 2) - 30/11/2005

2006, c. 34, s. 12 (1) - 01/01/2008

2021, c. 34, Sched. 9, s. 3 - 01/04/2023

Electrical Safety

Regulations, LG in C

113 (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing the design, construction, installation, protection, use, maintenance, repair, extension, alteration, connection and disconnection of all works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario;
- (b) prohibiting the use, advertising, display, offering for sale, or other disposal, and the sale or other disposal, publicly or privately, in Ontario, of any such works, matters and things unless and until they have been inspected and approved, or deemed approved;
- (c) prescribing the precautions to be taken in the sale or other disposal of such works, matters and things and the warnings and instructions to be given to purchasers and others in advertisements, by circular, labelling, including by tag, seal or other form of labelling, or otherwise, to prevent their use in such manner or under such conditions as may be likely to result in undue hazard to persons or property;
- (d) providing for the inspection, test and approval of such works, matters and things before being used in the generation, transmission, distribution, retail or use of electricity in Ontario, and for a process for granting, renewing, suspending, revoking and reinstating approvals for the works, matters and things before they are used for any of those purposes;
- (e) requiring compliance with any code, standard, guideline or procedure under a rule of a person retailing electricity to such works, matters and things. 2006, c. 34, s. 12 (2).

Regulations, Minister

(2) The Minister may make regulations,

- (a) adopting by reference, in whole or in part, with such changes as the Minister considers necessary or advisable, any code or standard that governs any matter set out in subsection (1) and requiring compliance with any code or standard that is so adopted;
- (b) establishing a code of ethics and a committee for the purpose of governing the conduct of authorization holders. 2006, c. 34, s. 12 (2).

Rolling incorporation

- (3) If a regulation under clause (2) (a) so provides, a code or standard adopted by reference shall be a reference to it, as amended from time to time, whether before or after the regulation is made. 2006, c. 34, s. 12 (2); 2009, c. 33, Sched. 10, s. 6.

Delegation

- (4) Despite subsection 3 (4) of the *Safety and Consumer Statutes Administration Act, 1996*, the Minister may, by regulation, delegate to the Authority the power to make some or all of the regulations under clause (2) (a) or (b). 2006, c. 34, s. 12 (2).

Temporary codes, testing organizations, variations

- (5) A director may, in writing,
 - (a) authorize, subject to such conditions as may be specified and for a limited time, the use of codes, standards, guidelines, plans, specifications and procedures or changes to codes, standards, guidelines, plans, specifications and procedures necessary to accommodate new developments or technological advances and require compliance with them and permit, subject to such conditions as may be specified, variances from them;
 - (b) designate organizations to test any thing for which standards, plans or specifications are established under this Part and provide for and require the placing of the organization's label on the thing or any parts of the thing that conform to the standards, plans or specifications;
 - (c) subject to such conditions as he or she may specify, allow a variance from any regulation made by the Minister under clause (2) (a) if, in his or her opinion, the variance would not detrimentally affect the safe use of the thing to which the regulation applies or the health or safety of any person. 2006, c. 34, s. 12 (2).

Legislation Act, 2006, Part III

- (6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to subsection (5). 2006, c. 34, s. 12 (2, 19).

Issuing of plans and specifications

- (7) The Authority may, in accordance with the regulations, prepare and issue plans and specifications governing the design, construction and test of works, matters and things used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario, and may alter such plans and specifications. 2006, c. 34, s. 12 (2).

Appointment of persons to inspect and test

- (8) The Authority may appoint persons, associations or organizations having, in the opinion of the Authority, special knowledge and facilities to inspect, test and report on any works, matters and things mentioned in subsection (1). 2006, c. 34, s. 12 (2).

Prohibition on holding out

- (9) No person shall hold himself out as a person who has been appointed under subsection (8) if the person has not been so appointed. 2006, c. 34, s. 12 (2).

Approval by adoption of report

- (10) The Authority may approve any work, matter and thing mentioned in subsection (1) by adopting a report made under subsection (8), or otherwise, as the Authority considers advisable. 2006, c. 34, s. 12 (2).

Orders relating to installations, alterations, etc.

- (11) The Authority may issue such orders relating to work to be done, or the removal of things used, in the installation, removal, alteration, repair, protection, connection or disconnection of any of the works, matters and things mentioned in subsection (1) as the Authority considers necessary or advisable for the safety of persons or the protection of property and, in any such order or after having made it, the Authority may order any person to cease and desist from doing anything intended or likely to interfere with the terms of the order. 2006, c. 34, s. 12 (2).

Offences

- (12) Every person,

- (a) disturbing or interfering with an inspector or other officer in the performance of the inspector's or officer's duty under this section is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (b) refusing or neglecting to comply with this section, or with any regulation, plan or specification made under its authority, is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (c) refusing or neglecting to comply with an order issued by the Authority under subsection (11) is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than \$5,000 for each day upon which such refusal or neglect is repeated or continued. 2006, c. 34, s. 12 (2).

Same, corporation

(13) A corporation that is guilty of an offence described in subsection (12) is liable, on conviction, to a fine of not more than \$1,000,000. 2006, c. 34, s. 12 (2).

Section not to apply to mines

(14) This section does not apply to a mine as defined in the *Mining Act*, save only as regards any dwelling house or other building not connected with or required for mining operations or purposes or used for the treatment of ore or mineral. 2006, c. 34, s. 12 (2).

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

2004, c. 19, s. 12 (3, 4) - 30/11/2005

2005, c. 33, s. 6 (1, 2) - 15/12/2005

2006, c. 34, s. 12 (2, 19) - 15/08/2007

2009, c. 33, Sched. 10, s. 6 - 15/12/2009

2012, c. 8, Sched. 11, s. 46 (1) - no effect - see 2020, c. 14, Sched. 8, s. 21 - 14/07/2020

Prohibitions

Causing damage

113.0.1 (1) No person shall damage or cause any damage to any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario. 2006, c. 34, s. 12 (3).

Interference

(2) No person shall interfere with any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario in the course of alterations or repairs to non-electrical equipment or structures except where it is necessary to disconnect or move components of an electrical installation, in which event it shall be the responsibility of the person carrying out the alterations or repairs to ensure that the electrical installation is restored to a safe operating condition as soon as the progress of the alterations or repairs permits. 2006, c. 34, s. 12 (3).

Removal of labels

(3) No person shall, without the consent of the Director, remove any label, tag, seal or warning, as prescribed by the regulations, applied by the Authority to any work, matter or thing used or to be used in the generation, transmission, distribution, retail or use of electricity in Ontario. 2006, c. 34, s. 12 (3).

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

2006, c. 34, s. 12 (3) - 01/10/2007

Director

113.1 (1) The Authority may appoint one or more Directors for the purposes of this Part. 2004, c. 19, s. 12 (5).

Restrictions

(2) An appointment is subject to the restrictions, limitations and conditions that the Authority sets out in it. 2004, c. 19, s. 12 (5).

Powers

(3) Unless otherwise stated in the appointment, a Director,

- (a) may supervise and direct inspectors and other persons responsible for administering or enforcing this Part, the regulations or an order of the Authority; and
- (b) is an inspector and may exercise any of the powers and perform any of the duties of an inspector. 2004, c. 19, s. 12 (5).

Delegation

(4) A Director may delegate in writing any of his or her powers or duties to any person, subject to the restrictions, limitations and conditions that the Director sets out in the delegation. 2004, c. 19, s. 12 (5).

Exception

(4.1) Despite subsection (4), a Director shall not delegate the power to impose an administrative penalty under subsection 113.18.1 (1). 2021, c. 34, Sched. 9, s. 4.

Document of appointment

(5) The Authority shall issue to each Director a document establishing his or her appointment, and the Director shall produce it on request. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2021, c. 34, Sched. 9, s. 4 - 01/04/2023

Authorization

113.2 (1) Except as provided in the regulations, no person shall carry out or propose to carry out, or permit or employ another person to carry out, an activity referred to in the regulations as requiring an authorization without first obtaining an authorization in accordance with this Part and the regulations. 2006, c. 34, s. 12 (4).

Refusal, suspension, etc.

(2) A Director may refuse to grant an applicant an authorization for the carrying out of activities or may refuse to renew, may suspend or may revoke an authorization holder's authorization for the carrying out of activities, if the Director has reason to believe that,

- (a) the applicant or authorization holder will not carry out the activities in accordance with the law;
- (b) the applicant or authorization holder will not carry out the activities safely;
- (c) the applicant or authorization holder lacks the basic resources necessary to carry out the activities;
- (d) the applicant or authorization holder will not conduct himself or herself with honesty and integrity or in accordance with the principle of protecting consumers;
- (e) the applicant or authorization holder lacks the training, experience, qualifications or skills prescribed by the regulations;
- (f) the applicant or authorization holder failed to comply with or to meet a requirement of this Part, the regulations or an order of the Authority;
- (g) the authorization holder failed to comply with a restriction, limitation or condition of the authorization;
- (h) the authorization holder obtained the authorization through misrepresentation or fraud; or
- (i) the authorization holder permitted an unauthorized person to carry out the activities. 2004, c. 19, s. 12 (5).

Conditions

(3) An authorization is subject to,

- (a) the restrictions, limitations and conditions that are prescribed by the regulations; and
- (b) the restrictions, limitations and conditions that are imposed by a Director. 2004, c. 19, s. 12 (5).

Compliance with regulations

(4) In imposing a restriction, limitation or condition on an authorization, a Director shall comply with the rules prescribed by the regulations. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Notice of proposal

113.3 (1) Subject to subsection (2), a Director who proposes any of the following shall serve notice of the proposal, together with written reasons, on the applicant or authorization holder:

1. To grant an authorization subject to restrictions, limitations or conditions imposed on it by the Director.
2. To renew an authorization subject to restrictions, limitations or conditions imposed on it by the Director.
3. To refuse to grant an authorization.
4. To refuse to renew an authorization.
5. To suspend an authorization.
6. To revoke an authorization. 2004, c. 19, s. 12 (5).

Exceptions

- (2) A notice of proposal is not required,
- (a) in the case of a provisional suspension of an authorization, or a provisional refusal to renew an authorization, under section 113.5;
 - (b) in the case of a refusal to grant or renew an authorization, or a suspension of an authorization, under section 113.6. 2004, c. 19, s. 12 (5).

Service of notice

(3) The Director may serve the notice of proposal personally or by registered mail addressed to the applicant or authorization holder at the last address known to the Director, by fax or by any other form of electronic transmission if there is a record that the notice has been sent. 2004, c. 19, s. 12 (5).

Deemed service, registered mail

(4) If registered mail is used, the notice shall be deemed to have been served on the third day after the day of mailing, unless the person on whom notice is being served satisfies the Director that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice until a later date. 2004, c. 19, s. 12 (5).

Deemed service, electronic transmission

(5) If a fax or any other form of electronic transmission is used, the notice shall be deemed to have been served on the day after the fax was sent or the other transmission was made, unless the person on whom notice is being served satisfies the Director that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice until a later date. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Hearing

113.4 (1) A notice of proposal shall inform the applicant or authorization holder that the applicant or holder has a right to a hearing before the Director if the applicant or holder applies to the Director for the hearing within 15 days after being served with the notice. 2004, c. 19, s. 12 (5).

Extension of time

(2) The Director may extend the time for applying for a hearing, either before or after the 15-day period expires, if he or she is satisfied that,

- (a) there are reasonable grounds for granting the extension; and
- (b) there are apparent grounds for granting to the applicant or authorization holder the relief sought at the hearing. 2004, c. 19, s. 12 (5).

Directions

(3) In granting an extension, the Director may give any directions he or she considers appropriate. 2004, c. 19, s. 12 (5).

If no hearing requested

(4) If the applicant or authorization holder does not apply for a hearing in accordance with this section, the Director may carry out the proposal stated in the notice of proposal. 2004, c. 19, s. 12 (5).

If hearing requested

(5) If the applicant or authorization holder applies for a hearing in accordance with this section, the Director shall set a time for and hold the hearing, after issuing a notice of hearing to the applicant or authorization holder. 2004, c. 19, s. 12 (5).

Findings of fact

(6) The findings of fact made by the Director upon the hearing shall be based exclusively on evidence admissible or matters that may be noticed under sections 15, 15.1, 15.2 and 16 of the *Statutory Powers Procedure Act*. 2004, c. 19, s. 12 (5).

Decision

- (7) After the hearing, the Director may carry out the proposal stated in the notice of proposal if,
- (a) in the case of a proposal mentioned in paragraph 3, 4, 5 or 6 of subsection 113.3 (1), the Director is satisfied that any of the grounds set out in subsection 113.2 (2) exists; or
 - (b) in the case of a proposal mentioned in paragraph 1 or 2 of subsection 113.3 (1), the Director is satisfied that the imposition of the restrictions, limitations and conditions complies with the rules mentioned in subsection 113.2 (4). 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Provisional suspension or refusal to renew if safety involved

113.5 (1) A Director may, by serving notice on an authorization holder and without a hearing, provisionally suspend or provisionally refuse to renew the holder's authorization if, in the Director's opinion, the carrying on of the activities under the authorization is an immediate threat to public safety or the safety of any person. 2004, c. 19, s. 12 (5).

Notice

(2) A notice under subsection (1) shall state the Director's reasons for the decision to provisionally suspend or provisionally refuse to renew the authorization and shall inform the authorization holder that the holder has a right to a hearing before the Director if the holder applies to the Director for the hearing within 15 days after being served with the notice. 2004, c. 19, s. 12 (5).

Application of provisions

(3) Subsections 113.3 (3), (4) and (5) apply with respect to a notice under this section and subsections 113.4 (2), (3), (5) and (6) apply for the purposes of a hearing under this section. 2004, c. 19, s. 12 (5).

Decision

- (4) After the hearing,
- (a) if the Director is satisfied that a ground set out in subsection 113.2 (2) exists, the Director may suspend, revoke or refuse to renew the authorization;
 - (b) if the Director is satisfied that no ground set out in subsection 113.2 (2) exists, the Director,
 - (i) shall reinstate the suspended authorization, or
 - (ii) shall renew the authorization and may impose restrictions, limitations or conditions on the authorization in accordance with subsection 113.2 (4). 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Default in payment

113.6 (1) A Director may refuse to grant or to renew an authorization or may suspend an authorization, if,

- (a) the applicant or authorization holder is in default of the payment of a fee, an administrative penalty, a cost or another charge owing to the Authority; or

- (b) the applicant or authorization holder is in default of the payment of a fine imposed on conviction for an offence under this Part. 2004, c. 19, s. 12 (5).

Notice and hearing not required

- (2) A Director is not required to give notice or to hold a hearing before acting under subsection (1). 2004, c. 19, s. 12 (5).

Granting of authorization or renewal

- (3) If an application for an authorization or for the renewal of an authorization is refused under subsection (1), the applicant is entitled to the authorization or renewal on providing proof to the Director that the applicant is no longer in default. 2004, c. 19, s. 12 (5).

Reinstatement of suspended authorization

- (4) If an authorization is suspended under subsection (1), the authorization holder is entitled to have the authorization reinstated on providing proof to the Director that the authorization holder is no longer in default. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Opportunities before hearing

113.7 (1) A notice of hearing issued by a Director under this Part shall afford to the applicant or authorization holder a reasonable opportunity to show or to achieve, before the hearing, compliance with all lawful requirements for the granting, retention or renewal of the authorization. 2004, c. 19, s. 12 (5).

Examination of documentary evidence

- (2) The applicant or authorization holder shall be given an opportunity to examine, before a hearing by a Director under this Part, any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Recording of evidence

113.8 (1) The oral evidence taken before a Director at a hearing under this Part shall be recorded at the request of the applicant, the authorization holder or the Director, and the recording shall be at the cost of the person making the request. 2004, c. 19, s. 12 (5).

Transcript

- (2) If copies of the transcript are requested, they shall be provided at the cost of the person making the request. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Conflict

113.9 If, under the *Safety and Consumer Statutes Administration Act, 1996*, this Part is designated legislation to be administered by a designated administrative authority, and if a regulation made under clause 15 (1) (c) of that Act requires that, before an appeal to the Divisional Court is made under section 113.10 of this Act, a review panel must review the decision made by a Director after a hearing under this Act, that regulation prevails over this Part to the extent of any conflict. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2012, c. 8, Sched. 11, s. 46 (2) - no effect - see 2020, c. 14, Sched. 8, s. 21 - 14/07/2020

Appeal after hearing

113.10 (1) An applicant or authorization holder may appeal to the Divisional Court if, after a hearing, a Director does any of the following:

1. Grants the authorization subject to restrictions, limitations or conditions imposed on it by the Director.

2. Renews the authorization subject to restrictions, limitations or conditions imposed on it by the Director.
3. Refuses to grant the authorization.
4. Refuses to renew the authorization.
5. Suspends the authorization.
6. Revokes the authorization. 2004, c. 19, s. 12 (5).

How to appeal

(2) To appeal under this section, the applicant or authorization holder must file a notice of appeal with the court within 30 days after receiving notice of the Director's decision. 2004, c. 19, s. 12 (5).

Director is party

(3) The Director is a party to the appeal. 2004, c. 19, s. 12 (5).

Decision

(4) In deciding the appeal, the court may order the Director to take such action as the court considers proper. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Continuation of authorization

Continuation upon renewal application

113.11 (1) If, within the time prescribed by the regulations, or, if no time is prescribed, before the expiry of the authorization, an authorization holder applies to a Director for renewal of the authorization, the authorization continues to be valid,

- (a) until the Director renews the authorization, unless clause (b), (c) or (d) applies;
- (b) until the Director provisionally refuses to renew the authorization under subsection 113.5 (1);
- (c) until the Director refuses to renew the authorization under subsection 113.6 (1);
- (d) subject to subsection (3), if the authorization holder is served with a notice under section 113.3 that the Director proposes to refuse to renew the authorization, or if the Director refuses to renew the authorization under subsection 113.5 (4),
 - (i) until the time for applying for a hearing by the Director under section 113.4 or 113.5 expires, unless subclause (ii) applies,
 - (ii) if the holder applies for a hearing in accordance with section 113.4 or 113.5,
 - (A) until the Director renews the authorization following the hearing, or
 - (B) if the Director refuses to renew the authorization following the hearing,
 - (1) until the time for filing a notice of appeal with the Divisional Court under section 113.10 expires, unless sub-sub-subclause 2 applies,
 - (2) if the holder files a notice of appeal with the Divisional Court in accordance with section 113.10, until the final disposition of the appeal. 2004, c. 19, s. 12 (5).

Continuation after suspension, revocation

(2) Subject to subsection (3), if a Director suspends or revokes an authorization under subsection 113.4 (7) or 113.5 (4), the suspension or revocation does not take effect,

- (a) until the time for filing a notice of appeal with the Divisional Court under section 113.10 expires, unless clause (b) applies;
- (b) if a notice of appeal is filed with the Divisional Court in accordance with section 113.10, until the final disposition of the appeal. 2004, c. 19, s. 12 (5).

Threat to safety

(3) If, in a Director's opinion, there is or may be a threat to public safety or to the safety of any person, the Director may specify that,

- (a) the authorization in respect of which the renewal application has been made ceases to be valid earlier than the time specified in clause (1) (d); or
- (b) the suspension or revocation referred to in subsection (2) takes effect earlier than the time specified in subsection (2). 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Compliance order

113.12 (1) If it appears to a Director that a person is not complying with subsection 113.2 (1), with a regulation made under the authority of clause 113.22 (1) (e) or with a restriction, limitation or condition of an authorization, the Director may apply to a judge of the Superior Court of Justice for an order directing compliance. 2004, c. 19, s. 12 (5).

Same

(2) The judge may make any order he or she considers just. 2004, c. 19, s. 12 (5).

Clarification

(3) A Director may make an application under subsection (1) even if a penalty or another sanction has been applied against the person in respect of the failure to comply and regardless of any other rights the person may have. 2004, c. 19, s. 12 (5).

Appeal

(4) An appeal lies to the Divisional Court from an order made under subsection (2). 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Definition

113.12.1 In sections 113.13 to 113.14.3,

“electrical product or device” means any thing used or to be used in the generation, transmission, distribution, retail or use of electricity. 2006, c. 34, s. 12 (5).

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

2006, c. 34, s. 12 (5) - 01/01/2008

Inspections

113.13 (1) The Authority or a person appointed as an inspector in writing by the Authority may conduct an inspection and may, as part of that inspection, enter and inspect at any reasonable time any land or premises, including the business premises of an authorization holder, for the purpose of,

- (a) ensuring compliance with this Act and the regulations; or
- (b) determining that the authorization holder remains entitled to the authorization. 2006, c. 34, s. 12 (6).

Limitations on power to enter

(2) An inspector shall not,

- (a) use force to enter and inspect land and premises under this section; or
- (b) enter any part of premises that are being used as a dwelling, except with the consent of the owner or occupier. 2006, c. 34, s. 12 (6).

Identification

(3) An inspector shall produce, on request, evidence of his or her appointment as an inspector. 2006, c. 34, s. 12 (6).

Powers on inspection

(4) An inspector conducting an inspection on any land or in any premises, including premises of an authorization holder, may,

- (a) examine all documents, records, electrical products, devices and other things that are relevant to the inspection;
- (b) require a person on the premises being inspected to produce a document, record or other thing that is relevant to the inspection;
- (c) use any data storage, processing or retrieval device or system used in carrying on business in order to produce information or a record that is relevant to the inspection and that is in any form; and
- (d) subject to subsection (5), on giving a receipt for it, remove any thing relevant to the inspection, including a document, a record, a data storage disk or a retrieval device needed to produce information. 2006, c. 34, s. 12 (6).

Electrical product not included

(5) An electrical product or device may not be removed under clause (4) (d). 2006, c. 34, s. 12 (6).

Obligation to produce and assist

(6) A person who is required to produce a document, record, electrical product or device, or other thing under clause (4) (b) shall produce it and shall, on request by the inspector, provide any assistance that is reasonably necessary, including assistance in using any data storage, processing or retrieval device or system, to produce information or a record that is relevant to the inspection and that is in any form. 2006, c. 34, s. 12 (6).

Obstruction prohibited

(7) No person shall obstruct an inspector executing his or her duties or withhold from him or her or conceal, alter or destroy any document, record, electrical product or device or other thing that is relevant to the inspection. 2006, c. 34, s. 12 (6).

Copy and return of removed things

(8) An inspector who removes any document, record or other thing under clause (4) (d) may make a copy of it and shall promptly return it to the person being inspected. 2006, c. 34, s. 12 (6).

Admissibility of copies

(9) A copy of a document or record certified by an inspector to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 34, s. 12 (6).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2006, c. 34, s. 12 (6) - 01/01/2008

Order to turn over or retain electrical product or device

113.13.1 (1) An inspector who is lawfully present in a place and who believes on reasonable grounds that an electrical product or device in the place is being sold or offered for sale in contravention of this Part or the regulations may order, orally or in writing, a person in the place,

- (a) to turn the electrical product or device over to the inspector; or
- (b) to retain and preserve the electrical product or device in accordance with the regulations. 2006, c. 34, s. 12 (6).

Obligation to retain electrical product or device

(2) A person who fails to immediately comply with an order to turn over the electrical product or device issued under subsection (1) shall retain and preserve the electrical product or device that was the subject of the order in accordance with the regulations. 2006, c. 34, s. 12 (6).

Inspector to inform director

(3) When an inspector issues an order under subsection (1), he or she shall promptly inform the director and, where the order is in writing, provide him or her with a copy of the order. 2006, c. 34, s. 12 (6).

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

2006, c. 34, s. 12 (6) - 01/01/2008

Warrant to seize electrical product or device

113.13.2 (1) On application made without notice by an inspector appointed under subsection 113.13 (1), a justice of the peace may issue a warrant if he or she is satisfied on information under oath that there is reasonable ground for believing that,

- (a) an inspector issued an order to turn over an electrical product or device or to retain and preserve such a product or device under subsection 113.13.1 (1);
- (b) the person who was issued the order failed to comply with it; and
- (c) the electrical product or device was being sold or offered for sale in contravention of this Part or the regulations. 2006, c. 34, s. 12 (6).

Powers under warrant

(2) Subject to any conditions contained in the warrant, a warrant issued under subsection (1) authorizes an inspector appointed under subsection 113.13 (1) to,

- (a) enter or access the place in which a person is required to retain and preserve the electrical product or device under clause 113.13.1 (1) (b) and subsection 113.13.1 (2);
- (b) require a person to produce the electrical product or device in question; and
- (c) seize the electrical product or device in question. 2006, c. 34, s. 12 (6).

Obligation to produce and assist

(3) A person who is required to do so by an inspector under clause (2) (b) shall produce the electrical product or device in question. 2006, c. 34, s. 12 (6).

Entry of dwelling

(4) Despite subsection (2), an inspector shall not exercise the power under a warrant to enter a place, or part of a place, used as a dwelling unless,

- (a) the justice of the peace is informed that the warrant is being sought to authorize entry into a dwelling; and
- (b) the justice of the peace authorizes the entry into the dwelling. 2006, c. 34, s. 12 (6).

Conditions on search warrant

(5) A warrant shall contain such conditions as the justice of the peace considers advisable to ensure that any entry and seizure authorized by the warrant is reasonable in the circumstances. 2006, c. 34, s. 12 (6).

Assistance

(6) A warrant may authorize persons who have special, expert or professional knowledge, and such other persons as may be necessary, to accompany and assist the inspector in respect of the execution of the warrant. 2006, c. 34, s. 12 (6).

Time of execution

(7) An entry or access under a warrant shall be made between 6 a.m. and 9 p.m., unless the warrant specifies otherwise. 2006, c. 34, s. 12 (6).

Expiry of warrant

(8) A warrant shall name a date of expiry, which shall be no later than 30 days after the warrant is issued, but a justice of the peace may, on application without notice by the inspector, extend the date of expiry for an additional period of no more than 30 days. 2006, c. 34, s. 12 (6).

Use of force

(9) An inspector may call upon police officers for assistance in executing a warrant and the inspector may use whatever force is reasonably necessary to execute the warrant. 2006, c. 34, s. 12 (6).

Obstruction

(10) No person shall obstruct an inspector executing a warrant. 2006, c. 34, s. 12 (6).

Inspector to inform director

(11) When an inspector seizes an electrical product or device under this section, he or she shall promptly inform the director. 2006, c. 34, s. 12 (6).

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

2006, c. 34, s. 12 (6) - 01/01/2008

Release or forfeiture of electrical product or device

113.13.3 (1) This section applies in respect of an electrical product or device that,

- (a) was turned over to an inspector in response to an order issued under subsection 113.13.1 (1);
- (b) was retained and preserved in response to an order issued under subsection 113.13.1 (1), or in accordance with subsection 113.13.1 (2); or
- (c) was seized by an inspector in accordance with the regulations under a warrant issued under subsection 113.13.2 (1). 2006, c. 34, s. 12 (6).

Application for release of electrical product or device

(2) Within 10 days of an electrical product or device being turned over or seized or ordered to be retained and preserved, a person who claims an interest in the electrical product or device may apply to the director for the release of the electrical product or device. 2006, c. 34, s. 12 (6).

Hearing

(3) Subject to subsection (4), a person who applies for the release of the electrical product or device within the time permitted under subsection (2) is entitled to a hearing before the Director. 2006, c. 34, s. 12 (6).

Director may refuse hearing

(4) The director may refuse to hold a hearing if the person who applies for the release of the electrical product or device is not the person who turned over the electrical product or device, who retained and preserved it or from whom it was seized and the director is not satisfied that the person has an interest in the electrical product or device. 2006, c. 34, s. 12 (6).

Director's determination

(5) After a hearing, the director may,

- (a) release to the person the electrical product or device that he or she determines was not sold or offered for sale in contravention of this Part or the regulations; or
- (b) direct that the electrical product or device that he or she determines was sold or offered for sale in contravention of this Part or the regulations is forfeited to the Crown. 2006, c. 34, s. 12 (6).

Forfeiture in other circumstances

(6) The director may direct that the electrical product or device is forfeited to the Crown if,

- (a) no person applies for the release of the electrical product or device within the time permitted under subsection (2);
- (b) the director refuses to hold a hearing under subsection (4); or
- (c) the person who applied for the release of the electrical product or device does not appear at the hearing. 2006, c. 34, s. 12 (6).

Decision final

(7) Any determination or direction made by the director under this section is final. 2006, c. 34, s. 12 (6).

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

2006, c. 34, s. 12 (6) - 01/01/2008

Appointment of investigators

113.14 (1) The Authority may appoint persons to be investigators for the purpose of conducting investigations. 2006, c. 34, s. 12 (6).

Identification

(2) An investigator shall produce, on request, evidence of his or her appointment as an investigator. 2006, c. 34, s. 12 (6).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2006, c. 34, s. 12 (6) - 01/01/2008

Search warrant

113.14.1 (1) On application made without notice by an investigator, a justice of the peace may issue a warrant, if he or she is satisfied on information under oath that there is reasonable ground for believing that,

- (a) a person has contravened or is contravening this Part or the regulations or has committed an offence that is relevant to the person's fitness for holding an authorization under this Part; and
- (b) there is,
 - (i) on any land or in any building, dwelling, container or place any thing relating to the contravention of this Part or the regulations or to the person's fitness for holding an authorization, or
 - (ii) information or evidence relating to the contravention of this Part or the regulations or the person's fitness for holding an authorization that may be obtained through the use of an investigative technique or procedure or the doing of anything described in the warrant. 2006, c. 34, s. 12 (6).

Powers under warrant

- (2) Subject to any conditions contained in the warrant, a warrant issued under subsection (1) authorizes an investigator to,
- (a) enter or access the land, building, dwelling, container or place specified in the warrant, and examine and seize any thing described in the warrant;
- (a.1) make reasonable inquiries of any person, orally or in writing, with respect to anything relevant to the investigation;
- (b) use any data storage, processing or retrieval device or system used in carrying on business in order to produce information or evidence described in the warrant, in any form;
 - (c) require a person to produce the information or evidence described in the warrant and to provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce, in any form, the information or evidence described in the warrant; and
 - (d) use any investigative technique or procedure described in the warrant or do anything described in the warrant. 2006, c. 34, s. 12 (6); 2019, c. 14, Sched. 10, s. 6 (1).

Obligation to produce and assist

(3) A person who is required to do so by an investigator under clause (2) (c) shall produce information or evidence described in the warrant and shall provide whatever assistance is reasonably necessary to produce the information or evidence in any form. 2006, c. 34, s. 12 (6).

Entry of dwelling

(4) Despite subsection (2), an investigator shall not exercise the power under a warrant to enter a place, or part of a place, used as a dwelling unless,

- (a) the justice of the peace is informed that the warrant is being sought to authorize entry into a dwelling; and
- (b) the justice of the peace authorizes the entry into the dwelling. 2006, c. 34, s. 12 (6).

Conditions on search warrant

(5) A warrant shall contain such conditions as the justice of the peace considers advisable to ensure that any search authorized by the warrant is reasonable in the circumstances. 2006, c. 34, s. 12 (6).

Assistance

(6) A warrant may authorize persons who have special, expert or professional knowledge, and such other persons as may be necessary, to accompany and assist the investigator in respect of the execution of the warrant. 2006, c. 34, s. 12 (6).

Time of execution

(7) An entry or access under a warrant shall be made between 6 a.m. and 9 p.m., unless the warrant specifies otherwise. 2006, c. 34, s. 12 (6).

Expiry of warrant

(8) A warrant shall name a date of expiry, which shall be no later than 30 days after the warrant is issued, but a justice of the peace may, on application without notice by the investigator, extend the date of expiry for an additional period of no more than 30 days. 2006, c. 34, s. 12 (6).

Use of force

(9) An investigator may call upon police officers for assistance in executing a warrant and the investigator may use whatever force is reasonably necessary to execute the warrant. 2006, c. 34, s. 12 (6).

No Obstruction

(10) No person shall obstruct an investigator executing a warrant or withhold from him or her or conceal, alter or destroy anything relevant to the investigation. 2006, c. 34, s. 12 (6).

Copies of seized items

(11) An investigator who seizes any thing under this section or section 113.14.3 may make a copy of it. 2019, c. 14, Sched. 10, s. 6 (2).

(12) REPEALED: 2019, c. 14, Sched. 10, s. 6 (2).

Admissibility of copies

(13) A copy of a document or record certified by an investigator to be a true copy of the original is admissible in evidence to the same extent as the original and has the same evidentiary value. 2006, c. 34, s. 12 (6); 2019, c. 14, Sched. 10, s. 6 (3).

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

2006, c. 34, s. 12 (6) - 01/01/2008

2019, c. 14, Sched. 10, s. 6 (1-3) - 10/12/2019

No warrant required in exigent circumstances

113.14.2 (1) Although a warrant issued under subsection 113.14.1 (1) would otherwise be required, an investigator may exercise any of the powers described in subsection 113.14.1 (2) without a warrant if the conditions for obtaining the warrant exist but because of exigent circumstances it would be impracticable to obtain the warrant. 2006, c. 34, s. 12 (6).

Dwellings

(2) Subsection (1) does not apply to any part of a building that is being used as a dwelling. 2006, c. 34, s. 12 (6).

Use of force

(3) An investigator may, in executing any authority given by this section, call upon police officers for assistance and use whatever force is reasonably necessary. 2006, c. 34, s. 12 (6).

Application of other provisions

(4) Subsections 113.14.1 (3), (6), (10), (11) and (13) apply, with necessary modifications, to the exercise of powers under this section. 2006, c. 34, s. 12 (6); 2019, c. 14, Sched. 10, s. 6 (4).

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

2006, c. 34, s. 12 (6) - 01/01/2008

2019, c. 14, Sched. 10, s. 6 (4) - 10/12/2019

Seizure of things in plain view

113.14.3 (1) An investigator who is lawfully present in a place under a warrant may seize any thing that is in plain view if the investigator believes on reasonable grounds that the thing will afford evidence of a contravention of this Part or the regulations. 2006, c. 34, s. 12 (6).

(2) REPEALED: 2019, c. 14, Sched. 10, s. 6 (5).

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

2006, c. 34, s. 12 (6) - 01/01/2008

2019, c. 14, Sched. 10, s. 6 (5) - 10/12/2019

Report when things seized

113.14.4 (1) An investigator who seizes any thing under the authority of section 113.14.1, 113.14.2 or 113.14.3 shall bring it before a justice of the peace or, if that is not reasonably possible, shall report the seizure to a justice of the peace. 2019, c. 14, Sched. 10, s. 6 (6).

Procedure

(2) Sections 159 and 160 of the *Provincial Offences Act* apply with necessary modifications in respect of a thing seized under the authority of section 113.14.1, 113.14.2 or 113.14.3 of this Act, reading the reference in subsection 160 (1) of that Act to a document that a person is about to examine or seize under a search warrant as a reference to a thing that an investigator is about to examine or seize under the authority of section 113.14.1, 113.14.2 or 113.14.3 of this Act. 2019, c. 14, Sched. 10, s. 6 (6).

Exception

(3) Despite subsection (2), a justice of the peace shall order that an electrical product or device seized under the authority of section 113.14.1, 113.14.2 or 113.14.3 is not to be returned if the justice of the peace is satisfied on reasonable grounds that the electrical product or device was sold or offered for sale in contravention of this Part or the regulations. 2019, c. 14, Sched. 10, s. 6 (6).

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

2019, c. 14, Sched. 10, s. 6 (6) - 10/12/2019

Information confidential

113.15 (1) This section applies to a document or information obtained in the course of an inspection conducted for a purpose set out in clause 113.13 (1) (a) or (b). 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (7).

Disclosure prohibited

(2) Subject to subsection (3), an inspector shall not disclose any document or information obtained in the course of an inspection except,

- (a) for the purposes of carrying out his or her duties under this Act; or
- (b) as authorized under the *Regulatory Modernization Act, 2007*. 2007, c. 4, s. 29.

Compellability in civil proceeding

(3) Subject to subsection (4), an inspector is a compellable witness in a civil proceeding respecting any document or information obtained in the course of an inspection. 2004, c. 19, s. 12 (5).

Refusal or conditional permission

(4) A Director may,

- (a) on reasonable grounds, refuse to permit an inspector to attend as a witness; or
- (b) require that an inspector's attendance as a witness be subject to such conditions as are reasonable and necessary for the proper administration of this Part and the regulations. 2004, c. 19, s. 12 (5).

Limitation

(5) Subsection (4) does not apply if,

- (a) the court orders that the inspector attend as a witness;
- (b) the proceeding is a proceeding under the *Provincial Offences Act*; or
- (c) the Authority is a party to the proceeding. 2004, c. 19, s. 12 (5).

Written decision

(6) A Director who makes a decision referred to in subsection (4) shall issue the decision in writing. 2004, c. 19, s. 12 (5).

Disclosure by Director

(7) A Director may publish or otherwise disclose documents or information obtained under the powers conferred on the Director under this Part. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2006, c. 34, s. 12 (7) - 01/01/2008

2007, c. 4, s. 29 - 17/01/2008

Director's confirmation

113.16 (1) A Director may issue a written confirmation with respect to,

- (a) the granting or non-granting of an authorization, the renewal or non-renewal of an authorization, or the revocation or suspension of an authorization;
- (b) the restrictions, limitations and conditions to which an authorization is subject;
- (c) the filing or non-filing of any document or material required or permitted to be filed with the Director; or
- (d) any other matter prescribed by the regulations. 2004, c. 19, s. 12 (5).

Effect of confirmation

(2) A confirmation that purports to have been issued by a Director is proof, in the absence of evidence to the contrary, of the facts stated in it, without any proof of appointment or signature. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Fees, etc.

113.17 (1) If the Authority does so in accordance with the process and criteria that it establishes and that the Minister responsible for the administration of this Part has approved, the Authority may establish fees, costs or other charges related to the administration of this Part and may require that such fees, costs and other charges be paid at the times and in the manner directed by it. 2004, c. 19, s. 12 (5); 2021, c. 34, Sched. 9, s. 5.

Collection and application of fees

(2) The Authority shall collect the fees, costs and other charges that it requires to be paid under this section and shall apply them to the expenses incurred by the Authority in administering this Part. 2004, c. 19, s. 12 (5); 2021, c. 34, Sched. 9, s. 5.

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

2004, c. 19, s. 12 (5) - 30/11/2005

2021, c. 34, Sched. 9, s. 5 - 01/04/2023

Agreement to exercise Authority's powers

113.18 The Authority may enter into agreements with any person or body prescribed by the regulations authorizing the person or body to exercise and perform any of the powers and duties of the Authority under subsection 113 (11) or section 113.13 or 113.17 and, for that purpose, a reference in section 113.19 or 113.20 to the Authority shall be deemed to be a reference to the person or body. 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (8).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2006, c. 34, s. 12 (8) - 15/08/2007

Administrative penalty

113.18.1 (1) A Director may, by order, impose an administrative penalty against a person in accordance with this section and the regulations made by the Minister if the Director is satisfied that the person has contravened or is contravening,

- (a) a prescribed provision of this Part or the regulations;
- (b) a restriction, limitation or condition imposed by a Director in respect of a prescribed authorization; or
- (c) a prescribed order of the Authority. 2021, c. 34, Sched. 9, s. 6.

To whom payable

(2) An administrative penalty is payable to the Authority. 2021, c. 34, Sched. 9, s. 6.

Purpose

(3) An administrative penalty may be imposed under this section for one or more of the following purposes:

1. To ensure compliance with this Part or the regulations.

2. To prevent a person from deriving, directly or indirectly, any economic benefit as a result of a contravention described in subsection (1). 2021, c. 34, Sched. 9, s. 6.

Amount

(4) The amount of an administrative penalty shall reflect the purpose of the penalty and shall be determined in accordance with the regulations made by the Minister, but the amount of the penalty shall not exceed \$10,000. 2021, c. 34, Sched. 9, s. 6.

Form of order

(5) An order made under subsection (1) imposing an administrative penalty against a person shall be in the form that the Authority determines. 2021, c. 34, Sched. 9, s. 6.

Service of order

(6) The order shall be served on the person against whom the administrative penalty is imposed in accordance with the regulations made by the Minister. 2021, c. 34, Sched. 9, s. 6.

Absolute liability

- (7) An order made under subsection (1) imposing an administrative penalty against a person applies even if,
- (a) the person took all reasonable steps to prevent the contravention on which the order is based; or
 - (b) at the time of the contravention, the person had an honest and reasonable belief in a mistaken set of facts that, if true, would have rendered the contravention innocent. 2021, c. 34, Sched. 9, s. 6.

No effect on offences

(8) For greater certainty, nothing in subsection (7) affects the prosecution of an offence. 2021, c. 34, Sched. 9, s. 6.

Other measures

(9) Subject to subsection (16), an administrative penalty may be imposed alone or in conjunction with the exercise of any measure against a person provided by this Part or the regulations, including the application of restrictions, limitations or conditions to an authorization by a Director, the suspension or revocation of an authorization or the refusal to renew an authorization. 2021, c. 34, Sched. 9, s. 6.

Limitation

(10) A Director shall not make an order under subsection (1) more than two years after the day the Director became aware of the person's contravention on which the order is based. 2021, c. 34, Sched. 9, s. 6.

No hearing required

(11) Subject to the regulations made by the Minister, a Director is not required to hold a hearing or to afford a person an opportunity for a hearing before making an order under subsection (1) against the person. 2021, c. 34, Sched. 9, s. 6.

Non-application of other Act

(12) The *Statutory Powers Procedure Act* does not apply to an order made under subsection (1). 2021, c. 34, Sched. 9, s. 6.

Appeal

(13) For greater certainty, a person on whom an order imposing an administrative penalty is made may appeal the order in accordance with the regulations made under clause 15 (1) (c) of the *Safety and Consumer Statutes Administration Act, 1996*. 2021, c. 34, Sched. 9, s. 6.

Enforcement

(14) If a person against whom an order imposing an administrative penalty is made fails to pay the penalty in accordance with the terms of the order or, if the order is varied on appeal, in accordance with the terms of the varied order, the order may be filed with the Superior Court of Justice and enforced as if it were an order of the court. 2021, c. 34, Sched. 9, s. 6.

Date of order

(15) For the purposes of section 129 of the *Courts of Justice Act*, the date on which the order is filed with the court is deemed to be the date of the order. 2021, c. 34, Sched. 9, s. 6.

Effect of paying penalty

(16) If a person against whom an order imposing an administrative penalty is made pays the penalty in accordance with the terms of the order or, if the order is varied on appeal, in accordance with the terms of the varied order, the person cannot be charged with an offence under this Part in respect of the same contravention on which the order is based and no other

prescribed measure shall be taken against the person in respect of the same contravention on which the order is based. 2021, c. 34, Sched. 9, s. 6.

Publication of orders

(17) The Authority may publish any orders made under subsection (1), or if varied on appeal, any varied orders, on its website. 2021, c. 34, Sched. 9, s. 6.

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

2021, c. 34, Sched. 9, s. 6 - 01/04/2023

Liability

113.19 (1) No action or other civil proceeding shall be commenced against a director, an officer, an employee or an agent of the Authority, or a Director, an inspector or an officer appointed under this Part, for any act done in good faith in the exercise or performance or the intended exercise or performance of a power or duty under this Part, or for any neglect or default in the exercise or performance in good faith of such a power or duty. 2004, c. 19, s. 12 (5).

Same

(2) Subsection (1) does not relieve the Authority of any liability to which it would otherwise be subject in respect of a cause of action arising from any act, neglect or default referred to in subsection (1). 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Offences

113.20 (1) Every person,

- (a) that refuses or neglects to comply with section 113 or with any regulation, plan or specification made under its authority is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (b) that refuses or neglects to comply with an order issued by the Authority under subsection 113 (11) is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than \$5,000 for each day upon which the refusal or neglect is repeated or continued;
- (c) that refuses or neglects to comply with subsection 113.13 (6), 113.13.1 (2), 113.13.2 (3) or 113.14.1 (3) or (10) or disturbs or interferes with an inspector, investigator or other officer in the performance of a duty the inspector, investigator or officer was appointed to perform under this Part is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (c.1) that contravenes or fails to comply with section 113.0.1 is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (d) that contravenes or fails to comply with subsection 113.2 (1) is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than \$5,000 for each day upon which the offence is repeated or continued;
- (e) that contravenes or fails to comply with any regulation made under the authority of clause 113.22 (1) (a), (e), (c.1) or (j) is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than \$5,000 for each day upon which the offence is repeated or continued;
- (f) that contravenes or fails to comply with a restriction, limitation or condition of an authorization is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both, and a further fine of not more than \$5,000 for each day upon which the offence is repeated or continued;
- (g) that knowingly makes a false statement or furnishes false information to a Director under this Part is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;
- (h) that knowingly holds out as genuine any document, certificate, identification card or any other document issued under this Part or the regulations is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both;

- (i) that holds themselves out as a holder of an authorization, an inspector, investigator or other official under this Part is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both. 2005, c. 33, s. 7 (3); 2006, c. 34, s. 12 (9-13).

Same, corporations

(2) A corporation that is guilty of an offence described in subsection (1) is liable, on conviction, to a fine of not more than \$1,000,000. 2005, c. 33, s. 7 (3).

Duty of director or officer

(3) Every director or officer of a corporation has a duty to take all reasonable care to prevent it from committing an offence under subsection (2). 2006, c. 34, s. 12 (14).

Offence

(4) Every director or officer who has a duty under subsection (3) and fails to carry out that duty is guilty of an offence and on conviction is liable to a fine of not more than \$50,000 or to imprisonment for a term of not more than one year, or to both. 2006, c. 34, s. 12 (14).

Separate offence

(5) Where a person contravenes any of the provisions of this Part, the regulations or any notice or order made under them on more than one day, the continuance of the contravention on each day shall be deemed to constitute a separate offence. 2006, c. 34, s. 12 (14).

(6) REPEALED: 2021, c. 34, Sched. 9, s. 7.

Time limit

(7) No proceeding in respect of an alleged offence under this Part may be commenced after two years following the date on which the facts that gave rise to the alleged offence first came to the attention of the Director. 2006, c. 34, s. 12 (14).

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

2004, c. 19, s. 12 (5) - 30/11/2005

2005, c. 33, s. 7 (3) - 15/12/2005

2006, c. 34, s. 12 (9) - 15/08/2007; 2006, c. 34, s. 12 (10-14) - 01/10/2007

2012, c. 8, Sched. 11, s. 46 (3) - no effect - see 2020, c. 14, Sched. 8, s. 21 - 14/07/2020

2021, c. 34, Sched. 9, s. 7 - 01/04/2023

Conflict

113.21 This Part and the regulations prevail over any municipal by-law. 2004, c. 19, s. 12 (5).

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

2004, c. 19, s. 12 (5) - 30/11/2005

Regulations

113.22 (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing activities that require an authorization, classifying the activities, the persons who carry out the activities and the authorizations, and prescribing the classes of authorizations that are required for different classes of activities or for different classes of persons;
- (b) prescribing the training, experience, qualifications or skills that persons must have and the other requirements that persons must meet in order to obtain and retain a class of authorization;
- (c) prescribing the period, or the manner of determining the period, for which a class of authorization is valid;
- (d) governing applications for authorization and applications for renewal of authorization, including prescribing procedures and timing requirements for making such applications;
- (e) prescribing duties, powers and prohibitions that apply to holders of an authorization;
- (e.1) governing the documents and records that must be kept by holders of authorizations, including the manner and location in which they are kept and the time periods for retaining such information and authorizing the Director to specify the location at which they must be kept;

- (f) prescribing rules with which a Director must comply in imposing a restriction, limitation or condition on an authorization;
- (g) prescribing anything that must or may by this Part be done in accordance with the regulations or that is referred to in this Part as prescribed by, required by, provided in or referred to in the regulations;
- (h) exempting any person, work, matter or thing from any provision of this Part or the regulations;
- (i) defining electrical incidents or accidents and classes of incidents or accidents;
- (j) providing for the reporting to the Authority of the electrical incidents or accidents referred to in clause (i), including the manner and time for reporting, and prescribing classes of persons who are required to make such reports;
- (k) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Part. 2004, c. 19, s. 12 (5); 2006, c. 34, s. 12 (15, 16).

Regulations, Minister

(2) The Minister may make regulations,

- (a) governing administrative penalties that a Director may order under this Part and all matters necessary and incidental to the administration of a system of administrative penalties, including,
 - (i) prescribing provisions, authorizations and orders for the purpose of subsection 113.18.1 (1),
 - (ii) specifying the amount of an administrative penalty or providing for the determination of the amount of an administrative penalty by specifying the method of calculating the amount and the criteria to be considered in determining the amount,
 - (iii) providing for different amounts to be paid, or different calculations or criteria to be used, depending on the circumstances that gave rise to the administrative penalty or the time at which the penalty is paid,
 - (iv) specifying information that must be included in an order for payment of an administrative penalty,
 - (v) governing the rules for serving an order for an administrative penalty and the rights of the parties affected by the rules, including the time at which the order is deemed to be served on the person against whom the order is made,
 - (vi) respecting hearings for the purpose of subsection 113.18.1 (11),
 - (vii) respecting measures for the purpose of subsection 113.18.1 (16);
- (b) specifying the purposes for which the Authority may use the funds that it collects as administrative penalties. 2021, c. 34, Sched. 9, s. 8.

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

2004, c. 19, s. 12 (5) - 30/11/2005

2006, c. 34, s. 12 (15, 16) - 01/10/2007

2021, c. 34, Sched. 9, s. 8 - 01/04/2023

PART IX REGULATIONS

Regulations

114 (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing other objects for the purposes of clause 6 (1) (s);
- (a.1) REPEALED: 2014, c. 7, Sched. 7, s. 15 (1).
- (b) governing the IESO's borrowing, investment of funds and the management of its financial assets, liabilities and risks, including,
 - (i) prescribing rules and restrictions that apply to borrowing, investment and management of financial assets, liabilities and risks,
 - (ii) prescribing purposes for which the IESO may borrow, invest or manage its financial assets, liabilities and risks,
 - (iii) prescribing the types of debt instruments and financial obligations that the IESO can issue or enter into for or in relation to borrowing,

- (iv) prescribing classes of securities, investment instruments and financial agreements that the IESO is authorized to invest in or enter into or is not authorized to invest in or enter into;
- (c) governing the IESO's obligation to make information available in French;
- (c.1) prescribing classes of persons for the purposes of subsection 10 (4);
- (c.2) prescribing other matters that are to be dealt with in the Governance and Structure By-law;
- (c.3) respecting the calculation of the fees referred to in subsection 23 (4) and respecting the manner in which and the time at which they are to be paid;
- (c.4) prescribing the types of expenditures the IESO may recover through fees and charges and any restrictions and limitations in respect of the recovery of an expenditure;
- (c.5) respecting the calculation of the fees and charges referred to in section 25.1 and respecting the manner in which and the time at which they are collected by the IESO;
- (c.6) prescribing provisions of the *Business Corporations Act*, the *Not-for-Profit Corporations Act, 2010* or the *Corporations Information Act* that apply, with necessary modifications, to the IESO;
- (d) prescribing transmitters, distributors, generators, retailers and consumers or classes of transmitters, distributors, generators, retailers and consumers for the purpose of subsection 26 (2);
- (d.1) governing renewable energy generation facilities including, but not limited to,
 - (i) the location of the facilities,
 - (ii) the generating capacity of such facilities,
 - (iii) the connection of such facilities to transmission systems and distribution systems, including technical specifications with respect to the connection, and
 - (iv) when such facilities must have commenced operation in order to be considered a renewable energy generation facility under this Act;
- (e) prescribing contracts or classes of contracts to which subsection 26 (3), (4) or (6) does not apply, subject to such conditions or restrictions as may be specified in the regulations;
- (f) prescribing the amount of electricity referred to in the definition of "low-volume consumer" in subsection 26 (10);
- (f.1) prescribing periods for the purpose of subsections 31 (4) and (5);
- (g) respecting limits and criteria for the purposes of section 29.1;
- (g.1) prescribing information for the purposes of subsections 33 (2) and 34 (2.1);
- (g.2) prescribing reasons for the purpose of paragraph 5 of subsection 34 (1);
- (h) prescribing an amount for the purpose of clause 36 (1) (a);
- (h.0.1) respecting reliability standards;
- (h.1) for the purpose of subsection 46.1 (2), prescribing types of fuel and, with respect to each type of fuel that is prescribed, prescribing one or more other types of fuel as substitute fuels;
- (h.2) for the purpose of clause 46.2 (1) (a), prescribing types of fuel;
 - (i) designating a person or body as the Electrical Safety Authority for the purposes of this Act;
 - (j) prescribing persons or bodies or classes of persons or bodies with which the Electrical Safety Authority may enter into agreements under section 113.18;
 - (k) prescribing consumer protection requirements that apply to market participants;
 - (l) governing standards for and the use of electricity meters;
- (l.1) requiring persons to offer, install or use electricity meters or other devices of a type specified by the regulations for the purpose of promoting energy conservation, energy efficiency or load management;
- (m) exempting any person or class of persons from any provision of this Act, subject to such conditions or restrictions as may be prescribed by the regulations;

- (n) defining any word or expression used in this Act that is not defined in this Act;
- (o) deeming a reference in any Act to Ontario Hydro to be a reference to a person or other entity specified in the regulations, subject to such conditions as may be prescribed by the regulations;
- (o.1) prescribing anything referred to in this Act as prescribed by the regulations or as prescribed;
- (p) providing for such transitional matters as the Lieutenant Governor in Council considers necessary or advisable in connection with the implementation of this Act;
- (q) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the purposes of this Act. 1998, c. 15, Sched. A, s. 114 (1); 2001, c. 23, s. 69; 2002, c. 23, s. 3 (24); 2004, c. 23, Sched. A, s. 53 (1-5); 2004, c. 19, s. 12 (6); 2008, c. 7, Sched. G, s. 5 (1); 2009, c. 12, Sched. B, s. 14 (1); 2014, c. 7, Sched. 7, s. 15 (1-3).

Regulations, Part I

(1.1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing energy sources and criteria for the purposes of the definition of “alternative energy source” in subsection 2 (1) and prescribing criteria relating to the generation of electricity from energy sources for the purposes of subsection 2 (1.1);
- (a.1) prescribing criteria and associated or ancillary equipment, systems and technologies for the purposes of the definition of “renewable energy generation facility” in subsection 2 (1) and prescribing works for the purposes of the definition;
- (b) prescribing energy sources and criteria for the purposes of the definition of “renewable energy source” in subsection 2 (1) and prescribing criteria relating to the generation of electricity from energy sources for the purposes of subsection 2 (1.2);
- (c) designating an agency or body as a standards authority for the purpose of the definition of “standards authority” in subsection 2 (1). 2004, c. 23, Sched. A, s. 53 (6); 2008, c. 7, Sched. G, s. 5 (2); 2009, c. 12, Sched. B, s. 14 (2).

(1.2) REPEALED: 2014, c. 7, Sched. 7, s. 15 (4).

Regulations, Part II.2

(1.3) The Lieutenant Governor in Council may make regulations,

- (a) REPEALED: 2016, c. 10, Sched. 2, s. 10 (1);
- (b) for the purposes of subsection 25.29 (7),
 - (i) requiring the Minister to consider technical reports or other reports, documents or information, and
 - (ii) prescribing technical reports or other reports, documents and information;
- (c) prescribing principles to be applied in developing procurement processes and in evaluating proposals for reducing or managing electricity demand or for increasing electricity supply or capacity;
- (d) REPEALED: 2016, c. 10, Sched. 2, s. 10 (3);
- (e) governing procurement contracts;
- (f) governing adjustments, payments, set-offs and credits for the purposes of section 25.33, including regulations,
 - (i) prescribing methods for determining the amounts of adjustments under subsection 25.33 (1), the classes of market participants and consumers to whom those adjustments apply, the time periods to which the adjustments apply and the time periods within which the adjustments must or may be made and the manner in which the amounts are paid to generators, the Financial Corporation, distributors and other entities,
 - (ii) prescribing adjustments that must or may be made by distributors or retailers with respect to classes of consumers or other distributors or retailers, methods for determining the amount of the adjustments, the time periods to which the adjustments apply and the time periods within which the adjustments must or may be made and the manner in which the amounts are paid to generators, the Financial Corporation, distributors and other entities,
 - (iii) prescribing classes of consumers for the purposes of paragraph 3 of subsection 25.33 (3),
 - (iv) governing the presentation of adjustments on invoices to consumers,
 - (v) requiring the IESO to make payments to a distributor or retailer and prescribing methods for determining the amounts payable,

- (vi) requiring a distributor to make payments to the IESO, another distributor or a retailer and prescribing methods for determining the amounts payable,
- (vii) requiring a retailer to make payments to the IESO or a distributor and prescribing methods for determining the amounts payable,
- (viii) REPEALED: 2014, c. 7, Sched. 7, s. 15 (6).
- (ix) governing the calculation of the amounts of the payments required by regulations made under this clause, methods of payment and the times within which payments must or may be made,
- (x) authorizing payments referred to in subclause (ix) to be made by way of set-offs and credits and prescribing conditions entitling or requiring amounts to be set off or credited,
- (xi) governing methods for determining amounts to be set off or credited, and the times within which amounts must or may be set off or credited,
- (xii) requiring a distributor, retailer or generator to provide information to the IESO, a distributor or the Board for the purposes of section 25.33 or a regulation made under this clause,
- (xiii) requiring the IESO to provide information to the Board for the purposes of section 25.33 or a regulation made under this clause,
- (xiv) requiring the Financial Corporation to provide information to the IESO or the Board for the purposes of section 25.33 or a regulation made under this clause,
- (xv) requiring a market participant or a consumer or a member of a class of market participants or consumers to meet specified requirements and to provide information to the IESO, a distributor or a retailer for the purpose of section 25.33 or a regulation made under this clause;
- (g) governing the establishment and maintenance of variance accounts referred to in subsection 25.33 (5);
- (g.0.1) providing for and governing the limitation period for the purposes of subsection 25.33 (9);
- (g.1) prescribing locations or land or classes of locations or land where the IESO shall not provide for a procurement process or enter into a contract for energy from a prescribed renewable energy generation facility or a prescribed class of renewable energy generation facility;
- (h) for the purposes of subsection 25.34 (2),
 - (i) providing that certain amounts or portions of amounts are not included in the amounts referred to in paragraph 1 of that subsection, and specifying those excluded amounts or portions of amounts or methods for determining them,
 - (ii) setting out amounts and procurement contracts for the purposes of paragraph 2 of that subsection. 2004, c. 23, Sched. A, s. 53 (8); 2009, c. 12, Sched. B, s. 14 (3-5); 2014, c. 7, Sched. 7, s. 15 (5-9); 2016, c. 10, Sched. 2, s. 10; 2018, c. 17, Sched. 14, s. 3; 2019, c. 6, Sched. 1, s. 5 (1); 2021, c. 34, Sched. 9, s. 9; 2024, c. 26, Sched. 1, s. 6.

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 114 (1.3) (h) of the Act is repealed and the following substituted: (See: 2019, c. 6, Sched. 1, s. 5 (2))

- (h) providing that certain amounts or portions of amounts are not included in the amounts referred to in paragraph 1 of subsection 25.34 (2), and specifying those excluded amounts or portions of amounts or methods for determining them.

Regulations, Part III

- (1.4) The Lieutenant Governor in Council may make regulations,
 - (0.a) governing the connection of generation facilities to transmission systems and distribution systems for the purposes of section 25.36;
- (0.a.1) REPEALED: 2021, c. 25, Sched. 5, s. 3.
 - (a) prescribing any other information or material to be posted under subsection 36.2 (1);
 - (b) requiring additional notice for the purpose of subsection 36.2 (2) and prescribing any other information or material to be included with that notice and the manner and time or times of giving it;
 - (c) prescribing the period of time within which the Board may initiate a review of a reliability standard under subsection 36.2 (4);

- (d) prescribing other matters to be considered for the purposes of subsection 36.2 (6);
- (e) prescribing limitations for the purposes of subsection 36.3 (1). 2008, c. 7, Sched. G, s. 5 (3); 2009, c. 12, Sched. B, s. 14 (6); 2021, c. 25, Sched. 5, s. 3.

General or particular

- (2) A regulation made under subsection (1) or (1.3) may be general or particular in its application. 1998, c. 15, Sched. A, s. 114 (2); 2004, c. 23, Sched. A, s. 53 (9); 2014, c. 7, Sched. 7, s. 15 (10).
- (3) REPEALED: 2004, c. 23, Sched. A, s. 53 (10).

Transitional regulations

- (4) A regulation made under clause (1) (p),
 - (a) may provide that it has retroactive application to a date not earlier than the day this section comes into force; and
 - (b) may provide that it applies despite this or any other general or special Act. 1998, c. 15, Sched. A, s. 114 (4).

Subdelegation

- (5) A regulation under clause (1) (b) or (1.3) (f) may authorize a person to require, authorize, prescribe or otherwise determine any matter that may be required, authorized, prescribed or otherwise determined by the Lieutenant Governor in Council under that clause. 2004, c. 23, Sched. A, s. 53 (11); 2014, c. 7, Sched. 7, s. 15 (11).

Provision of information

- (6) A person may do anything required by a regulation made under subclause (1.3) (f) (xii) or (xiii) despite any agreement to the contrary, the person is not liable for doing the thing in contravention of any agreement to the contrary, and doing the thing shall be deemed not to constitute a breach, termination, repudiation or frustration of any contract. 2004, c. 23, Sched. A, s. 53 (11); 2014, c. 7, Sched. 7, s. 15 (12).

Conflict with market rules

- (7) In the event of a conflict, a regulation made under clause (1.3) (f) prevails over the market rules to the extent of the conflict. 2004, c. 23, Sched. A, s. 53 (11); 2014, c. 7, Sched. 7, s. 15 (13).

Transition, *Green Energy Act, 2009*

- (8) The Lieutenant Governor in Council may make regulations governing transitional matters that, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate the implementation of amendments to this Act arising from the enactment of the *Green Energy and Green Economy Act, 2009* and to facilitate the implementation of the *Green Energy Act, 2009*. 2009, c. 12, Sched. B, s. 14 (7).

Transition, IESO

- (9) The Lieutenant Governor in Council may make regulations governing transitional matters that, in the opinion of the Lieutenant Governor in Council, are necessary or desirable to facilitate,
 - (a) the amalgamation of the predecessor Independent Electricity System Operator and the Ontario Power Authority; and
 - (b) the merging or segregation within the IESO of any of the duties, functions or activities of the predecessor Independent Electricity System Operator and the Ontario Power Authority. 2014, c. 7, Sched. 7, s. 15 (14).

Same, pension matters

- (10) Without limiting the generality of subsection (9), the Lieutenant Governor in Council may make regulations governing transitional matters arising from the amalgamation of the predecessor Independent Electricity System Operator and the Ontario Power Authority with respect to pensions, including regulations,
 - (a) respecting the right to continue a prescribed pension plan as a pension plan for the employees of the IESO and any persons who become employees of the IESO in the future;
 - (b) governing the right of the IESO to create a new pension plan for its employees;
 - (c) respecting the right of the board of directors of the IESO to determine which employees will be members of a prescribed pension plan or a new pension plan created under the regulations made under this subsection;
 - (d) governing any matters relating to a prescribed pension plan or any new pension plans created under the regulations made under this subsection. 2014, c. 7, Sched. 7, s. 15 (14).

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

2001, c. 23, s. 69 - 01/04/1999

2002, c. 23, s. 3 (24) - 09/12/2002; 2002, c. 23, s. 3 (25) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2012

2004, c. 19, s. 12 (6) - 30/11/2005; 2004, c. 23, Sched. A, s. 53 (1-6, 8-11) - 01/01/2005; 2004, c. 23, Sched. A, s. 53 (7) - 20/12/2004

2008, c. 7, Sched. G, s. 5 (1-3) - 14/05/2008

2009, c. 12, Sched. B, s. 14 (1-7) - 09/09/2009; 2009, c. 33, Sched. 14, s. 2 (7) - 15/12/2009

2010, c. 8, s. 37 (11, 12) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2020

2014, c. 7, Sched. 7, s. 15 (1, 3, 4-14) - 01/01/2015; 2014, c. 7, Sched. 7, s. 15 (2) - 19/10/2021

2016, c. 10, Sched. 2, s. 10 (1-3) - 01/07/2016

2018, c. 17, Sched. 14, s. 3 - 06/12/2018

2019, c. 6, Sched. 1, s. 5 (1) - 09/05/2019; 2019, c. 6, Sched. 1, s. 5 (2) - not in force

2021, c. 25, Sched. 5, s. 3 - 03/06/2021; 2021, c. 34, Sched. 9, s. 9 - 01/01/2022

2024, c. 26, Sched. 1, s. 6 - 04/12/2024

PART IX.1 OWNERSHIP AND USE OF CORRIDOR LAND

INTERPRETATION

Definitions

114.1 In this Part,

“effective date” means the date on which section 23 of Schedule A to the *Reliable Energy and Consumer Protection Act, 2002* comes into force; (“date d’effet”)

“Minister of Infrastructure” means the Minister of Infrastructure or such other member of the Executive Council as may be assigned under the *Executive Council Act* the powers and duties of the Minister of Infrastructure under this part; (“ministre de l’Infrastructure”)

“statutory right to use corridor land” or “statutory right to use the land” means, in relation to corridor land, the right created by section 114.5 to use the land for a purpose described in that section. (“droit légal d’utiliser des biens-fonds réservés aux couloirs”, “droit légal d’utiliser les biens-fonds”) 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (2, 3).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (2, 3) - 06/06/2011

OWNERSHIP AND USE

Transfer of corridor land to the Crown

114.2 (1) The fee simple interest in the following real property is hereby transferred to Her Majesty in right of Ontario:

1. All real property in Ontario that Hydro One Inc. or a subsidiary of Hydro One Inc. owned, directly or indirectly, in fee simple on the effective date that was used for the purposes of a transmission system on the effective date or was acquired before that date for the purposes of a transmission system.
2. All real property in Ontario that Hydro One Inc. or a subsidiary of Hydro One Inc. owned, directly or indirectly, in fee simple on the effective date that abuts real property described in paragraph 1. 2002, c. 1, Sched. A, s. 23.

Exceptions

(2) Buildings, structures and equipment on corridor land are not transferred to Her Majesty in right of Ontario by subsection (1). 2002, c. 1, Sched. A, s. 23.

Compensation

(3) No compensation of any kind is payable in respect of a transfer made by this section; however, the statutory right to use the land is given in exchange for the transfer. 2002, c. 1, Sched. A, s. 23.

Non-application of *Expropriations Act*

(4) The *Expropriations Act* does not apply with respect to a transfer made by this section or with respect to a subsequent transfer by the Crown in right of Ontario of the real property described in this section, despite section 2 of that Act. 2002, c. 1, Sched. A, s. 23.

Evidence of transfer

(5) In a document registered on title in a land titles office or registry office, a statement that real property described in the document was transferred to Her Majesty in right of Ontario by this section, and any other statement in the document relating to the transfer, shall be deemed to be conclusive evidence of the facts stated. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

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Effect of transfer to the Crown

114.3 (1) The transfer made by section 114.2 is binding on all persons and entities and,

- (a) shall be deemed not to constitute a breach, termination, repudiation or frustration of any contract, including a contract of insurance;
- (b) shall be deemed not to constitute an event of default or force majeure or a basis for any party to a contract to refuse to provide services under the contract;
- (c) shall be deemed not to give rise to a breach, termination, repudiation or frustration of any licence, permit or other right;
- (d) shall be deemed not to give rise to any right to terminate or repudiate a contract, licence, permit or other right; and
- (e) shall be deemed not to give rise to any estoppel. 2002, c. 1, Sched. A, s. 23.

Same

(2) The transfer made by section 114.2 does not create any new cause of action in favour of,

- (a) a holder of a debt instrument that was issued by Hydro One Inc. before the transfer; or
- (b) a party to a contract with Hydro One Inc. or any of its subsidiaries that was entered into before the transfer. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

Effect of transfer on leases, etc., affecting corridor land

114.4 (1) The transfer made by section 114.2 does not affect any right or interest of a person in the corridor land that is subordinate to the fee simple interest. 2002, c. 1, Sched. A, s. 23.

Same

(2) Despite the transfer made by section 114.2, Hydro One Inc. and its subsidiaries continue to have the benefit of, and be subject to all obligations under, any lease or agreement entered into or licence obtained before the effective date that affects corridor land or any easement or right created before the effective date with respect to corridor land. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

Statutory right to use corridor land

114.5 (1) The person or entity from whom corridor land is transferred by section 114.2 has a right to use the land to operate a transmission system or distribution system. 2002, c. 1, Sched. A, s. 23.

Duty to maintain

(2) The person or entity who has the right created by subsection (1) has a duty to maintain the corridor land at his, her or its own expense, including repairing or replacing buildings, equipment and structures on the land that are used by the person or entity, or used with his, her or its permission, if a prudent person would repair or replace them. 2002, c. 1, Sched. A, s. 23.

Same

(3) The Minister of Infrastructure may direct the person or entity who has the right created by subsection (1) to engage in such additional activities to maintain the corridor land at his, her or its own expense as the Minister of Infrastructure considers appropriate. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Exception

(4) The person or entity who has the right created by subsection (1) is not required to maintain corridor land that is being used for a purpose other than the operation of a transmission system or distribution system, unless it is being used for that purpose with the permission of the person or entity. 2002, c. 1, Sched. A, s. 23.

Taxes, etc.

(5) The *Land Transfer Tax Act* and such other statutes or provisions of statutes or regulations as may be prescribed do not apply with respect to the right created by subsection (1). 2002, c. 1, Sched. A, s. 23.

Status of right

(6) The right created by subsection (1) is an easement. 2002, c. 1, Sched. A, s. 23.

Binding

(7) The right created by subsection (1) is binding on all persons and entities. 2002, c. 1, Sched. A, s. 23.

Evidence of right

(8) In a document registered on title in a land titles office or registry office, a statement that a person or entity has a right created by subsection (1) to use real property described in the document for the purposes described in subsection (1), and any other statement in the document relating to the right, shall be deemed to be conclusive evidence of the facts stated. 2002, c. 1, Sched. A, s. 23.

Payment to holder of right

(9) If the Crown in right of Ontario uses corridor land or if a person or entity to whom the Crown in right of Ontario transfers corridor land uses it, the Minister of Infrastructure shall make payments from the Consolidated Revenue Fund to the person or entity who has the right created by subsection (1) with respect to such incremental costs incurred by the person or entity in the operation of a transmission system or distribution system as may be prescribed by regulation. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

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Primacy of use for transmission or distribution system

114.6 (1) A person or entity who owns corridor land shall not use it in such a way that the level of service provided by a transmission or distribution system owned by the person or entity who has the statutory right to use the land is reduced. 2002, c. 1, Sched. A, s. 23.

Expansion of use for transmission system or distribution system

(2) If, under Part VI of the *Ontario Energy Board Act, 1998*, the Board authorizes a person or entity who has the statutory right to use corridor land to expand a transmission system or distribution system on the land, the Board may make an order described in this section if the Board considers it to be in the public interest to do so. 2002, c. 1, Sched. A, s. 23.

Order re other uses

(3) The Board may order the owner of the corridor land to restrict or discontinue any use of the land that interferes with the expansion of the transmission system or distribution system as authorized under Part VI of the *Ontario Energy Board Act, 1998*. 2002, c. 1, Sched. A, s. 23.

Restriction

(4) The Board shall not make an order under subsection (3) to restrict or discontinue a use of the land if the Board determines that the expansion of the transmission system or distribution system can be reasonably accommodated without the restriction or without discontinuing the use, as the case may be. 2002, c. 1, Sched. A, s. 23.

Order re incremental costs

(5) The Board may order the owner of the corridor land to reimburse the person or entity seeking the expansion of the transmission system or distribution system for such incremental costs as the Board considers appropriate that are incurred by the person or entity in order to accommodate the other uses of the land. 2002, c. 1, Sched. A, s. 23.

Effect of agreement

(6) If an owner of corridor land and the person or entity who has the statutory right to use the land enter into an agreement governing the expansion of a transmission system or distribution system on the land or the use of the land, the Board shall not make an order under this section that is inconsistent with the agreement. 2002, c. 1, Sched. A, s. 23.

Status of agreement

(7) An agreement described in subsection (6) may be registered on title in the applicable land titles office or registry office and, when it is registered, it is binding on all persons and entities. 2002, c. 1, Sched. A, s. 23.

Status of orders

(8) The *Ontario Energy Board Act, 1998* applies with respect to an order made under this section as if the order had been made under that Act. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

Duty re use of corridor land

114.7 A person or entity who has the statutory right to use corridor land shall, to the extent practicable, ensure that the design and construction of any transmission system on the land maximizes the area available for other uses. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

Directions re location of buildings, etc.

114.8 (1) The Minister of Infrastructure may give directions to a person or entity who has the statutory right to use corridor land in respect of the location on the land of any proposed building, structure or equipment or of any proposed expansion of a building, structure or equipment, and the person or entity shall comply with the directions. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Restriction

(2) The Minister of Infrastructure shall not give a direction under this section that would have the effect of reducing the level of service provided by a transmission or distribution system owned by the person or entity who has the statutory right to use the corridor land. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Duty to obtain authorizations, etc.

(3) A direction by the Minister of Infrastructure under this section does not relieve the person or entity from the obligation to obtain such authorizations and consents as may be required by law, and the person or entity shall make reasonable efforts to obtain them. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Compensation

(4) If the Minister of Infrastructure directs that the construction or expansion must be located in a different place than the person or entity proposed, the Minister of Infrastructure shall pay the reasonable incremental costs associated with the direction. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Procedural matters

(5) The person or entity who proposes to construct or expand a building, structure or equipment on corridor land shall comply with such requirements as may be prescribed concerning notice to the Minister of Infrastructure and information to be given to him or her. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Effect of non-compliance

(6) A person or entity who fails to comply with this section shall remove the building, structure or equipment when given notice to do so by the Minister of Infrastructure and shall do so at his, her or its own expense. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

Relocation of buildings, etc.

114.9 (1) The Minister of Infrastructure may direct a person or entity who has the statutory right to use corridor land and who owns a building, structure or equipment located on the land to move it, and may impose conditions or restrictions with respect to the direction. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Restriction

(2) The Minister of Infrastructure shall not give a direction under this section that would have the effect of reducing the level of service provided by a transmission or distribution system owned by the person or entity who has the statutory right to use the corridor land. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Duty to obtain authorizations, etc.

(3) A direction by the Minister of Infrastructure under this section does not relieve the person or entity from the obligation to obtain such authorizations and consents as may be required by law to relocate the building, structure or equipment, and the person or entity shall make reasonable efforts to obtain them. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Compliance

(4) After obtaining all authorizations and consents otherwise required by law, the person or entity shall comply with the direction, and the Minister of Infrastructure shall pay the person's or entity's reasonable costs of complying with the direction. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Effect of non-compliance

(5) A person or entity who fails to comply with this section shall remove the building, structure or equipment when given notice to do so by the Minister of Infrastructure and shall do so at his, her or its own expense. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

Cessation of use for transmission system, etc.

114.10 (1) This section applies if a person or entity who has the statutory right to use corridor land decides that the land is not needed for the purposes of a transmission system or distribution system. 2002, c. 1, Sched. A, s. 23.

Duty to notify

(2) The person or entity who has the statutory right to use the land shall give written notice to the Minister of Infrastructure that it is not needed for the purposes of a transmission system or distribution system. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Same

(3) The notice must contain such information as may be prescribed by regulation and must be given in a manner authorized by regulation. 2002, c. 1, Sched. A, s. 23.

Transfer of statutory right

(4) The Minister of Infrastructure may require the person or entity to transfer to the Crown in right of Ontario the statutory right to use the land described in the written notice. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Payment for transfer

(5) No amount is payable for the transfer of the statutory right required under subsection (4). 2002, c. 1, Sched. A, s. 23.

Taxes, etc.

(6) The *Land Transfer Tax Act* and such other statutes or provisions of statutes or regulations as may be prescribed do not apply with respect to a transfer required under subsection (4). 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

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Disposition of statutory right

114.11 (1) A person or entity who has the statutory right to use corridor land may dispose of it and shall give prior written notice to the Minister of Infrastructure when disposing of the right. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Same

(2) The notice must contain such information as may be prescribed by regulation. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

Restriction on expropriation by holder of statutory right

114.12 (1) A person or entity who has the statutory right to use corridor land is not permitted to expropriate the land under section 99 of the *Ontario Energy Board Act, 1998*. 2002, c. 1, Sched. A, s. 23.

Expropriation of statutory right

(2) Nothing in this Part restricts the expropriation under any Act of the statutory right to use corridor land. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

Transfer of ownership by Crown to person with statutory right

114.13 (1) The Minister of Infrastructure, on behalf of the Crown in right of Ontario, may transfer the fee simple interest in all or any part of the corridor land to a person or entity who has the statutory right to use the land and the Minister of Infrastructure may do so with or without the consent of the person or entity. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Restriction re encumbrances

(2) The Minister of Infrastructure shall not make a transfer under subsection (1) if the corridor land is subject to encumbrances created with the consent of the Crown in right of Ontario that are greater than those to which it was subject on the effective date, unless the person or entity who has the statutory right to use the land consents to the transfer. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Restriction re condition of land

(3) The Minister of Infrastructure shall not make a transfer under subsection (1) if the condition of the corridor land has been significantly changed since the effective date with the consent of the Crown in right of Ontario, unless the person or entity who has the statutory right to use the land consents to the transfer. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Payment for transfer

(4) The amount payable by the person or entity for the transfer is the fair market value of the corridor land on the effective date. 2002, c. 1, Sched. A, s. 23.

Termination of right

(5) Immediately before the transfer, the statutory right of the person or entity under this Part to use the land is terminated. 2002, c. 1, Sched. A, s. 23.

Payment for termination of right

(6) The amount payable to the person or entity upon the termination of the statutory right is the fair market value of the corridor land on the effective date. 2002, c. 1, Sched. A, s. 23.

Taxes, etc.

(7) The *Land Transfer Tax Act* and such other statutes or provisions of statutes or regulations as may be prescribed do not apply with respect to the transfer described in subsection (1) or the termination of the right. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

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GENERAL

Duty to provide records, information and reports

114.14 (1) A person or entity who has an interest in, or has entered into an agreement to use, corridor land or a building, structure or equipment located on corridor land shall give the Minister of Infrastructure, upon request, such records, information and reports as he or she may specify with respect to the land and the use of the land, building, structure or equipment and shall do so within the time specified by the Minister of Infrastructure. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Use of records, information and reports

(2) The Minister of Infrastructure may use records, information and reports obtained under this section for the purpose of administering and enforcing this Part. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

Residual power of the Crown

114.15 (1) This Part does not restrict the authority of the Crown in right of Ontario to acquire, hold, dispose of or otherwise deal with corridor land. 2002, c. 1, Sched. A, s. 23.

Exception

(2) Subsection (1) does not authorize the Crown in right of Ontario to deal with corridor land contrary to section 114.6. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

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Indemnity re corridor land

114.16 (1) Hydro One Inc. shall indemnify the Crown in right of Ontario for any losses, damages or costs incurred by Her Majesty in right of Ontario,

- (a) that arise from an order, direction or award made under a statute of Ontario or Canada in respect of corridor land or that relate to a proceeding in respect of corridor land; and
- (b) that are a direct or indirect result of an act or omission by any person before the effective date. 2002, c. 1, Sched. A, s. 23.

Same

(2) Hydro One Inc. shall indemnify a person or entity to whom the Crown in right of Ontario transfers corridor land for any losses, damages or costs incurred by the person or entity,

- (a) that arise from an order, direction or award made under a statute of Ontario or Canada in respect of the land or that relate to a proceeding in respect of the land; and

- (b) that are a direct or indirect result of an act or omission by any person before the effective date. 2002, c. 1, Sched. A, s. 23.

Same, by holder of statutory right

(3) A person or entity who has the statutory right to use corridor land shall indemnify the owner of the land for any losses, damages or costs incurred by the owner,

- (a) that arise from an order, direction or award made under a statute of Ontario or Canada in respect of the land or that relate to a proceeding in respect of the land; and
- (b) that are a direct or indirect result of an act or omission by,
 - (i) the person or entity,
 - (ii) an employee or agent of the person or entity,
 - (iii) a person or entity who previously held the statutory right to use the land, or
 - (iv) another person or entity who was invited or permitted to use the land by the person or entity who holds, or held, the statutory right to use it. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

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Delegation of powers and duties

114.17 (1) The Minister of Infrastructure may delegate his or her powers and duties under any of the following provisions to any person or entity, subject to such conditions as the Minister of Infrastructure may impose:

1. Subsection 114.5 (3).
2. Subsection 114.8 (1) or (6) or both.
3. Subsection 114.9 (1) or (5) or both.
4. Subsection 114.13 (1).
5. Section 114.14. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Assignment of powers and duties

(2) The Minister of Infrastructure may assign his or her powers and duties under any of the provisions listed in subsection (1) to any person or entity, subject to such conditions as the Minister of Infrastructure may impose. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

Effect

(3) Despite the *Executive Council Act*, an agreement that is signed by a person or entity authorized to do so by a delegation or an assignment made under this section has the same effect as if the agreement had been signed by the Minister of Infrastructure. 2002, c. 1, Sched. A, s. 23; 2011, c. 9, Sched. 27, s. 23 (4).

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

2011, c. 9, Sched. 27, s. 23 (4) - 06/06/2011

Regulations

114.18 (1) The Lieutenant Governor in Council may make regulations,

- (a) prescribing one or more statutes, provisions of statutes or regulations for the purposes of subsection 114.5 (5), 114.10 (6) or 114.13 (7);
- (b) prescribing incremental costs for the purposes of subsection 114.5 (9);
- (c) prescribing the information to be included in a notice given under subsection 114.10 (3) and prescribing the manner in which the notice must be given;
- (d) prescribing the information to be included in a notice given under section 114.11. 2002, c. 1, Sched. A, s. 23.

General or particular

(2) A regulation may be general or particular. 2002, c. 1, Sched. A, s. 23.

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

2002, c. 1, Sched. A, s. 23 - 31/12/2002

PART X TRANSITION — ONTARIO HYDRO

Definitions, Part X

115 In this Part,

“transfer order” means an order made under section 116; (“décret de transfert ou de mutation”)

“transferee” means a person to whom officers, employees, assets, liabilities, rights or obligations are transferred by a transfer order. (“destinataire”) 1998, c. 15, Sched. A, s. 115.

Transfer orders

116 (1) The Lieutenant Governor in Council may make orders transferring officers, employees, assets, liabilities, rights and obligations of Ontario Hydro to Hydro One Inc., Ontario Power Generation Inc., the IESO, the Board, the Electrical Safety Authority, the subsidiary of the Financial Corporation established under section 110, Her Majesty in right of Ontario or any other person. 1998, c. 15, Sched. A, s. 116 (1); 2002, c. 1, Sched. A, s. 24 (1); 2004, c. 23, Sched. A, s. 54 (1).

Binding on all persons

(2) A transfer order is binding on Ontario Hydro, the transferee and all other persons. 1998, c. 15, Sched. A, s. 116 (2).

Same

(3) Subsection (2) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers. 1998, c. 15, Sched. A, s. 116 (3).

No consent required

(4) A transfer order does not require the consent of Ontario Hydro, the transferee or any other person. 1998, c. 15, Sched. A, s. 116 (4).

Same

(5) Despite subsection (4), the consent of the transferee is required if the transferee is a person other than,

- (a) Hydro One Inc. or a subsidiary of it;
- (b) Ontario Power Generation Inc. or a subsidiary of it;
- (c) the IESO;
- (d) the Board;
- (e) the Electrical Safety Authority;
- (f) the subsidiary of the Financial Corporation established under section 110; or
- (g) Her Majesty in right of Ontario. 1998, c. 15, Sched. A, s. 116 (5); 2002, c. 1, Sched. A, s. 24 (2); 2004, c. 23, Sched. A, s. 54 (2).

Legislation Act, 2006, Part III

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a transfer order. 1998, c. 15, Sched. A, s. 116 (6); 2006, c. 21, Sched. F, s. 136 (1).

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

2002, c. 1, Sched. A, s. 24 (1, 2) - 27/06/2002; 2002, c. 1, Sched. A, s. 24 (3) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2012

2004, c. 23, Sched. A, s. 54 (1, 2) - 01/01/2005

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

Notice of date

117 (1) The Minister shall, within 90 days after the date that a transfer order is made or amended, publish notice of the date in *The Ontario Gazette*. 1998, c. 15, Sched. A, s. 117 (1).

Amendments

(2) Notice of the date that a transfer order was amended shall identify the transfer order that was amended. 1998, c. 15, Sched. A, s. 117 (2).

Non-compliance

(3) Non-compliance with this section does not affect the validity of a transfer order or any amendment to a transfer order. 1998, c. 15, Sched. A, s. 117 (3).

Description of things transferred

118 A transfer order may describe officers, employees, assets, liabilities, rights or obligations to be transferred,

- (a) by reference to specific officers, employees, assets, liabilities, rights or obligations;
- (b) by reference to any class of officers, employees, assets, liabilities, rights or obligations; or
- (c) partly in accordance with clause (a) and partly in accordance with clause (b). 1998, c. 15, Sched. A, s. 118.

Approvals under the *Power Corporation Act*

119 If the approval of the Lieutenant Governor in Council was at any time required under the *Power Corporation Act* or a predecessor of that Act with respect to an asset, liability, right or obligation that is to be transferred by or pursuant to a transfer order, the approval shall be deemed to have been given. 1998, c. 15, Sched. A, s. 119.

Officers and employees

120 (1) The office or employment of an officer or employee who is transferred by or pursuant to a transfer order is not terminated by the transfer and shall be deemed to have been transferred to the transferee without interruption in service. 1998, c. 15, Sched. A, s. 120 (1).

Service

(2) Service with Ontario Hydro of an officer or employee who is transferred by or pursuant to a transfer order shall be deemed to be service with the transferee for the purpose of determining probationary periods, benefits or any other employment-related entitlements under the *Employment Standards Act* or any other Act or under any employment contract or collective agreement. 1998, c. 15, Sched. A, s. 120 (2).

No constructive dismissal

(3) An officer or employee who is transferred by or pursuant to a transfer order shall be deemed not to have been constructively dismissed. 1998, c. 15, Sched. A, s. 120 (3).

Future changes

- (4) If an officer or employee is transferred by or pursuant to a transfer order, nothing in this Act,
- (a) prevents the office or employment from being lawfully terminated after the transfer; or
 - (b) prevents any term or condition of the office or employment from being lawfully changed after the transfer. 1998, c. 15, Sched. A, s. 120 (4).

Payment for transfer

121 (1) A transfer order may require Ontario Hydro or the transferee to pay for anything transferred by or pursuant to the order and may specify to whom the payment shall be made. 1998, c. 15, Sched. A, s. 121 (1).

Amount of payment

- (2) The transfer order may,
- (a) fix the amount of the payment;
 - (b) specify a method for determining the amount of the payment; or
 - (c) provide that the amount of the payment be determined by the Minister of Finance or a person designated by the Minister of Finance. 1998, c. 15, Sched. A, s. 121 (2).

Form of payment

(3) The transfer order may require that the payment be made in cash, by set off, through the issuance of securities or in any other form specified by the order. 1998, c. 15, Sched. A, s. 121 (3).

Securities

(4) If the transfer order requires that the payment be made through the issuance of securities, it may specify the terms and conditions of the securities or may authorize the Minister of Finance or a person designated by the Minister of Finance to specify the terms and conditions. 1998, c. 15, Sched. A, s. 121 (4).

Valuations

(5) A transfer order may,

- (a) fix the value of anything transferred by or pursuant to the order;
- (b) specify a method for determining the value of anything transferred by or pursuant to the order; or
- (c) provide that the value of anything transferred by or pursuant to the order be determined by the Minister of Finance or a person designated by the Minister of Finance. 1998, c. 15, Sched. A, s. 121 (5).

Province may assume obligations in return for securities

122 (1) If, pursuant to a transfer order, Hydro One Inc. or Ontario Power Generation Inc. issues securities to Ontario Hydro, the Lieutenant Governor in Council, by order,

- (a) may authorize Her Majesty in right of Ontario or an agent of Her Majesty in right of Ontario to assume obligations of Hydro One Inc. or Ontario Power Generation Inc. under the securities; and
- (b) may require Hydro One Inc. or Ontario Power Generation Inc. to issue, and may authorize Her Majesty in right of Ontario or an agent of Her Majesty in right of Ontario to acquire, additional securities in such amount as the Lieutenant Governor in Council may specify. 1998, c. 15, Sched. A, s. 122 (1); 2002, c. 1, Sched. A, s. 25 (1).

Exchange of securities

(2) The Lieutenant Governor in Council may by order require Hydro One Inc. or Ontario Power Generation Inc. to issue securities to Ontario Hydro in exchange for securities it previously issued to Ontario Hydro pursuant to a transfer order. 1998, c. 15, Sched. A, s. 122 (2); 2002, c. 1, Sched. A, s. 25 (2).

Application of s. 28 of the *Financial Administration Act*

(3) Section 28 of the *Financial Administration Act* does not apply to anything done pursuant to an order under subsection (1) or (2). 1998, c. 15, Sched. A, s. 122 (3).

Terms and conditions of securities

(4) An order under subsection (1) or (2) may specify the terms and conditions of the securities issued under clause (1) (b) or subsection (2) or may authorize the Minister of Finance or a person designated by the Minister of Finance to specify the terms and conditions. 1998, c. 15, Sched. A, s. 122 (4).

Money required

(5) Money required for the purpose of meeting obligations assumed by Her Majesty under clause (1) (a) may be paid out of the Consolidated Revenue Fund. 1998, c. 15, Sched. A, s. 122 (5).

Non-application

(6) Clause (1) (b) and subsection (2) cease to apply with respect to Hydro One Inc. on the date specified in the regulations. 2002, c. 1, Sched. A, s. 25 (3).

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

2002, c. 1, Sched. A, s. 25 (1-3) - 27/06/2002

Effective date of transfer

123 (1) A transfer order may specify the date that a transfer takes effect and any interest in property that is transferred by the order vests in the transferee on that date. 1998, c. 15, Sched. A, s. 123 (1).

Effective on payment

(2) A transfer order may provide that a transfer not take effect until payment has been made for anything transferred by or pursuant to the order. 1998, c. 15, Sched. A, s. 123 (2).

Retroactive transfer

(3) A transfer order may provide that a transfer shall be deemed to have taken effect on a date earlier than the date the transfer order is made, but the effective date shall not be earlier than the day this section comes into force. 1998, c. 15, Sched. A, s. 123 (3).

Sequence of events

(4) A transfer order may provide that transfers specified in the order and other transactions associated with the transfers shall be deemed to have occurred in a sequence and at times specified in the order. 1998, c. 15, Sched. A, s. 123 (4).

Statements in registered documents

124 (1) A statement, in a registered document to which a person referred to in subsection (2) is a party, that land described in the document was transferred to the person from Ontario Hydro by or pursuant to a transfer order, and any other statement in the document relating to the transfer order, shall be deemed to be conclusive evidence of the facts stated. 1998, c. 15, Sched. A, s. 124 (1).

Persons referred to in subs. (1)

(2) The persons referred to in subsection (1) are:

1. Hydro One Inc. or a subsidiary of it.
2. Ontario Power Generation Inc. or a subsidiary of it.
3. The IESO.
4. The Board.
5. The subsidiary of the Financial Corporation established under section 110.
6. Her Majesty in right of Ontario.
7. The Electrical Safety Authority.
8. Any other person prescribed by the regulations. 1998, c. 15, Sched. A, s. 124 (2); 2002, c. 1, Sched. A, s. 26; 2004, c. 23, Sched. A, s. 55.

No new interest

(3) Subsection (1) does not give any person an interest in land that Ontario Hydro did not have. 1998, c. 15, Sched. A, s. 124 (3).

References to unregistered transfer orders

(4) A document that is otherwise capable of being registered or deposited under the *Registry Act* or registered under the *Land Titles Act* and that refers to an unregistered transfer order may be registered or deposited under the *Registry Act* or registered under the *Land Titles Act* despite any provision of those Acts. 1998, c. 15, Sched. A, s. 124 (4).

Definitions

(5) In this section,

“land” means land, tenements, hereditaments and appurtenances, or any estate or interest therein; (“bien-fonds”)

“registered document” means a document registered or deposited under the *Registry Act* or registered under the *Land Titles Act*. (“document enregistré”) 1998, c. 15, Sched. A, s. 124 (5).

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

2002, c. 1, Sched. A, s. 26 - 27/06/2002

2004, c. 23, Sched. A, s. 55 - 01/01/2005

Execution of agreements

125 (1) A transfer order may require Ontario Hydro or a transferee,

- (a) to enter into any written agreement or execute any instrument specified in the order; and
- (b) to register in accordance with the order any agreement or instrument entered into or executed under clause (a). 1998, c. 15, Sched. A, s. 125 (1).

Exception

(2) Subsection (1) does not apply to a transfer agreement referred to in subsection 111 (1). 1998, c. 15, Sched. A, s. 125 (2).

Enforcement of things transferred

126 (1) A transfer order may provide,

- (a) that any liability or obligation that is transferred by the order may be enforced against Ontario Hydro, the transferee, or both of them;
- (b) that any right that is transferred by the order may be enforced by Ontario Hydro, the transferee, or both of them;
- (c) that any liability or obligation that is transferred by the order may be transferred to one or more transferees on a joint and several basis, as specified in the order; and
- (d) that any liability or obligation that is transferred by the order may be allocated among two or more transferees on the basis set out in the order. 1998, c. 15, Sched. A, s. 126 (1); 2000, c. 42, s. 42.

Release of Ontario Hydro

(2) Subject to subsection (1), the transfer of a liability or obligation under this Part releases Ontario Hydro from the liability or obligation. 1998, c. 15, Sched. A, s. 126 (2).

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

2000, c. 42, s. 42 - 21/12/2000

Actions and other proceedings

127 Subject to section 126, any action or other proceeding that was commenced by or against Ontario Hydro before a transfer order takes effect and that relates to an officer, employee, asset, liability, right or obligation that is transferred by the order shall be continued by or against the transferee. 1998, c. 15, Sched. A, s. 127.

Limitation periods

128 An action or other proceeding shall not be commenced against a transferee in respect of any officer, employee, asset, liability, right or obligation that has been transferred to the transferee if, had there been no transfer, the time for commencing the action or other proceeding would have expired. 1998, c. 15, Sched. A, s. 128.

Certain rights not affected by transfer

129 (1) A transfer by or pursuant to a transfer order,

- (a) shall be deemed not to constitute,
 - (i) a breach, termination, repudiation or frustration of any contract, including a contract of employment or insurance,
 - (ii) a breach of any Act, regulation or municipal by-law, or
 - (iii) an event of default or force majeure;
- (b) shall be deemed not to give rise to a breach, termination, repudiation or frustration of any licence, permit or other right;
- (c) shall be deemed not to give rise to any right to terminate or repudiate a contract, licence, permit or other right; and
- (d) shall be deemed not to give rise to any estoppel. 1998, c. 15, Sched. A, s. 129 (1).

Exemptions

(2) Subsection (1) does not apply to the contracts prescribed by the regulations. 1998, c. 15, Sched. A, s. 129 (2).

No new cause of action

130 Subject to subsection 129 (2), nothing in this Act and nothing done by or pursuant to a transfer order creates any new cause of action in favour of,

- (a) a holder of a debt instrument that was issued by Ontario Hydro and guaranteed by the Province of Ontario before this section comes into force; or
- (b) a party to a contract with Ontario Hydro that was entered into before this section comes into force. 1998, c. 15, Sched. A, s. 130.

Conditions on exercise of powers

131 A transfer order may impose conditions on the exercise of powers by the transferee that are related to officers, employees, assets, liabilities, rights or obligations transferred by the transfer order, including a condition that the powers be exercised only with the approval of the Board. 1998, c. 15, Sched. A, s. 131.

Information

132 Ontario Hydro shall provide a transferee with records or copies of records, and other information, that are in its custody or control and that relate to an officer, employee, asset, liability, right or obligation that is transferred by or pursuant to a transfer order, including personal information. 1998, c. 15, Sched. A, s. 132.

Transfer orders, other matters

133 A transfer order may contain provisions dealing with other matters not specifically referred to in this Part that the Lieutenant Governor in Council considers necessary or advisable in connection with a transfer. 1998, c. 15, Sched. A, s. 133.

Amendment of transfer order

134 The Lieutenant Governor in Council may, at any time within 24 months after making a transfer order, make a further order amending the transfer order in any way that the Lieutenant Governor in Council considers necessary or advisable. 1998, c. 15, Sched. A, s. 134; 2002, c. 1, Sched. A, s. 27 (1).

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

2002, c. 1, Sched. A, s. 27 (1) - 27/06/2002; 2002, c. 1, Sched. A, s. 27 (2) - no effect - see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - 31/12/2012

Exemptions from other Acts

135 The *Land Transfer Tax Act*, the *Retail Sales Tax Act* and such other Acts or provisions as are prescribed by the regulations do not apply to any transfer of officers, employees, assets, liabilities, rights or obligations by or pursuant to a transfer order. 1998, c. 15, Sched. A, s. 135; 2017, c. 2, Sched. 3, s. 2 (1).

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

2017, c. 2, Sched. 3, s. 2 (1) - 22/03/2017

Limitations

136 (1) If possession of land transferred by or pursuant to a transfer order has been taken by another person, the right of Ontario Hydro or the transferee, or anyone claiming under them, to recover it, is not barred by reason of the lapse of time, despite the *Real Property Limitations Act* or any other Act, or by reason of any claim based on possession adverse to it for any period of time that might otherwise be made lawfully at common law, unless it is shown that it had actual notice in writing of the adverse possession, and such notice was had by it 10 years before it or the person claiming under it commenced action to recover the land. 1998, c. 15, Sched. A, s. 136 (1); 2002, c. 24, Sched. B, s. 33 (1).

Same

(2) No claim under subsection (1) shall be acquired by possession, prescription, custom, user or implied grant to any way, easement, watercourse or use of water or water right or privilege or flooding privilege of Ontario Hydro or the transferee, or to any way, easement, watercourse, or use of water, or right of drainage along, over, upon, on or from any land, or water, or water right, or privilege of Ontario Hydro or the transferee, despite the *Real Property Limitations Act* or any other Act or any claim at common law based on lapse of time, or length of enjoyment or use. 1998, c. 15, Sched. A, s. 136 (2); 2002, c. 24, Sched. B, s. 33 (2).

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

2002, c. 24, Sched. B, s. 33 (1, 2) - 01/01/2004

Pensions

137 (1) A transfer order shall not include any provision relating to,

- (a) the Ontario Hydro Pension and Insurance Plan or the Pension and Insurance Fund of Ontario Hydro, referred to in section 24 of the *Power Corporation Act*, as continued by Part VII of this Act; or
- (b) the pension benefits and ancillary benefits within the meaning of the *Pension Benefits Act* that are provided under a pension plan with respect to officers or employees transferred by or pursuant to a transfer order. 1998, c. 15, Sched. A, s. 137 (1).

Exception

(2) Despite clause (1) (a), a transfer order may include provisions relating to the following matters:

1. The disability benefits and life insurance described in subsection 98 (7) and the amount referred to in subsection 98 (8).
2. Any liability or obligation associated with a proceeding or potential proceeding relating to the Ontario Hydro Pension and Insurance Plan and the Pension and Insurance Fund of Ontario Hydro or relating to the Ontario Hydro Financial Corporation Pension Plan and the pension fund for it. 1998, c. 15, Sched. A, s. 137 (2).

Other transfer orders

Pension subsidiary of Financial Corporation

138 (1) The Lieutenant Governor in Council may make orders transferring officers, employees, assets, liabilities, rights and obligations of the subsidiary of the Financial Corporation established under section 110 to Hydro One Inc., Ontario Power Generation Inc., the IESO, the Board, the Electrical Safety Authority or any other person. 1998, c. 15, Sched. A, s. 138 (1); 2002, c. 1, Sched. A, s. 28 (1); 2004, c. 23, Sched. A, s. 56 (1).

Financial Corporation assets, etc.

(1.1) The Lieutenant Governor in Council may make orders transferring the following assets, liabilities, rights and obligations to Hydro One Inc., Ontario Power Generation Inc., the IESO, the Electrical Safety Authority or any other person:

1. Assets, liabilities, rights and obligations of, or relating to, the Ontario Hydro Pension and Insurance Plan and the Pension and Insurance Fund of Ontario Hydro.
2. Assets, liabilities, rights and obligations of, or relating to, the Ontario Hydro Financial Corporation Pension Plan and the Ontario Hydro Financial Corporation Pension Fund.
3. Assets, liabilities, rights and obligations of the Financial Corporation relating to an act or omission by the Financial Corporation in connection with its rights or duties under Part VII or by any other person in connection with the person's rights or duties under that Part. 2000, c. 42, s. 43 (1); 2002, c. 1, Sched. A, s. 28 (2); 2004, c. 23, Sched. A, s. 56 (2).

Restriction on scope of order

(1.2) An order under subsection (1.1) shall not contain a provision that conflicts with a provision of an agreement entered into under section 111. 2000, c. 42, s. 43 (1).

Applications of this Part

(2) This Part, except section 137, applies with necessary modifications to an order made under subsection (1) or (1.1) and, for that purpose,

- (a) a reference in this Part to a transfer order shall be deemed to be a reference to an order made under subsection (1) or (1.1), as the case may be;
- (b) a reference in this Part to Ontario Hydro in connection with an order made under subsection (1) shall be deemed to be a reference to the subsidiary of the Financial Corporation established under section 110; and
- (c) a reference in this Part to Ontario Hydro in connection with an order made under subsection (1.1) shall be deemed to be a reference to the Financial Corporation. 2000, c. 42, s. 43 (2).

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

2000, c. 42, s. 43 (1, 2) - 21/12/2000

2002, c. 1, Sched. A, s. 28 (1, 2) - 27/06/2002

2004, c. 23, Sched. A, s. 56 (1, 2) - 01/01/2005

Provincial liability not limited

139 The liability of the Province of Ontario as guarantor of a security or other liability of Ontario Hydro pursuant to a written guarantee given by the Province before this section comes into force is not limited by anything in this Act or by any transfer by or pursuant to a transfer order. 1998, c. 15, Sched. A, s. 139.

Regulations, Part X

140 (1) The Lieutenant Governor in Council may make regulations,

- (a) supplementing the provisions of this Part and governing the transfer of officers, employees, assets, liabilities, rights and obligations under this Part;
- (a.1) prescribing a date for the purposes of subsection 122 (6);
- (b) prescribing persons for the purpose of paragraph 8 of subsection 124 (2);
- (c) prescribing contracts or classes of contracts to which subsection 129 (1) does not apply, subject to such conditions or restrictions as may be prescribed by the regulations;
- (d) prescribing Acts or provisions of Acts that do not apply to a transfer for the purpose of section 135, subject to such conditions or restrictions as may be prescribed by the regulations. 1998, c. 15, Sched. A, s. 140 (1); 2002, c. 1, Sched. A, s. 29.

General or particular

(2) A regulation made under this section may be general or particular in its application. 1998, c. 15, Sched. A, s. 140 (2).

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

2002, c. 1, Sched. A, s. 29 - 27/06/2002

PART XI TRANSITION — MUNICIPAL ELECTRICITY UTILITIES

Interpretation, Part XI

141 (1) In this Part,

“transfer by-law” means a by-law made under section 145; (“règlement municipal de transfert ou de mutation”)

“transferee” means the corporation incorporated under the *Business Corporations Act* pursuant to section 142; (“destinataire”)

“transferor” means the municipal corporation, commission or other body whose employees, assets, liabilities, rights or obligations are transferred pursuant to a transfer by-law. (“auteur”) 1998, c. 15, Sched. A, s. 141 (1).

Same

(2) For the purposes of this Part, a municipal corporation generates, transmits, distributes or retails electricity indirectly if it carries on any of those activities through,

- (a) a commission established under the *Public Utilities Act* or any other general or special Act; or
- (b) any other body, however established. 1998, c. 15, Sched. A, s. 141 (2).

Incorporation of municipal electricity businesses

142 (1) One or more municipal corporations may cause a corporation to be incorporated under the *Business Corporations Act* for the purpose of generating, transmitting, distributing or retailing electricity. 1998, c. 15, Sched. A, s. 142 (1).

Holding companies

(1.1) A corporation that one or more municipal corporations caused to be incorporated under the *Business Corporations Act* after November 6, 1998 and before May 2, 2003 to acquire, hold, dispose of and otherwise deal with shares of a corporation that was incorporated pursuant to this section shall be considered to be a corporation incorporated pursuant to this section. 2004, c. 31, Sched. 11, s. 7.

Conversion of existing electricity businesses

(2) Not later than the second anniversary of the day this section comes into force, every municipal corporation that generates, transmits, distributes or retails electricity, directly or indirectly, shall cause a corporation to be incorporated under subsection (1) for the purpose of carrying on those activities. 1998, c. 15, Sched. A, s. 142 (2).

Two or more municipal corporations

(3) Two or more municipal corporations may incorporate a single corporation for the purpose of complying with subsection (2). 1998, c. 15, Sched. A, s. 142 (3).

Ownership

(4) The municipal corporation or corporations that incorporate a corporation pursuant to this section shall subscribe for all the initial shares issued by the corporation that are voting securities. 1998, c. 15, Sched. A, s. 142 (4).

Same

(5) A municipal corporation may acquire, hold, dispose of and otherwise deal with shares of a corporation incorporated pursuant to this section that carries on business in the municipality. 2002, c. 1, Sched. A, s. 30.

Not a local board, etc.

(6) A corporation incorporated pursuant to this section shall be deemed not to be a local board, public utilities commission or hydro-electric commission for the purposes of any Act. 1998, c. 15, Sched. A, s. 142 (6).

(7) REPEALED: 2004, c. 23, Sched. A, s. 57.

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

1999, c. 14, Sched. F, s. 3 - 22/12/1999

2002, c. 1, Sched. A, s. 30 - 07/11/1998

2004, c. 23, Sched. A, s. 57 - 01/01/2005; 2004, c. 31, Sched. 11, s. 7 - 16/12/2004

No new commissions

143 Except as provided by section 142, a municipal corporation shall not, after section 142 comes into force,

- (a) establish a commission or other body to generate, transmit, distribute or retail electricity; or
- (b) authorize a commission or other body that was established before section 142 came into force to generate, transmit, distribute or retail electricity, if the commission or other body was not authorized to carry on that activity immediately before section 142 came into force. 1998, c. 15, Sched. A, s. 143.

Restriction on municipal electricity activity

144 (1) After the second anniversary of the day section 142 comes into force, a municipal corporation shall not generate, transmit, distribute or retail electricity, directly or indirectly, except through a corporation incorporated under the *Business Corporations Act* pursuant to section 142. 1998, c. 15, Sched. A, s. 144.

Exception, renewable energy generation facilities

(2) Despite subsection (1) and section 143, a municipal corporation, a municipal service board, a city board or municipal services corporation may, subject to the prescribed rules, generate electricity by means other than through a corporation incorporated under the *Business Corporations Act* if,

- (a) the generation facility is a renewable energy generation facility that does not exceed 10 megawatts or such other capacity as may be prescribed by regulation; or
- (b) the generation facility meets the prescribed criteria. 2009, c. 12, Sched. B, s. 15.

Definition

(3) In this section,

“municipal services corporation” means a corporation established by a municipal corporation under section 203 of the *Municipal Act, 2001* or under section 148 of the *City of Toronto Act, 2006*. 2009, c. 12, Sched. B, s. 15.

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

2009, c. 12, Sched. B, s. 15 - 09/09/2009

Transfer by-laws

145 (1) The council of a municipality may make by-laws transferring employees, assets, liabilities, rights and obligations of the municipal corporation, or of a commission or other body through which the municipal corporation generates, transmits, distributes or retails electricity, to a corporation incorporated under the *Business Corporations Act* pursuant to section 142 for a purpose associated with the generation, transmission, distribution or retailing of electricity by the corporation incorporated pursuant to section 142. 1998, c. 15, Sched. A, s. 145 (1).

Debentures

(2) Despite subsection (1), a transfer by-law may not transfer any liabilities, rights or obligations arising under a debenture issued or authorized to be issued by a municipal corporation. 1998, c. 15, Sched. A, s. 145 (2).

Binding on all persons

(3) A transfer by-law is binding on the transferee, the transferor and all other persons. 1998, c. 15, Sched. A, s. 145 (3).

Same

(4) Subsection (3) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers. 1998, c. 15, Sched. A, s. 145 (4).

No consent required

(5) A transfer by-law does not require the consent of the transferor, the transferee or any other person. 1998, c. 15, Sched. A, s. 145 (5).

Description of things transferred

146 A transfer by-law may describe employees, assets, liabilities, rights or obligations to be transferred,

- (a) by reference to specific employees, assets, liabilities, rights or obligations;
- (b) by reference to any class of employees, assets, liabilities, rights or obligations; or
- (c) partly in accordance with clause (a) and partly in accordance with clause (b). 1998, c. 15, Sched. A, s. 146.

Employees

147 (1) The employment of an employee who is transferred by or pursuant to a transfer by-law is not terminated by the transfer and shall be deemed to have been transferred to the transferee without interruption in service. 1998, c. 15, Sched. A, s. 147 (1).

Service

(2) Service with the transferor of an employee who is transferred by or pursuant to a transfer by-law shall be deemed to be service with the transferee for the purpose of determining probationary periods, benefits or any other employment-related entitlements under the *Employment Standards Act* or any other Act or under any employment contract or collective agreement. 1998, c. 15, Sched. A, s. 147 (2).

No constructive dismissal

(3) An employee who is transferred by or pursuant to a transfer by-law shall be deemed not to have been constructively dismissed. 1998, c. 15, Sched. A, s. 147 (3).

Future changes

- (4) If an employee is transferred by or pursuant to a transfer by-law, nothing in this Act,
- (a) prevents the employment from being lawfully terminated after the transfer; or
 - (b) prevents any term or condition of the employment from being lawfully changed after the transfer. 1998, c. 15, Sched. A, s. 147 (4).

Reserve funds

148 (1) If employees or assets are transferred by or pursuant to a transfer by-law, the by-law or another transfer by-law shall transfer to the transferee,

- (a) the portion of any reserve fund established under section 33 of the *Development Charges Act, 1997* that relates to development charges collected in respect of electrical power services; and
- (b) the portion of any reserve fund referred to in section 63 of the *Development Charges Act, 1997* that relates to development charges collected in respect of electrical power services. 1998, c. 15, Sched. A, s. 148 (1).

Use of amount transferred

(2) Any amount transferred under subsection (1) shall be used by the transferee only to pay for capital costs in respect of electrical power services for which the amount transferred was collected. 1998, c. 15, Sched. A, s. 148 (2).

Effect on municipal by-law

(3) A municipal by-law that relates to development charges in respect of which an amount is transferred under subsection (1) ceases to apply in respect of electrical power services on the date of the transfer but otherwise continues to have effect, with necessary modifications. 1998, c. 15, Sched. A, s. 148 (3).

Payment for transfer

149 (1) A transfer by-law may require the transferor or the transferee to pay for anything transferred by or pursuant to the by-law and may specify to whom the payment shall be made. 1998, c. 15, Sched. A, s. 149 (1).

Amount of payment

- (2) The transfer by-law may,
- (a) fix the amount of the payment;
 - (b) specify a method for determining the amount of the payment; or
 - (c) provide that the amount of the payment be determined by a person designated by the by-law. 1998, c. 15, Sched. A, s. 149 (2).

Form of payment

- (3) The transfer by-law may require that the payment be made in cash, by set off, through the issuance of securities or in any other form specified by the by-law. 1998, c. 15, Sched. A, s. 149 (3).

Securities

- (4) If the transfer by-law requires that the payment be made through the issuance of securities, it may specify the terms and conditions of the securities or may authorize a person designated by the by-law to specify the terms and conditions. 1998, c. 15, Sched. A, s. 149 (4).

Valuations

- (5) A transfer by-law may,
- (a) fix the value of anything transferred by or pursuant to the by-law;
 - (b) specify a method for determining the value of anything transferred by or pursuant to the by-law; or
 - (c) provide that the value of anything transferred by or pursuant to the by-law be determined by a person designated by the by-law. 1998, c. 15, Sched. A, s. 149 (5).

Effective date of transfer

- 150** (1) A transfer by-law may specify a date not later than the second anniversary of the day section 142 comes into force as the date that a transfer takes effect and any interest in property that is transferred by the by-law vests in the transferee on that date. 1998, c. 15, Sched. A, s. 150 (1).

Effective on payment

- (2) A transfer by-law may provide that a transfer not take effect until payment has been made for anything transferred by or pursuant to the by-law. 1998, c. 15, Sched. A, s. 150 (2).

Retroactive transfer

- (3) A transfer by-law may provide that a transfer shall be deemed to have taken effect on a date earlier than the date the transfer by-law is made, but the effective date shall not be earlier than the day this section comes into force. 1998, c. 15, Sched. A, s. 150 (3).

Sequence of events

- (4) A transfer by-law may provide that transfers specified in the by-law and other transactions associated with the transfers shall be deemed to have occurred in a sequence and at times specified in the by-law. 1998, c. 15, Sched. A, s. 150 (4).

Statements in registered documents

- 151** (1) A statement, in a registered document to which a corporation incorporated under the *Business Corporations Act* pursuant to section 142 is a party, that land described in the document was transferred to the corporation, by or pursuant to a transfer by-law, from a municipal corporation or from a commission or other body through which a municipal corporation generated, transmitted, distributed or retailed electricity, and any other statement in the document relating to the transfer by-law, shall be deemed to be conclusive evidence of the facts stated. 1998, c. 15, Sched. A, s. 151 (1).

No new interest

- (2) Subsection (1) does not give any person an interest in land that the municipal corporation or the commission or other body did not have. 1998, c. 15, Sched. A, s. 151 (2).

References to unregistered transfer by-laws

- (3) A document that is otherwise capable of being registered or deposited under the *Registry Act* or registered under the *Land Titles Act* and that refers to an unregistered transfer by-law may be registered or deposited under the *Registry Act* or registered under the *Land Titles Act* despite any provision of those Acts. 1998, c. 15, Sched. A, s. 151 (3).

Definitions

(4) In this section,

“land” means land, tenements, hereditaments and appurtenances, or any estate or interest therein; (“bien-fonds”)

“registered document” means a document registered or deposited under the *Registry Act* or registered under the *Land Titles Act*. (“document enregistré”) 1998, c. 15, Sched. A, s. 151 (4).

Execution of agreements

152 A transfer by-law may require the transferor or the transferee,

- (a) to enter into any written agreement or execute any instrument specified in the by-law; and
- (b) to register in accordance with the by-law any agreement or instrument entered into or executed under clause (a). 1998, c. 15, Sched. A, s. 152.

Enforcement of things transferred

153 (1) A transfer by-law may provide,

- (a) that any liability or obligation that is transferred by the by-law may be enforced against the transferor, the transferee, or both of them; and
- (b) that any right that is transferred by the by-law may be enforced by the transferor, the transferee, or both of them. 1998, c. 15, Sched. A, s. 153 (1).

Release of transferor

(2) Subject to subsection (1), the transfer of a liability or obligation under this Part releases the transferor from the liability or obligation. 1998, c. 15, Sched. A, s. 153 (2).

Actions and other proceedings

154 Subject to section 153, any action or other proceeding that was commenced by or against the transferor before a transfer by-law takes effect and that relates to an employee, asset, liability, right or obligation that is transferred by the by-law shall be continued by or against the transferee. 1998, c. 15, Sched. A, s. 154.

Limitation periods

155 An action or other proceeding shall not be commenced against a transferee in respect of any employee, asset, liability, right or obligation that has been transferred to the transferee if, had there been no transfer, the time for commencing the action or other proceeding would have expired. 1998, c. 15, Sched. A, s. 155.

Certain rights not affected by transfer

156 (1) A transfer by or pursuant to a transfer by-law,

- (a) shall be deemed not to constitute,
 - (i) a breach, termination, repudiation or frustration of any contract, including a contract of employment or insurance,
 - (ii) a breach of any Act, regulation or municipal by-law, or
 - (iii) an event of default or force majeure;
- (b) shall be deemed not to give rise to a breach, termination, repudiation or frustration of any licence, permit or other right;
- (c) shall be deemed not to give rise to any right to terminate or repudiate a contract, licence, permit or other right; and
- (d) shall be deemed not to give rise to any estoppel. 1998, c. 15, Sched. A, s. 156 (1).

Exemptions

(2) Subsection (1) does not apply to the contracts prescribed by the regulations. 1998, c. 15, Sched. A, s. 156 (2).

Information

157 A transferor shall provide a transferee with records or copies of records, and other information, that are in its custody or control and that relate to an employee, asset, liability, right or obligation that is transferred by or pursuant to a transfer by-law, including personal information. 1998, c. 15, Sched. A, s. 157.

Transfer by-laws, other matters

158 A transfer by-law may contain provisions dealing with other matters not specifically referred to in this Part that the municipal council considers necessary or advisable in connection with a transfer. 1998, c. 15, Sched. A, s. 158.

Exemptions from other Acts

159 The *Land Transfer Tax Act*, the *Retail Sales Tax Act* and such other Acts or provisions as are prescribed by the regulations do not apply to any transfer of employees, assets, liabilities, rights or obligations by or pursuant to a transfer by-law. 1998, c. 15, Sched. A, s. 159; 2017, c. 2, Sched. 3, s. 2 (2).

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

2017, c. 2, Sched. 3, s. 2 (2) - 22/03/17

159.1 REPEALED: 2004, c. 23, Sched. A, s. 58.

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

2002, c. 23, s. 3 (26) - 09/12/2002

2004, c. 23, Sched. A, s. 58 - 09/12/2004

159.2 REPEALED: 2004, c. 23, Sched. A, s. 59.

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

2002, c. 23, s. 3 (26) - 09/12/2002

2004, c. 23, Sched. A, s. 59 - 09/12/2004

159.3 REPEALED: 2004, c. 23, Sched. A, s. 60.

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

2002, c. 23, s. 3 (26) - 09/12/2002

2004, c. 23, Sched. A, s. 60 - 09/12/2004

Regulations, Part XI

160 (1) The Lieutenant Governor in Council may make regulations,

- (a) supplementing the provisions of this Part and governing the transfer of employees, assets, liabilities, rights and obligations under this Part;
- (b) prescribing contracts or classes of contracts to which subsection 156 (1) does not apply, subject to such conditions or restrictions as may be prescribed by the regulations;
- (c) prescribing Acts or provisions of Acts that do not apply to a transfer for the purpose of section 159, subject to such conditions or restrictions as may be prescribed by the regulations. 1998, c. 15, Sched. A, s. 160 (1).

General or particular

(2) A regulation made under this section may be general or particular in its application. 1998, c. 15, Sched. A, s. 160 (2).

Conflict with other Acts

161 (1) This Part applies despite the provisions of the *Municipal Act, 2001* relating to the production, manufacture, distribution or supply of a public utility by a municipality or a municipal service board and despite any other general or special Act. 1998, c. 15, Sched. A, s. 161; 2002, c. 17, Sched. F, Table.

Same

(2) This Part applies despite the provisions of the *City of Toronto Act, 2006* relating to the production, manufacture, distribution or supply of a public utility by the City or by a city board as defined in subsection 3 (1) of that Act. 2006, c. 11, Sched. B, s. 4 (2).

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

2002, c. 17, Sched. F, Table - 01/01/2003

2006, c. 11, Sched. B, s. 4 (2) - 01/01/2007

PART XI.1
TRANSITION — ONTARIO POWER AUTHORITY, ONTARIO ENERGY BOARD, INDEPENDENT ELECTRICITY
SYSTEM OPERATOR

Definitions, Part XI.1

161.1 In this Part,

“transfer order” means an order made under section 161.2; (“décret de transfert”)

“transferee” means a person to whom assets, liabilities, rights or obligations are transferred by a transfer order; (“destinataire”)

“transferor” means the person from whom assets, liabilities, rights or obligations are transferred by a transfer order. (“auteur”) 2004, c. 23, Sched. A, s. 61.

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

2004, c. 23, Sched. A, s. 61 - 01/01/2005

Transfer orders

161.2 (1) The Lieutenant Governor in Council may make orders transferring the following:

1. Assets, liabilities, rights and obligations of the IESO relating to market surveillance and the Market Surveillance Panel to the Board.
2. Assets, liabilities, rights and obligations of the IESO relating to the forecasting of electricity demand and the adequacy and reliability of electricity resources for the medium and long term to the OPA. 2004, c. 23, Sched. A, s. 61.

Binding on all persons

(2) A transfer order is binding on the transferor, transferee and all other persons and does not require the consent of any person. 2004, c. 23, Sched. A, s. 61.

Same

(3) Subsection (2) applies despite any general or special Act or any rule of law, including an Act or rule of law that requires notice or registration of transfers. 2004, c. 23, Sched. A, s. 61.

Legislation Act, 2006, Part III

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a transfer order. 2004, c. 23, Sched. A, s. 61; 2006, c. 21, Sched. F, s. 136 (1).

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

2004, c. 23, Sched. A, s. 61 - 01/01/2005

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

Application of provisions of Part X

161.3 Sections 117, 118, 121 and 123, subsection 125 (1) and sections 126 to 135 apply for the purposes of this Part and, in the application of those provisions, references to Ontario Hydro shall be deemed to be references to the transferor under the transfer order. 2004, c. 23, Sched. A, s. 61.

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

2004, c. 23, Sched. A, s. 61 - 01/01/2005

Regulations

161.4 (1) The Lieutenant Governor in Council may make regulations,

- (a) supplementing the provisions of this Part and governing the transfer of assets, liabilities, rights and obligations under this Part;
- (b) prescribing contracts or classes of contracts to which subsection 129 (1), as made applicable by section 161.3, does not apply, subject to such conditions or restrictions as may be prescribed by the regulations;
- (c) prescribing Acts or provisions of Acts that do not apply to a transfer for the purpose of section 135, as made applicable by section 161.3, subject to such conditions or restrictions as may be prescribed by the regulations;

- (d) requiring the IESO, OPA and the Board to enter into contracts relating to the provision of services and such other matters as the Lieutenant Governor in Council considers necessary or advisable,
 - (i) to assist the Board and the Market Surveillance Panel with respect to market surveillance of the IESO-administered markets,
 - (ii) to assist the OPA with respect to the forecasting of electricity demand and the adequacy and reliability of electricity resources for the medium and long term. 2004, c. 23, Sched. A, s. 61.

General or particular

(2) A regulation under this section may be general or particular in its application. 2004, c. 23, Sched. A, s. 61.

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

2004, c. 23, Sched. A, s. 61 - 01/01/2005

162 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1998, c. 15, Sched. A, s. 162.

163 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1998, c. 15, Sched. A, s. 163.

Note: The Crown and its agents are protected from certain liabilities relating to or resulting from amendments made to this Act by the *Electricity Pricing, Conservation and Supply Act, 2002*, or from any action taken pursuant to those amendments or pursuant to regulations made under those amendments. See: 2002, c. 23, s. 6.

Français

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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 parallel¹, 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 case¹⁷, 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

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 legislation⁶⁷ 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
P.O. Box 2319
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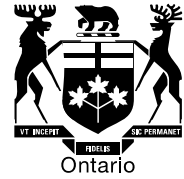
Fax: 416-440-7656

DATED at Toronto January 23, 2020

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary



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) of 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 1/10th 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)

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

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

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

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

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

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

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

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

19 **DECISION:**

20 MR. KAISER: Please be seated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 The aspects of the decision that AMPCO relies upon can

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

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

10 They go on to say:

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

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

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

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

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

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

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

21 "The Board concludes that stakeholder concerns
22 have been substantially met. The true test will,
23 however, be the experience of stakeholders in the
24 new process. Stakeholders and the Board will
25 have opportunities to review how well the process
26 works over time as they are implemented. The
27 Board therefore approves the IESO proposals on
28 its stakeholding process. It should be noted,

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

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

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

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

21 That completes the Board's ruling in this matter.

22 **PROCEDURAL MATTERS:**

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

26 MR. MARK: It probably makes sense.

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

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittreer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appellants*

c.

Zittreer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «LNE») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40a de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40a sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words “terminated by an employer” must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer’s bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l’historique législatif pour déterminer l’intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l’*Employment Standards Amendment Act, 1981*, étaient exemptés de l’obligation de verser des indemnités de cessation d’emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l’obligation de verser une indemnité de cessation d’emploi. Si tel n’était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l’ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40a sont examinés dans leur contexte global, les termes «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. La cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. Il était inutile d’examiner la question de l’applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d’avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. *ibid.*, s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
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Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40a(1) [abr. & rempl. *ibid.*, art. 5(1)].

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Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et Kathleen Martin, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

³ Pursuant to the receiving order, the respondent, Zittler, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittler, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

⁴ In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 \$). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

⁵ The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «LF») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «LNE»).

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7... .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

- a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;
- b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

- (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
 - (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
 - (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
 - (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
 - (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
 - (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
- and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

- c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;
 - d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;
 - e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;
 - f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;
 - g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;
 - h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,
- et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

- a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40a . . .

[TRANSLATION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

- a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;
- b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

- (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRANSDUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

- (3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date de la faillite, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the “*ESAA*”), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo’s former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n’avaient pas soutenu que les indemnités de licenciement et de cessation d’emploi devaient être prioritaires dans la distribution de l’actif, mais tout simplement qu’elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu’il ne convenait pas d’invoquer la jurisprudence et la doctrine portant sur l’interprétation des dispositions relatives à la priorité de la *LF*.

Même si la faillite ne met pas fin à la relation entre l’employeur et l’employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNF*, le juge Farley était d’avis que les employés en l’espèce avaient néanmoins droit à ces indemnités, car il s’agissait d’engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d’une part qu’aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d’une indemnité de licenciement et d’une indemnité de cessation d’emploi au moment de la cessation d’emploi et d’autre part que l’employeur en faillite est assujéti à l’obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l’employeur et l’employé, soit bien avant la faillite.

Le juge Farley a également examiné le par. 2(3) de l’*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l’*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l’indemnité de cessation d’emploi jusqu’à ce que les modifications aient reçu la sanction royale. Il était d’avis que cette disposition n’aurait pas été nécessaire si le législateur n’avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d’un licenciement s’appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d’obtenir des indemnités de licenciement et de cessation d’emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l’appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

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Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as “[n]o employer shall terminate the employment of an employee” (s. 40(1)), “the notice required by an employer to terminate the employment” (s. 40(2)), and “[a]n employer who has terminated or who proposes to terminate the employment of employees” (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase “employees have their employment terminated by an employer”. Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

Au nom d’une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s’arrêtant sur le libellé des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l’indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu’un employeur donne pour licencier» (par. 40(2)) et les «employés qu’un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l’indemnité de cessation d’emploi, il a cité l’al. 40a(1)a), à la p. 391, lequel contient l’expression «l’employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l’obligation d’accorder une indemnité de licenciement et une indemnité de cessation d’emploi aux cas où l’employeur licencie des employés. Selon lui, la cessation d’emploi résultant de l’effet de la loi, notamment de la faillite, n’entraîne pas l’application de la *LNE*.

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In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

À l’appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d’appel) a statué que les dispositions relatives à l’indemnité de licenciement de la *LNE* n’étaient pas conçues pour s’appliquer à l’employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l’appui de la proposition selon laquelle la faillite d’une compagnie à la demande d’un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

[TRADUCTION] Le libellé clair des art. 40 et 40a ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d’emploi que si l’employeur licencie l’employé. En l’espèce, la cessation d’emploi n’est pas le fait de l’employeur, elle résulte d’une ordonnance de séquestre rendue à l’encontre de Rizzo le 14 avril 1989, à la suite d’une pétition présentée par l’un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40a.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40a de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, “Where . . . fifty or more employees have their employment terminated by an employer. . . .” Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated “by an employer”.

licencier un employé . . . » Le paragraphe 40a(1a) contient également les mots: «si [. . .] l’employeur licencie cinquante employés ou plus . . . » Par conséquent, la question dans le présent pourvoi est de savoir si l’on peut dire que l’employeur qui fait faillite a licencié ses employés.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated “by an employer”, but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase “terminated by an employer” is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee’s employment is involuntarily terminated by reason of their employer’s bankruptcy, this constitutes termination “by an employer” for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

La Cour d’appel a répondu à cette question par la négative, statuant que, lorsqu’un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l’employeur mais par l’effet de la loi. La Cour d’appel a donc estimé que, dans les circonstances de l’espèce, les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNE* n’étaient pas applicables et qu’aucune obligation n’avait pris naissance. Les appelants répliquent que les mots «l’employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d’emploi volontaire et la cessation d’emploi forcée. Ils soutiennent que ce libellé visait à décharger l’employeur de son obligation de verser des indemnités de licenciement et de cessation d’emploi lorsque l’employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d’emploi forcée résultant de la faillite de l’employeur est assimilable au licenciement effectué par l’employeur pour l’exercice du droit à une indemnité de licenciement et à une indemnité de cessation d’emploi prévu par la *LNE*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Une question d’interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d’appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l’obligation de verser une indemnité de licenciement et une indemnité de cessation d’emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legisla-*

Bien que l’interprétation législative ait fait couler beaucoup d’encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of “...the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l’interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

[TRADUCTION] Aujourd’hui il n’y a qu’un seul principe ou solution: il faut lire les termes d’une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s’harmonise avec l’esprit de la loi, l’objet de la loi et l’intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m’appuie également sur l’art. 10 de la *Loi d’interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s’interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Bien que la Cour d’appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n’a pas accordé suffisamment d’attention à l’économie de la *LNE*, à son objet ni à l’intention du législateur; le contexte des mots en cause n’a pas non plus été pris en compte adéquatement. Je passe maintenant à l’analyse de ces questions.

Dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l’importance que notre société accorde à l’emploi et le rôle fondamental qu’il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C’est dans ce contexte que les juges majoritaires dans l’arrêt *Machtinger* ont défini, à la p. 1003, l’objet de la *LNE* comme étant la protection «...[d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination”. Accordingly, the majority concluded, at p. 1003, that, “. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not”.

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu’« . . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d’employés possible est à préférer à une interprétation qui n’a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to “cushion” employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L’objet des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L’article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L’une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s’ensuit que l’al. 40(7)a, qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu’un employeur n’a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l’absence d’une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2^e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer’s business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l’art. 40a, qui prévoit l’indemnité de cessation d’emploi, vient indemniser les employés ayant beaucoup d’années de service pour ces années investies dans l’entreprise de l’employeur et pour les pertes spéciales qu’ils subissent lorsqu’ils sont licenciés. Dans l’arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d’une décision rendue en matière de normes d’emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l’indemnité de cessation d’emploi:

Severance pay recognizes that an employee does make an investment in his employer’s business — the extent of this investment being directly related to the length of

[TRADUCTION] L’indemnité de cessation d’emploi reconnaît qu’un employé fait un investissement dans l’entreprise de son employeur — l’importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40a de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40a, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40a, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1^{er} janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

2. . . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

... any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *E.S.A.* ... it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

This interpretation is also consistent with statements made by the Minister of Labour at the time

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40a, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

[TRADUCTION] ... tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la *L.N.E.* [...] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . . .

. . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

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Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the “intent” of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

. . . .

. . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1^{er} janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

. . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40a de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats, supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

démnité de licenciement de l'ESA de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'ESA de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'ESA de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40a of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40a de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words “terminated by the employer” must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer’s bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer’s bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Adoptant l’interprétation libérale et généreuse qui convient aux lois conférant des avantages, j’estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l’intention du législateur, qui ressort du par. 2(3) de l’*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d’emploi en application de la *LNE* lorsque la cessation d’emploi résulte de la faillite de leur employeur serait aller à l’encontre des fins visées par les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi et minerait l’objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d’employés possible.

À mon avis, les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inequitable. De plus, je pense qu’une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. En raison de cette conclusion, j’estime inutile d’examiner l’autre conclusion tirée par le juge de première instance quant à l’applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu’après la faillite de Rizzo, les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, “[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law”. As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

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I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo’s former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l’emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d’emploi résulte de l’effet de la loi à la suite de la faillite de l’employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l’art. 17 de la *Loi d’interprétation* dispose que «[l]’abrogation ou la modification d’une loi n’est pas réputée constituer ou impliquer une déclaration portant sur l’état antérieur du droit», je précise que la modification apportée subséquemment à la loi n’a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d’avis d’accueillir le pourvoi et d’annuler le premier paragraphe de l’ordonnance de la Cour d’appel. Je suis d’avis d’y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d’indemnité de licenciement (y compris la paie de vacances due) et d’indemnité de cessation d’emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n’ayant produit aucun élément de preuve concernant les efforts qu’il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d’autorisation de pourvoi auprès de notre Cour en leur nom, je suis d’avis d’ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d’avis de ne pas modifier les ordonnances des juridictions inférieures à l’égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l’intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d’Ontario, Direction des normes d’emploi: Le procureur général de l’Ontario, Toronto.

Federal Power Com. v. Hope Natural Gas Co.

Supreme Court of the United States

October 20, 21, 1943, Argued ; January 3, 1944, Decided

No. 34

Reporter

320 U.S. 591 *; 64 S. Ct. 281 **; 88 L. Ed. 333 ***; 1944 U.S. LEXIS 1204 ****

FEDERAL POWER COMMISSION ET AL. v. HOPE
NATURAL GAS CO.

Prior History: [****1] CERTIORARI TO THE CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT. *

CERTIORARI, 319 U.S. 735, to review a decree setting
aside an order of the Federal Power Commission, 44 P.
U. R. (N. S.) 1, under the Natural Gas Act.

Disposition: 134 F.2d 287, reversed.

Syllabus

1. The validity of an order of the Federal Power Commission fixing rates under the Natural Gas Act is to be determined on judicial review by whether the impact or total effect of the order is just and reasonable rather than by the method of computing the rate base. P. 602.

2. One who seeks to have set aside an order of the Federal Power Commission fixing rates under the Natural Gas Act has the burden of showing convincingly that it is unjust and unreasonable in its consequences. P. 602.

3. An order of the Federal Power Commission reducing respondent's rates for sales of natural gas in interstate commerce, *held* valid under the Natural Gas Act. P. 603.

[****2] The rate base determined by the Commission was found by it to be the "actual legitimate cost" of the company's interstate property, less depletion and depreciation, plus allowances for unoperated acreage, working capital, and future net capital additions. "Reproduction cost new" and "trended original cost" were given no weight. Accrued depletion and

depreciation and the annual allowance for depletion and depreciation were determined by application of the "economic-service-life" method to "actual legitimate cost."

4. Considering the amount of the annual return which the company would be permitted to earn on its property in interstate service, and the various factors which that return reflects, this Court is unable to say that the rates fixed by the Commission are not "just and reasonable" under the Act. P. 604.

5. Rates which enable a natural gas company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed can not be condemned as unjust and unreasonable under the Natural Gas Act, even though they might produce only a meager return on a rate base computed on the "present fair value" method. P. [****3] 605.

6. The rationale of the decision renders it unnecessary to determine whether the Commission's exclusion from the rate base of well-drilling and other costs, previously charged to operating expenses, was consistent with the "prudent investment" theory as developed and applied in particular cases. P. 605.

7. *United Railways Co. v. West*, 280 U.S. 234, so far as it rejects cost as the basis of depreciation allowances, is disapproved. P. 606.

8. The requirements of the Constitution in respect of rates are not more exacting than the standards of the Act; and a rate order valid under the latter is consistent with the former. P. 607.

9. In fixing "just and reasonable" rates under §§ 4 and 5 of the Natural Gas Act, for natural gas sold in interstate commerce by a private operator through an established distribution system, the Commission was not required to take into consideration the indirect benefits -- affecting the economy, conservation policies, and tax revenues -- which the producing State might derive from higher valuations and rates. P. 609.

* Together with No. 35, *City of Cleveland v. Hope Natural Gas Co.*, also on writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit.

10. The suggestion that the Commission did not allow for gas production a return sufficient to induce private [****4] enterprise to perform completely and efficiently its functions for the public is unsupported. P. 615.

11. The Commission is not empowered by the provisions of §§ 4 and 5, which authorize it to fix "just and reasonable" rates, to fix rates calculated to discourage intrastate resales for industrial use. P. 616.

12. The question whether the rates charged by the company discriminate against domestic users and in favor of industrial users is not presented. P. 617.

13. Findings of the Commission as to the lawfulness of past rates, *held* not reviewable under § 19 (b) of the Act. P. 618.

Counsel: Assistant Attorney General Shea, with whom Solicitor General Fahy and Messrs. Paul A. Freund, K. Norman Diamond, Melvin Richter, Charles V. Shannon, Milford Springer, A. F. O'Neil, Clyde B. MacDonald, Harold A. Scragg, and Samuel Graff Miller were on the brief, for petitioners in No. 34; and Mr. Spencer W. Reeder, with whom Messrs. Robert E. May and Robert M. Morgan were on the brief, for petitioner in No. 35.

Mr. William B. Cockley, with whom Messrs. Walter J. Milde and William A. Dougherty were on the brief, for respondent.

By Special leave of Court, Mr. M. M. Neely, Governor of West [****5] Virginia, with whom Messrs. Ira J. Partlow, Assistant Attorney General, and W. W. Goldsmith were on the brief, for the State of West Virginia, as *amicus curiae*, urging affirmance.

Briefs of *amici curiae* were filed by Mr. Gay H. Brown, on behalf of the Public Service Commission of New York, and Messrs. John E. Benton and Frederick G. Hamley, on behalf of the National Association of Railroad and Utilities Commissioners, in No. 34, urging reversal; and by Messrs. Donald C. McCreery and Robert D. Garver, on behalf of the Cities Service Gas Co., in Nos. 34 and 35, urging affirmance.

Judges: Stone, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge; Roberts took no part in the consideration or decision of this case.

Opinion by: DOUGLAS

Opinion

[*593] [**283] [***340] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The primary issue in these cases concerns the validity under the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. § 717) of a rate order issued by the Federal Power Commission reducing the rates chargeable by Hope Natural Gas Co., 44 P. U. R. (N. S.) 1. On a petition for review of the order made pursuant to § 19 [****6] (b) of the Act, the [*594] Circuit Court of Appeals set it aside, one judge dissenting. 134 F.2d 287. The cases [**284] are here on petitions for writs of certiorari which we granted because of the public importance of the questions presented.

Hope is a West Virginia corporation organized in 1898. It is a wholly owned subsidiary of Standard Oil Co. (N. J.). Since the date of its organization, it has been in the business of producing, purchasing and marketing natural gas in that state. ¹ It sells some of that gas to local consumers in West Virginia. But the great bulk of it goes to five customer companies which receive it at the West Virginia line and distribute it in Ohio and in Pennsylvania. ² [***341] In July 1938 the cities of

¹Hope produces about one-third of its annual gas requirements and purchases the rest under some 300 contracts.

²These five companies are the East Ohio Gas Co., the Peoples Natural Gas Co., the River Gas Co., the Fayette County Gas Co., and the Manufacturers Light & Heat Co. The first three of these companies are, like Hope, subsidiaries of Standard Oil Co. (N. J.). East Ohio and River distribute gas in Ohio, the other three in Pennsylvania. Hope's approximate sales in m. c. f. for 1940 may be classified as follows:

 [Go to table1](#)

Local West Virginia sales

11,000,000

East Ohio

40,000,000

Peoples

10,000,000

River

400,000

Fayette

860,000

Cleveland and Akron filed complaints with the Commission charging that the rates collected by Hope from East Ohio Gas Co. (an affiliate of Hope which distributes gas in Ohio) were excessive and unreasonable. Later in 1938 the Commission on its own motion instituted an investigation to determine the reasonableness of all of Hope's interstate rates. In March [*595] 1939 the Public Utility Commission of Pennsylvania filed [****7] a complaint with the Commission charging that the rates collected by Hope from Peoples Natural Gas. Co. (an affiliate of Hope distributing gas in Pennsylvania) and two non-affiliated companies were unreasonable. The City of Cleveland asked that the challenged rates be declared unlawful and that just and reasonable rates be determined from June 30, 1939 to the date of the Commission's order. The latter finding was requested in aid of state regulation and to afford the Public Utilities Commission of Ohio a proper basis for disposition of a fund collected by East Ohio under bond from Ohio consumers since June 30, 1939. The cases were consolidated and hearings were held.

[****8] On May 26, 1942, the Commission entered its order and made its findings. Its order required Hope to decrease its future interstate rates so as to reflect a reduction, on an annual basis, of not less than \$ 3,609,857 in operating revenues. And it established "just and reasonable" average rates per m. c. f. for each of the five customer companies.³ In response to the prayer of the City of Cleveland the Commission also made findings as to the lawfulness of past rates, although concededly it had no authority under the Act to fix past rates or to award reparations. 44 P. U. R. (N. S.) p. 34. It found that the rates collected by Hope from East Ohio were unjust, unreasonable, excessive and therefore unlawful, by \$ 830,892 during 1939, \$ 3,219,551 during 1940, and \$ 2,815,789 on an annual basis since 1940. It further found that just, reasonable, and lawful rates for gas sold by Hope to East Ohio for

resale for ultimate public consumption were those required [*596] to produce \$ 11,528,608 for 1939, \$ 11,507,185 for 1940 and \$ 11,910,947 annually since 1940.

[****9] The Commission established an interstate rate base of \$ 33,712,526 which, it found, represented the "actual legitimate cost" of the company's interstate property less depletion and depreciation and plus unoperated acreage, working capital and future net capital additions. The Commission, beginning with book cost, made [**285] certain adjustments not necessary to relate here and found the "actual legitimate cost" of the plant in interstate service to be \$ 51,957,416, as of December 31, 1940. It deducted accrued depletion and depreciation, which it found to be \$ 22,328,016 on an "economic-service-life" basis. And it added \$ 1,392,021 for future net capital additions, \$ 566,105 for useful unoperated acreage, and \$ 2,125,000 for working capital. It used 1940 as a test year to estimate future revenues and expenses. It allowed over \$ 16,000,000 as annual operating expenses -- about \$ 1,300,000 for taxes, \$ 1,460,000 for depletion and depreciation, \$ 600,000 for exploration and development costs, \$ 8,500,000 for gas purchased. The Commission allowed a net increase of \$ 421,160 over 1940 operating expenses, which amount was to take care of future increase in wages, in West Virginia [****10] property taxes, and in exploration and development costs. The total amount of deductions allowed [***342] from interstate revenues was \$ 13,495,584.

Hope introduced evidence from which it estimated reproduction cost of the property at \$ 97,000,000. It also presented a so-called trended "original cost" estimate which exceeded \$ 105,000,000. The latter was designed "to indicate what the original cost of the property would have been if 1938 material and labor prices had prevailed throughout the whole period of the piecemeal construction of the company's property since 1898." 44 P. U. R. (N. S.), pp. 8-9. Hope estimated by the "per cent condition" method accrued depreciation at about 35% of [*597] reproduction cost new. On that basis Hope contended for a rate base of \$ 66,000,000. The Commission refused to place any reliance on reproduction cost new, saying that it was "not predicated upon facts" and was "too conjectural and illusory to be given any weight in these proceedings." *Id.*, p. 8. It likewise refused to give any "probative value" to trended "original cost" since it was "not founded in fact" but was "basically erroneous" and produced [****11] "irrational results." *Id.*, p. 9. In determining the amount of accrued depletion and depreciation the Commission, following

Manufacturers

2,000,000

Hope's natural gas is processed by Hope Construction & Refining Co., an affiliate, for the extraction of gasoline and butane. Domestic Coke Corp., another affiliate, sells coke-oven gas to Hope for boiler fuel.

³ These required minimum reductions of 7 cents per m. c. f. from the 36.5 cents and 35.5 cents rates previously charged East Ohio and Peoples, respectively, and 3 cents per m. c. f. from the 31.5 cents rate previously charged Fayette and Manufacturers.

Lindheimer v. Illinois Bell Tel. Co., 292 U.S. 151, 167-169; *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 592-593, based its computation on "actual legitimate cost." It found that Hope during the years when its business was not under regulation did not observe "sound depreciation and depletion practices" but "actually accumulated an excessive reserve" ⁴ of about \$ 46,000,000. *Id.*, p. 18. One member of the Commission thought that the entire amount of the reserve should be deducted from "actual legitimate cost" in determining the rate base. ⁵ [****13] The majority of the [*598] Commission concluded, however, that where, as here, a business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the deduction of the reserve requirement (actual existing depreciation and depletion) rather than the excessive reserve should be made so as to [**286] lay "a sound basis for future regulation and control of rates." [****12] *Id.*, p. 18. As we have pointed out, it determined accrued depletion and depreciation to be \$ 22,328,016; and it allowed approximately \$ 1,460,000 as the annual operating expense for depletion and depreciation. ⁶

⁴ The book reserve for interstate plant amounted at the end of 1938 to about \$ 18,000,000 more than the amount determined by the Commission as the proper reserve requirement. The Commission also noted that "twice in the past the company has transferred amounts aggregating \$ 7,500,000 from the depreciation and depletion reserve to surplus. When these latter adjustments are taken into account, the excess becomes \$ 25,500,000, which has been exacted from the ratepayers over and above the amount required to cover the consumption of property in the service rendered and thus to keep the investment unimpaired." 44 P. U. R. (N. S.), p. 22.

⁵ That contention was based on the fact that "every single dollar in the depreciation and depletion reserves" was taken "from gross operating revenues whose only source was the amounts charged customers in the past for natural gas. It is, therefore, a fact that the depreciation and depletion reserves have been contributed by the customers and do not represent any investment by Hope." *Id.*, p. 40. And see *Railroad Commission v. Cumberland Tel. & T. Co.*, 212 U.S. 414, 424-425; 2 Bonbright, *Valuation of Property* (1937), p. 1139.

⁶ The Commission noted that the case was "free from the usual complexities involved in the estimate of gas reserves because the geologists for the company and the Commission presented estimates of the remaining recoverable gas reserves which were about one per cent apart." 44 P. U. R. (N. S.), pp. 19-20.

The Commission utilized the "straight-line-basis" for determining the depreciation and depletion reserve

[****14] Hope's estimate of original cost [***343] was about \$ 69,735,000 -- approximately \$ 17,000,000 more than the amount found by the Commission. The item of \$ 17,000,000 was made up largely of expenditures which prior to December 31, 1938, were charged to operating expenses. Chief among those expenditures was some \$ 12,600,000 expended [*599] in well-drilling prior to 1923. Most of that sum was expended by Hope for labor, use of drilling-rigs, hauling, and similar costs of well-drilling. Prior to 1923 Hope followed the general practice of the natural gas industry and charged the cost of drilling wells to operating expenses. Hope continued that practice until the Public Service Commission of West Virginia in 1923 required it to capitalize such expenditures, as does the Commission under its present Uniform System of Accounts. ⁷ The Commission refused to add such items to the rate base stating that "No greater injustice to consumers could be done than to allow items as operating expenses and at a later date include them in the rate base, thereby placing multiple charges upon the consumers." *Id.*, p. 12. For the same reason the Commission excluded from the rate [****15] base about \$ 1,600,000 of expenditures on properties which Hope acquired from other utilities, the latter having charged those payments to operating expenses. The Commission disallowed certain other overhead items amounting to over \$ 3,000,000 which also had been previously charged to operating expenses. And it refused to add some \$ 632,000 as interest during construction since no interest was in fact paid.

Hope contended that it should be allowed a return of not less than 8%. The Commission found that an 8% return

requirements. It used estimates of the average service lives of the property by classes based in part on an inspection of the physical condition of the property. And studies were made of Hope's retirement experience and maintenance policies over the years. The average service lives of the various classes of property were converted into depreciation rates and then applied to the cost of the property to ascertain the portion of the cost which had expired in rendering the service.

The record in the present case shows that Hope is on the lookout for new sources of supply of natural gas and is contemplating an extension of its pipe line into Louisiana for that purpose. The Commission recognized in fixing the rates of depreciation that much material may be used again when various present sources of gas supply are exhausted, thus giving that property more than scrap value at the end of its present use.

⁷ See Uniform System of Accounts prescribed for Natural Gas Companies effective January 1, 1940, Account No. 332.1.

would be unreasonable but that 6 1/2% was a fair rate of return. That rate of return, applied to the rate base of \$ 33,712,526, would produce \$ 2,191,314 annually, as compared with the present income of not less than \$ 5,801,171.

The Circuit Court of Appeals set aside the order of the Commission for the following reasons. (1) It held that the rate base should reflect the "present [****16] fair value" of the [*600] property, that the Commission in determining the "value" should have considered reproduction cost and trended original cost, and that "actual legitimate cost" (prudent investment) was not the proper measure of "fair value" where price levels had changed since the investment. (2) It concluded that the well-drilling costs and overhead items in the amount of some \$ 17,000,000 should have been included in the rate base. (3) It held that accrued depletion and depreciation and the annual allowance for that expense should be computed on the basis of "present fair value" of the property, not on the basis of "actual legitimate cost."

[**287] The Circuit Court of Appeals also held that the Commission had no power to make findings as to past rates in aid of state regulation. But it concluded that those findings were proper as a step in the process of fixing future rates. Viewed in [***344] that light, however, the findings were deemed to be invalidated by the same errors which vitiated the findings on which the rate order was based.

Order Reducing Rates. [****17] Congress has provided in § 4 (a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission "shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." Sec. 5 (a) gives the Commission the power, after hearing, to determine the "just and reasonable rate" to be thereafter observed and to fix the rate by order. Sec. 5 (a) also empowers the Commission to order a "decrease where existing rates are unjust, . . . unlawful, or are not the lowest reasonable rates." And Congress has provided in § 19 (b) that on review of these rate orders the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Congress, however, has provided no formula by which the "just and reasonable" rate is to be determined. It has not filled in the [*601] details of the general prescription⁸ of § 4 (a) and § 5

(a). It has not expressed in a specific rule the fixed principle of "just and reasonable."

[****18] [1][2]When we sustained the constitutionality of the Natural Gas Act in the *Natural Gas Pipeline Co.* case, we stated that the "authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce." 315 U.S. p. 582. Rate-making is indeed but one species of price-fixing. *Munn v. Illinois*, 94 U.S. 113, 134. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. *Block v. Hirsh*, 256 U.S. 135, 155-157; *Nebbia v. New York*, 291 U.S. 502, 523-539 and cases cited. It does, however, indicate that "fair value" is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the [****19] matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.⁹

[*602] [3][4][5]We held in *Federal Power Commission v. Natural Gas Pipeline Co.*, *supra*, [****20] that the Commission was not bound to the use of any single

Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property." Subsection (b) provides that every natural-gas company on request shall file with the Commission a statement of the "original cost" of its property and shall keep the Commission informed regarding the "cost" of all additions, etc.

⁹ We recently stated that the meaning of the word "value" is to be gathered "from the purpose for which a valuation is being made. Thus the question in a valuation for rate making is how much a utility will be allowed to earn. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn." *Institutional Investors v. Chicago, M., St. P. & P. R. Co.*, 318 U.S. 523, 540.

⁸ Sec. 6 of the Act comes the closest to supplying any definite criteria for rate making. It provides in subsection (a) that, "The

formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." [***345] p. 586. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. *Id.*, p. 586. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. Cf. *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304-305, 314; *West Ohio Gas Co. v. Public Utilities Commission* (No. 1), 294 U.S. 63, 70; *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 692-693 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. [****21] Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. *Railroad Commission v. Cumberland Tel. & T. Co.*, 212 U.S. 414; *Lindheimer v. Illinois Bell Tel. Co.*, *supra*, pp. 164, 169; *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U.S. 388, 401.

[*603] [6]The rate-making process under the Act, i. e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that "regulation does not insure that the business shall produce net revenues." 315 U.S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial integrity [****22] of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity

of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U.S. 276, 291 (Mr. Justice Brandeis concurring). The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the [****23] investor or company viewpoint.

[7]We have already noted that Hope is a wholly owned subsidiary of the Standard Oil Co. (N. J.). It has no securities outstanding except stock. All of that stock has been owned by Standard since 1908. The par amount presently outstanding is approximately \$ 28,000,000 as compared with the rate base of \$ 33,712,526 established by [*604] the Commission. Of the total outstanding stock \$ 11,000,000 was issued in stock dividends. [***346] The balance, or about \$ 17,000,000, was issued for cash or other assets. During the four decades of its operations Hope has paid over \$ 97,000,000 in cash dividends. It had, moreover, accumulated by 1940 an earned surplus of about \$ 8,000,000. It had thus earned the total investment in the company nearly seven times. Down to 1940 it earned over 20% per year on the average annual amount of its capital stock issued for cash or other assets. On an average invested capital of some \$ 23,000,000 Hope's average earnings have been about 12% a year. And during this period it had accumulated in addition reserves for depletion and depreciation [****24] of about \$ 46,000,000. Furthermore, during 1939, 1940 and 1941, Hope paid dividends of 10% on its stock. And in the year 1942, during about half of which the lower rates were in effect, it paid dividends of 7 1/2%. From 1939-1942 its earned surplus increased from \$ 5,250,000 to about \$ 13,700,000, i. e., to almost half the par value of its outstanding stock.

As we have noted, the Commission fixed a rate of return which permits Hope to earn \$ 2,191,314 annually. In determining that amount it stressed the importance of maintaining the financial integrity of the [**289] company. It considered the financial history of Hope and a vast array of data bearing on the natural gas industry, related businesses, and general economic conditions. It noted that the yields on better issues of bonds of natural gas companies sold in the last few years were "close to 3 per cent," 44 P. U. R. (N. S.), p.

33. It stated that the company was a "seasoned enterprise whose risks have been minimized" by adequate provisions for depletion and depreciation (past and present) with "concurrent high profits," by "protected established markets, through affiliated distribution companies, in [****25] populous and industrialized areas," and by a supply of gas locally to meet all requirements, [*605] "except on certain peak days in the winter, which it is feasible to supplement in the future with gas from other sources." *Id.*, p. 33. The Commission concluded, "The company's efficient management, established markets, financial record, affiliations, and its prospective business place it in a strong position to attract capital upon favorable terms when it is required." *Id.*, p. 33.

[8][9]In view of these various considerations we cannot say that an annual return of \$ 2,191,314 is not "just and reasonable" within the meaning of the Act. Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return on the so-called [****26] "fair value" rate base. In that connection it will be recalled that Hope contended for a rate base of \$ 66,000,000 computed on reproduction cost new. The Commission points out that if that rate base were accepted, Hope's average rate of return for the four-year period from 1937-1940 would amount to 3.27%. During that period Hope earned an annual average return of about 9% on the average investment. It asked for no rate increases. Its properties were well maintained and operated. As the Commission says, such a modest rate of 3.27% suggests an "inflation of the base on which the rate has been computed." *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290, 312. Cf. *Lindheimer v. Illinois Bell Tel. Co.*, *supra*, p. 164. The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base.

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the \$ 17,000,000 of [***347] well-drilling and other costs to [*606] [****27] the rate base was consistent with the prudent investment theory as developed and applied in particular cases.

[10][11][12]Only a word need be added respecting

depletion and depreciation. We held in the *Natural Gas Pipeline Co.* case that there was no constitutional requirement "that the owner who embarks in a wasting-asset business of limited life shall receive at the end more than he has put into it." 315 U.S. p. 593. The Circuit Court of Appeals did not think that that rule was applicable here because Hope was a utility required to continue its service to the public and not scheduled to end its business on a day certain as was stipulated to be true of the *Natural Gas Pipeline Co.* But that distinction is quite immaterial. The ultimate exhaustion of the supply is inevitable in the case of all natural gas companies. Moreover, this Court recognized in *Lindheimer v. Illinois Bell Tel. Co.*, *supra*, the propriety of basing [****28] annual depreciation on cost.¹⁰ [****29] By such a procedure the [**290] utility is made whole and the integrity of its investment maintained.¹¹ No more is required.¹² We cannot approve the contrary holding [*607] of *United Railways Co. v. West*, 280 U.S. 234, 253-254. Since there are no constitutional requirements more exacting than the standards of the Act, a rate order which conforms to the latter does not run afoul of the former.

[13]*The Position of West Virginia.* The State of West Virginia, as well as its Public Service Commission, intervened in the proceedings before the Commission and participated in the hearings before it. They have

¹⁰ Chief Justice Hughes said in that case (292 U.S. pp. 168-169): "If the predictions of service life were entirely accurate and retirements were made when and as these predictions were precisely fulfilled, the depreciation reserve would represent the consumption of capital, on a cost basis, according to the method which spreads that loss over the respective service periods. But if the amounts charged to operating expenses and credited to the account for depreciation reserve are excessive, to that extent subscribers for the telephone service are required to provide, in effect, capital contributions, not to make good losses incurred by the utility in the service rendered and thus to keep its investment unimpaired, but to secure additional plant and equipment upon which the utility expects a return."

¹¹ See Mr. Justice Brandeis (dissenting) in *United Railways Co. v. West*, 280 U.S. 234, 259-288, for an extended analysis of the problem.

¹² It should be noted that the Act provides no specific rule governing depletion and depreciation. Sec. 9 (a) merely states that the Commission "may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas."

also filed a brief *amicus curiae* here and have participated in the argument at the bar. Their contention is that the result achieved by the rate order "brings consequences which are unjust to West Virginia and its citizens" and which [****30] "unfairly depress the value of gas, gas lands and gas leaseholds, unduly restrict development of their natural resources, and arbitrarily transfer their properties to the residents of other states without just compensation therefor."

West Virginia points out that the Hope Natural Gas Co. holds a large number of leases on both producing and unoperated properties. The owner or grantor receives from the operator or grantee delay rentals as compensation for postponed drilling. When a producing well is successfully brought in, the gas lease customarily continues indefinitely for the life of the field. In that case the [***348] operator pays a stipulated gas-well rental or in some cases a gas royalty equivalent to one-eighth of the gas marketed.¹³ [****33] Both the owner and operator have valuable property interests in the gas which are separately taxable under West Virginia law. The contention is that the reversionary interests in the leaseholds should be represented in the rate proceedings since it is their gas which is being sold in interstate [*608] commerce. It is argued, moreover, that the owners of the reversionary interests should have the benefit of the "discovery value" [****31] of the gas leaseholds, not the interstate consumers. Furthermore, West Virginia contends that the Commission in fixing a rate for natural gas produced in that State should consider the effect of the rate order on the economy of West Virginia. It is pointed out that gas is a wasting asset with a rapidly diminishing supply. As a result West Virginia's gas deposits are becoming increasingly valuable. Nevertheless the rate fixed by the Commission reduces that value. And that reduction, it is said, has severe repercussions on the economy of the State. It is argued in the first place that as a result of this rate reduction Hope's West Virginia property taxes may be decreased in view of the relevance which earnings have under West Virginia law in the assessment of property for tax purposes.¹⁴ Secondly, it is pointed out that West Virginia has a production tax¹⁵ on the "value" of the gas exported from the State. And

we are told that for purposes of that tax "value" becomes under West Virginia law "practically the substantial equivalent of market value." Thus West Virginia argues that undervaluation of Hope's gas leaseholds will cost the State many thousands of dollars in taxes. [****32] The effect, it is urged, is to impair West Virginia's tax structure for the benefit of Ohio and Pennsylvania consumers. West Virginia emphasizes, moreover, its deep interest in the conservation of its natural resources including its natural gas. It says that a reduction of the value of these leasehold values will jeopardize these conservation policies in three respects: (1) [**291] exploratory development of new fields will be discouraged; (2) abandonment of low-yield high-cost marginal wells will be hastened; and (3) secondary recovery of oil will be hampered. [*609] Furthermore, West Virginia contends that the reduced valuation will harm one of the great industries of the State and that harm to that industry must inevitably affect the welfare of the citizens of the State. It is also pointed out that West Virginia has a large interest in coal and oil as well as in gas and that these forms of fuel are competitive. When the price of gas is materially cheapened, consumers turn to that fuel in preference to the others. As a result this lowering of the price of natural gas will have the effect of depreciating the price of West Virginia coal and oil.

West Virginia insists that in neglecting this aspect of the problem the Commission failed to perform the function which Congress entrusted to it and that the case should be remanded to the Commission for a modification of its order.¹⁶

We have considered these contentions at length in view of the earnestness with which they have been urged upon us. We have searched the legislative history of the Natural Gas Act for any indication that Congress entrusted to the Commission the various considerations [****34] which [***349] West Virginia has advanced here. And our conclusion is that Congress did not.

[14]We pointed out in *Illinois Natural Gas Co. v. Public Service Co.*, 314 U.S. 498, 506, that the purpose of the Natural Gas Act was to provide, "through the exercise of

¹³ See Simonton, *The Nature of the Interest of the Grantee Under an Oil and Gas Lease* (1918), 25 W. Va. L. Quar. 295.

¹⁴ *West Penn Power Co. v. Board of Review*, 112 W. Va. 442, 164 S. E. 862.

¹⁵ W. Va. Rev. Code of 1943, ch. 11, Art. 13, §§ 2a, 3a.

¹⁶ West Virginia suggests as a possible solution (1) that a "going concern value" of the company's tangible assets be included in the rate base and (2) that the fair market value of gas delivered to customers be added to the outlay for operating expenses and taxes.

the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation." As stated in the House Report the "basic purpose" of this legislation was "to occupy" the field in which such cases as *Missouri v. [**610] Kansas Gas Co.*, 265 U.S. 298, and *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, had held the States might not act. H. Rep. No. 709, 75th Cong., 1st Sess., p. 2. In accomplishing that purpose the bill was designed to take "no authority from State commissions" [****35] and was "so drawn as to complement and in no manner usurp State regulatory authority." *Id.*, p. 2. And the Federal Power Commission was given no authority over the "production or gathering of natural gas." § 1 (b).

The primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies. Due to the hiatus in regulation which resulted from the *Kansas Gas Co.* case and related decisions state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states; and thus they were thwarted in local regulation. H. Rep. No. 709, *supra*, p. 3. Moreover, the investigations of the Federal Trade Commission had disclosed that the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies.¹⁷ State commissions, independent producers, and communities having or seeking the service were growing quite helpless against these combinations.¹⁸ These were the types of problems with which those participating [****36] in the hearings were preoccupied.¹⁹ Congress addressed itself to those specific evils.

[*611] The Federal Power Commission was given [**292] broad powers of regulation. The fixing of "just and reasonable" rates (§ 4) with the powers attendant

thereto²⁰ was the heart of the new regulatory system. Moreover, the Commission was given certain authority by § 7 (a), on a finding that the action was necessary or desirable "in the public interest," to require natural gas companies to extend or improve their transportation facilities and to sell gas to any authorized local [****37] distributor. By § 7 (b) it was given control over the abandonment of facilities or of service. And by § 7 (c), as originally enacted, no natural gas company could undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas was already being served by another company, or sell any natural gas in such a market, without obtaining a certificate of public convenience [***350] and necessity from the Commission. In passing on such applications for certificates of convenience and necessity the Commission was told by § 7 (c), as originally enacted, that it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." The latter provision was deleted from § 7 (c) when that subsection was amended by the Act of February 7, 1942, 56 Stat. 83. By that amendment limited grandfather rights were granted companies desiring to extend their facilities and services over the routes or within [****38] the area which they were already serving. Moreover, § 7 (c) was broadened so as to require certificates [*612] of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but in other situations as well.

[15] These provisions were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies. When it comes to cases of abandonment or of extensions of facilities or service, we may assume that, apart from the express exemptions²¹ contained [****39] in § 7, considerations

¹⁷ S. Doc. 92, Pt. 84-A, ch. XII, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong., 1st Sess.

¹⁸ S. Doc. 92, Pt. 84-A, chs. XII, XIII, *op. cit.*, *supra*, note 17.

¹⁹ See Hearings on H. R. 11662, Subcommittee of House Committee on Interstate & Foreign Commerce, 74th Cong., 2d Sess.; Hearings on H. R. 4008, House Committee on Interstate & Foreign Commerce, 75th Cong., 1st Sess.

²⁰ The power to investigate and ascertain the "actual legitimate cost" of property (§ 6), the requirement as to books and records (§ 8), control over rates of depreciation (§ 9), the requirements for periodic and special reports (§ 10), the broad powers of investigation (§ 14) are among the chief powers supporting the rate-making function.

²¹ Apart from the grandfather clause contained in § 7 (c), there is the provision of § 7 (f) that a natural gas company may enlarge or extend its facilities within the "service area" determined by the Commission without any further

of conservation are material to the issuance of certificates of public convenience and necessity. But the Commission was not asked here for a certificate of public convenience and necessity under § 7 for any proposed construction or extension. It was faced with a determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system. Secs. 4 and 5, not § 7, provide the standards for that determination. We cannot find in the words of the Act or in its history the slightest intimation or suggestion that the exploitation of consumers by private operators through the maintenance of high rates should be allowed to continue provided the producing states obtain indirect benefits from it. That apparently was the Commission's view of the matter, for the same arguments advanced here were presented to the Commission and not adopted by it.

[***40] We do not mean to suggest that Congress was unmindful of the interests of the producing states in their natural gas supplies when it drafted the Natural Gas Act. As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over [*613] "the production or gathering of natural gas." § 1 (b). In addition, Congress recognized the legitimate interests of the States in the conservation of natural gas. By § 11 Congress instructed the Commission to make reports on compacts between two or more States dealing with the conservation, production and transportation of natural gas.²² The Commission was also [**293] directed to recommend further legislation appropriate or necessary to carry out any proposed compact and "to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas." § 11 (a). Thus Congress was quite aware of the interests [***351] of the producing states in their natural gas supplies.²³ But it left the protection of

authorization.

²² See Act of July 7, 1943, c. 194, 57 Stat. 383, containing an "Interstate Compact to Conserve Oil and Gas" between Oklahoma, Texas, New Mexico, Illinois, Colorado, and Kansas.

²³ As we have pointed out, § 7 (c) was amended by the Act of February 7, 1942 (56 Stat. 83) so as to require certificates of public convenience and necessity not only where the extensions were being made to markets in which natural gas was already being sold by another company but to other

[*614] those interests [****41] to measures other than the maintenance of high rates to private companies. If the Commission is to be compelled to let the stockholders of natural gas companies have a feast so that the producing states may receive crumbs from that table, the present Act must be redesigned. Such a project raises questions of policy which go beyond our province.

[****42] It is hardly necessary to add that a limitation on the net earnings of a natural gas company from its interstate business is not a limitation on the power of the producing state either to safeguard its tax revenues from that industry²⁴ or to protect the interests of those who sell their gas to the interstate operator.²⁵ The

situations as well. Considerations of conservation entered into the proposal to give the Act that broader scope. H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 2-3. And see Annual Report, Federal Power Commission (1940) pp. 79, 80; Baum, *The Federal Power Commission and State Utility Regulation* (1942), p. 261.

The bill amending § 7 (c) originally contained a subsection (h) reading as follows: "Nothing contained in this section shall be construed to affect the authority of a State within which natural gas is produced to authorize or require the construction or extension of facilities for the transportation and sale of such gas within such State: Provided, however, That the Commission, after a hearing upon complaint or upon its own motion, may by order forbid any intrastate construction or extension by any natural-gas company which it shall find will prevent such company from rendering adequate service to its customers in interstate or foreign commerce in territory already being served." See Hearings on H. R. 5249, House Committee on Interstate & Foreign Commerce, 77th Cong., 1st Sess., pp. 7, 11, 21, 29, 32-33. In explanation of its deletion the House Committee Report stated, pp. 4-5: "The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection."

²⁴ We have noted that in the annual operating expenses of some \$ 16,000,000 the Commission included West Virginia and federal taxes. And in the net increase of \$ 421,160 over 1940 operating expenses allowed by the Commission was some \$ 80,000 for increased West Virginia property taxes. The adequacy of these amounts has not been challenged here.

²⁵ The Commission included in the aggregate annual operating

return which [**294] the Commission [*615] allowed was the net return after all such charges.

[****43] [16]It is suggested that the Commission has failed to perform its duty under the Act in that it has not allowed a return for gas production that will be [***352] enough to induce private enterprise to perform completely and efficiently its functions for the public. The Commission, however, was not oblivious of those matters. It considered them. It allowed, for example, delay rentals and exploration and development costs in operating expenses.²⁶ No serious attempt has been made here to show that they are inadequate. We certainly cannot say that they are, unless we are to substitute our opinions for the expert judgment of the administrators to whom Congress entrusted the decision. Moreover, if in light of experience they turn out to be inadequate for development of new sources of supply, the doors of the Commission are open for increased allowances. This is not an order for all time. The Act contains machinery for obtaining rate adjustments. § 4.

[****44] [17][18][19]But it is said that the Commission placed too low a rate on gas for industrial purposes as compared with gas for domestic purposes and that industrial uses should be discouraged. It should be noted in the first place that the rates which the Commission has fixed are Hope's interstate wholesale rates to distributors, not interstate rates to industrial users²⁷ and domestic consumers. We hardly [*616]

expenses which it allowed some \$ 8,500,000 for gas purchased. It also allowed about \$ 1,400,000 for natural gas production and about \$ 600,000 for exploration and development.

It is suggested, however, that the Commission in ascertaining the cost of Hope's natural gas production plant proceeded contrary to § 1 (b) which provides that the Act shall not apply to "the production or gathering of natural gas." But such valuation, like the provisions for operating expenses, is essential to the rate-making function as customarily performed in this country. Cf. Smith, *The Control of Power Rates in the United States and England* (1932), 159 *The Annals* 101. Indeed § 14 (b) of the Act gives the Commission the power to "determine the propriety and reasonableness of the inclusion in operating expenses, capital, or surplus of all delay rentals or other forms of rental or compensation for unoperated lands and leases."

²⁶ See note 25, *supra*.

²⁷ The Commission has expressed doubts over its power to fix rates on "direct sales to industries" from interstate pipelines as distinguished from "sales for resale to the industrial customers

can assume, in view of the history of the Act and its provisions, that the resales intrastate by the customer companies which distribute the gas to ultimate consumers in Ohio and Pennsylvania are subject to the rate-making powers of the Commission.²⁸ But in any event those rates are not in issue here. Moreover, we fail to find in the power to fix "just and reasonable" rates the power to fix rates which will disallow or discourage resales for industrial use. The Committee Report stated that the Act provided "for regulation along recognized [****45] and more or less standardized lines" and that there was "nothing novel in its provisions." H. Rep. No. 709, *supra*, p. 3. Yet if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a "novel" doctrine which has no express statutory sanction. The same would be true if we were to hold that the wasting-asset nature of the industry required the maintenance of the level of rates so that natural gas companies could make a greater profit on each unit of gas sold. Such theories of rate-making for this industry may or may not be desirable. The difficulty is that § 4 (a) and § 5 (a) contain only the conventional standards of rate-making for natural gas companies.²⁹ [****47] The [*617] Act of February 7, 1942, by broadening § 7 gave the Commission some additional authority to deal with the conservation aspects [***353] of the problem.³⁰ But § 4 (a) and § 5

of distributing companies." Annual Report, Federal Power Commission (1940), p. 11.

²⁸ Sec. 1 (b) of the Act provides: "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." And see § 2 (6), defining a "natural-gas company," and H. Rep. No. 709, *supra*, pp. 2, 3.

²⁹ The wasting-asset characteristic of the industry was recognized prior to the Act as requiring the inclusion of a depletion allowance among operating expenses. See *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398, 404-405. But no such theory of rate-making for natural gas companies as is now suggested emerged from the cases arising during the earlier period of regulation.

³⁰ The Commission has been alert to the problems of conservation in its administration of the Act. It has indeed suggested that it might be wise to restrict the use of natural

(a) were not changed. If the standard [**295] of "just and reasonable" is to sanction the maintenance of high rates by a natural gas company because they restrict the use of natural gas for certain purposes, the Act must be further amended. [****46]

[20][21]It is finally suggested that the rates charged by Hope are discriminatory as against domestic users and in favor of industrial users. That charge is apparently based on § 4 (b) of the Act which forbids natural gas companies from maintaining "any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." The power of the Commission [****48] to eliminate any such unreasonable differences or discriminations is plain. § 5 (a). The Commission, however, made no findings under § 4 (b). Its failure in that regard was not challenged in the petition to review. And it has not been raised or argued here by any party. Hence the problem of discrimination has no proper place in the present decision. It will be time enough to pass on that issue when it is presented to us. Congress has entrusted the administration of the Act to the Commission, not to the courts. Apart from the requirements of judicial review it is not [*618] for us to advise the Commission how to discharge its functions.

[22]*Findings as to the Lawfulness of Past Rates.* As we have noted, the Commission made certain findings as to the lawfulness of past rates which Hope had charged its interstate customers. Those findings were made on the complaint of the City of Cleveland and in aid of state regulation. It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed [****49] and in force." § 5 (a). But the Commission maintains that it has the power to make findings as to the lawfulness of past rates even though it has no power to fix those rates.³¹ However

gas "by functions rather than by areas." Annual Report (1940) p. 79.

The Commission stated in that connection that natural gas was particularly adapted to certain industrial uses. But it added that the general use of such gas "under boilers for the production of steam" is "under most circumstances of very questionable social economy." *Ibid.*

³¹ The argument is that § 4 (a) makes "unlawful" the charging of any rate that is not just and reasonable. And § 14 (a) gives the Commission power to investigate any matter "which it may find necessary or proper in order to determine whether any

that may be, we do not think that these findings were reviewable under § 19 (b) of the Act. That section gives any party "aggrieved by an order" of the Commission a review "of such order" in the circuit court of appeals for the circuit where the natural gas company is located or has its principle place of business or in the United States Court of Appeals for the District of Columbia. We do not think that the findings in question fall within that category.

[****50] [23]The Court recently summarized the various types of administrative action or determination reviewable as orders under the Urgent Deficiencies Act of October 22, [*619] 1913, 28 U. S. C. [***354] §§ 45, 47a, and kindred statutory provisions. *Rochester Telephone Corp. v. United States*, 307 U.S. 125. It was there pointed out that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," it is not reviewable. *Id.*, p. 130. The Court said, "In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province." *Id.*, p. 130. [**296] And see *United States v. Los Angeles & Salt Lake R. Co.*, 273 U.S. 299, 309, 310; *Shannahan v. United States*, 303 U.S. 596. These considerations are apposite here. The Commission has no authority to enforce these findings. They are "the exercise [****51] solely of the function of investigation." *United States v. Los Angeles & Salt Lake R. Co.*, *supra*, p. 310. They are only a preliminary, interim step towards possible future action -- action not by the Commission but by wholly independent agencies. The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action.

Reversed.

person has violated" any provision of the Act. Moreover, § 5 (b) gives the Commission power to investigate and determine the cost of production or transportation of natural gas in cases where it has "no authority to establish a rate governing the transportation or sale of such natural gas." And § 17 (c) directs the Commission to "make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies." For a discussion of these points by the Commission see 44 P. U. R. (N. S.) pp. 34-35.

MR. JUSTICE ROBERTS took no part in the consideration or decision of this case.

Opinion of MR. JUSTICE BLACK and MR. JUSTICE MURPHY:

We agree with the Court's opinion and would add nothing to what has been said but for what is patently a wholly gratuitous assertion as to Constitutional law in the dissent of MR. JUSTICE FRANKFURTER. We refer to the statement that "Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co. v. Minnesota, supra*, may fairly be claimed." That was the case in which a majority of this Court was finally induced to expand the meaning [*620] of "due process" so as to give courts power to block efforts of the state and national governments to regulate economic [****52] affairs. The present case does not afford a proper occasion to discuss the soundness of that doctrine because, as stated in MR. JUSTICE FRANKFURTER's dissent, "that issue is not here in controversy." The salutary practice whereby courts do not discuss issues in the abstract applies with peculiar force to Constitutional questions. Since, however, the dissent adverts to a highly controversial due process doctrine and implies its acceptance by Congress, we feel compelled to say that we do not understand that Congress voluntarily has acquiesced in a Constitutional principle of government that courts, rather than legislative bodies, possess final authority over regulation of economic affairs. Even this Court has not always fully embraced that principle, and we wish to repeat that we have never acquiesced in it, and do not now. See *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 599-601.

Dissent by: REED; FRANKFURTER

Dissent

MR. JUSTICE REED, dissenting:

This case involves the problem of rate making under the Natural Gas Act. Added importance arises from the obvious fact that the principles stated are generally applicable to all federal agencies [****53] which are entrusted with the determination of rates for utilities. Because my views differ somewhat from those of my brethren, it may be of some value to set them out in a summary form.

The Congress may fix utility rates in situations subject to federal control without regard to any standard except

the constitutional standards of due process and for taking private [***355] property for public use without just compensation. *Wilson v. New*, 243 U.S. 332, 350. A Commission, however, does not have this freedom of action. Its powers are limited not only by the constitutional standards but also by the standards of the delegation. Here the standard added by the Natural Gas Act is that the rate be "just [*621] and reasonable." ¹ Section 6 ² [**297] throws additional light on the meaning of these words.

[****54] When the phrase was used by Congress to describe allowable rates, it had relation to something ascertainable. The rates were not left to the whim of the Commission. The rates fixed would produce an annual return and that annual return was to be compared with a theoretical just and reasonable return, all risks considered, on the fair value of the property used and useful in the public service at the time of the determination.

Such an abstract test is not precise. The agency charged with its determination has a wide range before it could properly be said by a court that the agency had disregarded statutory standards or had confiscated the property of the utility for public use. Cf. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418, 461-66, dissent. This is as Congress intends. Rates are left to an experienced agency particularly competent by training to appraise the amount required.

The decision as to a reasonable return had not been a source of great difficulty, for borrowers and lenders reached such agreements daily in a multitude of situations; and although the determination of fair value had been troublesome, its essentials had been worked out [****55] in fairness to investor and consumer by the

¹ Natural Gas Act, § 4 (a), 52 Stat. 821, 822, 15 U. S. C. § 717 (a).

² 52 Stat. 821, 824, 15 U. S. C. § 717e:

"(a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

"(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction."

time of the enactment [*622] of this Act. Cf. *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304 *et seq.* The results were well known to Congress and had that body desired to depart from the traditional concepts of fair value and earnings, it would have stated its intention plainly. *Helvering v. Griffiths*, 318 U.S. 371.

It was already clear that when rates are in dispute, "earnings produced by rates do not afford a standard for decision." 289 U.S. at 305. Historical cost, prudent investment and reproduction cost ³ were all relevant factors in determining fair value. Indeed, disregarding the pioneer investor's risk, if prudent investment and reproduction cost were not distorted by changes in price levels or technology, each of them would produce the same result. The realization from the risk of an investment in a speculative field, such as natural gas utilities, should be reflected [***356] in the present fair value. ⁴ The amount of evidence to be admitted on any point was of course in the agency's reasonable discretion, and it was free to [****56] give its own weight to these or other factors and to determine from all the evidence its own judgment as to the necessary rates.

[****57] [*623] I agree with the Court in not imposing a rule of prudent investment alone in determining the rate base. This leaves the Commission free, as I understand it, to use any available evidence for its finding of fair value, including both prudent investment and the cost of installing at the present time an efficient system for furnishing the needed utility service.

My disagreement with the Court arises primarily from its

³ "Reproduction cost" has been variously defined, but for rate-making purposes the most useful sense seems to be, the minimum amount necessary to create at the time of the inquiry a modern plant capable of rendering equivalent service. See I Bonbright, *Valuation of Property* (1937) 152. Reproduction cost as the cost of building a replica of an obsolescent plant is not of real significance.

"Prudent investment" is not defined by the Court. It may mean the sum originally put in the enterprise, either with or without additional amounts from excess earnings reinvested in the business.

⁴ It is of no more than bookkeeping significance whether the Commission allows a rate of return commensurate with the risk of the original investment or the lower rate based on current risk and a capitalization reflecting the established earning power of a successful company and the probable cost of duplicating its services. Cf. *A. T. & T. Co. v. United States*, 299 U.S. 232. But the latter is the traditional method.

view that it makes no [**298] difference how the Commission reached the rate fixed so long as the result is fair and reasonable. For me the statutory command to the Commission is more explicit. Entirely aside from the constitutional problem of whether the Congress could validly delegate its rate-making power to the Commission, *in toto* and without standards, it did legislate in the light of the relation of fair and reasonable to fair value and reasonable return. The Commission must therefore make its findings in observance of that relationship.

The Federal Power Commission did not, as I construe their action, disregard its statutory duty. They heard the evidence relating to historical and reproduction cost and to the reasonable rate of return, [****58] and they appraised its weight. The evidence of reproduction cost was rejected as unpersuasive, but from the other evidence they found a rate base, which is to me a determination of fair value. On that base the earnings allowed seem fair and reasonable. So far as the Commission went in appraising the property employed in the service, I find nothing in the result which indicates confiscation, unfairness or unreasonableness. Good administration of rate-making agencies under this method would avoid undue delay and render revaluations unnecessary except after violent fluctuations of price levels. Rate making under this method has been subjected to criticism. But until Congress changes the standards for the agencies, these rate-making bodies should continue the conventional theory of rate [*624] making. It will probably be simpler to improve present methods than to devise new ones.

But a major error, I think, was committed in the disregard by the Commission of the investment in exploratory operations and other recognized capital costs. These were not considered by the Commission because they were charged to operating expenses by the company at a time when it was unregulated.

[****59] Congress did not direct the Commission in rate making to deduct from the rate base capital investment which had been recovered during the unregulated period through excess earnings. In my view this part of the investment should no more have been disregarded in the rate base than any other capital investment which previously had been recovered and paid out in dividends or placed to surplus. Even if prudent investment throughout the life of the property is accepted as the formula for figuring the rate base, it seems to me [***357] illogical to throw out the admittedly prudent cost of part of the property because

the earnings in the unregulated period had been sufficient to return the prudent cost to the investors over and above a reasonable return. What would the answer be under the theory of the Commission and the Court, if the only prudent investment in this utility had been the seventeen million capital charges which are now disallowed?

For the reasons heretofore stated, I should affirm the action of the Circuit Court of Appeals in returning the proceeding to the Commission for further consideration and should direct the Commission to accept the disallowed capital investment [****60] in determining the fair value for rate-making purposes.

MR. JUSTICE FRANKFURTER, dissenting:

My brother JACKSON has analyzed with particularity the economic and social aspects of natural gas as well as [*625] the difficulties which led to the enactment of the Natural Gas Act, especially those arising out of the abortive attempts of States to regulate natural gas utilities. The Natural Gas Act of 1938 should receive application in the light of this analysis, and MR. JUSTICE JACKSON has, I believe, drawn relevant inferences regarding the duty of the Federal Power Commission in fixing natural gas rates. His exposition seems to me unanswered, and I shall say only a few words to emphasize my basic agreement with him.

For our society the needs that are met by public utilities are as truly public services as the traditional governmental functions of police and justice. They are not less so when these services are rendered by private enterprise under governmental regulation. Who ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. Foreshadowed nearly sixty years ago, *Railroad Commission Cases*, 116 U.S. 307, 331, [****61] it was decided more than fifty [**299] years ago that the final say under the Constitution lies with the judiciary and not the legislature. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418.

While legal issues touching the proper distribution of governmental powers under the Constitution may always be raised, Congressional acquiescence to date in the doctrine of *Chicago, M. & St. P. Ry. Co. v. Minnesota*, *supra*, may fairly be claimed. But in any event that issue is not here in controversy. As pointed out in the opinions of my brethren, Congress has given only limited authority to the Federal Power Commission and made the exercise of that authority subject to judicial review. The Commission is authorized to fix

rates chargeable for natural gas. But the rates that it can fix must be "just and reasonable." § 5 of the Natural Gas Act, 15 U. S. C. § 717 (d). Instead of making the Commission's rate determinations final, Congress [*626] specifically provided for court review of such orders. To be sure, "the finding of the Commission as to the facts, if supported by substantial evidence" was made "conclusive, [****62] " § 19 of the Act, 15 U. S. C. § 717r. But obedience of the requirement of Congress that rates be "just and reasonable" is not an issue of fact of which the Commission's own determination is conclusive. Otherwise, there would be nothing for a court to review except questions of compliance with the procedural provisions of the Natural Gas Act. Congress might have seen fit so to cast its legislation. But it has not done so. It has committed to the administration of the Federal Power Commission the duty of applying standards of fair dealing and of reasonableness relevant to the purposes expressed by the Natural Gas Act. The requirement that rates must be "just and reasonable" means just and reasonable in [***358] relation to appropriate standards. Otherwise Congress would have directed the Commission to fix such rates as in the judgment of the Commission are just and reasonable; it would not have also provided that such determinations by the Commission are subject to court review.

To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? It is at this point that MR. JUSTICE [****63] JACKSON's analysis seems to me pertinent. There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. See, for [*627] instance, §§ 4 (a) (b) (c) (d), 6, and 11, 15 U. S. C., §§ 717c (a) (b) (c) (d), 717c, and 717j. Of course the statute is not concerned with abstract theories of rate-making. But its very foundation is the "public interest," and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.

It will not do to say that it must all be left to the skill

of [****64] experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in *Smyth v. Ames*, 169 U.S. 466, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant. That may be an appropriate attitude when state action is challenged as unconstitutional. Cf. *Driscoll v. Edison Co.*, 307 U.S. 104. But it is not to be assumed that it was the design of Congress to make the accommodation of the conflicting interests exposed in MR. JUSTICE JACKSON's opinion the occasion for a blind clash of forces or a partial assessment of relevant factors, either before the Commission or here.

The objection to the Commission's action is not that the rates it granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the [**300] total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude [****65] that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided [*628] in determining that rates are "just and reasonable," and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by MR. JUSTICE JACKSON.

By MR. JUSTICE JACKSON:

Certainly the theory of the court below that ties rate-making to the fair-value-reproduction-cost formula should be overruled as in conflict with *Federal Power Commission v. Natural Gas Pipeline Co.*¹ But the case should, I think, be the occasion for reconsideration of our rate-making doctrine as applied to natural gas and should be returned to the Commission, for further consideration in the light thereof.

The Commission appears to have [***359] understood the effect of the two opinions in the *Pipeline* case to [****66] be at least authority and perhaps direction to fix natural gas rates by exclusive application of the "prudent investment" rate base theory. This has no warrant in the opinion of the Chief Justice for the Court, however, which released the Commission from

subservience to "any single formula or combination of formulas" provided its order, "viewed in its entirety, produces no arbitrary result." 315 U.S. at 586. The minority opinion I understood to advocate the "prudent investment" theory as a sufficient guide in a natural gas case. The view was expressed in the court below that since this opinion was not expressly controverted it must have been approved.² I disclaim this imputed [*629] approval with some particularity, because I attach importance at the very beginning of federal regulation of the natural gas industry to approaching it as the performance of economic functions, not as the performance of legalistic rituals.

[****67] I.

Solutions of these cases must consider eccentricities of the industry which gives rise to them and also to the Act of Congress by which they are governed.

The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field. We cannot even reproduce the gas, for our manufactured product has only about half the heating value per unit of nature's

² Judge Dobie, dissenting below, pointed out that the majority opinion in the *Pipeline* case "contains no express discussion of the Prudent Investment Theory" and that the concurring opinion contained a clear one, and said, "It is difficult for me to believe that the majority of the Supreme Court, believing otherwise, would leave such a statement unchallenged." The fact that two other Justices had as matter of record in our books long opposed the reproduction cost theory of rate bases and had commented favorably on the prudent investment theory may have influenced that conclusion. See opinion of Mr. Justice Frankfurter in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122, and my brief as Solicitor General in that case. It should be noted, however, that these statements were made, not in a natural gas case, but in an electric power case -- a very important distinction, as I shall try to make plain.

¹ 315 U.S. 575.

own.³

[***68] [**301] Natural gas in some quantity is produced in twenty-four states. It is consumed in only thirty-five states, and is [*630] available only to about 7,600,000 consumers.⁴ Its availability has been more localized than that of any other utility service because it has depended more on the caprice of nature.

The supply of the Hope Company is drawn from that old and rich and vanishing field that flanks the Appalachian mountains. Its center of production is Pennsylvania and West Virginia, with a fringe of lesser production in New York, Ohio, Kentucky, Tennessee, and the north end of Alabama. Oil was discovered in commercial quantities at [***360] a depth of only 69 1/2 feet near Titusville, Pennsylvania, in 1859. Its value then was about \$ 16 per barrel.⁵ The oil branch of the petroleum industry went forward at once, and with unprecedented speed. The area productive of oil and gas was roughed out by the drilling of over 19,000 "wildcat" wells, [***69] estimated to have cost over \$ 222,000,000. Of these, over 18,000, or 94.9 per cent, were "dry holes." About five per cent, or 990 wells, made discoveries of commercial importance, 767 of them resulting chiefly in oil and 223 in gas only.⁶ Prospecting for many years was a search for oil, and to strike gas was a misfortune. Waste during this period and even later is appalling. Gas was regarded as having no commercial value until about 1882, in which year the total yield was valued only at about \$ 75,000.⁷ Since then, contrary to oil, which has become cheaper, gas in this field has pretty steadily advanced in price.

While for many years natural gas had been distributed on a small scale for lighting,⁸ its acceptance was slow,

[*631] facilities for its utilization were primitive, and not until 1885 did it take on the appearance of a substantial industry.⁹ Soon monopoly [****70] of production or markets developed.¹⁰ To get gas from the mountain country, where it was largely found, to centers of population, where it was in demand, required very large investment. By ownership of such facilities a few corporate systems, each including several companies, controlled access to markets. Their purchases became the dominating factor in giving a market value to gas produced by many small operators. Hope is the market for over 300 such operators. By 1928 natural gas in the Appalachian field commanded an average price of 21.1 cents per m. c. f. at points of production and was bringing 45.7 cents at points of consumption.¹¹ The companies which controlled markets, however, did not rely on gas purchases alone. They acquired and held in fee or leasehold great acreage in territory proved by "wildcat" drilling. These large marketing system companies as well as many small independent owners and operators have carried on the commercial development of proved territory. The development risks appear from the estimate that up to 1928, 312,318 proved area wells had been sunk in the Appalachian field of which 48,962, or 15.7 per cent, failed to produce oil or gas in commercial [****71] quantity.¹²

[*632] With the source of supply thus tapped to serve centers of large demand, like Pittsburgh, Buffalo, [****72] Cleveland, Youngstown, Akron, and other industrial communities, the distribution of natural gas fast became big business. Its advantages as a [**302] fuel and its price commended it, and the business yielded a handsome return. All was merry and the goose hung high for consumers and gas companies alike until about the [***361] time of the first World War.

³ Natural gas from the Appalachian field averages about 1,050 to 1,150 B. T. U. content, while by-product manufactured gas is about 530 to 540. Moody's Manual of Public Utilities (1943) 1,350; Youngberg, Natural Gas (1930) 7.

⁴ Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

⁵ Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 78.

⁶ *Id.* at 62-63.

⁷ *Id.*, at 61.

⁸ At Fredonia, New York, in 1821, natural gas was conveyed from a shallow well to some thirty people. The lighthouse at Barcelona Harbor, near what is now Westfield, New York, was at about that time and for many years afterward lighted by gas

that issued from a crevice. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 8-9.

⁹ In that year Pennsylvania enacted "An Act to provide for the incorporation and regulation of natural gas companies." Penn. Laws 1885, No. 32.

¹⁰ See Steptoe and Hoffheimer's Memorandum for Governor Cornwell of West Virginia (1917) 25 West Virginia Law Quarterly 257; see also Report on Utility Corporations by Federal Trade Commission, Sen. Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess.

¹¹ Arnold and Kemnitzer, Petroleum in the United States and Possessions (1931) 73.

¹² *Id.* at 63.

Almost unnoticed by the consuming public, the whole Appalachian field passed its peak of production and started to decline. Pennsylvania, which to 1928 had given off about 38 per cent of the natural gas from this field, had its peak in 1905; Ohio, which had produced 14 per cent, had its peak in 1915; and West Virginia, greatest producer of all, with 45 per cent to its credit, reached its peak in 1917.¹³

Western New York and Eastern Ohio, on the fringe of the field, had some production but relied heavily on imports from Pennsylvania and West Virginia. Pennsylvania, a producing and exporting state, was a heavy consumer and supplemented [****73] her production with imports from West Virginia. West Virginia was a consuming state, but the lion's share of her production was exported. Thus the interest of the states in the North Appalachian supply was in conflict.

Competition among localities to share in the failing supply and the helplessness of state and local authorities in the presence of state lines and corporate complexities is a part of the background of federal intervention in the industry.¹⁴ West Virginia took the boldest measure. It legislated a priority in its entire production in favor of its own inhabitants. That was frustrated by an injunction [*633] from this Court.¹⁵ Throughout the region clashes in the courts and conflicting decisions evidenced public anxiety and confusion. It was held that the New York Public Service Commission did not have power to classify consumers and restrict their use of gas.¹⁶ That Commission held that a company could not abandon a part of its territory and still serve the rest.¹⁷ Some courts admonished the companies to take action to protect consumers.¹⁸ [****75] Several courts held that companies,

regardless of failing supply, must continue to take on customers, but such [****74] compulsory additions were finally held to be within the Public Service Commission's discretion.¹⁹ There were attempts to throw up franchises and quit the service, and municipalities resorted to the courts with conflicting results.²⁰ Public service commissions of consuming states were handicapped, for they had no control of the supply.²¹

[****76] [*634] Shortages [**303] during World War I occasioned the first intervention in [***362] the natural gas industry by the Federal Government. Under Proclamation of President Wilson the United States Fuel Administrator took control, stopped extensions, classified consumers and established a priority for domestic over industrial use.²² After the war federal

Natural Gas Co., 108 Misc. 696, 178 N. Y. S. 24; *Park Abbott Realty Co. v. Iroquois Gas Co.*, 102 Misc. 266, 168 N. Y. S. 673; *Public Service Commission v. Iroquois Natural Gas Co.*, 189 App. Div. 545, 179 N. Y. S. 230.

¹⁹ *People ex rel. Pennsylvania Gas Co. v. Public Service Commission*, 196 App. Div. 514, 189 N. Y. S. 478.

²⁰ *East Ohio Gas Co. v. Akron*, 81 Ohio St. 33, 90 N. E. 40; *Newcomerstown v. Consolidated Gas Co.*, 100 Ohio St. 494, 127 N. E. 414; *Gress v. Village of Ft. Loramie*, 100 Ohio St. 35, 125 N. E. 112; *Jamestown v. Pennsylvania Gas Co.*, 263 F. 437, 264 F. 1009. See also *United Fuel Gas Co. v. Railroad Commission*, 278 U.S. 300, 308.

²¹ The New York Public Service Commission said: "While the transportation of natural gas through pipe lines from one state to another state is interstate commerce . . . , Congress has not taken over the regulation of that particular industry. Indeed, it has expressly excepted it from the operation of the Interstate Commerce Commissions Law (Interstate Commerce Commissions Law, section 1). It is quite clear, therefore, that this Commission can not require a Pennsylvania corporation producing gas in Pennsylvania to transport it and deliver it in the State of New York, and that the Interstate Commerce Commission is likewise powerless. If there exists such a power, and it seems that there does, it is a power vested in Congress and by it not yet exercised. There is no available source of supply for the Crystal City Company at present except through purchasing from the Potter Gas Company. It is possible that this Commission might fix a price at which the Potter Gas Company should sell if it sold at all, but as the Commission can not require it to supply gas in the State of New York, the exercise of such a power to fix the price, if such power exists, would merely say, sell at this price or keep out of the State." *Lane v. Crystal City Gas Co.*, 8 New York Public Service Comm. Reports, Second District, 210, 212.

²² Proclamation by the President of September 16, 1918;

¹³ *Id.* at 64.

¹⁴ See Report on Utility Corporations by Federal Trade Commission, Sen. Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess.

¹⁵ *Pennsylvania v. West Virginia*, 262 U.S. 553. For conditions there which provoked this legislation, see 25 West Virginia Law Quarterly 257.

¹⁶ *People ex rel. Pavilion Gas Co. v. Public Service Commission*, 188 App. Div. 36, 176 N. Y. S. 163.

¹⁷ *Village of Falconer v. Pennsylvania Gas Co.*, 17 State Department Reports (N. Y.) 407.

¹⁸ See, for example, *Public Service Commission v. Iroquois*

control was abandoned. Some cities once served with natural gas became dependent upon a mixed gas of reduced heating value and relatively higher price.²³

[****77] Utilization of natural gas of highest social as well as economic return is domestic use for cooking and water [*635] heating, followed closely by use for space heating in homes. This is the true public utility aspect of the enterprise, and its preservation should be the first concern of regulation. Gas does the family cooking cheaper than any other fuel.²⁴ But its advantages do not end with dollars and cents cost. It is delivered without interruption at the meter as needed and is paid for after it is used. No money is tied up in a supply, and no space is used for storage. It requires no handling, creates no dust, and leaves no ash. It responds to thermostatic control. It ignites easily and immediately develops its maximum heating capacity. These incidental advantages make domestic life more liveable.

[****78] Industrial use is induced less by these qualities than by low cost in competition with other fuels. Of the gas exported from West Virginia by the Hope Company a very substantial part is used by industries. This wholesale use speeds exhaustion of supply and displaces other fuels. Coal miners and the coal industry, a large part of whose costs are wages, have complained

of unfair competition from low-priced industrial gas produced with relatively little labor cost.²⁵

Gas rate structures generally have favored industrial users. In 1932, in Ohio, the average yield on gas for domestic consumption was 62.1 cents per m. c. f. and on industrial, [*636] 38.7. In Pennsylvania, the figures were 62.9 against 31.7. West Virginia showed the least spread, domestic consumers paying 36.6 cents; and industrial, [***363] 27.7.²⁶ Although this [****79] spread is less than [**304] in other parts of the United States,²⁷ it can hardly be said to be self-justifying. It

²⁵ See Brief on Behalf of Legislation Imposing an Excise Tax on Natural Gas, submitted to N. R. A. by the United Mine Workers of America and the National Coal Association.

²⁶ Brief of National Gas Association and United Mine Workers, *supra* note 26, pp. 35, 36, compiled from Bureau of Mines Reports.

²⁷ From the source quoted in the preceding note the spread elsewhere is shown to be:

 [Go to table2](#)

State

Industrial

Domestic

Illinois

29.2

1.678

Louisiana

10.4

59.7

Oklahoma

11.2

41.5

Texas

13.1

59.7

Alabama

17.8

1.227

Georgia

Rules and Regulations of H. A. Garfield, Fuel Administrator, September 24, 1918.

²³ For example, the Iroquois Gas Corporation which formerly served Buffalo, New York, with natural gas ranging from 1050 to 1150 b. t. u. per cu. ft., now mixes a by-product gas of between 530 and 540 b. t. u. in proportions to provide a mixed gas of about 900 b. t. u. per cu. ft. For space heating or water heating its charges range from 65 cents for the first 10 m. c. f. per month to 55 cents for all above 25 m. c. f. per month. Moody's Manual of Public Utilities (1943) 1350.

²⁴ The United States Fuel Administration made the following cooking value comparisons, based on tests made in the Department of Home Economics of Ohio State University:

Natural gas at 1.12 per M. is equivalent to coal at \$ 6.50 per ton.

Natural gas at 2.00 per M. is equivalent to gasoline at 27 cents per gal.

Natural gas at 2.20 per M. is equivalent to electricity at 3 cents per k. w. h.

Natural gas at 2.40 per M. is equivalent to coal oil at 15 cents per gal.

Use and Conservation of Natural Gas, issued by U.S. Fuel Administration (1918) 5.

certainly is a very great factor in hastening decline of the natural gas supply.

About the time of World War I there were occasional and short-lived efforts by some hard-pressed companies to reverse this discrimination and adopt graduated rates, giving a low rate to quantities adequate for domestic use and graduating it upward to discourage industrial use.²⁸ [***637] These rates met opposition from industrial sources, of course, and since diminished revenues from industrial sources tended [****80] to increase the domestic price, they met little popular or commission favor. The fact is that neither the gas companies nor the consumers nor local regulatory bodies can be depended upon to conserve gas. Unless federal regulation will take account of conservation, its efforts seem, as in this case, actually to constitute a new threat to the life of the Appalachian supply.

[****81] II.

Congress in 1938 decided upon federal regulation of the industry. It did so after an exhaustive investigation of all aspects including failing supply and competition for the use of natural gas intensified by growing scarcity.²⁹ [****82] Pipelines from the Appalachian area to

22.9

1.043

²⁸ In Corning, New York, rates were initiated by the Crystal City Gas Company as follows: 70 cents for the first 5,000 cu. ft. per month; 80 cents from 5,000 to 12,000; \$ 1.00 for all over 12,000. The Public Service Commission rejected these rates and fixed a flat rate of 58 cents per m. c. f. *Lane v. Crystal City Gas Co.*, 8 New York Public Service Comm. Reports, Second District, 210.

The Pennsylvania Gas Company (National Fuel Gas Company group) also attempted a sliding scale rate for New York consumers, net per month as follows: First 5,000 feet, 35 cents; second 5,000 feet, 45 cents; third 5,000 feet, 50 cents; all above 15,000, 55 cents. This was eventually abandoned, however. The company's present scale in Pennsylvania appears to be reversed to the following net monthly rate: first 3 m. c. f., 75 cents; next 4 m. c. f., 60 cents; next 8 m. c. f., 55 cents; over 15 m. c. f., 50 cents. *Moody's Manual of Public Utilities* (1943) 1350. In New York it now serves a mixed gas.

For a study of effect of sliding scale rates in reducing consumption see 11 Proceedings of Natural Gas Association of America (1919) 287.

²⁹ See Report on Utility Corporations by Federal Trade

markets were in the control of a handful of holding company systems.³⁰ This created a highly concentrated control of the producers' market and of the consumers' supplies. While holding companies dominated both production [***364] and distribution they segregated those activities in separate [***638] subsidiaries,³¹ the effect of which, if not the purpose, was to isolate [***305] some end of the business from the reach of any one state commission. The cost of natural gas to consumers moved steadily upwards over the years, out of proportion to prices of oil, which, except for the element of competition, is produced under somewhat comparable conditions. The public came to feel that the companies were exploiting the growing scarcity of local gas. The problems of this region had much to do with creating the demand for federal regulation.

[****83] The Natural Gas Act declared the natural gas business to be "affected with a *public interest*," and its regulation "necessary in the *public interest*."³² Originally, and at the time this proceeding was commenced and tried, it also declared "the intention of Congress that natural gas shall be sold in interstate

Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess.

³⁰ Four holding company systems control over 55 per cent of all natural gas transmission lines in the United States. They are Columbia Gas and Electric Corporation, Cities Service Co., Electric Bond and Share Co., and Standard Oil Co. of New Jersey. Columbia alone controls nearly 25 per cent, and fifteen companies account for over 80 per cent of the total. Report on Utility Corporations by Federal Trade Commission, Sen. Doc. 92, Pt. 84-A, 70th Cong., 1st Sess., 28.

In 1915, so it was reported to the Governor of West Virginia, 87 per cent of the total gas production of that state was under control of eight companies. Steptoe and Hoffheimer, *Legislative Regulation of Natural Gas Supply in West Virginia*, 17 *West Virginia Law Quarterly* 257, 260. Of these, three were subsidiaries of the Columbia system and others were subsidiaries of larger systems. In view of inter-system sales and interlocking interests it may be doubted whether there is much real competition among these companies.

³¹ This pattern with its effects on local regulatory efforts will be observed in our decisions. See *United Fuel Gas Co. v. Railroad Commission*, 278 U.S. 300; *United Fuel Gas Co. v. Public Service Commission*, 278 U.S. 322; *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U.S. 290; *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398, and the present case.

³² 15 U. S. C. § 717 (a). (Italics supplied throughout this paragraph.)

commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate *consistent with the maintenance of adequate service in the public interest*.³³ While this was later dropped, there is nothing to indicate that it was not and is not still an accurate statement of purpose of the Act. Extension or improvement of facilities may be ordered when "necessary or desirable in the public interest," abandonment of facilities may be ordered when the supply is "depleted to the extent that the continuance of service is unwarranted, or that the *present or future public convenience or necessity* [*639] permit" abandonment and certain extensions can only be made on finding of "the *present or future* convenience and necessity." ³⁴ The Commission is required to take account of the ultimate [****84] use of the gas. Thus it is given power to suspend new schedules as to rates, charges, and classification of services except where the schedules are for the sale of gas "for resale for industrial use only," ³⁵ which gives the companies greater freedom to increase rates on industrial gas than on domestic gas. More particularly, the Act expressly forbids any undue preference or advantage to any person or "*any unreasonable difference in rates . . . either as between localities or as between classes of service*." ³⁶ And the power of the Commission expressly includes that to determine the "*just and reasonable rate, charge, classification, rule, regulation, practice, or contract* to be thereafter observed and in force." ³⁷

In view [****85] of the Court's opinion that the Commission in administering the Act may ignore discrimination, it is interesting that in reporting this Bill both the Senate and the House Committees on Interstate Commerce pointed out that in 1934, on a nation-wide average the price of natural gas per m. c. f. was 74.6 cents for domestic use, 49.6 cents for commercial use, and 16.9 for industrial use. ³⁸ I am not ready to think that supporters of a bill called attention to the striking fact that householders were being charged five times [***365] as much for their gas as industrial

users only as a situation which the Bill would do nothing to remedy. On the other hand the Act gave to the Commission what the Court aptly describes as "broad powers of regulation."

[*640] III.

This proceeding was initiated by the Cities of Cleveland and Akron. They alleged that the price charged by Hope for natural gas "for resale to domestic, commercial and small industrial consumers in [****86] Cleveland and elsewhere is excessive, unjust, unreasonable, greatly in excess of the price charged by Hope to nonaffiliated companies at wholesale for resale to domestic, commercial, and small industrial consumers, and *greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio, and therefore is further unduly discriminatory between customers and between classes of service*" (italics supplied). The company answered admitting differences in prices to affiliated and nonaffiliated companies and justifying them by differences in conditions of delivery. [**306] As to the allegation that the contract price is "greatly in excess of the price charged by Hope to East Ohio for resale to certain favored industrial consumers in Ohio," Hope did not deny a price differential, but alleged that industrial gas was not sold to "favored consumers" but was sold under contracts and schedules filed with and approved by the Public Utilities Commission of Ohio, and that certain conditions of delivery made it not "unduly discriminatory."

The record shows that in 1940 Hope delivered for industrial consumption 36,523,792 m. c. f. and for domestic [****87] and commercial consumption, 50,343,652 m. c. f. I find no separate figure for domestic consumption. It served 43,767 domestic consumers directly, 511,521 through the East Ohio Gas Company, and 154,043 through the Peoples Natural Gas Company, both affiliates owned by the same parent. Its special contracts for industrial consumption, so far as appear, are confined to about a dozen big industries.

[*641] Hope is responsible for such discrimination as exists in favor of these few industrial consumers. It controls both the resale price and use of industrial gas by virtue of the very interstate sales contracts over which the Commission is exercising its jurisdiction.

Hope's contract with East Ohio Company is an example. Hope agrees to deliver, and the Ohio Company to take, "(a) all natural gas requisite for the supply of the

³³ § 7 (c), 52 Stat. 825.

³⁴ 15 U. S. C. § 717f.

³⁵ *Id.*, § 717c (e).

³⁶ *Id.*, § 717c (b).

³⁷ *Id.*, § 717d (a).

³⁸ Sen. Rep. No. 1162, 75th Cong., 1st Sess., 2.

domestic consumers of the Ohio Company; (b) such amounts of natural gas as may be requisite to fulfill contracts made with the consent and approval of the Hope Company by the Ohio Company, or companies which it supplies with natural gas, for the sale of gas upon special terms and conditions for manufacturing purposes." The Ohio Company is required to read [****88] domestic customers' meters once a month and meters of industrial customers daily and to furnish all meter readings to Hope. The Hope Company is to have access to meters of all consumers and to all of the Ohio Company's accounts. The domestic consumers of the Ohio Company are to be fully supplied in preference to consumers purchasing for manufacturing purposes and "Hope Company can be required to supply gas to be used for manufacturing purposes only where the same is sold under special contracts which have first been submitted to and approved in writing by the Hope Company and which expressly provide that natural gas will be supplied thereunder only in so far as the same is not necessary to meet the requirements of domestic consumers supplied through pipe lines of the Ohio Company." This basic contract was supplemented from time to time, chiefly as to price. The last amendment was in a letter from Hope to East Ohio in 1937. It contained a special discount on industrial gas and a schedule of special [***366] industrial contracts, Hope reserving the right to make eliminations therefrom and agreeing that others might be added from time to [*642] time with its approval in writing. [****89] It said, "It is believed that the price concessions contained in this letter, *while not based on our costs*, are, under certain conditions, to our mutual advantage in maintaining and building up the volumes of gas sold by us [italics supplied]." ³⁹

³⁹ The list of East Ohio Gas Company's special industrial contracts thus expressly under Hope's control and their demands are as follows:

 [Go to table3](#)

Customer

Ordinary Daily Requirements.

Republic Steel Corporation

15,000,000

cu. ft.

Otis Steel Company

10,000,000

[**307] The Commission took no note of the charges of discrimination [****90] and made no disposition of the issue tendered on this point. It ordered a flat reduction in the price per m. c. f. of all gas delivered by Hope in interstate commerce. It made no limitation, condition, or provision as to what classes of consumers should get the benefit of the reduction. While the cities have accepted and are defending the reduction, it is my view that the discrimination of which they have complained is perpetuated and increased by the order of the Commission and that it violates the Act in so doing.

The Commission's opinion aptly characterizes its entire objective by saying that "bona fide investment figures now become all-important in the regulation of rates." It should be noted that the all-importance of this theory is not the result of any instruction from Congress. When the Bill to regulate gas was first before Congress it contained [*643] the following: "In determining just and reasonable rates the Commission shall fix such rate as will allow a fair return upon the actual legitimate prudent

Timken Roller Bearing Co

7,500,000

Youngstown Sheet & Tube Co

7,000,000

U.S. Steel Corp. -- Subsidiaries

6,500,000

General Electric Company

2,500,000

Pittsburgh Plate Glass Co

2,000,000

Niles Rolling Mill Company

1,500,000

Chase Brass & Copper Company

700,000

U.S. Aluminum Company

400,000

Mahoning Valley Steel Company

400,000

Babcock & Wilcox Company

400,000

Canton Stamping & Enameling Co

350,000

cost of the property used and useful for the service in question." H. R. 5423, 74th Cong., 1st Sess., Title III, § 312 (c). Congress rejected this language. See [****91] H. R. 5423, § 213 (211 (c)), and H. R. Rep. No. 1318, 74th Cong., 1st Sess., 30.

The Commission contends nevertheless that the "all important" formula for finding a rate base is that of prudent investment. But it excluded from the investment base an amount actually and admittedly invested of some \$ 17,000,000. It did so because it says that the Company recouped these expenditures from customers before the days of regulation from earnings above a fair return. But it would not apply all of such "excess earnings" to reduce the rate base as one of the Commissioners suggested. The reason for applying excess earnings to reduce the investment base roughly from \$ 69,000,000 to \$ 52,000,000 but refusing to apply them to reduce it from that to some \$ 18,000,000 is not found in a difference in the character of the earnings or in their reinvestment. The reason assigned is a difference in bookkeeping treatment many years before the Company was subject to regulation. The \$ 17,000,000, reinvested chiefly in well drilling, was treated on the books as expense. (The Commission now requires that drilling costs be carried to capital account.) The allowed rate base thus actually was determined [****92] by the Company's bookkeeping, not its investment. [***367] This attributes a significance to formal classification in account keeping that seems inconsistent with rational rate regulation.⁴⁰ Of [*644]

⁴⁰To make a fetish of mere accounting is to shield from examination the deeper causes, forces, movements, and conditions which should govern rates. Even as a recording of current transactions, bookkeeping is hardly an exact science. As a representation of the condition and trend of a business, it uses symbols of certainty to express values that actually are in constant flux. It may be said that in commercial or investment banking or any business extending credit success depends on knowing what not to believe in accounting. Few concerns go into bankruptcy or reorganization whose books do not show them solvent and often even profitable. If one cannot rely on accountancy accurately to disclose past or current conditions of a business, the fallacy of using it as a sole guide to future price policy ought to be apparent. However, our quest for certitude is so ardent that we pay an irrational reverence to a technique which uses symbols of certainty, even though experience again and again warns us that they are delusive. Few writers have ventured to challenge this American idolatry, but see Hamilton, *Cost as a Standard for Price*, 4 *Law and Contemporary Problems* 321, 323-25. He observes that "As the apostle would put it, accountancy is all things to all men. . . . Its purpose determines the character of a system of

course, the [**308] Commission would not and should not allow a rate base to be inflated by bookkeeping which had improperly capitalized expenses. I have doubts about resting public regulation upon any rule that is to be used or not depending on which side it favors.

[****93] [*645] The Company on the other hand, has not put its gas fields into its calculations on the present-value basis, although that, it contends, is the only lawful rule for finding a rate base. To do so would result in a rate higher than it has charged or proposes as a matter of good business to charge.

The case before us demonstrates the lack of rational relationship between conventional rate-base formulas and natural gas production and the extremities to which regulating bodies are brought by the effort to rationalize them. The Commission and the Company each stands on a different theory, and neither ventures to carry its theory to logical conclusion as applied to gas fields.

IV.

This order is under judicial review not because we interpose constitutional theories between a State and the business it seeks to regulate, but because Congress put upon the federal courts a duty toward administration of a new federal regulatory Act. If we are to hold that a given rate is reasonable just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone. If on the other hand we are to bring judgment of our own to [****94] the task, we should for the

accounts." He analyzes the hypothetical character of accounting and says "It was no eternal mold for pecuniary verities handed down from on high. It was -- like logic, or algebra, or the device of analogy in the law -- an ingenious contrivance of the human mind to serve a limited and practical purpose." "Accountancy is far from being a pecuniary expression of all that is industrial reality. It is an instrument, highly selective in its application, in the service of the institution of money making." As to capital account he observes "In an enterprise in lusty competition with others of its kind, survival is the thing and the system of accounts has its focus in solvency. . . . Accordingly depreciation, obsolescence, and other factors which carry no immediate threat are matters of lesser concern and the capital account is likely to be regarded as a secondary phenomenon. . . . But in an enterprise, such as a public utility, where continued survival seems assured, solvency is likely to be taken for granted. . . . A persistent and ingenious attention is likely to be directed not so much to securing the upkeep of the physical property as to making it certain that capitalization fails in not one whit to give full recognition to every item that should go into the account."

guidance of the regulators and the [***368] regulated reveal something of the philosophy, be it legal or economic or social, which guides us. We need not be slaves to a formula but unless we can point out a rational way of reaching our conclusions they can only be accepted as resting on intuition or predilection. I must admit that I possess no instinct by which to know the "reasonable" from the "unreasonable" in prices and must seek some conscious design for decision.

The Court sustains this order as reasonable, but what makes it so or what could possibly make it otherwise, [*646] I cannot learn. It holds that: "it is the result reached not the method employed which is controlling"; "the fact that the method employed to reach that result may contain infirmities is not then important" and it is not "important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at." The Court does lean somewhat on considerations of capitalization and dividend history and requirements for dividends on outstanding stock. But I can give no real weight to that for it is generally and I think [****95] deservedly in discredit as any guide in rate cases.⁴¹

Our books already contain so much talk of methods of rationalizing rates that we must appear ambiguous if we announce results without our working methods. We are confronted with regulation of a unique type of enterprise which I think requires considered rejection of much conventional utility doctrine and adoption of concepts of "just and reasonable" rates and practices and of the "public interest" that will take account of the peculiarities of the business.

The Court rejects the suggestions of this opinion. It says that the Committees in reporting the bill which became the Act said it provided "for regulation along recognized and more or less standardized lines" and that there was "nothing novel in its provisions." So saying it sustains a rate calculated on a novel variation of a rate base theory which itself had at the time of enactment of the legislation been recognized only in dissenting opinions. [****96] Our difference seems to be between unconscious innovation,⁴² and the

purposeful [**309] and deliberate innovation I [*647] would make to meet the necessities of regulating the industry before us.

Hope's business has two components of quite divergent character. One, while not a conventional common-carrier undertaking, is essentially a transportation enterprise consisting of conveying gas from where it is produced to point of delivery to the buyer. This is a relatively routine operation not differing substantially from many other utility operations. The service is produced by an investment in compression and transmission facilities. Its risks are those of investing [****97] in a tested means of conveying a discovered supply of gas to a known market. A rate base calculated on the prudent investment formula would seem a reasonably satisfactory measure for fixing a return from that branch of the business whose service is roughly proportionate to the capital invested. But it has other consequences which must not be overlooked. It gives marketability and hence "value" to gas owned by the company and gives the pipeline company a large power over the marketability and hence "value" of the production of others.

The other part of the business -- to reduce to possession an adequate supply of natural gas -- is of opposite [***369] character, being more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business. A thousand feet of gas captured and severed from real estate for delivery to consumers is recognized under our law as property of much the same nature as a ton of coal, a barrel of oil, or a yard of sand. The value to be allowed for it is the real battleground between the investor and consumer. It is from this part of the business that the chief difference between the parties as to a proper rate [****98] base arises.

Is it necessary to a "reasonable" price for gas that it be anchored to a rate base of any kind? Why did courts in the first place begin valuing "rate bases" in order to "value" something else? The method came into vogue [*648] in fixing rates for transportation service which the public obtained from common carriers. The public received none of the carriers' physical property but did make some use of it. The carriage was often a monopoly so there were no open market criteria as to reasonableness. The "value" or "cost" of what was put to use in the service by the carrier was not a remote or irrelevant consideration in making such rates. Moreover

⁴¹ See 2 Bonbright, Valuation of Property (1937) 1112.

⁴² Bonbright says, ". . . the vice of traditional law lies, not in its adoption of excessively rigid concepts of value and rules of valuation, but rather in its tendency to permit shifts in meaning that are inept, or else that are ill-defined because the judges that make them will not openly admit that they are doing so."

Id., 1170.

the difficulty of appraising an intangible service was thought to be simplified if it could be related to physical property which was visible and measurable and the items of which might have market value. The court hoped to reason from the known to the unknown. But gas fields turn this method topsy turvy. Gas itself is tangible, possessible, and does have a market and a price in the field. The value of the rate base is more elusive than that of gas. It consists of intangibles -- leaseholds and freeholds -- operated [****99] and unoperated -- of little use in themselves except as rights to reach and capture gas. Their value lies almost wholly in predictions of discovery, and of price of gas when captured, and bears little relation to cost of tools and supplies and labor to develop it. Gas is what Hope sells and it can be directly priced more reasonably and easily and accurately than the components of a rate base can be valued. Hence the reason for resort to a roundabout way of rate base price fixing does not exist in the case of gas in the field.

But if found, and by whatever method found, a rate base is little help in determining reasonableness of the price of gas. Appraisal of present value of these intangible rights to pursue fugitive gas depends on the value assigned to the gas when captured. The "present fair value" rate base, generally in ill repute, ⁴³ is not even [**310] urged by the gas company for valuing its fields.

[****100] [*649] The prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment. The amount and quality of service rendered by the usual utility will, at least roughly, be measured by the amount of capital it puts into the enterprise. But it has no rational application where there is no such relationship between investment and capacity to serve. There is no such relationship between investment and amount of gas produced. Let us assume that Doe and Roe each produces in West Virginia for delivery to Cleveland the same quantity of natural gas per day. Doe, however, through luck or foresight or whatever it takes, gets his gas from investing \$ 50,000 in leases and drilling. Roe drilled poorer territory, got smaller wells, and has invested \$ 250,000. Does anybody imagine that Roe

can get or ought to get for his gas five times as much as Doe because [***370] he has spent five times as much? The service one renders to society in the gas business is measured by what he gets out of the ground, not by what he puts into it, and there is little more relation between the investment and the results than in a game of poker.

[****101] Two-thirds of the gas Hope handles it buys from about 340 independent producers. It is obvious that the principle of rate-making applied to Hope's own gas cannot be applied, and has not been applied, to the bulk of the gas Hope delivers. It is not probable that the investment of any two of these producers will bear the same ratio to their investments. The gas, however, all goes to the same use, has the same utilization value and the same ultimate price.

To regulate such an enterprise by indiscriminately transplanting any body of rate doctrine conceived and [*650] adapted to the ordinary utility business can serve the "public interest" as the Natural Gas Act requires, if at all, only by accident. Mr. Justice Brandeis, the pioneer juristic advocate of the prudent investment theory for manmade utilities, never, so far as I am able to discover, proposed its application to a natural gas case. On the other hand, dissenting in *Pennsylvania v. West Virginia*, he reviewed the problems of gas supply and said, "In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous [****102] supervision and control required in so high a degree." 262 U.S. 553, 621. If natural gas rates are intelligently to be regulated we must fit our legal principles to the economy of the industry and not try to fit the industry to our books.

As our decisions stand the Commission was justified in believing that it was required to proceed by the rate base method even as to gas in the field. For this reason the Court may not merely wash its hands of the method and rationale of rate making. The fact is that this Court, with no discussion of its fitness, simply transferred the rate base method to the natural gas industry. It happened in *Newark Natural Gas & Fuel Co. v. City of Newark, Ohio*, 242 U.S. 405 (1917), in which the company wanted 25 cents per m. c. f., and under the Fourteenth Amendment challenged the reduction to 18 cents by ordinance. This Court sustained the reduction because the court below "gave careful consideration to the questions of the value of the property at the time of the inquiry," and whether the rate "would be sufficient to provide a fair return on the value of the property." The

⁴³ "The attempt to regulate rates by reference to a periodic or occasional reappraisal of the properties has now been tested long enough to confirm the worst fears of its critics. Unless its place is taken by some more promising scheme of rate control, the days of private ownership under government regulation may be numbered." 2 Bonbright, *Valuation of Property* (1937) 1190.

Court said this method was "based upon principles [****103] thoroughly established by repeated decisions of this court," citing many cases, not one of which involved natural gas or a comparable wasting natural resource. Then came issues as to state power to [*651] regulate as affected by the commerce clause. *Public Utilities Commission v. Landon*, 249 U.S. 236 (1919); *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920). These questions settled, the Court again was called upon in natural gas cases to consider state rate-making claimed to be invalid under the Fourteenth Amendment. *United Fuel Gas Co. v. Railroad Commission of Kentucky*, 278 U.S. 300 (1929); *United Fuel Gas Co. v. Public Service Commission of West Virginia*, 278 U.S. 322 (1929). Then, as now, the differences were "due [**311] chiefly to the difference in value ascribed by each to the gas rights and leaseholds." 278 U.S. 300, 311. No one seems to have questioned that the rate base method must be pursued and the controversy was as to what rate base must be used. Later the "value" of gas in the field was [***371] questioned in determining the amount [****104] a regulated company should be allowed to pay an affiliate therefor -- a state determination also reviewed under the Fourteenth Amendment. *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U.S. 290 (1934); *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio*, 292 U.S. 398 (1934). In both cases, one of which sustained and one of which struck down a fixed rate, the Court assumed the rate base method as the legal way of testing reasonableness of natural gas prices fixed by public authority, without examining its real relevancy to the inquiry.

Under the weight of such precedents we cannot expect the Commission to initiate economically intelligent methods of fixing gas prices. But the Court now faces a new plan of federal regulation based on the power to fix the price at which gas shall be allowed to move in interstate commerce. I should now consider whether these rules devised under the Fourteenth Amendment are the exclusive tests of a just and reasonable rate under the federal statute, inviting reargument directed to that point [*652] if necessary. As I see it now I would be prepared to hold that these rules [****105] do not apply to a natural gas case arising under the Natural Gas Act.

Such a holding would leave the Commission to fix the price of gas in the field as one would fix maximum prices of oil or milk or coal, or any other commodity. Such a price is not calculated to produce a fair return on

the synthetic value of a rate base of any individual producer, and would not undertake to assure a fair return to any producer. The emphasis would shift from the producer to the product, which would be regulated with an eye to average or typical producing conditions in the field.

Such a price fixing process on economic lines would offer little temptation to the judiciary to become back seat drivers of the price fixing machine. The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is economically wise to what is legally permissible. It is probable that price reductions would reach economically unwise and self-defeating limits before they would reach constitutional ones. Any constitutional problems growing out of price fixing are quite different than those that have heretofore been considered to inhere in rate making. [****106] A producer would have difficulty showing the invalidity of such a fixed price so long as he voluntarily continued to sell his product in interstate commerce. Should he withdraw and other authority be invoked to compel him to part with his property, a different problem would be presented.

Allowance in a rate to compensate for gas removed from gas lands, whether fixed as of point of production or as of point of delivery, probably best can be measured by a functional test applied to the whole industry. For good or ill we depend upon private enterprise to exploit these natural resources for public consumption. The function which an allowance for gas in the field should perform [*653] for society in such circumstances is to be enough and no more than enough to induce private enterprise completely and efficiently to utilize gas resources, to acquire for public service any available gas or gas rights and to deliver gas at a rate and for uses which will be in the future as well as in the present public interest.

The Court fears that "if we are now to tell the Commission to fix the rates so as to discourage particular uses, we would indeed be injecting into a rate case a 'novel' doctrine [****107] . . ." With due deference I suggest that there is nothing novel in the idea that any change in price of a service or commodity reacts to encourage or discourage its use. The question is not whether such consequences [***372] will or will not follow; the question is whether effects must be suffered blindly or may be intelligently selected, whether price control shall have targets at which it deliberately aims or shall be handled like a gun in the hands of one who does not know it is loaded.

We should recognize "price" for what it is -- a tool, a means, an expedient. In public [^{**312}] hands it has much the same economic effects as in private hands. Hope knew that a concession in industrial price would tend to build up its volume of sales. It used price as an expedient to that end. The Commission makes another cut in that same price but the Court thinks we should ignore the effect that it will have on exhaustion of supply. The fact is that in natural gas regulation price must be used to reconcile the private property right society has permitted to vest in an important natural resource with the claims of society upon it -- price must draw a balance between wealth and welfare.

[^{****108}] To carry this into techniques of inquiry is the task of the Commissioner rather than of the judge, and it certainly is no task to be solved by mere bookkeeping but requires the best economic talent available. There would doubtless be inquiry into the price gas is bringing in the [^{*654}] field, how far that price is established by arm's length bargaining and how far it may be influenced by agreements in restraint of trade or monopolistic influences. What must Hope really pay to get and to replace gas it delivers under this order? If it should get more or less than that for its own, how much and why? How far are such prices influenced by pipe line access to markets and if the consumers pay returns on the pipe lines how far should the increment they cause go to gas producers? East Ohio is itself a producer in Ohio. ⁴⁴ What do Ohio authorities require Ohio consumers to pay for gas in the field? Perhaps these are reasons why the Federal Government should put West Virginia gas at lower or at higher rates. If so what are they? Should East Ohio be required to exploit its half million acres of unoperated reserve in Ohio before West Virginia resources shall be supplied on a devalued [^{****109}] basis of which that State complains and for which she threatens measures of self keep? What is gas worth in terms of other fuels it displaces?

A price cannot be fixed without considering its effect on the production of gas. Is it an incentive to continue to exploit vast unoperated reserves? Is it conducive to deep drilling tests the result of which we may know only after trial? Will it induce bringing gas from afar to supplement or even to substitute for Appalachian gas?

⁴⁵ Can it be had from distant fields as cheap or

cheaper? If so, that competitive potentiality is certainly a relevant consideration. Wise regulation must also consider, as a private buyer would, what alternatives the producer has [^{*655}] if the price is not acceptable. Hope has intrastate business and domestic and industrial customers. What can it do by way [^{****110}] of diverting its supply to intrastate sales? What can it do by way of disposing of its operated or reserve acreage to industrial concerns or other buyers? What can West Virginia do by way of conservation laws, severance or other taxation, if the regulated rate offends? It must be borne in mind that while West Virginia was prohibited from giving her own inhabitants a priority that [^{***373}] discriminated against interstate commerce, we have never yet held that a good faith conservation act, applicable to her own, as well as to others, is not valid. In considering alternatives, it must be noted that federal regulation is very incomplete, expressly excluding regulation of "production or gathering of natural gas," and that the only present way to get the gas seems to be to call it forth by price inducements. It is plain that there is a downward economic limit on a safe and wise price.

[^{****111}] But there is nothing in the law which compels a commission to fix a price at that "value" which a company might give to its product by taking advantage of scarcity, or monopoly of supply. The very purpose of fixing maximum prices is to take away from the seller his opportunity to get all that otherwise the market would award him for his goods. This is a constitutional use of the power to fix maximum prices, *Block v. Hirsh*, 256 U.S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Highland v. Russell Car & Snow Plow Co.*, 279 U.S. 253, just as the fixing of minimum prices of goods in interstate commerce is constitutional although it takes away from the buyer the advantage in bargaining which market conditions would give him. *United States v. Darby*, 312 U.S. 100; *Mulford v. Smith*, 307 U.S. 38; *United States v. Rock Royal Cooperative*, 307 U.S. 533; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381. The Commission has power to fix [^{*656}] [^{****112}] a price that will be both maximum and minimum and it has the incidental right, and I think the duty, to choose the economic consequences it will promote or retard in production and also more importantly in consumption, to which I now

⁴⁴ East Ohio itself owns natural gas rights in 550,600 acres, 518,526 of which are reserved and 32,074 operated, by 375 wells. Moody's Manual of Public Utilities (1943) 5.

⁴⁵ Hope has asked a certificate of convenience and necessity

to lay 1,140 miles of 22-inch pipeline from Hugoton gas fields in southwest Kansas to West Virginia to carry 285 million cu. ft. of natural gas per day. The cost was estimated at \$ 51,000,000. Moody's Manual of Public Utilities (1943) 1760.

turn.

If we assume that the reduction in company revenues is warranted we then come to the question of translating the allowed return into rates for consumers or classes of consumers. Here the Commission fixed a single rate for all gas delivered irrespective of its use despite the fact that Hope has established what amounts to two rates -- a high one for domestic use and a lower one for industrial contracts.⁴⁶ The Commission can fix two prices for interstate gas as readily as one -- a price for resale to domestic users and another for resale to industrial users. This is the pattern Hope itself has established in the very contracts over which the Commission is expressly given jurisdiction. Certainly the Act is broad enough to permit two prices to be fixed instead of one, if the concept of the "public interest" is not unduly narrowed.

[****113] The Commission's concept of the public interest in natural gas cases which is carried today into the Court's opinion was first announced in the opinion of the minority in the *Pipeline* case. It enumerated only two "phases of the public interest: (1) the investor interest; (2) the consumer interest," which it emphasized to the exclusion of all others. 315 U.S. 575, 606. This will do well enough in dealing with railroads or utilities supplying manufactured gas, electric power, a communications service or transportation, where utilization of facilities does not impair their future usefulness. Limitation of supply, however, brings into a natural gas case another phase of the public interest that to my mind overrides both the owner [*657] and the consumer of that interest. Both producers and industrial consumers have served their [***374] immediate private interests at the expense of the long-range public interest. The public interest, of course, requires stopping unjust enrichment of the owner. But it also requires stopping unjust impoverishment of future generations. The public interest in the use by Hope's half million domestic consumers is quite a different [****114] one from the public interest in use by a baker's dozen of industries.

Prudent price fixing it seems to me must at the very threshold determine whether any part of an allowed return shall be permitted to be realized from sales of gas for resale for industrial use. Such use does tend to level out daily and seasonal peaks of domestic demand and

to some extent permits a lower charge for domestic service. But is that a wise way of making gas cheaper when, in comparison with any substitute, gas is already a cheap fuel? The interstate sales contracts provide that at times when demand is so great that there is not enough gas to go around domestic users shall first be served. Should the operation of this preference await the day of actual shortage? Since the propriety of a preference seems conceded, should it not operate to prevent the coming of a shortage as well as to mitigate its effects? Should industrial use jeopardize tomorrow's service to householders any more than today's? If, however, it is decided to cheapen domestic use by resort to industrial sales, should they be limited to the few uses [**314] for which gas has special values or extend also to those who use it only [****115] because it is cheaper than competitive fuels? ⁴⁷ And how much cheaper should industrial [*658] gas sell than domestic gas, and how much advantage should it have over competitive fuels? If industrial gas is to contribute at all to lowering domestic rates, should it not be made to contribute the very maximum of which it is capable, that is, should not its price be the highest at which the desired volume of sales can be realized?

⁴⁷ The Federal Power Commission has touched upon the problem of conservation in connection with an application for a certificate permitting construction of a 1,500-mile pipeline from southern Texas to New York City and says: "The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.

"Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy." Twentieth Annual Report of the Federal Power Commission (1940) 79.

⁴⁶ I find little information as to the rates for industries in the record and none at all in such usual sources as Moody's Manual.

[***116] If I were to answer I should say that the household rate should be the lowest that can be fixed under commercial conditions that will conserve the supply for that use. The lowest probable rate for that purpose is not likely to speed exhaustion much, for it still will be high enough to induce economy, and use for that purpose has more nearly reached the saturation point. On the other hand the demand for industrial gas at present rates already appears to be increasing. To lower [***375] further the industrial rate is merely further to subsidize industrial consumption and speed depletion. The impact of the flat reduction [*659] of rates ordered here admittedly will be to increase the industrial advantages of gas over competing fuels and to increase its use. I think this is not, and there is no finding by the Commission that it is, in the public interest.

There is no justification in this record for the present discrimination against domestic users of gas in favor of industrial users. It is one of the evils against which the Natural Gas Act was aimed by Congress and one of the evils complained of here by Cleveland and Akron. If Hope's revenues should be cut by some \$ 3,600,000 [****117] the whole reduction is owing to domestic users. If it be considered wise to raise part of Hope's revenues by industrial purpose sales, the utmost possible revenue should be raised from the least consumption of gas. If competitive relationships to other fuels will permit, the industrial price should be substantially advanced, not for the benefit of the Company, but the increased revenues from the advance should be applied to reduce domestic rates. For in my opinion the "public interest" requires that the great volume of gas now being put to uneconomic industrial use should either be saved for its more important future domestic use or the present domestic user should have the full benefit of its exchange value in reducing his present rates.

Of course the Commission's power directly to regulate does not extend to the fixing of rates at which the local company shall sell to consumers. Nor is such power required to accomplish the purpose. As already pointed out, the very contract the Commission is altering classifies the gas according to the purposes for which it is to be resold and provides differentials between the two classifications. It would only be necessary for the Commission [****118] to order [**315] that all gas supplied under paragraph (a) of Hope's contract with the East Ohio Company shall be [*660] at a stated price fixed to give to domestic service the entire reduction herein and any further reductions that may prove

possible by increasing industrial rates. It might further provide that gas delivered under paragraph (b) of the contract for industrial purposes to those industrial customers Hope has approved in writing shall be at such other figure as might be found consistent with the public interest as herein defined. It is too late in the day to contend that the authority of a regulatory commission does not extend to a consideration of public interests which it may not directly regulate and a conditioning of its orders for their protection. *Interstate Commerce Commission v. Railway Labor Executives Assn.*, 315 U.S. 373; *United States v. Lowden*, 308 U.S. 225.

Whether the Commission will assert its apparently broad statutory authorization over prices and discriminations is, of course, its own affair, not ours. It is entitled to its own notion of the "public interest" and its judgment of policy must prevail. [****119] However, where there is ground for thinking that views of this Court may have constrained the Commission to accept the rate-base method of decision and a particular single formula as "all important" for a rate base, it is appropriate to make clear the reasons why I, at least, would not be so understood. The Commission is free to face up realistically to the nature and peculiarity of the resources in its control, to foster their duration in fixing price, and to consider future interests in addition to those of investors and present consumers. If we return this case it may accept or decline the proffered freedom. This problem presents the Commission an unprecedented opportunity if it will boldly make sound economic considerations, instead of legal and accounting [***376] theories, the foundation of federal policy. I would return the case to the Commission and thereby be clearly quit of what now may appear to be some responsibility for perpetrating a short-sighted pattern of natural gas regulation.

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Duquesne Light Co. v. Barasch

Supreme Court of the United States

November 7, 1988, Argued ; January 11, 1989, Decided

No. 87-1160

Reporter

488 U.S. 299 *; 109 S. Ct. 609 **; 102 L. Ed. 2d 646 ***; 1989 U.S. LEXIS 313 ****; 57 U.S.L.W. 4083; 98 P.U.R.4th 253

DUQUESNE LIGHT CO. ET AL. v. BARASCH ET AL.

Prior History: [****1] APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

Disposition: 516 Pa. 142, 532 A. 2d 325, affirmed.

Syllabus

In 1967, appellant Pennsylvania electric utilities joined a venture to construct seven nuclear generating units. But in 1980, because of intervening events, including the Arab oil embargo and the accident at Three Mile Island, the participants canceled plans for construction of four of the plants. Thereafter appellant Duquesne Light Co. applied to the Pennsylvania Public Utility Commission (PUC) to obtain a rate increase and to amortize its expenditures on the canceled plants over 10 years. The PUC granted a rate increase that included an amount representing the first payment of the 10-year amortized recovery of Duquesne's costs in the aborted plants. Shortly before the close of the rate proceeding, a state law (Act 335) was enacted that provided that an electric utility's cost of construction of a generating facility shall not be made part of a rate base nor otherwise included in rates charged until such time as the facility "is used and useful in service to the public." The State Office of the Consumer Advocate moved the PUC to reconsider in light of [****2] this law, but the PUC on reconsideration affirmed its original rate order, reading the new law as excluding the costs of canceled plants from the rate base, but not as preventing their recovery through amortization. Meanwhile, the PUC similarly granted appellant Pennsylvania Power Co. a rate increase and authorized it to amortize its share of the canceled plants over a 10-year period. The Consumer Advocate appealed both PUC decisions to the Pennsylvania Commonwealth Court, which held that the PUC had correctly construed Act 335. The Pennsylvania Supreme Court reversed, holding that Act 335 prohibited recovery of the costs in

question either by inclusion in the rate base or by amortization, and that the statute did not take appellants' property in violation of the Takings Clause of the Fifth Amendment, applicable to the States under the Fourteenth Amendment. The court remanded the case to the PUC for further proceedings to correct its rate orders, giving effect to the exclusion required by Act 335.

Held:

1. This Court has jurisdiction to decide the case under 28 U. S. C. § 1257(2), which authorizes the Court to review by appeal "[f]inal [****3] judgments . . . rendered by the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Although the Pennsylvania Supreme Court remanded the case for further proceedings to revise the rate orders, that court's judgment is final for purposes of this Court's appellate jurisdiction. The state court's last word on Act 335's constitutionality has been presented, and all that remains is the straightforward application of its clear directive to otherwise complete rate orders. Pp. 306-307.

2. A state scheme of utility regulation, such as is involved here, does not "take" property simply because it disallows recovery of capital investments that are not "used and useful in service to the public." Pp. 307-316.

(a) Under the "prudent investment" or "historical cost" rule, a utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. It was ruled in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, [****4] that historical cost was a valid basis on which to calculate utility compensation. Pp. 307-312.

(b) The Constitution does not require that subsidiary aspects of Pennsylvania's ratemaking methodology be examined piecemeal, as appellants argue. State

legislatures are competent bodies to set utility rates, and the PUC is essentially an administrative arm of the legislature. Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it, as appellants do here by noting Act 335's theoretical inconsistency in suddenly and selectively applying the "used and useful requirement," normally associated with the fair value method of ratesetting, in the context of Pennsylvania's system based on historical costs. Pp. 313-314.

(c) In this case, at all relevant times, Pennsylvania's rate system has been predominantly but not entirely based on historical costs, and it has not been shown that the rate orders in question as modified by Act 335 failed to give a reasonable rate of return on equity given the risk under such a regime. Therefore, Act 335's limited effect on those rate orders does not result in [****5] constitutionally impermissible rates. Pp. 314-315.

(d) But adoption of the "prudent investment" rule as the single constitutional standard of valuation would be inconsistent with the view of the Constitution that this Court has taken since *Hope Natural Gas* and would unnecessarily foreclose alternatives that could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public. Pp. 315-316.

Counsel: Peter Buscemi argued the cause for appellants. With him on the briefs were Alan L. Reed, William E. Zeiter, John F. Stillmun III, James R. Edgerly, Stephen L. Feld, Christine A. Hansen, and Larry R. Crayne.

Irwin A. Popowsky argued the cause for appellees and filed a brief for appellee David M. Barasch. With him on the brief were David M. Barasch, pro se, and Daniel Clearfield. Daniel P. Delaney, Bohdan R. Pankiw, and John A. Levin filed a brief for appellee Pennsylvania Public Utility Commission. *

* Briefs of amici curiae urging reversal were filed for the Edison Electric Institute by Robert L. Baum and Peter B. Kelsey; and for the Pennsylvania Electric Association by Rex E. Lee, David W. Carpenter, Vincent Butler, and David T. Evrard.

Briefs of amici curiae urging affirmance were filed for the Consumer Federation of America et al. by Scott Hempling and Roger Colton; for the National Association of Regulatory Utility Commissioners by William Paul Rodgers, Jr.; for the National

[****6]

Judges: REHNQUIST, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, in which WHITE and O'CONNOR, JJ., joined, post, p. 317. BLACKMUN, J., filed a dissenting opinion, post, p. 317.

Opinion by: REHNQUIST

Opinion

[*301] [***653] [**612] CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

[1A] Pennsylvania law required that rates for electricity be fixed without consideration of a utility's expenditures for electrical generating facilities which were planned but never built, even though the expenditures were prudent and reasonable when made. The Supreme Court of Pennsylvania held that such a law did not take the utilities' property in violation of the Fifth Amendment to the United States Constitution. We agree with that conclusion, and hold that a [*302] state scheme of utility regulation does not "take" property simply because it disallows recovery of capital investments that are not "used and useful in service to the public." 66 Pa. Cons. Stat. § 1315 (Supp. 1988).

I

In response to predictions of increased demand for electricity, Duquesne Light Company (Duquesne) and Pennsylvania [****7] Power Company (Penn Power) joined a venture in 1967 to build more generating capacity. The project, known as the Central Area Power Coordination Group (CAPCO), involved three other electric utilities and had as its objective the construction of seven large nuclear generating units. In 1980 the participants canceled plans for [**613] construction of four of the plants. Intervening events, including the Arab oil embargo and the accident at Three Mile Island, had

Association of State Utility Consumer Advocates by Raymon E. Lark, Jr.; and for the National Governor's Association et al. by Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, and Brian J. Moline.

H. Lee Roussell and David M. Kleppinger filed a brief for Industrial Energy Consumers of Pennsylvania et al. as amici curiae.

radically changed the outlook both for growth in the demand for electricity and for nuclear energy as a desirable way of meeting that demand. At the time of the cancellation, Duquesne's share of the preliminary construction costs associated with the four halted plants was \$ 34,697,389. Penn Power had invested \$ 9,569,665.

[2A]In 1980, and again in 1981, Duquesne sought permission from the Pennsylvania Public Utility Commission (PUC) ¹ to recoup its expenditures [***654] for the unbuilt plants over a 10-year period. The Commission deferred ruling on the request until it received the report from its investigation of the CAPCO construction. That report was issued in late 1982. The report found that Duquesne and Penn Power [****8] could not be faulted for initiating the construction of more nuclear generating capacity at the time they joined the CAPCO project in 1967. The projections at that time indicated a growing demand [*303] for electricity and a cost advantage to nuclear capacity. It also found that the intervening events which ultimately confounded the predictions could not have been predicted, and that work on the four nuclear plants was stopped at the proper time. In summing up, the Administrative Law Judge found "that the CAPCO decisions in regard to the [canceled plants] at every stage to their cancellation, were reasonable and prudent." App. to Juris. Statement 19h. He recommended that Duquesne and Penn Power be allowed to amortize their sunk costs in the project over a 10-year period. The PUC adopted the conclusions of the report. App. to Juris. Statement 1i.

[2B]

[****9] In 1982, Duquesne again came before the PUC to obtain a rate increase. Again, it sought to amortize its expenditures on the canceled plants over 10 years. In January 1983, the PUC issued a final order which granted Duquesne the authority to increase its revenues \$ 105.8 million to a total yearly revenue in excess of \$ 800 million. *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa. P. U. C. 1, 51 P. U. R. 4th 198 (1983). The rate increase included \$ 3.5 million in revenue representing

the first payment of the 10-year amortization of Duquesne's \$ 35 million loss in the CAPCO plants.

The Pennsylvania Office of the Consumer Advocate (Consumer Advocate) moved the PUC for reconsideration in light of a state law enacted about a month before the close of the 1982 Duquesne rate proceeding. The Act, No. 335, 1982 Pa. Laws 1473, amended the Pennsylvania Utility Code by limiting "the consideration of certain costs in the rate base." ² It [*304] provided that [**614] "the cost of [***655] construction or expansion of a facility undertaken by a public utility producing . . . electricity shall not be made a

² Act 335 amended the Pennsylvania Utility Code by adding 66 Pa. Cons. Stat. § 1315. The relevant parts of Act 335 read as follows:

"AN ACT

"Amending Title 66 (Public Utilities) of the Pennsylvania Consolidated Statutes, providing a *limitation on the consideration of certain costs in the rate base* for electric public utilities.

. . .

"Section 1. Title 66 . . . is amended by adding a section to read:

"§ 1315. Limitation on consideration of certain costs for electric utilities.

"Except for such nonrevenue producing, nonexpense reducing investments as may be reasonably shown to be necessary to improve environmental conditions at existing facilities or improve safety at existing facilities or as may be required to convert facilities to the utilization of coal, *the cost of construction or expansion of a facility* undertaken by a public utility producing, generating, transmitting, distributing or furnishing electricity *shall not be made a part of the rate base nor otherwise included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public.* Except as stated in this section, no electric utility property shall be deemed used and useful *until it is presently providing actual utility service to the customers.*

"Section 2. This act shall be applicable to *all proceedings pending before the Public Utility Commission and the courts at this time.* Nothing contained in this act shall be construed to modify or change existing law with regard to rate making treatment of investment in facilities of fixed utilities other than electric facilities.

"Section 3. *This act shall take effect immediately.*

"APPROVED -- The 30th day of December, A. D. 1982." (Emphasis added.)

¹ The PUC exercises a legislative grant of power to enforce the Pennsylvania public utilities laws. 66 Pa. Cons. Stat. § 501 (1986). "[T]he authority of the Commission must arise either from the express words of the pertinent statutes or by strong and necessary implication therefrom." *Philadelphia v. Philadelphia Electric Co.*, 504 Pa. 312, 317, 473 A. 2d 997, 999 (1984) (collecting cases).

part of the rate base nor otherwise [****10] included in the rates charged by the electric utility until such time as the facility is used and useful in service to the public." 66 Pa. Cons. Stat. § 1315 (Supp. 1988). On reconsideration, the PUC affirmed its original rate order. *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa. P. U. C. 177, 52 P. U. R. 4th 644 (1983). It read the new law as excluding the costs of canceled plants (obviously not used and useful) from the rate base, but not as preventing their recovery through amortization.

[****11] Meanwhile another CAPCO member, Penn Power, also sought to amortize its share of the canceled CAPCO power-plants over a 10-year period. The PUC granted Penn Power authority to increase its revenues by \$ 15.4 million to a total of \$ 184.2 million. *Pennsylvania PUC v. Pennsylvania Power Co.*, 58 Pa. P. U. C. 305, 60 P. U. R. 4th 593 (1984). Part of [*305] that revenue increase represented \$ 956,967 for the first year of the 10-year amortized recovery of Penn Power's costs in the aborted nuclear plants.

The Consumer Advocate appealed both of these decisions to the Commonwealth Court, which by a divided vote held that the Commission had correctly construed § 1315. *Cohen v. Pennsylvania PUC*, 90 Pa. Commw. 98, 494 A. 2d 58 (1985). The Consumer Advocate then appealed to the Supreme Court of Pennsylvania, and that court reversed. *Barasch v. Pennsylvania PUC*, 516 Pa. 142, 532 A. 2d 325 (1987). That court held that the controlling language of the Act prohibited recovery of the costs in question either by inclusion in the rate base [****12] or by amortization. The court rejected appellants' constitutional challenge to the statute thus interpreted, observing that "[t]he 'just compensation' safeguarded to a utility by the fourteenth amendment of the federal constitution is a reasonable return on the fair value of its property at the time it is being used for public service." *Id.*, at 163, 532 A. 2d, at 335. Since the instant CAPCO investment was not serving the public and did not constitute an operating expense, no constitutional rights to recovery attached to it. The court remanded to the PUC for further proceedings to correct its rate order, giving effect to the exclusion required by Act 335. ³ Duquesne and Penn Power appealed to this Court arguing that the effect of

Act 335 excluding their prudently incurred costs from the rate violated the Takings Clause of the Fifth Amendment, applicable to the States under the Fourteenth Amendment. We noted probable jurisdiction. 485 U.S. 933 [***656] (1988).

[****13] [*306] II

[3][4]Although the parties have not discussed it, we must first inquire into our jurisdiction to decide this case. See *Jackson v. Ashton*, 8 Pet. 148 (1834); *Mansfield C. & L. M. R. Co. v. Swan*, 111 U.S. 379 (1884). Our jurisdiction here rests on 28 U. S. C. § 1257(2), which authorizes this Court to review "[f]inal judgments or decrees rendered by the highest Court of a State in which a decision could be had . . . [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . and the decision is in favor of its validity." Although this case has been remanded for further proceedings to revise [**615] the relevant rate orders, we hold that for purposes of our appellate jurisdiction the judgment of the Pennsylvania Supreme Court is final.

We have acknowledged that the words of § 1257(2) could well be interpreted to preclude review in this Court as long as any proceedings remain in state court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). [****14] In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), however, we recognized that in practice the final judgment rule has not been interpreted so strictly. Cox outlined four circumstances in which the adjudication of a federal issue in a case by the highest available state court had been reviewed in this Court notwithstanding the prospect of some further state-court proceedings.

This case falls into the first of the four categories. The Pennsylvania Supreme Court has finally adjudicated the constitutionality of Act 335 in the context of otherwise completed rate proceedings and so has left "the outcome of further proceedings preordained." Cox, *supra*, at 479. We do not think that the PUC might undo the effects of Act 335 on remand by allowing recovery of the disputed costs in some other way consistent with state law. The Pennsylvania Supreme Court's interpretation of the Act does not leave its [*307] effect in doubt; the CAPCO related costs may not be "otherwise included in the rates charged." 66 Pa. Cons. Stat. § 1315 (1986). ⁴ We are satisfied that we are

³On October 10, 1985, too late to affect this case, the Pennsylvania Legislature enacted Act 1985-62 which added 66 Pa. Cons. Stat. § 520 (Supp. 1988) to the state utility code. Under § 520, the PUC is now authorized to permit amortized recovery of prudently incurred investment in canceled generating units.

⁴As a result of recent legislation, this Court will not long have

presented with the State's last word on [****15] the constitutionality of Act 335 and that all that remains is the straightforward application of its clear directive to otherwise complete rate orders. We therefore have jurisdiction. See *Cox, supra*, at 479; *Mills v. Alabama*, 384 U.S. 214 (1966).

III

As public utilities, both Duquesne [***657] and Penn Power are under a state statutory duty to serve the [****16] public. A Pennsylvania statute provides that "[e]very public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities" and that "[s]uch service also shall be reasonably continuous and without unreasonable interruptions or delay." 66 Pa. Cons. Stat. § 1501 (1986). Although their assets are employed in the public interest to provide consumers of the State with electric power, they are owned and operated by private investors. This partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment.

[5]The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically [*308] deprive[s] the owner of property without due process of law"); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) [****17] ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) ("All that is protected against, in a constitutional sense, is that [**616] the rates fixed by the Commission be higher than a confiscatory level"). If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so

appellate jurisdiction over cases of the instant type. Public L. 100-352, 102 Stat. 662, effective September 25, 1988, and applicable to judgments rendered on or after that date, eliminates substantially all of our appellate jurisdiction, including § 1257(2). Persons aggrieved by state-court judgments should now file a petition for certiorari, rather than appeal. See S. Rep. No. 100-300 (1988); H. R. Rep. No. 100-660 (1988); B. Boskey & E. Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 109 S. Ct. LXXXI (1988).

violated the Fifth and Fourteenth Amendments. As has been observed, however, "[h]ow such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question." *Smyth v. Ames*, 169 U.S. 466, 546 (1898). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders").

At one time, it was thought that the Constitution required rates to be set according to the actual present value of the assets employed in the public service. [****18] This method, known as the "fair value" rule, is exemplified by the decision in *Smyth v. Ames, supra*. Under the fair value approach, a "company is entitled to ask . . . a fair return upon the value of that which it employs for the public convenience," while on the other hand, "the public is entitled to demand . . . that no more be exacted from it for the use of [utility property] than the services rendered by it are reasonably worth." 169 U.S., at 547. In theory the *Smyth v. Ames* fair value standard mimics the operation of the competitive market. To the extent utilities' investments in plants are good ones (because their benefits exceed their costs) they are rewarded with an opportunity to earn an "above-cost" return, that is, a fair return on the current "market value" of the plant. To the extent utilities' investments turn out to be bad ones (such as plants that are [***658] canceled and so never used and useful to [*309] the public), the utilities suffer because the investments have no fair value and so justify no return.

Although the fair value rule gives utilities strong incentive to manage their affairs [****19] well and to provide efficient service to the public, it suffered from practical difficulties which ultimately led to its abandonment as a constitutional requirement.⁵ [****20]

⁵ Perhaps the most serious problem associated with the fair value rule was the "laborious and baffling task of finding the present value of the utility." *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 292-294 (1923) (Brandeis, J. dissenting). The exchange value of a utility's assets, such as powerplants, could not be set by a market price because such assets were rarely bought and sold. Nor could the capital assets be valued by the stream of income they produced because setting that stream of income was the very object of the rate proceeding. According to Brandeis, the *Smyth v. Ames* test usually degenerated to proofs about how much it would cost to reconstruct the asset in question, a hopelessly hypothetical, complex, and inexact process. 262 U.S., at 292-294.

In response to these problems, Justice Brandeis had advocated an alternative approach as the constitutional minimum, what has become known as the "prudent investment" or "historical cost" rule. He accepted the *Smyth v. Ames* eminent domain analogy, but concluded that what was "taken" by public utility regulation is not specific physical assets that are to be individually valued, but the capital prudently devoted to the public utility enterprise by the utilities' owners. *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm'n*, 262 U.S. 276, 291 (1923) (dissenting opinion). Under the prudent investment rule, the utility is compensated for all prudent investments at their actual cost when made (their "historical" cost), irrespective of whether individual investments are deemed necessary or beneficial in hindsight. The utilities incur fewer risks, but are limited to a standard rate of return on the actual amount of money reasonably invested.⁶

[*310] [**617] [6A][7]Forty-five years ago in the landmark case of *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), this Court abandoned the rule of *Smyth v. Ames*, and held that the "fair value" rule is not the only constitutionally acceptable method of fixing utility rates. In *Hope* we ruled that historical cost was a valid basis on which to calculate utility compensation. 320 U.S., at 605 ("Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid, even though they might produce only a meager return [****21] on the so called 'fair value' rate base"). We also acknowledged in that case that all of the subsidiary aspects of valuation for ratemaking purposes could not properly be characterized as having a constitutional dimension, despite the fact that they might affect property rights to some degree. Today we reaffirm these teachings of *Hope Natural Gas*: "[I]t [***659] is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an

end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id.*, at 602. This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional [****22] overtones.

[8A]Pennsylvania determines rates under a slightly modified form of the historical cost/prudent investment system.⁷ [**618] Neither [*311] Duquesne nor Penn

⁷ Pennsylvania values property in the rate base according to its historical cost. As provided by 66 Pa. Cons. Stat. § 1311(b) (1986), "[t]he value of the property of the public utility included in the rate base shall be the original cost of the property when first devoted to the public service less the applicable accrued depreciation." Accordingly, the PUC declared in Duquesne's rate proceeding that "we shall adopt as the fair value of the respondent's rate base, the original cost measure of value." *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa. P. U. C. 1, 5, 51 P. U. R. 4th 198, 202 (1983). It held likewise in Penn Power's case. See *Pennsylvania PUC v. Pennsylvania Power Co.*, 58 Pa. P. U. C. 305, 310, 60 P. U. R. 4th 593, 597 (1984) (same).

Having adjusted the historical cost in various ways to account for such things as depreciation and working capital, the PUC proceeds to set a rate of return based largely on the cost of capital to the enterprise. The cost of each component of the utility's capital is considered, *i. e.*, "the cost of debt, the cost of preferred stock, and the cost of common stock[.] [t]he latter being determined by the return required to sell such stock upon reasonable terms in the market." *Pennsylvania PUC v. Duquesne Light Co.*, *supra*, at 42, 51 P. U. R. 4th, at 235; *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693 (1923). It then exercises "informed judgment" to set the total rate of return based on these component costs of capital. *Ibid.* See also *Pennsylvania PUC v. Pennsylvania Power*, *supra*, at 325-326, 60 P. U. R. 4th, at 611-621.

The bulk of the rate based on capital, then, represents a return (set by costs of capital) on a rate base (determined by historical cost). These are features of the historical cost/prudent investment system. Pennsylvania has modified the system in several instances, however, when prudent investments will never be used and useful. For such occurrences, it has allowed amortization of the capital lost, but does not allow the utility to earn a return on that investment.

⁶The system avoids the difficult valuation problems encountered under the *Smyth v. Ames* test because it relies on the actual historical cost of investments as the basis for setting the rate. The amount of a utility's actual outlays for assets in the public service is more easily ascertained by a ratemaking body because less judgment is required than in valuing an asset.

Power alleges that the total effect of the rate order arrived at within this system is unjust or unreasonable. In fact the overall effect is well within the [*312] bounds of *Hope*, even with total exclusion of the [***660] CAPCO costs. Duquesne was authorized to earn a 16.14% return on common equity and an 11.64% overall return on a rate base of nearly \$ 1.8 billion. See *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa. P. U. C., at 51, 51 P. U. R. 4th, at 243. Its \$ 35 million investment in the canceled plants comprises roughly 1.9% of its total base. The denial of plant amortization will reduce its annual allowance by 0.4%. Similarly, Penn Power was allowed a charge of 15.72% return on common equity and a 12.02% overall return. Its investment in the CAPCO plants comprises only 2.4% of its \$ 401.8 million rate base. See *Pennsylvania PUC v. Pennsylvania Power Co.*, 58 Pa. P. U. C., at 331-332, 60 P. U. R. 4th, at 618. [****23] The denial of amortized recovery of its \$ 9.6 million investment in CAPCO will reduce its annual revenue allowance by only 0.5%.

[****24] [8B] Given these numbers, it appears that the PUC would have acted within the constitutional range of reasonableness if it had allowed amortization of the CAPCO costs but set a lower rate of return on equity with the result that Duquesne and Penn Power received the same revenue they will under the instant orders on remand. The overall impact of the rate orders, then, is not constitutionally objectionable. No argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital. Nor has it been

demonstrated that these rates are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme.⁸

[****25]

[*313] [9A][10A] Instead, appellants argue that the Constitution requires that subsidiary aspects of Pennsylvania's ratemaking methodology be examined piecemeal. One aspect which they find objectionable is the constraint Act 335 places on the PUC's decisions. They urge that such legislative direction to the PUC impermissibly interferes with the PUC's duty to balance consumer and investor interest under *Permian Basin*, 390 U.S., at 792. Appellants also note the theoretical inconsistency of Act 335, suddenly and selectively applying the used and useful requirement, normally associated with the fair value approach, in the context of Pennsylvania's system based on historical cost. Neither of the errors appellants perceive in this case is of constitutional magnitude.

[9B] [11] [12] It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates. And the Pennsylvania PUC is essentially an administrative arm of the legislature. See, e. g., *Barasch v. Pennsylvania PUC*, 516 Pa., at 171, 532 A. 2d, at 339 [****26] ("The Commission is but an instrumentality of the state legislature for the performance of [ratemaking]"); *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making power is a legislative power [***661] and necessarily implies a range of legislative discretion").⁹

See, e. g., *Pennsylvania PUC v. Metropolitan Edison Co.*, 55 Pa. P. U. C. 478, 486 (1982) (amortization of company's investment in contaminated Three Mile Island Unit 2); *Philadelphia Electric Co. v. Pennsylvania PUC*, 61 Pa. Commw. 325, 433 A. 2d 620 (1981) (excluding from the rate base a portion of a utility's generating plant that was excess capacity, but allowing recovery of the operating expenses, including depreciation charges on the entire plants); *UGI Corp. v. Pennsylvania PUC*, 49 Pa. Commw. 69, 410 A. 2d 923 (1980) (permitting amortization of terminated feasibility studies); *Pennsylvania PUC v. Philadelphia Electric Co.*, 46 Pa. P. U. C. 746, 750 (1973) (10-year amortization of unusual expenses caused by tropical storm). The loss to utilities from prudent but ultimately unsuccessful investments under such a system is greater than under a pure prudent investment rule, but less than under a fair value approach. Pennsylvania's modification slightly increases the overall risk of investments in utilities over the pure prudent investment rule. Presumably the PUC adjusts the risk premium element of the rate of return on equity accordingly.

⁸ Duquesne's embedded cost of debt was 9.42%. *Pennsylvania PUC v. Duquesne Light Co.*, 57 Pa. P. U. C., at 44, 51 P. U. R. 4th, at 237. Penn Power's debt service was at 10.25%. *Pennsylvania PUC v. Pennsylvania Power Co.*, 58 Pa. P. U. C., at 332, 60 P. U. R. 4th, at 618.

⁹ Indeed, the issue of constitutional concern has usually been just the reverse of appellants' objection. Challenges to state and federal laws have been raised on the ground that the legislatures have delegated too much authority and discretion. See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928) (federal delegation of authority to set import tariff rates); *York R. Co. v. Driscoll*, 331 Pa. 193, 200 A. 864 (1938) (PUC's authorization to exempt utility securities from reporting and registration requirements an unconstitutional delegation of

We stated in *Permian* [*619] *Basin* that the commission "must be free, within the limitations imposed by pertinent constitutional [*314] and *statutory commands*, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." 390 U.S., at 767 (emphasis added). This is not to say that any system of ratemaking applied by a utilities commission, including the specific instructions it has received from its legislature, will necessarily be constitutional. But if the system fails to pass muster, it will not be because the legislature has performed part of the work.

[***27] [6B]Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." *Hope*, 320 U.S., at 602. The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.

[1B][10B]Admittedly, the impact of certain rates can only be evaluated in the context of the system under which they are imposed. One of the elements always relevant to setting the rate under *Hope* is the return investors expect given the risk of the enterprise. *Id.*, at 603 ("[R]eturn [***28] to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks"); *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of West Virginia*, 262 U.S. 679, 692-693 (1923) ("A public utility is entitled to such rates as will permit it to earn a return . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by [*315] corresponding risks and

uncertainties"). The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions. But the instant case does not present this question. [***662] At all relevant times, Pennsylvania's rate system has been predominantly [****29] but not entirely based on historical cost and it has not been shown that the rate orders as modified by Act 335 fail to give a reasonable rate of return on equity given the risks under such a regime. We therefore hold that Act 335's limited effect on the rate order at issue does not result in a constitutionally impermissible rate.

[10C]Finally we address the suggestion of the Pennsylvania Electric Association as *amicus* that the prudent investment rule should be adopted as the constitutional standard. We think that the adoption of any such rule would signal a retreat from 45 years of decisional law in this area which would be as unwarranted as it would be unsettling. *Hope* clearly held that "the Commission was not bound to the use of [**620] any single formula or combination of formulae in determining rates." 320 U.S. at 602. More recently, we upheld the Federal Power Commission's departure from the individual producer cost-of-service (prudent investment) system. In *Wisconsin v. FPC*, 373 U.S. 294 (1963), the FPC had concluded after extensive hearings that "the individual company cost-of-service method, based on [***30] theories of original cost and prudent investment, was not a workable or desirable method for determining the rates of independent producers and that the 'ultimate solution' lay in what has become to be known as the area rate approach: 'the determination of fair prices . . . based on reasonable financial requirements of the industry.'" [*316] *Id.*, at 298-299. In upholding the FPC's area rate methodology against the argument that the individual company prudent investment rule was constitutionally required, the Court observed:

"[T]o declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly articulated approach to the

legislative power under Pennsylvania Constitution because it allowed the utility to nullify the statutory reporting requirements).

question of the Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates." *Id.*, at 309 (collecting cases).

See also *FPC v. Texaco Inc.*, 417 U.S. at 387-390.

The adoption of a single theory [****31] of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas*, *supra*. As demonstrated in *Wisconsin v. FPC*, circumstances may favor the use of one ratemaking procedure over another. The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors.¹⁰ The Constitution [***663] within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.

[****32] *Affirmed*.

Concur by: SCALIA

Concur

[*317] JUSTICE SCALIA, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, concurring.

I join the Court in reaffirming our established rule that no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs. See, e. g., *FPC v. Texaco Inc.*, 417 U.S. 380, 387-390 (1974); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). I think it important to observe, however, that while "prudent investment" (by which I

mean capital reasonably expended to meet the utility's legal obligation to assure adequate service) need not be taken into account as such in ratemaking formulas, it may need to be taken into account in assessing the constitutionality of the particular consequences produced by those formulas. We cannot determine whether the payments a utility has been allowed to collect constitute a fair return on investment, and thus whether the government's action is confiscatory, unless we agree upon what the relevant [****33] "investment" is. For that purpose, all prudently incurred investment may well have to be counted. As the Court's opinion describes, that question is not presented in the [*621] present suit, which challenges techniques rather than consequences.

Dissent by: BLACKMUN

Dissent

JUSTICE BLACKMUN, dissenting.

The Court, I fear, because of what it regards as the investment of time in having this case argued and briefed, is strong-arming the finality concept and finding a *Cox* exception that does not exist. We have jurisdiction, under 28 U. S. C. § 1257, only if there is a "final judgment" by the "highest court of a State" in which a decision could be had. To be sure, we have interpreted § 1257 somewhat flexibly to the effect that the finality requirement is satisfied in four discrete situations despite the need of further proceedings in the state courts: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

[*318] The Court here concludes that this case falls within the first of the four *Cox* exceptions ("the outcome of further proceedings preordained," *id.*, at 479). With all respect, [****34] I disagree, for this case concerns rates, and there is no rate order whatsoever before this Court. The Supreme Court of Pennsylvania invalidated the rate orders set by the Pennsylvania Commission, and remanded the cases for further ratemaking. The Court deludes itself when it speaks of preordination of the Commission's further action. New rates will be set, based upon factors we do not as yet know, and only then will a final [***664] judgment possibly emerge in due course.

I therefore would dismiss the appeal for want of the final judgment that § 1257 requires.

¹⁰ For example, rigid requirement of the prudent investment rule would foreclose hybrid systems such as the one Pennsylvania used before the effective date of Act 335 and now uses again. See n. 4, *supra*. It would also foreclose a return to some form of the fair value rule just as its practical problems may be diminishing. The emergent market for wholesale electric energy could provide a readily available objective basis for determining the value of utility assets.

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Index to Annotations, Electricity and Electric Companies; Eminent Domain; Public Service Commissions; Rates and Charges; Utilities

Annotation References:

Supreme Court's views [****35] as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L Ed 2d 977.

What judgment or decree of state court in civil cases is final for purpose of review by United States Supreme Court under 28 USCS 1257 and similar predecessors. 29 L Ed 2d 872.

Principles of Public Utility Rates

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Public Utilities Reports, Inc.

050290

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Second Edition

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First Printing, 1961

Second Edition, March 1988

Library of Congress Catalog Card No. 88-60167

ISBN 0-910325-23-5

Printed in the United States of America

objective rate plan. Initiated by a utility as a means of shifting to a lower level of rates without temporary loss of revenue pending the development of an enhanced demand for service, the enjoyment of the lower rates was temporarily limited to consumers whose monthly bills under these rates would not be less than their bills for the previous year. Not all commissions approved. But even those that did admitted in words or by implication that the plan was discriminatory. More recently, Nolan (1983) has discussed the lawfulness — under an undue or unreasonable preference or discrimination standard — of discounted or reduced rates for employees of public utilities. And if they are legal, should the costs be included in the company's cost-of-service allowance? Such factors as the method of wage negotiations, managerial discretion, and reasonableness of the compensation have also been included in the hearings. There does not appear to be any consensus by the states that have most recently looked at this matter (e.g., Iowa, Maine, and Washington).

By and large the tribunals have shared a popular feeling that "discrimination," as a practice of ratemaking, is an odious and pejorative term. This virulent sentiment has made regulators reluctant to characterize as discriminatory any rates which they find lawful. Approval is more likely to be expressed by a finding of "no undue discrimination," without any commitment as to whether discrimination of even a due type was found to exist.

This tendency to treat "undue discrimination" as if it were one word has been encouraged by the failure of the rate regulators to observe any single and definitive distinction between discriminatory and nondiscriminatory rate differentials. At times, the cases suggest a distinction similar to that drawn by economists, in deeming discriminatory any rate differential not based on a cost differential. But at other times "discrimination" has been used as a mere synonym for *any* kind of rate differentiation; whereas at still other times it has become a convenient, shorthand term for *undue* discrimination — for what has been called "discrimination in a legal sense." The Robinson-Patman Act (1936), treats a price differentiation as legal price discrimination (such as quantity discounts) whether or not it is economic discrimination or not (Scherer, 1980, pp. 571-582). Also, the utility representatives seldom to our knowledge have declared that value-of-the-service ratemaking constitutes discrimination. Yet this practice is regarded as the very essence of discriminatory monopoly pricing by the academic economists, even by those economists who defend it as in the public interest. Since under conditions of steep scale economies, price discrimination may be the only method available for cost recovery, a better distinction than "just" and "unjust" discrimination would

have been "efficient" and "inefficient" discrimination. While this is the approach of economists in general, it is still not memorialized in the decisions of many regulatory commissions.

In view of this confusion of language, something is to be said for the proposal to drop the word discrimination as a tool of public utility ratemaking or else to let it refer to *any* difference between rates of charge at the same time and place for different units of a physically similar types of service. But even if this proposal should win general acceptance, there would still be a need to understand the significance of the distinction that economists have attempted to draw, although with only partial success, between discriminatory and nondiscriminatory rate relationships. In the remainder of this chapter, we shall first discuss the nature of the distinction and shall then turn to the problem of setting practical limits between due and undue forms and degrees of discrimination.

The Economic Meaning of Rate Discrimination

Conditions Required for Discrimination to Be Implemented. In the literature of economics, one of the cardinal attributes of prices under assumed conditions of pure competition is that of a uniform price for any one product at any given time and place. This uniformity precludes not only the price higgling and bargaining that characterizes many markets, but also the systematic practice of price differentiation designed to impose different charges on different groups of persons depending on differences in their capacity and willingness to pay. A purely competitive price, forged through the Smith (1937, e.g., p. 13) propensity in human nature to "truck, barter, and exchange one thing for another," is the same to the rich and the poor, to the powerful and the powerless, to the person who finds the product barely worth buying and to the person who would pay many times the prevailing price rather than go without.

This pressure, exercised on all sellers in a competitive market, to sell any given product at a uniform price may be imposed more or less effectively even upon monopolists unless they can divide the market for their products so as to prevent ready transfer among buyers. Otherwise, if a monopolist should attempt to discriminate, say, by selling personal computers to general customers at \$1,000 each while selling them to college students at only \$500 there might arise a resale market beyond the seller's control, in which the general public could buy computers directly or indirectly from college students at less than \$1,000.

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"Complex" Consol. Edison Co. of N.Y., Inc. v. FERC

United States Court of Appeals for the District of Columbia Circuit

November 23, 1998, Argued ; February 12, 1999, Decided

No. 97-1554, Consolidated with Nos. 97-1560, 97-1580, 97-1590

Reporter

165 F.3d 992 *; 1999 U.S. App. LEXIS 2088 **; 334 U.S. App. D.C. 205

"COMPLEX" CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL., PETITIONERS v. FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT; NORTHERN ILLINOIS GAS COMPANY, ET AL., INTERVENORS

Prior History: [*1] On Petition for Review of Orders of the Federal Energy Regulatory Commission.

Tenn. Gas Pipeline Co., 80 F.E.R.C. P61070, 1997 FERC LEXIS 1474 (F.E.R.C., July 18, 1997)

Tenn. Gas Pipeline Co., 76 F.E.R.C. P61022, 1996 FERC LEXIS 1223 (F.E.R.C., July 3, 1996)

Disposition: JMC Power's petition for review denied. Affirmed the Commission's rulings in Opinions 406 and 406-A and its denial of Equitable's request for rehearing. Denied the petitions for review filed by JMC Power, Equitable, and Con Ed.

Counsel: Lee A. Alexander argued the cause for petitioners JMC Power Projects and New England Power Company. With him on the briefs were Stefan M. Krantz and Mitchell F. Hertz. Yoav K. Gery entered an appearance.

Gary E. Guy argued the cause and filed the briefs for petitioner Equitable Gas Company.

Harvey L. Reiter argued the cause for petitioners Consolidated Edison Company of New York, Inc., et al. With him on the briefs was Kenneth T. Maloney. Marc Richter entered an appearance.

Timm L. Abendroth, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With him on the brief were Jay L. Witkin, Solicitor, and Susan J. Court, Special Counsel.

Jonathan D. Schneider argued the cause for intervenor New York State Electric and Gas Corporation.

Kevin J. McKeon argued the cause for intervenor Connecticut Natural Gas Corporation. With them [*2] on the brief were Richard M. Lorenzo, Gary E. Guy, David I. Bloom, Scott P. Klurfeld, David D'Alessandro,

Tom Rattray, Barbara K. Heffernan, Roy R. Robertson, Jr., Nancy A. White, Elizabeth Ward Whittle and Kevin M. Sweeney. Lillian S. Harris and Bruce A. Connell entered appearances.

Jeffrey D. Komarow argued the cause for intervenors Tennessee Gas Pipeline Company and Bay State Gas Company, et al. With him on the brief were Robert H. Benna, Barbara K. Heffernan and Tom Rattray. Michael J. Fremuth entered an appearance.

Judges: Before: WALD, RANDOLPH and ROGERS, Circuit Judges.

Opinion

[*995] *PER CURIAM:* Tennessee Gas Pipeline Company ("Tennessee") owns and operates a "long-line" interstate natural gas pipeline system running from the Texas gulf coast to New Hampshire. In 1991, Tennessee made a general rate filing pursuant to section 4 of the Natural Gas Act. 15 U.S.C. § 717c (1994). A number of Tennessee's customers brought challenges. Most issues were resolved at various points in the ensuing rate proceedings, with the exception of those raised by the petitioners here. Petitioners now seek review of several rulings issued by the Federal Energy Regulatory Commission ("FERC" or the [*3] "Commission"). See *Tennessee Gas Pipeline Co.*, 76 F.E.R.C. P61,022 (1996) ("Opinion 406") ("*Tennessee II*"), *reh'g denied*, *Tennessee Gas Pipeline Co.*, 80 F.E.R.C. P61,389 (1997) ("Opinion 406-A") ("*Tennessee III*"). For the reasons set forth in Parts I, II, and III, we deny each of the petitions for review.¹

¹Part I, written by Judge Wald, discusses the NET/T-180 facilities. Part II, written by Judge Randolph, discusses the FSST/ T-149 and Boundary facilities, as well as the Niagara Spur Charge. Part III, written by Judge Rogers, discusses the Uniform Hourly Take Tariff. The factual background and procedural history relevant to each of the petitioners' challenges are discussed within the respective parts.

PART I: THE NET/T-180 FACILITIES

JMC Power Projects and the New England Power Company (jointly "JMC Power") petition for review of several FERC rulings, in the relevant portions of which the Commission approved a Tennessee proposal to continue recovering the costs of a series [²4] of facility expansions, collectively referred to as the NET/T-180 facilities, on an incremental basis. [²5] Petitioners claim that, in accepting the proposed incremental rate treatment, FERC unjustifiably departed from both its own precedent and prior decisions of this court, and unlawfully utilized quantitative measures in assessing the potential costs and benefits of the expansion facilities to pre-existing customers. We conclude that Opinions 406 and 406-A clearly clarified the Commission's historic test for determining the propriety of rolled-in versus incremental pricing of expansion facilities' costs, and that FERC provided a reasoned explanation for a modest shift from its strictly two-tiered *Battle Creek* test [³] towards a standard that examines additional relevant factors. Because [⁴996] FERC supplied a sufficient explication for this clarification which, as intended, brought FERC policy into accord with this court's Natural Gas Act jurisprudence, we deny JMC Power's petition for review.

A. Background

²"Incremental" pricing refers to a cost-recovery method in which the constructing pipeline develops a separate cost of service for the expansion facilities, recapturing the construction cost solely from the particular customers who utilize them. See *TransCanada Pipelines Ltd. v. FERC*, 306 U.S. App. D.C. 299, 24 F.3d 305, 307 n.1 (D.C. Cir. 1994). Under "rolled-in" pricing, the primary alternative to incremental treatment, the pipeline adds the costs of the expansion facilities to its total rate base, recovering its expenditures by increasing the general rate that all customers pay in proportion to their reservation of capacity or direct usage. See *Algonquin Gas Transmission Co. v. FERC*, 292 U.S. App. D.C. 197, 948 F.2d 1305, 1308 & n.1 (D.C. Cir. 1991).

³In *Battle Creek Co. v. FPC*, 108 U.S. App. D.C. 209, 281 F.2d 42 (D.C. Cir. 1960), this court first gave its approval to the prevailing Federal Power Commission ("FPC") policy with respect to the pricing of expansion facilities. See *Southeastern Michigan Gas Co. v. FERC*, 328 U.S. App. D.C. 171, 133 F.3d 34, 37 (D.C. Cir. 1998). Under the so-called *Battle Creek* test, the costs affiliated with expansion facilities can properly be rolled into the general system rates whenever such facilities are integrated with the pipeline system and provide system-wide benefits.

Between 1988 and 1992, FERC approved the construction of seven separate projects (collectively the "NET/T-180 facilities") [⁴7] by Tennessee, whose costs were initially to be recovered through incremental pricing. [⁵] In its 1991 general rate filing pursuant to section 4 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c, [⁶] Tennessee proposed to continue the existing incremental pricing of the NET/T-180 facilities. [⁷] FERC

⁴Serving various customers in Zones 5 and 6 of the Tennessee pipeline, the NET/T-180 facilities are as follows. (1) The Ocean State Power Project, which provides service to a new electric generation facility, consists of roughly 14.3 miles of 30-inch mainline looping, 10.7 miles of 20-inch pipeline extension, and three new compressors. Its rate schedule was designated T-180. (2) The Niagara Import project phase II, which provides transportation service to four new customers, includes approximately 30.3 miles of 30-inch pipeline looping, 31.4 miles of 30-inch looping along the Niagara Spur, and two new compressors in New York and Massachusetts. (3) The Niagara Import project phase III, which provides transportation service to three additional customers, includes a percentage of a half mile 30-inch loop crossing the Niagara River, a percentage of 17.3 miles of mainline looping and two new compressors along the Niagara Spur, and roughly 24.4 miles of mainline looping in New York and Massachusetts. (4) The NET-Northeast project encompasses a part of both the Iroquois Gas Transmission System ("Iroquois") Phase I and Phase II expansions. (5) Iroquois Phase I provides service to twelve customers located in Massachusetts, Rhode Island, Connecticut, and New Hampshire. It includes approximately 62.8 miles of mainline looping and pipeline replacement. (6) Iroquois Phase II provides service to three customers, along with 27.13 miles of mainline looping and replacement laterals in Massachusetts, and an additional 9350 horsepower of compression at three stations situated in Massachusetts and New York. (7) The NET-Elgin project serves four customers through 29.33 miles of 30-inch and 36-inch mainline looping and 3100 additional horsepower of compression at two New York stations. See *Tennessee II*, 76 F.E.R.C. at 61,108-09.

⁵Although the projects were priced individually at the time of their respective certification, in 1992 FERC accepted a partial settlement through which Tennessee's different NET rate schedules were consolidated into a single incremental rate schedule. See *Tennessee Gas Pipeline Co.*, 63 F.E.R.C. P61,095 (1992).

⁶Section 4(e) of the NGA provides that "at any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate is just and reasonable shall be upon the natural-gas company...." 15 U.S.C. § 717c(e).

⁷Tennessee had made a limited section 4 filing in Docket No.

accepted the rate filing subject to refund, and set the matter for evidentiary hearing [**6] before an Administrative Law Judge ("ALJ"). Tennessee and its customers later reached an agreement settling most of the contested issues, which FERC then approved on October 29, 1993. See *Tennessee Gas Pipeline Co.*, 65 F.E.R.C. P61,142. The remaining issues were assigned to the ALJ.

In the ensuing series of evidentiary hearings, JMC Power sought rolled-in treatment for the NET/T-180 facilities by arguing that the facilities were fully integrated into the Tennessee [**8] pipeline system and provided various operational and financial benefits to Tennessee and its pre-expansion customers. In particular, its primary witness testified that, in his estimation, the NET/T-180 facilities produced between \$ 28.85 and \$ 79.45 million in total levelized annual benefits⁸ to pre-existing Tennessee customers, with a mid-case value of \$ 46.53 million. He also asserted that the annual levelized costs of rolled-in treatment would amount to \$ 22.73 million. [*997] See *Tennessee Gas Pipeline Co.*, 72 F.E.R.C. P63,005, at 65,077 (1995) ("*Tennessee I*"). A number of Tennessee's preexisting customers challenged these claims, questioning the existence of each alleged benefit, as well as the statistical models upon which JMC Power had assessed their value. According to the ALJ's initial decision, the weight of the evidence favored the conclusion that the NET/T-180 facilities provided neither operational benefits nor additional reliability to Tennessee's system customers. In addition, the ALJ found that rolling-in the costs of the NET/T-180 facilities to Tennessee's general rate base would cause a rate increase for pre-expansion customers in excess of 5%. See *id.* at [**9] 65,084-86. On the basis of these findings, he concluded that both

the *Battle Creek* test and FERC's Pricing Policy Statement⁹ mandated incremental pricing. Accordingly, he approved the Tennessee proposal to continue the existing incremental treatment. See *id.* at 65,086.

[**10] JMC Power filed exceptions to the ALJ's initial decision with the Commission, alleging that the judge had misinterpreted both FERC and D.C. Circuit precedent, and had misapplied the *Battle Creek* test in assessing the proper pricing scheme for the NET/T-180 facilities. JMC Power further contended that the ALJ had misconstrued the evidence before him, as the testimony presented (in JMC Power's view) fully established that the NET/T-180 facilities were both integrated into the Tennessee pipeline and provided significant benefits to pre-existing customers. These alleged benefits included: increased interruptible service; increased peak capacity due to both nonsynchronous demand and the fuel switching capabilities of the primary NET/T-180

⁹ In 1995, FERC issued a Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipeline, 71 F.E.R.C. P61,241 (1995), *reh'g denied*, 75 F.E.R.C. P61,105 (1996) ("Pricing Policy Statement"), which clarified its policy with respect to the pricing of expansion facilities. The Commission solicited comments on that subject in Docket No. PL94-4-000, receiving written submissions from seventy-five companies and groups and hearing oral comments from others through a public hearing. Concerned that the use of rolled-in pricing could force existing customers to pay substantially higher prices without receiving proportionate system-wide benefits, and that the lack of price certainty negatively impacted customers with long-term service contracts, FERC announced a new policy designed to minimize significant rate shocks and to provide greater cost certainty prior to the construction of new facilities. The Pricing Policy Statement sought to achieve these goals by making a determination as to the appropriate rate design at the certificate stage, at which time FERC would assess the system-wide benefits of a project as well as its rate impact on existing customers. To the extent that rolled-in pricing would increase the rates of existing customers by 5% or less, and its proponents had made a showing of system benefits with "reasonable particularity," see 71 F.E.R.C. at 61,916, FERC would presume that the expansion costs should be rolled-in. Opponents of rolled-in pricing could rebut this presumption by establishing that the benefits of the expansion facilities were so insignificant that rolled-in pricing would be unreasonable. See *id.* at 61,916-17. To the extent that rolled-in pricing would cause a rate increase of more than 5%, the Pricing Policy Statement created a rebuttable presumption in favor of incremental treatment. Opponents could overcome this presumption through showing that the resulting system benefits were sufficient to support rolled-in treatment. See *id.*

RP92-132-000, solely addressing its NET-EU and T-180 Rate Schedules. FERC consolidated this docket with Tennessee's general section 4 rate filing in Docket No. RP91-203-000, the filing which gave rise to this case. See *Tennessee Gas Pipeline Co.*, 58 F.E.R.C. P61,343 (1992).

⁸ Levelization refers to a process in which the costs of a one-time capital expenditure or a lump-sum benefit are converted into a constant annual cash flow so as to provide a consistent basis from which to compare average annual costs and benefits. The annual levelized cost refers to that amount which, if collected for each year of the project's life, would yield the same present value of revenue requirements as is yielded under traditional rate-making. The JMC Power witness utilized levelized estimates so as to avoid the distorting effects caused by straight-line depreciation, which does not differentiate between present and future value.

customers; avoided facilities costs for future expansions; the encouragement of price competition through increased access to Canadian gas suppliers; fuel savings stemming from the greater efficiency of the new compressors; contribution to Tennessee's take-or-pay costs through the payment of the volumetric surcharge established by the Cosmic Settlement;¹⁰ potential contributions to stranded investment and new facilities costs; potential contributions [**11] to gas supply realignment ("GSR") costs; and general environmental and national security benefits. Finally, JMC Power claimed that the ALJ had miscalculated the rate impact of rolling-in the contested facilities; according to JMC Power's calculations, rolled-in treatment would only result in a 4.9% rate increase, below the 5% presumption established in the Pricing Policy Statement. The parties who had presented contrary evidence before the ALJ filed briefs opposing JMC Power's exceptions.

[*998] In Opinion 406, the Commission agreed with the ALJ's decision to order incremental pricing for the NET/T-180 facilities. The Commission found the alleged system benefits postulated by JMC Power to be insubstantial; in each case, the purported benefits flowed [**12] almost entirely to the shippers for whom the NET/T-180 facilities were constructed. Because of the high load factor¹¹ of these shippers--roughly 85-90%--FERC concluded that they likely made substantial purchases of Canadian gas, thereby leaving little capacity available for other pre-existing shippers and limiting the availability of interruptible transportation.¹² See *Tennessee II*, 76 F.E.R.C. at 61,112. Moreover, FERC reasoned, a capacity bottleneck at Station 219 prevented upstream shippers from utilizing the NET/T-180 facilities, calling into question any additional access

to Canadian gas supplies. See *id.* at 61,112-13. The alleged benefits of cheaper future expansions and declining fuel costs were deemed purely speculative, as were the payment of GSR costs in the event of future conversions to open-access transportation, and the alleged environmental and national security benefits.¹³ See *id.* at 61,113-14. Finally, the Commission noted that JMC Power had manipulated its estimation of the rate increase that would accompany rolled-in treatment by illegitimately adding the costs of the FSST, Niagara Spur, and the Boundary facilities into the figure it used for the [**13] pre-expansion rate base. See *id.* at 61,114 n.144.

[**14] Departing from the ALJ's reasoning to some extent, FERC based its final determination on the grounds that JMC Power had failed to provide sufficient evidence for the Commission to find, under section 5 of the NGA,¹⁴ [**16] not only that rolled-in treatment itself would be just and reasonable, but also that the pipeline's proposed continuation of the existing incremental treatment would be unjust and unreasonable. Since the NGA delegates the primary

¹³ FERC reasoned that the environmental and national security benefits proffered by JMC Power raised the type of general social benefits which the Pricing Policy Statement had deemed improper for consideration because they "are difficult to substantiate and quantify." *Id.* at 61,114 n.143 (quoting Pricing Policy Statement, 71 F.E.R.C. at 61,196). FERC also noted the ALJ's finding, based upon the record before him, that such benefits were merely speculative, and that they were unrelated to the operation of a gas pipeline. Finally, the Commission stated that it was not "aware of any cases decided under *Battle Creek* in which such general social benefits were relied on to support rolled-in rates." *Id.*

¹⁴ Section 5(a) of the NGA provides that:

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge or classification demanded, observed, charged, or collected by a natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order....

15 U.S.C. § 717d(a).

¹⁰ The "Cosmic Settlement" refers to an agreement that resolved a significant number of Tennessee cases pending before FERC. See *Tennessee Gas Pipeline Co.*, 57 F.E.R.C. P61,360 (1991), *order on reh'g approving settlement as modified*, 59 F.E.R.C. P61,045 (1992).

¹¹ The term "load factor" refers to the ratio of a shipper's average hourly use over its maximum hourly use. Customers who need a constant supply of natural gas--e.g., industrial customers--will have high load factors, while those whose needs vary throughout the day--e.g., residential suppliers--will generally have lower load factors.

¹² Interruptible service "provides gas on a 'when available' basis and may be interrupted after notice to the subscriber." *Algonquin*, 948 F.2d at 1309 n.5.

initiative to propose transportation rates to the pipelines, see *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 100 L. Ed. 373, 76 S. Ct. 373 (1956); *ANR Pipeline Co. v. FERC*, 248 U.S. App. D.C. 315, 771 F.2d 507, 513 (D.C. Cir. 1985), FERC distinguished its treatment of the FSST/T-149 and Boundary facilities, see discussion *infra* Part II, on the grounds that Tennessee had proposed to roll-in their facilities costs. See *Tennessee II*, 76 F.E.R.C. at 61,115. By contrast, as Tennessee had proposed to continue the existing incremental treatment of the NET/T-180 facilities in this section 4 proceeding, FERC could only have ordered rolled-in treatment by acting under section 5 of the NGA. See *Algonquin Gas Transmission Co. v. FERC*, 292 U.S. App. D.C. 197, 948 F.2d 1305, 1311 (D.C. Cir. 1991). Accordingly, it reviewed JMC Power's exceptions by asking [*999] whether, as the proponent of rolled-in treatment, JMC Power had offered evidence sufficient to justify the statutory burden FERC would face were it to act under section 5 to order rolled-in treatment.¹⁵ The Commission analogized the present case to the *Algonquin* proceedings, in which this court had remanded the Commission's decision to set aside the proposed incremental treatment, and to order rolled-in rates, on the grounds that it had failed to produce substantial evidence to satisfy its section 5 burden. On the record before it, FERC held that JMC Power had similarly failed to establish that the proposed incremental treatment would be unjust or unreasonable.

In Opinion 406-A, FERC denied JMC Power's request for rehearing and further elaborated its decision denying rolled-in treatment for the NET/T-180 facilities cost.¹⁶

¹⁵ In order to act under section 5, FERC would have been required to show that the existing incremental pricing was unjust and unreasonable. Implicitly, then, FERC asked whether JMC Power had satisfied the standard that FERC itself would have had to meet were it to reject the proposed incremental pricing and to order rolled-in pricing. Since FERC supported the incremental treatment proposed by Tennessee in its section 4 rate filing, and found it to be just and reasonable, it shifted the statutory burden of section 5 onto the shoulders of JMC Power when assessing the argument for rolling-in the NET/T-180 facilities cost. Although this burden would have been FERC's had it formulated and ordered its own rate, FERC discussed the matter in terms of whether JMC Power had provided sufficient evidence to satisfy the section 5 burden. We shall do the same.

¹⁶ The Commission first rejected an offer by 68% of the NET/T-180 shippers to convert to open-access transportation service under Part 284 of the Commission's regulations, conditional

Focusing upon JMC Power's assertion that it had provided substantial evidence to[*17] support its contention that rolled-in pricing would be just and reasonable, FERC ruled that, even if true, JMC Power had nevertheless failed to make the necessary prior showing that the proposed incremental rates were unjust and unreasonable. The Commission acknowledged that it had previously considered the satisfaction of *Battle Creek*--a showing of integration and system-wide benefits--sufficient to support a finding both that rolled-in treatment is just and reasonable and that incremental pricing is unjust and unreasonable. However, FERC went on to note, this court's *Algonquin* and *TransCanada Pipelines Ltd. v. FERC*, 306 U.S. App. D.C. 299, 24 F.3d 305 (D.C. Cir. 1994), decisions had overturned its previous two rate-setting actions under NGA section 5. In its view, "a contributing factor" to these decisions reversing the agency's price setting action "has been an improper blurring of the distinction between NGA sections 4 and 5." *Tennessee II*, 76 F.E.R.C. at 61,223.

[*18] In what it described as a refinement of the Commission's past practices under section 5 of the NGA, taken in light of this court's repeated admonitions to respect the boundaries that separate section 4 from section 5 rate-settings, FERC reiterated its premise that there is no single just and reasonable rate. See *id.* at 61,223-24 & n.106 (citing *Western Resources, Inc. v. FERC*, 304 U.S. App. D.C. 9, 9 F.3d 1568, 1578 (D.C. Cir. 1993); *Northwest Pipeline Corp.*, 71 F.E.R.C.

upon FERC's acceptance of rolled-in treatment. Since the conversion offer constituted a new proposal, and one opposed by Tennessee, FERC could only accept the offer if it had satisfied section 5 of the NGA. As superceding settlements in Docket No. RP93-151-024, *et al.*, *Tennessee Gas Pipeline Co.*, 79 F.E.R.C. P61,031 (1997), had fixed Tennessee's GSR surcharge for existing customers, the proposed shift to Part 284 service by some of the NET/T-180 shippers would not have reduced the GSR costs borne by the pre-expansion customers in the near future. See *Tennessee III*, 80 F.E.R.C. at 61,219-21. Moreover, FERC noted that conversion to Part 284 service would have shifted the rate at which the NET/T-180 facilities were depreciated from the existing 5% level to the standard system rate of 2.5%. Such a shift would have reduced the return on equity associated with the NET/T-180 facilities, decreasing the level of revenues collected by Tennessee without providing any opportunity for it to offset these losses. See *id.* at 61,221-22 & n.97. After taking the altered depreciation rate into account, FERC found that the rate impact of rolled-in treatment would still exceed the 5% threshold utilized in the Pricing Policy Statement. See *supra* n.9.

P61,012 at 61,042 (1995)). The mere fact that rolled-in treatment may be just and reasonable under *Battle Creek*, FERC continued, does not establish that incremental treatment is necessarily unjust and unreasonable. "There is not a single magic point on the continuum between incremental and rolled-in rates such that at [*1000] that single point an incremental rate becomes unjust and unreasonable while a rolled-in rate simultaneously becomes just and reasonable." *Tennessee III*, 80 F.E.R.C. at 61,224.

The Commission then went on to explain that its references in Opinion 406 to the fact that the benefits of the NET/T-180 facilities primarily inure to the NET/T-180 shippers served to illustrate that the [**19] proposed incremental pricing was not unjust and unreasonable. Because the facilities provided a greater and more direct benefit to the expansion shippers than to Tennessee's pre-existing customers, the postulated system benefits of increased reliability, improved flexibility, and reduction of costs were insufficiently material. This determination, coupled with the fact that rolled-in treatment would entail a substantial cost-shifting to pre-expansion customers, led the Commission to reaffirm its earlier conclusion that incremental treatment was neither unjust nor unreasonable. Accordingly, the Commission had properly approved the proposed section 4 rate filing in Opinion 406.

In this petition for review, JMC Power challenges the Commission's decisions on three separate but interrelated grounds. First, it alleges that FERC unjustifiably departed from *Battle Creek*, and that it did so in contravention of—rather than, as FERC maintains, in accordance with—this court's *Algonquin* and *TransCanada* decisions. Second, JMC Power contends that FERC unlawfully applied a "strict quantitative" standard in assessing the costs and benefits of rolled-in treatment, and that it fully satisfied [**20] the qualitative *Battle Creek* standard that should have been utilized. Finally, JMC Power asserts that the Commission improperly departed from its own *Great Lakes Gas Transmission, L.P.*, 72 F.E.R.C. P61,081 (1995) ("*Great Lakes I*") precedent, wherein it ordered rolled-in pricing on the grounds that *Great Lakes Gas Transmission, L.P.* ("*Great Lakes*") had legitimately relied upon the continued application of *Battle Creek* at the time its expansion facilities were certificated and then constructed. JMC Power maintains that it too relied upon the future application of *Battle Creek*, and that the pricing of the NET/T-180 facilities should be determined solely on the basis of that standard. We disagree with all

three of JMC Power's contentions, and hold that FERC provided sufficient explication for its refinement of the *Battle Creek* test, and that the multi-factored elaboration accords with both our supervening jurisprudence and common sense.

B. Discussion

1. NGA Section 5 and Rolled-in Versus Incremental Pricing

In *Battle Creek Gas Company v. Federal Power Commission*, 108 U.S. App. D.C. 209, 281 F.2d 42 (D.C. Cir. 1960), this court distilled from [**21] FPC precedents a two-prong test for determining whether the costs of expansion facilities were properly recovered through incremental or rolled-in pricing. Under what has become known as the *Battle Creek* test, the Commission asks: (i) whether the expansion facilities form part of an integrated system that functions as a single unit in serving pre-existing and expansion customers alike; and (ii) whether the expansion facilities provide system benefits that accrue generally to all those who utilize the pipeline. See 281 F.2d at 47. Rolled-in pricing is only appropriate in those instances where expansion facilities are integrated and provide system-wide benefits.

The *Battle Creek* test has proven more contentious in its application than this seemingly straightforward articulation might imply. In particular, when the question of its proper application has intersected with the disparate burdens that distinguish agency action under section 4 from that under section 5 of the NGA, as it does in this case, both the Commission and the courts have had a difficult time reconciling countervailing impulses. In Opinions 406 and 406-A, the Commission sought to impose a degree of conceptual [**22] order upon rate-setting at this point of overlap. Taken together, they offer a reasoned reconciliation of the pipeline's role as the primary initiator of price setting with FERC's statutory duty to ensure that proposed rates are just, reasonable, and nondiscriminatory.

a. Section 5 in Court

This court reviews rate-setting deferentially; our scrutiny is limited to ensuring [*1001] that the Commission has made a principled and reasoned decision supported by the evidentiary record. See *Columbia Gas Transmission Corp. v. FERC*, 202 U.S. App. D.C. 291, 628 F.2d 578, 593 (D.C. Cir. 1979). Nevertheless, this court has strictly policed the statutory line that separates action taken under NGA section 4 from that taken under NGA section

5. In *Algonquin*, we described this distinction as follows:

The Commission may act under two different sections of the Natural Gas Act (NGA or the Act) to effect a change in a gas company's rates. When the Commission reviews rate increases that a gas company has proposed, it is subject to the requirements of section 4(e) of the Act, 15 U.S.C. § 717c(e). Under section 4(e), the gas company bears the burden of proving that its proposed rates are reasonable. [**23] On the other hand, when the Commission seeks to impose its own rate determinations, rather than accepting or rejecting a change proposed by the gas company, it must do so in compliance with section 5(a) of the NGA.

948 F.2d at 1311. Under section 5, the Commission must first establish that the proposed or existing rate is unjust and unreasonable. It is only after this antecedent showing has been made that the Commission properly can illustrate that its alternative rate proposal is both just and reasonable. See *id.* at 1314.

In recent years, we have rejected a series of rate orders on the grounds that the Commission had failed to adhere to this statutory distinction. Our *Western Resources* decision typifies the reaction that past FERC rate-setting ignoring that distinction has evoked. *Western Resources*, 304 U.S. App. D.C. 9, 9 F.3d 1568. There, the Commission had rejected a proposed rate increase by Panhandle Eastern Pipeline Company, substituting in its place an alternative rate formulated by the Commission staff. Defending this rate in a petition for review before this court, FERC maintained that its formulation needed only to satisfy the section 4 just and reasonable [**24] standard. In its view, the proposed rate had met this standard by half; accordingly, it ordered a rate that amounted to exactly 50% of the pipeline's proposal. In rejecting this reasoning, as well as the rate it sought to justify, this court noted that it

has consistently disallowed attempts to blur the line between §§ 4 and 5. As we complained four years ago, 'on four occasions in the last three years this court has reviewed Commission efforts to compromise § 5's limits on the power to revise rates. On each the court has repelled the Commission's gambit. This is number five.' We now make it an even six.

9 F.3d at 1568 (internal citations omitted).

FERC decisions specifically addressing the appropriate recovery method for the cost of expansion facilities--i.e., incremental versus rolled-in pricing--have faced similar

repudiation. In *Algonquin*, 292 U.S. App. D.C. 197, 948 F.2d 1305, for example, this court rejected a modification of proposed incremental rates on the grounds that the Commission had failed to establish that the proposed continuation of incremental treatment would be unjust and unreasonable. In support of its order to roll-in their cost, FERC [**25] had asserted generally that the new facilities both increased the overall reliability of the pipeline and made any future expansion easier and cheaper. See *id.* at 1312. Rejecting these conclusions as unsubstantiated, the court directed the Commission to undertake an analysis of the benefits allegedly associated with the expansion facilities, and to outline "with reasonable particularity the system-wide benefits which each new facility produces" before it could order rolled-in treatment under NGA section 5. *Id.* at 1313. In *TransCanada*, 306 U.S. App. D.C. 299, 24 F.3d 305, FERC ordered the incremental pricing of expansion facilities where the pipeline had proposed to roll-in the costs. In its *TransCanada* proceedings, FERC had articulated a new standard for determining the propriety of rolled-in versus incremental pricing, which this court styled the "commensurate benefits" test. 24 F.3d at 308. Under this standard, FERC weighed the system-wide benefits that the expansion facilities provided existing customers against the costs to those same customers of rolled-in treatment; on the record before it, the Commission found those benefits insufficient to support the proposed [**26] roll-in. After comparing it with *Battle Creek*, we concluded that the "commensurate benefits" [**1002] test constituted a departure from pre-existing Commission policy. As it had not been dictated by any supervening decision of this court, and FERC had failed to provide a reasoned explanation for this policy shift, we rejected FERC's rate order and remanded for further consideration and elaboration. See *id.* at 310.

b. The NET/T-180 Facilities

The parties before us disagree as to the proper reading of these decisions. According to JMC Power, *Algonquin* and *TransCanada*, together with *Southeastern Michigan Gas Co. v. FERC*, 328 U.S. App. D.C. 171, 133 F.3d 34 (D.C. Cir. 1998) (affirming the rolled-in treatment of expansion facilities' cost adopted by FERC on remand from *TransCanada*), collectively require application of *Battle Creek* to the NET/T-180 facilities. In its view, *Battle Creek* controls irrespective of the particular cost-recovery method proposed by the pipeline. Having demonstrated that the expansion facilities are integrated with Tennessee's mainline pipeline and having articulated qualitative system

benefits, JMC Power claims to have satisfied [**27] *Battle Creek's* requirements for rolled-in pricing, whether assessed under section 4 or section 5. By contrast, FERC asserts that JMC Power has failed to satisfy the section 5 burden imposed by our NGA jurisprudence, as the pipeline had proposed incremental pricing for the NET/T-180 facilities. In its view, a determination that rolled-in pricing would satisfy *Battle Creek* if such rates had been proposed by the pipeline does not carry with it a concomitant determination that incremental pricing would necessarily be unjust and unreasonable. Rather, these two inquiries must be kept separate from one another; to collapse them would violate the settled doctrine that there is no single just and reasonable rate. See *Tennessee III*, 80 F.E.R.C. at 61,223-24 & n.107 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 20 L. Ed. 2d 312, 88 S. Ct. 1344 (1968); *Hope Natural Gas Co.*, 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)). In order to satisfy the NGA's grant of primary initiative for rate-setting to the pipeline, as well as this court's derivative and repeated assertion that section 5 of the NGA imposes a more rigorous evidentiary burden than section 4, FERC [**28] contends that the two prongs of *Battle Creek* cannot any longer constitute the sole measure for determining the propriety of incremental versus rolled-in pricing. Mindful of the Commission's broad discretion over the proper allocation of costs among a pipeline's customers, see *Algonquin*, 948 F.2d at 1313; *Consolidated Gas Supply Corp. v. FPC*, 172 U.S. App. D.C. 162, 520 F.2d 1176, 1185 (D.C. Cir. 1975), we endorse FERC's reading.

An avowed refinement of the *Battle Creek* standard in light of supervening decisions by this court, the minor policy shift that FERC articulated in Opinions 406 and 406-A is reasoned and justified. As FERC explicitly acknowledged in Opinion 406-A, our *Algonquin* and *TransCanada* decisions reveal that "the Commission's past practices with respect to rolled-in [versus] incremental pricing did not give sufficient weight to this statutory scheme." *Tennessee III*, 80 F.E.R.C. at 61,224. By separating the inquiry into whether a proposed rate is unjust and unreasonable from that into whether FERC's alternative formulation is just and reasonable, FERC tailored its policy to our jurisprudence. This clarification accords with our repeated emphasis [**29] of the necessary distinction between section 4 and section 5 rate-making proceedings, and accordingly with the text and structure of the NGA. Cf. *Clark-Cowlitz Joint Operating Agency v. FERC*, 264 U.S. App. D.C. 58, 826 F.2d 1074 (D.C. Cir. 1987) (in banc) (reinterpretation of FERC policy more compelling when animated by belief that earlier

policy thwarted congressional intent).

Unlike the "commensurate benefits" test that this court remanded in *TransCanada*, the refinement of *Battle Creek* currently before us has been fully explicated below. In Opinions 406 and 406-A, the Commission announced its attempt to reconcile the tension between *Battle Creek* and the evidentiary constraints of NGA section 5. It went on to provide an elaborate and reasoned justification for what we consider a reasonable reconciliation. See *Tennessee II*, 76 F.E.R.C. at 61,115-16; *Tennessee III*, 80 F.E.R.C. at 61,223-25. Although FERC did not explicitly rely upon its 1995 Pricing Policy Statement, see discussion *supra* note 9, [*1003] the emphasis on the 5% cost impact figure that is present in the filings of the parties, the ALJ's decision, and the Commission's discussion, evidences a keen [**30] awareness of its background presence. FERC clearly referenced and reiterated the justifications underlying the Pricing Policy Statement in its *Tennessee II* and *Tennessee III* decisions, and its desire to prevent unwarranted rate shocks lends further support for its refinement of *Battle Creek*.

We agree with FERC that the alternative reading proffered by JMC Power improperly collapses the section 5 analysis into a single determination that rolled-in pricing would be reasonable under *Battle Creek*. On this theory, it makes no difference whether the pipeline proposed incremental or rolled-in rates, as the inquiry under either section 4 or section 5 would be the same. So long as the proponent of rolled-in treatment could show that the expansion facilities are integrated with the pipeline and provide some qualitative benefits, rolled-in treatment would be necessitated. This reading falters on at least two grounds. First, it ignores the statutory distinction between section 4 and section 5 ratesetting.¹⁷ As this court has repeatedly emphasized, and we

¹⁷ FERC properly accorded different treatment to the FSST/ T-149 facilities, for which Tennessee Gas had proposed rolled-in pricing. Since Tennessee Gas proposed incremental treatment for the NET/T-180 facilities, and since JMC Power failed to carry its initial burden of establishing that such treatment would be unjust and unreasonable, FERC properly approved the rate filing. Due to the distinction between section 4 and section 5 proceedings, we reject JMC Power's additional assertion of discriminatory treatment as meritless.

JMC Power makes a separate claim of discrimination which emerges directly out of this court's *TransCanada* decision. Therein, we had concluded that FERC failed to assess whether incremental pricing of integrated facilities is necessarily discriminatory. See *TransCanada*, 24 F.3d at 311.

reiterate, section 5 contains two separate and distinct components. We will not approve a rate formulated by FERC unless the [**31] Commission has shown (i) that the proposed and rejected rate is unjust and unreasonable and (ii) that its alternative formulation is just and reasonable.

[**32] Second, despite its pretension to the contrary, the reading articulated by JMC Power is not in any way dictated by any prior decision of this court. Nothing we have said can be reasonably read to limit FERC's freedom to modify its previous policies in the manner here chosen. In *TransCanada*, we remanded FERC's orders on the grounds that the Commission had failed to supply a sufficient explanation for the new "commensurate benefits" test it had utilized below. Nevertheless, we invited FERC to provide the sort of reasoned explanation contained in Opinions 406 and 406-A. This court's most recent decision in this area, *Southeastern Michigan*, 328 U.S. App. D.C. 171, 133 F.3d 34, lends further support to the refinement of *Battle Creek* that FERC has here undertaken. There, in upholding FERC's *Great Lakes I*, 72 F.E.R.C. P61,081, *reh'g denied*, 75 F.E.R.C. P61,089 (1996) ("*Great Lakes II*"), decision on remand from *TransCanada*, where FERC had approved the proposed rolled-in pricing, this court acknowledged that "on both a theoretical and practical basis, it is perfectly possible for both cross-subsidization ¹⁸ [**34] and systemwide benefits to exist on the same facts." [**33] 133 F.3d at 41. Although the court did not make the logical connection between this possibility and the potential existence of multiple just and reasonable rates, its assertion implicitly acknowledges one of the core ideas underlying FERC's refinement of *Battle Creek*. It is because cross-subsidization and systemwide benefits can coexist that there is no single "magic point" at which incremental or

rolled-in pricing becomes unjust. *Tennessee III*, 80 F.E.R.C. at 61,224. While incremental [**1004] treatment may be required at one end of the rate-setting continuum, and rolled-in pricing required at the other, in between the two extremes lie a series of intermediate points in which both cost-recovery methods would satisfy section 4's just and reasonable test. ¹⁹ At each of these places along the continuum, the pricing mechanism will essentially lie in the hands of the initiating pipeline. It is only when the proposed rate crosses the boundary separating the just from the unjust that FERC can act under its section 5 authority to order a rate of its own formulation.

c. FERC's Use of Quantitative Measures

JMC Power also makes much of the fact that FERC allegedly assessed both the costs as well as the postulated system benefits of the NET/T-180 expansion on a quantitative basis, alleging that the use of any quantitative standard was unlawful. While JMC Power attaches many of its previous arguments to this claim, it also makes an independent assertion that the use of a quantitative standard is in and of itself arbitrary, capricious, or contrary to law. We reject this contention, as it rests upon a misreading of this court's caselaw and defies both logic and common sense.

JMC Power's argument is [**35] difficult to reconstruct, but it seems to begin from this court's statement in *Battle Creek* that the rolled-in treatment of new facilities is just and reasonable when they are integrated with the pipeline and provide system-wide benefits. Although the Trunkline Gas Company had not quantified the benefits that would likely accrue from the expansion facilities, in the form of increased capacity and a reduction in the costs of planned future expansions designed to meet the supply needs of all customers, the *Battle Creek* court held that the existence of the benefits had been sufficiently established to support rolled-in treatment. 281 F.2d at 47-48. In *Algonquin*, this court rejected an assertion of system-wide benefits that failed to establish

In the proceedings below, the Commission explicitly responded to this challenge, going to great lengths to establish why, given the particular facts of this case, incremental treatment was just and reasonable. Since differential rates founded upon differences of fact do not constitute discrimination, FERC clearly responded to the concerns we had articulated in *TransCanada*. See generally *Tennessee II*, 76 F.E.R.C. at 61,113-15; *Tennessee III*, 80 F.E.R.C. at 61,223-27.

¹⁸ Cross-subsidization occurs when expansion facilities that provide limited benefits to an integrated pipeline system receive rolled-in treatment. Where pre-expansion customers bear a portion of the construction costs that is not equivalent to the benefits they receive, they essentially subsidize the investment undertaken on behalf of the expansion customers.

¹⁹ Although formulated in different terms, the *Battle Creek* court recognized this variability in its statement that

whether the cost of a particular facility is more properly treated as a systemic cost and rolled-in to the rate base of all of the customers, or as a segregated cost to a particular customer, which should be treated on an incremental basis, is frequently a difficult issue of fact presented to the Commission.

281 F.2d at 47.

the existence of any such benefits with "reasonable particularity," but rested instead upon conclusory assertions of fact. 948 F.2d at 1313. *Algonquin* thereby called into question excessive reliance upon unsubstantiated qualitative benefits. In *TransCanada*, by contrast, the court cut off any shift towards requiring quantitative elaboration, emphasizing that the *Algonquin* decision "was careful not to require a balancing of [**36] costs and benefits (much less a quantification thereof)." 24 F.3d at 308. From this statement, JMC Power seemingly reads a ban on the use of quantitative analysis into this court's decisions.

However, the mere fact that the court has not *required* the explicit quantification of benefits which, as this case well illustrates, are difficult to forecast with precision, does not carry a concomitant *prohibition* on the use of quantitative measures. Where the parties expend the necessary resources to allow for quantitative projections, FERC is not forbidden from looking at those estimations. *Cf. Southeastern Michigan*, 133 F.3d at 41 ("when an expansion is both integrated and to the benefit of existing users, FERC is *not bound* to study the quantitative effect of rolling in construction costs") (emphasis added). While JMC Power goes to great lengths to establish that FERC utilized a "strict quantitative standard," the evidence does not bear out its contention. Once it is understood that FERC simply attempted to assess whether JMC Power had made out a claim that incremental pricing would be unjust and unreasonable, all of its allegedly damning statements become innocuous. They [**37] amount to nothing more than a determination that the alleged benefits proffered by JMC Power, which FERC found to be either speculative or to the primary benefit of the NET/T-180 customers, did not establish that incremental pricing would be unjust. For the same reason, FERC did not err in referencing its finding that rolling-in the expansion [**1005] facilities would have a rate impact of greater than 6%. That finding merely supports its conclusion that the section 5 burden had not been satisfied.

JMC Power fails to recognize the import of such quantitative estimations because it seeks to collapse the two prongs of the section 5 analysis into a single assessment of whether rolled-in rates would be just and reasonable. Once it is recognized that NGA section 4 and section 5 have different requirements, however, it becomes clear that FERC can properly utilize quantitative measures of costs and benefits in making a section 5 assessment of whether a proposed cost-recovery method would be unjust and unreasonable.

2. *The Great Lakes Decisions and Reliance*

After this court's *TransCanada* decision, which invalidated FERC's application of its newly-crafted "commensurate benefits" test for [**38] failure to provide a reasoned explanation for its departure from *Battle Creek*, FERC ordered a roll-in of the expansion facilities' costs at issue. See *Great Lakes I*, 72 F.E.R.C. P61,081. Rather than articulating a sufficiently detailed justification for its policy shift, FERC decided that, on the facts of the case, it would be more equitable simply to apply *Battle Creek*. At the time that the Great Lakes expansion shippers had made substantial financial commitments for the planning and construction of the additional pipeline facilities, *Battle Creek* provided the prevailing backdrop. In its petition for review, JMC Power argues that it too relied upon the continued application of *Battle Creek* when making its own financial commitments. In its view, the same principles of equity and nondiscrimination that FERC relied upon in *Great Lakes I* dictate adherence to *Battle Creek* in this case as well. We do not agree.

Despite the alleged similarities stressed by JMC Power between its situation and that of the Great Lakes expansion shippers, material differences separate the respective business and regulatory environments that they confronted. First, and we think dispositive [**39] in light of our preceding discussion of the difference between section 4 and section 5 rate-settings, the pipeline company--Great Lakes Gas Transmission Limited Partnership--proposed rolling-in the costs of the expansion facilities at issue in the *Great Lakes* decisions. See *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973) (plurality opinion) (factual differences serve to distinguish cases "when some legislative policy makes the differences relevant to determining the proper scope of the prior rule"). In the ensuing section 4 proceeding, FERC needed only to determine whether rolled-in pricing would be just and reasonable. Throughout its *Great Lakes II* opinion denying rehearing of its order approving the proposed rolled-in rates, 75 F.E.R.C. P61,089, FERC emphasized the procedural posture of the dispute and the resulting evidentiary burdens. Responding to objections made by a pre-expansion customer--Texas Eastern--FERC distinguished a series of its own previous decisions ordering incremental treatment on the grounds that, in each case, incremental rates had been proposed by the pipeline in a section [**40] 4 rate filing. "In all but one of the cases Texas Eastern cites, the Commission implemented incremental rates at the request of the

pipeline. The other case ... did not involve facilities-based incremental charges...." *Id.* at 61,272.

The assertion that the NET/T-180 shippers stand in the same position as the Great Lakes expansion shippers cannot survive the comparison. Since Tennessee Gas proposed to continue the existing incremental treatment of the NET/ T-180 facilities, this case presents the very scenario expressly distinguished in *Great Lakes II*. Moreover, FERC's opinion there went on to note that, where the pipeline proposes incremental treatment, "the Commission can only order rolled-in rates if it meets its burden under NGA section 5 to show that the existing non-rolled-in rates are unjust and unreasonable, and rolled-in rates are just and reasonable." *Id.* In the present case, FERC concluded that JMC Power had failed to satisfy its burden of establishing that the proposed incremental rates are unjust and unreasonable. We have not been directed to any evidence in [*1006] the record that points to a contrary direction, and see no reason to disrupt this conclusion.

Turning [*41] to the facts underlying the *Great Lakes* decisions, we note that the original certification of the Great Lakes expansion provided for rolled-in treatment of the facilities' cost. Given that Great Lakes Transmission L.P. is an affiliate of TransCanada Pipelines, its largest customer, TransCanada knew that the pipeline would seek to continue rolled-in treatment in its next rate filing. Accordingly, its assumption that *Battle Creek* would continue to apply in the resulting section 4 proceeding, and that the expansion facilities would continue to receive rolled-in treatment, was reasonable. In the present case, by contrast, the original certification process provided for incremental pricing of the NET/T-180 facilities, without any guarantee or firm commitment that the pipeline would necessarily seek rolled-in rates at the next section 4 proceeding. See *Tennessee II*, 76 F.E.R.C. at 61,115. The Commission held that JMC Power had no reasonable expectation of rolled-in treatment, and we agree. As JMC Power makes no other claim that the application of FERC's refinement of *Battle Creek* would entail a "manifest injustice," *Clark-Cowlitz*, 826 F.2d at 1081, we uphold its application [*42] to the NET/T-180 facilities.

C. Conclusion

For the reasons stated, JMC Power's petition for review is denied.

PART II: THE FSST/T-149 AND BOUNDARY FACILITIES AND THE NIAGARA SPUR CHARGE

Equitable Gas Company petitions for review of the Commission's orders in *Tennessee II*, *reh'g denied*, *Tennessee III*. In the relevant portions of these orders, the Commission approved Tennessee's proposal to recover the costs of a series of facility expansions, collectively referred to as the FSST/T-149 and Boundary facilities, on a "rolled-in" basis, and rejected Tennessee's proposed "Niagara Spur Charge," an incremental surcharge to Tennessee's open-access firm transportation rate (Rate Schedule FT-A) concerning Tennessee's Niagara Spur facilities. Equitable claims that the Commission wrongly reviewed Tennessee's roll-in proposal under section 4 instead of section 5 of the Natural Gas Act and that the Commission wrongly denied Equitable's request for a rehearing on the Niagara Spur Charge. We hold that Opinions 406 and 406-A properly followed the statutory framework set up by the Natural Gas Act and that the Commission acted well within its discretion in denying Equitable's [*43] request for a rehearing. We therefore deny Equitable's petition for review.

A. Background

Tennessee's pipeline system divides into seven zones. Zones 0 and 1 (the Texas and Southern Zones) comprise Tennessee's production area. The remaining zones (Central, Eastern, Northern, New York, and New England) comprise its market area. Between 1984 and 1993, Tennessee constructed four independent expansion projects in Zones 5 and 6, including the FSST/T-149, Boundary, and Niagara Spur facilities.²⁰

Tennessee designed its FSST/T-149 facilities to provide service to nine customers in Zone 6 and one customer in eastern Zone 5. Constructed along scattered portions of Tennessee's mainline in Pennsylvania, New York, New Jersey, Connecticut, [*44] Massachusetts, and New Hampshire, the facilities include approximately 74 miles of looping and 17,300 horsepower of new and additional compression. The original estimated cost of the facilities was \$ 99,043,000.

Tennessee's Boundary facilities were built to provide additional gas service to four eastern Zone 5 and nine Zone 6 customers to meet their peak period needs. These facilities consist of approximately ten mainline

²⁰ These projects primarily involved the addition of mainline looping and compression. The looping increased the carrying capacity of the entire pipeline. See *Algonquin*, 948 F.2d at 1308-09 n.4. Both the looping and the increased compression protect customers from outages.

looping segments totaling 40 miles in various counties of Pennsylvania and Tennessee.

Pursuant to settlements the Commission approved in 1985 and 1987, Tennessee agreed to recover the costs of the FSST/T-149 and [*1007] Boundary facilities initially by incremental rates. Then, in its 1991 general rate filing pursuant to section 4 of the Natural Gas Act, 15 U.S.C. § 717c, Tennessee proposed to roll in the costs of the FSST/T-149 and Boundary facilities. See *Tennessee II*, 76 F.E.R.C. at 61,095-96.

The Commission suspended Tennessee's 1991 filing for five months and ordered an evidentiary hearing before an administrative law judge to resolve cost allocation and rate design issues. Two years later, in October 1993, the Commission approved a settlement among Tennessee [*45] and its customers resolving all questions concerning the allowable level of cost Tennessee could recover in its rates. The settling parties left for prospective resolution before an administrative law judge ("ALJ") the allocation of costs of the new facilities among Tennessee's customers, and the design of Tennessee's rates. See *id.* at 61,080.

In an initial decision issued after hearings, *Tennessee I*, 72 F.E.R.C. P63,005, the ALJ ruled that Tennessee--and its customers supporting the rolled-in pricing of the FSST/T-149 and Boundary facilities--had the burden under section 5 of the Act to show both that incremental pricing of those facilities was unjust and unreasonable, and that the proposed rolled-in pricing was just and reasonable. See *id.* at 65,068. Concluding that Tennessee and the other proponents of rolled-in pricing had not met that burden, see *id.* at 65,068-69, the ALJ held that Tennessee could not recover the costs of the FSST/T-149 and Boundary facilities on a rolled-in basis.

The ALJ also addressed Tennessee's proposal to modify the previous rolled-in rate treatment of the Niagara Spur by creating a new, incremental Niagara Spur Charge. Because the Niagara [*46] Spur is integrated into Tennessee's system and was intended to benefit the Tennessee system as a whole, the ALJ rejected Tennessee's proposal. See *id.* at 65,073.

On review, the Commission reversed the ALJ's ruling with respect to the FSST/T-149 and Boundary facilities. See *Tennessee II*, 76 F.E.R.C. at 61,097-104. The Commission held that because Tennessee had proposed the change to rolled-in pricing under section 4 of the Act, Tennessee needed to establish only that rolled-in pricing was just and reasonable without the additional burden of establishing that incremental rates

were unjust and unreasonable under section 5. See *id.* at 61,097-104. Finding that Tennessee had met its section 4 burden of proof, the Commission approved Tennessee's proposal to roll in the costs of the FSST/T-149 and Boundary facilities. See *id.* at 61,098-104. The Commission also affirmed the ALJ's rejection of Tennessee's proposed incremental Niagara Spur Charge. See *id.* at 61,107-08.

Equitable, a distributor of natural gas in Pennsylvania, West Virginia and Kentucky, sought rehearing, which the Commission denied in Order 406-A. See *Tennessee III*, 80 F.E.R.C. at 61,070.

B. [*47] Discussion

The first issue Equitable raises is whether section 4 or section 5 of the Act governs Tennessee's proposal to roll in the costs of its FSST/T-149 and Boundary facilities. As discussed in Part I of this opinion, the approval or rejection of rates proposed by the pipeline is governed by section 4. See 15 U.S.C. § 717c. Under section 4, the pipeline must prove that its proposed rates are just and reasonable. See 15 U.S.C. § 717c; see also *Public Serv. Comm'n v. FERC*, 275 U.S. App. D.C. 286, 866 F.2d 487, 488 (D.C. Cir. 1989). Section 5 applies when the Commission or an intervenor seeks to impose on the pipeline rates different from either present rates or rates proposed by the pipeline. See 15 U.S.C. § 717d. Under section 5, the Commission or the intervenor must prove that the pipeline's present rates are not just and reasonable and that the new rates proposed by the Commission or the intervenor are just and reasonable. See 15 U.S.C. § 717d; see also *Public Serv. Comm'n*, 866 F.2d at 488.

It was Tennessee who proposed to roll in the costs of the FSST/T-149 and Boundary facilities. One would therefore suppose that section 4 governed the rate proceeding. [*48] Equitable nevertheless insists section 5, rather than section 4, applies. It claims that once Tennessee canceled its rate change request, [*1008] there was no longer any basis for using section 4. The trouble with Equitable's argument is that Tennessee did not, in fact, withdraw its proposal and did not abandon its stated desire for rolled-in pricing of its FSST/T-149 and Boundary facilities. Equitable has another line of argument based on the fact that Commission trial staff and other parties--but not Tennessee--presented the evidence in support of Tennessee's rate-change request concerning the

FSST/T-149 facilities.²¹ According to Equitable, whether section 4 or section 5 governs depends not on the identity of the party proposing the rate change, but on the identity of the party supporting the rate change with evidence at the hearing. Since the pipeline here did not mount the case in its favor, section 4 did not control. Nothing in the Act or this circuit's precedent suggests, let alone supports, this theory. When choosing between section 4 and section 5, the Act makes the source of the proposed rate change decisive. See *East Tenn. Natural Gas Co. v. FERC*, 274 U.S. App. D.C. 243, 863 [**49] F.2d 932, 937 (D.C. Cir. 1988). Because the pipeline (Tennessee) proposed the rate change concerning the FSST/T-149 and Boundary facilities, the Commission properly followed the framework set up by the Act and applied section 4. See *Sea Robin Pipeline Co. v. FERC*, 254 U.S. App. D.C. 137, 795 F.2d 182, 183-84 (D.C. Cir. 1986).²²

This leads to Equitable's second challenge. Even if section 4 governs Tennessee's rate-change request, Equitable tells us that [**50] the Commission erred in another respect--namely, in holding that Tennessee proved that rolled-in rates were just and reasonable. Equitable argues that Tennessee could not have met its section 4 burden of proof because Tennessee itself did not present any evidence at the hearing to support its proposal.

City of Winnfield, La. v. FERC, 240 U.S. App. D.C. 247, 744 F.2d 871 (D.C. Cir. 1984), forecloses Equitable's line of reasoning, although no one saw fit to cite the decision to us. That case involved § 205 of the Federal Power Act, 16 U.S.C. § 824d, which requires utilities to prove that their rate-change proposals are just and reasonable. The precise question in *City of Winnfield* was whether an electric utility could meet its burden of proof under § 205 even though Commission staff--not the utility--presented key evidence in support of a rate change. See 744 F.2d at 876. The court held that "if evidence is introduced in the proceeding supporting a

rate increase, the increase can lawfully be imposed, regardless of the source from which that evidence comes." *Id.* at 877. In reaching this conclusion, the court noted that the burden of proof requirement under § 205 relates to the burden of [**51] persuasion (or, more accurately, the risk of non-persuasion), not to the burden of production, and thus the identity of the party submitting evidence is not dispositive. See 744 F.2d at 877.²³ Section 205 of the Federal Power Act and section 4 of the Natural Gas Act are identical in form and have been treated as identical in substance. See 744 F.2d at 875; compare 16 U.S.C. §§ 824d(e) & 824e(a) with 15 U.S.C. §§ 717c(e) & 717d(a). There is no reason to adopt one set of evidentiary rules for rate proposals from utilities but a different set for rate proposals from pipelines. We therefore [*1009] hold that in a proceeding supporting a rate change pursuant to section 4 of the Natural Gas Act, a pipeline may rely on any submitted evidence--regardless of its source--to satisfy its burden of proof.

[**52] The two previous Commission decisions Equitable cites do not change our mind about this. According to Equitable, under *Equitrans, L.P.*, 80 F.E.R.C. P61,144 (1997), order on reh'g, 81 F.E.R.C. P61,030 (1997), and *El Paso Natural Gas Co.*, 48 F.E.R.C. P61,018 (1989), the Commission must reject pipeline-initiated filings if the pipeline fails to support the filing with evidence. The facts in those cases differ from the facts in this case. As the Commission pointed out, in *El Paso*, no party furnished any evidence to support the filing. In *Equitrans*, the pipeline submitted some evidence to support its filing, but the Commission described it as "seriously deficient."²⁴ 81 F.E.R.C. at

²¹ Tennessee provided some of the evidentiary support for rolling in the costs of the Boundary facilities.

²² This is not inconsistent, as Equitable claims, with the Commission's decision to apply section 5 to the New England Customer Group's proposal to eliminate the direct assignment of Tennessee's New England lateral facilities' costs. Because the New England Customer Group proposed rates different from those urged by the pipeline, the Commission properly applied section 5 to the New England Customer Group's proposal. See 15 U.S.C. § 717d.

²³ The procedural setting of *City of Winnfield* was unusual. The utility proposed incremental pricing to replace its average cost rates but indicated that if the Commission rejected this proposal, the utility would accept a staff proposal to increase the utility's average cost rates. See 744 F.2d at 873. In the § 205 proceeding, the Commission declined to permit the incremental pricing proposal but granted the average cost rate increase. See *id.* at 875. The court stated that "it would be wasteful to require, instead of the sensible procedure adopted here, that the Commission first deny [the utility's] requested increase and that the utility then commence a separate § 205 proceeding proposing the acceptable increase of rates under the existing scheme that the Commission staff had suggested." See *id.* at 876-77.

²⁴ Equitable also cites *Pacific Gas Transmission Co.*, 66 F.E.R.C. P61,384 (1994). But that case does not address the issue here, namely, whether a pipeline's failure to support a

61,157. In marked contrast, here no one disputes that intervenors and the Commission trial staff presented extensive evidence to support Tennessee's filing. Equitable does not challenge the adequacy of the evidence. The issue, according to Equitable, is whether the standard governing a pipeline's rate proposal turns on the identity of the party supporting the filing with evidence. As *City of Winnfield* makes clear, it does not.

[**53] One other detail about Tennessee's filing merits mention. Equitable contends that Tennessee failed to submit certain statements required by 18 C.F.R. §§ 154.301 & 154.312. Although the record is not clear in this regard, the Commission appeared to concede at oral argument that Tennessee may not have filed some documents required by Commission regulations. We will assume, arguendo, that Tennessee failed in this respect. But we will not assume that Tennessee's neglect obligated the Commission to reject its filing. The Commission has broad discretion to decide whether a filing substantially complies with its regulations. See *United Gas Pipe Line Co. v. FERC*, 228 U.S. App. D.C. 102, 707 F.2d 1507, 1512 (D.C. Cir. 1983). The Commission may even accept defective filings. See *id.* That seems to be the posture the Commission adopted with respect to Tennessee's filing. In any event, it does not appear that Equitable raised this issue in a timely manner before the Commission. Equitable thus cannot raise it--and this court will not address it--now. See 15 U.S.C. § 717r(b).

The third issue Equitable raises is whether the Commission abused its discretion by not rehearing a proposal to [**54] reinstate Tennessee's proposed Niagara Spur Charge.²⁵ The Commission held that

section 4 filing with evidence requires the Commission to reject the pipeline's filing.

²⁵ Tennessee's Niagara Spur is located in Zone 5 and extends from an interconnection between the systems of Tennessee and a Canadian pipeline at the Niagara River to a connection with Tennessee's mainline at East Aurora, New York. The expansion of the Niagara Spur facilities involved the addition of odorization facilities and permanent compression facilities. The new facilities increased pressure on the Niagara Spur so that Tennessee could begin using the Niagara Spur to deliver gas to mainline customers. The Niagara Spur Charge recovers approximately half of the cost of the Niagara Spur facilities from those Rate Schedule FT-A shippers with primary receipt points on the Niagara Spur for delivery of transportation of Canadian gas supply into Tennessee's Zones 5 and 6. The remaining Niagara Spur costs are allocated to incremental Rate Schedule NET-Segment 1 shippers with firm transportation rights on the Niagara Spur.

rolled-in pricing of the Niagara Spur facilities was just and reasonable. Equitable argues that the Niagara Spur cost-allocation decision warranted a rehearing because the Commission allowed further hearings on a cost-allocation issue involving Tennessee's New England lateral facilities.

[**55] The Commission reasonably treated the two questions differently, ordering a rehearing in one but not the other. After a review of the record and allegations by the New England Customer Group regarding the treatment of non-New England lateral facilities, the Commission concluded that the existing cost-allocation of the New England laterals potentially violated the anti-discrimination provisions of section 5 of the Act. Although a hearing had already been held on the general issue of the justness and reasonableness [**1010] of that allocation methodology, the specific subsidiary issue whether the methodology is unduly discriminatory was not fully explored. In order to answer that question on the merits, the Commission believed it needed to develop the record further, and thus ordered a rehearing. The situation with the Niagara Spur cost-allocation issue was different. The record regarding this subject was adequate to decide on the merits whether rolled-in pricing of the Niagara Spur facilities was just and reasonable. In the Commission's considered view, further hearings were not needed. See *Cajun Elec. Power Coop., Inc. v. FERC*, 307 U.S. App. D.C. 306, 28 F.3d 173, 177 (D.C. Cir. 1994). We [**56] find no reason to question the Commission's judgment. For these reasons, and in deference to the Commission's expertise in deciding whether to conduct hearings in the first instance, see *Alabama Power Co. v. FERC*, 301 U.S. App. D.C. 253, 993 F.2d 1557, 1565 (D.C. Cir. 1993); *Southern Union Gas Co. v. FERC*, 268 U.S. App. D.C. 257, 840 F.2d 964, 970-71 (D.C. Cir. 1988), we hold that its refusal to rehear a proposal concerning the Niagara Spur Charge fell well within the Commission's discretion.

C. Conclusion

No useful purpose would be served by setting forth Equitable's other arguments. We have considered and rejected them. We therefore affirm the Commission's rulings in Opinions 406 and 406-A and its denial of Equitable's request for rehearing.

PART III: THE UNIFORM HOURLY TAKE TARIFF

Consolidated Edison, Brooklyn Union, and the Long Island Lighting Companies (collectively "Con Ed") fare

no better in contending that the Commission erred in concluding that Tennessee does not unduly discriminate in the implementation of a tariff provision governing the uniform hourly take of gas. The Commission reasonably found that while Tennessee routinely provides New England [**57] customers with greater hourly flexibility than New York area customers such as Con Ed, Tennessee was not unduly discriminatory because the two sets of customers were not similarly situated, due to the operational constraints of the system.

A. Background

A tariff provision affecting two of Tennessee's rate schedules requires customers to take "as nearly as practicable" uniform hourly quantities of their daily entitlements to gas. § 4.11 of Rate Schedule FT-A; see also § 4.4 of Rate Schedule IT. Con Ed complained to the Commission that Tennessee does not uniformly apply that provision; while a flow control valve at the White Plains meter limited Con Ed's hourly take of gas to strictly 1/24 (or 4.2%) of its daily contract, New England customers, with no flow control valves in place at their meters, routinely could take up to 6% of their daily entitlements during any given peak hour "under an informal, unwritten, and unfiled agreement." *Tennessee I*, 72 F.E.R.C. at 65,116. At the rates in effect during the administrative proceedings, Con Ed claimed that it could have contracted for 31% less gas, at an annual savings of approximately \$ 4 million, had it been given the [**58] same hourly flexibility as the New England customers. Contending that Tennessee's practice constitutes undue discrimination in violation of sections 4 and 5 of the Natural Gas Act, see 15 U.S.C. §§ 717c-717d, Con Ed claimed that it should be allowed the same degree of hourly flexibility, or in the alternative, if Tennessee was able to demonstrate that it was operationally incapable of resetting the meters to provide the same flexibility, then Con Ed should be charged a lower rate to reflect the "inferior" quality of service. 72 F.E.R.C. at 65,116.

In his initial decision, the ALJ found that there was no evidence of undue preference; the uniform hourly take provision applied to all of Tennessee's customers, and any customer was entitled to flexibility if it was operationally feasible for Tennessee to allow that customer to take gas in excess of its scheduled hourly entitlement. *Id.* at 65,121. Given its evenhanded application of the provision, Tennessee explained that any difference in the hourly flexibility of New York and New England customers was due to the system's operational design, requiring flow control devices on all of Tennessee's meters [*1011] with maximum daily

quantities [**59] ("MDQs") of 100,000 Dekatherm ("Dth") per day or greater, such as the White Plains meter used to service Con Ed. ²⁶ *Id.* at 65,118, 65,121. The ALJ found that if Tennessee removed or even reset the flow control valve on the White Plains meter to allow for the same flexibility as in New England, the amount of gas that Con Ed could potentially draw from the system would deplete the pipeline's flow, rendering Tennessee incapable of meeting its obligations to other regional customers. *Id.* In New England, however, no set of customers on a single meter could draw enough gas to compromise the system. The ALJ concluded, therefore, that Con Ed had not met its burden to demonstrate that Tennessee implemented its uniform hourly take provision in an unduly discriminatory way by treating similarly situated customers differently. *Id.* at 65,121.

[**60] The Commission affirmed the ALJ's ruling, finding that the difference in hourly flexibility was the result of operational constraints rather than preferential treatment: the evidence showed that Tennessee (1) installed flow control devices on all meters with MDQs of 100,000 Dth per day or greater, (2) permitted all customers subject to the tariff to vary their hourly takes if operationally feasible, and (3) applied the same operational standard to all of its customers, granting every customer a provisional right to hourly flexibility. ²⁷ *Tennessee II*, 76 F.E.R.C. at 61,137-38. The Commission also found that the ability of customers to take in excess of their hourly schedule was not a firm entitlement; customers were still subject to the tariff restriction, and no customer had a firm right to hourly flexibility. *Id.* at 61,138.

[**61] To the extent that the consistent application of the operational standard resulted in differing degrees of hourly flexibility for New York and New England customers, the Commission agreed with the ALJ that it was due to the physical design of the system: given the size of the flow through the White Plains meter (300,000 Dth per day) and the proportion (50%) it comprised of

²⁶ As the Commission noted, the capacity of the White Plains meter is approximately 300,000 Dth per day; Consolidated Edison's MDQ alone is 165,000 Dth per day. *Tennessee II*, 76 F.E.R.C. at 61,135 n.258.

²⁷ The Commission noted that under the operational standard, Tennessee adjusted the flow control valve at the White Plains meter on several occasions in the winter to allow Con Ed to take gas in excess of 1/24 of its MDQ per hour; in the summer, the flow control valve could be shut off altogether. 76 F.E.R.C. at 61,137 n.274.

the total pipeline capacity of the New York market, the Commission found that it was operationally not feasible for Tennessee to reset the White Plains meter to give Con Ed the same flexibility as Tennessee provided to New England customers, as none of their meters presented the same potential for endangering the service of others. *Id.* at 61,138-39. In addition, the Commission concluded that Con Ed failed to show "that a limitation upon hourly takes, in and of itself, apart from any considerations of undue discrimination, merits the reallocation of fixed costs and redesign of rates to reflect maximum hourly entitlements, instead of maximum daily quantities." *Id.* at 61,140.

In seeking rehearing, Con Ed asserted that the consistent application of the operational standard was irrelevant if the New England [**62] customers received, in effect, a firm right to hourly flexibility, and that the difference in flexibility did not constitute a reasonable variation in the nature of service received by the customers within a class. *Tennessee III*, 80 F.E.R.C. at 61,244-45. Furthermore, Con Ed maintained that the differences in flexibility resulted from Tennessee's intentional design of its system, making the resulting differences unduly discriminatory. Under the circumstances, Con Ed concluded, the proper remedy was to adjust rates to reflect that it received an inferior quality of service. *Id.* at 61,245.

The Commission denied rehearing. Although the New England customers received more hourly take flexibility than Con Ed, it was not undue discrimination, in the Commission's view, because the two were not similarly situated, and a rational basis existed for denying Con Ed the additional flexibility. *Id.* The record showed that the size and proportion of the White Plains meter required Tennessee to maintain flow control [*1012] over Con Ed, while "no meter in New England presented the same potential for endangerment of service that the White Plains meter presented." *Id.* at 61,246. Because the [**63] differing degrees of flexibility resulted from the evenhanded application of an operational standard, the Commission opined that the evidence in the record demonstrated that the difference was not arbitrary. *Id.* The Commission rejected Con Ed's complaint that it received allegedly "inferior" service, inasmuch as Con Ed had failed to show that the lesser amount of hourly flexibility made the quality of service it received "inferior" to merit a rate adjustment. *Id.* The mere fact that Con Ed had to contact Tennessee officials to request flexibility while the New England customers could take additional gas off the system without contacting Tennessee officials, the Commission found was a

"difference without substance." *Id.* (internal brackets omitted). The Commission noted, moreover, that Con Ed's service may be superior in other respects, such as delivery pressure, to the service in New England. *Id.* at 61,246 & 61,246 n.183. In any event, regardless of whether the quality of service was inferior, the Commission concluded that Con Ed failed to justify its remedy of a downward rate adjustment because it had not shown that Tennessee incurred less costs in providing service [**64] with limited flexibility to New York customers "than it does in providing the more flexible service to the New England customers, or by showing that Tennessee incurs more costs to provide the New England customers with the extra flexibility." *Id.* at 61,247.

Con Ed contends in its petition for review that because the differing degree of hourly flexibility available to New York and New England customers constitutes undue discrimination, the Commission erred in denying an appropriate remedy--namely an adjustment of its rate to reflect the inferior quality of service. See 5 U.S.C. § 706(2)(A),(E). Intervenors, Tennessee and the Bay State Gas Company, contend as a preliminary matter that the court is barred from entertaining what in effect is a new claim of undue discrimination. See NGA § 19(b), 15 U.S.C. § 717r(b); *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 294 U.S. App. D.C. 243, 958 F.2d 1101, 1117 n.8 (D.C. Cir. 1992). We disagree. Intervenors maintain that throughout the administrative proceedings, Con Ed's claim of undue discrimination was consistently one of outright preference, in which Tennessee granted additional hourly flexibility to New [**65] England customers rather than New York. Con Ed's allegedly new position, that the undue discrimination arises from the fact that it pays the same rate while receiving inferior service, was thus never argued before the Commission. In fact, Con Ed's petition for rehearing articulated the theory of discrimination it raises now on appeal. We therefore address Con Ed's contention, and do so with the recognition that the Commission has broad discretion in exercising its authority under the NGA, see *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 452 (D.C. Cir. 1988), and that the court may not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). Our review is limited to assuring that the Commission's orders are reasoned, principled, and based upon the record. See, e.g., *Pennsylvania Office of Consumer Advocate v. FERC*, 327 U.S. App. D.C. 332, 131 F.3d 182, 185-86 (D.C. Cir. 1997), *modified*, 328 U.S. App.

D.C. 266, 134 F.3d 422 (D.C. Cir. 1998); *Western Resources*, 9 F.3d at 1572; *Columbia Gas Transmission Corp. v. FERC*, 202 U.S. App. D.C. 291, 628 F.2d 578, 593 (D.C. [**66] Cir. 1979).

B. Discussion

Under the NGA, see 15 U.S.C. §§ 717c, 717d, differences in the rates paid by two sets of customers are not always unduly discriminatory. Rather, to show undue discrimination, the petitioner must demonstrate that the two classes of customers are similarly situated for purposes of the rate. See, e.g., *Tennessee Gas*, 860 F.2d at 452 n.9; *City of Vernon v. FERC*, 269 U.S. App. D.C. 297, 845 F.2d 1042, 1046-47 (D.C. Cir. 1988); *Consolidated Edison Co. v. FERC*, 219 U.S. App. D.C. 165, 676 F.2d 763, 773 & 773 n.31 (D.C. Cir. 1982).

In its request for rehearing, Con Ed did not challenge the Commission's findings that the largest meters of 100,000 Dth per day or greater, such as the one in White Plains, New York, required flow control devices [**1013] while the smaller meters, such as many of those in the New England states, remained on pressure control. See 80 F.E.R.C. at 61,245. The Commission reasonably concluded that this operational distinction, which created the difference in hourly flexibility the two groups received, showed that the New York and New England customers were not "similarly situated," and that therefore there was no undue [**67] discrimination because Tennessee had a rational basis for treating the two differently. See *id.* at 61,245-46.

The capacity constraints also entered into the Commission's analysis. It found, and Con Ed did not contest, that the capacity of the White Plains meter comprised half of the New York area market, see 76 F.E.R.C. at 61,138-39; 80 F.E.R.C. at 61,245-46, and to the extent Con Ed could take gas off the system in excess of the uniform hourly requirement, that Con Ed could potentially deplete the availability of service in the area, adversely affecting other Tennessee customers. 80 F.E.R.C. at 61,246. "Differences ... based on relevant, significant facts which are explained are not contrary to the NGA." *TransCanada Pipelines Ltd. v. FERC*, 278 U.S. App. D.C. 299, 878 F.2d 401, 413 (D.C. Cir. 1989); see also *Metropolitan Edison Co. v. FERC*, 194 U.S. App. D.C. 44, 595 F.2d 851, 857 (D.C. Cir. 1979); *St. Michaels Utils. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967). The Commission noted the difference in operational circumstances but found that Tennessee applied the same feasibility standard to all

customers in determining whether to grant additional flexibility. [**68] See 80 F.E.R.C. at 61,246. For these reasons we conclude that the Commission gave an adequate explanation of how it reached its conclusion that there was no undue discrimination; the record substantially supported the Commission's findings that the two customer groups were not similarly situated, and a rational, non-discriminatory basis existed for the difference in situation, namely operational constraints.

Contrary to Con Ed's contention, the Commission did not give inconsistent reasons in Opinion Nos. 406 and 406-A. The Commission, in Opinion 406, affirmed the ALJ's finding that although there was in fact a difference in the degree of hourly flexibility, it was not a "substantive difference in treatment between the New York customers and New England customers on the part of Tennessee" because no customer had a firm right to that flexibility and all customers were given the same opportunity to vary their hourly takes if operationally feasible. 76 F.E.R.C. at 61,140. In Opinion No. 406-A, the Commission again acknowledged that "although Tennessee assesses all customer requests to vary hourly takes under the same standard, in practice, there is a difference between the hourly [**69] take flexibility that the New England customers receive and the flexibility that the New York customers receive." 80 F.E.R.C. at 61,245. The Commission then explained that the difference in treatment was not unduly discriminatory; in other words, it was "not a substantive difference in treatment" because the customers were not similarly situated and Tennessee had a rational basis for treating them differently. *Id.*

Citing *Alabama Elec. Coop., Inc. v. FERC*, 221 U.S. App. D.C. 246, 684 F.2d 20 (D.C. Cir. 1982), Con Ed contends that the Commission's finding that the New York and New England customers were not similarly situated should have led to a finding of undue discrimination. "Just as charging similarly situated customers different rates is unduly discriminatory," Con Ed maintains, "so too is it discriminatory to charge customers the same rate if, as FERC has found here, they are *not* similarly situated." Yet *Alabama Electric* does not stand for the proposition that charging the same rates to differently situated customers always constitutes undue discrimination. Although *Alabama Electric* stated that in the "unusual case," 684 F.2d at 21, charging the same rate [**70] to differently situated customers could constitute a form of discrimination, the critical determination was whether that difference was unreasonable or undue. *Id.* at 28. Because the

Commission provided a sufficient explanation for the operational limits placed upon Con Ed, the resulting differences were not unduly discriminatory.

Nor can *Alabama Electric* be read to recognize quality of service claims such as Con Ed's as necessarily constituting undue discrimination. Although 15 U.S.C. § 717c(b)(2) forbids "any unreasonable difference [*1014] in ... service," the difference in service here was not unreasonable because of operational constraints. Furthermore, the court in *Alabama Electric* held that the application of the same rate to customers who were similar in many respects could still potentially constitute undue discrimination if the rate applied to the two classes of customers yielded disparate rates of return on the costs to the pipeline to service them. *Id.* at 27-28. Because "it has come to be well established that ... rates should be based on the costs of providing service to the utility's customers," *id.*, the court concluded the critical factor in the claim of [*71] undue discrimination was a disparity in the costs of service. *Id.* at 28 & 28 n.34; see also *Electricity Consumers Resource Council v. FERC*, 241 U.S. App. D.C. 397, 747 F.2d 1511, 1515-16 (D.C. Cir. 1984).

Here, the Commission could properly find that Con Ed failed to make an adequate showing regarding such costs to justify a downward rate adjustment. 80 F.E.R.C. at 61,247. A witness for Con Ed referred to testimony by Tennessee's expert that there were additional costs in monitoring pressure control and in maintaining the New England lateral pipelines, all of which operationally contribute to New England's greater flexibility; the Con Ed witness also testified that only 50% of those costs were directly incurred by New England customers, and the rest borne by others on the system, despite the benefit to New England customers. However, merely asserting that the direct assignment of 50% of the lateral costs to New England customers was insufficient to reflect the cost of additional flexibility is not the same as submitting evidence in support of such a claim. Under section 5 of the NGA, see *Sea Robin Pipeline*, 795 F.2d at 184, Con Ed had the burden to justify a change in [*72] rates, yet it submitted no cost allocation studies on providing hourly flexibility to New England customers in comparison to those in New York. The evidence in the record demonstrates neither "that Tennessee incurs less costs in providing to the New York customers a service with limited flexibility than it does in providing the more flexible service to the New England customers, ... [nor] that Tennessee incurs more costs to provide the New England customers with the extra flexibility." 80 F.E.R.C. at 61,247; cf. *Alabama*

Elec., 684 F.2d at 28 & 28 n.34. Moreover, the Commission found that Con Ed had not sufficiently shown that the quality of service it received was necessarily inferior to the service received by New England customers to warrant an adjustment in rates. See 80 F.E.R.C. at 61,246. The New England customers' service was not firm, see 76 F.E.R.C. at 61,138, and the Commission noted that the record reflected that in some regards, the service to Con Ed may be better than that in New England. 80 F.E.R.C. at 61,246.

C. Conclusion

Because the Commission's refusal to order Tennessee to provide Con Ed with a rate adjustment on the grounds of undue [*73] discrimination was reasoned and supported by the record, we deny Con Ed's petition for review.

Accordingly, we deny the petitions for review filed by JMC Power, Equitable, and Con Ed.

So ordered.

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133 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Western Grid Development, LLC

Docket No. EL10-19-001

ORDER DENYING REHEARING

(Issued October 12, 2010)

1. In this order, we deny requests for rehearing of an order issued on January 21, 2010 that granted Western Grid Development, LLC's (Western Grid) petition for declaratory order, finding that operation of its proposed sodium sulfur battery storage projects (Projects) in the manner it proposed would make the Projects wholesale transmission facilities, and conditionally granting the requested transmission rate incentives, with the exception of the abandoned plant incentive.¹

I. Background

2. On November 20, 2009, Western Grid filed a petition for declaratory order (Petition), requesting a Commission finding that its Projects are wholesale transmission facilities.² In addition, Western Grid requested Commission approval of certain incentive rate treatments for the Projects pursuant to section 219 of the Federal Power Act (FPA)³ and Order No. 679.⁴ In the Declaratory Order, the Commission found that, based on the circumstances and characteristics of the Projects, the Projects are wholesale transmission facilities. Importantly, the Commission determined that, because the Projects would be operated by Western Grid under the direction of the California Independent System

¹ *Western Grid Dev., LLC*, 130 FERC ¶ 61,056 (2010) (Declaratory Order).

² Western Grid November 20, 2009 Petition for Declaratory Order in Docket No. EL10-19-000 (Petition).

³ 16 U.S.C. § 825s (2006).

⁴ *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh'g*, 119 FERC ¶ 61,062 (2007).

Operator Corporation (CAISO) in a manner similar to the way in which high-voltage wholesale transmission facilities are operated currently by participating transmission owners (PTO) under the direction of CAISO, the independence of CAISO would be maintained.⁵ The Commission also found that, based on the proposal to use the Projects to provide voltage support and address thermal overload situations, the Projects shared some important characteristics with capacitors, which the Commission had previously found to be transmission equipment.⁶ In addition, the Commission noted that the Projects would not be bid into the CAISO markets or be market participants in any way and would pass through any incidental market revenues to customers through a PTO tariff.⁷ Based upon these facts, the Commission concluded that the Projects would be wholesale transmission facilities if built and operated in the manner proposed. The Commission emphasized that its findings applied only to the specific Projects already identified by Western Grid to CAISO in CAISO's transmission planning process as of the date Western Grid filed the Petition. The Commission stated that it did not intend to classify all energy storage projects as wholesale transmission facilities and did not rule out the possibility of a general rulemaking on the issue in the future.⁸

3. The Commission also conditionally granted Western Grid's request for the following incentives: (1) inclusion of 100 percent of the Projects' construction work in progress (CWIP) in rate base; (2) a combined return on equity (ROE) adder of 195 basis-points for the Projects; (3) deferred cost recovery through creation of a regulatory asset for pre-commercial costs that will be amortized over five years; and (4) a hypothetical capital structure of 50 percent equity and 50 percent debt until the Projects are placed into service. The Commission's grant of these incentives was conditioned upon, among other things, CAISO's approval of the Projects in its transmission planning process. The Commission denied Western Grid's request for recovery of 100 percent of prudently-incurred abandoned plant costs if the Projects were cancelled or abandoned for reasons beyond Western Grid's control.

4. Public Service Electric & Gas Company, PSEG Energy Resources & Trade LLC, and PSEG Power LLC (collectively, PSE&G) and the California Department of Water Resources State Water Project (SWP) filed timely requests for rehearing.

⁵ Declaratory Order, 130 FERC ¶ 61,056 at P 45.

⁶ *Id.* P 47.

⁷ *Id.* P 46, 47, 50, 51.

⁸ *Id.* P 56.

II. Discussion

A. Rehearing Requests

5. In its request for rehearing, PSE&G argues that the Commission erred in finding that batteries could function as transmission assets. PSE&G asserts that, very much like pumped storage facilities that have long been classified as generation, batteries store energy received and later release stored energy to provide ancillary services. PSE&G further contends that batteries are easily distinguished from capacitors, which have been classified as transmission, because, unlike capacitors, batteries are “active” in the sense that they can produce real energy and displace generation or other resources that are supplying energy and/or ancillary services in the competitive marketplace.⁹

6. Further, PSE&G asserts that the Commission failed to articulate a sound basis for departing from applicable precedent regarding the status of energy storage facilities.¹⁰ PSE&G argues that this “substantial deviation from past established Commission policy and practices” clashes with the reasonable expectations of market participants and violates procedural due process requirements.¹¹ Finally, PSE&G contends that the Commission’s determination in the Declaratory Order is not consistent with the definition of transmission facilities under the North American Electric Reliability Corporation (NERC) reliability standards¹² because batteries “are not associated equipment necessary for the movement of power over bulk power transmission lines.”¹³

7. Both PSE&G and SWP claim that the Commission’s approval of the requested rate treatment for the Projects is inconsistent with existing open access and pro-competition policies and fails to articulate a basis for departing from such requirements.

⁹ PSE&G February 22, 2010 Request for Rehearing in Docket No. EL10-19-001 at 5-6 (PSE&G Rehearing Request).

¹⁰ *Id.* at 7-8 (citing *Norton Energy Storage, L.L.C.*, 95 FERC ¶ 61,476 (2001) (*Norton Energy Storage*) (granting petition for declaratory order to establish that energy exchange transactions facilitated by a compressed air energy storage facility were subject to the Commission’s exclusive jurisdiction); *Nevada Hydro Co.*, 122 FERC ¶ 61,272, at P 83 (2008) (*Nevada Hydro II*) (rejecting request to recover costs of pumped storage facility in CAISO transmission access charge)).

¹¹ *Id.* at 15-16.

¹² *Id.* at 10.

¹³ *Id.*

Specifically, according to SWP and PSE&G, the Projects would be providing ancillary services that cannot be rolled into transmission rates under Order No. 888.¹⁴ PSE&G contends that the products that will be supplied by the Projects are part of the competitive ancillary services market and, as such, must be unbundled from transmission to ensure a competitive outcome.¹⁵ SWP asserts that the Declaratory Order is at odds with the Commission's finding in *Nevada Hydro II* that the "purpose of the CAISO's transmission access charge is to recover the costs of transmission facilities under the control of the CAISO; the purpose is not to recover bundled services."¹⁶ In addition, SWP argues that the Projects exhibit none of the natural monopoly characteristics of transmission facilities and asserts that Commission transmission ratemaking is not intended to use ratepayer funding as a way to shield a start-up competitor from market forces. Further, SWP claims that the Commission's decision to use a case-by-case approach to electricity storage devices not only eliminates the efficiencies of competition by selecting certain projects as "winners" in terms of rate and financing advantages, but also fosters undue discrimination against other providers of similar reliability services.¹⁷ Finally, SWP argues that the Commission's failure to address what SWP considers the "anti-competitive effects" of Western Grid's proposal cannot be reconciled with the Commission's statutory duty under numerous sections of the FPA.¹⁸

8. Similarly, PSE&G asserts that the Commission failed to adequately consider the impact of its finding on the CAISO markets and opines that any energy and ancillary services that would be provided by the Projects would displace energy that would otherwise be competitively procured. Thus, PSE&G argues that any energy released by the Projects would affect market prices. PSE&G contends that the record does not

¹⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁵ PSE&G Rehearing Request at 10-11.

¹⁶ SWP Request for Rehearing in Docket No. EL10-19-001 at 8-9 (SWP Rehearing Request) (citing *Nevada Hydro II*, 122 FERC ¶ 61,272 at P 83 (internal quotes omitted)).

¹⁷ *Id.* at 10-12.

¹⁸ *Id.* at 12 (citing *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973)).

support the Commission's finding of no adverse market impact.¹⁹ PSE&G argues that the Commission failed to adequately consider and respond to the concerns raised by the CAISO that the treatment of energy storage devices as transmission will result in discrimination and harm to the markets.²⁰

9. SWP claims that the Commission failed to consider the justness and reasonableness of the rate incentives approved in the Declaratory Order. SWP appears to argue that, by conditioning the grant of the rate incentives on approval of the Projects in the CAISO transmission planning process, the Commission improperly delegated its ratemaking responsibilities to CAISO.²¹ SWP challenges the Commission's determination that Western Grid's proposal to retain operational control of the Projects makes transmission rate treatment appropriate. SWP argues that this finding is contrary to both the CAISO tariff, which defines the transmission revenue requirement as "the total annual authorized revenue requirements associated with transmission facilities ... turned over to the operational control of the CAISO,"²² and prior Commission determinations that energy storage facilities must be under CAISO control to receive transmission rates.²³ According to SWP, the Projects would not be under CAISO's operational control. Thus, SWP asserts that the finding that CAISO will be responsible for directing the use of the Projects in the same manner as other transmission assets rests upon factual error and not substantial record evidence.²⁴

10. PSE&G contends that the Commission should have set this matter for hearing or undertaken further investigation of the issues through a technical conference or rulemaking. PSE&G argues that, pursuant to the requirements of the Administrative Procedure Act,²⁵ the Commission cannot use this single issue proceeding to effect a major policy change regarding the treatment of energy storage.²⁶ SWP repeats its request

¹⁹ PSE&G Rehearing Request at 11-13.

²⁰ *Id.* at 13-15.

²¹ SWP Rehearing Request at 6-7.

²² *Id.* at 13 (citing CAISO Tariff 4th Replacement Vol. II, 1st Rev. Sheet 960, available at <http://www.caiso.com/2471/2471974a121c0.pdf>).

²³ *Id.* (citing *Nevada Hydro II*, 122 FERC ¶ 61,272 at P 83).

²⁴ *Id.* at 14.

²⁵ 5 U.S.C. §§ 501, *et seq.* (2006).

²⁶ PSE&G Rehearing Request at 17.

that the Commission convene a proceeding to establish a national policy for the treatment of energy storage devices, instead of proceeding via a case-by-case approach. SWP states that cost allocation is one of the energy storage issues that needs to be addressed. Specifically, SWP questions whether the Projects would pay transmission costs when acting as a load, as other loads do. SWP expresses concern that the “load pays” approach to transmission cost allocation has been adopted by CAISO and other RTOs/ISOs without clear explanation or justification and has, as a practical matter, become increasingly difficult to apply and reconcile to demand response and energy storage. SWP suggests that this policy may unfairly discriminate against demand response and energy storage to the extent that they are allocated costs that other, generation-based, resources are not.²⁷

B. Commission Determination

11. The Commission denies the rehearing requests of PSE&G and SWP. First, we reject PSE&G’s contention that battery storage facilities cannot be considered transmission facilities. In the Declaratory Order, the Commission acknowledged that electricity storage devices, in a general sense, do not readily fit neatly into either of the traditional functions of generation, transmission or distribution.²⁸ Accordingly, rather than making a general pronouncement regarding the classification of battery storage, the Commission limited its findings to the specific facts and circumstances of this case.²⁹ Based on the proposed use of the Projects and the evidence submitted by the parties, the Commission concluded that the Projects share enough characteristics with capacitors to justify the analogy and afford similar treatment.³⁰ Therefore, we reject PSE&G’s argument that, because batteries can produce real power and interact in the market, any comparison to capacitors is inapt. The mere fact that batteries, in general, have the potential to produce real power does not mean that the Projects cannot be considered transmission assets. As the Commission stated in the Declaratory Order, the Projects would “not be bid into the CAISO markets or be a market participant in any way;” instead, they would “only be operated at the CAISO’s request when system reliability issues require them to provide voltage support to the grid.”³¹ This fundamental operational difference justifies a different cost recovery treatment. Indeed, the information supplied by Western Grid persuaded the Commission that the Projects will function in a manner that is comparable to capacitors in the sense that they will be

²⁷ SWP Rehearing Request at 14-16.

²⁸ Declaratory Order, 130 FERC ¶ 61,056 at P 44.

²⁹ *Id.*

³⁰ *Id.* P 47.

³¹ *Id.* P 50.

operated to provide electricity to the transmission grid to maintain system reliability, rather than to act as an energy or capacity resource.³² PSE&G has not supplied any additional evidence in its rehearing request to persuade us otherwise.

12. Moreover, the fact that batteries share some characteristics with pumped storage facilities, which have previously been classified as generation,³³ does not mandate a general finding that battery storage devices are generation. The rationale for denying incentive transmission rate treatment in prior cases involving pumped storage focused on the operation of the facilities at issue.³⁴ As the Commission explained in the Declaratory Order, the concerns that contributed to the Commission's denial in *Nevada Hydro II* were sufficiently addressed by Western Grid in its Petition.³⁵ *Nevada Hydro II* raised the question of whether the CAISO's operation of the Lake Elsinore Advanced Pump Storage (LEAPS) storage facility would render it an energy market participant. Nevada Hydro proposed that CAISO would decide when to charge and discharge the facility and would therefore have influence over the prices paid and received during those operations. Nevada Hydro also did not propose any mechanism to deal with the potential costs and revenues from such market operations, which could have left CAISO in the position of being a profit-seeking operator of the LEAPS facility. Thus, the Commission concluded that it would be inappropriate for CAISO to assume operational control over the LEAPS facility.³⁶ In contrast, in the Declaratory Order, the Commission explained that Western Grid's proposal eliminated the concern raised in *Nevada Hydro II* by specifying that Western Grid, rather than CAISO, will be responsible for maintaining the state of charge of the Projects, thereby minimizing the risk that CAISO will become a profit-seeking market participant.³⁷ Additionally, the Commission found that Western Grid will further mitigate the concern presented by the LEAPS facility because Western Grid will credit any incidental net revenues from such transactions to its customers via the transmission access charge.³⁸ Therefore, there is little likelihood here that CAISO will become a profit-seeking energy market participant, and we disagree with PSE&G's contention that

³² Petition, Exhibit AJP (Affidavit of Armando J. Perez) at para. 24.

³³ See, e.g., *Nevada Hydro II*, 122 FERC ¶ 61,272.

³⁴ Declaratory Order, 130 FERC ¶ 61,056 at P 48.

³⁵ *Id.* P 48-49.

³⁶ *Nevada Hydro II*, 122 FERC ¶ 61,272 at P 82.

³⁷ Declaratory Order, 130 FERC ¶ 61,056 at P 49.

³⁸ *Id.* at P 49.

the Commission failed to meaningfully consider the evidence offered by CAISO on this issue. We therefore continue to find that the result in *Nevada Hydro II* is not controlling in this case.

13. PSE&G's reliance on *Norton Energy Storage* is likewise misplaced. In *Norton Energy Storage*, the Commission did not consider the issue of whether the applicant's compressed air storage facility could be considered transmission. Rather, the case dealt with the jurisdictional question of whether a delivery of energy to the facility as part of an energy exchange was part of a wholesale transaction or whether such a delivery would be considered an end-use, retail purchase. Further, the proposed use of the facility at issue in *Norton Energy Storage* was the reclamation of energy from the compressed air facility for delivery to the parties that supplied the compression energy for subsequent resale into wholesale markets.³⁹ Unlike the facility in *Norton Energy Storage*, which was intended specifically to engage in wholesale energy exchange transactions, the Projects will not be market participants; the intended purpose of the Projects is to provide transmission services at CAISO's instruction. Thus, because the cases cited by PSE&G and SWP are readily distinguishable from the facts and circumstances in this proceeding, we continue to find the Projects are wholesale transmission facilities eligible for incentive rate treatment.

14. Also unavailing is PSE&G's assertion that the determination in the Declaratory Order is inconsistent with the definition of transmission facilities under the NERC reliability standards. PSE&G did not raise this issue in its initial comments on Western Grid's proposal. It is well established that a request for rehearing is not the appropriate procedural vehicle for raising issues for the first time because it is disruptive to the administrative process and denies parties the opportunity to respond.⁴⁰ As such, we need not address PG&E's arguments on this issue. However, even if we were to consider the merits of PSE&G's rehearing request on this issue, we would find PG&E's argument unavailing. The NERC definition encompasses equipment that is associated with the movement or transfer of energy, along with the lines themselves.⁴¹ The NERC definition does not, as PSE&G implies, require that the facilities be "necessary" for the movement

³⁹ *Norton Energy Storage*, 95 FERC ¶ 61,476 at 62,699.

⁴⁰ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,030, at P 15 (2009) (citing *Enron Energy Servs. Inc. v. Sellers of Energy*, 122 FERC ¶ 61,015, at P 64 n.98 (2008); *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at P 188 (2006) (denying rehearing of new issues as outside the proper scope of the rehearing)).

⁴¹ NERC defines transmission as "[a]n interconnected group of lines and associated equipment for the movement or transfer of electric energy between points of supply and points at which it is transformed for delivery to customers or is delivered to

(continued)

of power over bulk transmission lines. When used as proposed by Western Grid, the Projects are clearly equipment that is associated with the movement or transfer of electricity over the bulk power system; in much the same way as large electricity capacitors are used, the Projects will be called to action when the system requires them for the reliable movement of power.

15. Likewise, we find no conflict between our findings in the Declaratory Order and the requirements of Order No. 888 and related precedent. As PSE&G and SWP correctly state, the cost of providing ancillary services cannot be rolled into wholesale transmission rates under Order No. 888.⁴² However, the Projects will not be used to provide competitively-procured ancillary services, so this case does not raise the type of concern over bundled rates (i.e., rates that include both generation and transmission services) that would implicate the requirements of Order No. 888. The fact that batteries are capable of providing ancillary services is incidental because, as proposed, Western Grid will not be bidding the Projects into the CAISO markets. For the same reason, we reject SWP's claim that the Declaratory Order departs from the precedent regarding the prohibition against recovering the cost of bundled services in transmission rates in *Nevada Hydro II* on this issue. In *Nevada Hydro II*, the Commission stated that the purpose of the CAISO transmission access charge is to recover the cost of transmission facilities under CAISO's control, and not the cost of bundled services.⁴³ We find, however, that the Projects are intended solely to enhance the reliability of the CAISO transmission grid and will not provide any bundled services. Our finding here is thus consistent with our finding in *Nevada Hydro II*.

16. Because the Projects will not be bid into the CAISO's markets, we continue to find that the Projects will not undercut the competitive markets for ancillary services. In fact, as the Commission found in the Declaratory Order, the Projects will only be used to provide voltage support and to address thermal overload situations, at CAISO's instruction, only if there is no other competitive bid to provide that service through the markets.⁴⁴ The record contains no evidence to indicate that the Projects will be used otherwise. In their rehearing requests, neither PSE&G nor SWP provide any facts or arguments on this issue that have not already been considered by the Commission. Thus,

other electric systems.” NERC Glossary of Terms Used in Reliability Standards (Apr. 20, 2010), *available at* http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.

⁴² Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,654-55.

⁴³ *Nevada Hydro II*, 122 FERC ¶ 61,272 at P 83.

⁴⁴ Declaratory Order, 130 FERC ¶ 61,056 at P 51.

we reject PSE&G and SWP's claims that the record does not support the Commission's finding of no adverse market impact.

17. In addition, we reject PSE&G's contention that the Commission failed to address the concerns raised by CAISO in its comments that treating the Projects as transmission facilities will result in an undue competitive advantage for the Projects. The Commission gave meaningful consideration to the comments filed by all parties, including CAISO.⁴⁵ Upon careful consideration of the evidence, the Commission determined that the fundamental operational differences between the Projects, on one hand, and generation and pumped storage, on the other, justify a different cost recovery treatment.⁴⁶ The protection against undue discrimination prohibits the dissimilar treatment of similarly situated entities; rate differences may be justified and rendered lawful based on the specific factual differences between the entities at issue.⁴⁷ Unlike generation and pumped storage, which are active market participants that earn market revenues, the Projects will not be bid into the CAISO markets or be market participants in any way. The "products" of generation and pumped storage are energy and ancillary services that are bid into the CAISO markets, whereas the "product" created by the Projects is a transmission reliability service that will only be used when there is no competitive product available to address a potential transmission reliability issue. Therefore, we continue to find that, because the Projects are not similarly situated to generation and pumped storage, the Commission's finding in the Declaratory Order will not provide undue preference or discriminatory treatment to the Projects.

18. Regarding operational control of the projects, we find that SWP appears to misunderstand the division of operational responsibilities proposed by Western Grid. First, in the Declaratory Order, the Commission explained that, in order to avoid the conflicts that arose in *Nevada Hydro II*, Western Grid has proposed to perform the duties associated with day-to-day operation and maintenance, including keeping the Projects energized. The Commission found in the Declaratory Order that this strategy preserves the independence of CAISO and minimizes the likelihood that CAISO will become a profit-seeking market participant.⁴⁸ With respect to the transmission functions to be

⁴⁵ We note that the CAISO did not request rehearing of the Declaratory Order.

⁴⁶ *Id.* P 50.

⁴⁷ See, e.g., *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984) (upholding Commission order allowing utility to charge different rates pursuant to settlement agreement, negotiated in good faith, or based on differences in general characteristics such as load profile).

⁴⁸ Declaratory Order, 130 FERC ¶ 61,056 at P 49.

provided by the Projects, the Commission found that the Projects will be operated under the direction of CAISO in a way that is similar to the operation of other transmission assets such as capacitors that address voltage issues or alternate transmission circuits that address line overloads or trips.⁴⁹ SWP has not submitted any information in its rehearing request to convince us that the proposed distribution of operational responsibilities will conflict with CAISO tariff requirements or Commission precedent.

19. In finding that the Projects are eligible for transmission rate treatment and conditionally approving the requested incentives, the Commission has not, contrary to SWP's assertion, improperly delegated its ratemaking authority to CAISO. In the Declaratory Order, the Commission conditionally granted the incentives requested by Western Grid, with the exception of the abandoned plant incentive, subject to the Projects' approval in the CAISO transmission planning process. Specifically, the Commission found that Western Grid had not made a factual showing sufficient to demonstrate that the Projects are needed and, therefore, failed to satisfy the requirements of FPA section 219.⁵⁰ The Commission noted, however, that, because the CAISO transmission planning process would adequately consider the reliability and congestion-relieving impacts of the Projects, conditional approval was appropriate.⁵¹

20. Such conditional approval does not constitute an improper delegation of the Commission's duty to ensure just and reasonable rates. The Commission made clear in the Declaratory Order that, if CAISO does approve the Projects in its transmission planning process, Western Grid must make an additional filing with the Commission that includes evidence not only that the Projects were approved, but also that the CAISO transmission planning process included a finding that the Projects will ensure reliability or reduce the cost of delivered power by mitigating congestion, consistent with Order No. 679-A.⁵² In the Declaratory Order, the Commission also conditioned its approval of Western Grid's proposal to recover 100 percent of CWIP in rate base upon Western Grid fulfilling the Commission's requirements for CWIP inclusion in a future FPA section 205 filing.⁵³ Likewise, the Commission stated that it would determine whether Western Grid's requested ROE is within the zone of reasonableness when Western Grid makes a

⁴⁹ *Id.* P 45.

⁵⁰ *Id.* P 67 (citing Order No. 679, FERC Stats. & Regs. ¶ 31,222 at P 57).

⁵¹ *Id.* P 71.

⁵² *Id.* (citing Order No. 679-A, FERC Stats & Regs. ¶ 31,236 at P 49).

⁵³ *Id.* P 81.

future FPA section 205 filing.⁵⁴ Finally, the Commission reserved judgment regarding the justness and reasonableness of Western Grid's recovery of pre-commercial expenses, if any, until it seeks such recovery in a future FPA section 205 filing.⁵⁵ Thus, the Commission, not CAISO, retains the final authority regarding whether the requested incentives are appropriate and whether the resulting rates are just and reasonable.

21. In response to the claims by PSE&G and SWP that a single-issue proceeding is inappropriate for addressing the issues presented in this case, we remind the parties that the findings in the Declaratory Order do not represent a general policy regarding the classification of energy storage devices. The Commission stated clearly in the Declaratory Order that our determination was "strictly limited to the specific circumstances identified by the applicant" and emphasized that the Commission did not "intend to classify all energy storage devices as transmission or otherwise."⁵⁶ Because, as stated in the Declaratory Order, electricity storage devices do not fit neatly into one of the traditional categories of generation, transmission, or distribution, the Commission has addressed the classification of these devices on a fact-and-circumstance-sensitive, case-by-case basis.⁵⁷ While we continue to find that a general rulemaking is not necessary to address the merits of the Petition, we note that the Commission has not ruled out a general rulemaking on this issue.⁵⁸

22. Finally, we find that SWP's concern that the current "load pays" approach to transmission cost allocation may unduly discriminate against demand response and energy storage is beyond the scope of this proceeding. This proceeding is concerned solely with the issue of whether, under the facts and circumstances of this case, the Projects can be treated as wholesale transmission facilities that are eligible for transmission rate incentives. Accordingly, we find that it would be inappropriate to generally consider the efficacy of the predominant policy approach to transmission cost allocation within the context of this proceeding.

The Commission orders:

⁵⁴ *Id.* P 95, 96, 98.

⁵⁵ *Id.* P 103.

⁵⁶ *Id.* P 56.

⁵⁷ *Id.* P 44.

⁵⁸ We note that, on June 11, 2010, Commission staff issued a request for comments on rates, accounting and financial reporting for new electric storage technologies in Docket No. AD10-13-000. Comments were filed by numerous parties.

Docket No. EL10-19-001

- 13 -

The requests for rehearing are hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

EL10-19-001.DOC.....1

Anthony Graat Appellant;

and

Her Majesty The Queen Respondent.

File No.: 16189.

1982: October 12; 1982: December 21.

Present: Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Evidence — Opinion evidence — Non-expert witnesses — Impaired driving — Degree of intoxication — Whether police officers and other witnesses opinions as to impairment of accused admissible — Criminal Code, R.S.C. 1970, c. C-34 as amended, s. 234.

The trial judge accepted the opinion evidence of two police officers that the appellant's ability to drive had been impaired by alcohol and convicted him under s. 234 of the *Criminal Code*. Appellant's appeals to the County Court and the Court of Appeal were dismissed. This appeal is to determine whether a court may admit opinion evidence on the question to be decided—here, whether the appellant's ability to drive had been impaired by alcohol.

Held: The appeal should be dismissed.

The question whether a person's ability to drive was impaired by alcohol is one of fact, not of law, and non-expert witnesses may give evidence as to the degree of a person's impairment. The guidance of an expert is unnecessary. The value of opinion will depend on the view the court takes in all the circumstances. The judges, however, should not consider the opinion of police officers in a preferential way merely because they may have extensive experience with impaired drivers. Here, the non-expert evidence was correctly admitted. The witnesses all had an opportunity for personal observations. They were not deciding a matter for the court to decide as the weight of the evidence is entirely a matter for the judge who could accept all or part or none of their evidence.

Wright v. Tatham (1838), 4 Bing. N.C. 489; *R. v. German* (1947), 89 C.C.C. 90; *R. v. Marks*, [1952] O.W.N. 608; *R. v. Zarins* (1959), 125 C.C.C. 375; *R. v. Beauvais*, [1965] 3 C.C.C. 281; *R. v. Pollock* (1947), 90

Anthony Graat Appellant;

et

Sa Majesté La Reine Intimée.

N° du greffe: 16189.

1982: 12 octobre; 1982: 21 décembre.

Présents: Les juges Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard et Wilson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Preuve — Témoignage d'opinion — Témoins ordinaires — Conduite avec facultés affaiblies — Degré d'ébriété — L'opinion des témoins policiers et des autres témoins sur l'affaiblissement des facultés de l'accusé est-elle recevable? — Code criminel, S.R.C. 1970, chap. C-34 et modifications, art. 234.

Le juge du procès a cru le témoignage d'opinion de deux agents de police selon lequel la capacité de conduire de l'appelant était affaiblie par l'alcool et l'a déclaré coupable aux termes de l'art. 234 du *Code criminel*. Les appels de l'appelant à la Cour de comté et à la Cour d'appel ont été rejetés. Le présent pourvoi soulève la question de savoir si la Cour peut recevoir un témoignage d'opinion sur la question à trancher—en l'espèce, savoir si la capacité de conduite de l'appelant était affaiblie par l'effet de l'alcool.

Arrêt: Le pourvoi est rejeté.

La question de savoir si la capacité de conduire d'une personne est affaiblie par l'effet de l'alcool est une question de fait et non une question de droit et un témoin ordinaire peut témoigner quant au degré d'incapacité d'une personne. L'aide d'un expert est superflue. La valeur probante de l'opinion donnée dépend de la façon dont la cour juge l'ensemble des circonstances. Les juges ne doivent cependant pas accorder un traitement spécial à l'opinion des agents de police parce qu'ils peuvent avoir une grande expérience des conducteurs aux facultés affaiblies. En l'espèce, les dépositions de non-experts ont été reçues à bon droit. Les témoins avaient tous eu l'occasion d'observer les faits par eux-mêmes. Ils ne décidaient pas une question relevant de la cour puisque la valeur probante des témoignages relève complètement du juge qui peut ajouter foi à la totalité ou à une partie des témoignages ou les rejeter.

Jurisprudence: *Wright v. Tatham* (1838), 4 Bing. N.C. 489; *R. v. German* (1947), 89 C.C.C. 90; *R. v. Marks*, [1952] O.W.N. 608; *R. v. Zarins* (1959), 125 C.C.C. 375; *R. v. Beauvais*, [1965] 3 C.C.C. 281; *R. v.*

C.C.C. 171; *R. v. Cox* (1948), 93 C.C.C. 32; *Giddings v. The King* (1947), 89 C.C.C. 346; *R. v. Smith* (1948), 17 Fortnightly L.J. 241; *Grimsteit v. McDonald* (1950), 96 C.C.C. 272; *R. v. MacDonald* (1966), 9 Crim. L.Q. 239; *R. v. Davies*, [1962] 1 W.L.R. 1111 (U.K.); *R. v. Neil*, [1962] Crim. L.R. 698; *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185; *Sherrard v. Jacob*, [1965] N.I.L.R. 151; *Burrows v. Hanlin*, [1930] S.A.S.R. 54; *R. v. Spooner*, [1957] V.R. 540; *R. v. Kelly*, [1958] V.R. 412; *Blackie v. Police*, [1966] N.Z.L.R. 910, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1980), 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247, 45 N.R. 474, 17 C.R. (3d) 55, 7 M.V.R. 163, dismissing appellant's appeal from a conviction for impaired driving. Appeal dismissed.

Edward L. Greenspan, Q.C., for the appellant.

Douglas C. Hunt, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—This appeal raises the issue whether on a charge of driving while impaired the Court may admit opinion evidence on the very question to be decided, namely, was the accused's ability to drive impaired by alcohol at the time and place stated in the charge.

I

The Procedural History

The appellant, Anthony Graat, was charged on August 10, 1978 at the City of London, County of Middlesex, while his ability to drive a motor vehicle was impaired by alcohol, he did drive a motor vehicle, contrary to s. 234 of the *Criminal Code*. He was tried, convicted, and sentenced to a fine of \$300 or, in default, imprisonment for 30 days. An appeal to the County Court was dismissed. Leave to appeal to the Court of Appeal of Ontario was granted but the appeal was dismissed. The matter is now, by leave, before this Court.

Pollock (1947), 90 C.C.C. 171; *R. v. Cox* (1948), 93 C.C.C. 32; *Giddings v. The King* (1947), 89 C.C.C. 346; *R. v. Smith* (1948), 17 Fortnightly L.J. 241; *Grimsteit v. McDonald* (1950), 96 C.C.C. 272; *R. v. MacDonald* (1966), 9 Crim. L.Q. 239; *R. v. Davies*, [1962] 1 W.L.R. 1111 (R.-U.); *R. v. Neil*, [1962] Crim. L.R. 698; *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185; *Sherrard v. Jacob*, [1965] N.I.L.R. 151; *Burrows v. Hanlin*, [1930] S.A.S.R. 54; *R. v. Spooner*, [1957] V.R. 540; *R. v. Kelly*, [1958] V.R. 412; *Blackie v. Police*, [1966] N.Z.L.R. 910.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1980), 116 D.L.R. (3d) 143, 55 C.C.C. (2d) 429, 30 O.R. (2d) 247, 45 N.R. 474, 17 C.R. (3d) 55, 7 M.V.R. 163, qui a rejeté l'appel de l'appellant à l'encontre d'une déclaration de culpabilité d'avoir conduit avec des facultés affaiblies. Pourvoi rejeté.

Edward L. Greenspan, c.r., pour l'appellant.

Douglas C. Hunt, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE DICKSON—Le présent pourvoi soulève la question de savoir si, relativement à une accusation d'avoir conduit avec des facultés affaiblies, la Cour peut recevoir un témoignage d'opinion sur la question même à trancher, c.-à-d. la capacité de l'accusé de conduire était-elle affaiblie par l'effet de l'alcool au moment et à l'endroit mentionnés dans l'acte d'accusation?

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I

La procédure

L'appellant, Anthony Graat, a été accusé, le 10 août 1978, à London, comté de Middlesex, d'avoir conduit un véhicule à moteur, en contravention de l'art. 234 du *Code criminel*, alors que sa capacité de conduire un véhicule à moteur était affaiblie par l'alcool. Il a subi son procès, a été déclaré coupable et condamné à une amende de \$300 ou, faute de payer l'amende, à un emprisonnement de 30 jours. Un appel interjeté à la Cour de comté a été rejeté. La Cour d'appel de l'Ontario a accordé l'autorisation d'interjeter appel, mais a rejeté l'appel. L'affaire est maintenant soumise à cette Cour avec son autorisation.

II

The Facts

At approximately 2:15 a.m. on the date in question, Constables Case and McMullen of the London City Police observed Mr. Graat's vehicle travelling at a high rate of speed. The constables followed for several blocks. They observed Mr. Graat's car weaving in the southbound lane, crossing the centre line on two occasions and driving onto the shoulder of the road on another occasion. When the vehicle turned left it straddled the centre line.

Both constables testified they noticed the smell of alcohol on the appellant's breath; both said Mr. Graat was unsteady on his feet, he staggered as he walked, and had bloodshot eyes.

At the police station Mr. Graat was observed by a Sergeant Spoelstra. The sergeant testified he smelled alcohol on the appellant's breath, the top part of his body was swaying, and his walk was "kind of wavy".

Mr. Graat complained of chest pains. He told the police he suffered from a heart condition and asked to be taken to a hospital. The police complied. By the time Mr. Graat returned to the police station it was too late to take two breath samples because the two-hour time limit for the taking of such samples had expired or was about to expire.

Mr. Graat testified he had had two drinks of gin between the hours of 3:00 p.m. and 7:00 p.m., and two glasses of wine with his dinner about 11:00 p.m. He said he and two friends, George Wilson and Vincent O'Donovan, were returning from a sailing party; he became tired. Wilson drove the car while he dozed in the back seat. The appellant resumed driving after Wilson had driven O'Donovan and himself home. Wilson testified that if he had thought Mr. Graat was not in a fit condition to drive he would have asked him to stay at his, Wilson's, house.

At trial Constable Case was asked the following questions and gave the following answers:

II

Les faits

Vers 2 h 15 du matin, le jour en cause, les agents Case et McMullen, de la police de la ville de London, ont remarqué la voiture de M. Graat qui circulait à grande vitesse. Les agents l'ont suivie sur une bonne distance. Ils ont constaté que la voiture de M. Graat zigzaguait dans la voie de circulation sud, qu'elle a traversé la ligne médiane à deux reprises et qu'à un moment donné elle circulait sur l'accotement. Au moment de tourner à gauche, le véhicule enjambait la ligne médiane.

Les deux agents ont déposé qu'ils avaient constaté que l'haleine de l'appellant sentait l'alcool, ils ont tous deux affirmé que M. Graat chancelait et marchait en titubant et qu'il avait les yeux injectés de sang.

Au poste de police, le sergent Spoelstra a observé M. Graat. Le sergent a témoigné que l'haleine de l'appellant sentait l'alcool, que le haut de son corps vacillait et que sa démarche était en quelque sorte instable.

M. Graat s'est plaint de douleurs à la poitrine. Il a informé les policiers qu'il souffrait de troubles cardiaques et a demandé à être conduit à l'hôpital. Les policiers ont accédé à sa demande. Quand M. Graat est revenu au poste de police, il était trop tard pour prélever deux échantillons d'haleine parce que le délai de deux heures pendant lequel il faut prélever ces échantillons était écoulé ou sur le point de l'être.

M. Graat a témoigné qu'il avait consommé deux gins entre 15 h et 19 h et deux verres de vin au souper, vers 23 h. Il a raconté qu'avec deux amis, George Wilson et Vincent O'Donovan, ils revenaient d'une excursion de voile; il était fatigué. Wilson a conduit la voiture pendant que lui somnolait sur le siège arrière. L'appellant a repris le volant après que Wilson est rentré chez lui, ayant reconduit O'Donovan. Wilson a déposé que s'il avait pensé que M. Graat n'était pas en état de conduire, il l'aurait invité à passer la nuit chez lui.

Au procès, l'agent Case a donné les réponses qui suivent aux questions suivantes:

Q. All right, now what, if any, opinion having made those observations, what if any opinion did you form regarding the accused man's ability to drive a motor vehicle?

A. I formed the opinion that the accused's ability was impaired.

Q. By?

A. By alcohol.

Q. You said the accused man's ability to what?

A. To drive a motor vehicle was impaired by alcohol.

Constable McMullen was asked the following question:

Q. Now officer when you were at the scene and having made the observations of the driving of the accused man, having observed him, having smelled the alcoholic beverage on his breath and observed him walk and observed him standing, observed him speaking to you what, if any, conclusion did you come to regarding his ability to drive a motor vehicle?

A. It was in my opinion that the accused's ability to operate a motor vehicle was impaired by alcohol beverage.

Sergeant Spoelstra, the desk sergeant, gave similar evidence:

Q. ... You saw him standing and you saw him walking. What, if any opinion, did you form regarding his ability to drive a motor vehicle?

A. In my opinion the accused's ability was impaired by the use of alcohol to drive a motor vehicle.

No objection was taken at trial to the admission of any of this evidence. Indeed, at the conclusion of the examination in chief of Sergeant Spoelstra, the following exchange took place:

MR. ALLAN: [Crown Counsel]

Your witness.

Q. Oh, wait a minute, what if any opinion, did you form regarding his ability to drive a motor vehicle from what you saw?

A. From what I saw.

THE COURT:

Just one moment, please. This man's a desk sergeant, he's not the man in the field, so to speak. Do you say I should permit him to give his opinion?

[TRADUCTION] Q. Très bien, si vous aviez une opinion, après avoir fait ces observations, à quelle opinion étiez-vous arrivé quant à la capacité de l'accusé de conduire un véhicule à moteur?

R. J'étais d'opinion que la capacité de l'accusé était affaiblie.

Q. Par?

R. Par l'alcool.

Q. Vous avez dit la capacité de l'accusé de quoi?

R. De conduire un véhicule à moteur était affaiblie par l'alcool.

L'agent McMullen a répondu à la question suivante:

[TRADUCTION] Q. Maintenant, constable, alors que vous étiez sur les lieux et après avoir observé la façon de conduire de l'accusé, l'avoir observé, avoir constaté que son haleine sentait l'alcool et l'avoir vu marcher et se tenir debout, après l'avoir vu parler, à quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur?

R. A mon avis la capacité de l'accusé de conduire un véhicule à moteur était affaiblie par l'alcool.

Le sergent Spoelstra, qui était de service, a témoigné dans le même sens:

[TRADUCTION] Q. ... vous l'avez vu debout et l'avez vu marcher. A quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur?

R. A mon avis, la capacité de l'accusé de conduire un véhicule à moteur était affaiblie par l'usage d'alcool.

Il n'y a pas eu d'opposition, au moment du procès, à la réception d'aucun de ces témoignages. En réalité, l'interrogatoire principal du sergent Spoelstra s'est terminé de la façon suivante:

[TRADUCTION] M^e ALLAN: [substitut du procureur]
Votre témoin.

Q. Oh, un instant, à quelle conclusion en êtes-vous venu quant à sa capacité de conduire un véhicule à moteur d'après ce que vous avez vu?

R. D'après ce que j'ai vu?

LE TRIBUNAL:

Juste un instant s'il vous plaît. C'est le sergent de service, il n'est pas celui qui se trouve sur les lieux, pour ainsi dire. Prétendez-vous que je devrais lui permettre d'énoncer son opinion?

MR. ALLAN:

Your Honour, with respect, even if he didn't see the accused man driving, if the sergeant . . .

MR. SILVER: [then counsel for the defence]

I can save time, Your Honour, I'm quite content with it.

THE COURT:

Thank you. Proceed.

I do not think failure on the part of defence counsel to object to the admission of inadmissible evidence should, in the circumstances of this case, stand in the way of directing a new trial if such evidence is held to be inadmissible.

The trial judge preferred the evidence of the police witnesses to the evidence of Mr. Graat and Mr. Wilson. In particular, the judge relied on the evidence of Constable McMullen and Sergeant Spoelstra, policemen for 8 and 17 years respectively. Constable Case had only been a police officer for a few months, and had only charged two or three persons with impaired driving. The judge said he accepted the opinions of officers McMullen and Spoelstra in reaching his conclusion that the accused's ability to drive was impaired:

I'm of the view that I'm entitled to accept and I do accept the opinions of those two police officers on the issue of impairment as part of the totality of the evidence.

On the appeal to the County Court, Judge McNab concluded there was direct evidence upon which the trial judge was justified in making a finding that the ability of the appellant to drive was impaired.

III

The Ontario Court of Appeal

The appellant sought leave to appeal to the Court of Appeal of Ontario and at that time the question was raised as to whether the trial judge had erred in law in relying on the opinion evidence of the two police officers that the appellant's ability to drive a motor vehicle had been impaired by alcohol.

M^e ALLAN:

Votre Honneur, avec égards, même s'il n'a pas vu l'accusé conduire, si le sergent . . .

M^e SILVER: [alors avocat de la défense]

Je puis vous faire gagner du temps, Votre Honneur, je n'ai aucune objection.

LE TRIBUNAL:

Merci. Continuez.

A mon avis, ce n'est pas parce que l'avocat de la défense a omis de s'opposer à la réception de témoignages irrecevables que, dans les circonstances de l'espèce, cela devrait empêcher d'ordonner un nouveau procès si ces témoignages sont jugés irrecevables.

Le juge du procès a plutôt ajouté foi au témoignage des policiers qu'à ceux de MM. Graat et Wilson. Plus particulièrement, le juge a accepté les témoignages de l'agent McMullen et du sergent Spoelstra, qui sont policiers depuis 8 et 17 ans respectivement. L'agent Case n'était policier que depuis quelques mois et n'avait inculqué que deux ou trois personnes de conduite avec facultés affaiblies. Le juge déclare qu'il a accepté l'opinion des agents McMullen et Spoelstra pour conclure que la capacité de conduire de l'accusé était affaiblie:

[TRADUCTION] J'estime que j'ai le droit d'accepter et j'accepte effectivement l'opinion de ces deux agents de police sur la question des facultés affaiblies en tant que partie de l'ensemble de la preuve.

En appel à la Cour de comté, le juge McNab a conclu qu'il y avait des éléments de preuve directs qui permettaient au juge du procès de conclure que la capacité de conduire de l'appellant était affaiblie.

III

En Cour d'appel de l'Ontario

L'appellant a demandé l'autorisation d'interjeter appel à la Cour d'appel de l'Ontario et a alors soulevé la question de savoir si le juge du procès avait commis une erreur de droit en acceptant le témoignage d'opinion des agents de police selon lequel la capacité de l'appellant de conduire un véhicule à moteur était affaiblie par l'alcool.

The Court dismissed the appeal, saying that the evidence was admissible under the exception to the rule excluding opinion evidence:

... that permits non-expert opinion evidence where the primary facts and the inferences to be drawn from them are so closely associated that the opinion is really a compendious way of giving evidence as to certain facts—in this case the condition of the appellant.

This echoes the words of Parke B. in *Wright v. Tatham* (1838), 4 Bing. N.C. 489 (at pp. 543-44):

... and though the opinion of a witness upon oath, as to that fact [testamentary capacity], might be asked, it would only be a compendious mode of ascertaining the result of the actual observation of the witness, from acts done, as to the habits and demeanour of the deceased.

On behalf of the Court of Appeal Chief Justice Howland delivered a lengthy, scholarly, judgment exhaustively reviewing academic opinion and case law relating to the exclusion of opinion evidence. He began with a passage from *Cross on Evidence*, 5th ed., 1979, at p. 442:

In the law of evidence 'opinion' means any inference from observed facts, and the law on the subject derives from the general rule that witnesses must speak only to that which was directly observed by them. The treatment of evidence of opinion by English law is based on the assumption that it is possible to draw a sharp distinction between inferences and the facts on which they are based. The drawing of inferences is said to be the function of the judge or jury, while it is the business of a witness to state facts.

The Chief Justice then spoke of two categories of opinion evidence that has traditionally been admissible: (i) cases calling for expert testimony in matters requiring specialized skill and knowledge, the only questions being whether the subject matter called for expertise and whether the witness was a qualified expert; (ii) non-expert opinion on matters requiring no special knowledge, where it is virtually impossible to separate the witness' inference from the facts on which the inference is based. In the opinion of the Chief Justice, the admission of opinion evidence in the latter circum-

La Cour a rejeté l'appel, statuant que les témoignages étaient recevables en vertu de l'exception à la règle qui exclut les témoignages d'opinion:

[TRADUCTION] ... qui autorise le témoignage d'opinion d'un témoin non expert si les faits fondamentaux et la conclusion qu'il faut en tirer sont si intimement liés qu'en réalité l'opinion n'est qu'une façon concise de témoigner de certains faits—soit, en l'espèce, l'état de l'appellant.

Cela rappelle l'observation du baron Parke dans *Wright v. Tatham* (1838), 4 Bing. N.C. 489 (aux pp. 543 et 544):

[TRADUCTION] ... et bien qu'on puisse demander à un témoin sous serment son opinion sur ce fait [de la capacité de tester], ce ne serait qu'une manière concise de vérifier le résultat de l'observation, faite personnellement par le témoin, des habitudes et de la conduite du défunt d'après ses actes.

En Cour d'appel, le juge en chef Howland a rédigé les motifs élaborés et fouillés qui étudient de façon exhaustive la doctrine et la jurisprudence relatives à l'exclusion du témoignage d'opinion. Il commence par un extrait de *Cross on Evidence*, 5^e éd., 1979, à la p. 442:

[TRADUCTION] Dans le droit de la preuve, «opinion» signifie une inférence tirée de faits observés et le droit à ce sujet découle de la règle générale selon laquelle les témoins ne doivent parler que de ce qu'ils ont eux-mêmes directement observé. La façon dont le droit anglais aborde le témoignage d'opinion se fonde sur l'hypothèse qu'il est possible d'établir une distinction précise entre les inférences et les faits sur lesquels elles s'appuient. Il appartient, dit-on, au juge ou au jury de tirer des inférences, tandis qu'il appartient au témoin d'énoncer les faits.

Le Juge en chef traite ensuite de deux catégories de témoignages d'opinion qui ont été traditionnellement considérées comme recevables: (i) les affaires qui exigent le témoignage d'experts sur des questions relevant de compétence et de connaissances spécialisées; la seule question pertinente étant alors de savoir si l'objet de la cause exige une expertise et si le témoin est un expert compétent; (ii) l'opinion de personnes non expertes sur des questions qui n'exigent pas de connaissances spéciales, où il est à peu près impossible de séparer les inférences du témoin des faits sur lesquels elles se

stance is merely a compendious way of ascertaining the result of the witness' observations.

After canvassing the case law in this country and a number of other countries, Chief Justice Howland summed up in the following passage:

In my opinion, impairment is a degree of drunkenness. It is a compendious way of describing a condition based on observed facts. It does not require the evidence of a doctor or other expert, nor should it be limited to persons who themselves drive cars. It is a subject about which most people should be able to express an opinion from their ordinary day-to-day experience of life. To testify that a person is impaired is really tantamount to saying "I don't think that he should have been driving". In each case the opinion must be based on the observed facts: the car was weaving back and forth across the road, there was a strong odour of alcohol on the driver's breath, his powers of perception and coordination were poor, he was drowsy and was not reacting quickly to other cars or pedestrians in the path of his car, and so on. To exclude such non-expert evidence of witnesses who were passengers in the car of the accused or of other cars in the vicinity or who were pedestrians may result in an injustice to the accused and may at the same time impede the police in the prosecution of impaired drivers. Such evidence should be admissible. The weight to be given to such inferential testimony will vary from witness to witness, depending on the observed facts on which it is based.

The learned Chief Justice rejected the "ultimate issue" doctrine, *i.e.* that an opinion can never be received when it touches the very issue before the jury. He also noted that opinion evidence is properly rejected when it involves a legal component, such as the question of whether a person had acted negligently.

The judgment concludes:

In my opinion the trial judge did not err in admitting as non-expert testimony the opinion evidence of the police officers as to impairment, and in relying on it as part of the totality of the evidence. Having reached this conclusion, it is not necessary to consider whether the police officers could have qualified as experts and what evidence would have been necessary for this purpose.

fondent. De l'avis du Juge en chef, la réception de témoignages d'opinion dans ce dernier cas n'est qu'une façon concise de vérifier le résultat des observations du témoin.

Après avoir examiné la jurisprudence d'ici et de plusieurs autres pays, le juge en chef Howland conclut en ces termes:

[TRADUCTION] A mon avis, l'affaiblissement des facultés est une phase de l'ivresse. C'est une façon concise de décrire un état, d'après l'observation de certains faits. Il n'exige pas le témoignage d'un médecin ou de quelque autre expert, ni n'est restreint aux personnes qui elles-mêmes conduisent. C'est un sujet à propos duquel presque tout le monde peut exprimer une opinion d'après son expérience personnelle du quotidien. Témoigner que les facultés d'une personne sont affaiblies équivaut en réalité à dire: «Je ne crois pas qu'il aurait dû conduire.» Dans tous les cas, l'opinion doit se fonder sur les faits observés: la voiture zigzaguait, l'haleine du chauffeur avait une forte odeur d'alcool, ses facultés de perception et de coordination étaient réduites, il était somnolent et réagissait lentement à la présence d'autres voitures ou de piétons sur la trajectoire de sa voiture, et ainsi de suite. Exclure la déposition de témoins non experts qu'ils soient passagers de la voiture de l'accusé, passagers d'autres voitures proches ou qu'ils soient piétons peut conduire à une injustice envers l'accusé et, en même temps, entraver la police dans la poursuite des conducteurs dont les facultés sont affaiblies. De telles dépositions doivent être recevables. Le poids à accorder à de tels témoignages d'opinion variera selon le témoin et selon les faits observés sur lesquels le témoignage se fonde.

Le savant Juge en chef a rejeté la doctrine de la «question essentielle», *c.-à-d.* que le témoignage d'opinion n'est jamais recevable s'il porte sur la question même à soumettre au jury. Il a aussi fait remarquer que le témoignage d'opinion est refusé à bon droit s'il comporte une question de droit, telle la question de savoir si une personne a agi avec négligence.

Les motifs se terminent comme ceci:

[TRADUCTION] A mon avis, le juge du procès n'a pas commis d'erreur en recevant, comme déposition d'un non-expert, le témoignage d'opinion des agents de police au sujet de la capacité affaiblie de l'accusé et en y ajoutant foi comme partie de l'ensemble de la preuve. Vu cette conclusion, il n'est pas nécessaire de déterminer si les agents de police auraient pu se qualifier comme

Accordingly, leave to appeal is granted, but the appeal is dismissed.

IV

The Case Law

The question in issue is a vexed one. The authorities in this country and elsewhere are by no means congruous. One of the earliest, and most frequently quoted cases is *R. v. German* (1947), 89 C.C.C. 90, a decision of the Ontario Court of Appeal involving charges of dangerous driving and driving while intoxicated. Counsel for the appellant submitted that the Crown was improperly permitted to introduce opinion evidence of persons who had no special qualifications. This evidence related to whether the accused was intoxicated, and was in a fit condition to drive. The Court observed that there were several matters on which a person of ordinary intelligence may be permitted to give opinion evidence based on his personal knowledge, such as the identity of individuals, the apparent age of a person, the speed of a vehicle and whether a person was sober or not.

Robertson C.J.O. said (at p. 99):

I am sure there have been many cases where a witness has been asked whether a person was sober or not, and has been allowed to state what is after all, a matter of opinion, but the answer is given as if nothing but a mere question of fact was involved.

In the present case the evidence objected to is that of witnesses who saw the appellant and had opportunity of observing him. While some of the questions allowed to be answered were, I think, improperly framed, it was quite plain to the jury that these witnesses were ordinary observers applying their unskilled knowledge to what they actually saw, and, taken as a whole, I do not think any injustice was done by the occasional putting of a question that was unfortunately framed.

The case is of limited help as the degree of impairment was not really in issue.

German's case was discussed in *R. v. Marks*, [1952] O.W.N. 608, in which it was held that it was for the judge to decide whether in the light of the facts the police officer was "competent" to

témoins experts et quelle preuve aurait été exigée pour y arriver. En conséquence, l'autorisation d'interjeter appel est accordée, mais l'appel est rejeté.

IV

La jurisprudence

La question en cause est controversée. La jurisprudence d'ici et d'ailleurs est loin d'être uniforme. Un des arrêts les plus anciens et le plus fréquemment cité est *R. v. German* (1947), 89 C.C.C. 90, de la Cour d'appel de l'Ontario à propos d'accusations de conduite dangereuse et de conduite en état d'ébriété. L'avocat de l'accusé avait soutenu qu'on avait permis, à tort, à la poursuite de présenter des témoignages d'opinion de personnes qui n'avaient pas de titres de compétence spéciaux. Ces témoignages avaient trait à l'état d'ébriété de l'accusé et à sa capacité de conduire. La Cour avait signalé qu'il y avait plusieurs sujets sur lesquels une personne d'intelligence normale peut être admise à donner un témoignage d'opinion fondé sur ses connaissances personnelles, comme l'identité des gens, l'âge apparent d'une personne, la vitesse d'un véhicule et si une personne est sobre ou non.

Le juge en chef Robertson dit ceci (à la p. 99):

[TRADUCTION] Je suis certain que dans de nombreuses affaires on a demandé à un témoin si une personne était ivre ou non et on lui a permis de se prononcer sur ce qui est en définitive une question d'opinion, mais la réponse est alors donnée comme s'il ne s'agissait que d'une pure question de fait.

En l'espèce, la déposition à laquelle on s'oppose est celle de témoins qui ont vu l'appellant et ont eu la possibilité de l'observer. Même si certaines des questions permises étaient, à mon avis, mal formulées, il était évident pour le jury que ces témoins étaient des observateurs ordinaires qui appliquaient leurs connaissances générales à ce qu'ils avaient effectivement vu et, dans l'ensemble, je ne crois pas qu'il y ait eu une injustice du fait d'avoir posé, à l'occasion, une question mal formulée.

Cette affaire n'est pas très utile puisque le degré d'affaiblissement des facultés n'était pas vraiment en cause.

L'arrêt *German* a été étudié dans l'arrêt *R. v. Marks*, [1952] O.W.N. 608; il y est décidé qu'il appartient au juge de déterminer si, étant donné les faits, l'agent de police a «compétence» pour

give an opinion as to any condition of impairment by consumption of alcohol. On the evidence in that case the judge held that the officers were not competent because they did not actually observe the accused driving his car and because they disagreed both about the state of intoxication and about the accused's ability to drive.

The next case is *R. v. Zarins* (1959), 125 C.C.C. 375, another impaired driving case, the judgment of the Ontario Court of Appeal being delivered by Porter C.J.O. Two short passages might be quoted (at pp. 380 and 382):

I would adopt certain language of Harvey C.J.A. in *R. v. Cox* 93 Can.C.C. 32 at p. 36, [1949] 1 D.L.R. 524 at p. 528, and say that the fact of intoxication under s. 222, and impairment under s. 223 "may well be determined by observance of the conduct of the person charged as to which anyone can speak."

and

Following this decision [the decision in *R. v. German*, *supra*], I think that the evidence of the police officers as to intoxication and impairment was clearly admissible.

From the Ontario authorities one would conclude that opinion evidence as to drunkenness, and as to impairment, are currently both admissible.

In British Columbia (*R. v. Beauvais*, [1965] 3 C.C.C. 281 (B.C.S.C.)) McFarlane J. adopted the reasoning of the Court of Appeal in Ontario in *R. v. German* and held that the opinions of the constables was lawfully admissible evidence on which the magistrate could find impairment.

In Alberta, it has been held that the constables could describe the accused's actions, appearance, language and general conduct and, in answer to a question framed as a question of fact, state the accused was drunk: *R. v. Pollock* (1947), 90 C.C.C. 171. In *R. v. Cox* (1948), 93 C.C.C., 32 (Alta. C.A.), Harvey C.J.A., delivering the judgment of the Court, said (at pp. 35-36):

donner une opinion quant à l'affaiblissement des facultés dû à l'usage d'alcool. Selon la preuve soumise dans cette affaire-là, le juge a conclu que les agents n'avaient pas compétence parce qu'ils n'avaient pas réellement vu l'accusé conduire et parce qu'ils n'étaient pas d'accord sur l'état d'ébriété de l'accusé ni sur sa capacité de conduire.

L'arrêt suivant est *R. v. Zarins* (1959), 125 C.C.C. 375, une autre affaire de conduite avec facultés affaiblies. C'est le juge en chef Porter qui a rédigé les motifs de jugement de la Cour d'appel de l'Ontario. On peut en citer les deux courts passages suivants [aux pp. 380 et 382]:

[TRADUCTION] Je fais mienne l'expression employée par le juge en chef Harvey en Cour d'appel dans *R. v. Cox* 93 Can.C.C. 32, à la p. 36, [1949] 1 D.L.R. 524, à la p. 528, et dirais que l'ébriété au sens de l'art. 222 et les facultés affaiblies au sens de l'art. 223 «peuvent bien être établies par l'observation du comportement de l'accusé dont n'importe qui peut faire état».

et

[TRADUCTION] Conformément à cette décision [*R. v. German*, précitée], je crois que le témoignage des agents de police quant à l'ébriété et à l'affaiblissement des facultés était manifestement recevable.

Selon la jurisprudence ontarienne, on pourrait conclure que le témoignage d'opinion sur l'ébriété et sur l'affaiblissement des facultés sont aujourd'hui l'un et l'autre recevables.

En Colombie-Britannique (*R. v. Beauvais*, [1965] 3 C.C.C. 281 (C.S.B.-C.)), le juge McFarlane a suivi le raisonnement de la Cour d'appel de l'Ontario dans l'arrêt *R. v. German* et a conclu que l'opinion des agents était une preuve légalement recevable d'après laquelle le magistrat pouvait conclure à l'affaiblissement des facultés.

En Alberta, on a décidé que les agents pouvaient rapporter les gestes de l'accusé, ses paroles, décrire son apparence et son comportement général et, en réponse à une question formulée comme s'il s'agissait d'un fait, dire que l'accusé était en état d'ivresse: *R. v. Pollock* (1947), 90 C.C.C. 171. Dans *R. v. Cox* (1948), 93 C.C.C. 32 (C.A. Alta.) le juge en chef Harvey dit ceci au nom de la cour (aux pp. 35 et 36):

It seems clear, however, that the purpose of the prohibition of s. 285 is for the protection of people on the highway, and that when a person is in such a state of intoxication that his driving is a menace to the public safety, he must be intoxicated within the intention, and therefore the meaning, of the term as used in the section.

That fact may well be determined by observance of the conduct of the person charged as to which anyone can speak, and that too perhaps with greater certainty than by any conclusions from the percentage of alcohol in the blood.

In some of the other provinces the position is more narrowly circumscribed. For example, in Prince Edward Island, Campbell C.J. held in *Giddings v. The King* (1947), 89 C.C.C. 346 that, in cases where intoxication is the very issue, it is neither helpful nor permissible for witnesses to state their own opinions or conclusions as to the fact or degree of intoxication, at least unless they relate the detailed symptoms on which their conclusions are based. In *R. v. Smith* (1948), 17 Fortnightly L.J. 241, the same judge held that only evidence of actual symptoms could be regarded, and evidence that the accused was intoxicated should be eliminated. An equally restrictive view was taken by Hogarth D.C.J. in *Grimsteit v. McDonald* (1950), 96 C.C.C. 272: "My opinion has always been that it is for a witness to state the facts and for the Court to draw conclusions from those facts" (at p. 286).

A midway position was voiced by O'Hearn C.C.J. in *R. v. MacDonald* (1966), 9 Crim. L.Q. 239 (at p. 241):

I ruled that it would probably be improper for the witness to give as his opinion that the defendant's ability to drive a motor vehicle was impaired by alcohol or a drug, as this might involve a conclusion of law, but that any adult person with sufficient experience of the world may be asked his opinion of a person's condition with respect to intoxication.

England

Lord Parker, speaking on behalf of the Court-Martial Appeal Court in *R. v. Davies*, [1962] 1 W.L.R. 1111 was of opinion that a witness could

[TRANSCRIPTION] Il me semble clair cependant que l'interdiction portée à l'art. 285 vise à protéger le public sur les routes et que, lorsqu'une personne est dans un état d'ébriété tel qu'elle constituerait une menace pour la sécurité publique si elle conduisait, elle doit être dans un état d'ébriété visé par le législateur et en conséquence selon le sens de cette expression dans l'article.

Ce fait peut bien être établi par l'observation du comportement de l'accusé dont n'importe qui peut rendre compte et aussi, peut-être avec plus de certitude que n'importe quelle constatation du taux d'alcoolémie.

Dans certaines autres provinces la position adoptée est réglée de façon plus stricte. Par exemple, à l'Île-du-Prince-Édouard, le juge en chef Campbell a conclu dans l'arrêt *Giddings v. The King* (1947), 89 C.C.C. 346, que, dans les cas où l'ébriété est la question essentielle, il n'est ni permis, ni utile que les témoins donnent leur propre opinion ou leur conclusion sur le degré d'ébriété ou sur l'ébriété elle-même à moins qu'ils ne décrivent les signes détaillés sur lesquels ils fondent leur conclusion. Dans l'arrêt *R. v. Smith* (1948), 17 Fortnightly L.J. 241, le même juge conclut que seule la déposition relative aux signes réels pouvait être retenue et que celle selon laquelle l'accusé était en état d'ébriété devait être rayée. Le juge Hogarth de la Cour de district a exprimé un avis aussi sévère dans *Grimsteit v. McDonald* (1950), 96 C.C.C. 272: [TRANSCRIPTION] «J'ai toujours été d'avis qu'il appartient aux témoins d'énoncer les faits et au tribunal de tirer des conclusions à partir de ces faits» (à la p. 286).

Le juge O'Hearn de la Cour de comté a opté pour une position intermédiaire dans *R. v. MacDonald* (1966), 9 Crim. L.Q. 239 (à la p. 241):

[TRANSCRIPTION] J'ai décidé qu'il serait probablement répréhensible que le témoin dise, à titre d'opinion, que la capacité du défendeur de conduire un véhicule à moteur était affaiblie par l'usage d'alcool ou d'une drogue puisque ce pourrait être une conclusion de droit, mais on peut demander à tout adulte, qui a une expérience suffisante de la vie, son opinion sur l'état d'une personne pour ce qui a trait à l'ébriété.

En Angleterre

Au nom du Tribunal d'appel des cours martiales, lord Parker a exprimé l'avis dans *R. v. Davies*, [1962] 1 W.L.R. 1111 qu'un témoin pouvait fort

properly give his impression as to whether another had "taken drink", but could not testify as to fitness or unfitness to drive. He reached his conclusion on two grounds (i) he is not in the expert witness category; (ii) that was the very matter the court had to determine on a charge of driving a vehicle on a road while unfit to drive through drink or drugs. The passage reads (at p. 1113):

The court has come clearly to the conclusion that a witness can quite properly give his general impression as to whether a driver had taken [a] drink. He must describe of course the facts upon which he relies, but it seems to this court that he is perfectly entitled to give his impression as to whether drink had been taken or not. On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the very matter which the court itself has to determine. Accordingly, in so far as this witness and two subsequent witnesses, the lance-corporal and the regimental sergeant-major gave their opinion as to the appellant's ability or fitness to drive, the court was wrong in admitting that evidence.

In *R. v. Neil*, [1962] Crim. L.R. 698 a Courts-Martial Appeal Court (Winn, Widgery and Brabin JJ.) indicated that the scope of *Davies* "might call for consideration in future in relation to particular circumstances". The Court in *Neil* upheld the conviction on the somewhat tenuous ground that the members of the Court Martial "were not invited or directed by the Judge-Advocate to pay attention to opinion as distinct from observation".

Eire

An informative discussion of the point under review comes from Eire, *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185. Kenny was charged with driving a motor lorry while drunk. The prosecution proposed to ask a police witness whether "in his opinion the defendant was drunk and incapable of driving the vehicle". The solicitor for the defend-

bien dire qu'il a l'impression qu'une autre personne «a bu», mais il ne peut pas déposer quant à sa capacité ou son incapacité de conduire. Le juge en est arrivé à cette conclusion pour deux motifs (i) le témoin n'est pas un témoin expert; (ii) c'est la question même que la cour est appelée à trancher relativement à une accusation de conduite d'un véhicule avec facultés affaiblies par l'usage d'alcool ou de drogue. Voici l'extrait de cette décision (à la p. 1113):

[TRADUCTION] La cour a conclu sans hésitation qu'un témoin peut fort bien donner son impression générale quant à savoir si un conducteur a bu. Il doit évidemment énoncer les faits sur lesquels il s'appuie, mais cette cour estime qu'il a parfaitement le droit de donner son impression à savoir s'il y a eu consommation d'alcool. D'autre part, pour ce qui a trait à la seconde question, on ne peut dire selon nous que, simplement parce qu'un témoin conduit lui-même une automobile, il entre dans la catégorie des témoins experts et qu'il convient de lui demander son avis sur la capacité ou l'incapacité de l'accusé de conduire. C'est la question même que la cour est appelée à trancher. En conséquence, pour autant que ce témoin et les deux autres témoins suivants, le caporal et le sergent major du régiment, ont exprimé leur opinion quant à la capacité ou aptitude de l'appelant de conduire, la cour a eu tort de recevoir leur témoignage.

Dans l'arrêt *R. v. Neil*, [1962] Crim. L.R. 698, le Tribunal d'appel des cours martiales (les juges Winn, Widgery et Brabin) a signalé que la portée de l'affaire *Davies* [TRADUCTION] «pourrait devoir être réexaminée plus tard, à cause de circonstances particulières». Dans l'arrêt *Neil*, la Cour a confirmé la déclaration de culpabilité en fonction d'un motif plutôt ténu selon lequel les membres de la Cour martiale [TRADUCTION] «n'avaient été ni invités, ni incités par le juge-avocat à tenir compte de l'opinion des témoins par opposition à leurs observations».

En Irlande

L'arrêt irlandais *A.G. (Ruddy) v. Kenny* (1959), 94 I.T.L.R. 185 comporte une étude utile du point en cause. Kenny était accusé d'avoir conduit un camion en état d'ivresse. La poursuite voulait demander à un témoin policier si [TRADUCTION] «à son avis, le défendeur était ivre et incapable de conduire le véhicule». L'avocat de la défense s'est

ant objected to the question and submitted that the witness "not being a doctor or like expert was not qualified or competent to give evidence of his opinion of the defendant's condition". The prosecution replied that evidence as to drunkenness or sobriety need not necessarily be that of a medical practitioner or similar witness but that any ordinary witness would be qualified to give evidence on such matters. The District Justice thereupon agreed to state a case for the opinion of the High Court. The question for decision was whether evidence by a member of the Garda Síochána was admissible of his opinion that the defendant driver by reason of his being drunk, was unfit to drive a mechanically propelled vehicle? It was held by Davitt P. and on appeal by the Supreme Court of Eire (Lavery and O'Daly JJ., Kingsmill Moore J., dissenting) that the question asked should be answered "Yes". The evidence was admissible.

Northern Ireland

The same point arose in Northern Ireland in *Sherrard v. Jacob*, [1965] N.I.L.R. 151 on a stated case. The Court of Appeal held that opinion evidence of the police officers as to drunkenness was admissible but (Lord MacDermott L.C.J., dissenting) opinion evidence of the police officers as to capability to drive was not admissible. The majority of the Court followed *R. v. Davies*.

Australia

The Australian case of *Burrows v. Hanlin*, [1930] S.A.S.R. 54 held that mere opinion as to whether a man is drunk or whether he is capable of driving a motorcar, unsupported by facts, is not entitled to any weight. Murray C.J. said (at p. 55):

Evidence of opinion can be given by experts on questions of science, but as to whether a man is drunk or whether he is capable of exercising effective control over a motorcar, mere opinion, unsupported by facts (I think I may go so far as to say), is not admissible evidence.

opposé à la question et a soutenu que, vu que le témoin [TRADUCTION] «n'était ni médecin, ni expert de ce genre, il n'était ni qualifié, ni compétent pour donner en preuve son opinion quant à l'état du défendeur». La poursuite a répliqué que le témoignage quant à l'ivresse ou à la sobriété de quelqu'un n'était pas nécessairement celui d'un médecin ou d'un témoin de cette catégorie, mais que tout témoin ordinaire avait compétence pour déposer sur ces questions. Le juge de district a, dès lors, accepté de référer l'affaire, sous forme d'énoncé de cause, à la Haute Cour. Il s'agissait de décider de la recevabilité du témoignage d'un membre de la Garda Síochána, selon lequel l'accusé était incapable de conduire un véhicule motorisé parce qu'il était ivre. Le président Davitt et, en appel, la Cour suprême d'Irlande (les juges Lavery, O'Daly et le juge Kingsmill Moore étant dissident) ont conclu qu'il faut répondre à la question par l'affirmative. Le témoignage était recevable.

En Irlande du Nord

La même question s'est posée en Irlande du Nord, sous forme d'énoncé de cause dans l'affaire *Sherrard v. Jacob*, [1965] N.I.L.R. 151. La Cour d'appel a conclu que le témoignage d'opinion des agents de police sur l'état d'ébriété était recevable mais (le lord juge en chef MacDermott étant dissident) que leur témoignage d'opinion sur la capacité de conduire n'était pas recevable. La Cour à la majorité a suivi l'arrêt *R. v. Davies*.

En Australie

Selon l'affaire australienne *Burrows v. Hanlin*, [1930] S.A.S.R. 54, la simple opinion quant à l'ébriété d'une personne et à sa capacité de conduire un véhicule à moteur, non fondée sur des faits, n'a aucune valeur probante. Le juge en chef Murray a dit (à la p. 55):

[TRADUCTION] Des experts peuvent rendre des témoignages d'opinion sur des questions de science, mais un témoignage d'opinion sur la question de savoir si un homme est ivre et s'il est capable d'exercer un contrôle efficace sur une automobile, une simple opinion, non appuyée sur des faits est (j'oserais dire) non recevable.

The later case of *R. v. Spooner*, [1957] V.R. 540 expressed a less strict view, with which I find myself much in accord. Sholl J. said (at p. 541):

I think I ought to say that my own view would be that it is not only a police officer who may be capable of expressing an opinion whether a man is so intoxicated as to be unable properly to drive a car. Many other persons have had experience in driving a motor-car, and have observed persons under the influence of intoxicating liquor, and must, one would suppose, be in a position to form a view as to the capacity to drive. I see no magic myself in the fact that the witness is a police officer, or anything else. It depends largely, I suppose, on his actual knowledge of what is required in driving a motor car.

In *R. v. Kelly*, [1958] V.R. 412, Smith J. expressed the opinion that if the Crown is merely seeking from a witness a compendious description of what he actually observed, evidence in such form is not properly to be regarded as opinion evidence and the law of evidence does not forbid the giving of evidence in such form. Moreover, the law of evidence does not require that a witness should be qualified as an expert before he testifies.

New Zealand

In *Blackie v. Police*, [1966] N.Z.L.R. 910 the New Zealand Court of Appeal divided on whether an experienced traffic officer could give evidence as to whether a driver was so far intoxicated as to be incapable of having control of a vehicle. A majority of the Court held that a traffic officer or policeman who can show that he is sufficiently qualified by training or experience may be allowed to express his opinion in evidence as to a person's capacity to drive. The Court held also that the fact that a witness is either a traffic officer or a policeman does not, however, automatically qualify him to give opinion evidence on this topic.

L'affaire plus récente *R. v. Spooner*, [1957] V.R. 540 exprime une opinion moins rigide, avec laquelle je suis beaucoup plus en accord. Le juge Sholl y dit (à la p. 541):

[TRADUCTION] Je crois devoir dire qu'à mon avis, un agent de police n'est pas le seul qui peut être capable de dire si, selon lui, un homme est à ce point ivre qu'il en est incapable de conduire normalement une voiture. Bien d'autres personnes ont eu l'expérience de conduire une voiture et d'observer des personnes en état d'ébriété et doivent, on peut le supposer, être en mesure de se former une opinion sur la capacité du chauffeur de conduire. Quant à moi je ne vois rien de magique à ce que le témoin soit un agent de police ou autre chose. Cela dépend en grande partie, je suppose, de la connaissance qu'a le témoin de ce qui est nécessaire pour conduire une voiture.

Dans *R. v. Kelly*, [1958] V.R. 412, le juge Smith a exprimé l'avis que si la poursuite cherche simplement à faire décrire de façon concise par un témoin ce qu'il a effectivement observé, cette forme de témoignage ne peut valablement être considérée comme un témoignage d'opinion et le droit de la preuve n'interdit pas la présentation de cette forme de preuve. De plus, le droit de la preuve n'exige pas qu'un témoin se qualifie comme expert avant de déposer.

En Nouvelle-Zélande

Dans l'affaire *Blackie v. Police*, [1966] N.Z.L.R. 910, la Cour d'appel de Nouvelle-Zélande a rendu une décision partagée sur le point de savoir si un agent de la circulation expérimenté pouvait déposer qu'un chauffeur était ivre au point d'être incapable de contrôler un véhicule. La majorité de la Cour a conclu qu'on peut permettre à un policier ou à un agent de la circulation qui peut démontrer qu'il a l'expérience ou la formation voulue, d'exprimer son opinion, comme témoin, sur la question de savoir si une personne est capable de conduire. La Cour a aussi conclu que même si le témoin est agent de la circulation ou policier, cela ne l'habilite pas automatiquement à rendre un témoignage d'opinion sur ce sujet.

V

The Text Writers

Sir Rupert Cross in his work on *Evidence* (5th ed., 1979, p. 451) states that the existence of a particular issue may necessitate the reception of evidence which is not that of an expert and yet is nothing short of a witness' opinion concerning an ultimate issue in the case. The author adds, (at p. 452), that, subject to the exceptional type of situation, it would seem that, if non-expert opinion is in reality evidence of fact given *ex necessitate* in the form of evidence of opinion, there should be no question of its inadmissibility because it deals with ultimate issues.

Professor Cross continues (at p. 452):

This is borne out by the form of s. 3(2) of the Civil Evidence Act 1972, which suggests that no change in the law was intended:

It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

So far as criminal cases are concerned, the decisions on drunken driving indicate a difference of approach between the English and Northern Irish courts on the one hand, and the courts of Eire on the other.

Professor Cross suggests (at p. 453) two main and two subsidiary reasons for the exclusion of non-expert opinion: In the first place it is said that opinion evidence is irrelevant and that this is largely true of non-expert opinion on a subject requiring expertise as well as opinion evidence concerning matters which do not call for expertise. Secondly, it is said that the reception of opinion evidence would "usurp the functions of the jury" in the sense that the jury would be tempted blindly to accept a witness' opinion. The two subsidiary reasons mentioned are the fact that a witness who merely speaks his opinion cannot be prosecuted for perjury, and the danger that the reception of such evidence might indirectly evade other exclusionary rules. Cross speaks of the first subsidiary reason as

V

La doctrine

Sir Rupert Cross dans son ouvrage intitulé *Evidence* (5^e éd., 1979, p. 451) déclare qu'il peut se présenter une question qui exige qu'on reçoive un témoignage qui n'est pas celui d'un expert, mais qui n'en est pas moins l'opinion d'un témoin sur une question fondamentale dans l'affaire. L'auteur ajoute (à la p. 452) que sauf dans une situation exceptionnelle, il semblerait que, si l'opinion d'un non-expert constitue en réalité la preuve de faits apportée *ex necessitate* sous forme de témoignage d'opinion, sa recevabilité ne devrait pas être mise en doute parce qu'elle porte sur des questions fondamentales.

Le professeur Cross poursuit (à la p. 452):

[TRADUCTION] Cela ressort du texte du par. 3(2) de la Civil Evidence Act 1972, qui donne à penser qu'on n'a pas voulu modifier le droit:

Il est par les présentes déclaré que lorsqu'une personne, citée comme témoin dans une procédure civile, énonce une opinion sur un sujet pertinent sur lequel elle n'est pas un témoin expert, si elle le fait dans le but de relater les faits pertinents dont elle a eu personnellement connaissance, sa déclaration est recevable comme preuve de ce dont elle a eu connaissance.

Pour ce qui est des affaires criminelles, les décisions relatives à la conduite en état d'ébriété indiquent une différence de point de vue entre les cours d'Angleterre et celles d'Irlande du Nord d'une part et les cours de la République d'Irlande d'autre part.

Le professeur Cross fait état (à la p. 453) de deux raisons principales et deux raisons accessoires qui justifient l'exclusion de l'opinion de témoins ordinaires. D'abord, on affirme que le témoignage d'opinion n'a pas de pertinence et que c'est largement aussi vrai du témoignage d'opinion d'une personne ordinaire sur un sujet qui exige des connaissances spéciales que du témoignage d'opinion sur des questions qui n'en nécessitent pas. En deuxième lieu, on soutient que la réception de témoignages d'opinion empiéterait sur le rôle du jury en ce que le jury pourrait être tenté d'accepter aveuglément l'opinion du témoin. Les deux motifs secondaires indiqués tiennent à ce que le témoin qui ne fait qu'émettre une opinion n'est pas susceptible de poursuite pour parjure, et aux dangers que

one of "some antiquity" and suggests that there is more force in the second reason, but that "it has not been stressed by the judges".

Professor Wigmore takes a diametrically opposed position. He states, (vol. 7, para. 1917, Chadbourn ed., 1978) that the disparagement of "opinion" always had reference to the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstances that incidentally he drew inferences from his observed data and expressed conclusions from them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing.

Wigmore refers to the theory that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, the theory being that of the exclusion of supererogatory evidence.

Wigmore uses strong language in discussing the "usurp the functions of the jury" theory (para. 1920). The phrase, he says, is made to imply a moral impropriety or a radical unfairness in the witness' expression of opinion. He says that "In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric". The author continues "There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to 'usurp' the jury's function; nor could if he desired".

Turning then to an attack of the other theory, which would deny opinions of the "very issue before the jury" Wigmore has this to say:

The fallacy of this doctrine is, of course, that, measured by the principle, it is both too narrow and too

la réception d'un tel témoignage puisse permettre de contourner d'autres règles d'exclusion. Cross qualifie la première raison accessoire de [TRADUCTION] «désuète dans une certaine mesure» et opine
a que la seconde raison est plus convaincante, mais [TRADUCTION] «que les juges n'en ont pas beaucoup fait état».

Le professeur Wigmore adopte un point de vue diamétralement opposé. Il affirme (vol. 7, par. 1917, éd. Chadbourn, 1978) que le dénigrement du témoignage d'opinion a toujours fait référence au témoignage d'une personne qui n'a pas personnellement observé de «faits» qu'elle pourrait rapporter et que le témoin expert est celui qu'il faut entendre par exception à cette notion. Donc lorsqu'un témoin ordinaire dépose, avec une connaissance personnelle de l'affaire et, en conséquence, bien assuré de ses sources de connaissances, le fait qu'il tire des conclusions incidentes et exprime une opinion à partir de faits qu'il a observés n'a en soi rien de répréhensible. Il ne viendrait jamais à l'idée d'un juge que ce témoin se conduit mal.

Wigmore parle de la théorie selon laquelle chaque fois que le jury aussi bien que le témoin peut tirer des inférences et des conclusions, le témoin est de trop; c'est la théorie de l'exclusion de la preuve surérogatoire.

Wigmore emploie des termes forts pour parler de la théorie de «l'empiétement sur le rôle du jury» (par. 1920). On a fait dire à cette expression, dit-il, que l'énoncé d'opinion du témoin est moralement incorrect ou fondamentalement inéquitable. Il affirme que [TRADUCTION] «Sous ce rapport, l'expression est si trompeuse et mal fondée qu'il y a lieu de la désavouer complètement. Ce n'est qu'un exercice de rhétorique creuse». L'auteur poursuit «Aucune raison de la sorte ne fonde la règle, puisqu'en exprimant son opinion, le témoin n'essaie pas de s'«approprier» le rôle du jury et il ne pourrait pas le faire même s'il le voulait».

Abordant la critique de l'autre théorie, qui interdirait le témoignage d'opinion sur «la question même soumise au jury», Wigmore dit ceci:

[TRADUCTION] La fausseté de cette théorie tient à ce que, de toute évidence, en fonction du principe, elle est à

broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle [para. 1921].

VI

Law Reform Commission Reports

The Law Reform Commission of Canada has proposed an opinion rule based on facts perceived by the witness and on "helpfulness":

Section 67. A witness other than one testifying as an expert may not give an opinion or draw an inference unless it is based on facts perceived by him and is helpful to the witness in giving a clear statement or to the trier of fact in determining an issue [*Report on Evidence* (1975), Evidence Code, s. 67].

The Ontario Law Reform Commission proposed the enactment of the following section (Draft Act, Section 14):

Where a witness in a proceeding is testifying in a capacity other than as a person qualified to give opinion evidence and a question is put to him to elicit a fact that he personally perceived, his answer is admissible as evidence of the fact even though given in the form of an expression of his opinion upon a matter in issue in the proceeding [*Report on the Law of Evidence* (1976), pp. 150-53].

A majority of the Federal/Provincial Task Force on Uniform Rules of Evidence favoured the adoption of the proposal of the Law Reform Commission of Canada, embodied in s. 67 of the Commission's Evidence Code, rather than that of the Ontario Law Reform Commission. The majority opposed the proposal of the Ontario Law Reform Commission as being an enactment of the "collective facts rule" which allows non-expert opinion to be admitted on the basis that it is "a compendious mode of ascertaining the result of the actual observation of the witness". The majority felt that such

la fois trop particulière et trop générale. Elle est trop générale, parce que même s'il faut viser le point essentiel de l'affaire, le jury doit avoir l'aide dont il peut avoir besoin. Elle est trop particulière parce qu'une opinion peut être irrecevable même si elle porte sur autre chose que le point essentiel de l'affaire. De plus, si on applique la règle de façon stricte et inconditionnelle, on éliminerait les témoignages les plus nécessaires. Tout compte fait, elle n'est qu'une proposition, parmi d'autres, inapplicable et mal conçue qui n'a absolument pas de fondement dans les principes [par. 1921].

VI

Les rapports des commissions de réforme du droit

La Commission de réforme du droit du Canada a proposé une règle sur le témoignage d'opinion fondée sur des faits perçus par le témoin lui-même et sur l'«utilité»:

67. Hormis l'expert, aucun témoin ne peut faire part de ses opinions ou de ses conclusions à moins qu'elles ne soient fondées sur des faits perçus par lui-même et qu'elles ne soient utiles soit à une narration claire des faits, soit à la solution par l'arbitre des faits d'un problème soulevé au cours du litige. [*Rapport sur la preuve* (1975), Code de la preuve, art. 67].

La Commission de réforme du droit de l'Ontario a proposé l'adoption de l'article suivant (projet de loi, article 14):

[TRADUCTION] Lorsque dans une procédure où il dépose à un titre autre que celui de témoin expert, un témoin rapporte un fait dont il a eu personnellement connaissance, sa déposition est recevable à titre de preuve de ce fait, même si elle prend la forme d'une expression de son opinion à l'égard d'une question soulevée dans la procédure [*Report on the Law of Evidence* (1976), aux pp. 150 à 153].

Le groupe d'étude fédéral-provincial sur les règles uniformes de preuve a opté à la majorité pour l'adoption de la proposition formulée par la Commission de réforme du droit du Canada à l'art. 67 de son Code de la preuve, plutôt que pour la proposition de la Commission de réforme du droit de l'Ontario. Le groupe s'est majoritairement opposé à la proposition de la Commission de réforme du droit de l'Ontario parce qu'elle équivaut à adopter la «règle des faits en bloc» qui permet de recevoir le témoignage d'opinion d'un témoin ordinaire parce que c'est là [TRADUCTION]

an approach purported to draw an impossible and illogical distinction between "fact" and "opinion". The Task Force observed:

Section 67 would allow a lay witness to testify in the form of opinion if it is relevant, within the realm of common experience and a shorthand expression of the witness's personal observation.

VII

Conclusion

I have attempted in the foregoing to highlight the opposing points of view as reflected in some of the cases, texts, and reports of the law reform commissions.

We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob, supra*, is by no means exhaustive: (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things—e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

To resolve the question before the Court, I would like to return to broad principles. Admissibility is determined, first, by asking whether the evidence sought to be admitted is relevant. This is a matter of applying logic and experience to the circumstances of the particular case. The question which must then be asked is whether, though

«une façon concise d'obtenir le résultat des observations réelles du témoin». Le groupe a majoritairement estimé que cette attitude tend à établir une distinction illogique et inapplicable entre les «faits» et les «opinions». Le groupe d'étude a fait remarquer que:

[TRADUCTION] L'article 67 permettrait à un témoin ordinaire de rendre un témoignage d'opinion si celui-ci est pertinent, s'il appartient au domaine d'expérience courante et constitue un énoncé concis des observations personnelles du témoin.

VII

Conclusion

Jusqu'ici, j'ai essayé de souligner les points de vue opposés qu'on retrouve dans la jurisprudence, dans la doctrine et dans les rapports des commissions de réforme du droit.

Disons au départ que, dans le concret, le droit de la preuve est embarrassé d'un grand nombre de règles encombrantes, assorties d'exclusions, d'exceptions à ces exclusions et d'exceptions aux exceptions. La liste des sujets sur lesquels un témoin ordinaire peut rendre un témoignage d'opinion est longue. Celle qui est mentionnée dans l'arrêt *Sherrard v. Jacob*, précité, n'est nullement exhaustive: (i) l'identification d'écriture, de personnes ou de choses; (ii) l'âge apparent; (iii) l'état physique d'une personne, notamment si elle est malade ou morte; (iv) l'état émotif d'une personne—c.-à-d. si elle est affligée, en colère, agressive, tendre ou découragée; (v) l'état des choses—c.-à-d. si elles sont usées, détériorées, neuves ou usagées; (vi) certaines questions d'évaluation; et (vii) des estimations de vitesse ou de distance.

Si ce n'est par commodité, la distinction fondée sur l'opposition précaire, et même souvent fausse, entre un fait et une opinion a peu ou pas d'avantages. La distinction entre un «fait» et une «opinion» n'est pas nette.

Pour résoudre la question soumise à la Cour, je veux revenir aux principes généraux. Le premier critère de recevabilité d'une preuve est sa pertinence. Il s'agit d'appliquer la logique et l'expérience aux circonstances du cas particulier. Il faut alors se demander si, même si la preuve a une

probative, the evidence must be excluded by a clear ground of policy or of law.

There is a direct and logical relevance between (i) the evidence offered here, namely, the opinion of a police officer (based on perceived facts as to the manner of driving, and *indicia* of intoxication of the driver) that the person's ability to drive was impaired by alcohol, and (ii) the ultimate *probandum* in the case. The probative value of the evidence is not outweighed by such policy considerations as danger of confusing the issues or misleading the jury. It does not unfairly surprise a party who had not had reasonable ground to anticipate that such evidence will be offered, and the adducing of the evidence does not necessitate undue consumption of time. As for other considerations such as "usurping the functions of the jury" and, to the extent that it may be regarded as a separate consideration, "opinion on the very issue before the jury", Wigmore has gone a long way toward establishing that rejection of opinion evidence on either of these grounds is unsound historically and in principle. If the court is being told that which it is in itself entirely equipped to determine without the aid of the witness on the point then of course the evidence is supererogatory and unnecessary. It would be a waste of time listening to superfluous testimony.

The judge in the instant case was not in as good a position as the police officers or Mr. Wilson to determine the degree of Mr. Graat's impairment or his ability to drive a motor vehicle. The witnesses had an opportunity for personal observation. They were in a position to give the Court real help. They were not settling the dispute. They were not deciding the matter the Court had to decide, the ultimate issue. The judge could accept all or part or none of their evidence. In the end he accepted the evidence of two of the police officers and paid little heed to the evidence of the third officer or of Mr. Wilson.

I agree with Professor Cross (at p. 443) that "The exclusion of opinion evidence on the ultimate

valeur probante, il y a lieu de l'exclure pour un motif manifeste de principe ou de droit.

Il y a une relation directe et logique entre (i) le témoignage présenté en l'espèce, savoir l'opinion d'un agent de police (fondée sur des observations quant à la manière de conduire du chauffeur et sur des indices d'ébriété de celui-ci) d'après laquelle la capacité de conduire de la personne était affaiblie par l'alcool et (ii) la preuve même à faire en l'espèce. La force probante du témoignage n'est pas supplantée par des considérations de principe comme le danger d'embrouiller les questions ou d'induire le jury en erreur. Le témoignage ne prend pas injustement par surprise une partie qui n'aurait pu raisonnablement prévoir qu'un tel témoignage serait présenté et sa présentation ne prend pas un temps excessivement long. Pour ce qui est des autres considérations, comme «l'empiètement sur le rôle du jury» et, dans la mesure où on peut la considérer comme une préoccupation distincte, celle que «le témoignage d'opinion porte sur la question même soumise au jury», Wigmore a bien établi qu'il est illogique de rejeter le témoignage d'opinion pour l'un ou l'autre de ces motifs tant du point de vue historique que de celui des principes. Si l'on dit au tribunal ce qu'il pourrait entièrement décider par lui-même, sans le secours du témoin sur la question, alors il va de soi que le témoignage est surérogatoire et inutile. Ce serait perdre son temps que d'entendre des dépositions superflues.

En l'espèce, le juge n'était pas aussi bien placé que les agents de police ou M. Wilson pour juger du degré de capacité ou d'incapacité de M. Graat de conduire un véhicule à moteur. Les témoins ont eu la possibilité de l'observer personnellement. Ils étaient en mesure d'apporter une aide réelle au tribunal. Ils ne tranchaient pas le litige. Ils ne décidaient pas ce que la cour était appelée à décider, le point crucial de l'affaire. Le juge avait la liberté d'accepter leurs dépositions en entier, en partie ou de les rejeter entièrement. En définitive il a cru les témoignages de deux agents de police et accordé peu d'attention à celui d'un troisième agent ou à celui de M. Wilson.

Je suis d'accord avec le professeur Cross pour dire (à la p. 443) que [TRADUCTION] «L'exclusion

issue can easily become something of a fetish". I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible.

When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:

"Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."

There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, handwriting and identity in general [at p. 448].

Before this Court counsel for the appellant took the position that although opinion evidence by non-experts may be admissible where it is "necessary" the opinions of the police officers in this case were superfluous, irrelevant and inadmissible. I disagree. It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If a witness is to

du témoignage d'opinion sur le point crucial de l'affaire peut, en quelque sorte, devenir un fétiche». Je ne puis voir pourquoi en principe ou selon le bon sens, on ne pourrait pas permettre à un témoin ordinaire de déposer en exprimant son opinion si, en le faisant, il peut énoncer plus précisément les faits qu'il a observés.

Je considère l'extrait suivant de Cross comme l'énoncé exact du droit relatif aux affaires où le témoignage d'opinion d'un non-expert est recevable.

[TRADUCTION] Lorsque, selon l'expression d'un juge américain, les faits qui ont produit une impression sur le témoin sont trop fugaces pour qu'il s'en rappelle ou trop compliqués pour qu'il les énonce un par un, le témoin peut faire état de son opinion ou de son impression. Il était dans une situation plus favorable que le jury pour y arriver et il lui est impossible de faire saisir au jury les prémisses sur lesquelles il s'appuie:

«A moins que les opinions, les estimations et les conclusions auxquelles on arrive inconsciemment, dans la vie de tous les jours, par suite de ce qu'on perçoit par nos sens soient considérées, en droit de la preuve, comme de simples énoncés de faits, les témoins seront incapables de communiquer au juge une impression exacte des circonstances qu'ils veulent relater.»

Il n'y a pas d'énumération exhaustive des affaires pour lesquelles un témoignage d'opinion de non-expert est recevable. Les exemples caractéristiques sont ceux qui concernent l'âge, la vitesse, la température, l'écriture et de façon générale l'identité [à la p. 448].

Devant cette Cour, l'avocat de l'appellant a soutenu que même si le témoignage d'opinion de certains non-experts peut être recevable lorsqu'il est nécessaire, l'opinion des agents de police en l'espèce était superflue, non pertinente et irrecevable. Je ne suis pas d'accord. Il est bien établi qu'un témoin qui n'est pas un expert peut déposer que quelqu'un est ivre tout comme il peut témoigner au sujet de l'âge, de la vitesse, de l'identité ou d'un état émotif. Il en est ainsi parce qu'il peut être difficile au témoin d'énoncer une à une ses observations des faits. Consommer de l'alcool au point où la capacité de conduire est affaiblie constitue un degré d'ivresse et il est encore plus difficile pour un témoin de relater les faits distincts qui justifient l'inférence pour le témoin ou pour le juge des faits, que quelqu'un est ivre à un degré donné. Si l'on

be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree. I agree with the comment of Lord MacDermott L.C.J. in his dissent in *Sherrard v. Jacob*, *supra*:

I can find no good reason for allowing the non-expert to give his opinion of the driver's observable condition and then denying him the right to state an opinion on the consequences of that observed condition so far as driving is concerned [at p. 162].

Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

If that be so it seems illogical to deny the court the help it could get from a witness' opinion as to the degree of intoxication, that is to say whether the person's ability to drive was impaired by alcohol. If non-expert evidence is excluded the defence may be seriously hampered. If an accused is to be denied the right to call persons who were in his company at the time to testify that in their opinion his ability to drive was by no means impaired, the cause of justice would suffer.

Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.

doit permettre au témoin de résumer ses observations de façon concise en affirmant que quelqu'un est ivre, il est encore plus nécessaire de lui permettre de mieux éclairer la cour en disant que quelqu'un est ivre à un degré donné. Je souscris au commentaire du lord juge en chef MacDermott, dissident, dans l'arrêt *Sherrard v. Jacob*, précité:

[TRADUCTION] Je ne puis trouver de motif valable de permettre au témoin ordinaire de donner son avis sur l'état apparent du conducteur et de lui refuser ensuite le droit de dire son avis sur les conséquences de l'état qu'il a observé pour autant que la capacité de conduire est en cause [à la p. 162].

Il ne s'agit pas ici d'une affaire d'exclusion du témoignage d'un non-expert parce qu'on aurait dû faire appel à un spécialiste. Il est depuis longtemps admis dans notre droit que l'ébriété n'est pas un état si exceptionnel qu'il faille avoir recours à un expert en médecine pour la diagnostiquer. Un témoin ordinaire peut donner son avis sur la question de savoir si une personne est ivre. Ce n'est pas un sujet où il est nécessaire d'obtenir un témoignage scientifique, technique ou spécialisé pour que le tribunal apprécie les faits pertinents à leur juste valeur. L'ébriété et l'affaiblissement de la capacité de conduire sont des questions que, de nos jours, un jury peut résoudre intelligemment en fonction des connaissances et de l'expérience communes. L'aide d'un expert est superflue.

Dans ces conditions, il paraît illogique de priver la cour de l'aide que l'opinion du témoin peut lui apporter sur le degré d'ébriété, c.-à-d. sur la question de savoir si la capacité de conduire d'une personne était affaiblie par l'usage de l'alcool. S'il fallait exclure les dépositions de témoins ordinaires, la défense en serait gravement gênée. Si l'on doit priver l'accusé du droit de citer des personnes qui l'accompagnaient lors de l'incident et de les faire témoigner qu'à leur avis sa capacité de conduire n'était nullement affaiblie, l'intérêt de la justice en serait atteint.

C'est une autre question de savoir s'il faut ajouter foi au témoignage des policiers ou d'autres témoins ordinaires. Le poids à accorder au témoignage relève complètement du juge ou du juge et du jury. La valeur probante de l'opinion dépend de la façon dont la cour juge toutes les circonstances.

I would adopt the following passage from the reasons of Lord MacDermott in *Sherrard v. Jacob, supra*:

The next stage is to enquire if the opinion of the same witnesses was also admissible on the question whether the respondent, if he was under the influence of drink, was so to an extent which made him incapable of having proper control of the car he was driving. On this it seems to me that the reasoning which has led me to the conclusion just stated applies as well to this branch of the matter. The driving of motor vehicles is now so much a matter of everyday experience for ordinary people that I find it difficult to see how inferential or opinion evidence as to being (a) under the influence of drink and (b) thereby unfit to drive a car can be placed in different categories for the purpose of determining admissibility. The one as much as the other seems to be within the capacity of the non-expert to form a reasonable conclusion [at p. 162].

A non-expert witness cannot, of course, give opinion evidence on a legal issue as, for example, whether or not a person was negligent. That is because such an opinion would not qualify as an abbreviated version of the witnesses factual observations. An opinion that someone was negligent is partly factual, but it also involves the application of legal standards. On the other hand, whether a person's ability to drive is impaired by alcohol is a question of fact, not of law. It does not involve the application of any legal standard. It is akin to an opinion that someone is too drunk to climb a ladder or to go swimming, and the fact that a witness' opinion, as here, may be expressed in the exact words of the *Criminal Code* does not change a factual matter into a question of law. It only reflects the fact that the draftsmen of the *Code* employed the ordinary English phrase: "his ability to drive . . . is impaired by alcohol" (s. 234).

In short, I know of no clear ground of policy or of law which would require the exclusion of opinion evidence tendered by the Crown or the defence as to Mr. Graat's impairment.

I conclude with two caveats. First, in every case, in determining whether an opinion is admissible,

Je suis d'avis d'adopter le passage suivant des motifs de lord MacDermott dans l'arrêt *Sherrard v. Jacob*, précité:

[TRADUCTION] L'étape suivante consiste à se demander si l'opinion de ce témoin est aussi recevable quand il s'agit de déterminer si l'intimé, étant sous l'influence de l'alcool, l'était au point d'être incapable de bien contrôler la voiture qu'il conduisait. Sur ce point, il me semble que le raisonnement qui m'a amené à la conclusion que je viens d'énoncer s'applique aussi bien à cet aspect de la question. Conduire un véhicule automobile est devenu une expérience tellement quotidienne pour la moyenne des gens que je vois difficilement comment une inférence ou un témoignage d'opinion quant a) au fait d'être sous l'influence de l'alcool et b) d'être, en conséquence, incapable de conduire une automobile peuvent être placés dans des catégories différentes pour en déterminer la recevabilité. L'une et l'autre me semblent relever de la capacité du témoin ordinaire de se former une opinion raisonnable [à la p. 162].

Un témoin ordinaire ne peut évidemment pas rendre un témoignage d'opinion sur une question de droit, par exemple, déterminer si une personne a été négligente ou non. Il en est ainsi parce qu'une telle opinion n'équivaut pas à une expression abrégée des observations des témoins. L'opinion qu'une personne a été négligente repose en partie sur des faits, mais elle comprend aussi l'application de critères juridiques. D'autre part déterminer si la capacité de conduire d'une personne est affaiblie par l'alcool est une question de fait et non une question de droit. Elle ne comporte l'application d'aucun critère juridique. Elle est semblable à l'opinion selon laquelle quelqu'un est trop ivre pour grimper à une échelle ou pour se baigner et le fait que l'opinion du témoin soit exprimée, comme en l'espèce, selon les termes mêmes du *Code criminel*, ne transforme pas une question de fait en une question de droit. Cela signifie simplement que les rédacteurs du *Code* ont utilisé une expression courante: «sa capacité de conduire . . . est affaiblie par l'effet de l'alcool» (art. 234).

En bref, je ne vois pas de motif évident, ni en principe, ni en droit, d'exclure le témoignage d'opinion offert par la poursuite ou par la défense quant à l'incapacité de conduire de M. Graat.

Je conclus par deux mises en garde. D'abord dans tous les cas, pour déterminer si un témoi-

the trial judge must necessarily exercise a large measure of discretion. Second, there may be a tendency for judges and juries to let the opinion of police witnesses overwhelm the opinion evidence of other witnesses. Since the opinion is admitted under the "compendious statement of facts" exception, rather than under the "expert witness" exception, there is no special reason for preferring the police evidence over the "opinion" of other witnesses. As always, the trier of fact must decide in each case what weight to give what evidence. The "opinion" of the police officer is entitled to no special regard. Ordinary people with ordinary experience are able to know as a matter of fact that someone is too drunk to perform certain tasks, such as driving a car. If the witness lacks the relevant experience, or is otherwise limited in his testimonial capacity, or if the witness is not sure whether the person was intoxicated to the point of impairment, that can be brought out in cross-examination. But the fact that a police witness has seen more impaired drivers than a non-police witness is not a reason in itself to prefer the evidence of the police officer. Constable McMullen and Sergeant Spoelstra were not testifying as experts based on their extensive experience as police officers.

There was some confusion about this matter in this case as appears from the following cross-examination of Mr. Wilson:

Q. ... And of course you've not and never have been a Police Officer. Do you agree or disagree with me?

A. No. No.

Q. You have never been a Police Officer?

A. No.

Q. And you're not in the habit of checking people as to the amount of alcohol that is consumed in order to make him impaired. Do you agree or disagree with me?

A. I have to agree with you.

Q. Yes. So you're really not in a position to tell us whether or not he was impaired or not impaired by alcohol. Do you agree or disagree with me?

A. I was only ...

gnage d'opinion est recevable, le juge du procès doit nécessairement exercer une grande mesure de discrétion. Deuxièmement, il se peut que les juges et les jurys aient tendance à laisser l'opinion des policiers prévaloir sur les témoignages d'opinion d'autres témoins. Puisque le témoignage d'opinion est reçu en vertu de l'exception dite «de l'énoncé concis des faits» plutôt qu'en vertu de l'exception visant le témoignage d'experts, il n'y a pas de raison particulière de préférer la déposition des policiers à «l'opinion» d'autres témoins. Comme dans tous les cas, l'arbitre des faits doit juger quel poids accorder à ce témoignage. L'opinion d'un agent de police ne mérite pas un traitement spécial. Des gens ordinaires avec une expérience courante peuvent savoir qu'en réalité quelqu'un est trop ivre pour faire certaines choses comme conduire une automobile. Si le témoin n'a pas l'expérience pertinente, si sa capacité de témoigner est autrement limitée, ou si le témoin n'est pas certain que la personne était ivre au point d'être incapable de conduire, on peut le faire ressortir par le contre-interrogatoire. Mais le fait qu'un agent de police ait vu plus de conducteurs incapables de conduire qu'un témoin qui n'est pas policier n'est pas un motif en soi d'accorder plus de poids à la déposition d'un agent de police. L'agent McMullen et le sergent Spoelstra n'ont pas déposé à titre d'experts en fonction de leur grande expérience comme agents de police.

Il y a eu en l'espèce un certain flottement à ce sujet, comme on peut le constater de l'extrait suivant du contre-interrogatoire de M. Wilson:

[TRADUCTION] Q. ... Et bien sûr vous n'êtes pas agent de police et ne l'avez jamais été. Êtes-vous d'accord avec moi ou non?

R. Non, non.

Q. Vous n'avez jamais été agent de police?

R. Non.

Q. Et vous n'avez pas l'habitude de surveiller les gens pour voir quelle quantité d'alcool il leur faut absorber avant d'être incapables de conduire. Êtes-vous d'accord avec moi?

R. Je suis obligé d'être d'accord.

Q. Oui. Donc vous n'êtes pas en mesure de nous dire s'il était capable ou incapable à cause de l'alcool. Êtes-vous d'accord avec moi ou non?

R. Je n'ai que ...

Q. ... But of course you were in no position to judge as to whether or not he was impaired. Do you agree or disagree with me?

A. I don't have any qualifications in that regard I guess. a

Mr. Wilson does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have been closely associated with the prosecution, such association may affect the weight to be given to such evidence. b

The trial judge was correct in admitting the opinions of the three police officers and Mr. Wilson. c

For the foregoing reasons, as well as for the reasons given by Chief Justice Howland, I would dismiss the appeal. d

Appeal dismissed.

Solicitors for the appellant: Greenspan, Moldaver, Toronto.

Solicitor for the respondent: The Attorney General for the Province of Ontario.

Q. ... Mais bien sûr vous n'étiez pas en mesure de juger s'il était incapable ou non. Êtes-vous d'accord avec moi ou non?

R. Je n'ai aucun titre particulier sous ce rapport, je suppose. e

M. Wilson n'a besoin d'aucun titre spécial. Les agents de police n'ont pas non plus besoin d'avoir de titre spécial lorsqu'ils donnent leur opinion. Les témoins qui sont agents de police et ceux qui ne le sont pas ne font que donner un énoncé concis des faits qui sont trop subtils et trop compliqués pour être énoncés un par un. Les juges de première instance ne devraient pas oublier qu'il s'agit là de témoignages d'opinion de non-experts et que l'opinion des agents de police n'a pas droit à un traitement de faveur simplement parce que ceux-ci peuvent avoir une grande expérience des conducteurs dont les facultés sont affaiblies. La fiabilité et l'exactitude des policiers doivent être appréciées de la même façon que celles des autres témoins, en fonction de l'ensemble de la preuve dans la cause. Si les agents de police et les agents de circulation ont été intimement associés à la poursuite de ces infractions, cette expérience peut modifier la force probante de leur témoignage. f

Le juge du procès a eu raison de recevoir l'opinion des trois agents de police et celle de M. Wilson. g

Pour les motifs ci-dessus, et pour les motifs exprimés par le juge en chef Howland, je suis d'avis de rejeter le pourvoi. h

Pourvoi rejeté.

Procureurs de l'appellant: Greenspan, Moldaver, Toronto.

Procureur de l'intimée: Le procureur général de la province de l'Ontario.

2010 ONSC 3712
Ontario Superior Court of Justice

Andersen v. St. Jude Medical, Inc.

2010 CarswellOnt 18587, 2010 ONSC 3712

Yvonne Andersen on her own behalf and as Executrix of the Estate of Erik Andersen, Sharon Frost and Her Majesty the Queen in Right of the Province of Alberta, as represented by the Minister of Health and Wellness, Plaintiffs and St. Jude Medical, Inc. and St. Jude Medical Canada, Inc., Defendants

Lax J.

Heard: June 7, 2010
Judgment: June 28, 2010
Docket: Toronto 00-CV-195906CV

Counsel: Angus McKinnon, for Plaintiffs
Jill Lawrie, for Defendants

Lax J.:

Objections to Dr. Bhatnagar's evidence

1 Dr. Bhatnagar, a cardiac surgeon, treated two class members: Patient M and Patient 0058. Both received Silzone valves and Dr. Bhatnagar explanted these valves.

2 Dr. Bhatnagar is a fact witness who was called by the plaintiffs to testify about his treatment of these patients, his general experience at implanting heart valves, and his experience with implanting and explanting Silzone valves. The defendants have not raised objections to these general subject areas of his testimony. However, the defendants do object to six areas of his anticipated evidence on Exhibit 519ID, which they say constitute inadmissible opinion evidence. These areas are as follows:

1. Dr. B will review the pathology reports, autopsy reports and microbiology reports of Patient M, and will testify that it is his conclusion that this is not a case of infective endocarditis.
2. Dr. B will testify that he was in error when he wrote his original discharge note that there was a positive finding of *staph aureus*, because the culture results show no positive cultures. He will testify that he has concluded that this is not a case of sub-acute bacterial endocarditis.
3. Dr. B will testify that Patient 0058 was not a case of sub-acute bacterial endocarditis.
4. Dr. B will testify that the appearance of a valve with liquefied necrosis has the same appearance as a valve infected with endocarditis and that a diagnosis of endocarditis requires positive cultures. He will testify as to his observations as to the difference between a vegetation and a clot and his standard practice when an individual presents with fever, the effect of antibiotics on cultures, and the fact that there will be some evidence in the patient's history. He will also testify that with infective endocarditis, you will see bacteria on the pathological examination and there may be some microscopic markers as opposed to toxic necrosis. He will testify that it is his conclusion that neither patient M nor 0058 were cases of sub-acute bacterial endocarditis.

5. Dr. B will testify that the mitral valve is largely muscular. As a result, when a valve is implanted there is reliance on healing to hold the sutures in place. Usually the valve is incorporated within a few weeks. Where a valve does not heal, there is an extraordinary amount of force on the sutures and a suture in unhealed tissue can tear out.

6. Dr. B will testify that in the case of Patient M and Patient 0058 the tissue healing process had been interfered with.

3 The defendants submit that these opinions fall within three categories: patient specific causation opinions, opinions with respect to different aspects of tissue healing, and opinions with respect to the diagnosis of endocarditis generally.

4 The defendants distinguish between treatment opinions and litigation opinions. They accept that treatment opinions are admissible as the professional opinions of treating physicians formed in the process of making a diagnosis, treatment choices, and a prognosis for a patient. They submit that if a witness wants to provide opinion evidence that goes beyond what actually happened and the decisions and advice given at the time, this amounts to litigation opinions and the witness must meet the requirements of Rule 53 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (rule 53.03 pertains to expert reports) and the criteria from *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.).

5 The defendants conclude from *Marchand*, discussed below, that as a fact witness, Dr. Bhatnagar can give evidence of his observations and his diagnosis and treatment choices during the course of his treatment of the two patients. They say that Dr. Bhatnagar is providing inadmissible "causation opinions in the guise of conclusions" in paras. 1, 2, & 3, cited above, where he opines that neither patient is a case of infective endocarditis; and, in paras. 4, 5, & 6, where he expresses an opinion both about causation and tissue healing. The defendants submit that these are opinions that are unrelated to his factual involvement as the treating physician and that although he may testify about treatment choice, he may not testify about standard practice, because he has not been qualified as an expert.

6 The plaintiffs submit that it is appropriate for a treating physician to refer to his standard practice — in this case, as to how he approaches patients who present with a fever, in the context of mechanical heart valves; the effects of antibiotics on cultures; and how he would approach a surgical candidate knowing that endocarditis is a potential issue.

7 With respect to diagnostic opinions, the plaintiffs submit that just as the treating physician's conclusion on his discharge note diagnosing endocarditis is admissible, so too is his subsequent conclusion — based on a review of the records and the lack of positive tests for infection — that his initial diagnosis was wrong. Further, from his experience explanting the heart valves, he should be allowed to testify not only to the fact that he observed liquefied necrosis, but to his opinion as to its similarity with the appearance of infective endocarditis.

8 With respect to tissue healing, the plaintiffs submit that if it is permissible for Dr. Bhatnagar to testify about what appeared to be an inflammatory process that weakened the annular tissue, it should be appropriate for him to testify that the tissue healing process had been interfered with.

Case law

9 The defendants rely on *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (Ont. C.A.) for the principle that a witness who testifies as to fact is limited with respect to providing his or her opinion of those facts. However, where a witness purports to give an opinion on certain facts in *K. (A.)* the example given was a physician who opines that it is usual or unusual to observe a certain kind of injury in a patient who alleges sexual assault), then such testimony is only admissible if the witness is qualified as an expert, and is then subject to the applicable rules on expert opinion (paras. 70-72).

10 *K. (A.)* was not a case about the distinction between a fact witness and an expert witness. The excerpts cited by the defendants were part of a background discussion on the exception to the hearsay rule for expert opinion. Despite the obiter comments in *K. (A.)*, the Supreme Court of Canada and other Ontario Court of Appeal case law support that there is not a bright line between fact evidence and opinion evidence. A fact witness with expertise can express opinions based on his or her expertise if such opinions stem from the witness' first hand involvement and not from the litigation.

12 For example, in *Andersen v. St. Jude Medical Inc.*, [2007] O.J. No. 5383 (Ont. Master), Master MacLeod considered the scope of discovery of expert witnesses and fact witnesses. The master noted that in theory, expert and fact witnesses play distinct roles: fact witnesses testify to their first-hand knowledge, and expert witnesses are called to give the court the benefit of their scientific, technical, or other specialized knowledge. However, he went on to say, at para. 13:

In practice the world of witnesses is not so neatly divided and there are many situations in which an expert is also a fact witness. Indeed, it is common to find situations in which professional opinions formed at relevant times by one of the proposed experts form part of the factual nexus itself. Common examples are treating physicians whose diagnosis and prognosis may have determined the treatment choices made by an injured plaintiff.

13 *Andersen* is consistent with the Supreme Court of Canada decision, *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.). In *Graat*, the Court addressed the issue of whether a trial judge may admit opinion evidence on the question to be decided. The specific issue in *Graat* was whether officers could give opinion evidence about the degree of the appellant's impairment and the appellant's ability to drive. The Court concluded that the evidence was admissible, that the question of the appellant's impairment was a question of fact, not law (p. 839), and that the trier of fact must decide in each case what weight to give the evidence (p. 840).

14 In reaching its conclusion, the Court reasoned that there is no clear line between fact and opinion evidence, and no value in artificially forcing such a line. The Court noted that it may be helpful for the trial judge to accept opinion evidence from a fact witness who, unlike the judge, made first hand observations. The Court stated the following, at pp. 835 to 837:

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

...

The judge in the instant case was not in as good a position as the police officers or Mr. Wilson to determine the degree of Mr. Graat's impairment or his ability to drive a motor vehicle. The witnesses had an opportunity for personal observation. They were in a position to give the Court real help. They were not settling the dispute. They were not deciding the matter the Court had to decide, the ultimate issue. The judge could accept all or part or none of their evidence.

...

I can see no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived.

16 In *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont. C.A.), an obstetrical medical negligence case, the Court of Appeal considered the trial judge's treatment of opinion evidence from several witnesses. The court stated, at para. 95, that as a general proposition, lay witnesses may not testify as to their opinion. However, relying on *Graat*, the court observed that lay witnesses may be permitted to give opinion evidence in circumstances where because of their first hand observation in a matter, they are in a position to give the court help by stating their opinions or impressions. Based on this principle, the Court of Appeal upheld the trial judge's decision to exclude a nurse's opinion evidence about the conduct of other respondents. The court found that her proposed testimony was not intended to more accurately express the facts that she perceived, and it therefore fell outside of the basis for admissibility set out in *Graat* (*Marchand*, para. 97).

17 The appellants in *Marchand* also challenged the trial judge's restrictions on the evidence of a treating pathologist, Dr. Awad. The trial judge had ruled that Dr. Awad could give evidence about his own reports, provided that the evidence was limited to his involvement in the matter. However, he could not provide opinion evidence about the conduct of others or express his opinion about the cause of the injured baby's condition. The trial judge then applied this restriction to limit the appellants' right to cross-examine the doctor on the nature of the placental abruption, if any, that had occurred.

18 On appeal, the appellants complained about their inability to lead this evidence from Dr. Awad. The respondents conceded that because the doctor was a treating physician, this was a permissible line of questioning and that the trial judge erred in his

ruling on the point. The Court of Appeal found that "this error did not result in any significant prejudice to the appellants" (para. 90). It is unclear where the Court of Appeal would have drawn the line with respect to Dr. Awad's evidence. However, the court's comments on the evidence of another treating physician, Dr. Tithecott, illuminate the court's position. At para. 120, the court states as follows:

Like Dr. Awad, Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. **Thus, in so far as Dr. Tithecott was testifying about the facts of his own involvement, or the opinions that went to the exercise of his judgment, rule 53.03 was not engaged.** We have found that the trial judge erred in applying rule 53.03 to limit the cross-examination of Dr. Awad.

[Emphasis added.]

19 The principles from *Graat* and *Marchand* are apparent in *Hall v. Kawartha Carpet & Tile Co.*, [2007] O.J. No. 4293 (Ont. S.C.J.), a motion for leave to call the assistant fire chief as a witness to give opinion evidence in a matter where the plaintiffs alleged that the defendants were negligent in causing a fire. Ferguson J. found that the plaintiffs could elicit opinion evidence from the assistant fire chief, who was involved in the history of the subject matter and had expertise and knowledge about the case, without the application of rule 53.03.

Application to Dr. Bhatnagar's evidence

20 It is clear from the above cases that opinion evidence from a fact witness is admissible, where the opinion evidence is limited to the witness' involvement in the matter or the exercise of the witness' judgment that relate to his or her involvement; or where the proposed testimony is intended to explain the facts that the witness perceived. Further, as in *Graat*, although the lay witness' opinion may bear on a legal issue, that does not make the opinion an inadmissible opinion of law. It is for the trier of fact to determine the weight of the evidence in light of other evidence and apply the legal standard.

22 Accordingly, Dr. Bhatnagar may give evidence, even opinion evidence, provided his evidence is limited to his involvement in patient treatment and diagnosis or his practice implanting and explanting valves. However, if his opinions were formed later and are unrelated to his experiences as a cardiac surgeon or to his involvement with the patients and their medical conditions at the time of treatment, the opinions would not be admissible because they would extend beyond his involvement in the matter.

23 With respect the objections in paras. 1 & 2 relating to Patient M, it is unclear whether Dr. Bhatnagar's diagnosis changed because of information he received in connection with the patient's medical condition or as a result of information he received subsequently, in connection with the litigation. If the former, his changed opinion is admissible as part of his continuing involvement in the matter, but if the latter, this would, in my opinion, cross over the line to inadmissible opinion evidence.

25 With this caveat, I am prepared to admit all of Dr. Bhatnagar's anticipated evidence as set out in Exhibit 519ID. Dr. Bhatnagar may express an opinion or opinions about the observations he made in treating and diagnosing Patient M and Patient 0058 as they relate to his experience with implanting and explanting Silzone and other prosthetic heart valves. These opinions extend to Dr. Bhatnagar's diagnostic considerations, including his standard practice in arriving at his diagnosis, and his observations and conclusions about tissue healing. These are opinions derived from observations of these patients in light of his experience as a cardiac surgeon. In my view, they are not inadmissible causation opinions.

Evidence admissible.

[c] Modern Statement of Lay Opinion Rule: Helpfulness

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.

Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed. (Lederman, Fuerst, Stewart) > Chapter 12 OPINION EVIDENCE > § 12.02 THE OPINION OF LAY PERSONS > [1] Rationale and Development of the Rule

Chapter 12 OPINION EVIDENCE

§ 12.02 THE OPINION OF LAY PERSONS

[1] Rationale and Development of the Rule

[c] Modern Statement of Lay Opinion Rule: Helpfulness

¶12.11

Finally, Dickson J. (as he then was) in *R. v. Graat*¹ all but did away with the illogical distinction between so-called fact and opinion where the witness' testimony was founded on personal knowledge. He pointed out the numerous exceptions to the opinion rule that had developed and concluded:

Except for the sake of convenience, there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.²

¶12.12

Prior to the *Graat* decision, the trial judge would simply stop the witness if he or she began to answer in the form of an opinion and the judge would then determine whether the proffered testimony would be necessary for the trier of fact. Justice Dickson held that lay persons may testify about their observations where the witness is "merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly".³ Thus, the law moved away from the requirement of "necessity" in the case of lay witnesses whereby opinion evidence was received only if the witness could not "owing to the nature of the matter adequately convey to the jury the data from which such inference is made"⁴ to a "helpfulness" standard. Justice Dickson held that the testimony of the particular witnesses whose opinions were at issue was admissible because they "had an opportunity for personal observation [and] were in a position to give the Court real help".⁵

¶12.13

Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when a witness is testifying as to his or her perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.

¶12.14

Other jurisdictions have also adopted the "helpful" test for lay witnesses. Rule 701 of the United States *Federal Rules of Evidence* provides for the admission of opinions or inferences which are "helpful to clearly understanding the witness's testimony or to determining a fact in issue".⁶ As the American Advisory Committee on the Rules of Evidence observed, the courts have made concessions in certain recurring situations, such as identification and

handwriting, where opinion evidence is admitted. The Advisory Committee also noted, however, that “necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration”.⁷ The Law Reform Commission of Canada supported that view and recommended that the present strict necessity test for determining the admissibility of opinion testimony of lay witnesses be altered to a test of whether the opinion would be helpful to the trier of fact.⁸ This criterion should have the advantage of being capable of application and permitting witnesses to describe facts not only in a manner in which they are accustomed to speaking but also in a manner which will be most useful to the trier of fact in determining the accuracy and reliability of their evidence.⁹

¶12.15

Courts now have greater freedom to receive lay witnesses’ opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.¹⁰ But as such evidence approaches the central issues that the court must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.¹¹

¶12.16

In view of the “helpfulness” principle enunciated by the Supreme Court of Canada in *R. v. Graat*,¹² the categories of topics about which a lay witness can testify are not limited, and in fact have been said to be expanding.¹³ Since lay witnesses traditionally have been allowed to express opinions upon a number of established subjects and a certain amount of protective jurisprudence has developed around them to assure reliability, several illustrations are appropriate. These subjects should not be considered as falling within the exclusive domain of lay persons. For example, a lay person may conduct a pre-trial experiment, such as driving a car along a roadway to calculate the time it takes to travel from point A to point B or to determine at which point along the roadway a stop sign becomes visible. In these scenarios, the lay witness testifies to observed facts and it is for the trier of fact to draw inferences from the witness’ observed facts. In comparison, a pre-trial experiment may be more complex and only a physicist can perform and interpret the data. In this scenario, an expert performs the experiment and draws inferences from the observed facts to assist the trier of fact.¹⁴

Footnote(s)

¹ [1982] 2 S.C.R. 819, [1982] S.C.J. No. 102 (S.C.C.).

² *R. v. Graat*, [1982] 2 S.C.R. 819, at 835, [1982] S.C.J. No. 102 (S.C.C.).

³ [1982] 2 S.C.R. 819, at 841, [1982] S.C.J. No. 102 (S.C.C.).

⁴ Z. Cowen & P. Carter, *Essays on the Law of Evidence* (Oxford: Clarendon Press, 1956), at 170. The threshold for the admissibility of expert testimony is the higher standard of “necessity in assisting the trier of fact”: *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, at 413, [1994] S.C.J. No. 36 (S.C.C.).

⁵ *R. v. Graat*, [1982] 2 S.C.R. 819, at 836, [1982] S.C.J. No. 102 (S.C.C.). Justice Dickson’s approach is in accord with s. 38 of the draft Uniform Evidence Act, *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982), at 541, which also addressed the problem of the difficulty of separating facts from inferences. That section establishes the following basis upon which lay opinion will be received: “A witness who is not testifying as an expert may give opinion evidence where it is based on facts perceived by him, and the evidence would be helpful either to the witness in giving a clear statement or to the trier of fact in determining an issue” (at 553). This

[c] Modern Statement of Lay Opinion Rule: Helpfulness

provision follows the recommendations of the Law Reform Commission of Canada in its *Report on Evidence* (Ottawa: Information Canada, 1975).

- 6 28 U.S.C.A. app. (1976); see also Rules 403 and 602 of the United States *Federal Rules of Evidence*.
- 7 Robert P. Mosteller, ed., *McCormick on Evidence*, 8th ed. (St. Paul: Thomson Reuters, 2020), vol. 2, App. A, at 946.
- 8 *Law Reform Commission of Canada Report on Evidence* (Ottawa: Information Canada, 1975), s. 67 draft Evidence Code, at 40.
- 9 *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: Carswell, 1982), at 119-20.
- 10 *R. v. Graat*, [1982] 2 S.C.R. 819, [1982] S.C.J. No. 102 (S.C.C.). See *Ganges Kangro Properties Ltd. v. Shepard* (2015), 380 B.C.A.C. 269, [2015] B.C.J. No. 2821, at paras. 68-76 (B.C.C.A.).
- 11 *Per* Lord MacDermott in *Sherrard v. Jacob*, [1965] N.I. 151 (C.A.), at 156:

... the inference may involve a matter of law which is for the court alone and on which the opinion of the witness is plainly irrelevant. A witness, for example, cannot be allowed to say that a defendant was negligent or that the respondent in a divorce suit was guilty of the matrimonial offence of cruelty, for while these issues are issues of fact they necessitate the application of standards determined by law.

However, where a testator's competency to make a will is in dispute, lay opinion as to his sanity has been regularly admitted: *Wright v. Doe d. Tatham* (1837), 5 Cl. & Fin. 670, 7 E.R. 559 (H.L.); *Re Fraser* (1911), 26 O.L.R. 508, [1912] O.J. No. 150 (Ont. C.A.), *rev'd* (1911), 24 O.L.R. 222, [1911] O.J. No. 67 (Ont. Div. Ct.); *Buttrum v. Udell* (1925), 57 O.L.R. 97, at 103, [1925] O.J. No. 16 (Ont. C.A.); *Robins v. National Trust Co.* (1925), 57 O.L.R. 46, at 58, [1925] O.J. No. 10 (Ont. C.A.), *aff'd* [1927] A.C. 515, [1927] 1 W.W.R. 692 (P.C.); *Foothills Pipe Lines (Yukon) Ltd. v. M.N.R.* (1990), 115 N.R. 380, [1990] F.C.J. No. 925 (F.C.A.). Compare *R. v. Loake* (1911), 7 Cr. App. R. 71 (C.C.A.).

- 12 [1982] 2 S.C.R. 819, [1982] S.C.J. No. 102 (S.C.C.).
- 13 In *R. v. Gavin*, 2018 PECA 6, [2018] P.E.I.J. No. 13, at para. 43 (P.E.I.C.A.), the Prince Edward Island Court of Appeal stated:

Although there are no defined categories of lay opinion evidence, certain groupings of cases have developed over time — evidence of impairment, identifying “things,” recognition evidence from a videotape or photograph, opinions about the crime scene, demeanour evidence, footprint evidence, handwriting analysis, eyewitness identification, voice identification evidence... .

- 14 *R. v. Collins* (2001), 160 C.C.C. (3d) 85, [2001] O.J. No. 3894, at paras. 16-21 (Ont. C.A.); *R. v. Nikitin* (2003), 176 C.C.C. (3d) 225, [2003] O.J. No. 2505 (Ont. C.A.); see *R. v. Walizadah* (2007), 223 C.C.C. (3d) 28, [2007] O.J. No. 2721, at 38-51 (Ont. C.A.), concerning re-enactments.

Westerhof v. The Estate of Gee et al. McCallum v. Baker
[Indexed as: Westerhof v. Gee Estate]

Ontario Reports

Court of Appeal for Ontario,
Laskin, Sharpe and Simmons JJ.A.
March 26, 2015

124 O.R. (3d) 721 | 2015 ONCA 206

Case Summary

Civil procedure — Evidence — Expert evidence — Rule 53.03 not applying to experts who were not engaged by or on behalf of party to provide opinion evidence in relation to proceeding — Trial judge erring in ruling that evidence of treating physicians and experts retained by non-party to litigation was inadmissible for failure to comply with rule 53.03 — Participant experts and non-party experts not required to comply with rule 53.03 in order to give opinion evidence where opinion is based on witness' observation of or participation in events at issue and witness formed opinion as part of ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 53.03.

Civil procedure — Trial — Jury trial — Charge to jury — Trial judge providing counsel with copy of his jury instructions on evening before delivering charge to jury — Defence counsel objecting to charge only after trial judge had completed his instructions — Trial judge declining to recharge jury — Defendant raising same objection on appeal — Failure to object before charge was delivered being fatal to claim that charge was flawed.

Two personal injury actions raised issues about the scope of rule 53.03 of the Rules of Civil Procedure, which sets out the requirements for introducing the evidence of expert witnesses at trial. In *Westerhof*, the trial judge ruled that opinion evidence concerning history, diagnosis and prognosis from treating physicians ("participant experts") and experts engaged by a non-party to the litigation ("non-party experts") was inadmissible as the witnesses were required to comply with rule 53.03 and had not done so. In addition, he ruled that a neurologist, who had complied with rule 53.03, could not refer to the diagnoses made by the witnesses who had not complied with rule 53.03 and that the plaintiff's family doctor's clinical notes and records could not be filed as an exhibit. Although the jury awarded the plaintiff general damages and damages for past loss of income, the trial judge dismissed the action, holding that the claim for non-pecuniary damages did not meet the threshold set out in s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 and that the amount awarded for past loss of income was less than the collateral benefits the plaintiff had already received. The Divisional Court dismissed the plaintiff's appeal. The plaintiff appealed.

In *McCallum*, the trial judge permitted several medical practitioners who had treated the plaintiff

to give opinion evidence concerning the plaintiff's future employment prospects and future treatment needs without complying with rule 53.03. The jury awarded the plaintiff damages totalling \$787,275. The defendant appealed.

Held, appeal in *Westerhof* allowed; appeal in *McCallum* dismissed.

The trial judge in *Westerhof* erred in finding that rule 53.03 applies to participant experts and non-party experts. Rule 53.03 applies to expert witnesses [page 722] "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding". A witness with special skill, knowledge, training or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where (1) the opinion to be given is based on the witness' observation of or participation in the events at issue; and (2) the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events. The trial judge's error in applying rule 53.03 resulted in the exclusion of important evidence tendered by the plaintiff that could reasonably have affected the outcome of the trial. The court ordered a new trial.

The trial judge in *McCallum* did not err in admitting the evidence of participant experts and non-party experts who had not complied with rule 53.03.

The defendant in *McCallum* also argued that the trial judge's jury instructions were unbalanced and failed to summarize adequately defence counsel's overriding theory. The trial judge provided counsel with a copy of his jury instructions on the evening before the trial judge delivered his charge to the jury. Defence counsel objected to the charge only after the trial judge had completed his instructions to the jury. The trial judge declined to recharge the jury. In the circumstances, defence counsel's failure to object before the charge was delivered was fatal to the claim that the charge was flawed.

Beasley v. Barrand (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466, 2010 ONSC 2095, 94 C.P.C. (6th) 331 (S.C.J.) [Leave to appeal to Div. Ct. refused [2010] O.J. No. 6319, 94 C.P.C. (6th) 347, 190 A.C.W.S. (3d) 799 (S.C.J.)]; *Burgess (Litigation Guardian of) v. Wu* (2003), 68 O.R. (3d) 710, [2003] O.J. No. 4826, 235 D.L.R. (4th) 341, [2003] O.T.C. 1047, 127 A.C.W.S. (3d) 558 (S.C.J.); *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, [2000] O.J. No. 4428, 138 O.A.C. 201, 43 C.P.C. (5th) 65, 101 A.C.W.S. (3d) 634 (C.A.); *McNeill v. Filthaut*, [2011] O.J. No. 1863, 2011 ONSC 2165, [2011] I.L.R. I-5138 (S.C.J.); *Moore v. Getahun*, [2015] O.J. No. 398, 2015 ONCA 55, 73 M.V.R. (6th) 169, 65 C.P.C. (7th) 1, 381 D.L.R. (4th) 471, 248 A.C.W.S. (3d) 844, **consd**

Other cases referred to

Beldycki Estate v. Jaipargas, [2012] O.J. No. 3769, 2012 ONCA 537, 295 O.A.C. 100; *Continental Roofing Ltd. v. J.J.'s Hospitality Ltd.*, [2012] O.J. No. 1166, 2012 ONSC 1751, 12 C.L.R. (4th) 90, 214 A.C.W.S. (3d) 154 (S.C.J.); *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641, [1992] O.J. No. 1725, 94 D.L.R. (4th) 193, 57 O.A.C. 115, 11

Admin. L.R. (2d) 147, 76 C.C.C. (3d) 10, 35 A.C.W.S. (3d) 322 (C.A.); *Kusnierz v. Economical Mutual Insurance Co.* (2011), 108 O.R. (3d) 272, [2011] O.J. No. 5908, 2011 ONCA 823, 4 C.C.L.I. (5th) 211, 24 M.V.R. (6th) 173, 288 O.A.C. 104, 346 D.L.R. (4th) 371, [2012] I.L.R. I-5228, 210 A.C.W.S. (3d) 511, revg on other grounds (2010), 104 O.R. (3d) 113, [2010] O.J. No. 4462, 2010 ONSC 5749, 90 C.C.L.I. (4th) 91, [2011] I.L.R. I-5063 (S.C.J.); *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813, [2002] O.J. No. 84, 209 D.L.R. (4th) 411, 155 O.A.C. 103, 16 C.C.E.L. (3d) 162, [2002] CLLC Â210-019, 111 A.C.W.S. (3d) 75 (C.A.); *McGregor v. Crossland*, [1994] O.J. No. 310, 1994 CanLII 388, 45 A.C.W.S. (3d) 1184 (C.A.); *Robb Estate v. Canadian Red Cross Society*, [2001] O.J. No. 4605, 152 O.A.C. 60, 9 C.C.L.T. (3d) 131, 109 A.C.W.S. (3d) 1002 (C.A.); *Slaight v. Phillips* (May 18, 2010), Simcoe 109/07 (Ont. S.C.J.)

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1) (b), (6) [page723]

Evidence Act, R.S.O. 1990, c. E.23, ss. 12, 35, 52, (2)

Insurance Act, R.S.O. 1990, c. I.8, s. 267.5(5)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 4.1.01, (1), 53.03, (2.1), (2.1)3, (2.1)7

Authorities referred to

Osborne, Coulter A., *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007)

APPEAL by the plaintiff from the order of the Divisional Court (Matlow, Aston and Lederer JJ.), [2013] O.J. No. 3134, 2013 ONSC 2093, 310 O.A.C. 335 (Div. Ct.), affirming the judgment of Crane J. of the Superior Court of Justice dated October 26, 2011, following a decision by a jury; APPEAL by the defendant from the judgment of Mulligan J. of the Superior Court of Justice dated December 20, 2012, sitting with a jury.

Jane Poproski, Lou Ferro and Robert Zigler, for appellant Jeremy Westerhof.

Kieran C. Dickson and Kenneth J. Raddatz, for respondent estate of William Gee.

Donald Rollo and David Visschedyk, for appellant James Baker.

Paul J. Pape and Joanna Nairn, for respondent Daniel McCallum.

Richard Halpern and Brian Cameron, for intervenor Ontario Trial Lawyers Association.

William D. Black, Jerome R. Morse and John J. Morris, for intervenor Holland Access to Justice in Medical Malpractice Group.

John A. Olah and Stephen Libin, for intervenor Canadian Defence Lawyers Association.

Linda R. Rothstein and Jean-Claude Killey, for intervenor Advocates' Society.

The judgment of the court was delivered by
SIMMONS J.A.: —

A. Introduction

[1] Rule 53.03 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (the "rules") sets out the requirements for introducing the evidence of expert witnesses at trial. These appeals, which were heard together, raise related issues about to whom rule 53.03 applies. [page724]

[2] Both cases were tried following the 2010 amendments to the rules, which were aimed at ensuring the neutrality and expertise of expert witnesses, as well as adequate disclosure of the basis for an expert's opinion.

[3] Those amendments set out the overriding duty of an expert "engaged by or on behalf of a party" to provide opinion evidence "in relation to a proceeding" that is fair, neutral and non-partisan and within the expert's area of expertise: rule 4.1.01.

[4] The 2010 amendments also specified certain information relating to an expert's opinion and expertise that must be included in an expert's report and required that the expert sign an acknowledgement of his or her duty, which identifies the party by or on behalf of whom the expert was engaged: rule 53.03(2.1), Form 53.

[5] Both appeals arise from claims for damages for injuries suffered in car accidents. Both cases were tried before a judge and jury. In each case, the defendant admitted liability for causing the accident, and the issues at trial related to whether the accidents caused the plaintiffs' injuries and the quantum of damages.

[6] The *Westerhof* appeal raises the question of whether rule 53.03 applies only to experts described in rule 4.1.01 and Form 53 -- experts "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" (referred to in these reasons as "litigation experts") -- or whether it applies more broadly to all witnesses with special expertise who give opinion evidence. This broader group of witnesses would include, for example, treating physicians, who form opinions based on their participation in the underlying events (referred to in these reasons as "participant experts") rather than because they were engaged by a party to the litigation to form an opinion. It would also include experts retained by a non-party to the litigation (for example, statutory accident benefits ("SABs") insurers), who form opinions based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation (referred to in these reasons as "non-party experts").

[7] At the *Westerhof* trial, the trial judge ruled inadmissible opinion evidence concerning history, diagnosis and prognosis from various medical practitioners who were either participant experts or non-party experts. The trial judge found that these witnesses were required to comply with rule 53.03 and had not done so. In addition, he ruled that a neurologist, who had complied with rule 53.03, could not refer to the diagnoses made by the witnesses who had not complied with rule 53.03 and that [page725] Mr. Westerhof's family doctor's clinical notes and records could not be filed as an exhibit.

[8] The trial judge also ruled inadmissible the evidence of a road safety consultant/driving therapist intern who had assessed Mr. Westerhof at the request of Mr. Westerhof's treating psychiatrist, holding that this witness was not qualified to give the opinion that would arise from his evidence.

[9] Although the jury awarded Mr. Westerhof \$22,000 for general damages and for \$13,000 past loss of income, the trial judge dismissed his action. The trial judge found that Mr. Westerhof's claim for non-pecuniary damages did not meet the threshold prescribed by s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8. In addition, he found the amount awarded for past loss of income was less than the collateral benefits Mr. Westerhof had already received.

[10] On appeal to the Divisional Court, Mr. Westerhof claimed that the trial judge erred in his evidentiary rulings by failing to distinguish between opinion evidence given by litigation experts and opinion evidence given by participant and non-party experts. Mr. Westerhof argued that the latter two classes of witnesses are not caught by rule 53.03.

[11] The Divisional Court disagreed. In dismissing Mr. Westerhof's appeal, the Divisional Court held that the "important distinction is not in the role or involvement of the witness, but in the type of evidence sought to be admitted": at para. 21. If the evidence at issue is opinion evidence, then compliance with rule 53.03 is required; if the evidence at issue is factual evidence, then compliance with rule 53.03 is not required.

[12] On appeal to this court with leave, Mr. Westerhof reiterates his argument in the Divisional Court: rule 53.03 applies solely to litigation experts -- expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding".

[13] For reasons that I will explain, I do not agree with the Divisional Court's conclusion that the type of evidence -- whether fact or opinion -- is the key factor in determining to whom rule 53.03 applies.

[14] In my opinion, participant experts and non-party experts may give opinion evidence without complying with rule 53.03. Accordingly, I conclude that the trial judge in *Westerhof* erred in excluding the evidence of several witnesses. For that reason, I would order a new trial.

[15] At the *McCallum* trial, which took place prior to the Divisional Court's decision in *Westerhof*, the trial judge permitted several medical practitioners who had treated Mr. McCallum to [page726] give opinion evidence concerning Mr. McCallum's future employment prospects and future treatment needs without complying with rule 53.03. The trial judge concluded that because these witnesses were treating medical practitioners, they could give opinion evidence without complying with rule 53.03.

[16] The jury awarded Mr. McCallum damages totalling \$787,275. Mr. Baker appeals from that award. In oral argument before this court, he accepted that treating physicians may give opinion

evidence directly related to their treatment of a patient, such as a working diagnosis and prognosis.

[17] Nonetheless, he submits that the trial judge erred by allowing treating medical practitioners who had not complied with rule 53.03 to give "an avalanche" of opinion evidence going beyond the scope of their expertise and that did not arise directly from treatment of their patient. He also submits that the trial judge's jury instructions were unbalanced and failed to properly set out the defence position.

[18] For reasons that I will explain, I would not accept these submissions, and I would dismiss the *McCallum* appeal.

[19] I will begin my reasons by addressing the *Westerhof* appeal and the question of to whom rule 53.03 applies. I will review the factual background of the case, the Divisional Court's decision and then turn to my analysis of the rule 53.03 issue. I will then address the more specific questions raised by each appeal.

B. Westerhof v. Gee Estate: To Whom Does Rule 53.03 Apply?

(1) Factual background

(a) The accident

[20] Mr. Westerhof was injured in a car accident on the evening of April 22, 2004. A friend picked Mr. Westerhof up from his home in Hamilton, and the two young men went out for a coffee. Mr. Westerhof rode in the front passenger seat of his friend's 1987 Pontiac Grand Am. On their way back to Mr. Westerhof's house, they drove along Stone Church Road at the speed limit, 50 kph. The accident happened just after Mr. Westerhof spotted a single headlight in the side mirror of his friend's car. Their car was hit hard from the rear suddenly and with such force that the trunk was pushed forward into the back of the Grand Am. Based on the distance their car travelled following the impact, Mr. Westerhof estimated that the car that hit them was travelling between 100 and 110 kph.

[21] Mr. Westerhof was wearing a seatbelt, but his friend's car did not have air bags. The force of the impact threw him back in [page727] his seat. He does not recall if his body struck the interior of the car. He got out of the car and leaned against a post. Eventually, his friend's mother drove him home.

(b) Mr. Westerhof's claim

[22] Mr. Westerhof claims that he suffered serious permanent impairments of important physical, mental and psychological functions as a result of the accident, including post-traumatic headaches; post-traumatic mechanical low back pain; numbness and tingling in both hands (bilateral radiculopathy); post-traumatic sleep disturbances; a labral tear at the left hip joint; depression; anxiety when driving or riding in a car; and chronic pain. The labral tear was diagnosed in 2008, and surgically repaired in 2009. However, Mr. Westerhof claims that he still has restricted movement of his left hip and chronic pain as a result of his injuries.

[23] Mr. Westerhof described himself as shaky and in shock when he got home after the accident. He testified that he began to experience other symptoms the next day. His neck and

shoulder were the prominent issues, but he also experienced pain in his lower back, left knee, groin and left leg.

[24] According to Mr. Westerhof's family doctor, Dr. Black, Mr. Westerhof attended his office the day after the accident and reported neck pain, left shoulder pain, left knee pain and numbness in the fingers of his left hand. Mr. Westerhof reported similar complaints to a chiropractor, Dr. Ramelli, whom he began seeing four days after the accident, on April 26, 2004.

[25] Eleven days after the accident, on May 3, 2004, Mr. Westerhof told Dr. Black he had low back pain, mainly on the left side with radiation down his left leg to his foot, and that this pain had developed within three or four days of the accident. Mr. Westerhof first reported low back pain to Dr. Ramelli 15 days after the accident, on May 7, 2004. Dr. Ramelli concluded that Mr. Westerhof had tightness in the low back and pelvic area. In late May, Mr. Westerhof reported to Dr. Black difficulties with sleep, nightmares about the accident and anxiety, particularly about riding in a car. By early July, he was reporting headaches associated with nausea and vomiting.

[26] Mr. Westerhof was 25 years old at the time of the accident and otherwise in good health. He worked full-time as a thermoform machine operator at ITML Horticultural Products, a company that manufactured plastic flower pots. In 2003, the year before the accident, he earned \$27,000.

[27] Following the accident, Mr. Westerhof remained off work because of his injuries for about five months, until September 13, 2004. [page728] His work required running and heavy lifting -- roll bars weighing between 70 and 90 lbs and boxes weighing 50 lbs. Because of the pain he was experiencing, particularly in his left leg, Mr. Westerhof found it more and more difficult to cope. He found himself limping and eventually walked using a cane. He finally left his job at ITML on February 2, 2006. In 2005, he earned \$33,000.

[28] After leaving his job, Mr. Westerhof felt depressed and started cutting himself.

[29] Mr. Westerhof remained off work until late 2008. He took some cooking courses at Mohawk College before returning to work. In late 2008, he got a part-time job as a short order cook at Montana's Cookhouse. He continued working at Montana's until his hip surgery in June 2009, but returned to Montana's about three to four months after the surgery. He was off work again because of pain for three to four months in 2010, but returned to Montana's in November. About three to four weeks before the trial began on October 11, 2011, he became a kitchen supervisor, earning \$12.50 per hour -- an amount he claims is substantially less than what he could have earned had he been able to remain as a thermoform machine operator.

(c) The 2010 amendments to the rules relating to expert witnesses

[30] Prior to the 2010 amendments to the rules relating to expert witnesses, rule 53.03 consisted primarily of procedural requirements and provided limited direction concerning the substance of an expert's report.

[31] In essence, pre-2010, rule 53.03 required a party to provide a signed report from an expert witness setting out the expert's "name, address and qualifications and the substance of his or her proposed testimony" within specified time frames.

[32] As Sharpe J.A. noted in *Moore v. Getahun*, [2015] O.J. No. 398, 2015 ONCA 55, in 2010, significant changes were made to the rules relating to expert witnesses following the recommendations of the Honourable Coulter Osborne in his review of the civil justice system, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) (the "Osborne report").

[33] Mr. Osborne's report highlighted, at p. 71, the common complaint that "too many experts are no more than hired guns who tailor the reports and evidence to suit the client's needs". At pp. 80-84 of his report, Mr. Osborne also highlighted the need for adequate disclosure of the basis for an expert's opinion. [page729]

[34] Two significant recommendations of the Osborne report were subsequently adopted through amendments to the rules, which came into effect on January 1, 2010.

[35] First, rule 4.1.01 was added to the rules. It sets out the overriding duty of every expert engaged by or on behalf of a party to provide opinion evidence that is fair, objective and non-partisan and within the expert's area of expertise. Significantly, the introductory paragraph to rule 4.1.01(1) refers specifically to the duty of experts "engaged by or on behalf of a party":

4.1.01(1) It is the duty of every *expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules*[.]

(Emphasis added)

[36] Second, rule 53.03(2.1) was added. It specifies the information to be included in an expert's report and requires that the expert sign an acknowledgment of the expert's duty. Some of the required information relates to the expert's retainer to give evidence in relation to the proceeding:

53.03(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. *The instructions provided to the expert in relation to the proceeding.*
4. *The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.*
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

(Emphasis added)

[37] The acknowledgment mandated by rule 53.03(2.1)7 is set out in Form 53 and reads, in part, as follows: [page730]

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is (*name*). I
live at (*city*), in the
..... (*province/ state*) of
..... (*name of*
province/state).
2. *I have been engaged by or on behalf of*
..... (*name of party/parties*) to
provide evidence in relation to the above-noted court
*proceeding.*¹

(Emphasis added)

(d) *The issues at trial*

[38] The major issues at the Westerhof trial related to causation and damages. Mr. Westerhof claimed that all of his injuries, and his resulting loss of future economic opportunity, were related to the motor vehicle accident.

[39] The defence acknowledged that Mr. Westerhof suffered upper body soft tissue injuries in the accident. However, the defence maintained that those injuries resolved well before trial. Further, the defence claimed that Mr. Westerhof's remaining problems had other causes. According to the defence, Mr. Westerhof's hip and lower back problems were both caused by underlying conditions (hip: dysplasia (abnormality) of the femoral head and neck and femoral acetabular impingement; back: spondylosis and spondylolisthesis²). As his back and hip problems did not manifest themselves immediately after the accident, the defence claimed they were not related to it. Further, the defence claimed that Mr. Westerhof's psychological problems were caused largely by his non-accident related physical symptoms and domestic difficulties he was having with his spouse.

(e) *The impugned evidentiary rulings*

[40] Mr. Westerhof proposed to call evidence from nine medical witnesses at trial. According to him, only two of these witnesses [page731] were allowed to give their evidence in its entirety. Those witnesses were Dr. McComas, a neurologist engaged by counsel to perform EMG testing

on Mr. Westerhof in August 2004 (who complied with rule 53.03); and Dr. Adili, the orthopedic surgeon who performed hip surgery on Mr. Westerhof in June 2009 (who did not comply with rule 53.03).

[41] From the outset of the trial, the trial judge ruled that the medical witnesses who treated or assessed Mr. Westerhof but did not comply with rule 53.03 would not be entitled to give opinion evidence concerning their diagnosis or prognosis, even though they had not been retained for the purpose of the litigation. Those witnesses were also prevented from giving evidence of the history they had taken from Mr. Westerhof. These witnesses included Dr. Ramelli, a treating chiropractor; Dr. Bartolucci, a treating psychiatrist; and Ms. Murray and Ms. Gross, a kinesiologist and a physiotherapist respectively, who conducted an assessment for Mr. Westerhof's SABs insurer.³ The trial judge also ordered redactions to two MRI reports of statements relating to the cause of Mr. Westerhof's labral tear. In addition, he ruled that Dr. Rathbone, a neurologist, who had complied with rule 53.03, could not refer in his evidence to the opinions of the witnesses who had not complied with rule 53.03.

[42] The trial judge also ruled that Mr. Westerhof's family doctor's clinical notes and records could not be marked as an exhibit. Finally, he ruled that Mr. Husler, a road safety consultant/driving therapist intern who had conducted an in-vehicle assessment of Mr. Westerhof, could not testify.

[43] Mr. Westerhof claims that the trial judge adopted an unduly narrow approach to rule 53.03, which led him to exclude relevant, material and probative evidence. I will return to these rulings when I address the specific issues raised on the Westerhof appeal.

(f) *The jury's verdict*

[44] The jury awarded Mr. Westerhof general damages of \$22,000 and damages of \$13,000 for past loss of income from April 22, 2004 until the date of the verdict on October 24, 2011. They did not award damages for future loss of economic opportunity or earning capacity. [page732]

(g) *The trial judge's ruling dismissing the action*

[45] As of the date of the accident, a claimant seeking to recover damages for non-pecuniary loss arising from a motor vehicle accident had to show either a permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function: *Insurance Act*, s. 267.5(5).

[46] The trial judge found that Mr. Westerhof's claim for non-pecuniary damages did not meet this threshold. He concluded that, to have a chance of meeting the threshold, Mr. Westerhof would have to show that his hip complaints related to the motor vehicle accident, and that Mr. Westerhof had not met this burden.

[47] Instead, the trial judge found that Mr. Westerhof's hip complaints and symptoms were not related to the motor vehicle accident, and that his upper body injuries had resolved long before trial. The trial judge also found that Mr. Westerhof's back complaints are congenital, although possibly aggravated by the motor vehicle accident. However, on balance, any back injuries arising from the motor vehicle accident were neither permanent nor serious. With respect to Mr.

Westerhof's psychological symptoms, the trial judge concluded that they may have a pain component, but the pain related to the motor vehicle accident was not permanent.

[48] It was undisputed that collateral benefits paid to Mr. Westerhof exceeded the jury's award for past loss of income.

[49] In the circumstances, the trial judge dismissed Mr. Westerhof's action.

(2) *The Divisional Court's decision*

[50] The Divisional Court upheld the trial judge's evidentiary rulings and dismissed Mr. Westerhof's appeal.

[51] At the outset of its analysis, the Divisional Court reviewed various decisions, which had held that, at least in certain circumstances, medical practitioners retained by a non-party insurance company need not comply with the amended rule 53.03: *McNeill v. Filthaut*, [2011] O.J. No. 1863, 2011 ONSC 2165 (S.C.J.); *Slaight v. Phillips* (May 18, 2010), Simcoe 109/07 (Ont. S.C.J.); and *Kusnierz v. Economical Mutual Insurance Co.* (2010), 104 O.R. (3d) 113, [2010] O.J. No. 4462, 2010 ONSC 5749 (S.C.J.), rev'd on other grounds (2011), 108 O.R. (3d) 272, [2011] O.J. No. 5908, 2011 ONCA 823.

[52] The Divisional Court rejected the conclusions in those cases, saying that they relied inappropriately on "who the witnesses were (who retained them and for what purpose) rather than the nature of the evidence to be provided": at para. 14. [page 733]

[53] The Divisional Court then turned to *Beasley v. Barrand* (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466, 2010 ONSC 2095 (S.C.J.), leave to appeal to Div. Ct. refused [2010] O.J. No. 6319, 94 C.P.C. (6th) 347 (S.C.J.), in which Moore J. disallowed the evidence of three medical practitioners retained by a non-party insurer because the practitioners had not complied with rule 53.03.

[54] According to the Divisional Court, in *Beasley*, Moore J. focused on the nature and impact of the evidence, not the standing or involvement of the witnesses, and found there was no reason to distinguish between the three medical practitioners and other expert witnesses for the purposes of rule 53.03.

[55] The Divisional Court concluded, at para. 21, that "[t]he important distinction is not in the role or involvement of the witness, but in the type of evidence sought to be admitted. If it is opinion evidence, compliance with rule 53.03 is required; if it is factual evidence, it is not."

[56] In *Beasley*, Moore J. specifically noted that the three medical practitioners at issue were not treating physicians. Nonetheless, the Divisional Court stated, at para. 23, "[t]his does not suggest that, if they had been treating physicians, the three doctors would have been free to offer opinions without concern for rule 53.03".

[57] Concerning treating professionals, the Divisional Court acknowledged that they are entitled to give factual evidence of their observations of a party and a description of the treatment provided without being qualified as experts and without complying with rule 53.03. However, when such "witnesses [seek] to offer opinions as to the cause of an injury, its pathology or prognosis [then] the evidence enters into the area of expert opinion requiring compliance with rule 53.03": at para. 23.

[58] The Divisional Court concluded that evidence of diagnosis and prognosis are opinions because they involve inferences from observed facts and may turn out to be either right or wrong. Thus, although a treating physician may give evidence of his or her diagnosis to explain the treatment provided, such evidence is not admissible for the truth of its contents. Rather, it is admissible only to understand the basis of the treatment provided.

(3) *Analysis: To whom does rule 53.03 apply?*

(a) *General principles*

[59] As I have said, I do not agree with the Divisional Court's conclusion that the type of evidence -- whether fact or opinion -- is the key factor in determining to whom rule 53.03 applies. [page734]

[60] Instead, I conclude that a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where

- the opinion to be given is based on the witness' observation of or participation in the events at issue; and
-
- the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.

[61] Such witnesses have sometimes been referred to as "fact witnesses" because their evidence is derived from their observations of or involvement in the underlying facts. Yet, describing such witnesses as "fact witness" risks confusion because the term "fact witness" does not make clear whether the witness' evidence must relate solely to their *observations* of the underlying facts or whether they may give *opinion* evidence admissible for its truth. I have therefore referred to such witnesses as "participant experts".

[62] Similarly, I conclude that rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the litigation for a purpose other than the litigation.

[63] If participant experts or non-party experts also proffer opinion evidence extending beyond the limits I have described, they must comply with rule 53.03 with respect to the portion of their opinions extending beyond those limits.

[64] As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents. The court could also require that the participant expert or non-party expert comply with rule 53.03 if the participant or

non-party expert's opinion went beyond the scope of an opinion formed in the course of treatment or observation for purposes other than the litigation. [page735]

(b) *Errors in the Divisional Court's analysis*

[65] In my view, the Divisional Court erred in concluding that rule 53.03 applies to participant experts and non-party experts who offer opinion evidence. I say this for several reasons.

[66] First, in its reasons, the Divisional Court made no reference to pre-2010 jurisprudence supporting the conclusion that, prior to the 2010 amendments to the rules, participant experts were entitled to give opinion evidence arising from their observation of or participation in events for the truth of its contents without complying with the former rule 53.03.

[67] The leading pre-2010 case concerning the scope and application of rule 53.03 is this court's decision in *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, [2000] O.J. No. 4428 (C.A.). In *Marchand*, this court confirmed that treating physicians could testify about treatment opinions without complying with the former rule 53.03.

[68] At para. 120 of *Marchand*, this court held that a treating physician is called as a "witness of fact, not as an expert witness", and therefore the former rule 53.03 was not engaged:

. . . Dr. Tithecott was not a "rule 53.03 witness". Dr. Tithecott was called as a witness of fact, not as an expert witness. Thus, insofar as Dr. Tithecott was testifying about the facts of his own involvement, *or the opinions that went to the exercise of his judgment*, rule 53.03 was not engaged.

(Emphasis added)

[69] In describing Dr. Tithecott as "a witness of fact, not as an expert witness", this court was not making a simple distinction between factual evidence and opinion evidence. This court said specifically that, "insofar as Dr. Tithecott was testifying about the facts of his own involvement, *or the opinions that went to the exercise of his judgment*" (emphasis added), the former rule 53.03 "was not engaged".

[70] Put another way, Dr. Tithecott, a treating physician, was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. He was not required to comply with rule 53.03, and his opinion evidence was admitted for the truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events and as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, Dr. Tithecott formed his opinion based on direct knowledge of the underlying facts. He was therefore a "fact witness", or, [page736] as I have referred to such witnesses in these reasons, a "participant expert".

[71] Other pre-2010 decisions also support the conclusion that rule 53.03 does not apply to opinion evidence given by participant experts.

[72] For example, in *Burgess (Litigation Guardian of) v. Wu* (2003), 68 O.R. (3d) 710, [2003] O.J. No. 4826 (S.C.J.), in *obiter* comments, the trial judge differentiated between physicians'

opinions formed at the time of treatment -- which involve making a diagnosis, formulating a treatment plan and making a prognosis ("treatment opinions") -- and opinions formed for the purpose of assisting the court at trial and based on consideration of information from a variety of sources ("litigation opinions"). Although the question of to whom rule 53.03 applies was not before the court, the clear distinction made between treatment opinions and litigation opinions supports the view that not all opinion evidence falls within the ambit of rule 53.03.

[73] In my view, the Divisional Court's failure to refer to the pre-2010 jurisprudence was a significant oversight. In *Moore*, this court observed that "[t]he 2010 amendments to rule 53.03 did not create new duties but rather codified and reinforced . . . basic common law principles": para. 52. I am not aware of any basis for concluding that the pre-2010 jurisprudence did not continue to apply following the 2010 amendments to the rules relating to expert witnesses.

[74] Second, apart from *Westerhof*, no cases have been brought to our attention that support the view that participant experts are obliged to comply with rule 53.03 when giving evidence concerning treatment opinions. Following the amendments to rule 53.03, but prior to the decisions at issue, several Superior Court judges grappled with the question of to whom rule 53.03 applies. Opinion was divided concerning whether rule 53.03 applies to non-party experts, but apart from *Westerhof*, no decision held that treating physicians must comply with rule 53.03.

[75] The cases brought to our attention include those brought to the attention of the Divisional Court: *Kusnierz*; *Slaight*; *McNeill*; as well as *Continental Roofing Ltd. v. J.J.'s Hospitality Ltd.*, [2012] O.J. No. 1166, 2012 ONSC 1751, 12 C.L.R. (4th) 90 (S.C.J.).

[76] Notably, in *McNeill*, MacLeod-Beliveau J. described rule 4.1.01, rule 53.03 and Form 53 as providing a "comprehensive framework" for the duty of an expert called as a witness at trial: at para. 18. She also described the "ultimate purpose of rule 53.03" as being "to limit and control the proliferation of experts retained by litigants": at para. 44. Further, she described the [page737] "introduction of the new rules about expert witnesses" as "an effort to eliminate the use of 'hired guns' or 'opinions for sale' in civil litigation, where the use of which has resulted in potentially biased expert evidence being given at trial": at para. 44. Thus, *McNeill* provides support for the position that rule 53.03 was not intended to apply to participant and non-party witnesses.

[77] Third, I see nothing in the Osborne report that indicates an intention to address participant experts or non-party experts. Mr. Osborne began the section of his report on expert evidence with the following statement, at p. 68:

There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it.

[78] Mr. Osborne identified several problems with expert evidence, including, for example, the proliferation of experts and expert reports, resulting in an "industry" of competing experts and associated increases in costs; expert bias; lengthy and uncontrolled expert testimony; the absence of a rule requiring experts to meet to seek to narrow disputed issues; problems with the timeliness of expert reports; and lack of regulation of the standard content of expert reports.

[79] By their nature, the problems Mr. Osborne identified relate to litigation experts -- expert witnesses engaged by or on behalf of a party to provide opinion evidence in relation to a

proceeding. I see nothing in his discussion or recommendations indicating an intention to address participant experts or non-party experts, whose evidence is relevant because of their observation of or participation in events underlying the litigation.

[80] Fourth, the text of the 2010 amendments supports the view that rule 53.03 does not apply to participant experts or non-party experts in several ways. For example, the use of the words "expert engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" in rule 4.1.01 and Form 53 makes this clear. An expert must be "engaged by or on behalf of a party to provide [opinion] evidence in relation to the proceeding" before the rule applies.

[81] Like MacLeod-Beliveau J. in *McNeill*, I conclude that rule 4.1.01, rule 53.03 and Form 53 are a comprehensive framework addressing a specific class of expert witnesses and expert reports. Although the words "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding" do not appear in rule 53.03, they appear in both rule 4.1.01 and Form 53. Rule 4.1.01 defines the expert's duty referred to in rule 53.03(2.1)7, and rule 53.03(2.1)7 requires that Form 53 be [page 738] signed. Taking account of these factors, I see no basis for concluding that rule 53.03 was intended to apply to persons other than expert witnesses "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding".

[82] Witnesses, albeit ones with expertise, testifying to opinions formed during their involvement in a matter, do not come within this description. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, they are not "engaged by or on behalf of a party to provide [opinion] evidence in relation to a proceeding". A party does not "engage" an expert "to provide [opinion] evidence in relation to a proceeding" simply by calling the expert to testify about an opinion the expert has already formed.

[83] Similarly, the requirement in rule 53.03(2.1)3 that an expert's report set out "[t]he instructions provided to the expert in relation to the proceeding" makes it abundantly clear that rule 53.03 only applies to litigation experts. A party does not provide instructions to a litigation expert or a non-party expert in relation to the proceeding -- that it is because these experts have already formed their opinions.

[84] Moreover, the conclusion that rule 53.03 applies only to experts engaged by a party to form an opinion for the purpose of the litigation reflects the prior jurisprudence and practice. As I have said, in my view, *Marchand* makes it clear that prior to 2010, rule 53.03 did not apply to participant experts. I see nothing in rule 53.03 reflecting an intention on the part of the Civil Rules Committee to change the *status quo*. Had the Civil Rules Committee intended to make a change to the jurisprudential *status quo*, I am confident it would have made that intention clear.

[85] Fifth, I am not persuaded that disclosure problems exist in relation to the opinions of participant experts and non-party experts requiring that they comply with rule 53.03. In many instances, these experts will have prepared documents summarizing their opinions about the matter contemporaneously with their involvement. These summaries can be obtained as part of the discovery process. Further, even if these experts have not prepared such summaries, it is open to a party, as part of the discovery process, to seek disclosure of any opinions, notes or records of participant experts and non-party experts the opposing party intends to rely on at trial. If the notes produced are illegible, the party producing them must provide a readable version.

[86] Sixth, I agree with the submissions of the parties and intervenors who say that the Divisional Court's ruling will actually exacerbate the problems of expense and delay that it [page739] purports to alleviate. Unlike an expert witness engaged by or on behalf of a party to provide opinion evidence in relation to the proceeding, participant experts and non-party experts do not testify because they are being paid an expert's fee to write the report contemplated by rule 53.03. Rather, they testify because they were involved in underlying events and, generally, have already documented their opinions in notes or summaries that do not comply with rule 53.03. Rule 53.03(2.1) contains strict requirements. Requiring participant witnesses and non-party experts to comply with rule 53.03 can only add to the cost of the litigation, create the possibility of delay because of potential difficulties in obtaining rule 53.03 compliant reports, and add unnecessarily to the workload of persons not expecting to have to write rule 53.03-compliant reports (e.g., emergency room physicians, surgeons and family doctors).

C. Westerhof v. Gee Estate: Specific Issues

(1) Did the trial judge err in his evidentiary rulings?

[87] Based on my conclusions concerning to whom rule 53.03 applies, I agree that the trial judge erred in holding as a general matter that the various medical practitioners who had treated or assessed Mr. Westerhof could not give opinion evidence because they had not complied with rule 53.03. Nonetheless, I am not convinced that he erred in excluding all of the evidence that he excluded. I will address each of the impugned rulings in turn.

Dr. Ramelli

[88] Dr. Ramelli is a chiropractor who treated Mr. Westerhof from April 26, 2004 (four days after the accident) until April 2005. He was not permitted to give evidence of the history he took from Mr. Westerhof or of his diagnosis or prognosis. In addition, Dr. Ramelli could not give evidence that he submitted a treatment plan to the accident benefits insurer, nor that the insurer had accepted the treatment plan.

[89] Dr. Ramelli was permitted to give evidence of Mr. Westerhof's complaints and of the treatments he provided. He also gave evidence about the observations he made of Mr. Westerhof.

[90] Although I agree that the trial judge erred in making a blanket ruling that treating practitioners could not give evidence of the histories they took and of their diagnosis and prognosis, based on the record before us, I am not persuaded that he erred in excluding the portions of Dr. Ramelli's evidence to which objection was taken. Defence counsel objected to Dr. Ramelli's [page740] giving opinion evidence in part because defence counsel did not receive Dr. Ramelli's clinical notes until the evening before Dr. Ramelli testified and had no indication of what Dr. Ramelli's opinion would be. There was no suggestion at trial that this was an invalid objection. In these circumstances, it was open to the trial judge to exclude the portions of Dr. Ramelli's evidence to which objection was taken.

Dr. Bartolucci

[91] Dr. Bartolucci is a psychiatrist and pain specialist. He treated Mr. Westerhof during about 30 sessions between May 2006 (about two years post-accident) and March 2009. He was not permitted to give evidence of the history he took, or of his diagnosis or prognosis. Like Dr. Ramelli, Dr. Bartolucci was permitted to testify about Mr. Westerhof's complaints, his observations of Mr. Westerhof and the treatment he provided, including the medications he prescribed and why he prescribed them.

[92] Dr. Bartolucci's medical reports (which did not comply with rule 53.03) were not admitted into evidence at trial, but they were marked as lettered exhibits and included in the appeal record. The reports list a variety of diagnoses, including chronic pain; psychiatric post-traumatic symptoms (fear of the worst happening, dizziness, heart pounding and racing, nervousness, and fear of losing control); and moderate to severe major depressive disorder.

[93] As Dr. Bartolucci was a treating psychiatrist and pain specialist, I agree that the trial judge erred in making a blanket ruling that he could not give evidence of the history he took and of his diagnosis and prognosis. This evidence should have been admitted.

Dr. Black's clinical notes and records

[94] Dr. Black, Mr. Westerhof's family doctor, was permitted to describe Mr. Westerhof's pre-motor vehicle accident medical history, as well as Mr. Westerhof's presenting symptoms and complaints the day after the accident and on subsequent visits. He also testified about the treatments he prescribed, the tests he ordered and the referrals he made.

[95] Mr. Westerhof's counsel was not, however, permitted to file Dr. Black's clinical notes and records covering the period April 23, 2004 (the day after the accident) to June 30, 2009 as business records under s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23.

[96] At trial, defence counsel conceded that Dr. Black's clinical notes are the type of records that can be admitted as business records. However, he objected to the introduction of the clinical [page741] notes and records for two reasons. First, the notes and records contained reports and opinions from other practitioners (which defence counsel acknowledged could be redacted). Second, the notes and records had little added probative value because Dr. Black had given evidence about his visits with Mr. Westerhof. Further, they had the potential to distract the jury because they were recorded in Dr. Black's own shorthand.

[97] The trial judge held that the clinical notes and records had limited probative value and declined to admit them.

[98] I see no basis on which to hold that the trial judge erred in his decision. If counsel for Mr. Westerhof wished to have the reports of other practitioners included in Dr. Black's notes and records admitted for the truth of their contents, he should have served notices under s. 52 of the *Evidence Act*.⁴ There is no indication in the appeal record that this was done. Further, because Dr. Black had testified, the decision whether to also admit his clinical notes and records was an issue within the trial judge's discretion. I see no basis on which to interfere with that exercise of discretion.

The MRI reports

[99] Counsel for Mr. Westerhof tendered two MRI reports, dated July 16, 2008 and September 21, 2008 (conducted with contrast), for admission as business records under s. 35 of the *Evidence Act*. The trial judge admitted them subject to redactions to exclude the radiologist's comments on causation related to the motor vehicle accident. The trial judge also ruled that, if called, the radiologist who authored the MRI reports would not be permitted to opine on causation because he had not filed a rule 53.03 report.

[100] Among other things, the MRI reports disclosed dysplasia of the femoral head and neck; the potential for femoral acetabular impingement syndrome, which would be a chronic issue; mild bone marrow edema; a 5 mm loose body adjacent to the anterior acetabulum; and a degenerative complex labral injury with associated articular cartilage injury. [page 742]

[101] The following redactions were made to the first report:

-- "There is a history of a previous MVA."

- "Given the history of recent trauma the labral injury may in fact be due to an acute injury as well."
-
- "This [5 mm loose body] may represent an avulsed bony injury given the history of trauma and the presence of the bone marrow edema."
-

[102] The following statement was redacted from the second report:

- "The labral tear is probably secondary to trauma superimposed on a background of CAM femoroacetabular
- impingement."

[103] Because these reports were tendered under s. 35 of the *Evidence Act*, the opinions concerning causation were not admissible for the truth of their contents: *Robb Estate v. Canadian Red Cross Society*, [2001] O.J. No. 4605, 152 O.A.C. 60 (C.A.), at para. 152; *McGregor v. Crossland*, [1994] O.J. No. 310, 1994 CanLII 388 (C.A.), at para. 3. Further, the appeal record contains no indication that notice was served for the admission of these reports under s. 52 of the *Evidence Act*.

[104] Nonetheless, I conclude that the trial judge erred in ruling that the author of the MRI reports could not be called because he had not complied with rule 53.03. The MRIs were conducted to diagnose and treat Mr. Westerhof. Thus, the author of the MRI reports was effectively a treating physician. There was no suggestion at trial that he was not qualified to give the opinions he offered.

Dr. Rathbone

[105] Dr. Rathbone testified as a rule 53.03 litigation expert. He was initially qualified as a neurologist and was later qualified as having expertise in the diagnosis (but not treatment or assessment) of "muscular skeletal injuries" and "in the field of physical and rehabilitative medicine".

[106] Dr. Rathbone examined Mr. Westerhof on June 10, 2011. He was permitted to give evidence about his own diagnosis and prognosis, and to provide an opinion on causation, including his review of the MRI reports. He was not permitted to give evidence about diagnoses made by other professionals who had not complied with rule 53.03, namely, the causation opinion [page 743] contained in the MRI reports and Dr. Bartolucci's psychiatric diagnoses, including any chronic pain diagnosis.

[107] As I understand it, Mr. Westerhof's complaints in relation to Dr. Rathbone are twofold. First, the trial judge erred in preventing Dr. Rathbone from giving evidence about the opinions of other rule-53.03-non-compliant experts for the truth of its contents. Second, Dr. Rathbone was precluded from referring to the evidence of the other rule-53.03-non-compliant experts to explain how he arrived at his own conclusions.

[108] I would not give effect to Mr. Westerhof's first complaint. As I have said, the author of the MRI reports and Dr. Bartolucci should have been permitted to testify about their opinions, and the trial judge erred in refusing to permit them to do so. However, whether the other rule-53.03-non-compliant experts testified, Dr. Rathbone could not give evidence about their opinions for the truth of its contents. The other experts had to give that evidence themselves; his recounting of their opinions would constitute hearsay.

[109] However, Mr. Westerhof's second complaint is valid. Dr. Rathbone was precluded from giving evidence at trial about his diagnosis that Mr. Westerhof suffered accident-related post-traumatic psychological changes and his recommendations in that regard. The reason was that he had relied, at least in part, and perhaps largely, on Dr. Bartolucci's reports to reach that conclusion. An expert witness is entitled to refer to the reports of other experts to explain how he or she reached his or her conclusions. It is then up to the trier of fact to assess whether the basis for the expert's conclusions have been proven in evidence and, if they have not, to determine how that should affect the weight to be given to the expert's opinion. Thus, the trial judge erred in precluding Dr. Rathbone from testifying about his opinions concerning the psychological effects of the accident on Mr. Westerhof and his recommended treatments.

[110] As for the MRI reports, I acknowledge that, although Dr. Rathbone was not permitted to read the redacted portions of the MRI reports into the record,⁵ he was permitted to testify about his diagnosis of Mr. Westerhof's hip problem based on his review of the MRI reports -- and he was also able to state his [page 744] opinion that Mr. Westerhof's labral tear "most probably happened traumatically".

[111] Dr. Rathbone testified that the MRI reports disclosed a labral tear; that such tears almost always occur in the presence of some abnormality in the bone; that the first MRI disclosed changes within the labrum that looked like a crack and that the second MRI was compatible with degenerative changes plus trauma. He also testified that a forceful movement is necessary to tear the labrum. And he explained that "the literature says that 2.5 years from trauma to diagnosis is characteristic". Nonetheless, the fact remains that Dr. Rathbone was not permitted to refer to the redacted portions of the MRI reports, which were consistent with his opinion that

the labral tear happened traumatically -- something he would have been entitled to do had the radiologist who authored the reports been permitted to testify.

Ms. Gross and Ms. Murray

[112] Ms. Gross is a physiotherapist, and Ms. Murray is a kinesiologist. They conducted a functional abilities assessment on Mr. Westerhof in August 2006, and prepared a report for Mr. Westerhof's SABs insurer.

[113] Ms. Gross and Ms. Murray each signed a Form 53 acknowledgment of expert's duty; however, the trial judge ruled that they could not provide rule 53.03 evidence because they were not retained for the purposes of the litigation. The trial judge held that they could give evidence of their observations of Mr. Westerhof, but that they could not testify about their conclusions and opinions, including opinions that Mr. Westerhof was experiencing pain. Due to these restrictions, Mr. Westerhof did not call them as witnesses.

[114] I agree that the trial judge erred in ruling that these witnesses could not testify about their opinions because they had not or could not comply with rule 53.03. In my view, they were entitled to testify concerning the history they took, the tests they performed and the results they observed, including their observations about whether Mr. Westerhof was experiencing pain, without complying with rule 53.03, because of their status as non-party experts.

[115] Their report is in the appeal record and includes the following notes and assessments:

- (i) Mr. Westerhof's present complaints include constant pain in the left lumbar spine and left groin region; shooting intermittent pain in the left leg; intermittent aching in the left neck and shoulder blade region; driving anxiety; [page745] depression; irritability; mood swings; short concentration; and sleep disturbances;
- (ii) "Mr. Westerhof currently demonstrates the ability to work at a light physical demands level with a maximum of 20 lbs. being manipulated. He demonstrated the ability to walk on an occasional basis and stand on a frequent basis with the opportunity to alter his position approximately every 30 minutes. His demonstrated abilities are probably an over-estimation of his actual abilities to sustain activity on a day to day basis. Mr. Westerhof continues to be challenged by low back pain with static and repetitive postures, left/leg hip weakness, with standing activities and low level postures";
- (iii) Mr. Westerhof cannot return to his previous job as a thermoform machine operator because "[h]is physical/ functional abilities do not meet the requirements of his job for walking, standing, low level positioning, lifting, pushing, and reaching." Mr. Westerhof "could manage a job that allows for frequent altering of position between sitting and standing, light lifting requirements and no low level positioning";
- (iv) "There were some observed pain behaviours primarily with motion of the left hip"; "Squatting resulted in marked left hip pain which continued for approximately 1 to 2 minutes"; A "[h]ip evaluation shows the left hip to have decreased mobility. . . . The right hip mobility was pain free and full range of movement";

- (v) "Having reviewed Mr. Westerhof's file, derived a history, performed a physical examination, it is the opinion of this assessor that Mr. Westerhof's presentation today is consistent with the motor vehicle accident as described. There is a temporal relationship from the accident to the onset of symptoms. The mechanism of injury is consistent with whiplash and rear end collision. There was no pre-existing condition noted in his history";
- (vi) "Mr. Westerhof . . . was involved in a motor vehicle accident which occurred on April 22, 2004. From this motor vehicle accident, he has sustained cervical, shoulder soft tissue injuries with EMG demonstrated radiculopathy and lumbar spine spondylolisthesis with EMG demonstrated L5 radiculopathy. There also appears to be left hip dysfunction."

[116] I am satisfied that Ms. Gross and Ms. Murray were entitled to testify concerning the contents of the first four [page 746] paragraphs set out above. These paragraphs include statements about the history these witnesses took from Mr. Westerhof, their observations of Mr. Westerhof during their assessment and their conclusions about his ability to return to his pre-accident employment in the light of his presenting condition. All of these matters related to their interactions with Mr. Westerhof and fell within the scope of the ordinary exercise of their expertise.

[117] Concerning the fifth and sixth paragraphs, which addressed causation, the trial judge could properly have excluded these opinions, or required the witnesses to comply with rule 53.03 in relation to them. This decision would depend on the trial judge's assessment of factors such as the witnesses' expertise and the extent to which their opinions were based on information gained from sources beyond their interactions with Mr. Westerhof. Rather than making a blanket ruling excluding the evidence of these witnesses, the trial judge should have determined the admissibility of the contested portions of their opinions as part of the usual exercise of his gatekeeper function.

Mr. Husler

[118] Mr. Husler is a road safety consultant and driving therapist intern. At the request of Dr. Bartolucci, Mr. Husler did an in-vehicle assessment of Mr. Westerhof in February 2007 "for assessment with regard to diagnosed anxiety in-vehicle as well as pain factors in the ergonomics of safe driving". Mr. Husler also prepared a letter setting out his observations and conclusions and a treatment plan.

[119] At trial, Mr. Westerhof submitted that Mr. Husler was a "treater" not an "expert", and that compliance with rule 53.03 was not required. However, the trial judge concluded that Mr. Husler was being called to give evidence that Mr. Westerhof had a pathology of a psychiatric nature arising from the motor vehicle accident and that he was not qualified to give that opinion. In the result, the trial judge ruled that Mr. Husler could not testify.

[120] It is unclear from Mr. Husler's report exactly what qualifications he has, but there is no dispute that Dr. Bartolucci referred Mr. Westerhof to him and asked that he conduct an assessment and prepare a treatment plan. Based on this referral, it seems likely that Mr. Husler was sufficiently qualified to conduct the tasks he was asked to perform. His qualifications should have been explored more fully before any ruling was made. In any event, he should have been

allowed to testify concerning his observations of Mr. Westerhof during the in-car assessment.
[page747]

(2) *Do the trial judge's erroneous evidentiary rulings warrant a new trial?*

[121] Section 134(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 authorizes an appeal court to order a new trial. However, s. 134(6) provides that this court "shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred".

[122] As this court stated in *Beldycki Estate v. Jaipargas*, [2012] O.J. No. 3769, 2012 ONCA 537, 295 O.A.C. 100, at para. 42, "in a civil trial, a new trial will only be ordered where the interests of justice plainly require it".

[123] Counsel for the respondent submits that, even if the trial judge erred in applying rule 53.03, an order for a new trial is not warranted because substantially all of Mr. Westerhof's tendered evidence was before the court in any event.

[124] For example, Drs. Ramelli, Black and Bartolucci were all entitled to describe their visits with Mr. Westerhof; the complaints he made; their observations of him; the treatments they prescribed or administered; and the referrals they made. Although precluded from testifying concerning his formal diagnosis, Dr. Bartolucci was permitted to describe Mr. Westerhof as depressed and explain some of the complaints and symptoms that led him to this conclusion.

[125] Further, Dr. Rathbone was able to give his opinion on causation concerning Mr. Westerhof's hip and back problems. Although he was not entitled to read from the redacted portions of the two MRI reports, he was able to say he reviewed the MRIs and formed his conclusions, at least in part, on the basis of that review.

[126] Finally, although the trial judge ruled the driving counsellor could not testify, several lay witnesses testified as to their observations of Mr. Westerhof's state when riding in a car.

[127] I would not accept these submissions. In my view, the trial judge's erroneous evidentiary rulings prevented Mr. Westerhof from placing important evidence before the judge and jury that could reasonably have affected the outcome of the trial.

[128] As the trial judge observed in his threshold ruling, causation was a central issue at trial. Mr. Westerhof's claims that he is disabled, in chronic pain and suffering significant psychological post-traumatic symptoms are all inextricably linked to the question whether he suffered hip and back injuries as a result of the accident.

[129] At trial, each side called a rule-53.03-compliant witness to testify about causation. Mr. Westerhof called Dr. Rathbone, [page748] a neurologist, who examined Mr. Westerhof on June 10, 2011. I have described the essence of his testimony relating to Mr. Westerhof's hip problems above. Concerning Mr. Westerhof's low back pain, Dr. Rathbone testified that the X-rays of Mr. Westerhof's lower back revealed spondylosis and spondylolisthesis. He indicated that although spondylolisthesis can develop "in a relatively young man one has to suspect that it's most probably caused by trauma". In his view, Mr. Westerhof's low back pain was related to the accident. While there was likely some pre-existing degenerative change, it was asymptomatic. The additional stress of the motor vehicle accident likely caused Mr. Westerhof's lower back pain.

[130] The respondent called Dr. Cividino, a rheumatologist, as its rule-53.03-compliant expert.⁶ He examined Mr. Westerhof on June 20, 2006. He opined that the motor vehicle accident did not cause Mr. Westerhof's low back and hip problems and that the soft tissue injuries Mr. Westerhof suffered in the accident had resolved prior to trial.

[131] According to Dr. Cividino, at the time of his examination, Mr. Westerhof reported left leg pain, groin pain and lower back pain on certain movements. Dr. Cividino opined that these were not valid complaints because the particular movements should not have produced pain in the areas identified by Mr. Westerhof. Despite this conclusion, Dr. Cividino accepted that Mr. Westerhof had mechanical low back pain (activity-related pain) as of June 2006. However, he opined that it was unrelated to the accident because Mr. Westerhof had not reported low back pain to either his family doctor or his chiropractor immediately following the accident.

[132] Dr. Cividino also reviewed additional medical records generated subsequent to his examination. He said they reflected worsening back pain and complaints of left hip pain. He noted that Mr. Westerhof had had an MRI done on his back, which showed some mild degenerative changes, and two MRIs of his hip, which showed dysplasia of the femoral neck and a labral tear.

[133] In Dr. Cividino's view, the labral tear at the left hip could not have resulted from the car accident. He said that in order to tear the labrum from trauma you have to sublux or dislocate the [page 749] hip, meaning that the ball and socket come out partially or completely. These would be painful, memorable events, which would render a person unable to bear weight. Mr. Westerhof was able to get up and walk around after the accident, and his hip symptoms came years later. In Dr. Cividino's view, this was consistent with the natural history of femoral impingement that had been building up over time.

[134] Concerning the low back pain, Dr. Cividino indicated that Mr. Westerhof's spondylosis and spondylolisthesis "are things that develop in the late teen years in the lower spine . . . so . . . over the years [he's] been having changes to his low back. And so having them become symptomatic at some point it's not surprising." Further, it was his view that because Mr. Westerhof did not report back pain until two weeks after the accident, the source of the back pain was unrelated to the accident.

[135] Dr. Cividino also testified that Mr. Westerhof's hip problems could be affecting Mr. Westerhof's level of back pain. This was because Dr. Adili confirmed he saw and removed the synovium⁷ during surgery, which indicated there was arthritis in the joint. People develop flexion contractures as a result of arthritis, meaning that they cannot move their leg back. That results in flexion of the hip, so that when a person stands up they arch their back and really load up their lower back joints.

[136] Based on the jury's verdict and the findings of the trial judge on the threshold motion, it is apparent that Dr. Cividino's evidence was accepted and that Dr. Rathbone's evidence was not accepted.

[137] In my view, had the improperly excluded evidence been admitted, at least three aspects of that evidence, in combination, could reasonably have affected the outcome of the trial.

[138] First, the evidence of Ms. Gross and Ms. Murray concerning Mr. Westerhof's condition in August 2006 could have undermined the evidence and credibility of the defence expert, Dr. Cividino.

[139] As I read his evidence, Dr. Cividino testified, in effect, that as of June 2006, Mr. Westerhof was malingering. Moreover, Dr. Cividino testified in-chief that Mr. Westerhof did not complain of hip pain at the time of his examination.⁸ [page750]

[140] On the other hand, Ms. Gross and Ms. Murray observed pain behaviours and restricted hip movement. They described no observations suggesting malingering. In my view, their evidence had the potential to undermine Dr. Cividino's credibility and neutrality concerning whether Mr. Westerhof was malingering and concerning whether Mr. Westerhof was experiencing hip problems in the summer of 2006 -- factors that may well have been important to the jury's (and the trial judge's) acceptance of Dr. Cividino's evidence.

[141] Second, had the radiologist been entitled to testify and express the opinion on causation that he expressed in the MRI reports, that evidence would have provided direct support for Dr. Rathbone's evidence concerning the cause of Mr. Westerhof's hip problems.

[142] Third, had Dr. Rathbone been entitled to refer to the radiologist's opinion expressed in the MRI reports, that could have been an important factor supporting his credibility. Dr. Rathbone testified about causation in relation to the hip injury based in part on his review of the MRI reports. Yet the references to the motor vehicle accident and the opinion that the labral tear was secondary to trauma were redacted from the MRI reports that were filed as exhibits. What remained in both exhibits was reference to a "degenerative complex labral injury", suggesting nothing more than wear and tear. Had Dr. Rathbone been permitted to refer to the redacted portions of the MRI reports, his evidence would have been supported rather than possibly undermined. This could have been important in determining which expert's evidence to accept.

[143] For the sake of completeness, I note that Dr. Adili's evidence could be interpreted as assisting the defence. Dr. Adili is the orthopedic surgeon who performed hip surgery on Mr. Westerhof in June 2009. He had not complied with rule 53.03 and therefore was not entitled, under the trial judge's rulings, to give opinion evidence.

[144] Dr. Adili described the surgery he performed as femoral reshaping, basically taking off the "offending parts" of the bone that were causing an impingement. He explained that he found a lesion over the femoral neck that was banging into the cup part of the hip joint and some fraying of the labral material. He "trimmed [the labrum] back to stable margins", which he analogized to trimming frayed ends of a rug.

[145] During his examination-in-chief, he volunteered that "for the most part . . . it looked like the labrum was stable, so [his] suspicion [was] that fraying was secondary to the bone banging up against the cartilage". [page751]

[146] Although this evidence may imply that it was Dr. Adili's opinion that Mr. Westerhof's hip problems are the result of wear and tear and not trauma, I do not think it appropriate that I draw that inference on appeal. Neither counsel referred to this evidence in their appeal submissions. Moreover, counsel's examination of Dr. Adili was circumscribed by the trial judge's ruling that witnesses who had not complied with rule 53.03 could not give opinion evidence.

[147] In my opinion, the trial judge's error in applying rule 53.03 resulted in the exclusion of important evidence tendered by Mr. Westerhof that could reasonably have affected the outcome of the trial. Based on my review of the record, I am not satisfied that either the trial judge, in his threshold ruling, or the jury, in its verdict, "would necessarily have reached the same result" had such evidence not been excluded: *Moore*, at para. 117; *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641, [1992] O.J. No. 1725 (C.A.), at p. 676 O.R. Accordingly, in all the circumstances, I would order a new trial.

D. *McCallum v. Baker*

(1) *Introduction*

[148] Mr. McCallum suffered injuries in a motor vehicle accident on March 23, 2009. The accident happened at about 6:45 a.m. He was on his way to work in a full size GMC Sierra pickup truck, southbound on Highway 400. Traffic in the southbound lanes came to a stop just north of King Road. Mr. McCallum was in the far left lane. He looked in his rear view mirror and saw headlights coming and braced himself for a collision. The rear of his pickup truck was then struck by a car driven by Mr. Baker.

[149] Mr. McCallum was 41 years of age at the time of the accident and was working as an electrical subcontractor. He claims that he was healthy prior to the accident, but that as a result of the accident he suffered serious injuries to his neck, back, shoulder and hands, as well as chronic pain, chronic headaches and severe depression. He claims that these injuries prevented him from returning to work and severely curtailed his activities of daily living. Mr. McCallum also claims that it is unlikely that he will ever be able to return to work.

[150] Mr. McCallum sued Mr. Baker for damages. In addition to general damages and damages for past loss of income, Mr. McCallum claimed significant amounts for future loss of income and future costs of care, including \$598,209 for medications.

[151] Mr. Baker admitted liability and agreed that Mr. McCallum was entitled to damages, including a significant [page752] amount for general damages and sums for future loss of wages and future care. However, Mr. Baker also claimed that Mr. McCallum had pre-existing conditions that were aggravated by the accident, and disputed Mr. McCallum's assertions that he will never be able to return to work. He claimed that some of Mr. McCallum's symptoms are side effects of medications Mr. McCallum has been prescribed, and that Mr. McCallum's award should be reduced for failure to mitigate by reducing his dependency on these medications.

[152] The trial was held before a judge and jury prior to the Divisional Court's decision in *Westerhof*.

[153] At trial, the trial judge permitted several medical practitioners who had treated Mr. McCallum to give opinion evidence concerning Mr. McCallum's future employment prospects and future treatment needs without complying with rule 53.03. The trial judge concluded that because these witnesses were treating medical practitioners, they could give opinion evidence without complying with rule 53.03.⁹

[154] The jury awarded damages to Mr. McCallum totalling \$785,275. That figure is broken down as follows:

- General damages: \$175,000
- Past loss of income: \$47,081
- Future loss of income: \$272,285
- Future costs of care:
 - Multidisciplinary and other programs: \$19,772
 - Medications: \$222,016
 - Aids to daily living: \$4,821
 - Physiotherapy: \$25,000
 - Housekeeping and home maintenance: \$19,300

[155] On appeal, Mr. Baker accepted that treating physicians may give opinion evidence directly related to their treatment of a patient, such as a working diagnosis and prognosis. Nonetheless, he submits that the trial judge retains a gatekeeper function in relation to opinion evidence of treating physicians who do [page 753] not comply with rule 53.03 and that, in his case, the trial judge erred in failing to fulfill his gatekeeper function in three ways.

[156] First, the trial judge erred in permitting treating physicians to give opinion evidence concerning matters such as future employability and future medication requirements that were not directly related to the treating physician's treatment of Mr. McCallum and that had not been disclosed prior to trial.

[157] Second, the trial judge erred in permitting treating physicians to give opinions that went beyond their expertise.

[158] Third, by permitting treating physicians to opine on matters that properly fell within the boundaries of rule 53.03 expert evidence, the trial judge unfairly allowed an excessive amount of expert evidence and ran afoul of the provisions of s. 12 of the *Evidence Act*. Subject to leave, s. 12 limits to three the number of experts who may testify for a party.

[159] Mr. Baker also argues that the trial judge's jury instructions were unbalanced and failed to properly set out key portions of the evidence and his submissions and theory of the case.

(2) *The opinion evidence issue*

[160] Mr. Baker called seven rule-53.03-compliant medical expert witnesses at trial:

- a neurologist, qualified to speak about chronic pain and psychological issues as a sub-specialty;
-

- an anaesthetist qualified to give evidence about medical psychotherapy and pain medication;
-

-- a physiatrist;

- an orthopedic surgeon with a sub-specialty in chronic pain and orthopedic disability;
-

-- a psychiatrist;

-- a family physician who works at a pain centre; and

- a psychologist qualified to give evidence about psychology and vocational rehabilitation and chronic pain.
-

[161] In addition to these experts, Mr. Baker called seven treating medical practitioners, the evidence of five of whom is controversial:

-- Dr. Cutbush, his family doctor;

-- Dr. McMaster, a treating psychologist; [page754]

-- Dr. Kraus, a treating psychiatrist;

-- Dr. May, a treating family doctor and pain specialist; and

-- Mr. Ball, a treating physiotherapist.

[162] The controversial aspects of these witnesses' testimony all relate to opinions concerning Mr. McCallum's prognosis. Mr. Baker objects to the following general areas of testimony:

- Dr. Cutbush and Mr. Ball testified that with respect to the conditions for which they were treating Mr. McCallum he appeared to have plateaued and was unlikely to improve further;
- Drs. May and Kraus testified that Mr. McCallum would need to remain on medication indefinitely;
-
- Dr. Kraus testified that if Mr. McCallum stopped taking his anti-depressants, he would be at increased risk of suicide; and
-

- Drs. McMaster, Kraus and Cutbush and Mr. Ball testified that Mr. McCallum was not able to return to work.
-

[163] Mr. Baker's first two complaints in relation to this evidence are interrelated. He says the opinions on matters such as future medication requirements and future employability were not directly related to these practitioners' treatment of Mr. McCallum, that such opinions had not been disclosed prior to trial and that such opinions went beyond the treating practitioners' expertise.

[164] With respect to the opinions relating to potential for improvement and future medication requirements, I see no merit in Mr. Baker's complaints. On their face, these opinions relate to the practitioners' treatment of Mr. McCallum and fall within their respective areas of expertise. Although some of the transcript excerpts to which we were referred may be somewhat ambiguous, it appears that the opinions at issue were formed at the time of treatment. I see no indication in the transcript that the opinions had not been disclosed.

[165] The opinions concerning ability to return to work are more difficult. Nonetheless, in the circumstances of this case, I am not persuaded that the trial judge erred in allowing Drs. McMaster, Kraus, Cutbush and Mr. Ball to give them. The opinions appear to have been formed at the time of, and arise directly from, the practitioners' treatment of Mr. McCallum, they are not [page755] complex vocational opinions requiring highly specialized expertise and I see no indication that they had not been disclosed.

[166] Dr. McMaster gave her opinion in the context of describing her DSM IV diagnosis. To make this diagnosis, Dr. McMaster assessed Mr. McCallum on five axes. She described axis 5 as a global assessment of functioning ("GAF"), and said that a score of 60 on the GAF scale is considered a minimum requirement for return to work (a score of 65 is ideal). She classified Mr. McCallum as a 50 on the GAF scale. She explained that although Mr. McCallum was making "a little bit of a turning point", he continued to have issues accepting his "new body" and "dealing with what it can't do anymore". Thus, in her view, Mr. McCallum was "definitely not ready to return to work". There is no suggestion that Dr. McMaster was not qualified to conduct this assessment.

[167] Concerning Dr. Kraus, when asked if Mr. McCallum could return to any form of gainful employment, he testified that if Mr. McCallum was going to go back to work as an electrician, he (Dr. Kraus) would not let Mr. McCallum into his house. He explained:

[B]ut if you look at -- with the way he is right now, his concentration isn't good enough, his motivation is not good enough, his energy level is not good enough. I don't think that he could do any kind of activity related to any sort of complex task that would require a significant period of sustained activity that aren't [sic] interruptible. I don't think he could do those things because he can't right now and I don't see anything on the horizon that is rapidly likely to change that.

[168] Considered in context, Dr. Kraus' opinion concerning Mr. McCallum's employability was no more than a conclusion that flowed naturally from his observations concerning Mr.

McCallum's presenting condition. The observations and Dr. Kraus' conclusion arising from them fell within his expertise.

[169] Dr. Cutbush was asked if he formed an opinion with respect to Mr. McCallum's employability when he wrote a report dated January 8, 2012. In what appears to be a direct quotation from that report, Dr. Cutbush testified, "[i]n my opinion Mr. McCallum is permanently disabled from gainful employment for which he is qualified by training and/or experience, as a direct result of the motor vehicle accident of March 23, 2009."

[170] Dr. Cutbush also testified that in the same report he listed the following diagnoses in relation to Mr. McCallum: whiplash associated disorder III, with left arm neuropathy; cervical spine injury: discogenic, facet or mechanical; lumbar spine injury: discogenic, facet or mechanical; traumatic bilateral carpal tunnel syndrome; chronic post-traumatic headaches, post-traumatic depression and anxiety and chronic pain disorder. [page756]

[171] It appears that Dr. Cutbush's opinion concerning Mr. McCallum's ability to work flowed directly from the diagnoses he had made in his capacity as Mr. McCallum's family doctor. Again, this was not a complex vocational assessment, but simply a straightforward opinion formed as part of his ongoing treatment of Mr. McCallum.

[172] Finally, Mr. Ball's opinion was based on the simple fact that Mr. McCallum could not do overhead work because of the condition of the facet joints in his neck. This opinion was straightforward and fell within Mr. Ball's area of expertise.

[173] Mr. Baker's third complaint is that, in permitting treating physicians to give the opinions noted above (which he claims fall more properly within the boundaries of rule 53.03 litigation expert opinion), the trial judge unfairly permitted an "avalanche" of expert evidence.

[174] I agree that it may have been open to the trial judge, in the exercise of his gatekeeper function, to exclude at least some of the impugned evidence. Nonetheless, I am not persuaded that he erred in failing to do so. As I have said, the opinions concerning ability to return to work were not complex vocational opinions of the kind one would expect from a rule 53.03 expert. Rather, they were opinions formed by treating practitioners in the course of their treatment, reflecting the treating practitioners' assessment of the impact of Mr. McCallum's presenting condition on his ability to return to work. There is no suggestion that any of these practitioners were litigation experts in disguise, *i.e.*, practitioners to whom Mr. McCallum was referred to obtain additional evidence for the purposes of the litigation. In all the circumstances, I am not persuaded that permitting the evidence of these witnesses was unfair.

[175] In the result, I would not give effect to this ground of appeal.

(3) *The jury instructions issue*

[176] Mr. Baker submits that the trial judge's jury instructions were unbalanced and failed to adequately summarize for the jury his overriding theory -- and the evidence that supported it -- that many of Mr. McCallum's complaints were being caused by the medications he was taking and that Mr. McCallum had not taken adequate steps to improve his condition. We did not call on Mr. McCallum to respond to this argument.

[177] In the context of a civil jury trial, failure to object to the charge, particularly in a case involving non-direction, will often be fatal to any subsequent claim that the charge was flawed: [page757] *Marshall v. Watson Wyatt & Co.* (2002), 57 O.R. (3d) 813, [2002] O.J. No. 84 (C.A.), at para.15.

[178] In this case, counsel for Mr. Baker had a copy of the trial judge's jury instructions by approximately 5:00 p.m. on the evening before the trial judge delivered his charge to the jury. Nonetheless, he did not raise the objection he now advances on appeal until after the trial judge had completed his instructions to the jury.

[179] The trial judge declined to recharge the jury. Among other things, he said it would be a virtually impossible and potentially confusing task:

I also agree that it would be very confusing and difficult to go back to recharge the jury on issues that [defence counsel] suggest percolate through the whole evidence review, an issue which we could have tackled yesterday . . . or at least been alerted to this morning. *But having given them that information to go back and try to readdress it I think is an impossible task and certainly might represent utter confusion to the jury.*

(Emphasis added)

[180] In recent years, it has become a common practice in Ontario for trial judges to distribute copies of their jury instructions to counsel in advance of delivering them to the jury. Counsel who receive a copy of such jury instructions have an obligation to the court to review them before the charge is delivered. Counsel who fail to review the instructions and make prompt objections in advance of their delivery to the jury do so at their peril.

[181] In the circumstances, we agree that the nature of Mr. Baker's objection would have made it difficult for the trial judge to promptly prepare a meaningful recharge. We see no reason not to treat the absence of a *timely* objection in the same fashion as we would treat a failure to object at trial.

[182] In any event, Mr. Baker acknowledges that, prior to instructing the jury, the trial judge asked counsel to provide him with a statement of their positions for inclusion in his charge and that the trial judge read out Mr. Baker's position statement verbatim as part of his jury instructions. We note as well that, when reviewing each head of damages in his jury instructions, the trial judge reviewed the defence position and the reasons for it.

[183] In the circumstances, we declined to give effect to this ground of appeal.

E. *Disposition*

[184] Based on the foregoing reasons, I would allow Mr. Westerhof's appeal, set aside the jury's verdict and the trial judge's judgment, and order a new trial. I would dismiss Mr. Baker's [page758] appeal. If the parties are unable to agree as to costs, we will receive brief written submissions.

Westerhof's appeal allowed; Baker's appeal dismissed.

FORM 53

Courts of Justice Act

ACKNOWLEDGMENT OF EXPERT'S DUTY

(General heading)

ACKNOWLEDGMENT OF EXPERT'S DUTY

1. My name is
(*name*). I live at
..... (*city*), in
the (*province/ state*)
of (*name of*
province/state).
2. I have been engaged by or on behalf of
..... (*name of party/*
parties) to provide evidence in relation to the
above-noted court proceeding.
3. I acknowledge that it is my duty to provide evidence in relation to this proceeding
as follows:
 - (a) to provide opinion evidence that is fair, objective and non-partisan;
 - (b) to provide opinion evidence that is related only to matters that are within my area
of expertise; and
 - (c) to provide such additional assistance as the court may reasonably require, to
determine a matter in issue.
4. I acknowledge that the duty referred to above prevails over any obligation which I
may owe to any party by whom or on whose behalf I am engaged.

Date

Signature

Notes

- 1 The full text of Form 53 is included in Appendix 'A'.
- 2 Mr. Westerhof's expert, Dr. Rathbone, described spondylosis and spondylolisthesis without explicitly explaining the distinction between the two conditions. After describing vertebrae, the cushion between them and the nearby facet joints, he said a break can occur in the area going to the facet joint which leads to inflammation and pressure on the nerve root. He said, in Mr. Westerhof's case, he also has slippage of one vertebrae over another, causing further pressure on nerve roots. The respondent's expert, Dr. Cividino, explained that spondylosis is a condition where the area between a bone in the vertebra and another part of the spine becomes stretched out and weakened. Spondylolisthesis refers to the slippage of that vertebra on the vertebra below.
- 3 In addition to the medical practitioners listed, Mr. Westerhof also called a treating physiotherapist, Dr. Bakri. Mr. Westerhof did not make any submissions concerning Dr. Bakri on the appeal.
- 4 Section 52(2) of the *Evidence Act* provides:

52(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days' notice has been given to all other parties, admissible in evidence in the action.
- 5 At one point in his examination-in-chief, Dr. Rathbone referred to the fact that the second MRI report disclosed "the appearance of degenerative changes . . . with secondary trauma". Counsel for Mr. Westerhof immediately asked him to "please refrain from that" and to just state his opinion arising from his review of the MRI report.
- 6 Dr. Cividino drafted his report in 2006, several years before the amendments to rule 53.03. As such, his report did not include a description of the instructions provided by defence counsel, as required by rule 53.03(2.1). A copy of defence counsel's instructions was provided to plaintiff's counsel before cross-examination.
- 7 A fluid membrane lining the joint.
- 8 Dr. Cividino did acknowledge in cross-examination that Mr. Westerhof complained of left groin pain at one point during his physical examination and that the pain could have been referred from the hip.
- 9 The trial judge's original ruling in this regard is not in the appeal record. However, Mr. Baker renewed his objection to this form of evidence when the witnesses were testifying.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Ronald Starra	)	
	)	Karen Pelletier, for the Applicant
Applicant	)	Responding party
	)	
– and –	)	
	)	
Carole Starra	)	Joseph Hamon, for the Respondent Moving
	)	Party
Respondent	)	
	)	
	)	
	)	HEARD: September 20, 2024, and
	)	December 2, 2024

RULING ON MOTION TO CHANGE

JUSTICE HÉLÈNE C. DESORMEAU

Overview

- [1] Following the demise of their 25-year marriage in 2007, the parties resolved the spousal support issue mid-trial in 2013. Justice de Sousa granted a final order (“Final Order”) dated February 1, 2013, whereby the Husband would pay the Wife spousal support of \$15,500.00 per month, as well as an unqualified payment of \$100,000.00. The Order included a mutual restraining order prohibiting communication or approaching the other or being within 200 metres of their residences unless there was consent in writing through the Wife’s lawyer. Additionally, the Order provided for the Husband to maintain \$1 million of irrevocable life insurance on his life in favour of the Wife. The Order was to be enforced through the FRO.
- [2] The Husband, a doctor, has recently given notice of his intention to retire from his place of employment, and is seeking to terminate spousal support. Though he initially commenced the motion to terminate in Quebec, that was the improper jurisdiction.
- [3] In the intervening time, the Wife commenced a Motion to Change to readdress and readjust spousal support from January 1, 2014, onward due to her continued declining health.

- [4] This motion was argued in both official languages but given that the Moving Party to the Motion to Change was the Wife, and she pled in English, this Ruling is being released in English. The court will provide a translation upon request of either party.
- [5] Importantly, I did not consider inadmissible hearsay evidence either party attempted to rely upon, including for instance letters appended to affidavits not in compliance with the *Family Law Rules* or the rules of evidence.

Background facts

- [6] The parties were married from June 19, 1982. They separated on October 22, 2007 and divorced on May 27, 2009.
- [7] Together, the parties had 3 children, born in 1985, 1986 and 1989. The children are now fully independent adults. At separation, the youngest child was 17 years old, the oldest 21 years old. At the time the Final Order was granted, the youngest was 23 years old.
- [8] The Wife was qualified as a bilingual elementary school teacher and worked one year early in their marriage. Following the birth of the children, she chose to educate their children from home. In 2003, when she stopped teaching the children, she decided not to return to work.
- [9] It was not disputed that the Wife supported the Husband's education and training by making these career sacrifices.
- [10] The Husband however argued that from 2003 until 2008 the Wife could work as she was taking care of the billing for his medical practice for which she was remunerated.
- [11] It was advanced by the Wife that she was unable to return to work due to physiological and psychological reasons. In support of her argument, she provided letters produced for the 2013 trial from her family physician since the early 1990's, Dr. Lise Beaubien, accompanied with her Acknowledgement of Expert's Duty. In 2012, Dr. Beaubien concluded that the Wife's symptoms of anxiety and depression were related to chronic PTSD, a consequence of chronic physical and emotional abuse. At that time, Dr. Beaubien felt the Wife would never be able to sustain gainful employment due to her ongoing issues.
- [12] In 2011, Dr. Bakish of the Ottawa Psychopharmacology Clinic completed an IME at the Husband's request. Attached to his report was the Acknowledgement of Expert's Duty. The report noted that the Wife's father psychologically abused her, and that she may suffer from chronic PTSD due to the childhood abuse. It was determined that the Wife suffers from a major depressive disorder, anxious type which is complicated by a chronic post traumatic stress disorder and has medication hypersensitivity. The Doctor's report also stated there was a very high probability that the abuse experienced by the Wife prior to the date of marriage may have made it much easier to develop or worsen PTSD with a new stressor. Further, it indicted that as the Wife is hyper aroused, she seemed to be extremely sensitive to the Husband's alleged behaviour and believed there to be an unquantifiable association. Dr. Bakish indicated that the Wife was at that time unable to work.

- [13] Also, pre-dating the original trial dates, Dr. Black, the Wife's obstetrician, provided a report as to the Wife's health at the beginning of the marriage by way of letter dated July 29, 2011, along with an Acknowledgement of Expert's Duty. His evidence can best be summarized as indicating the Wife was of excellent health and she has no other significant medical issues. While the Wife argued this report went unchallenged, it is important to note that the trial was resolved prior to completion. Further, Dr. Black made no specific mention as to the Wife's mental health, which as an obstetrician, would not have been within his field of expertise.
- [14] The Wife maintained that the physical abuse by her father was "not physical abuse such as [she] suffered from [the Husband]." This was a contentious issue.
- [15] In 2013, mid-trial, spousal support was resolved on consent of both parties. Both parties agree that the support amount fixed was based on mid-range support and the parties' 2011 income. There is no comment in the Final Order by Justice de Sousa as to the basis for spousal support entitlement, quantum, or range.

Language Rights

- [16] The Wife contended that the Husband "forced" the matter to be heard bilingually, when in the past he proceeded in English, therefore he was "unnecessarily prolonging and complicating this case and trying to hurt [her] once again. It is [her] position that [the Husband] ought to be held responsible for time and costs thrown away regardless of the cause in this continuing of his effort to control and abuse me."
- [17] The Wife attributed the Husband's attempt to terminate spousal support in Quebec was a calculated move as "he knew I was ill and hope [sic] I would simply not respond", and as an attempt to deprive her of her legal representation given her lawyer does not speak French.
- [18] The Husband articulated his comfort level was greater by pleading his case in French and he commenced the matter in the province in which he resides.
- [19] I am not persuaded there was an ulterior motive for the Husband initially commencing the matter in Quebec. Further, pursuant to s.126 of the *Courts of Justice Act*, the Husband's language rights are protected by the court. Bilingual proceedings are his right. Therefore, the Wife's submissions on this issue are rejected.

Participant Expert versus Litigation Expert

- [20] In the context of this Motion to Change, both parties relied on evidence from several experts. Most, if not all, at some point in the litigation, complied with the requirement of filing an Acknowledgment of Experts Duty.
- [21] The evidence of Dr. Garnham was tendered to be both based on her being a participant expert **and** a litigation expert. There is a distinction that needs to be drawn about these two types of experts. For reasons set out below, I find that Dr. Garnham's opinion evidence

went beyond the scope of her expertise, and thus evidence outside of her expertise is afforded no weight.

[22] As set out in *Westerhof v. Gee Estate*, participant experts are defined as:

...a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation [who] may give opinion evidence for the truth of its contents without complying with rule 53.03 (concerning the provision and content of an expert report) where:

the opinion to be given is based on the witness's observation of or participation in the events at issue; and

the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events. See *Westerhof v. Gee Estate*, 2015 ONCA 206 (Ont. C.A.), at para. 60.

[23] Thus, “participant experts” may give opinion evidence without complying with Rule 53.03 of the *Rules of Civil Procedure* (and thus Rule 20.1 of the *Family Law Rules*).

[24] In essence, the distinction between participant and litigation experts turns on the words “engaged by or on behalf of a party.” Participant experts testify to opinions formed during their involvement in a matter. They are not engaged by a party to form their opinions, and they do not form their opinions for the purpose of the litigation. As such, a party does not “engage” an expert “to provide [opinion] evidence in relation to a proceeding” simply by calling the expert to testify about an opinion the expert has already formed.

[25] Similarly, the court noted that if a participant expert also proffers opinion evidence extending beyond the limits described above, they must comply with rule 53.03 *RCP* [or Rule 20.1 *FLR*] with respect to the portion of their opinions extending beyond those limits.

[26] Rules 20.1(2) and (3) *Family Law Rules* specifies that it is the duty of every expert: to:

(2) (a) provide opinion evidence that is fair, objective and non-partisan;

(b) provide opinion evidence that is related only to matters that are within the expert’s area of expertise; and

(c) provide such additional assistance as the court may reasonably require to determine a matter in issue.

(3) In the case of a litigation expert, the duty in subrule (2) prevails over any obligation owed by the expert to a party. O. Reg. 250/19, s. 8.

[27] Rule 20.2(2) *FLR* requires: A party who wishes to call a litigation expert as a witness at trial shall, at least six days before the settlement conference, serve on all other parties and file a report signed by the expert and containing, at a minimum, the following:

1. The expert's name, address and area of expertise.
2. The expert's qualifications, including his or her employment and educational experiences in his or her area of expertise.
3. The nature of the opinion being sought and each issue in the case to which the opinion relates.
4. The instructions provided to the expert in relation to the case.
5. The expert's opinion on each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research or test conducted by or for the expert, or of any independent observations made by the expert, that led him or her to form the opinion, and, for each test,
 - A. an explanation of the scientific principles underlying the test and of the meaning of the test results, and
 - B. a description of any substantial influence a person's gender, socio-economic status, culture or race had or may have had on the test results or on the expert's assessment of the test results, and
 - iii. a description and explanation of every document or other source of information directly relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 20.2) signed by the expert. O. Reg. 250/19, s. 8.

[28] Rule 20.2(14) stipulates that a party who wishes to call a participant expert as a witness at trial shall,

- (a) at least six days before the settlement conference,
 - (i) serve notice of the fact on all other parties, and
 - (ii) if the party wishes to submit any written opinion prepared by the expert as evidence in the trial, serve the written opinion on all other parties and file it; and

(b) serve on any other party, at that party's request, a copy of any documents supporting the opinion evidence the participant expert plans to provide. O. Reg. 250/19, s. 8.

[29] In *Westerhof v. Gee Estate*, a treating physician was permitted to testify about opinions that arose directly from his treatment of his patient, the plaintiff in the case. The treating physician was not required to comply with Rule 53.03, and his opinion evidence was admitted for the truth of its contents. This was because he formed his opinions relevant to the matters at issue while participating in the events as part of the ordinary exercise of his expertise. Accordingly, rather than being a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place, the treating physician formed his opinion based on direct knowledge of the underlying facts. He was therefore a participant witness. See *Westerhof v. Gee Estate*, *supra*, at para. 70.

[30] The case law informs me that I must first determine if the participant expert's opinion falls within the scope of what is allowed. Specifically, whether their opinion evidence is based upon their observation of or participation in the events at issue; and if they formed that opinion as "part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events." Then, looking at the court's gatekeeping function, the court may exclude evidence as inadmissible if it does not meet the criteria applicable to all expert evidence (Mohan factors):

- i. The evidence is relevant to some issue in the case;
- ii. The evidence is necessary to assist the trier of fact;
- iii. The evidence does not contravene an exclusionary rule; and,
- iv. The witness is a properly qualified expert;
 - i. Impartial,
 - ii. Independent and
 - iii. Unbiased. See *R. v. Mohan*, 1994 SCC 80 (S.C.C.); *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23; and *R. v. Abbey*, 2017 ONCA 640 at para 48.

[31] The party seeking to tender the expert evidence has the evidential and legal burden to satisfy these criteria on a balance of probabilities. See *R. c. J. (J.)*, 2000 SCC 51 (S.C.C.) at para. 50.

[32] The Supreme Court of Canada has recognized that being properly qualified as an expert witness includes being willing and able to fulfil one's duty to the court, which includes a duty of impartiality. The court stated:

Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence. See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 CarswellNS 313, 2015 CarswellNS 314, 2015 SCC 23 (S.C.C.) at paras. 2 and 53.

- [33] The court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, opined on long-standing concerns regarding expert witnesses:

There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, “[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them”: *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358 (Eng. Rolls Ct.), at p. 374. See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, *supra*, at para. 11.

- [34] The court went on to conclude in *White Burgess Langille Inman v. Abbott and Haliburton Co.*:

Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J. (J.-L.)*: “The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility” (para. 28). See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, *supra*, at para. 45.

Application to this matter

- [35] Unless mentioned herein, the evidence proffered by the experts in this Motion to Change meet the requirements outlined above, and thus their evidence is properly admissible.

- [36] Dr. Garnham, the Wife's psychiatrist, provided letters under the guise of a participant expert and litigation expert. The *Family Law Rules* provide distinct definitions for participant experts and litigation experts, the latter of which is required to provide an Acknowledgment of Expert's Duty. This form requires the signatory to acknowledge that their opinion evidence is "fair, objective and non-partisan... and is related to only to matters which are within my area of expertise" and that the duty to the court prevails over any obligation to the party.
- [37] The most recent evidence from Dr. Garnham, were her letters ("reports") dated February 12, 2024, March 12, 2024, and August 4, 2024. In the first letter, Dr. Garnham indicated that she was "providing this letter on behalf of [the Wife] regarding her request for a retroactive increase in spousal support." ... "I have been asked to comment specifically on the reason for her 'delay' in asking for increased spousal support retroactively." ... She opines that "[t]herefore, my medical opinion is that it is not at all surprising that [the Wife] has not brought this issue forward sooner. I have been [the Wife's] psychiatrist for many years and I have witnessed the psychological damage that has occurred whenever she must deal with her ex-husband." She also provided an addendum to the report of February 12, 2024, on March 12, 2024, whereby she identified the Wife's PTSD as being a direct result of the Husband's "physical, psychological and verbal abuse throughout their marriage."
- [38] In Dr. Garnham's letter dated April 13, 2023, [B663 in Case Center], she refused to provide the medical file upon which she based her opinion. Rule 20.2(14) *FLR* states that the participant expert is to serve a copy of any documents supporting the opinion evidence the participant expert plans to provide. In that same letter, Dr. Garnham stated: "[o]ther than Ativan, she is unable to tolerate any traditional western pharmaceuticals due to severe and, at times, life-threatening side-effects. This has made it very difficult to treat her PTSD and Depression/Anxiety as effectively as anti-depressants could." However, at questioning, the Wife was unable to give any evidence as to any "life-threatening side effects" which undermined this opinion. Additionally, the medical evidence provided does not support the conclusion that the Wife has Sjogren's Syndrome. Further, in her report of August 4, 2024, Dr. Garnham was asked to comment about the Husband's affidavit and opined that the Wife "has not fabricated nor attempted to deceive" about her diagnosis of Sjogren's Syndrome.
- [39] Dr. Garnham is the Wife's psychiatrist, yet I find her opinion evidence went beyond the scope of her expertise. She refused to provide her medical files which form the basis for the opinion, and instead provided a two-page letter. Further, I find that much of her evidence did not meet her duty of impartiality nor was it unbiased. Thus, any evidence that Dr. Garnham provided that went beyond the scope of her expertise as a psychiatrist is afforded no weight.

Financial Experts reports

- [40] Both parties sought to rely on their respective experts' financial reports. The Husband provided a report from Jamie Jocsak ("Jocsak report") whereas the Wife provided a report from Baker Tilly ("Baker Tilly report"). The parties each argue frailties regarding the

other's reports. Both reports however comply with the *FLR*, and I find them to be properly in evidence.

Jocsak reports

- [41] The Jocsak report, drafted by Jamie Jocsak, an Actuary (F.S.A. / F.C.I.A.), dated June 22, 2023, was commissioned to determine the difference between the Husband's and Wife's expected retirement income, based on all assets currently available to them. The calculations in the report were intended to be used to assist in income determination for the purpose of determining post-retirement spousal support payable, if any.
- [42] The Jocsak report makes the following assumptions:
- a. Assuming that the Husband and Wife will realize monthly income from their registered retirement assets, spread over their expected lifetime, which increases in accordance with the assumed annual increase in inflation.
 - b. CPP/QPP pension is roughly estimated;
 - c. OAS is equal to the current OAS maximum pension from age 65.
 - d. Assuming that the Husband will realize monthly lifetime dividend income from the investments in corporation (i.e., including assumed interest income and principal withdrawals), which increases in accordance with the assumed annual increase in inflation.
 - e. Assuming that the Husband and Wife will realize monthly income from their non-registered assets, including home/rental equity, (i.e., including assumed interest income and principal withdrawals), spread over their expected lifetime, which increases in accordance with the assumed annual increase in inflation.
- [43] The report relies on the parties' respective financial statements, which included their total RRSP values' bank account values; total cash / investments for the Husband's professional corporation; total non-registered investment value for the Wife; total TFSA value and total home/rental equity (market value less mortgage). However, for the Husband, the report used "[e]qual to 50% of the account balance, account joint with the Husband's current spouse, and equal to 50% of the equity in [the home in] Cantley and [the rental property in] Ottawa, equity split with the Husband's current spouse (joint owner of both properties)."
- [44] The report determined that the total after tax income in retirement for the Husband will be \$94,822; for the Wife: \$80,621, with a difference of \$14,201. The Equivalent total pre-tax (gross) income in retirement for the Husband will be \$134,252; for the Wife: \$107,964; with a difference of \$26,288.
- [45] An additional report was dated June 25, 2024, addressing the Wife's medical expenses, charitable donations and tax rates used.

- [46] Regarding the Wife's medical expenses, the report provided that if the Wife claimed medical expenses of approximately \$36,000 per year, based on the analysis in the June 2023 Actuarial Report, she will not pay any income tax (i.e., her net income will increase by \$6,099 per year from the amount indicated in the June 2023 Actuarial Report, her projected income tax).
- [47] Based on the Wife's charitable donations from 2010 to 2022, accumulating these amounts with interest based on the average annual interest rates on personal fixed terms deposits results in a cumulative value of \$266,921.23 with interest as of July 1, 2023. Based on the same assumptions and methodology detailed in the June 2023 Actuarial Report, these funds are projected to have been sufficient to provide the Wife with an annual after-tax income of \$12,000 per year in 2023 dollars for her lifetime which increases by the assumed future annual increase in CPI [consumer price index] each year.
- [48] Finally, while the initial report applied the tax rates for an Ontario resident to the Husband, he resides in Quebec. Applying tax rates for a Quebec resident to the Husband's projected retirement income, based on the analysis in the June 2023 Actuarial Report, the Husband will pay additional income tax of \$3,682 per year (i.e., his net income will decrease by \$3,682 per year from the amount indicated in the June 2023 Actuarial Report, his projected additional income tax payable as a Quebec resident).

Baker Tilly reports

- [49] The Baker Tilly report, who are Chartered Professional Accountants, was commissioned with a view of calculating the income available to the Husband for each of the 2012 to 2022 taxation years, for the purpose of establishing support payments. For this report, they defined "income available for support purposes" as the income available to the Husband, during the time in question, that can reasonably be expected to continue into the foreseeable future. The report relied on sections 16 to 19 of the *Child Support Guidelines* in calculating the income available to the Husband.
- [50] Amongst the considerations detailed in the report were the following:
- a. The Husband's employment income and dividend income from his professional corporation;
 - b. He earned professional income from an unincorporated medical practice in 2016, 2017, 2020, and 2021;
 - c. He had 100% ownership of a rental property located [in] Ottawa. All years with the exception of 2017, 2020, and 2021 the CCA claim on the property reduced net rental income to \$Nil;
 - d. He earned one-time Interest income in 2019 due to an adjustment in his 2019 notice of reassessment;

- e. He withdrew an RRSP overpayment in 2013 and filed a T3012A election to receive a refund of undeducted RRSP contribution;
- f. He received other income from self-employment via a T4A in 2013 and 2014;
- g. He elected to file for a split pension amount in 2022; and
- h. His corporation provided him with compensation for use of a vehicle and cell phone.

[51] The report considered the professional corporations balance sheets and income statements. The financial statements showed that the professional corporation earned between \$450,000 and \$550,000 in revenues per year, with one exceptional year in 2014 where it earned \$640,000 in revenues; it carried an investment portfolio on its balance sheet and earned a small amount of income related to portfolio investments each year under review; salaries comprise the majority of expenses each year under review, averaging 33-40% of revenues from 2021-2016, and jumping to 63-78% of revenues in subsequent years; dividends were declared each year under review, and capital dividends were declared some of the years under review; and the corporation leased vehicles which the Husband also used for personal purposes.

[52] It reviewed copies of two Experts Reports (the “Pittman Reports”) from the original trial, referencing 2007 to 2011 years and made adjustments in line with s.16 of the *Child Support Guidelines* for expenses such as meals and home office expenses. It also made adjustments from the 2012 to 2022 calendar years in conformity with Scheduled III of the *Guidelines*.

[53] It considered the Husband’s pattern of income pursuant to s.17 of the *Guidelines*, as well as the income he is expected to earn in the future with the following adjustments:

- a. They deducted the refund of undeducted RRSP contributions as this is not earned income and it is a non-recurring item;
- b. Dividends from owner-managed businesses are, by their nature, distributions of earned surplus. For the purpose of determining income for support purposes, the income available to the shareholder is recognized when the income is earned by the corporation. Recognizing a dividend distributed from corporate surplus would essentially recognize the earned income of the corporation a second time. Accordingly, [they] have deducted all dividends received by [the Husband] between 2012 and 2022 from the [professional corporation] since [they] are attributing to [the Husband] all of the pretax corporate income available from the [professional corporation] during these years. [They] understand that [the Husband] is not the only shareholder of the [professional corporation], but as he holds a majority position and 100% of the voting shares of the [professional corporation] he has *de facto* control over dividend declarations; and

- c. It was recognized that the Husband received capital dividends in addition to taxable dividends. There are not reflected since these capital dividends would be excluded for the same reasons that taxable dividends are excluded.

[54] There was a review of the pre-tax corporate income as per s.18 of the *Guidelines* and what is available for distribution from the professional corporation from 2012 to 2022.

[55] Thereafter, consideration of imputation of income pursuant to s.19 of the *Guidelines*. Some amounts were imputed to the Husband to include for instance some of the costs for meals and home office.

[56] The report concluded that the Husband had the following income available to him:

2012: \$ 431,900

2013: \$ 483,900

2014: \$ 596,100

2015: \$ 515,700

2016: \$ 539,000

2017: \$ 535,300

2018: \$ 469,500

2019: \$ 434,800

2020: \$ 493,400

2021: \$ 440,900

2022: \$ 410,300

[57] The August 14, 2024, updated report of from Baker Tilly provided for the Husband's 2023 year and concluded that he had \$ 425,900 available income. The assumptions and methodology include similar considerations as above, as well as the pension split for 2023.

[58] I note that the evidence does not support a finding that the Husband has 100% ownership of the rental property located in Ottawa.

The Wife's Argument and Health

[59] The Wife was born September 28, 1961. When this Motion to Change was argued, the Wife was 62 years old, turning 63 in late September 2024. The Husband was born December 19, 1960. At the hearing, the Husband was 63 years old, turning 64 in December 2024.

- [60] In her Motion to Change dated August 26, 2022, the Wife sought high-end spousal support retroactive to January 1, 2014. The basis for this change was her deteriorating health and her continued inability to work. At the hearing, she submitted it would be most appropriate to receive a 50/50 NDI split due to the cost of her medical expenses.
- [61] In her draft order at the hearing, she requested annual disclosure “deemed necessary by a valuator to determine income for spousal support purposes.” She also sought a finding that the Husband engaged in blameworthy conduct by refusing to provide financial disclosure from 2013 onward, and a finding that the Husband’s income significantly and materially increased from 2013 to 2022 and fixing spousal support arrears at \$292,356.00.
- [62] Regarding her deteriorating health, in her Motion to Change, she stated:
- “... I continue to be unable to work. My chronic fatigue is worse, variation day to day and/or hour to hour; weekly IV supplementation, often 2 pre/post out-of-town trips; vicious debilitating cycle between complex carbohydrate intolerance/malabsorption/leaky gut syndrome causing severe abdominal bloating/chronic rectal issue post-anus scarring in 2012 causing difficulty opening to eliminate stools and back ligamentous instability - severe bloating aggravates back and back out worsens ability to eliminate (chiro twice per week) - needing colonic hydrotherapy once per month (using over 50 gallons of water) for over 2 years to release blockages, undigested foods, inordinate amount of toxins and gas causing walls, also aggravated by need of CPAP machine for sleep apnea (2017); migraines caused by neck issue; very strict and costly medical diet which requires an inordinate amount of time to obtain, prepare and ingest; autoimmune diseases from 2 to 3 (1. Sjogren's disease, 2. gluten enteropathy, 3. Raynaud's syndrome (2019 - fingers/toes turn whitish in mildly cold weather); depression/anxiety/severe PTSD with inability to treat with traditional medications due to extreme and life-threatening allergic reactions (worse triggers: computer/cell use/writing texts), also causing need for custom formulas. I have also become more sensitive to many natural products that I need, and very low dosages and very slow increases are needed at new trials; indoor & outdoor allergies needing customized treatment; post-concussion syndrome; widespread warts; eyes drier, need 2 glasses lenses changes per year since post-PTSD medication trial (2013) and concussion (2019); orthotics needed indoor and outdoor; too risky to receive any vaccines including flu vaccine; to be able to drive to North Bay to visit son and family, I need to stay in motel overnight both ways; recent acupuncture trials with naturopatheo help both with PTSD and digestion to hopefully be able to reintroduce foods. Since February 2022, after trying everything suggested by medical people for yrs and despite exhaustion, I daily go for a slow walk for 15-20 mins just before bed (between 10:30 pm-12:00 am) to try to improve very bad cycle of not being able to physically lie down for sleep and be able to tolerate CPAP mask on before 1:00-1:30 am. All due to abdominal and ocsophegeal [sic] discomfort/pain caused by severe bloating and not able to pass gas from below; and the walking along with abdominal massage helps some air come out by mouth. It also helps calm my system down from PTSD hyperactivity and often improves my sleep quality.

-the continued deterioration in my health has resulted in higher medical and other necessary expenses to me. At the time of trial in 2013, my medical expenses were \$27,722.79. My medical expenses have gone up progressively and substantially and to August 25, 2022, they are already \$24,281.78 and project to be \$40,000 in 2022.”

- [63] In her Affidavit in support of the final motion, the Wife advanced continued inability to work, worsening chronic fatigue, regular medial appointments, etc. Since the Final Order, the Wife identified new medical issues such as sleep apnea from 2017; Raynaud’s syndrome from 2019; concussion from 2019; a second concussion in early March 2024; and Pelvic Floor Physiotherapy which started in June 2023.
- [64] It was unclear how or if these were related to the breakdown of the relationship. Other ailments were generalized without dates or pre-date the Final Order. In her list of ailments, the Wife included: “too risky to receive any vaccines including flu vaccine; to be able to drive to North Bay to visit my son and my grandchildren, I need to stay in motel overnight both ways” but did not indicate how this was relevant to the threshold test. In her more recent evidence, the Wife suggested her 2024 expenses were to be over \$45,000.00.
- [65] The Wife was allegedly surprised by the receipt of a medical note from Dr. Karsh, her family doctor, which identified that she did not meet the criteria for Sjogren’s syndrome. The Wife maintained despite same that “as far as I am aware, I think I have Sjogren syndrome among my many health challenges, but I depend on my doctors for that particular diagnosis.”
- [66] The Wife argued that the settlement resulting in the Final Order was based on the Husband earning \$425,284.00 “with weighted average and personal expenses.”
- [67] Her claim was based on a compensatory and non-compensatory support, as she had sacrificed her career, was the primary caregiver for the children and helped put the Husband through his medical training.
- [68] The Wife’s psychotherapist concurred with the 2011 report from Dr. Bakish and the 2023 report from Dr. Garnham that she suffers from PTSD, major depressive disorder and major anxiety disorder. She also suffers from post concussion symptoms.
- [69] The Wife advanced evidence regarding several incidents of abuse that pre-dated the 2013 Final Order to support her assertion that the Husband was the cause of the PTSD. Despite this, it was conceded that her childhood abuse also played in role in her diagnosis of PTSD.

Retroactive Support

- [70] The Wife recognized there was no obligation to exchange financial information. Nevertheless, she argued that she had sent to her Husband, through her counsel or accountant, her Notices of Assessment yearly and has requested same from him. The Husband had apparently refused to provide disclosure, and in 2021 accused the Wife of harassing him with the requests. The Wife submitted that disclosure was outstanding from 2011, and that inevitably the Husband’s income would have increased. She contended, “I

think it only fair that [the Husband] be ordered to pay increased spousal support as per the *Guidelines* from January 1, 2014, as he has an ability to pay for support for my needs on a retroactive basis and going forward.”

- [71] The Wife instructed the parties’ mutual accountant, Steve Ernst, on February 1, 2013, to release her Income Tax Returns and Notices of Assessment and/or reassessments to the Husband annually. These have been provided to the Husband since July 30, 2013.
- [72] On April 21, 2015, the Wife, by way of correspondence through her lawyer, requested financial disclosure from the Husband, going back to 2012. In that letter, Mr. Hamon indicated to the Husband, “[y]ou have an annual obligation to provide this information under the *Child Support Guidelines*” (Caselaw has held that there is a similar obligation for spousal support even though the obligation is not strictly rooted under statute law).” Counsel provided the Wife’s 2014 Income Tax Return. The Husband denied being able to find this letter, and at questioning was not in a position to confirm or deny receipt of same.
- [73] Other correspondences were sent by Mr. Hamon on September 29, 2015 and December 11, 2015. The Husband confirmed receipt of correspondence from December 11, 2015. The Wife argued the Husband must have received the April 2015 letter as he referenced it in other correspondence.
- [74] The evidence established that after the letter of June 30, 2017, there were no further specific requests for financial disclosure until the Wife served the Motion to Change signed August 26, 2022, issued October 13, 2022.
- [75] The Wife advanced that the Husband should be “held responsible for causing a condition that prevents [her] from working.” The Husband admitted to having slapped the Wife on three occasions and agreed it had been inappropriate. The Wife meanwhile advanced there were approximately 74 allegations of abuse and accused the Husband of being a pathological liar.
- [76] The Wife relied on a report by Dr. Garnham, dated August 4, 2024, as both a participant expert and expert, responding to the Husband’s affidavit. The Acknowledgment of Expert’s Duty was attached. Dr. Garnham indicated that the psychological damage to the Wife is not limited to PTSD symptoms and instead affected her physical health, and being called a hypochondriac is extremely detrimental to a patient with PTSD.
- [77] The Wife also attached evidence of other medical diagnoses to support her alternative medical treatment.
- [78] Ultimately, the Wife was not opposed to the Husband retiring, but advanced, based on the Jocsak report, which included his pension and other savings income, he should continue to pay support given her desperate need, at high range.
- [79] The Wife did not dispute that an income be attributed to her from her savings, but suggested this should only occur as of when she turned 65 years of age, being September 28, 2026.

This is also despite no income having been attributed to her in the Final Order and despite the Husband's admission that she was unable to work due to psychological issues.

[80] The Wife accused the Husband of being a "serial liar" and did not accept that the representation by him of the RAMQ payments as an accurate picture of his financial situation. She based this assertion on her prior involvement in the Husband's billings with RAMQ and on a release signed in about 2011 where she discovered the Husband omitted salient financial information. Further, she argued the financial information was not accurately reflective of his income as he took vacation with their children during the reporting period. This information was only articulated in the Wife's reply affidavit.

[81] The Wife also submitted that the RAMQ earnings were not the Husband's only income, as he has received revenue from other sources including those listed below, such as in 2005 and 2007.

- i. RAMQ (largest)
- ii. Locums, ex. Yellowknife, Magdalen Islands (used to go - 2nd largest)
- iii. OHIP patients into Québec
- iv. Out-of-province and/or US patients
- v. patients without med insurance
- vi. Blue Cross
- vii. Régie des Rentes du Québec
- viii. Conference speaker
- ix. Medical students/residents' supervision
- x. Overseeing COPD clinic at hosp
- xi. Study income
- xii. Honorarium from Centre de santé et de services sociaux de Gatineau
- xiii. Insurance forms
- xiv. Medical certificates
- xv. Research projects participation

[82] Unfortunately, the Husband was not afforded a right of reply to this evidence as it was raised in reply, but admitted to having spoken at 4 conferences, earning approximately \$2,000.00 per conference.

[83] A review of the 2005- and 2007-income sources provided by the Wife show income additional to RAMQ being \$11,978 (with \$4,940 from study income) and \$15,245 (with \$13,035 for study income), respectively.

[84] The Wife took issue with the Husband's argument about the charitable donations as these were religious participation expenses similar to his own. Attached to her evidence was a chart of charitable expenses incurred by the Husband from 2012 to 2022, ranging between \$7,605 in 2013 to as high as \$15,973 in 2019. She asserted that support should be based on their income rather than their personal choices, apart from her medical expenses, which were as a result of the marriage.

The Husband's Argument and Health

- [85] The Husband argued that the Wife has not demonstrated sufficient evidence of a material change in circumstances which were not foreseeable at the time the Final Order was rendered.
- [86] In his Response Motion to Change, as clarified in his Notice of Motion for the hearing, the Husband sought an order that spousal support terminate as of June 1, 2024, or another date to be determined by the court. Alternatively, the Husband sought to impute an annual income of \$98,720 to the Wife; that as of January 1, 2024, and until its ultimate termination on December 31, 2024, the Husband pay spousal support of \$1,728 per month, that he receive credit for the \$15,500 per month already paid by him, with reimbursement of his overpayment. The Husband also sought orders either terminating the requirement to maintain a life insurance policy in favour of the wife or alternatively reducing the amount and termination once support was no longer payable. His originating process sought termination as early as June 2023.
- [87] The Final Order was pursuant to the *Spousal Support Advisory Guidelines*, in a mid-range quantum. The Husband argued there were no material changes in circumstances articulated that would allow for high-range support or 50/50 NDI split. The Final Order contained neither a review clause nor a financial disclosure obligation.
- [88] He disputed the Wife's greater need for support. According to her financial statement of October 13, 2022, the Wife was able to accumulate assets and investments of \$1,528,485.00; she had minimal debts such as her mortgage of \$45,000.00; and was able to make charitable donations of \$1,700.00 per month.
- [89] Further, the Wife waited 9 years prior to bringing a Motion to Change, that she has not been placed in any financial hardship during those 9 years despite never having returned to work following separation. Her accumulation of wealth was due to the spousal support paid by the Husband. The Wife only started the proceedings for retroactive support after the Husband requested termination of support in Quebec, where he resides, which was found to be the wrong jurisdiction.
- [90] Since separation, the Wife has made no effort to return to the workplace. Her sole source of revenue has been the spousal support he has been paying. Nonetheless, he acknowledged her having some psychological diagnoses which prevent her from being able to work.
- [91] An order for retroactive support would cause the Husband financial difficulties. He argued he has a new wife and is the midst of retiring, and as such did not have the means to pay additional support to the Wife, who had no additional needs.
- [92] As part of his Response, the Husband set out the following table for the parties' respective incomes:

Year	Requesting Party's [Wife] income	Income sources	Responding Party's [Husband] income	Income sources
2019	\$191,108.66	Spousal support, dividends, interest, capital gains	\$327,262.78	Employment income, dividends
2020	\$189,735.39	Spousal support, dividends, interest, capital gains	\$340,003.90	Employment income, dividends
2021	\$203,443.58	Spousal support, dividends, interest, capital gains	\$320,084.88	Employment income, dividends

- [93] The Husband is an internal medicine specialist as well as offering consultation services for the emergency room and intensive care. He has been in the medical field for approximately 38 years. He works out of three different hospitals, principally through the CISSS de l'Outaouais. Over and above his day job, he works on-call, which necessitates him being available 24 hours, for five of the seven days.
- [94] The Husband anticipated taking his full retirement as of December 1, 2023, but this was impossible given the current Final Order. As such, he has provided notice of his pre-retirement on April 25, 2024, effective June 1, 2024. While the Husband attempted to rely on a letter provided by Dr. Moleski, the Head of Internal Medicine at the CISSS, that letter was not properly in evidence to permit it to be used as truth of its contents. Nevertheless, the Husband's move toward retirement was not contested.
- [95] The Husband conceded that his decision to retire was voluntary, but was reasonable given his age, health and reduced abilities. He advanced that he has a stressful career rendered even more difficult since the pandemic and has increased anxiety and insomnia and now sees a psychologist. He also noted that he had a complaint made against him which caused him stress and anxiety and made him doubt his competencies. He added that the field of medicine has continued to develop exponentially, and he finds it difficult to keep up. He has difficulties coping with the on-call night shifts, which are part of his practice. He worked between 55 and 58 on-call night shifts per year in the past three years.
- [96] It was articulated that his family doctor, Dr. St-Pierre, recommended that he significantly reduce his work hours. He therefore decided and advised on April 25, 2024, of his intention to retire. Prior to fully retiring, he must meet all his patients, ensure continued services for them, stop meeting new patients and stop on-call shifts. He estimated he had six to 12 months to prepare for his retirement and organize his patients. Due to this change in

schedule, his income will continue to significantly decrease, particularly as the majority of his salary is from the on-call and consultation services.

- [97] The Husband provided evidence of decreased income from his employer, the RAMQ (Régie de l'assurance maladie Québec). As noted above though, the Wife argued that during this time the husband was also on vacation and suggested that it was possible the Husband withheld billings to reflect a modified reality to support his argument.
- [98] The Husband estimated that his gross corporate income for 2024 would be between \$240,000 to \$260,000, and net corporate revenue around \$200,000. Nevertheless, he has continued to pay the ordered spousal support of \$15,500 per month, drawing down on his savings.
- [99] As for anticipated 2025 income, the Husband relied on Jocsak report. Based on this report, the Husband's projected income at retirement will be \$134,252.00 (gross) and \$94,822.00 (net), while the Wife's projected annual income at retirement will be \$107,964 (gross) and \$80,621.00 (net) without spousal support, which represents difference of only \$26,288.00 (gross) and \$14,201.00 (net) between their two retirement incomes. The Wife would not have to pay taxes given the level of her medical expenses; thus her net income would increase by \$6,099.00 per year and the Husband's net income would decrease by \$3,682.00 as he resides in Quebec. Further, if the Wife had invested her charitable donations made since 2010, she could have received an additional income of \$12,000.00 per year, which would result in a higher income than the Husband.
- [100] Based on this information, the Husband argued that the support paid by him since 2010 ought to be sufficient to permit the Wife to be financially independent upon the Husband's retirement. Moreover, he will not have the capacity to pay support upon full retirement due to his income and financial obligations.

Response to Wife's claims

- [101] The Husband took the position that the Wife has made no efforts to become financially independent since separation over 15 years ago. He has paid over \$2.1 million dollars in support since 2010. The Wife has very little debt and sufficient investments to permit her to meet her needs without support. He advanced that income ought to be imputed to the Wife based on the withdrawals she can make from her assets, as per the Jocsak report. Her expenses as listed in her then-only financial statement, dated October 22, 2022, were grossly exaggerated.
- [102] The Husband admitted that at the beginning of their relationship, he had hit the Wife on three separate occasions. The relationship greatly deteriorated in 2006, and the couple attended counselling in Missouri in an attempt to help their marriage. The Husband asserted that at no time did the Wife accuse him of being an abusive husband and no such conclusions were drawn by the psychologist. As for Dr. Graham who composed a letter dated March 12, 2024, that doctor never met the Husband, and omitted any mention of the Wife having been abused by her father. The letters tendered by the Wife to establish the

Husband as being abusive were explained by him to be attempts to reestablish a good relationship with his then Wife, and he attempted to recognize in those letters the Wife's feelings, as recommended in counselling.

- [103] The Husband relied on the transcription of an audio recording from 2003 which was put to the Wife in questioning where the undertaking [Undertaking 16, Exhibit 15] was not responded to by the Wife. In that recording, the Wife spoke very positively of the relationship with her Husband, that the knot in her stomach was gone, that she was safe and cherished, that he was gentle, and her opinions were sought out before anyone else's. I note that this particular undertaking was not set out in the list of undertakings as uploaded to Case Center.
- [104] The Husband argued that based on questioning, the Wife has been self-diagnosing health problems and incurred significant expenses for supplements and naturopathic treatment which were not prescribed or recommended by medical doctors. For instance, in 2022, about \$24,000 of the expenses were incurred for non-psychiatric supplements, naturopathic treatments and other treatments.
- [105] Additionally, the Wife claimed to suffer from several illnesses, including Sjogren's Syndrome and having had a cerebral concussion in 2019. However, she was unable to provide proof of these diagnoses. She stated that she suffers from life-threatening allergies but was unable to name them or provide proof as to any instance where she has had a life-threatening allergic reaction. The Wife takes several supplements and participates in several treatments that have been recommended by a naturopath and not prescribed by a physician, some of which were not approved by the Wife's doctors. The Husband provided evidence that her doctor had advised against continued naturopathic treatment as some could be harmful to her.
- [106] As an alternate argument, the Husband argued that income of \$98, 720 ought to be imputed to the Wife, and when using the mid-point of the SSAG's and the Husband's pre-retirement income of \$200,000, support for 2024 should be \$1,728 per month, and it should terminate December 31, 2024.

Comparison of the Parties Financial Circumstances

- [107] The Wife submitted that the Husband's new wife ought to have provided full financial disclosure to get an accurate view of the couple's means. However, as set out in *Angulo v. Angulo*, 2019 ONSC 1456 at paragraph 57, a former spouse is not entitled to the "full financial picture" of a spouse's new partner by right. Such disclosure would be extensive and intrusive. As Kristjanson J. stated in *Politis v. Politis*, 2018 ONSC 323 (Ont. S.C.J.) at para. 17:

Compelling the production of personal income, asset and other financial information of new life partners is highly invasive of personal privacy and generally of minimal relevance. The privacy interests of third party new partners must be

carefully balanced against the interests of the parties to the family law proceeding, and any production order carefully scrutinized.

- [108] In consideration of the parties' incomes, both sought imputation for the other. Section 19(e) of the *Child Support Guidelines* permits the imputation of income to a spouse where "the spouse's property is not reasonably utilized to generate income." It has been held that the method of calculating a spouse's income pursuant to the *Guidelines* can be used as an aid in calculating income for the purpose of determining spousal support: *Rilli v. Rilli*, 2006 CarswellOnt 6335 at para. 28.
- [109] A review of the Wife's financial statement dated July 25, 2024 [B346] shows she has been unemployed since 2009. Her sole source of income is spousal support of \$15,500.00 per month, or \$186,000.00 annually. Listed in her expenses are: \$20,400.00 annually for charity; \$30,000.00 for RRSP purchases; and \$45,000.00 for health-related expenses inclusive of dental and eye care. Her net worth is \$1,574,592.09, including her home which she estimates to be worth \$575,000.00, mortgage free; \$948,537 of investments or RRSP's; and \$41,989 in cash or bank accounts. The Wife's Financial Statement of October 13, 2022 showed her net worth to be \$1,475,551.36.
- [110] The Wife submitted that based on the Baker Tilly report, a total of \$317,640 of income ought to be imputed from 2012 to 2022 to the Husband, based on "unreasonably deducted expenses" in those 10 years. According to her Divorcemate calculation, she argued there has been an underpayment of mid-range spousal support of \$295,308 from 2012 to 2023.
- [111] The Wife argued that the Husband lives with his new wife in a home he values at \$960,600.00 and an income property worth \$758,000, totalling \$1,718,600, or \$859,300 to the Husband. The Husband placed his income property into the joint names of he and his wife for one dollar on October 5, 2010, for tax planning purposes. Nevertheless, despite it being jointly held, the Husband claims 100% of the revenues or expenses. The mortgage and lines of credit result in a net equity of approximately \$1,139,715, or \$569,857.50 for the Husband. She advanced that rental income property revenue ought to be adjusted as per her chart [B279], which included adjustments for capital cost allowance; insurance, interest, etc. The adjustments take the net revenue of \$6,261.34 to either \$72,942.40 or in her submission of "bare bones" adjustments, \$31,278.59.
- [112] Based on the Husband's financial statement dated July 25, 2024, he estimated his net income from his professional corporation to \$200,000.00, and less in 2025 when he would be fully retired. He estimated his total income to be \$206,261.40 for 2024 from all income sources. He has \$614,000 of assets, of which \$573,000 are RRSP's. The Husband's net worth is \$1,182,799.27.
- [113] The Husband also contributes toward charity, ranging post-separation from \$11,255 in 2015 to \$13,983 in 2016, and \$17,362 in 2012.

Legal Framework

- [114] This is a conventional case whereby the payor wants to retire and terminate spousal support, and the recipient wants spousal support to continue. The following are considerations the court must apply.
- [115] Section 17(1) of the *Divorce Act* provides that a court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively, a support order or any provision of one, on application by either or both former spouses.
- [116] Before a spousal support order can be varied, s.17(4.1) of the *Divorce Act* requires that: “the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.”
- [117] The Supreme Court of Canada established the analysis to be applied by the court in considering a variation application in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), at p. 688, as follows:
- The approach which a court should take is to determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances.
- In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances... [Also see *Angulo v. Angulo*, 2019 ONSC 1456 at para. 91.]
- [118] The Supreme Court of Canada articulated the fundamental principles respecting entitlement of spousal support in the cases of *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. There are three conceptual bases for entitlement to spousal support. First, a spousal support obligation may arise on a compensatory basis, in recognition that upon marriage breakdown, there should be an equitable distribution between the parties of the economic consequences of the marriage. In other words, spouses are entitled to be compensated for the contributions which they made to the marriage and for economic losses which they experienced as a result of the marriage: See *Moge v. Moge*, supra, at paras. 68-70; also see *K. (V.) v. S. (T.)* 2011 ONSC 4305, at para. 245.
- [119] Entitlement can also arise in appropriate circumstances on a contractual or consensual basis, as a result of express or implied agreements between spouses that purport to either create or negate a spousal support obligation. (See *Bracklow v. Bracklow*, supra, at para. 38.) Finally, entitlement may exist on a non-compensatory basis, as a result of the needs of a spouse. This ground for spousal support establishes that a spouse may be obliged to pay support based on the other spouse's economic need, even if that need does not arise as a result of the roles adopted during the marriage. This basis for spousal support is founded on the view that "marriage is a relationship involving mutual obligations and

interdependencies that may be difficult to unravel when the marriage breaks down.”: *K. (V.) v. S. (T.)* 2011 ONSC 4305, at para. 246.

[120] While the Supreme Court of Canada delineated several fundamental principles and guidelines respecting the issue of spousal support in *Moge v. Moge* and *Bracklow v. Bracklow*, it also emphasized in *Bracklow* that the determination of spousal support claims ultimately remains a highly discretionary and individualized undertaking by the trial judge, who must take into consideration the various factors and objectives set out in the *Divorce Act* and the particular circumstances of each case: *K. (V.) v. S. (T.)* 2011 ONSC 4305, at para. 247.

[121] In *St-Jean v. Fridgen*, Trousdale J. held that a wide variety of factors are considered to determine whether and when a support payor may reduce or terminate support upon retirement:

Whether a support payor spouse may seek a reduction or termination of spousal support upon retirement depends on an examination of the individual facts and circumstances of each case which may include:

- (a) The age of each party at the date of separation and at the current date;
- (b) The length of the marriage;
- (c) Whether there were children born of the marriage;
- (d) The role which each party played in the marriage;
- (e) The financial circumstances of each party at the date of separation and at the current date including income, expenses, assets and debts;
- (f) Whether either party has re-partnered;
- (g) The medical situation of each party if relevant, supported by medical evidence;
- (h) Whether there has been a material change in circumstances of either party;
- (i) Whether the spousal support was needs-based support or compensatory support or contractual support or some combination thereof;
- (j) The period of time subsequent to separation and/or the order that the support payor spouse has paid spousal support;
- (k) What the intention of the parties was at the date of the order and/or the date of the separation agreement, if ascertainable from the order and/or separation agreement;

- (l) Whether the order and/or separation agreement dealt with the issue of retirement or with the issue of age of retirement;
- (m) The reasons for retirement including whether the retirement was voluntary or was beyond the control of the support payor spouse;
- (n) Whether either party has any economic advantages or disadvantages arising from the marriage or its breakdown;
- (o) Whether there are any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (p) Whether there is any economic hardship of the former spouses arising from the breakdown of the marriage;
- (q) Whether each spouse is or may become economically self-sufficient within a reasonable period of time;
- (r) What, if any, is the range of spousal support provided for pursuant to the Spousal Support Advisory Guidelines on the parties' incomes at the current time; and
- (s) Any other relevant circumstance.

In my view, there is no hard and fast rule to be applied in every case about when or at what particular age a support payor is entitled to retire and seek a reduction or termination of spousal support. An examination of the facts of each particular case is required and this examination may result in a different conclusion in different cases depending on the specific facts of each case: *St. Jean v. Fridgen*, 2017 ONSC 7680 at para. 37 and 38; also see *Fielding v. Fielding*, 2023 ONSC 1819 at para. 88.

- [122] As discussed in *Haworth v. Howarth*, the payor's substantial decrease in annual income meets the threshold for variation as the original agreement expressly contemplated a salary level far exceeding what the payor would receive in retirement. "As in *Schulstad v. Schulstad*, 2017 ONCA 95, 91 R.F.L. (7th) 84 (Ont. C.A.), while retirement may have been within the parties' contemplation at the time, the effect of that retirement was not considered in fixing the amount of support. Again, as in *Schulstad*, it would not have been possible for the parties, or the judge making the original order, to know what the respondent's financial circumstances would be at retirement some 25 years later." See *Haworth v. Haworth*, 2018 ONCA 1055 at para. 14. In that case however, the payor was 72 years old when he ultimately retired, and the court found this was not a situation where the payor took early retirement to avoid support obligations: *Haworth v. Haworth*, *supra*, at para. 12.

Material Change in Circumstances

The Wife's claim

- [123] In a nutshell, the Wife sought to retroactively adjust spousal support. The Wife argued the Husband had engaged in blameworthy conduct by refusing to disclose his financial statements from 2013 onward, which would have permitted her to make timely requests for a variation of support. She also relied on her medical issues, specifically her PTSD, to explain why she delayed in commencing the motion to vary.
- [124] The Husband argued that the Wife's Motion to Change ought to be rejected as there has not been a material change in circumstances since the Final Order. There were no provisions for review of quantum of support in the Final Order or requiring exchange of financial disclosure. Moreover, the quantum was based on a mid-range point, and there is no justification to vary it to high-range support or 50/50 NDI.
- [125] To determine if the conditions for variation exist, the court must be satisfied that there has been a material change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support. The change must be substantial, continuing and not foreseeable at the time of the original order.
- [126] Both parties agree the Final Order was made on consent prior to the conclusion of the 2013 trial and reflected mid-range support based the Wife not having any income and the Husband's 2011 income. There were no determinations made by Justice de Sousa as to whether the Final Order was based on compensatory or non-compensatory support, or both.
- [127] At trial, the Wife submitted medical evidence confirming she was unable to work. The Wife argued that the Husband's abuse was the cause of the Wife's inability to work. However, there was also an IME report which detailed reports of abuse prior to marriage by the Wife's father.
- [128] It was uncontested that the Wife had stayed at home to raise the children despite her training to be a teacher, following which she assisted the Husband with billings for his medical practice. Given her role in the relationship, the Wife argued that support was clearly compensatory.
- [129] The evidence advanced for this Motion to Change was similar to that relied upon by the Wife in 2013. She provided this court with a plethora of medical evidence to support her asserted inability to work. Some of the medical evidence was problematic in that it contained opinion evidence which was not within the scope of the treating doctor and contrary to the Acknowledgement of Expert's Duty.
- [130] Nevertheless, the Husband conceded, and I find, that the Wife continues to suffer from psychological issues and continues to be unable to work. I find that she suffers from PTSD amongst other health issues. I am not prepared to find that the Husband was the sole cause of the PTSD, nor am I persuaded it is necessary to make any findings about the Husband being a "pathological liar".

- [131] The Wife continues to have health issues which necessitate regular use of medication. The cost of the medical expenses in 2013 was approximately \$27,722.79. It was advanced at the motion that the cost for her medication, including naturopathy treatment, was estimated to be \$45,000.00 in 2024. It was also argued that the Wife's medication costs did not increase every year, but there was a significant escalation at the time the Motion to Change was commenced. A review of the annual expenses is found at A478.
- [132] The Husband disputed the cost of naturopathic treatments as being medical expenses, particularly when unsupported by her medical doctor.
- [133] There was sufficient evidence to conclude, on a balance of probabilities, that most of these expenses are accepted as legitimate medical expenses by CRA, address her medical sensitivities, and that they work for her.
- [134] The evidence did not however support a finding that the Wife has ever suffered from life-threatening allergies or life-threatening side effects. Further, on a balance, on the evidence before me, I am not persuaded that the Wife suffers from Sjogren's Syndrome.
- [135] Nevertheless, based on the significant increase of her medical expenses, I am persuaded that the Wife has met the threshold to establish there has been a material change of circumstances.

The Husband's claim

- [136] As for his own variation request, the Husband advanced that his retirement and corresponding decrease in income was a material change in circumstance.
- [137] Again, the court must be satisfied that there has been a material change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support, such change must be substantial, continuing and not foreseeable at the time of the original order.
- [138] The Wife argued that "pre-retirement" did not meet the test of being continuous as it was a temporary adjustment of income. The Husband continues to hold his medical licence and has other sources of income. She relied on *L.M.P. v. L.S.*, 2011 SCC 64 for the proposition that the change in circumstances must have a significant impact on the recipient's needs for support or payor's ability to pay. Based on his continued substantial income; rental property and his new wife's contribution to the household, the Husband's "pre-retirement" income does not materially diminish his ability to meet his spousal support obligations.
- [139] However, and at the Motion, she did not oppose the Husband's claim of a material change and articulated a desire for a proportional balanced adjustment to the spousal support based on the proper valuation of his income.
- [140] I find the Husband, at the age of 62, has given his notice of retirement and has begun winding up his practice. He is no longer seeing new patients and no longer working on-call shifts which included having to be available 24 hours per day. He was experiencing health

issues and having difficulty keeping up with medical advancements. It was uncontested that the decision to retire was voluntary.

- [141] I find, based on his personal circumstances, and the criteria set out in the relevant jurisprudence, the Husband's voluntary decision to retire was reasonable. It is evident to me that this decision was not motivated by a desire to avoid paying spousal support.
- [142] The Husband advanced that his gross corporate annual income for 2024 was estimated to be between \$240,000 to \$260,000, and net corporate income to be approximately \$200,000.00. Despite this, he has continued to pay full spousal support until ordered otherwise, and thus had relied on his savings to pay his expenses.
- [143] As required by the *Divorce Act*, I am satisfied that a material change has been established for several reasons, including the financial impact due to the Husband's retirement. Like in *Shulstad v. Shulstad*, though the Final Order did not contemplate a termination date, there was no evidence that Justice De Sousa was able to assess the impact of retirement: *Shulstad v. Shulstad*, 2017 ONCA 95, at para. 31.
- [144] This warrants a review of spousal support and the corresponding obligation to maintain a \$1 million life insurance policy.

The Husband's claim for termination of spousal support

- [145] When the Wife was 45 years old, and the Husband 46 years old, their 25-year relationship ended. The Final Order made by Justice de Sousa in 2013 provided for ongoing spousal support without reference to a termination or review date.
- [146] Having determined there has been a material change in circumstances, in accordance with s.17(7) of the *Divorce Act*, a variation order varying a spousal support order should:
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- [147] The evidence as I find it shows that the Wife forwent career opportunities to care for the parties' children. These actions favoured the Husband's career and were to the Wife's detriment. The Wife also assisted the Husband with billings prior to separation.

- [148] As a consequence of their relationship and actions taken during same, the lack of personal income from the Wife, the 25-year marriage, and the Wife's mental health and physical health ailments, I am of the view that the Wife's entitlement to spousal support is grounded in both compensatory and non-compensatory support.
- [149] I must therefore determine whether it is consistent with the objectives of spousal support, on either ground, to terminate, reduce or continue to require the Husband to pay spousal support after retirement.
- [150] Both parties agreed that the Final Order was based on mid-range spousal support calculation.
- [151] The evidence established that since the Final Order, the Husband has paid over \$2.1 million of spousal support.
- [152] The parties are now 63 and 62 years old. The Wife accepts that the Husband is permitted to retire. The Husband accepts the Wife is unable to return to work, at least due to her psychological health issues.
- [153] As noted above, both parties are seeking to impute income to the other and provided experts reports to support their respective positions.
- [154] The Supreme Court of Canada in *Boston v. Boston* articulated that under a compensatory support order, the recipient has an obligation to use the property equalized between the parties in an income-producing way. Said otherwise, the recipient spousal must use the assets received on equalization to create a "pension" to provide for her future support: *Boston v. Boston*, 2001 SCC 43 at para. 54. The court went on to state:

This requirement is based on the principle that, as far as it is reasonable, the payee spouse should attempt to generate economic self-sufficiency. Self-sufficiency is only one factor of many that is weighed. It is obvious that in most cases of long-term marriage, the goal of self-sufficiency is decidedly difficult to attain, particularly for spouses who remained at home during the marriage. Self-sufficiency will often not be practicable largely due to the residual effects of being outside the labour market for a protracted period of time. In addition, there are factors to consider such as age, education and parenting responsibilities. Consequently, it is often unreasonable to expect the payee [recipient] spouse to earn an income from employment after separation or divorce.

However, where the payee spouse receives assets on equalization in exchange for a part of her former spouse's pension entitlement, she must use those assets in a reasonable attempt to generate income at least by the time the pension starts to pay out.

...

The obligation of the payee spouse to generate investment income from the assets that she received on equalization is not an onerous one. It is not predicated upon insensitive standards on how the payee spouse should have managed her finances from the point of separation. Nor does it require investment-savvy decisions, premised upon an extensive knowledge of the marketplace. The obligation on the payee spouse to generate income from her assets would be satisfied by investing in a capital depleting income fund which would provide a regular annual income.

Boston v. Boston, 2001 SCC 43 at paras. 55, 56 and 58

- [155] In *Campbell v. Vaughan*, the New Brunswick Court of Appeal upheld the motion judges' decision regarding an imputation of income to the spouse in recognition of income that could have been earned on her investments: "[The Wife] cannot sit on assets worth one-half million dollars and not have them generate revenue. Although it is unlikely that she will be employed given that she was out of the labour force for a long time, she still has an obligation to attempt to generate economic self-sufficiency. By not using these resources to produce some income, she is not reasonably utilizing her property to generate income contrary to paragraph 19(1)(e) of the *Federal Child Support Guidelines*, SOR/97-175.": *Campbell v. Vaughan* 2016 NBCA 9, at para. 24.
- [156] The Husband relied on *K. (V.) v. S. (T.)* 2011 ONSC 4305, at para. 254 for the proposition that the court may attribute income to a party when it is determined that the party was not reasonably using its resources or has not been able to reasonably explain the reasons for its failure.
- [157] The Wife referenced s. 12.4 of the *Spousal Support Advisory Guidelines* which addresses illness and disability, to support her claim that her unusually high medical costs can increase support payable. The SSAGs and *SSAG Revised Users Guide* discussed this notion but notes that this is less frequently applied by the courts and is "the least consistent with *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420]]. The SSAG RUG remark some courts broadening the "illness and disability" exception to be more akin to a "basic social obligation" exception given the recipient's basic needs go beyond the support formulas. However, "[the authors] believe that the sheer breadth of a basic social obligation exception would undermine the integrity and consistency of any formula or guidelines."
- [158] The Wife also cited *Fisher v. Fisher*, 2008 ONCA 11 to support her submission that this court move quantum of support from the mid-range to the high range. The Wife also cited *Boston v. Boston*, 2001 SCC 43 at para. 55 to buttress her argument that she was unable to generate economic self-sufficiency.
- [159] After reviewing the evidence and relevant jurisprudence, I find that it would be most equitable for spousal support payments to be reduced through a transition period before they terminate as the Wife's initial compensatory and needs basis for entitlement to support continue to exist despite the Husband's retirement.

- [160] In terms of her compensatory entitlement, this was a long-term traditional marriage where the Wife made significant sacrifices for the Husband's career. At the very beginning of their marriage, she worked as a teacher, but forwent that career to raise and educate their children. As the children grew older, she continued to remain at home and instead helped the Husband with his billings. The evidence established the Wife never returned to the workforce as a teacher. The Husband was the main financial provider for the family. In addition, the Wife experienced health issues which continue to prevent her from being able to secure employment.
- [161] The Wife's continuing need for support is measured against the parties' marital standard of living and the Wife's limited earning capacity. See *Schulstad v. Schulstad*, 2017 ONCA 94 at paras. 56 and 57.
- [162] However, I must also analyze the Husband's current ability to pay, which will significantly decrease once he is fully retired.
- [163] As noted in *Schulstad v. Schulstad*, at para. 60, a payor's retirement also has a particular impact on the SSAG analysis. Recognizing this impact, Rogerson and Thompson state the following in s. 19(e) of the *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice Canada, 2016):
- Eventually, as we get old enough, we all have to "live off our capital", to draw down our capital resources to pay for our current needs, especially those without pensions. RRSPs have to be converted into RRIFs (Registered Retirement Income Funds) or annuities. Businesses and farms have to be sold, Interest from investments becomes insufficient to fund daily needs.
- [164] I accept that both parties have the obligation to draw down on their respective capital resources to address their needs, and in the case of the husband, pay support. The Wife conceded this point but only after she turns 65 years old.
- [165] A review of the Jocsak Actuarial reports helps guide the court in determining the proper incomes attributable to each spouse. The report suggested the Husband's total gross income at retirement would be \$134,252 (net \$94,822) and the Wife's would be \$107,964 (net \$80,621). This was arguably as of 2025 for the Husband as he is currently winding down his practice.
- [166] The Wife disputed the results of the Jocsak report as there was no consideration of her elevated medical expenses and failed to factor in the assets or income of the Husband's new wife of 14 years. She argued the new wife's income and co-ownership of their revenue property was relevant to the calculation of his standard of living in comparison to hers. Further, the report did not factor in the repercussions of the Husband adding the new wife to title on the income property, it now being a jointly owned property. It was submitted by the Husband this was tax planning purposes, but the Husband solely deducts CCA for this rental, which the Wife advanced ought not be excluded for spousal support purposes. For the 2023 net income of the rental property, the Husband claimed \$6,261.34, where, based

on her evidence, his net rental income with the Wife's adjustments, should be \$72,952.22 [B817] and [B802]. At the very least, the Wife sought an adjustment of \$10,954 due to the Husband's erroneous interest calculation.

- [167] Despite the report having been disclosed in 2023, these concerns and the chart were only advanced in the Wife's reply affidavit, thus the Husband was not afforded an opportunity to respond.
- [168] The reality is that the Husband co-owns both his home and rental property with his new wife. The evidence shows that this happened in or around 2010 for at least one of the properties, and therefore I am not prepared to conclude it was to reduce his assets upon retirement. As such, no adjustments will be made based on this submission.
- [169] The Wife also contended in her reply that the CPP amount attributed to her did not reflect reality. She provided a statement from September 29, 2020, which estimated her future CPP benefits, indicating \$3,727.08 annually as opposed to attribution of \$8,238.00 in the report. This results in a difference of \$4,510.92.
- [170] I find it is appropriate to adjusted for inputs to the Wife's net income to remove the CPP and OAS given my findings below. I also find it appropriate to adjust for the Husband residing in Quebec (his net income will decrease by \$3,682). I note that the Wife could be entitled to CPP of \$198.78 [B826] per month as of 60 years of age. The evidence however does not show that she is currently in receipt of CPP or OAS.
- [171] Turning to the argument advanced by the Wife that the court ought to adjust the net rental income property revenue from \$6,261.34 to either \$72,942.40, or a "bare bones" adjustments of \$31,278.59. In submissions, she also articulated that the court should attribute \$25,017 to account for the rental property.
- [172] I accept that the CCA for the rental property ought to be added back into income (\$14,062.88) [A608] as per Schedule III of the *Child Support Guidelines*.
- [173] The evidence showed that in 2022, the Husband paid just over \$11,000.00 for interest and bank charges regarding the rental property expenses. In 2023, he claimed on his Income Tax Return \$22,073.42 for interest and bank charges [A608]. When questioned about the increased interest, the Husband explained the amount claimed in 2022 was his error and was lower as it did not include the interest for the mortgage and the line of credit. This error was thereafter corrected on the 2022 return. As for 2023, the figure provided was fairly accurate according to the Husband, considering the repairs and the increased cost of interest for the bank. On a balance, I accept the Husband's evidence on this point.
- [174] The remainder of the Wife's suggested adjustments were unsupported assertions without evidence, i.e., the assertion that the rent was "well below market" should be supported by a professional rental appraisal.
- [175] The RAMQ billings show that from January 1, 2024, to August 8, 2024, the Husband has received \$192,906.28. The Wife argued that a portion of this time was when the Husband

was on holidays, therefore it did not accurately reflect his annual earnings. She provided no evidence to support this assertion, which was raised in her reply affidavit. Nevertheless, I find it is reasonable that the Husband be permitted to take some holiday time during the year, and therefore am not persuaded that the chart is an inaccurate reflection of the Husband's year to date earnings.

- [176] Regarding the Wife's charitable donations, the Husband argued that had the Wife accumulated those amounts, as of July 1, 2023, the cumulative value would be \$266,921.23. The Husband provided evidence that this could give the Wife with an annual after-tax income of \$12,000.00 for her lifetime. I note the Husband made similar charitable donations. Imputation of income is discretionary. In this case, on these facts, I am not prepared to go back retrospectively to adjust the Wife's donations in order to impute income to her.
- [177] While the evidence supports a finding that the Husband has given his notice of retirement and is currently winding up his involvement with the hospitals, it did not address whether the Husband was giving up his medical licence and whether he would be providing services in any other capacity, such as speaking engagements. However, the uncontested evidence was that the Husband received a complaint which affected him and he was unable to keep up with the medical advancements. As such, I am not prepared to find that he will continue to work in any capacity after he retires. Also, due to a lack of evidentiary foundation, I cannot support the Wife's argument to impute one quarter of his current gross income, or approximately \$106,000.00 (as per her Divorcemate Calculation - B1406). Though she provided a long list of other sources of income he has had in the past, these also not sufficiently quantified to permit the court to adopt the Wife's rationale.
- [178] At its highest, the Wife's evidence regarding other sources of income included: \$8,000.00 for speaking engagements in 2023, for which he was paid \$2,000.00 each time. In 2005 he received income from additional sources of \$7,038 plus \$4,940.00 from "study income"; and in 2007 he had income from additional sources of \$2,210 plus \$13,035.00 from "study income". There was no evidence that the Husband would continue to have any "study income" in the future. Removing that possible input, at best the Wife's argument was between \$2,210 to \$7,038 additional income, plus any possible speaking income.
- [179] Again, the Husband was not provided an opportunity to comment about the additional income sources as this was in reply evidence. His Financial Statement indicated that income from all income sources would be \$206,261.40.
- [180] A review of the RAMQ billings showed a steady decline of billings from January 2024 of approximately \$52,057 to May 2024 of \$35,103, to June 2024 of \$7,414 and July 2024 of \$2,915.
- [181] A review of the Divorcemate calculations provided by counsel necessitated the parties to reattend to help determine the proper inputs as the calculations were not comparable. For instance, some calculations provide gross income from the Jocsak report, while others use net income. Some use "self-employment income (net)" when another uses "other non-

taxable income (auto gross-up)". It was important to use the same language to achieve the just result.

- [182] Having heard submissions and reviewing the evidence provided, including the Divorcemate calculations, taking into consideration the Jocsak report and the adjustments that I accept, for the purpose of determining ongoing spousal support, I find the incomes and imputations found below are appropriate in these circumstances.
- [183] Based on the evidence before me, the Husband grossed approximately \$192,906.28 from RAMQ. Recognizing that there are reasonable deductions permitted through his corporation, and following the decreasing flow of income consistent with retirement, which I accept, I find it reasonable to impute income for 2024 in the amount of \$200,000.00.
- [184] Both parties agreed that it was reasonable to use the Husband's 2023 Income Tax Return [A589] inputs to determine the proper apportionment of income. In 2023, the apportionment reflected 80% as employment income and 20% as "other than eligible" dividend income.
- [185] I also find it reasonable to use the 2023 figures for CCA and for net rental expenses.
- [186] As for "other" additional sources of income, on this evidence, I am not persuaded it is appropriate to impute an additional income.
- [187] Given the evidence was that it would take between six and twelve months to fully wind down his practice, and that he gave his notice in April 2025, based on his continued decline of billings, I accept that the Husband will have to rely on his assets as income as of 2025. As such, I will rely primarily on the Jocsak report as the primary source of income for 2025. Further, from 2025 onward, I have removed the Net Rental Income as that has been considered in the Jocsak report in determining the Husband's income. Additionally, I will continue to include the CCA as there was no evidence that the rental property was being disposed of in the near future.
- [188] I decline to include income to the Wife regarding the charitable donations. I will however impute income to her as of January 1, 2024 based on the Jocsak report, subject to my comments contained herein.
- [189] The Wife submitted that her medical expenses ought to be accounted for in Divorcemate as "tax credits" (medical expenses) and "cash flow adjustment (other cash flow amount - decrease NDI)". The Husband argued, based on the Jocsak report, that there was not actual decrease to NDI as the Wife receives the equivalent tax credits or tax deductions for this amount. I accept the Wife's argument and therefore I have used these inputs in the calculations. In these circumstances, I decline to increase the Wife's income by \$6,099.00 based on the medical expenses. Instead, I have included that expense the Divorcemate Calculations as a Tax Credit and adjustment to the NDI. I also accept for the purpose of this motion to change the estimate provided of \$45,000.00.
- [190] As such, I find that Husband's and Wife's income ought to be imputed as follows:

2024:

Husband:

- Net employment income: \$160,000.00 (\$200,000.00 x 80%); (quantified on consent of both parties as “net employment income”)
- Dividend income: \$40,000.00;
- Net Rental Income: \$6,261.00;
- CCA: \$14,062.88 [A608].

Wife:

- Net self-employment income: \$80,621.00 (quantified on consent of both parties as “net self-employment income”)
- CPP and OAS would only be claimed as of 65 years of age, when I’ve determined spousal support will terminate. As such, the quantum of net income determined in the Jocsak report necessarily are reduced by \$8,238 for CPP and \$9,292 for OAS, being a total reduction of \$16,530.
- Medical expenses of \$45,000 with equivalent adjustment to NDI.

2025:

Husband:

- Net self-employment income: \$94,822.00 based on Jocsak report. (Quantified on consent of both parties as “net self-employment income”)
- Given the Husband resides in Quebec, I am prepared to rely on the Jocsak report regarding the retirement income and allow for a reduction of his net income due to \$3,682 for additional taxes paid by him.
- Rental income is accounted for in the net income, above.
- CCA: \$14,062.88 [A608];

Wife:

- Net self-employment income: \$80,621.00
- CPP and OAS reduction of \$16,530.
- Medical expenses of \$45,000 with equivalent adjustment to NDI.

2026:

Husband:

- Net self-employment income: \$94,822.00
- Deduction of \$3,682 for additional taxes due to residing in Quebec.
- Rental income is accounted for in the net income, above.
- CCA: \$14,062.88.

Wife:

- Net self-employment income: \$80,621.00
- CPP and OAS reduction of \$16,530.
- Medical expenses of \$45,000 with equivalent adjustment to NDI.

Quantum and Duration

- [191] At the time of the Final Order, the Husband's income was approximately \$425,284. Based on his pre-retirement and projected income, his situation is now considerably different.
- [192] In 2013, the Wife was suffering from health issues which restricted her ability to be employed. This has not changed.
- [193] The Husband and Wife both submit that the Final Order reflected mid-range spousal support. While the Wife argued at the motion that the range ought to be shifted to high-range support, or 50/50 NDI split due to her compensatory entitlement and needs, I am not persuaded that would be appropriate in these circumstances. Though I accept that the cost to meet the Wife's health issues have increased, this is in part due to the treatment plan she chooses to follow. I am not persuaded that the evidence at this motion supports an adjustment of the range support from 2013.
- [194] I note that the Husband has paid approximately \$2.1 million of spousal support since separation. Currently, the parties' net worth is similar, with the Wife's being \$1,574,592.09 and the Husband's being \$1,182,799.27.
- [195] Pursuant to the *Divorce Act*, the objectives of spousal support are to recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown; apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage; relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

- [196] I am of the view that the Wife continues to be entitled to compensatory support, for a further two-year transitional period, until September 30, 2026. At that point, the Wife will be 65 years old and the Husband 66 years old, and I find that a termination as of September 2026 will have met the objectives of spousal support.

Calculation

- [197] I find it reasonable in the circumstances, considering when the Motion to Change was commenced, when the Husband gave notice of his retirement in April 2024 and that his income has experienced a significant drop as of June 2024, that the recalculation of spousal support ought to commence as of June 1, 2024.
- [198] I find it appropriate that the Husband pay mid-range spousal support in accordance with the incomes and/or inputs noted above.
- [199] Thus, for commencing June 1, 2024, based on mid-range support, the Husband is ordered to pay \$5,999.00 per month, until December 31, 2024. As the Husband has continued to pay \$15,500.00 per month based on the 2013 Final Order, for which he is commended, this results in an overpayment of \$9,501.00 per month since June 1, 2024.
- [200] For both 2025 and 2026 years, based on mid-range support, the Husband shall pay \$1,423.00 per month, commencing January 1, 2025, and terminating September 30, 2026.

The Wife's claim to retroactive adjustment of spousal support

- [201] The Wife sought an order to retroactively adjust spousal support payable by the Husband and fixing arrears at \$292,356.00. She relied on the Baker Tilly Report to support her claim.
- [202] She provided evidence that her mental health precluded her from advancing her claims until October 2022, when she commenced her Motion to Change.
- [203] The Husband contended that the Wife waited over nine years prior to bringing a retroactive review of support. She has never found herself in a precarious financial position during that time despite never having returned to work. Further, it was unreasonable to advance this claim at this time, given her admission of incurring legal fees annually since 2014 related to starting a review of support based on income tax returns, but had not taken the necessary steps to claim retroactive spousal support prior to fall of 2022.
- [204] *Colucci* established that first, the court must determine if there has been a material change in circumstances. Once that test is established, then the court must look at the date of effective notice for the requested change, failing which the court would look at the date of actual notice. Effective notice for retroactive increase requests by the recipient requires the recipient to broach the topic with the payor. The Wife's view was that effective notice occurred at the latest, in April 2015 when her lawyer sent a request for financial information to the Husband.

- [205] The Husband meanwhile submitted that a claim for retroactive support would cause him financial difficulties as he will soon be fully retired and does not have the means to make such a payment. In this regard he relied on *Kerr v. Baranow*, 2011 SCC 10, which addressed the *S. (D.B.)* factors which were equally applicable on the issue of spousal support, namely, the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse: *Kerr v. Baranow*, 2011 SCC 10, at para. 207.
- [206] However, as noted in *Kerr*, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support: *Kerr v. Baranow*, 2011 SCC 10, *ibid.* The court remarked that spousal support has a very different legal basis than child support. There is no presumptive entitlement to spousal support, a spouse is under no obligation to look after the legal interests of their former spouse; and in spousal support there is highly discretionary balancing of means and needs.
- [207] The court in *Angulo v. Angulo* noted, “the court must consider the recipient's needs, the conduct of the payor, any hardship the retroactive award may occasion on the payor, and the reason for the delay in seeking support. (*Kerr v. Baranow*, 2011 SCC 10 (S.C.C.) at para 207; *P. (S.) v. P. (R.)*, 2011 ONCA 336 (Ont. C.A.)). A consideration of these factors does not favour a retroactive spousal support award.”: See *Angulo v. Angulo*, 2019 ONSC 1456, at para. 79. In that case, the court was not convinced as to the explanation proffered on the delay in seeking past adjustments, particularly in the face of the payor having complied with his obligations to pay support for 14 years and having retired two years prior. The court found that the recipient’s needs did not justify the retroactive award as she had considerable equity in her home and could continue to earn rental income, coupled with the terms of the separation agreement alluding to the use of each party’s capital for support.
- [208] As articulated in *Riznek v. Riznek*, 2022 BCSC 2068, there are no mandatory disclosure provisions in the *SSAG*’s. In *Riznek*, the court cited *Arsenault v. Blanchard*, 2018 NBQB 14, which was a case where the payor husband sought to vary spousal support and the recipient wife sought to retroactively increase support based on the husband’s increased income since the date of the original order. The court noted there was no requirement for an annual exchange of income information. In *Arsenault*, the court held that absent such a requirement, the failure to disclose income increases was not blameworthy conduct for the purposes of the retroactive variation analysis: See *Riznek v. Riznek*, 2022 BCSC 2068, at para. 78.
- [209] The court in *Riznek* went on to find that the comments regarding spousal support from *Kerr v. Baranow* support the view that there is no free-standing obligation for ongoing and continuous financial and income disclosure in respect to spousal support issues and that failure to disclose will be one of a number of factors that will inform the analysis of ongoing and/or retroactive spousal support: *Riznek v. Riznek*, 2022 BCSC 2068, at para. 81.

- [210] Further, the court in *Riznek* distinguished *Colucci v. Colucci*, 2021 SCC 24, which was a child support case, and found that the law does not support the existence of a duty to disclose material increases to income, absent a clear term to that effect in a valid order. The absence of a clear term of annual disclosure in the final order demonstrated that the order was intended to give the parties finality and certainty with respect to spousal support: *Riznek v. Riznek*, 2022 BCSC 2068, at para. 121.
- [211] In support of her argument that the Husband engaged in blameworthy behaviour, the Wife relied on *Hevey v. Hevey*, 2021 ONCA 740 where the court found the same imperatives as set out in *Colucci* apply when dealing with issues of retroactive spousal support, namely that courts must encourage proactive financial disclosure and in no way reward those who improperly withhold, hide or misrepresent information they ought to have shared: *Hevey v. Hevey*, 2021 ONCA 740 at para. 54.
- [212] The facts in *Colucci* are distinguishable, as are those in *Hevey*. *Colucci* was a child support case where the payor father was found to be a recalcitrant payor, in arrears of approximately \$170,000.00 representing 16 years of child support, seeking a retroactive decrease of support. The law regarding the parental obligations to support their child and provide timely financial disclosure is clear. In *Hevey*, there was a misrepresentation of disclosure of arguably \$21 million leading to a waiver of equalization and support.
- [213] On the issue of delay, the Wife relied on *Legge v. Legge*, 2023 BCCA 365 wherein the court articulated that though there may be delay occasioned by a support recipient, the court should consider along with this factor the excuse proffered for the delay. In that case, it was a lack of financial resources and “her mental resources were taxed by the conflict with her spouse.” Similarly, here, the Wife articulated that her mental health precluded her from advancing her claim in a timelier fashion.

Analysis

- [214] I have already determined there has been a material change in circumstances.
- [215] The Baker Tilly reports indicated that the Husband has underestimated his income for spousal support in the amount of \$317,640.00, inclusive of the 2023 income [see B849].
- [216] While the Wife occasioned to have her Income Tax Returns and Notices of Assessment sent to the Husband as of July 2013, I am not persuaded that the Husband would have been aware that these were sent to him for him to reciprocate disclosure.
- [217] Though the Wife argued that she was unable to bring this matter back to court prior to 2022 due to her mental health, the evidence established that from 2013 to 2022, she nevertheless incurred legal fees annually, presumably in relation to support as she claimed the expense on her Income Tax Returns [A479]. She articulated: “My lawyer has been asking me to provide him with information to bring a motion to change earlier but my health has simply not allowed for me to do this.” She also provided a letter from her doctor who opined that it was reasonable for her not to pursue the claim due to her PTSD.

- [218] I accept that the Wife's date of effective notice of request for financial disclosure was April 21, 2015.
- [219] The Wife acknowledged there was no obligation in the Final Order to exchange financial disclosure.
- [220] The jurisprudence confirms there is no presumptive entitlement to spousal support, a spouse is under no obligation to look after the legal interests of their former spouse; and in determinations of spousal support there is highly discretionary balancing of means and needs. There are no mandatory disclosure provisions in the *SSAG*'s.
- [221] The court must consider the recipient's needs, the conduct of the payor, any hardship the retroactive award may occasion on the payor, and the reason for the delay in seeking support.
- [222] The Husband made all the required support payments in a timely fashion therefore I am not prepared to find him to be a recalcitrant payor. While the Wife argued the Husband engaged in blameworthy behaviour by not providing financial disclosure, on the facts of this case, I am not prepared to make such a finding. The Final Order imposed no obligation to exchange financial disclosure and it specifically restrained the parties from communicating with each other unless both parties consented to same in writing "as exchanged through [the Wife's lawyer] or his designate."
- [223] I am not persuaded it is appropriate to award retroactive spousal support. Though the Wife has serious mental and physical health ailments, she was able to seek annual legal advice with her lawyer, who repeatedly asked her to provide evidence in order to pursue the support claim. She waited until 2022, when the Husband was amid arranging his affairs to retire. The Husband has complied with his obligations to pay support for the past 11 years. The Wife's needs do not justify a retroactive award. The award would create significant hardship for the Husband.
- [224] As such, the request for retroactive spousal support is dismissed. Pursuant to this determination, I am not of the view that a finding as to the Husband's increase of income is necessary.

Life Insurance Policy

- [225] The Final Order provided that the Husband maintain a Life Insurance Policy ("LIP") of \$1 million to secure spousal support. In order to do so, he maintained three LIP's naming the Wife as irrevocable beneficiary, at a cost of \$5,529 for 2024. One of the policies decreased annually as of him turning 61 years old. He argued he was no longer in a position to maintain \$1 million worth of Life Insurance. He requested termination of this term or alternatively a reduction and eventual termination. Any reduction should reflect the continuing obligation for support.

- [226] The Wife agreed that the insurance obligation should be reduced to a reasonable amount as determined by FamilySure insurance or another mutually accepted actuary or insurance company.
- [227] The Ontario Court of Appeal in *Katz v. Katz* found that the power under the *Family Law Act* to order a spouse to obtain insurance to secure payment of support payments that are binding on the payor's estate also exists under the *Divorce Act*: *Katz v. Katz*, 2014 ONCA 606, at para. 73.
- [228] However, the court cautioned that “consideration should be given to the amount of insurance that is appropriate. It should not exceed the total amount of support likely to be payable over the duration of the support award. Moreover, the required insurance should generally be somewhat less than the total support anticipated where the court determines that the recipient will be able to invest the proceeds of an insurance payout. Further, the amount of insurance to be maintained should decline over time as the total amount of support payable over the duration of the award diminishes. The obligation to maintain insurance should end when the support obligation ceases — and provision should be made to allow the payor spouse to deal with the policy at that time. Finally, when proceeding under the *Divorce Act*, the court should first order that the support obligation is binding on the payor's estate.” *Katz v. Katz*, 2014 ONCA 606, at para. 74.
- [229] In *Hubault Virgili c. Virgili*, 2021 NBCA 7, the court found fit in a situation where there was a variation of spousal support to also reduce the amount of life insurance coverage to be maintained to secure it.
- [230] I find that it is reasonable in these circumstances to reduce the Life Insurance Policy to \$73,299.00, which is representative of spousal support obligations ordered above, terminating on September 30, 2026.

Disposition

- [231] Commencing June 1, 2024, and on the first day of each month until December 31, 2024, based on mid-range support, the Husband shall pay to the Wife \$5,999.00 per month for mid-range spousal support.
- [232] From January 1, 2025, until the termination of spousal support effective September 30, 2026, based on mid-range support, the Husband shall pay to the Wife \$1,423.00 per month.
- [233] The parties shall quantify the overpayment of spousal support made by the Husband and include the amount in the draft final order. The overpayment shall be repaid by the Wife to the Husband no later than December 6, 2025, unless there is an agreement in writing to afford her more time.
- [234] The Wife's claim to retroactive adjustment of spousal support is dismissed.
- [235] The Husband shall maintain a Life Insurance Policy to guarantee his support obligations, naming the Wife as the irrevocable beneficiary, in the amount of \$73,299.00 until October

1, 2026, at which time he may terminate that policy. The Wife shall sign any necessary documentation to terminate that irrevocable beneficiary designation upon the Husband making the final payment of spousal support.

- [236] The parties are invited to resolve the issue of costs between them. Failing resolution, costs submissions shall be sent to Desormeau J's attention, both by filing at the Ottawa courthouse and a courtesy copy being sent to my judicial assistant: CornwallJudicialAssistants@ontario.ca. The Husband has 30 days from the release of this ruling, and the Wife has 30 days thereafter. Maximum 3 pages plus bills of costs and (case name, citation, and paragraph number only for caselaw). Should no submissions be received within the timelines outlined above, the costs issue shall be deemed to having been resolved.

The Honourable Justice Hélène C. Desormeau

Released: December 6, 2024

CITATION: Starra v. Starra, 2024 ONSC 6613
COURT FILE NO.: 09-80-1
DATE: 20241206

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Starra

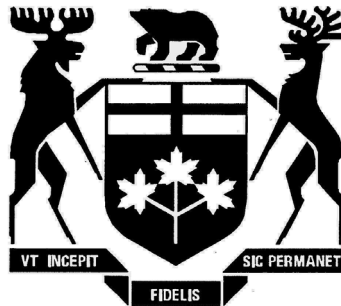
and

Starra

RULING ON MOTION TO CHANGE

The Honourable Justice Hélène C. Desormeau

Released: December 6, 2024



Ontario

ONTARIO ENERGY BOARD

FILE NO.: EB-2007-0040

VOLUME: 2

DATE: March 30, 2007

BEFORE:	Gordon Kaiser	Vice Chair and Vice Chair
	Pamela Nowina	Vice Chair
	Bill Rupert	Member

THE ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board 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.

Hearing held at 2300 Yonge Street, 25th Floor,
Toronto, Ontario, on Friday,
March 30, 2007, commencing at 9:31 a.m.

Volume 2

A P P E A R A N C E S

MICHAEL MILLAR	Board Counsel
MARTINE BAND	Board Staff
HAROLD THIESSEN	
DAVID BROWN	
PETER FRASER	
MARK RODGER	Association of Major Power
JAMES SIDLOFSKY	Consumers of Ontario (AMPCO)
ALAN MARK	Independent Energy Services
KELLY FRIEDMAN	Operator (IESO)
JOHN RATTRAY	
MICHAEL BUONAGURO	Vulnerable Energy
BILL HARPER	Consumers Association
ELISABETH DeMARCO	Association of Power
	Producers of Ontario (APPrO)
JOSEPHINA ERZETIC	Ontario Power Generation
GEORGE VEGH	Coral Energy Canada Inc.
ANGELA AVERY	TransCanada Energy

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1 Friday, March 30, 2007

2 --- Upon commencing at 9:31 a.m.

3 MR. KAISER: Please be seated. Mr. Rodger.

4 **PRELIMINARY MATTERS:**

5 MR. RODGER: Good morning, Mr. Chairman. First, to
6 update the Board as to the progress made by the parties
7 since the Board rendered its decision yesterday. We now
8 collectively have had several discussions over the
9 afternoon, evening and this morning, and I think with
10 respect to what documents are irrelevant and should be
11 removed from the record, I think essentially we're there or
12 just about there.

13 What we're proposing is that we proceed with the AMPCO
14 evidence and Dr. Murphy's testimony this morning, and then
15 over the lunch hour together put forward one consolidated
16 document of all the views of the parties as to what should
17 be removed, and then table that with the Board this
18 afternoon. And that way we're not holding up the process
19 this morning.

20 As I say, it appears like we're just about there on
21 agreement of what should be removed, sir.

22 MR. KAISER: Thank you.

23 MR. MARK: Mr. Chair, just to expand a bit, we have an
24 agreement with respect to the oral evidence you will hear
25 and what oral evidence you won't hear. Mr. Rodger has
26 indicated now that he is not calling Mr. Clark and Mr.
27 White. His sole witness will be Dr. Murphy.

28 With respect to the IESO case, we still intend to

1 call, hopefully more briefly than originally planned, our
2 three -- the panel of our three witnesses.

3 With respect to the expert witnesses, it's been agreed
4 that Dr. Fuss's report goes into evidence as tendered and
5 there's no need for Dr. Fuss to attend for examination.
6 Mr. Rodger has no cross-examination for him.

7 Mr. Falk will testify and will be subject to
8 cross-examination, and then my friends, who were also
9 calling evidence, will still be tendering their evidence.

10 So we're hopeful we should be able to get through this
11 today, in light of what the scope of the issues now are. I
12 know I've certainly tried to truncate things with my
13 witnesses. I think everybody understands there's prefiled
14 evidence, and hopefully we'll be able to proceed on that
15 basis.

16 Just with respect to Dr. Murphy, as part of these
17 arrangements that we've agreed to with respect to the
18 witnesses, there were going to be objections to Dr.
19 Murphy's testimony because of the extreme lateness of his
20 report, which only came to us on Monday evening, despite
21 the Board's previous orders with respect to filing of
22 evidence.

23 We've agreed that we won't object to Dr. Murphy being
24 called so we can get through this proceeding with a minimum
25 of fighting, but we're reserving the right, obviously, for
26 purposes of weight, to address the issue of the nature and
27 tardiness of the report when it comes to final argument.

28 MR. KAISER: All right. Thank you.

1 MR. RODGER: And perhaps I should just respond before
2 we introduce Dr. Murphy. AMPCO's position is that we did
3 advise my friend last week that we were contemplating this
4 report, and that's reflected in the correspondence.
5 AMPCO's view is that until we had complete production, we
6 really couldn't make a final decision on what evidence we
7 wouldn't produce, in any event. So the timing may not be
8 perfect, but in this case that was the situation we were
9 dealt with.

10 MR. KAISER: Thank you.

11 MR. RODGER: With that, Mr. Chairman, perhaps Dr.
12 Murphy could --

13 MS. DeMARCO: I don't want to interrupt, Mr. Rodger,
14 but just to voice APPrO's position on this point, to note
15 for the record that our expert economic witness did not
16 have the benefit of the report in providing his advice by
17 March 9th, and we also wish to reserve our right to argue
18 as to weight.

19 MR. KAISER: Thank you.

20 **AMPCO - PANEL 1**

21 **Dr. Larry Murphy; Sworn**

22 **EXAMINATION-IN-CHIEF BY MR. RODGER:**

23 MR. RODGER: Mr. Chairman, there's two documents that
24 I'll be referring to in Dr. Murphy's evidence-in-chief.
25 The first is a four-page report prepared by Dr. Murphy,
26 dated March 26th, 2007, entitled "Economic aspects of the
27 3X ramp rate decision." And we have extra copies if
28 anybody's in need of them.

1 And we have also filed Dr. Murphy's biographical
2 notes.

3 Dr. Murphy, if I could first start with your CV. I
4 understand that you have a Ph.D. in economics from McMaster
5 University and a Bachelor of Commerce from McGill, and over
6 your career you've been an associate professor of finance
7 and economics at the University of Toronto; director of
8 corporate planning, Gulf Oil Canada; a vice-president of
9 economic research and forecasting for the Conference Board
10 of Canada; and an economic advisor with the Department of
11 Finance, Government of Canada.

12 Is that correct?

13 DR. MURPHY: Yes.

14 MR. RODGER: And I also understand that over the past
15 20 years, in your consulting practice, you have focussed on
16 the electricity sector in Ontario for most of that period;
17 is that correct?

18 DR. MURPHY: That's correct.

19 MR. RODGER: Could you give us a little flavour of the
20 range of projects that you have been involved in over that
21 period?

22 DR. MURPHY: Oh, it goes back to the beginning. I was
23 involved with the market design committee, chaired the
24 retail technical panel, sat on the wholesale panel, and
25 they were the organizations that came up with the first set
26 of codes and market rules, as a matter of fact, and were
27 taken over by the OEB and by the IMO at the time that
28 established the initial sets of rules and the first sets of

1 codes.

2 So that was the work that we did with that
3 organization.

4 Then I was on the technical panel from its inception
5 until April of '05, and various working groups with the
6 IESO and the OEB over that period.

7 MR. RODGER: And you also have indicated that you
8 advise industrial, institutional and commercial companies
9 in the design and negotiation of hedge contracts and other
10 aspects of operating in the restructured Ontario
11 electricity sector. Could you just expand on that work,
12 please?

13 DR. MURPHY: Yes, industrials, commercials, hospitals
14 and some other industrial -- institutional, rather,
15 clients, we help them. They were -- this is a new market.
16 They weren't used to how to buy power in this environment.
17 So we help them with decision-making in the types of
18 contracts that they needed, how to assess prices that were
19 being offered and that sort of thing.

20 MR. RODGER: Mr. Chairman, given Dr. Murphy's
21 specialized knowledge in the Ontario electricity sector, I
22 would ask to have Dr. Murphy qualified as an expert witness
23 in the area of electricity sector economics.

24 MR. KAISER: Any objection, Mr. Mark?

25 MR. MARK: None, Mr. Chair.

26 MR. KAISER: Ms. DeMarco?

27 MS. DeMARCO: None, Mr. Chair.

28 MR. KAISER: That's fine. Proceed.

1 MR. RODGER: Dr. Murphy, could you please summarize
2 your understanding of the economic rationale that has been
3 provided by the IESO in moving to a 3X ramp rate.

4 DR. MURPHY: Well, in my understanding, the market
5 surveillance panel identified problems having to do with
6 the issue of uneconomic exports, and the feeling of the
7 IESO, as far as I can determine, is that a way of
8 attempting to resolve at least part of this is to increase
9 domestic prices that would decrease the difference between
10 HOEP and the shadow price in the exporting region, and that
11 would have the effect of discouraging exports.

12 So it seems to me that's one of the prime motivations
13 for the proposed move to 3X ramp rate.

14 MR. RODGER: And what is your view of the impact of
15 moving to 3X ramp rate on any distortions that may exist in
16 the current market?

17 DR. MURPHY: Well, I guess the first question is: Is
18 moving to 3X ramp rate an improvement in the first place?

19 I guess I need to go back to the beginning and take a
20 look at why 12X was introduced in the first place. I sat
21 on the technical panel at the beginning, before the market
22 was opened, and just before we were about to open the
23 market, we were - I say "we"; I mean the IESO - was doing
24 various tests. And during that testing period they found
25 that they were having a terrible time getting any set of
26 reasonable prices coming out of solution of the model
27 during the tests. And part of the problem, I think the
28 heart of the problem was myopic pricing, that it

1 exaggerated prices upwards and downwards, created for very
2 unstable prices. It was really unknown if the average
3 price that was being produced was an efficient price. That
4 was the real concern.

5 And so you were bringing, you were opening this model
6 into this environment, where prices were very volatile, and
7 it could undermine the credibility of the market itself.

8 So various fixes were looked at, and the one that was
9 settled at was 12 times ramp rate, which settled prices.
10 Prices still had some variability but they were reasonable
11 and it was sufficient for the market-opening.

12 And the idea was that once the market opened, if we
13 had time we'd take a closer look at what was going on
14 behind this tremendous variability in prices. And I think
15 the presumption right off the bat was, it was probably
16 related to myopic pricing. And myopic pricing forces you
17 to look at just a five-minute slice and not look at any
18 other information that may be relevant to the decision in
19 that five-minute price. So if you knew the demand was
20 going increase in subsequent periods, that was irrelevant
21 inside the five-minute determination.

22 So the linear programming problem was taking that
23 information, giving you an optimal solution slice by slice.
24 That's not what an operating system manager would do.
25 Obviously they would take a look at what was coming next
26 and come up with a rational decision overall.

27 So that seemed to be at the heart of the problem, and
28 generators were certainly complaining because they were

1 being cranked all over the system. The LP would solve a
2 solution here, a solution there. It may mean starting up
3 the generator, closing it down five minutes later, that
4 sort of thing, which was playing havoc with the generators.

5 So there was a general consensus that we would take a
6 look at a solution to the problem, and the -- one of the
7 possible solutions was the multi-interval optimization. So
8 a working group was put together.

9 I sat on that working group, and I must say that was
10 probably the most collegial working group that I've had
11 experience with at the IESO. There were others that were
12 not quite so collegial. But in any case, it worked well,
13 and they came up with a solution. Not the ideal solution;
14 some were proposed that would take a look further out, for
15 example, out over the full 12 intervals, and see if you
16 couldn't come up with a solution for an hour. But it
17 turned out that it was just far too sophisticated for the
18 machinery that we had, so a truncated version of that was
19 introduced. And it worked well.

20 And the conclusion of that was, This looks like it
21 makes sense. We should turn our attention next to how we
22 deal with prices because this is all done in the
23 constrained run. Okay? Separately done is the
24 determination of prices in the unconstrained run.

25 So that's where we left it, where I left it. It was
26 handed over to the market pricing working group, which I
27 was not a member of. Ken Snelson was there. And my
28 presumption was they were going to move along that path

1 toward an integration of MIO in the unconstrained and MIO
2 in the constrained. And I think there was fairly broad
3 support for that as I take a look at some of the background
4 material, for example, the NERA report that was done --

5 MR. RODGER: And Dr. Murphy, which NERA report are you
6 referring to, please?

7 DR. MURPHY: May 16th. It's referred to as being in
8 tab 28. And I believe that's the supplementary material
9 that was submitted by IESO, Volume 1, section 4, tab 28.

10 MR. RODGER: Thank you.

11 DR. MURPHY: Where he says:

12 "By switching to multi-interval optimization and
13 including the actual ramp rates and minimum loads
14 constraints, the optimization algorithm should
15 give an accurate indication of what energy is
16 really worth, for the simple reason that this
17 algorithm is closest to the algorithm that system
18 operators actually use."

19 Okay? So if you want to get the true value of the
20 resource, then you should line up the pricing algorithm
21 with the physical algorithm, and that is both of them using
22 MIO.

23 So that's where this thing seemed to be going. My
24 impression was that both IESO and NERA seemed to be in
25 support of that.

26 Now then, there was a study that was done by IESO to
27 see just what prices would meet that criterion. If you
28 were to use MIO, what would the prices look like? So there

1 was a study that was done internally at IESO that did a run
2 using 3X ramp rate and MIO. The result of that was
3 probably surprising, in that the prices that came out of
4 that showed that the MIO and 3X looked almost exactly like
5 the 12X ramp rate prices. So if 12 --

6 MR. RUPERT: Excuse me, Dr. Murphy, is it 3X or 1X?

7 DR. MURPHY: It says 3X on the document I had. I had
8 initially thought it was one time, but it was actually 3X.
9 That's documented.

10 MR. RUPERT: Thanks.

11 DR. MURPHY: And I should give you the reference to
12 that. It's also in the -- I'll find it later on and give
13 it to you, but it's also in the subsequent material that
14 was submitted by IESO.

15 So where are we now? IESO is the best way to do it.
16 It takes into consideration not just the five-minute
17 information but a breadth of information about future
18 periods. If you do a price run using MIO, what do you get?
19 You get a set of prices that look to be almost identical to
20 the 12X ramp rate. So one would conclude that if NERA's
21 right, if they do give you the real cost, then probably
22 you're closest to the real costs with 12X.

23 Now, what happens if you reintroduce 3X ramp rate now
24 again with myopic pricing? Obviously this has got to be a
25 distortion to the real-time prices that you've just shown.

26 If in fact you're using that to increase the HOEP for
27 the purpose of reducing exports, you're also exposing the
28 entire domestic market to those higher prices, with all of

1 the distortions that could come from that. And we're
2 talking about distortions on top of distortions, because
3 that market is nothing like a competitive market.

4 You have any number of distortions that have been
5 introduced, and we know them all. The regulated price
6 plan. Market power. We had to have a mitigation agreement
7 to try to manage that. OPA contracting prices, which
8 eliminates the need for the scarcity pricing that's
9 provided by high prices. And on and on and on. All of
10 these distortions.

11 So you're introducing another distortion on top of a
12 very distorted market, just for the purpose of getting rid
13 of uneconomic exports.

14 Well, where do these uneconomic exports come from in
15 the first place? The market surveillance panel is fairly
16 clear.

17 MR. RODGER: And which report are you referring, to
18 Dr. Murphy?

19 DR. MURPHY: I'm referring to their June 6th report.

20 MS. DeMARCO: I'm sorry, June 6, what year?

21 DR. MURPHY: June of '06, sorry.

22 MR. RODGER: And do you have a reference, Dr. Murphy?

23 DR. MURPHY: It's on page 68.

24 MR. RODGER: But of the exhibits?

25 DR. MURPHY: What the name of it is?

26 MR. RODGER: No, where the document can be found in
27 the record before the Board.

28 DR. MURPHY: Oh. I'm sorry, I don't -- it's been

1 referred to by the IESO and by myself on several occasions.
2 I don't know where it would appear in the...

3 MR. RODGER: We'll get that reference, Mr. Chairman.

4 In the effort to expunge documents, Mr. Chair, I think
5 we're having a little bit of trouble locating what is left.

6 Well, perhaps we can just proceed, Dr. Murphy, and
7 when we find the reference we'll put it on the record.

8 DR. MURPHY: Okay.

9 I'm referring to page 68, where the MSP is dealing
10 with so-called other anomalous events, and specifically
11 inefficient net exports over the New York interface. And
12 it says:

13 "Further analysis points to the uniform pricing
14 model employed in Ontario as the cause of this
15 inefficient trade."

16 And the explanation for that is that exports pay the
17 HOEP. Let's assume that there are no constraints on the
18 interface. Then if an exporter wants to export, it pays
19 the HOEP any transaction costs and sells it in New York.

20 But the real cost of producing that is the cost of
21 production in the closest region to New York - that is, the
22 Niagara region -- and the cost of producing there is given
23 by the shadow price in that region.

24 When the shadow price is higher than the HOEP, you're
25 selling at HOEP and the cost is the shadow price. And the
26 difference is the amount of the uneconomic export.

27 So that's what the MSP is pointing to as being an
28 anomalous condition. And presumably you don't get rid of

1 that problem until you get rid of the difference between
2 the two, and that's why the MSP has been pushing for
3 locational pricing.

4 If I go on further, there's another quote that says --
5 dealing with the same thing, that refers to a possible
6 involvement of 12X ramp rate, and it says, in effect, if it
7 does have the impact of lowering HOEP, then it may simply
8 lead to more exports than otherwise would be indicated, the
9 inference being a contribution towards the uneconomic
10 export problem.

11 But that's immediately followed by:

12 "Our analysis in this section focuses on one of
13 the inefficiencies that are caused by uniform
14 pricing. The uniform price regime by its very
15 nature also distorts consumption and generation
16 decisions within Ontario."

17 So we have this problem of uneconomic exports, and
18 presumably what this policy is trying to do is ameliorate
19 that problem by increasing the price of oil. Anything that
20 would increase the price of HOEP would reduce the
21 reduction, notwithstanding that it's creating distortions
22 in the rest of the market, okay?

23 So if you wanted to get rid of the entire problem, you
24 would have to have HOEP at the same level as the shadow
25 price minus transaction costs. Now the whole domestic
26 economy would be paying the New York shadow price, which
27 doesn't seem to be a sensible solution.

28 So -- and that's not their intent. They're saying

1 We're going push up the price, and that will at least
2 partially get rid of these uneconomic exports.

3 But that's kind of a peculiar solution. Here we
4 started down a track of ramp rate problems, and my
5 association with the ramp rate issue was that it had to
6 deal with things like mismatch between ramping and pricing,
7 overuse of ramping facilities, non-payment for those
8 ramping capabilities, that sort of thing. Now we're
9 solving an export problem.

10 I mean, maybe there are different ways to solve the
11 export problem that have no impact on prices in the rest of
12 the domestic economy. I don't know. We haven't looked at
13 that. It has not been identified as an issue by the market
14 price working group at all. It simply came up as a
15 byproduct of looking at this ramping issue.

16 I mean, there may be solutions that are focussed on
17 just the difference between HOEP and the shadow price. And
18 it's not the first time we've done that. I mean, in this
19 system, if I recall correctly, we have only two locational
20 prices, and they are the export prices. On both exports
21 and imports, we add ICP, if I can remember that, intertie
22 congestion price.

23 When there's congestion on the interface, you have a
24 different import and export price than you have in the rest
25 of the economy. And we have also the IOG, which is an
26 adjustment on import prices to deal with a special problem.

27 So maybe it's possible to come up with a special
28 adjustment to exports that deals with the gap between HOEP

1 and the shadow price at Niagara. I mean, if you had such a
2 solution, it wouldn't affect the rest of the prices, or at
3 least marginally, in the rest of the economy, and you
4 wouldn't have to deal with these wealth transfers.

5 MR. RODGER: So Dr. Murphy, just to be clear: In your
6 opinion, the move to a 3X ramp rate, is that an efficient
7 way to reduce this problem of uneconomic exports?

8 DR. MURPHY: No, it's not clear that 3X moves you
9 towards a better pricing. I discussed that earlier in the
10 results that came out of the simulation of using MIO plus
11 3X. It's not obvious that 3X with myopic is a better price
12 and moves you towards marginal costs.

13 It causes all kinds of potential distortions in the
14 rest of the market, and it solves only partially the
15 uneconomic export problem, if at all. The real solution
16 there gets -- you would have to get to the heart of the
17 difference between HOEP and the shadow price to really
18 solve that problem.

19 MR. RODGER: So could you summarize what other
20 economic conclusions might the IESO have come to regarding
21 the 12X ramp rate?

22 DR. MURPHY: Well, one possibility is just, since we
23 know that the 12X option leaves you close to what the IESO
24 simulation has shown has been the true price, why not just
25 leave it there until you deal with some other problems,
26 like the day-ahead market, possibly locational pricing or
27 whatever? That would at least limit the scope of this
28 problem.

1 The difficulty arises because when you increase the
2 price under 3X, you increase it to the rest of the economy,
3 and you create the potential for all kinds of distortions
4 there. I know that the initial estimate was \$200 million,
5 and then it disappeared after a bunch of assumptions. But
6 the initial impact is at least in the order of -- that
7 order of magnitude.

8 So it's not a trivial amount that you're talking
9 about. I also know that the IESO says, Well, you shouldn't
10 consider wealth transfers. So here we have a situation
11 where you're gaining 9 million from a savings in exports,
12 and it's costing you 200 million in wealth transfers to do
13 it. But by virtue of your cost benefit calculus, you
14 exclude wealth transfers between parties within the
15 economy.

16 So, presumably, you could have a \$1 billion transfer
17 and you exclude that, too. I don't think that's reasonable
18 at all to exclude wealth transfers from the decision-
19 making, and I think there are other solutions that are
20 probably far more efficient.

21 MR. RODGER: Are you also concerned about any free
22 rider issues that the 3X solution raises?

23 DR. MURPHY: Well, that's the heart of the wealth
24 transfer, isn't it, that when you increase prices, they're
25 typically related to the offer prices of particular
26 generators? But all the marginal generators get that, too,
27 under our system. So effectively they're all free riders
28 and they're part of the wealth transfer.

1 MR. RODGER: Do any particular form of generation
2 benefit from others under this arrangement, this free
3 ridership?

4 DR. MURPHY: Well, mostly based on the generators. I
5 mean, they're really not contributing anything to solving
6 the ramp rate problem, and of course they are
7 beneficiaries.

8 Now, there is that great recycling of money that
9 occurs under the regulated prices. They weren't designed
10 for this purpose, obviously, but that happens.

11 But they're not there all the time. They do
12 disappear. The OPG rebate, for example, is scheduled to
13 disappear in April of 2009. That's about 20 percent of the
14 overall protection. So it's not an insignificant amount of
15 protection that disappears by that time.

16 MR. RODGER: And, Dr. Murphy, is it your view that
17 these wealth transfers that you've talked about, when the
18 Board's considering this matter - that is, the Ontario
19 Energy Board - should those wealth transfer issues be
20 irrelevant to the Board's consideration of this matter?

21 DR. MURPHY: No, I don't see how they can be ignored.
22 They're so big that they have to be part of the calculus.

23 MR. RODGER: And then, Dr. Murphy, finally, if you
24 could just, please, summarize the opinions you want to
25 present to the Board.

26 DR. MURPHY: I have questions with the conclusions
27 that the IESO has come to, the justification for the
28 particular measure they have proposed.

1 I have questions with respect to the presumption that
2 the 3X leads to improvements in pricing as opposed to a
3 deterioration in pricing.

4 I have questions about the total ignorance of the
5 other economic impacts that it may have in other parts of
6 the economy.

7 And I think there are far more effective ways to deal
8 with the export problem that have not been explored as part
9 of this process.

10 MR. RODGER: Thank you, Dr. Murphy.

11 That concludes our evidence in-chief, Mr. Chair.

12 MR. KAISER: Thank you.

13 MR. RUPERT: Just a clarifying question, Dr. Murphy,
14 going back to an earlier question.

15 Your report, your evidence on page 4, the first full
16 paragraph, starts out and states:

17 "The IESO's analysis shows that the introduction
18 of a 1X ramp rate plus MIO would result in prices
19 that are essentially the same as under the 12X
20 approach with myopic pricing."

21 DR. MURPHY: Mm-hm.

22 MR. RUPERT: And I think you said just now that that
23 comparison -- that had the same prices was myopic plus 3X.

24 DR. MURPHY: Mm-hm.

25 MR. RUPERT: Sorry, MIO plus 3X, excuse me.

26 DR. MURPHY: Right.

27 MR. RUPERT: And your report says MIO plus 1X. I just
28 wanted to clarify. Does this mean that your report should

1 read 3X?

2 DR. MURPHY: It should read 3X. My recollection is --
3 I think there must be another report, because my
4 recollection from being on the MIO group was there was a
5 study that used 1X, but the report that was actually
6 submitted by IESO said 3X. So I should have to -- I should
7 say 3X, because that's the evidence that I have right now.

8 MR. RUPERT: And I would take it, then, that assuming
9 it is MIO plus 3X, that if one were to move -- What's your
10 view if one were to move to a MIO and 1X, then? If MIO and
11 3X is equivalent to what we have today, I think is what
12 you're saying, if you then change to MIO with 1X, would
13 that result in a higher or a lower price?

14 DR. MURPHY: I don't know, Bill. You would really
15 have to run that and see what it would do. I would think
16 there wouldn't much difference between the two, between 3X
17 and 1X. But that's just my conjecture. You would have to
18 run that case.

19 MR. KAISER: Dr. Murphy, you said several times this
20 morning that there are more effective ways to solve this
21 problem which haven't been explored. What are those?

22 DR. MURPHY: Well, I just gave one example. I would
23 like to explore ways of just getting rid of the difference
24 between HOEP and shadow price, just by a surcharge or
25 something of that sort, in the same way we've used IOG.
26 All we've done is to recognize they're different, put in a
27 fix, and that did it.

28 MR. KAISER: Is there any legal impediment to putting

1 a surcharge on?

2 DR. MURPHY: I'm not aware of any. I mean, we managed
3 to do it in the case of IOG.

4 MR. KAISER: Thank you. Mr. Mark.

5 DR. MURPHY: But that's just one possible solution
6 that comes off the top of my head. This particular group
7 was not focussed toward solving that problem so people
8 weren't raising alternatives.

9 MR. MARK: May I just have a moment, Mr. Chairman?

10 MR. KAISER: Yes.

11 MR. KAISER: While Mr. Mark is... has this particular
12 problem surfaced in any other jurisdictions or is it unique
13 to Ontario?

14 DR. MURPHY: I think it arises only because we have
15 uniform pricing. In the other jurisdictions they have
16 locational pricing so that problem doesn't arise.

17 MR. KAISER: Does that mean if we go to locational
18 pricing the problem goes away?

19 DR. MURPHY: Yeah. And the MSP has been advocating
20 that from day one.

21 MS. DeMARCO: I'm sorry, Mr. Chair. We are just
22 struggling to try and actually find report that Dr. Murphy
23 is referring to. I'm wondering if my friend could be of
24 assistance, Mr. Rodger, in directing us to the specific
25 reference so we can ensure that our experts are
26 appropriately considering that.

27 MR. KAISER: Why don't we take a 10-minute break and
28 that will allow you the freedom to consult with each other

1 and find this document. Or do you have it?

2 MR. RODGER: It's certainly referenced in the IESO's
3 prefiled materials of... I'm looking for the date. I
4 assume it's March 9th, but it's tab -- no, the tab isn't
5 marked. But behind the first tab, page 18 of 39, paragraph
6 75.

7 MR. KAISER: But I think they're looking for the
8 actual document, aren't they?

9 MR. RODGER: Yes.

10 MR. KAISER: Yes, I have that reference. Let's take a
11 10-minute break, see if we can find the document.

12 --- Recess taken at 10:07 a.m.

13 --- On resuming at 10:37 a.m.

14 MR. KAISER: Please be seated. Mr. Mark.

15 MR. MARK: Thank you, Mr. Chair.

16 **CROSS-EXAMINATION BY MR. MARK:**

17 MR. MARK: Dr. Murphy, how long have you been doing
18 work for AMPCO?

19 DR. MURPHY: About 17 years.

20 MR. MARK: And you are, I gather, a paid external
21 consultant?

22 DR. MURPHY: Mm-hm.

23 MR. MARK: Sorry, you have to answer yes or no.

24 DR. MURPHY: Yes.

25 MR. MARK: Right. And since when have you been
26 advising and consulting AMPCO with respect to the ramp rate
27 issue?

28 DR. MURPHY: On the ramp rate issue, I came into this

1 discussion only at the end of the process, at the end of
2 the work of the market working group. When they came to
3 their conclusions, then I was asked to take a look at the
4 results.

5 MR. MARK: Yes. My recollection is some time around
6 August or September you got involved; is that right?

7 DR. MURPHY: That's right, yes.

8 MR. MARK: And you had a pretty regular dialogue with
9 Dr. Rivard and the others at the IESO for some time after
10 that?

11 DR. MURPHY: We had a couple of meetings after that;
12 two meetings, I believe.

13 MR. MARK: Two meetings. And you had a rather lengthy
14 series of e-mails exchanges, did you not, with Dr. Rivard
15 about his calculations?

16 DR. MURPHY: Right.

17 MR. MARK: And that culminated in October when AMPCO,
18 your client, presumably in consultation with you, sent a
19 letter to Dr. Rivard indicating that their analysis of the
20 global adjustment and OPG rebate issue was, in fact,
21 correct?

22 DR. MURPHY: Correct.

23 MR. MARK: And throughout -- since the IESO set up its
24 process to look at the alternatives in early '06, to your
25 knowledge, has AMPCO or anyone else suggested that the IESO
26 look at this proposal you floated a few moments ago of
27 putting a surcharge on exports?

28 DR. MURPHY: No, that was not part of the discussion,

1 as far as I know.

2 MR. MARK: So as far as you know, no one involved in
3 the market power working group raised that as a feasible
4 option?

5 DR. MURPHY: Not that I know of.

6 MR. MARK: And nobody in the stakeholders' advisory
7 committee did; correct?

8 DR. MURPHY: I don't know about that.

9 MR. RODGER: Mr. Chairman, excuse me for interrupting,
10 but it seems to me that what Mr. Mark is referring to is
11 stakeholdering process, and from your decision yesterday
12 that's now irrelevant.

13 MR. MARK: Oh, please, Mr. Chair, I'm going at the
14 basis of his --

15 MR. KAISER: I don't think he's talking about the
16 actual process, it's a question of whether this particular
17 concept was raised.

18 MR. MARK: And to your knowledge, has the market
19 surveillance panel ever suggested this as an option?

20 DR. MURPHY: No.

21 MR. MARK: And have you undertaken any examination,
22 Dr. Murphy, as to the compliance of this tax suggestion
23 with NAFTA?

24 DR. MURPHY: No.

25 MR. MARK: Have you undertaken any analysis of the
26 impact of this taxation scheme on FERC and what their view
27 of it would be?

28 DR. MURPHY: No.

1 MR. MARK: And I take it from your extensive
2 involvement in the Ontario system, Dr. Murphy, you're aware
3 that the intertie arrangements with New York are an
4 essential element of the system -- reliability of our
5 system; right?

6 DR. MURPHY: Yes.

7 MR. MARK: And I take it you would be loathe to
8 interfere with those arrangements unless it was a concept
9 which was fully articulated, fully investigated and fully
10 vented?

11 DR. MURPHY: Absolutely.

12 MR. MARK: Now, on the subject of market surveillance
13 panel, you gave us some references to, I take it, what you
14 say is the gist of the market surveillance panel's
15 criticism, and that is that it is the uniform price which
16 is the problem?

17 DR. MURPHY: Mm-hm.

18 MR. MARK: Sorry, I'm going to ask you, again, Dr.
19 Murphy, to say "yes" or "no" for the record.

20 DR. MURPHY: Yes.

21 MR. MARK: Thank you. Now, you suggested, Dr. Murphy,
22 that the IESO - I took this from your evidence - was not
23 recommending that the 12X ramp rate multiplier be removed,
24 other than in the context of a move away from uniform
25 pricing. Do I have your evidence on that right?

26 DR. MURPHY: Say again, please?

27 MR. MARK: I took your evidence as suggesting that the
28 market surveillance panel was not recommending a move away

1 from 12X, except in the concept -- in the context of a move
2 away from uniform pricing altogether.

3 DR. MURPHY: No. I interpreted that as it being an
4 adjustment within the framework of uniform pricing.

5 MR. MARK: All right. Well, that's my point. I mean,
6 to continue with the market surveillance panel issue, are
7 you aware, Dr. Murphy, that in its December 2004 report,
8 the market surveillance panel said this:

9 "The analysis above demonstrates that a
10 significant portion of the difference between the
11 constrained and unconstrained real-time prices is
12 due to the 12X ramp rate assumption."

13 Do you recall that and is the market surveillance
14 panel correct?

15 DR. MURPHY: I don't recall that, no.

16 MR. MARK: Does the statement sound correct?

17 DR. MURPHY: I would have to take a look at the
18 circumstances. It could be due equally to transmission
19 constraints at that particular zone.

20 MR. MARK: Well, so you don't accept as correct the
21 market surveillance panel's conclusion, when they say:

22 "The analysis above demonstrates that a
23 significant portion of the difference between the
24 constrained and unconstrained real-time prices is
25 due to the 12X ramp rate assumption."

26 DR. MURPHY: I would have to read that to reach that
27 conclusion.

28 MR. MARK: And they say also:

1 "It follows that a significant portion of the
2 remaining difference between the HOEP and the
3 unconstrained pre-dispatch price must also be due
4 to the 12X ramp rate assumption."

5 DR. MURPHY: Under their assumption, that would be
6 true.

7 MR. MARK: Then they say:

8 "The panel is of the view that the continued
9 understatement of the HOEP leads to inefficient
10 decisions by both loads and generators in both
11 the short term and the long term. This takes the
12 form of an inefficient load profile and of under-
13 investment in both conservation and generation."

14 DR. MURPHY: Mm-hm.

15 MR. MARK: Are they correct in that statement?

16 DR. MURPHY: See, that would be true if the 12X price
17 could be proved to be wrong in the first place.

18 MR. MARK: Well --

19 MR. RODGER: Mr. Chairman, is there a copy of this
20 document that the witness could at least refer to? Is it
21 in evidence?

22 MR. MARK: We have filed a brief of excerpts from the
23 market surveillance panel, and you should have that, and it
24 was filed on March 27th.

25 MR. MILLAR: So it's the March 27th filing?

26 MS. FRIEDMAN: That was the day we sent with the
27 letter the CVs.

28 MR. MILLAR: And affidavits?

1 MS. FRIEDMAN: No, the CVs of the parties and said who
2 our panels were, and the attached excerpts of the market
3 surveillance panel reports that the parties had cited.

4 MR. MILLAR: Sorry. I have it.

5 MS. DeMARCO: Mr. Chair, if I could also be of
6 assistance here. We filed this morning a compendium of
7 documents to support everything, every reference in our
8 experts' direct evidence. It's included -- the actual
9 market surveillance panel reports and excerpts are included
10 at tab 9, tab 10, tab 11, tab 12, tab 13 of that document.

11 MR. MILLAR: Mr. Chair, I don't believe you have
12 copies of that yet, but perhaps this would be a good time
13 to circulate that.

14 MS. DeMARCO: It may well be, and it perhaps should be
15 marked as an exhibit.

16 MR. MILLAR: Yes, that is what I was going to suggest.
17 So we will call that K2.1.

18 **EXHIBIT NO. K2.1: MARKET SURVEILLANCE PANEL REPORT,**
19 **DECEMBER 2004**

20 MR. MARK: I'm glad my friends are doing so well with
21 my cross-examination.

22 MR. KAISER: Mr. Rodger, have you been able to get Ms.
23 Friedman's letter of March 27th?

24 MR. RODGER: I believe I can access the materials from
25 the compendium of documents that Ms. DeMarco just handed
26 out. Thank you, sir.

27 MR. MARK: Dr. Murphy, do you now have the page in
28 front of you?

1 DR. MURPHY: I don't think I do.

2 MR. MARK: It should be page 66.

3 DR. MURPHY: I'm on 1; 1 of 12.

4 MR. MARK: Mr. Chairman, I've got an extra copy I'm
5 happy to give to the witness.

6 MR. MILLAR: Mr. Mark, which document again are we
7 referring to, which market surveillance?

8 MR. MARK: This is the December 2004 market
9 surveillance panel report, at page 66.

10 MR. MILLAR: Thank you.

11 MR. MARK: If you're looking at the APPrO compendium
12 -- I'm not sure if people have that yet -- it is at tab 10,
13 the very last page.

14 DR. MURPHY: This is based on the notion that there's
15 an understatement of the HOEP.

16 MR. MARK: I think we all understand that there's an
17 understatement of the HOEP, and we all understand that
18 market surveillance --

19 DR. MURPHY: No, we don't understand that there's an
20 understatement of the HOEP. This is based on a premise
21 that there is.

22 MR. MARK: I take it, Dr. Murphy, that in all of its
23 reports over several years the market surveillance panel
24 has concluded that there is an understatement of HOEP and
25 it would like to see that understatement be reversed, and
26 anything that contributes to its reversal they consider to
27 be useful and efficient?

28 DR. MURPHY: I would like to see evidence that, in

1 fact, there is an understatement of the HOEP. We have any
2 number of distortions in the market that I've referred to.
3 I have seen no evidence that identifies what a competitive
4 HOEP would be and what the size of the distortion between
5 that and the HOEP that we have is.

6 MR. MARK: Would you agree with me, Dr. Murphy, that
7 it is axiomatic that the use of the 12X multiplier
8 understates the price that results from the pricing
9 algorithm relative to the price that you would get if you
10 didn't have that constraint?

11 DR. MURPHY: Correct.

12 MR. MARK: And it produces a price signal which does
13 not reflect and is lower than the price that is actually
14 paid as a result of the dispatch algorithm? The cost
15 that's actually determined --

16 DR. MURPHY: Correct.

17 MR. MARK: -- from dispatch?

18 DR. MURPHY: That's all. That does not mean that that
19 is a lower than competitive price. It just means it's
20 different, that's all.

21 MR. MARK: Well, there is a misalignment of dispatch
22 and pricing algorithm.

23 DR. MURPHY: Correct.

24 MR. MARK: So you're not prepared to accept the
25 conclusions of the market surveillance panel and others who
26 have said that that is an inefficiency which should be
27 rectified?

28 DR. MURPHY: That is correct. I would say that's one

1 among many inefficiencies.

2 MR. MARK: Is that because, Dr. Murphy, you don't
3 think that is directionally appropriate or is it because of
4 this notion you say that we don't know what other impacts
5 we may get from this, so maybe there's a risk in doing it?
6 Is that the nature of the objection?

7 DR. MURPHY: Yes.

8 MR. MARK: You agree that there's a difference. You
9 agree, all other things being equal, it would be wise to
10 reverse it. You're concerned about other impacts. Have
11 you got a study about other possible impacts?

12 DR. MURPHY: No. I can identify the major impacts,
13 but I can't tell you what the sum total of the effects of
14 those impacts are.

15 MR. MARK: Returning back to the market surveillance
16 panel report that we were talking about at page 66. Let me
17 take you to one other quote and see if you agree with this
18 one. It says at the bottom of page 66:

19 "The panel strongly recommends that actual ramp
20 rates be used to determine the HOEP. The panel
21 understands that this is being considered by the
22 IMO pricing working group but that no progress
23 has been made. The panel observes in this
24 connection that while stakeholder consultation is
25 important, no stakeholder should have an
26 effective veto over changes in market rules that
27 make the market more efficient."

28 Do you agree with what the MSP, market surveillance

1 Panel is saying about a pretty strong imperative to change
2 the ramp rate?

3 DR. MURPHY: Right.

4 MR. MARK: You don't agree with them there?

5 DR. MURPHY: No, I agree with them.

6 MR. MARK: You agree with them.

7 DR. MURPHY: Yes.

8 MR. MARK: And you talked in your evidence-in-chief
9 about some other what you call distortions. One of them,
10 if my note is correct, you said, is the issue of market
11 power.

12 DR. MURPHY: Mm-hm.

13 MR. MARK: Are you talking there about the conditions
14 that may cause market power to arise sometime or are you
15 saying that there actually is market power being improperly
16 exercised by any of the market participants?

17 DR. MURPHY: I'm saying the conditions are there, and
18 the market power surveillance group agrees with that, and
19 they have identified instances where market power has been
20 used.

21 MR. MARK: Aren't you aware, Dr. Murphy, that the
22 market surveillance panel has actually concluded that, from
23 the available evidence, it appears that there was no
24 generator who was withholding capacity?

25 DR. MURPHY: They say they haven't had -- they have
26 had discussions with entities who appear to have been using
27 market power and have resolved those issues.

28 MR. MARK: You're aware, Dr. Murphy, that this, of

1 course, is one of the fundamental issues that the market
2 surveillance panel addresses in the course of its work?

3 DR. MURPHY: Mm-hm.

4 MR. MARK: And I've handed up to you, Dr. Murphy, an
5 excerpt from the December 2003 market surveillance report,
6 and I want to direct your attention particularly to page
7 110.

8 MR. KAISER: Mr. Millar, should we give this a number?

9 MR. MILLAR: Mr. Chair, I believe it's part of the
10 prefiled evident. If you would like, we can mark it just
11 for convenience, but I'd leave that to you.

12 MR. KAISER: That would be helpful.

13 MR. MILLAR: We'll call it Exhibit K2.2.

14 **EXHIBIT NO. K2.2: MARKET SURVEILLANCE PANEL REPORT,**
15 **DECEMBER 2003**

16 MR. MARK: Mr. Chairman, it appears that I should more
17 regularly turn to my friend Ms. DeMarco and asked her where
18 to find things. In their compendium filed today at tab 9
19 you will find this excerpt.

20 In the middle of the page, Dr. Murphy, they say as
21 follows:

22 "Insofar as dispatch is concerned, we are
23 satisfied that that domestic dispatch has been
24 efficient. That is, having regard to
25 transmission and other constraints, Ontario's
26 available generating capacity is being dispatched
27 in merit order. This implies that there has been
28 no physical or economic withholding of capacity

1 by Ontario generators."

2 You understand that that is their conclusion and that
3 has never changed?

4 DR. MURPHY: Mm-hm. That's only one aspect of the
5 exercise of market power. The other is to increase prices.
6 They differentiate between the two. They don't comment on
7 that here.

8 MR. MARK: Right. They don't comment. You don't have
9 any report from them on that, do you?

10 DR. MURPHY: What I do have is their framework that's
11 been announced recently indicating that they feel that
12 their work in that area is not adequate and they want to
13 develop a framework that more carefully examines the
14 potential and the actual occurrence of both types of market
15 power, and they're looking for input from people to help
16 them set that procedure up.

17 MR. MARK: Right. And we all look forward to that.

18 In your report, Dr. Murphy, and again in your evidence
19 this morning, you refer to this concept of a wealth
20 transfer.

21 DR. MURPHY: Mm-hm.

22 MR. MARK: Is the size of a wealth transfer determined
23 by how much more consumers will be paying?

24 DR. MURPHY: Yes.

25 MR. MARK: It's whether there's an increase in their
26 bills; correct?

27 DR. MURPHY: Mm-hm.

28 MR. MARK: And I take it you understand, Dr. Murphy,

1 that the evidence from the IESO is that consumers will not
2 be paying \$225 million; they won't be paying anything close
3 to that?

4 DR. MURPHY: Yes, that's their evidence.

5 MR. MARK: Right. Now, it's got a few components in
6 it, Dr. Murphy, and maybe let's look at it.

7 DR. MURPHY: Mm-hm.

8 MR. MARK: If you look at -- just give me a moment.
9 Thank you.

10 Mr. Chairman, I'm going to introduce another group of
11 documents at the moment. Hopefully, this will make it
12 simple. I have a small compendium of four documents that I
13 was planning to use and will use in my examination-in-chief
14 of my witnesses. It has one of the documents I'm going to
15 put to Dr. Murphy now, so, with leave of the Panel, maybe
16 we can file this now and give it an exhibit number, and it
17 would make the reference to Dr. Murphy easier.

18 MR. KAISER: Thank you. What number, Mr. Millar?

19 MR. MILLAR: K2.3, and this is the IESO book of
20 materials.

21 **EXHIBIT NO. K2.3: IESO BOOK OF MATERIALS**

22 MR. MARK: And there is an index, Mr. Chairman, which
23 will give you the location of the original documents in the
24 record.

25 Sorry, Mr. Millar, what's the number?

26 MR. MILLAR: K2.3.

27 MR. MARK: And I'm going to ask you to turn up tab 4,
28 Dr. Murphy, which is the actual market rule amendment

1 proposal relevant to this proceeding.

2 DR. MURPHY: Mm-hm.

3 MR. MARK: And to turn up to page 4 of 5 --

4 DR. MURPHY: Mm-hm.

5 MR. MARK: -- which has a table on it headed, "Net
6 payments 3X ramp rate and distribution from transmission
7 rights clearing account."

8 DR. MURPHY: Right.

9 MR. MARK: And you've seen this table before, I trust?

10 DR. MURPHY: I have.

11 MR. MARK: You're familiar with it and you understand
12 what it represents?

13 DR. MURPHY: Mm-hm.

14 MR. MARK: And if we look at the first line, it says:

15 "Wholesale market price impact of change to 3X
16 multiplier."

17 You understand that to be the upward pressure put on
18 rates by this change, absent any behavioural changes or any
19 other phenomenon which would act to offset that upward
20 pressure?

21 DR. MURPHY: Mm-hm.

22 MR. MARK: And then we see it expressed in a \$/MWh
23 figure, and then we see a 50 percent figure which is
24 labelled as the "reduced impact due to arbitrage."

25 Now, Dr. Murphy, I take it you agree that there will
26 be arbitrage and there will be a reduction in inefficient
27 exports because of this change?

28 DR. MURPHY: I have two comments here.

1 First of all, you're using 2006 prices, which are
2 exceptionally low prices. Let's say we were talking about
3 2009, because this is --

4 MR. MARK: I just want you to answer my question, that
5 if I am correct that as a result of this change you will
6 get arbitrage and you will get a reduction in exports.

7 DR. MURPHY: Of some amount, yes.

8 MR. MARK: Right. And to the extent you do get a
9 reduction in exports, you understand, I take it, that that
10 will tend to reduce the HOEP?

11 DR. MURPHY: Correct.

12 MR. MARK: And you understand that this 50 percent
13 was, at the time this was prepared and was explained as
14 being, the most conservative possible outcome as the IESO
15 considered it at the time?

16 DR. MURPHY: That's what the IESO said, yes.

17 MR. MARK: So on this table, then, if we continue
18 down, you see they indicate the HOEP increase after the
19 arbitrage, and they put that as being 64 cents/MWh;
20 correct?

21 DR. MURPHY: Mm-hm.

22 MR. MARK: And then we move down. It puts it in gross
23 dollars. So they say after arbitrage, on the worst
24 possible scenario, you would have an initial price impact
25 of \$98.74 million; right?

26 DR. MURPHY: Mm-hm.

27 MR. MARK: And then we see an entry for global
28 adjustment reduces impact by 80 percent, and that reduces

1 the upward price pressure from the \$98 to \$19.75; correct?

2 DR. MURPHY: Mm-hm.

3 MR. MARK: And the 80 percent figure, by the way, is
4 the 80 percent figure that you confirmed as being accurate
5 in your October 2006 letter from AMPCO?

6 DR. MURPHY: Well, we agreed the procedure was
7 correct.

8 MR. MARK: Right. You agreed that the price impact
9 effects of the global adjustment and the rebate was 80
10 percent; correct?

11 DR. MURPHY: I believe that the NERA calculation is
12 actually closer to the truth, and that's 75 percent.

13 MR. MARK: Did you not in your October letter say to
14 Dr. Rivard, after AMPCO and you and he had a very lengthy
15 exchange, including meetings, that after that you were
16 satisfied that their analysis of the impact of the rebate
17 and the global adjustment was correct, and that number was
18 80 percent?

19 DR. MURPHY: We understood how they got to their 80
20 percent.

21 MR. MARK: Now, let me read to you from that letter,
22 Dr. Murphy. It is in the volume 1 of the IESO February
23 26th filing at tab 61. I'm supposed to tell you that's in
24 section 4. It's very close to the back of the binder, Mr.
25 Chairman.

26 MR. RUPERT: Which tab is it?

27 MR. MARK: At section 4, tab 61. Now, don't tell me
28 it's in the compendium? I promise you, Ms. DeMarco and I

1 have not spoken about documents to put to the witnesses in
2 cross.

3 MR. KAISER: You're going to owe her a good lunch, Mr.
4 Mark.

5 MR. MARK: Absolutely.

6 MR. RUPERT: Just so I'm clear --

7 MR. MARK: As long as I can send a bill to my client.

8 MR. RUPERT: This is an October 24th letter from
9 AMPCO?

10 MR. MARK: Yes. So that's in the compendium, in Ms.
11 DeMarco's compendium, at -- I'm told that it has been
12 slip-sheeted in at the very back of the book.

13 DR. MURPHY: "As much as 80 percent".

14 MR. MARK: Right. And you concluded in the third
15 paragraph from the bottom:

16 "As a result of this new information and our
17 deeper understanding of the issues, we are now
18 satisfied that the IESO's methodology of
19 calculating the net financial impacts of
20 electricity price increases is sound."

21 DR. MURPHY: Mm-hm.

22 MR. MARK: And that is the method that they use to
23 come up with the 80 percent?

24 DR. MURPHY: Mm-hm.

25 MR. MARK: And then we go down to the line of CMSC,
26 which is congestion management settlement credits, and OIG
27 savings, OIG being, I believe, intertie offer guarantee,
28 and you have a further offset of just over \$13 million;

1 correct?

2 DR. MURPHY: Mm-hm.

3 MR. MARK: And I take it you understand and agree, and
4 again this is axiomatic, that as the difference between the
5 HOEP and the shadow price decreases, there will be
6 decreases in these payments resulting in a decrease in
7 customer appeals?

8 DR. MURPHY: Correct.

9 MR. MARK: Sorry, I didn't --

10 DR. MURPHY: Correct.

11 MR. MARK: And using that analysis, then, at the end
12 of the day we get a net cost for customers, before even
13 looking at the transmission rights account distribution, of
14 4/1000ths of a cent per kilowatt hour. You understand
15 that's the result of the IESO analysis?

16 DR. MURPHY: Yes.

17 MR. MARK: Now, on that subject, Dr. Murphy, you
18 juxtapose in the penultimate paragraph of your report, on
19 page 4 -- and you did again in your evidence this morning --
20 -- put up the juxtaposition of the \$225 million wealth
21 transfer as against the 6.6 million in system efficiency
22 savings; correct?

23 DR. MURPHY: Mm-hm.

24 MR. MARK: Based upon the discussion we've had for the
25 past few moments, I take it there is no dispute that the
26 amount of \$225 million is not going to be the amount of the
27 wealth transfer. Correct?

28 DR. MURPHY: Of the actual wealth transfer; that's

1 correct.

2 MR. MARK: Right. So, when you say here, "When it
3 involves a wealth transfer of \$225 million," that's just
4 not right.

5 DR. MURPHY: It's an initial wealth transfer of that
6 amount that is mitigating.

7 MR. MARK: Is anybody actually going to pay that, Dr.
8 Murphy? Is anybody actually going to pay that?

9 DR. MURPHY: Some people will.

10 MR. MARK: Pay the 225 million?

11 DR. MURPHY: Not the total 220 million.

12 MR. MARK: Well, that's my question.

13 DR. MURPHY: Mm-hm.

14 MR. MARK: This doesn't work as if people are paying
15 the 225 and getting a cheque back. In fact, just as the
16 IESO's table shows, the bill impact using their
17 calculations is, worst-case scenario, according to them,
18 4/1000ths of a cent; correct?

19 DR. MURPHY: No, that's not the worst-case
20 calculation.

21 MR. MARK: According to them.

22 DR. MURPHY: Let me give you an alternative, okay,
23 using the same procedure.

24 MR. MARK: Sorry. Dr. Murphy. You haven't filed or
25 performed any analysis of your own on this. My question to
26 you is: You must agree with me that whatever the initial
27 upward price pressure is --

28 DR. MURPHY: Mm-hm.

1 MR. MARK: -- it will be mitigated, it will be offset,
2 and nobody is going to pay \$225 million?

3 DR. MURPHY: That's correct.

4 MR. MARK: Now, let's look at the juxtaposition of the
5 225 and the 6.6 million. Even if we accept, for the
6 purpose of the next few questions, that there is a wealth
7 transfer of at which \$225 million, I take it, Dr. Murphy,
8 that the 225 million and the 6.6 million in fact would
9 never co-exist?

10 DR. MURPHY: That's correct.

11 MR. MARK: Right. Because, if you had a wealth
12 transfer staying at the \$225 million mark, that would imply
13 there were no behavioural changes, and therefore no
14 efficiency gains; correct?

15 DR. MURPHY: That there would be no redistribution.

16 MR. MARK: Right. So, aside from any problems with
17 the \$225 million, this is a juxtaposition that will never
18 appear; it's, in fact, it's a fictitious juxtaposition,
19 isn't it?

20 DR. MURPHY: I'm sorry, the juxtaposition of what?

21 MR. MARK: The juxtaposition of a wealth transfer of
22 225 million versus a system benefit of \$6.6 million, those
23 two numbers will never exist together.

24 DR. MURPHY: No, but there will exist a wealth
25 transfer that is compared to the so-called benefit.

26 MR. MARK: But it won't be these numbers.

27 DR. MURPHY: Correct. Neither one.

28 MR. MARK: Now, Dr. Murphy, in your report you also

1 refer to... in your paper, your report, Dr. Murphy, you
2 refer to the work of NERA.

3 DR. MURPHY: Mm-hm.

4 MR. MARK: On page 3 in particular, in the second full
5 paragraph, you make this statement. You say:

6 "In a presentation to the market pricing working
7 group on the subject of ramp rate options, NERA
8 cautioned 'changes to improve one aspect of a
9 system may make the overall system worse' and
10 cited the theory of the second-best."

11 DR. MURPHY: Mm-hm.

12 MR. MARK: (Reading):

13 "This theory says that where not all of the
14 conditions for optimality in the competitive
15 model are satisfied, the belief that it is better
16 to fill some of them rather than none is false."

17 Now, the sentence that says:

18 "This theory says that where not all of the
19 conditions for optimality in the competitive
20 model are satisfied, the belief that it is better
21 to fill some of them rather than none is false."

22 Is that a correct statement of the theory of second-
23 best?

24 DR. MURPHY: It is.

25 MR. MARK: So you say that the theory says that you
26 should never make an incremental change unless it's in the
27 context of resolving every distortion or inefficiency in
28 the market.

1 DR. MURPHY: It says that you can't be sure, when you
2 are making a change, whether you're going to improve the
3 situation or worsen it.

4 MR. MARK: But that's different than what you stated
5 here, Dr. Murphy. Doesn't the theory merely say that you
6 have to be cautious because there may be circumstances
7 where there will be other impacts?

8 DR. MURPHY: Mm-hm.

9 MR. MARK: Because you do have, as most markets have,
10 various imperfections, correct?

11 DR. MURPHY: Mm-hm, mm-hm.

12 MR. MARK: It doesn't say you don't do it, it says be
13 cautious, turn your mind to see if you could identify any.
14 But if you don't and you believe there's an incremental
15 improvement with your proposal, you proceed; correct?

16 DR. MURPHY: Mm-hm. But it says that "the conditions
17 for being sure of an improvement are extremely complex."

18 MR. MARK: We should in Ontario eschew any efforts to
19 gaining any incremental improvements of an efficiency? We
20 should just stick with the status quo regardless?

21 DR. MURPHY: No, it doesn't say that.

22 MR. MARK: Well, that's what you just said, isn't it,
23 Dr. Murphy?

24 DR. MURPHY: No. No, I'm saying that if you want to
25 be sure that you've actually improved things, you have to
26 define all the other distortions and show that in fact they
27 are being improved. That's what the theory says.

28 MR. MARK: You have to define them or you have to

1 consider them?

2 DR. MURPHY: You have to define them because you have
3 to be able to show they're improved.

4 MR. MARK: All the other distortions are improved?

5 DR. MURPHY: Yes.

6 MR. MARK: So your test is that the efficiency I'm
7 proposing to solve, problem A, must be proven to solve or
8 improve problems B, C, D, E, F, and G?

9 DR. MURPHY: Correct.

10 MR. MARK: Thank you. It won't surprise you to note,
11 will it, Dr. Murphy, that NERA, in particular Dr. Falk, the
12 author of that statement, will disagree with you on that
13 definition?

14 DR. MURPHY: Not at all.

15 MR. MARK: No, it won't surprise you at all. I'm
16 wondering why you quoted him as being authoritative on
17 that.

18 Now, all of which, I think, Dr. Murphy, leads us at
19 the end of the day, as we just said, that you say,
20 regardless of whether there are identified inefficiencies
21 in the given market we have, you don't think this is worth
22 the effort.

23 DR. MURPHY: Yes, that's correct.

24 MR. MARK: At the time of market opening, the status
25 quo immediately before the change was that this system was
26 going operate with a 1X multiplier; right? Correct?

27 DR. MURPHY: Mm-hm. Yes.

28 MR. MARK: And I take it your theory, then, would have

1 dictated at that time that they should simply not change
2 that, because nobody could predict with accuracy what all
3 the impacts of that would be, given other problems in the
4 market?

5 DR. MURPHY: No. We knew we had a gross inefficiency,
6 and it was obviously better to introduce a lesser
7 inefficiency.

8 DR. MURPHY: Your definition of the rule of second
9 best doesn't apply when you don't think it should apply?

10 DR. MURPHY: It's pretty well constrained to that one
11 issue.

12 MR. MARK: That's the only exception we should have,
13 is when it went from 1X to 12X and reduce the volatility,
14 which was so important to your clients.

15 DR. MURPHY: Mm-hm. Mm-hm.

16 MR. MARK: Right. Now, let me try you with a couple
17 of other propositions, Dr. Murphy, and see what you have to
18 say. Just give me your indulgence a moment, Mr. Chair. I
19 just have to find a reference.

20 Would you agree or disagree with this statement, Dr.
21 Murphy:

22 "The spot market has a central role to play in
23 ensuring that consumption, investment and
24 dispatch decision on Ontario's new hybrid market
25 are efficient."

26 DR. MURPHY: I would say a refined spot market has a
27 role to play, as you've described.

28 MR. MARK: Well, can we agree that the spot market has

1 an important role to play even in a hybrid system?

2 DR. MURPHY: Yes.

3 MR. MARK: And what you're telling me is that there's
4 a vision of that spot market which you care for, but that's
5 the only one?

6 DR. MURPHY: Say again?

7 MR. MARK: Well, do you not agree -- do you agree or
8 disagree that improvements in the efficiency of the spot
9 market are beneficial to Ontario?

10 DR. MURPHY: Right.

11 MR. MARK: Regardless of the fact that we have a
12 hybrid system?

13 DR. MURPHY: Correct.

14 MR. MARK: All right. Good.

15 Now, what about this proposition:

16 "Spot market design, even with the hybrid market,
17 should be such as to allow spot market prices to
18 provide an accurate reflection of underlying
19 supply and demand conditions."

20 DR. MURPHY: Correct.

21 MR. MARK: What about this proposition:

22 "There are changes in the design of the spot
23 market which would increase the quality of the
24 signals it can provide to planners and regulators
25 as well as producers and customers, and that now
26 is a good time to make these changes."

27 DR. MURPHY: Correct.

28 MR. MARK: You will be interested to note, Dr. Murphy,

1 that those propositions were quotes from the market
2 surveillance panel's December 13th report, where they
3 continue to advocate these changes.

4 DR. MURPHY: Mm-hm.

5 MR. MARK: Now, in your evidence this morning, Dr.
6 Murphy, you referenced this study which you says -- which
7 you say -- I apologize for that -- which you say compares,
8 as I understand it, 3X myopic and 12X?

9 DR. MURPHY: Mm-hm.

10 MR. MARK: Sorry, 3X MIO and 12X.

11 DR. MURPHY: Mm-hm.

12 MR. MARK: We have the same problem, Mr. Rupert.

13 Now -- and your counsel had located that reference and
14 told us it is at the IESO February 26 filing, volume 2,
15 section 8, tab 9.

16 Do you have that?

17 DR. MURPHY: Yes.

18 MR. MARK: And I'm advised, Dr. Murphy, that this, in
19 fact, has nothing to do with MIO. Do you agree with that?

20 DR. MURPHY: I was under the understanding that did
21 have to do with MIO.

22 MR. MARK: You'll agree with me as you read it there's
23 nothing in there that talks about MIO?

24 DR. MURPHY: Mm-hm.

25 MR. MARK: And it appears to be simply a comparison of
26 a 3X interval and the 12X?

27 DR. MURPHY: So it would suggest that there's no
28 difference between 3X and 12X? Then how would we get a

1 difference in price using one over the other?

2 MR. MARK: Because the -- and the reason for that, of
3 course, is set out in the last paragraph of the text;
4 correct?

5 MR. RUPERT: Sorry, I want to make sure, Mr. Mark,
6 I've got the right documents.

7 MR. MARK: It's an e-mail dated January 12 from Andy
8 Hee to Paul Murphy.

9 MR. RUPERT: Okay, and I just want to understand that
10 this memo, so I make sure I understand this, is talking
11 about a particular hour, 12 five-minute intervals in a
12 single hour. it is not a general study of --

13 MR. MARK: No, this was a run on one particular
14 hour --

15 MR. RUPERT: Okay, thank you.

16 MR. MARK: -- of one particular day under particular
17 conditions. Do you understand that's what this was, Dr.
18 Murphy?

19 DR. MURPHY: Seems like that, yes.

20 MR. MARK: Yes. And for this hour, under those
21 conditions, there was a similarity between the simulated
22 price and the 3X price?

23 DR. MURPHY: Yes, but there was a simulation of 3X --
24 no, 1X under MIO --

25 MR. MARK: No, I agree with you. I mean, I think
26 we're in agreement. My advice is that this isn't the MIO
27 comparison. The MIO comparison was a 1X MIO compared to
28 12X --

1 DR. MURPHY: Right.

2 MR. MARK: -- unconstrained.

3 DR. MURPHY: Right. And the conclusion of that was
4 that there was no difference between the MIO price -- that
5 they ended up with the same MIO price.

6 MR. MARK: Well, but let's be clear. That was a
7 comparison against 12X unconstrained --

8 DR. MURPHY: Mm-hm.

9 MR. MARK: -- which is not what we have in our system.

10 DR. MURPHY: Mm-hm.

11 MR. MARK: Our dispatches run on a 12X constrained --
12 pardon me, on a 1X constrained.

13 DR. MURPHY: Right.

14 MR. MARK: Right.

15 DR. MURPHY: But the point was to replicate in
16 unconstrained what was being done in constrained.

17 MR. MARK: I know, but let's be clear. It wasn't a
18 comparison of 1X MIO versus the dispatch costs under the
19 system we have today.

20 DR. MURPHY: Right. And the conclusions were that if
21 you get prices that are the same as 12X, then they are
22 representing the true costs. That was the point of the
23 simulation.

24 MR. MARK: Sorry. The true costs, Dr. Murphy, are the
25 actual costs that are derived from the actual dispatch by
26 our dispatch algorithm?

27 DR. MURPHY: Correct.

28 MR. MARK: And our dispatch algorithm is constrained;

1 correct?

2 DR. MURPHY: Right. And the closer you can align the
3 unconstrained to the constrained, the closer you're getting
4 to the true costs.

5 MR. MARK: No, the closer you're getting to a
6 different cost. But it's not the cost --

7 DR. MURPHY: The true costs.

8 MR. MARK: Well --

9 DR. MURPHY: That's precisely what NERA says.

10 MR. MARK: Well, we'll agree to disagree on that one.

11 Thank you, Mr. Chair. Those are my questions.

12 MR. RUPERT: Could I -- just before you leave, is
13 there a reference for the study that you have just been
14 questioning Dr. Murphy on somewhere, and what is the right
15 reference that I should look at for the study that is
16 referred to on page 4, which I gather now is a 1X MIO
17 versus 12X myopic?

18 MR. MARK: We'll get you that.

19 MR. RUPERT: Thank you. I don't need it now. If you
20 could get it for me at some point.

21 MR. MARK: I'm sorry, I think we have it now.

22 MS. FRIEDMAN: Mr. Chair, the MIO simulation
23 calculations that are being referred to can be found in
24 volume 1 -- in volume 1 of the IESO filing of February 26,
25 section 3, tab 4. Those simulations are attached --
26 contained within the minutes of the January 20, 2006 market
27 pricing working group meeting.

28 MR. RUPERT: Thank you.

1 MR. KAISER: Ms. DeMarco, do you have questions of
2 this witness?

3 MS. DeMARCO: I do, Mr. Chair. I think I can
4 substantially eliminate significant numbers, so I wonder if
5 it's an appropriate time to break so I can achieve some
6 efficiency for the Board and hopefully not stand between my
7 expert witness and his vacation.

8 MR. KAISER: All right, let's take 15 minutes.

9 --- Recess taken at 11:28 a.m.

10 --- On resuming at 11:53 a.m.

11 MR. KAISER: Please be seated.

12 MR. MARK: Before my friends continue, Mr. Chairman,
13 when I told you what our agreements were this morning with
14 respect to the conduct of the proceeding, I neglected to
15 mention that we had spoken about an agreed subject of the
16 Board's direction regarding argument, and the agreement we
17 have - again, subject to the Panel's view, obviously - is
18 that Mr. Rodger would submit written argument on Monday,
19 and the other parties would submit written argument on
20 Wednesday, and if Mr. Rodger has any reply, on Thursday.

21 MR. KAISER: All right. We'll consider that. Ms.
22 DeMarco.

23 **CROSS-EXAMINATION BY MS. DeMARCO:**

24 MS. DeMARCO: Thank you, Mr. Chair. Mr. Murphy, in
25 one of your responses I've written down that you indicated:

26 "There are no studies to support that 12X ramp
27 rate understates the market price."

28 Did I get that right?

1 DR. MURPHY: Yes. I'm not aware of any.

2 MS. DeMARCO: Can I ask you to turn to tab 10 of my
3 compendium of documents and --

4 DR. MURPHY: Which one is that?

5 MS. DeMARCO: This is in response to the compendium of
6 documents to support the examination of Cliff Hamal.

7 That was at tab 10.

8 DR. MURPHY: Okay.

9 MS. DeMARCO: Starting at page 63.

10 DR. MURPHY: Mm-hm.

11 MS. DeMARCO: This is an excerpt from the market
12 surveillance panel report outlining a study that they did
13 to examine the price depression impacts of the 12X ramp
14 rate. If I can take you to the second-last paragraph, can
15 we read together? It says that:

16 "Since the price difference is higher during the
17 peak hours, the difference between the weighted
18 average HOEP for those 15 days should be greater.
19 The weighted average sandbox HOEP was \$53.38,
20 assuming 12X ramp rate, while the weighted
21 average sandbox HOEP was \$61.93 when ramp rates
22 are set at their actual values, a difference of
23 \$8.55."

24 DR. MURPHY: Mm-hm.

25 MR. MILLAR: Would you agree with me that a study was
26 done?

27 DR. MURPHY: Okay.

28 MS. DeMARCO: I have some very brief questions for you

1 in relation to the overreaching nature of the hybrid
2 electricity market, and specifically on page 2 of your
3 evidence, you refer to the Government's stated policy
4 objectives --

5 DR. MURPHY: Mm-hm.

6 MS. DeMARCO: -- in creating a hybrid market. Can I
7 ask you to turn to page 17 of the compendium of documents
8 that you now have before you.

9 DR. MURPHY: Mm-hm.

10 MS. DeMARCO: Tab 17 includes the speech from Minister
11 Duncan outlining his vision for the hybrid market,
12 entitled: "Choosing what works for a change." If I can
13 ask you --

14 DR. MURPHY: I'm sorry, what page again?

15 MR. HOWE: Page 3 of that document.

16 DR. MURPHY: Okay.

17 MS. DeMARCO: Tab 17.

18 DR. MURPHY: Mm-hm.

19 MS. DeMARCO: Starting at the second paragraph of that
20 document, the Minister indicates:

21 "Today I will outline a plan for the electricity
22 sector that will encourage the development of a
23 new reliable supply, promote a culture of
24 conservation, lessen the environmental footprint
25 of our undertakings, produce stable prices for
26 small consumers, afford large consumers the
27 benefits of a competitive market, and enhance
28 Ontario's competitiveness in electricity

1 pricing."

2 DR. MURPHY: Mm-hm.

3 MS. DeMARCO: Is it fair to say, then, encouraging the
4 development of new reliable supply is an objective in the
5 hybrid market?

6 DR. MURPHY: Yes.

7 MS. DeMARCO: Fair to say, then, promoting a culture
8 of conservation is also an objective for that hybrid
9 market?

10 DR. MURPHY: Correct.

11 MS. DeMARCO: Lessening the environmental footprint,
12 also an objective?

13 DR. MURPHY: Right.

14 MS. DeMARCO: Producing stable prices for small
15 consumers, also an objective?

16 DR. MURPHY: Mm-hm.

17 MS. DeMARCO: Affording large consumers the benefits
18 of a competitive market, also an objective?

19 DR. MURPHY: Correct.

20 MS. DeMARCO: And enhancing Ontario's competitiveness
21 in electricity pricing, also an objective?

22 DR. MURPHY: Yes. The whole series of non-competitive
23 measures leading up to a competitive market. I agree.

24 MS. DeMARCO: Moving along, then, to the fourth full
25 paragraph on that page, the Minister indicates:

26 "Finally, the plan I will outline recognizes that
27 ratepayers must pay the true cost of the
28 electricity they consume."

1 DR. MURPHY: Mm-hm.

2 MS. DeMARCO: Is it fair to say, then, that that's
3 also a very important objective?

4 DR. MURPHY: Yes.

5 MS. DeMARCO: And to this end Ontario is currently
6 installing thousands of Smart Meters across the province?
7 Is that fair?

8 DR. MURPHY: Yes.

9 MS. DeMARCO: Those Smart Meters are installed so that
10 customers know the price of electricity, the market price
11 of electricity; fair?

12 DR. MURPHY: At some point in the future, yes.

13 MS. DeMARCO: And then, further along in that speech,
14 down in the - one, two, three, four - fifth full paragraph,
15 the Minister indicates:

16 "Our policy will not be bound by ideology but
17 rather by what works."

18 DR. MURPHY: Mm-hm.

19 MS. DeMARCO: Would you agree that it's fair to say
20 that the Minister's vision of a hybrid market is not based
21 on the ideology of something perfect, but rather a
22 pragmatic view of what works?

23 DR. MURPHY: Correct.

24 MS. DeMARCO: If I can ask you to turn to -- and I'll
25 apologize, it is not in my book of materials.

26 DR. MURPHY: Mm-hm.

27 MS. DeMARCO: Volume 1, subsection 3, tab 10 of the
28 IESO's evidence. What that is is the minutes of a meeting

1 of the stakeholder advisory committee on May 24th, 2006.

2 MR. RODGER: Could we have a reference again, please,
3 Ms. DeMarco?

4 MS. DeMARCO: Sure. Volume 1, section 3, tab 10.

5 MR. RODGER: Thank you.

6 MS. DeMARCO: Again, those were the minutes of a May
7 24, 2006, stakeholder advisory committee, wherein the
8 vision of the Ontario electricity market was being
9 discussed.

10 DR. MURPHY: Mm-hm.

11 MS. DeMARCO: If I can take you to --

12 DR. MURPHY: Yes.

13 MS. DeMARCO: -- pages 7 and 8 of that document, where
14 we see AMPCO's vision of that electricity market,
15 specifically, on page 8, the second paragraph. AMPCO
16 states:

17 "AMPCO is strategically working towards a desired
18 endstate. There is a need to be pragmatic now.
19 It is not all or nothing."

20 Is that fair?

21 DR. MURPHY: Yes.

22 MS. DeMARCO: Is it fair to say, then, that AMPCO
23 shares the Minister's vision of a pragmatic, not-perfect,
24 not purely ideological model?

25 DR. MURPHY: Absolutely, yes.

26 MS. DeMARCO: Those are my questions.

27 DR. MURPHY: Mm-hm.

28 MR. KAISER: Thank you, Ms. DeMarco. Mr. Buonaguro,

1 did you have any questions?

2 MR. BUONAGURO: No, Mr. Chair.

3 MR. KAISER: Any questions?

4 MS. ERZETIC: No, we have no questions, sir.

5 MR. KAISER: TransCanada?

6 MS. AVERY: We do have a few questions.

7 MR. KAISER: All right, please go ahead.

8 **CROSS-EXAMINATION BY MS. AVERY:**

9 MS. AVERY: I'll try and be brief with you, Dr.
10 Murphy. If I can go back to what you originally said when
11 you were being examined by your counsel, I understand you
12 told us it was the perception of price volatility that
13 caused the introduction of the 12X ramp rate multiplier; is
14 that right?

15 DR. MURPHY: I'm sorry, I can't hear.

16 MS. AVERY: I'll try a little closer to the mike. If
17 I can understand the evidence you gave in-chief today, sir,
18 it was the perception of price volatility that led to the
19 introduction of the 12X ramp rate.

20 DR. MURPHY: That's correct.

21 MS. AVERY: Is that right, sir?

22 DR. MURPHY: Yes.

23 MS. AVERY: It wasn't anything to do with export
24 issues that led to the actual introduction of the ramp rate
25 multiplier?

26 DR. MURPHY: That's correct.

27 MS. AVERY: Sorry, Madam Reporter, I'll try my best to
28 go slower, or more slowly.

1 And it was the intent from the change from a 1X
2 multiplier to a 12X multiplier to dampen volatility; is
3 that right?

4 DR. MURPHY: Right.

5 MS. AVERY: Would you agree with me, then, the
6 introduction of a 12X multiplier was a distortion from the
7 original vision of the markets?

8 DR. MURPHY: That's correct.

9 MS. AVERY: I've looked at AMPCO's application, and
10 I'm certain you have as well, sir. Would you agree that
11 the 12X ramp rate multiplier was only ever meant to be a
12 transitional measure?

13 DR. MURPHY: That's right.

14 MS. AVERY: And AMPCO's application, they indicate
15 that the change to a 3X ramp rate assumption is essentially
16 an arbitrary decision from going from 12 to 3; would you
17 agree with that?

18 DR. MURPHY: Mm-hm, yes.

19 MS. AVERY: And would you agree that the number 12 in
20 itself is somewhat arbitrary?

21 DR. MURPHY: It is. It worked.

22 MS. AVERY: And would you agree with me, sir, that the
23 only number that wouldn't be arbitrary in connection with
24 the multiplier would be the number 1?

25 DR. MURPHY: Okay, yes. I see what you mean. Mm-hm.

26 MS. AVERY: Now, I want to just briefly address some
27 of the evidence you also gave in-chief concerning what I
28 believe you called the free riders in the market.

1 DR. MURPHY: Mm-hm.

2 MS. AVERY: And to do that, I think we need to look
3 just briefly at how the markets operate. Would you agree
4 with me, sir, that all of the generators in Ontario are
5 expected to be able to change their dispatch on a five-
6 minute interval?

7 DR. MURPHY: Mm-hm, yes.

8 MS. AVERY: So generators that can't ramp very quickly
9 either up or down have to bid to account for that
10 inability; is that right?

11 DR. MURPHY: Correct.

12 MS. AVERY: Is that "yes" on the record, sir?

13 DR. MURPHY: Yes.

14 MS. AVERY: And so would you agree with what the
15 applicant has said in its application, that different types
16 of generators have these different capabilities and,
17 therefore, generators such as nukes, or nuclear facilities,
18 have to normally bid their energy prices to avoid ramping;
19 is that right?

20 DR. MURPHY: Right.

21 MS. AVERY: And they bid that to avoid ramping by
22 bidding at a lower rate; would you agree with that?

23 DR. MURPHY: Right.

24 MS. AVERY: So would you agree with me that the effect
25 of this bidding strategy, which is to bid at a low rate so
26 that they're constantly running, is one that results in
27 lower prices setting the market price in hours of

1 non-ramping than would normally be expected by generators
2 that could ramp more quickly?

3 DR. MURPHY: It depends upon who's at the margin and
4 who's setting the price, but, generally speaking, if you're
5 at low levels of demand, that might be correct.

6 MS. AVERY: So the base load generators are bidding at
7 a low rate so that they won't be ramped up or down. And
8 you agree with me, then, that they sometimes do set the
9 market prices in the periods where ramping isn't taking
10 place?

11 DR. MURPHY: That's correct, yes.

12 MS. AVERY: Can you tell us today what some of the
13 examples of this base load generation would include? We
14 understand from the record that might include nuclear, but
15 are you aware of any other generators that might be
16 included within this base load category?

17 DR. MURPHY: We've always referred to the base load
18 generators as being the ones that we were concerned about,
19 big volumes, low prices, susceptible to windfalls.

20 MS. AVERY: But the windfall language you're speaking
21 about are those hours during which ramping would be taking
22 place; is that right?

23 DR. MURPHY: That's correct, yes.

24 MS. AVERY: And so that would be at times when other
25 generators would be setting the market price?

26 DR. MURPHY: That's right.

1 MS. AVERY: And so it wouldn't be these other
2 generators setting the market price during these other
3 hours when ramping wasn't taking place?

4 DR. MURPHY: Sorry, say again?

5 MS. AVERY: So I think we've established on the record
6 today that sometimes it's the base load generators that set
7 the price and that they have to bid in a defensive way --

8 DR. MURPHY: Well, the base load generators never set
9 the price. If you're talking about nuclear, they never set
10 the price. So it's the next ones up.

11 MS. AVERY: And what generation would that be, sir?

12 DR. MURPHY: That would be presumably base load
13 coal --

14 MS. AVERY: And do you have any --

15 DR. MURPHY: -- or hydro.

16 MS. AVERY: Have you provided -- or, pardon me.
17 Strike that.

18 Just one moment, please.

19 Would you agree with me that the bidding behaviour of
20 some of the business load generation has the effect of
21 dampening the overall HOEP?

22 DR. MURPHY: Yes, could.

23 MS. AVERY: Thank you, sir.

24 Now, if I can move more directly into the report that
25 was filed late on Monday, would you agree that the IESO
26 itself is created by the *Electricity Act*?

27 DR. MURPHY: Mm-hm.

1 MS. AVERY: And would you agree with me that the
2 markets themselves were created by virtue of the
3 *Electricity Act*?

4 DR. MURPHY: Mm-hm.

5 MS. AVERY: And do you agree with me that the IESO
6 obviously still calculates an hourly Ontario energy price?

7 DR. MURPHY: Mm-hm.

8 MS. AVERY: And do you agree with me that generators
9 still bid into that market?

10 DR. MURPHY: Yes.

11 MS. AVERY: Now, you've had some discussion in your
12 report where it seems to me the upshot of it is that the
13 markets were created, things have happened to make the
14 market a hybrid, and IESO is still essentially playing from
15 the old play book. Is that a fair summary of your first
16 page?

17 DR. MURPHY: Yes.

18 MS. AVERY: Now, if we can start looking at some of
19 the differences between this hybrid model and the
20 competitive model, I guess the difference between what you
21 perceive to be the reality today and what the IESO seems to
22 be trying to fix.

23 DR. MURPHY: Mm-hm.

24 MS. AVERY: If I can take you to page 2 of your
25 report, you say -- in the second full paragraph, you talk
26 about the demand side. And you say that:

27 "For the most part, prices are regulated."

1 Would you agree with me, sir, that you're speaking in
2 terms of retail prices, not wholesale prices?

3 DR. MURPHY: Both, actually. Formal regulation at the
4 retail level through the regulated prices of OPG and the
5 OPG rebate, and then effective regulation in the sense that
6 a free hedge has been created for all customers by virtue
7 of the fact they participate in that rebate.

8 MS. AVERY: But that's in connection with retail
9 customers, right, rather than wholesale customers; is that
10 right?

11 DR. MURPHY: Well, the RPP is connected with the
12 retail customers. The others are on their own, but they
13 get the effect of that.

14 MS. AVERY: Now, you next say that:

15 "Conservation is encouraged through separate
16 programs administered by the OPA."

17 Is it also the case that the IESO has created load
18 response programs?

19 DR. MURPHY: The IESO? Yes, they have. Yeah.

20 MS. AVERY: Now, in your next paragraph you conclude
21 with this:

22 "The combination of market power and demand that
23 is made even more unresponsive to price by
24 government pricing policy..."

25 And that's what we've just talked about:

26 "...creates the potential for prices considerably
27 higher than the competitive benchmark."

1 Have you provided any analysis to show that this has,
2 in fact, taken place?

3 DR. MURPHY: No.

4 MS. AVERY: Now, would you agree with me that going
5 from a 12X ramp rate multiplier to a 3X ramp rate
6 multiplier will reduce CMSC payments?

7 DR. MURPHY: Will reduce CMSC payments? I guess it
8 depends upon how you did. If you stayed with the current
9 system, you would have one effect. If you went with the
10 MIO system, you would have something else.

11 MS. AVERY: And when you are talking about going with
12 the MIO system, you are talking about adding MIO to the
13 pricing part of the schedule, because it's already
14 obviously been added to the dispatch part of the schedule;
15 is that right?

16 DR. MURPHY: That's right, yes.

17 MS. AVERY: So if we were to go from 12 to 3, without
18 adding the MIO optic to the pricing side, would you agree
19 that that would reduce CMSC payments?

20 DR. MURPHY: That's correct, yes.

21 MS. AVERY: And you agree that these payments are a
22 form of uplift?

23 DR. MURPHY: Yes.

24 MS. AVERY: And do you agree with the position your
25 clients have taken in their filed evidence, and they quote
26 I believe paragraph 48 of their application, that any kind
27 of ramp rate solution should not include any kind of
28 uplift? Would you agree with that assertion?

1 DR. MURPHY: That a ramp rate solution...

2 MS. AVERY: I can take you to paragraph 48, if that
3 would be easier for your to comment on.

4 DR. MURPHY: Yes.

5 MS. AVERY: It says that at paragraph 48:

6 "On February 7, 2007, AMPCO wrote to Mr. Ken
7 Kozlik, the director of market evolution, to
8 propose that the IESO consider five market
9 criteria for any new ramp rate mechanism. The
10 first one was that any mechanism should be
11 transparent in sending the correct signals to the
12 market, and that such a mechanism should not
13 increase uplift, which is opaque in terms of
14 price signals and cannot be hedged."

15 DR. MURPHY: I think that comment was related to
16 particular types of solutions to the problem that Ken was
17 recommending that would create additional payments to
18 generators who had ramping capability and their receiving
19 side payments. They would be picked up by uplift payments
20 by everybody else.

21 MS. AVERY: But would you generally agree that any
22 kind of payment for ramp that is opaque is less beneficial
23 to a competitive market than one that is transparent?

24 DR. MURPHY: That's correct.

25 MS. AVERY: And I just have one final question, sir,
26 and that's in connection with this theory of second best.
27 And you've answered a number of questions for my friend,
28 Mr. Mark, this morning in connection with that, but I'm

1 just wondering, sir, if this theory of the second best, as
2 you formulated this morning, was one that was used in the
3 150- to 200-odd market rule amendments that have been
4 completed by the IESO since the inception of the market?

5 DR. MURPHY: It has never been used in all that
6 period. It's quite a devastating theory, really, in its
7 pure statement. It says if you don't get everything, then
8 you can't get anything.

9 If there are distortions to the basic set of
10 assumptions, then moving one of them close to the efficient
11 level tells you nothing about whether you're better off or
12 worse off. And you can think of circumstances where that's
13 true. I won't get into that now, but it has been quite a
14 devastating theory to welfare economics.

15 MS. AVERY: Thank you. Those are my questions, Dr.
16 Murphy.

17 MR. KAISER: Thank you. Mr. Millar, do you have
18 anything?

19 MR. MILLAR: Nothing from me, Mr. Chair.

20 MR. KAISER: Thank you. Mr. Mark, are your witnesses
21 ready? Oh, I'm sorry.

22 MR. RODGER: Just a couple of reply questions, sir.

23 **RE-EXAMINATION BY MR. RODGER:**

24 MR. RODGER: Dr. Murphy, in your exchange with Mr.
25 Mark you had a discussion about the export surcharges. Is
26 it your evidence that this is the only option that the IESO
27 should consider?

28 DR. MURPHY: No, not at all. I wasn't raising this as

1 a proposal. I was saying that the working price group has
2 not considered alternatives. I just threw that up as an
3 example, that's all.

4 MR. MILLAR: You also had a discussion with Mr. Mark
5 about major impacts to HOEP but you didn't get a chance to
6 complete your answer as to what these major impacts were,
7 in your view. Could you tell us them now, please?

8 DR. MURPHY: Sure. The IESO made a series of
9 assumptions in coming up with their estimates, but I
10 thought it would be reasonable to take a look at some
11 alternative reasonable assumptions, if I can find them.
12 Bear with me just one sec. So much paper here.

13 Here it is. What the IESO did was to take their 2.6
14 percent, which was the extent of the price increase that
15 came out of the simulation, and they applied it to the
16 average price that existed in 2006, which happened to be
17 the lowest price that we've seen in quite some time.

18 I said, well, this thing exists for indefinitely, so
19 why not take 2009 and assume that it was at 2005 prices.

20 2005 prices averaged \$69.50. If I take 2.6 percent of
21 that - do that again; my scribbling is a mess - now I get
22 1.70.

23 MR. MARK: Excuse me, Mr. Chair. Could I interject
24 for a moment, please? The witness is now reading from an
25 analysis that he's prepared. It's not part of his report.
26 When Mr. Rodger and I spoke the issue of whether you should
27 have a Technical Conference or not, Mr. Rodger confirmed to
28 me, and it's confirmed in the correspondence, that he would

1 not through his witnesses be tendering any analysis,
2 calculation, forecast, model, econometric study. Now we're
3 getting this for the first time on re-examination.

4 MR. KAISER: I thought all the witness is doing, Mr.
5 Mark, is redoing these calculations assuming he was using
6 2005 prices instead of 2006. Am I wrong?

7 MR. MARK: He said 2009 prices, I think.

8 MR. KAISER: This 69.50, I thought he said it was a
9 2005 price. Am I wrong?

10 MR. MARK: I don't know. I don't have the
11 calculation.

12 MR. RODGER: Perhaps Dr. Murphy can clarify. The
13 intent of the question was just to ask what were the other
14 major impacts that he would identify on the price...

15 MR. KAISER: I think the question here is whether this
16 is some study that hasn't been produced or whether -- I
17 understood the point of your examination to be to do the
18 calculation as the IESO had, but to use prices - I don't
19 know whether 2009 or 2005 - instead of 2006. Is that what
20 you're asking your witness to do?

21 MR. RODGER: Essentially, yes.

22 MS. DeMARCO: I'm sorry, Mr. Chair --

23 MR. MARK: With respect, behind those numbers there's
24 no formula on those pages. For this witness to be giving
25 that evidence, he must have run a model to have done a
26 series of calculations or modelling calculations,
27 mathematical equations, and that's what Mr. Rodger told me
28 that he wasn't going to put up. And especially to put it

1 up in re-exam -- I've had no chance to look at it. I don't
2 know what it's based on.

3 MS. DeMARCO: Mr. Chair, if I could also voice. I
4 don't know that 2005 prices have been put in evidence and
5 probed accurately. I don't know that 2009 estimated prices
6 have been put in evidence and probed. So, really, the
7 basis for that calculation hasn't been presented at all.

8 MR. KAISER: Well, we can figure out what the 2005 or
9 2009 price is without having a big argument about it. But
10 let me understand. I had thought that if you substituted
11 the \$49 with \$69.50 - I thought it was 2005, maybe it's
12 2009, we'll find out - that if you're simply reducing you
13 the impact due to arbitrage by the same 50 percent, that's
14 not some econometric model, that's just straight
15 arithmetic, isn't it?

16 MR. MARK: No, if he's just substituting that number,
17 that's fine.

18 MR. RODGER: That was my understanding of the extent
19 of it. I don't think there is any independent study or
20 analysis that Dr. Murphy has done, as I indicated to my
21 friend.

22 MR. MARK: I had assumed that we were going to get
23 into a question of changing the assumption of 50 percent.
24 If that's where we're going, that's way out of bounds.

25 MR. KAISER: No; I understand. I didn't assume that.

26 MR. MARK: Okay.

27 MS. DeMARCO: Mr. Chair, I do have a remaining
28 challenge with that because as you change the price,

1 according to footnote 4 of tab 2 of our documents, the
2 CMS/CMIOG savings vary with that price. You would have to
3 do an assorted analysis to make that number accurate as
4 well. We simply don't have that analysis before us.

5 MR. KAISER: But do they vary directly with price or
6 is that just another piece of arithmetic?

7 MS. DeMARCO: I'm not certain that's the case.
8 Certainly, we would love the ability to examine that.

9 MR. KAISER: What is it your witness is calculating?
10 What was the last question, Mr. Rodger?

11 MR. RODGER: I wanted to clarify the discussion, Dr.
12 Murphy, you had with Mr. Mark about, on the general topic
13 of major impacts that affect the HOEP, and you started to
14 give a list of the major impacts in your view, but you
15 didn't get through them all. I wanted to make sure the
16 record reflects all of the major impacts that you think
17 exist that impact HOEP under the current hybrid system.

18 DR. MURPHY: I was just looking at alternative
19 situations and saying, this is going to last for quite some
20 time. Suppose that we had the prices of 2005 which were
21 \$69.50, compared to \$49. And when it comes to the
22 arbitrage impact, that's a judgmental. I've looked through
23 the MSP information on that to see what their view was. If
24 I can find it. There it is. This goes to the issue of
25 arbitrage, and in the IESO calculation, what they're saying
26 is, half the price increase that you might expect is being
27 arbitrated away through exports and imports.

28 The MSP looked at this same issue, and it concluded,

1 talking about a price difference:

2 "This dynamic adjustment process would continue
3 to the point that, in equilibrium, absent any
4 constraints on the intertie, all arbitrage
5 opportunities would dissipate. The key point
6 here is that, at least in theory, there should be
7 no inefficient trade flows."

8 It defines that there are inefficient trade flows and
9 examines possible reasons for it, finally concluding:

10 "This apparently inefficient arbitrage is
11 extensive and contrary to our theoretical
12 expectations."

13 So, suppose I say that I take, instead of half that
14 the IESO's put in, a quarter of that.

15 MR. MARK: Mr. Chairman, this is exactly what wasn't
16 supposed to happen. The witness is now saying -- giving
17 his expert testimony as to what a different number than the
18 50 percent may be. That was a calculation we have done.
19 AMPCO has had it four months. It's not in his prefiled.

20 Mr. Rodger told me he was going to present no analysis
21 through this witness, and now we get it on re-exam. He's
22 read a passage of the market surveillance panel report that
23 I can tell you has nothing to do with the conclusion he
24 just talked about. This is not appropriate re-examination.

25 MR. KAISER: Well, Mr. Mark --

26 MR. MARK: If what we want, which is, I think, Mr.
27 Rodger suggested was going to be the question, is: What is
28 the mathematical result on this table if you change the

1 input price, if you look in the box below, Mr. Chairman,
2 under the footnotes, you'll see we've given you that.

3 If you change the price to those prices, there's the
4 result of this table, of this model.

5 But what this witness is now saying is, I want to
6 change -- I want to change the 50 percent assumption. I
7 want to challenge the econometric analysis that was done by
8 Mr. Rivard, with the assistance of the folks from the
9 University of Toronto and Mr. Falk, and suggest to you that
10 it should be another number.

11 It's not in a report, didn't disclose it in months;
12 not in the report, not in his chief, and he can't do it
13 now. This is sandbagging of the highest order.

14 MR. KAISER: Well, I'm not sure that it's sandbagging.
15 You took him through this calculation. It's true he didn't
16 question the 50 percent in his answers to you. It's come
17 up in reply.

18 Let's proceed on this basis. Let's hear his answer.
19 If you need to ask any questions about his answer or Ms.
20 DeMarco does, we'll allow you to. It's an important point.
21 We'd like to know whether the 50 percent can be relied on
22 or not relied on.

23 MR. RUPERT: Before we carry on, let me just ask one
24 further question going back to this morning. There was a
25 letter, the October 24th letter from AMPCO to Mr. Rivard,
26 which had the conclusion that said:

27 "We are now satisfied that the IESO's methodology
28 for calculating net financial impacts on

1 electricity price increases is sound."

2 And I just want to make sure I understood the answers
3 this morning. I took it - maybe I was wrong, I guess -
4 that that letter was intended to say that the AMPCO folks
5 had accepted the 50 percent calculation. Am I wrong on
6 that? I just want to make sure I understand where we're
7 going here.

8 Are we saying the 50 percent calculation is now in
9 question?

10 MR. RODGER: As I understand it, AMPCO is saying that
11 the IESO did the math correctly. That doesn't mean that
12 AMPCO has accepted the analysis or basis upon which that is
13 concluded.

14 MR. RUPERT: Well, I read the methodology to be more
15 than arithmetic, but maybe I am wrong. I just want to
16 understand whether you're saying, if you do alternative
17 calculation, you have different numbers, which I can
18 appreciate, or whether you're saying that the 50 percent
19 itself is a number that you believe is suspect.

20 MR. RODGER: I wonder if it would be helpful for Mr.
21 White - it's his letter - just to clarify it.

22 MR. KAISER: This is the letter of October 24th? By
23 the way, does this have an exhibit number, now that we're
24 into it? I know it was slipped into some other document,
25 but it's now floating around.

26 MS. DeMARCO: It was tab 61, I believe, volume 2,
27 section 8, tab 61, subject to check.

28 MR. KAISER: All right. Okay, what number is the --

1 Ms. DeMarco's compendium?

2 MS. DeMARCO: Yes, that's correct.

3 MR. KAISER: Well, let's give it a separate number,
4 anyway, because it was just put in loose. This is Mr.
5 White's letter of October 24, 2006. What number would this
6 be?

7 MR. CAMPBELL: It would be K2.4, Mr. Chair.

8 **EXHIBIT NO. K2.4: LETTER FROM MR. WHITE DATED OCTOBER**
9 **24, 2006.**

10 MR. KAISER: Mr. White?

11 MR. WHITE: Thank you, Mr. Chair.

12 As was discussed earlier, Dr. Murphy and I spent some
13 time with IESO staff in the weeks preceding this letter,
14 during which time, for example, we reviewed the Order in
15 Council that sets out how the IESO will settle --

16 MS. ERZETIC: Excuse me, Mr. Chair. Should Mr. White
17 be sworn? Is he giving evidence now?

18 MR. KAISER: Well, it's getting pretty close to that,
19 I admit.

20 MR. RODGER: I thought it might be helpful for Mr.
21 White to clarify the specific issue with Mr. Rupert.

22 MR. MARK: If counsel wants to tell us whether Mr.
23 Rupert's understanding is correct or incorrect, I'm
24 content. I don't want Mr. White giving evidence. He's not
25 under oath. He was not going to testify.

26 MR. KAISER: I think you're right about that, Mr.
27 Mark. Why don't you take time to talk to Mr. White?
28 We'll...

1 MR. RODGER: That's fine, sir.

2 MR. KAISER: We can come back after the lunch break,
3 if that's what you want to do.

4 MR. RODGER: I just had one final area. Perhaps what
5 we could do is I could just ask Dr. Murphy my final
6 question, and then at the break get this clarified. Then
7 after lunch you could start with the IESO's panel.

8 MR. KAISER: Is that satisfactory, Mr. Mark?

9 MR. MARK: That's fine, sir.

10 MR. RODGER: Dr. Murphy, you also had an exchange with
11 some of my friends concerning a conclusion you had made on
12 page 4 of your report. This has to do with the wealth
13 transfer and your statement that reads:

14 "Is it reasonable to attempt to achieve an
15 uncertain \$6.6 million in system benefit when it
16 involves a wealth transfer of \$225 million? In
17 my opinion, this is not a reasonable outcome."

18 Now, has your conclusion changed on this in discussion
19 with your friends, or this still stands? Is this still
20 your position?

21 DR. MURPHY: It's still my position. And even if you
22 allow for the rebates, as we'll go through in the
23 arithmetic exercise in a sec, it comes out to be about 100
24 million, so you have a wealth transfer of about \$100
25 million to save a questionable \$6 million, and you can only
26 justify that if you say that wealth transfers account for
27 zero.

28 But as a practical matter, it seems to me to make not

1 much sense, particularly when you haven't explored other
2 opportunities that could create no wealth transfer and have
3 the same effect.

4 MR. RODGER: Thank you, Mr. Kaiser.

5 MR. KAISER: All right. We'll come back at 1:30.

6 --- Luncheon recess taken at 12:30 p.m.

7 --- On resuming at 1:39 p.m.

8 MR. KAISER: Please be seated. Mr. Rodger.

9 MR. RODGER: Thank you, Mr. Kaiser. Just before the
10 lunch break there was a question of interpretation about
11 Mr. White's October 24th, 2006, letter to Mr. Rivard. The
12 sentence in question reads as follows:

13 "As a result of this new information and our
14 deeper understanding of the issues, we are now
15 satisfied that the IESO's methodology for
16 calculating the net financial impacts of
17 electricity price increases is sound."

18 If you go to the net payments 3X ramp rate table that
19 my friends referred to, in the IESO compendium of materials
20 at tab 3, what this sentence refers to is the 80 percent
21 figure, the global adjustment. OPG rebate reduces the
22 impact by 80 percent.

23 There was discussion between --

24 MR. MARK: I acknowledge that. I haven't checked with
25 my clients, Mr. Chairman, but I think we're agreed that
26 that is a reference to the method that was used to come up
27 with the 80 percent figure.

28 MR. RODGER: That's right, the 80 percent was

1 calculated correctly. AMPCO agrees with that.

2 MR. KAISER: Thank you.

3 MR. MARK: Ready for my panel, Mr. Chairman.

4 MR. KAISER: Do you have anything, Mr. Millar, or did
5 I ask you?

6 MR. MILLAR: No, Mr. Chair. You've asked. Thank you.

7 MR. KAISER: All right, please proceed.

8 MR. MARK: Asking Mr. Campbell, Mr. Kozlik, and Dr.
9 Rivard to come forward.

10 Mr. Chair, while they're settling in, we had
11 initially, yesterday or the day before, filed an errata --

12 MR. KAISER: Yes.

13 MR. MARK: -- with certain changes to our evidence.
14 As a result of your ruling yesterday and our discussions
15 amongst counsel, a lot of that, I think virtually most of
16 it, anyways, becomes irrelevant.

17 What I'd like to do is withdraw the errata, and what
18 we have are a few amended pages for our main submission,
19 which is changes in the material which appears at tab I of
20 our evidence filed on February the 26th. There are four
21 typographical errors that these pages will correct.

22 MR. MILLAR: Mr. Chair, I suppose we should mark this
23 as an exhibit, since it's changes to the prefiled.

24 MR. KAISER: Yes, please. Thank you.

25 MR. MILLAR: Exhibit K2.5.

26 **EXHIBIT NO. K2.5: CORRECTIONS TO COST BENEFIT**
27 **ANALYSIS**

28 MR. MILLAR: This, and Mr. Mark can correct me if I am

1 wrong, appears to be corrections to the cost benefit
2 analysis. Is that right, Mr. Mark?

3 MR. MARK: That's correct.

4 MR. MILLAR: Thank you.

5 MR. MARK: I ask that the witnesses be sworn.

6 **IESO - PANEL 1**

7 **Bruce Campbell; Sworn**

8 **Brian Rivard; Sworn**

9 **Ken Kozlik; Sworn**

10 MR. MARK: Thank you. Mr. Chair, in the interest of
11 expediting proceedings and in the hope of finishing today,
12 counsel have agreed to dispense with reviewing the
13 curriculum vitae of the witnesses, as they've been filed,
14 and counsel have also agreed that Dr. Rivard is qualified
15 to testify as an economist, particularly in relation to
16 markets, including electricity markets.

17 MR. KAISER: Thank you.

18 **EXAMINATION-IN-CHIEF BY MR. MARK:**

19 MR. MARK: Mr. Campbell, let me start with you,
20 please. Can you tell me briefly what is your position with
21 the company, and what is your role with respect to the
22 proposed market amendment.

23 MS. CAMPBELL: I'm vice-president, corporate relations
24 and market development, and my role in relation to this
25 amendment flows from one of my responsibilities, being the
26 market development area of the IESO's business. And I am
27 responsible for taking recommendations on those matters
28 forward to the Board.

1 MR. MARK: And, Mr. Kozlik, how about yourself?
2 What's your position with the company? What role have you
3 played in this?

4 MR. KOZLIK: I'm the director of market evolution. As
5 such, I'm the Chair of the market pricing working group,
6 which is the forum where most of the technical analysis was
7 performed.

8 MR. MARK: And, Dr. Rivard, yourself.

9 DR. RIVARD: I'm the manager economics, and manager of
10 the market evolution analysis and research group.

11 MR. MARK: And --

12 DR. RIVARD: Sorry. I guess my involvement in this
13 file was to manage the economic analysis.

14 MR. MARK: Now, Mr. Kozlik, let me turn to you to
15 discuss some background with regard to the proposal. What
16 is the HOEP?

17 MR. KOZLIK: The HOEP is the hourly Ontario energy
18 price, and it represents the hourly average of the five-
19 minute market clearing prices that come from the pricing
20 algorithm.

21 MR. MARK: What is the pricing algorithm?

22 MR. KOZLIK: The pricing algorithm is a computer
23 program that's run every five minutes by the IESO that
24 calculates the energy price, which is the basis for the
25 charge in payment of energy in Ontario.

26 MR. MARK: How does the pricing algorithm compare to
27 the dispatch algorithm?

28 MR. KOZLIK: The pricing algorithm and the dispatch

1 algorithm use exactly the same logic in their calculations.

2 The differences are that the pricing algorithm does
3 not respect all the physical constraints that the dispatch
4 algorithm must in order to maintain reliability of the
5 system.

6 MR. MARK: Is this difference between the two
7 algorithms a desirable state of affairs?

8 MR. KOZLIK: No. It's not. The preference is that
9 the prices match exactly the costs of the dispatch.

10 MR. MARK: What implications does this difference have
11 for the price signal which is sent to market participants?

12 MR. KOZLIK: The price signal is a trigger for actions
13 for all participants that are not being dispatched by the
14 IESO. So, when the price signal is not reflecting the
15 actual costs of dispatch, then actions can be taking place
16 that are not consistent with the actual costs of dispatch
17 that those actions result in.

18 MR. MARK: And how does the term which we've heard
19 much about so far, "efficiency," relate to this phenomenon?

20 MR. KOZLIK: To the extent that actions are taken that
21 are not consistent with the costs that are being incurred
22 in running the system, then they are inefficient actions.

23 MR. MARK: Now, mention has been made, I know you are
24 aware, Mr. Kozlik, of the issue of Ontario having a hybrid
25 market. And let me ask you this. Is the price signal
26 relevant in the context of the hybrid market we have in
27 Ontario?

28 MR. KOZLIK: The price signal is still very relevant

1 in the hybrid market. It's relevant to the supply side in
2 Ontario. It's relevant to the consuming side in Ontario,
3 and it's very relevant to the arranging of imports and
4 exports to and from Ontario.

5 MR. MARK: Do you have any estimate, Mr. Kozlik, of
6 how much of the load consumed in Ontario is exposed
7 directly to the HOEP?

8 MR. KOZLIK: Yes, I do. The portion of the load that
9 is not exposed is the regulated price plan, and that's just
10 under 50 percent; therefore, it's over 50 percent of the
11 load is exposed to the hourly Ontario energy price.

12 MR. MARK: What has the market surveillance panel had
13 to say about the issue of efficient price signals?

14 MR. KOZLIK: In every report that the market
15 surveillance panel has produced they've commented on what
16 they refer to as the wedge between the Hourly Ontario
17 Energy Price and the actual costs of dispatch, and the
18 extent that that is creating inefficiencies in the market.

19 MR. MARK: Mr. Chairman, I'm reminded by a note from
20 my colleague that I've done the unmentionable and I've
21 forgotten to have the witnesses adopt their prefiled
22 testimony. I'm just going to interrupt the flow at this
23 point and ask each of these gentlemen if for the purpose of
24 appearance today they adopt the prefiled testimony as their
25 own.

26 MS. CAMPBELL: Yes, I do.

27 MR. KOZLIK: Yes, I do.

28 DR. RIVARD: Yes, I do.

1 MR. MARK: Thank you. I'm indebted to my colleague.

2 Now returning, Mr. Kozlik, to the market surveillance
3 panel and if they had anything to say about the timing of
4 any changes which are contemplated to address
5 inefficiencies.

6 MR. KOZLIK: The market surveillance was commenting
7 from its first report and it continues to comment even in
8 its latest report despite the introduction of the hybrid
9 market.

10 MR. MARK: Now, let's turn to the ramp rate in
11 particular, Mr. Kozlik. What is the ramp rate?

12 MR. KOZLIK: Ramp rate is a term that is used to
13 define how quickly a facility can change its output,
14 specifically with a generator, how quickly it can change
15 its output from one level to another, and it's usually
16 expressed in megawatts per minute.

17 MR. MARK: And what role does ramping play in the
18 Ontario system?

19 MR. KOZLIK: Ramping is critical to ensure that the
20 supply/demand balance can be maintained over time,
21 especially in the changes in demand throughout the day. As
22 you can imagine, the demand for electricity increases at a
23 very high rate as we're going through the morning. We need
24 generators to be able to change their output from one level
25 to another in order to keep up with that change of demand.

26 It's critical to the maintaining of supply/demand
27 balance.

28 MR. MARK: And what is the ramp rate multiplier and

1 why is it used?

2 MR. KOZLIK: The ramp rate multiplier is a multiplier
3 that exists only in the pricing algorithm, and it is a
4 multiplier to change the way in which the pricing algorithm
5 looks at the ramp rates of the facilities it has available
6 to choose from.

7 It effectively takes the ramp rate that those
8 facilities have and multiplies them by a factor. In the
9 current case, at this point, it's a factor of 12.

10 MR. MARK: And why do you have the ramp rate
11 multiplier?

12 MR. KOZLIK: Leading up to the market opening, there
13 were extensive tests that were conducted, and when we got
14 to the phase called coupled operational dry run, the prices
15 that were being produced from those tests were volatile,
16 much more volatile than people had expected, and
17 unpredictable, and it was agreed by all that this was not a
18 circumstance that was amenable to market opening; and it
19 was agreed at that time, by the IMO board, to institute the
20 ramp rate multiplier in the pricing algorithm.

21 With the pricing algorithm seeing generators that
22 could actually ramp 12X more quickly than they actually
23 can, it effectively dampened the prices to align them
24 better with the expectations.

25 MR. MARK: What ramp rate was used at that time?

26 MR. KOZLIK: It was a 12X ramp rate multiplier.

27 MR. MARK: And why was 12X selected?

28 MR. KOZLIK: In those test results, the pre-dispatch

1 prices that were being produced, which are prices produced
2 one hour in advance of actual operation, were judged by all
3 involved as somewhat reasonable outcomes relative to the
4 supply/demand situations that appeared to exist in those
5 tests.

6 The pre-dispatch, being an hourly calculation, is a
7 longer interval than the pricing algorithm, which has to
8 set price every five minutes. Given that there are 12
9 five-minute intervals in an hour, it was felt that by using
10 a 12X multiplier, we would then have real-time prices that
11 more closely emulated the pre-dispatch prices.

12 MR. MARK: Was this intended as a permanent solution
13 to the volatility you spoke of before?

14 MR. KOZLIK: No, it was put forward as a transitional
15 measure and it was recognized as such both in the rule
16 amendment document and in the memo from Paul Murphy to the
17 IESO -- pardon me, the IMO board at its -- at the time it
18 was adopted.

19 MR. MARK: And why was this viewed as only a temporary
20 measure?

21 MR. KOZLIK: Well, even then it was realized that this
22 was going to result in an inefficient outcome that would
23 create the gap -- it would reinforce the gap between the
24 actual prices of the HOEP and the actual costs of dispatch.

25 MR. MARK: Now, Mr. Kozlik, can you indicate for us in
26 general terms -- and I'll get more information from Dr.
27 Rivard, but can you indicate to us in general terms the
28 consequence of this wedge between the dispatch algorithm

1 and the pricing algorithm from this multiplier on export
2 sales?

3 MR. KOZLIK: On export sales. The market surveillance
4 panel did an extensive review of what it referred to as
5 inefficient exports in its June 2006 report. Effectively,
6 an inefficient export is one that occurs when the cost of
7 producing the power for the export in Ontario is actually
8 higher than the value of the power in New York.

9 Those prices would suggest that ideally, without
10 barriers, the power should have, in fact, flown in the
11 reverse direction.

12 MR. MARK: Now, Dr. Rivard, I want to turn to you,
13 please, for a discussion of those export sales. Mr. Chair,
14 I'm going to hand around, and we have a large copy to
15 display, a chart which I'm going to ask Dr. Rivard to refer
16 to.

17 Now, Dr. Rivard, does this -- sorry, there's more to
18 be handed out.

19 MR. MILLAR: Mr. Chair, would you like this marked as
20 an exhibit?

21 MR. KAISER: Yes, please.

22 MR. MILLAR: This will be Exhibit -- I think we're at
23 K2.5 -- 2.6. Pardon me, I missed one, K2.6, and which is a
24 chart from the IESO relating to inefficient exports.

25 **EXHIBIT NO. K2.6: CHART FROM IESO RELATING TO**
26 **INEFFICIENT EXPORTS**

27 MR. MARK: Now, Dr. Rivard, are you the one who caused
28 this chart to be prepared?

1 DR. RIVARD: Yes.

2 MR. MARK: Can you put your microphone on? Is that
3 better?

4 Now, in this chart, Dr. Rivard, you have used some
5 illustrative numbers. How do those numbers compare to
6 actual numbers we can see in the market?

7 DR. RIVARD: They're very close to actual numbers.
8 They're representative of the actual average numbers that
9 could occur in the market, yes.

10 MR. MARK: All right. So let's look at one of these
11 trades. The \$49 you have as the HOEP, I think we all
12 understand that; and then the next figure up is \$55/MWh,
13 and that's described as neighbouring market value. What
14 does that represent?

15 DR. RIVARD: Well, it represents the price in the New
16 York market that the exporter would receive from exporting
17 a megawatt, and at the same time the incremental costs of
18 serving another megawatt of demand in New York.

19 MR. MARK: And in this situation where you have the
20 power available to be bought at \$49 in Ontario and can be
21 sold for \$55 in New York, are there transaction costs that
22 the exporter would incur in order to make that sale?

23 DR. RIVARD: Yes, there are. In this example, we
24 point out the transaction costs of that sale would be
25 \$5/MWh.

26 MR. MARK: So that would then bring the total price
27 for that sale to the exporter to \$54?

28 DR. RIVARD: That's correct, yes.

1 MR. MARK: And the line you have there, "trade
2 profit," does that represent one dollar of trade profit in
3 this example?

4 DR. RIVARD: That's correct.

5 MR. MARK: And in this situation, a situation such as
6 the one depicted here, would this trade take place?

7 DR. RIVARD: This looks like a profitable trade, yes.

8 MR. MARK: Now, there's a couple of other numbers on
9 this table, and I want you tell us what they represent.

10 At the very top we have the \$67/MWh, and you've
11 described that as the constrained on Ontario generation
12 cost. And can you tell us what that represents?

13 DR. RIVARD: That represents the shadow price right at
14 the border where the exporters serve, and what it means is
15 that it represents the costs of getting another megawatt to
16 serve -- supply to serve that export.

17 MR. MARK: So does that reflect an actual cost of
18 production of the most closely available megawatt?

19 DR. RIVARD: That's correct, yes.

20 MR. MARK: And then at the bottom of the chart, we see
21 the number of \$41/MWh. What does that represent?

22 DR. RIVARD: Well, that represents the offer of a
23 generator who would be constrained-off in this situation.

24 MR. MARK: You describe the difference between \$49 and
25 \$67 as a constrained-on payment. Is that a payment which
26 is passed along to customers in the uplift charge?

27 DR. RIVARD: That is a payment that would be passed on
28 to all customers, Ontario customers as well as exporters.

1 MR. MARK: Right. And you have the difference at the
2 other end between the 49 and the 41 described as a
3 constrained-off payment. Is that a payment that's made to
4 the generators in Ontario?

5 DR. RIVARD: That would be a payment made to this
6 specific generator. That's correct.

7 MR. MARK: We have a total uplift, then, of \$26; am I
8 right?

9 DR. RIVARD: That's correct.

10 MR. MARK: Who pays for this?

11 DR. RIVARD: The \$26 is paid by all consumers, so all
12 of the consumers within Ontario as well as exporters.

13 MR. MARK: Can you give us some estimate of how much
14 of that charge of \$26 is borne by the exporter in this
15 example, and how much would be borne by the other consumers
16 in Ontario?

17 DR. RIVARD: If we are using a typical hour of demand,
18 where the Ontario plus export demand, is, say, 20,000 MW,
19 this megawatt of export would pay roughly about one penny
20 in uplift and the remaining \$25.99 would be paid by the
21 rest of the consumers.

22 MR. MARK: What would happen to that \$26 charge if
23 this sale did not occur?

24 DR. RIVARD: If one megawatt of export did not occur,
25 that charge would not occur.

26 MR. MARK: Do you have any estimate, Dr. Rivard, as to
27 what portion of export sales to New York are inefficient in
28 the sense that they cost more to produce in Ontario than

1 they're sold for in New York?

2 DR. RIVARD: The latest market surveillance panel
3 report indicated that, for the six-month period that they
4 reviewed, 53 percent of all exports to New York were
5 inefficient.

6 MR. MARK: Mr. Kozlik, back to you, if I might. Has
7 the ramp rate being an issue for the IESO since market-
8 opening?

9 MR. KOZLIK: Yes. It was introduced as a transitional
10 measure so it has been in our minds and on our list to
11 address since the word "go." It was addressed in the very
12 first meetings of the market pricing working group, which
13 were created in May of 2004. That group addressed the ramp
14 rate issue throughout 2004, and right up to the fall of
15 2005, and it stopped at that time because the IESO shifted
16 all of its efforts at that point to develop the day-ahead
17 commitment process to address the reliability concerns that
18 we had in the summer of 2005.

19 But we then picked it up again in 2006, at the market
20 pricing working group, and were directed to do so also by
21 our board.

22 MR. MARK: And when did your board of directors give
23 you that direction?

24 MR. KOZLIK: That was given to us from their December
25 board meeting of 2005.

26 MR. MARK: Did you then in terms of addressing that
27 look at the possibility of changing or eliminating the ramp
28 rate, the 12X multiplier?

1 MR. KOZLIK: Yes. It was certainly one of the options
2 looked at.

3 MR. MARK: You spoke at the beginning of the fact that
4 the reason that you initially went to the multiplier was
5 because of concerns about volatility. Why would you then
6 be looking at changing the system in 2006? Was volatility
7 no longer an issue?

8 MR. KOZLIK: I'd say that there are two main reasons
9 why we would be less concerned about volatility now than we
10 were at the time of the market-opening.

11 One of them is that we've taken several steps in
12 design of the market since then that helps to address the
13 problem by ensuring that there's more supply available.

14 As an example, we've introduced programs such as the
15 spare generation online. We've recognized that we use
16 control action operating reserve. And we have created the
17 day-ahead commitment process, which is a program to get
18 generators and imports committed a day ahead.

19 The other reason why I would say that it's less of a
20 concern to us now relates to the circumstances that existed
21 at the time of the testing that created the actual volatile
22 and unpredictable prices. And that would be that the
23 exports were not actually varying during the testing as a
24 function of the market prices.

25 We've learned a tremendous amount since that point in
26 time, in terms of the responsiveness of exports and imports
27 to the market price that we did not know about at that
28 time. And we also didn't have the benefit of the test

1 results actually reflecting changes of imports and exports
2 to the price.

3 MR. MARK: When did the market pricing working group
4 start on this effort following the board's direction in
5 December 2005?

6 MR. KOZLIK: We started it with our meeting in January
7 20th.

8 MR. MARK: Did you continue working on it continuously
9 until the recommendation was made to the board?

10 MR. KOZLIK: Yes. It was the number one issue in the
11 market pricing for that entire time.

12 MR. MARK: Now, Mr. Campbell, if I could turn to you
13 at this point.

14 What recommendation did IESO management ultimately
15 make to the board of directors regarding the ramp rate
16 issue?

17 MR. CAMPBELL: We made the recommendation to change
18 the ramp rate multiplier from 12X to 3X.

19 MR. MARK: When was that recommendation made?

20 MR. CAMPBELL: It was made by way of a memo from
21 myself to the board of November 8th in anticipation of the
22 November 17th board meeting.

23 MR. MARK: You should have the compendium for the IESO
24 examination-in-chief which was given Exhibit K2.3 this
25 morning. Is your memorandum the document which appears at
26 tab 1?

27 MR. CAMPBELL: That's correct.

28 MR. MARK: Mr. Campbell, when you made that

1 recommendation, what were the benefits that you saw from
2 the proposed change?

3 MR. CAMPBELL: The benefits that we saw in the
4 proposed change are both laid out in that memorandum and in
5 paragraph 4 of our evidence. The benefits we saw were that
6 this change would more closely align the dispatch and
7 pricing algorithm. It would provide more accurate price
8 signals, both for producers and consumers. It would reduce
9 uneconomic exports, with significant improvement in
10 efficiency. It would achieve this with minimal if any
11 impact on consumer bills, certainly, we felt at that time
12 with minimal impact on consumer bills.

13 It would be very straightforward to implement, with
14 virtually no implementation costs for either the IESO or
15 market participants.

16 It would result in reduced fossil burn in Ontario.
17 And we felt confident that it was the superior alternative
18 that had been developed.

19 MR. MARK: Now, Mr. Campbell, it was suggested in Dr.
20 Murphy's testimony this morning that the only reason you
21 advanced this change was with respect to the reductions of
22 export sales. Is that so?

23 MR. CAMPBELL: That is not so.

24 MR. MARK: Dr. Rivard, I want to turn back to you just
25 to continue briefly, again, our discussion on the export
26 sales. As a result of the change to a 3X multiplier, will
27 there be upward or downward pressure on the HOEP?

28 DR. RIVARD: The change to the 3X ramp rate multiplier

1 will put upward pressure on the average HOEP.

2 MR. MARK: Going back to our chart, if the upward
3 pressure was to be at least \$1, what would happen to the
4 export sale?

5 DR. RIVARD: If the upward pressure on the HOEP was to
6 be about a dollar, as you say, then the exports that were
7 occurring that were profitable or just profitable before
8 the upward pressure would no longer be profitable, and
9 those exports would go away.

10 MR. MARK: Is this the concept that's referred to
11 throughout these proceedings as arbitrage?

12 DR. RIVARD: That's correct, yeah.

13 MR. MARK: And does the reduction of the quantity of
14 export sales itself have an impact on price?

15 DR. RIVARD: Well, as the exports decline, that means
16 that the demand in the -- in Ontario declines, and the
17 decline in the demand in Ontario puts a downward pressure
18 on the HOEP. So that downward pressure offsets the initial
19 upward pressure caused by the 3X.

20 MR. MARK: And have you made an estimate of how much
21 of the upward price pressure will be offset by the downward
22 price pressure from the arbitrage?

23 DR. RIVARD: Our -- yes. My estimates would be that
24 there would be only minimal impact on the HOEP following
25 the -- following the change to 3X and the arbitrage.

26 MR. MARK: And is there any change in the CMSC and IOG
27 payments as a result of the change to the 3X multiplier?

28 DR. RIVARD: Yes, there is. Yes.

1 MR. MARK: And what is that change?

2 DR. RIVARD: Going to 3X would lead to a reduction in
3 the CMSC payments.

4 MR. MARK: And why is that?

5 DR. RIVARD: When you use an arbitrary ramp rate, such
6 as 12X, there will be times when the pricing algorithm will
7 call upon supply that can't actually provide that supply.

8 So because it can't actually provide that supply, it
9 will be made a constrained-off payment. Correspondingly,
10 the dispatch algorithm has to have supply and demand in
11 balance. So it will have to find some more costly
12 generation to make up for the constrained-off supply.
13 There will be a corresponding constrained-on payment.

14 When we go to 3X, we have a better match on the actual
15 ramp rates, and so these occurrences will be reduced and
16 the overall uplift will decline.

17 MR. MARK: And what is your expectation, Dr. Rivard,
18 as to whether there will be any bill impacts for customers
19 after considering the impact on prices of arbitrage and the
20 impact on bills of the reduced uplift charges?

21 DR. RIVARD: My estimate would be that it would be
22 minimal.

23 MR. MARK: And if there is some price -- upward price
24 impact on bills after the application of the two offsetting
25 factors we've been speaking about, will the global
26 adjustment in OPG rebate affect that amount?

27 DR. RIVARD: It will certainly affect the final bill
28 of the consumers, yes.

1 MR. MARK: And to what extent?

2 DR. RIVARD: The global adjustment, as has been
3 discussed today, the global adjustment OPG rebate
4 essentially provides an 80 percent rebate for any dollar
5 increase in the HOEP. So, for example, if the HOEP goes
6 up, 80 percent of that price increase will be -- come back
7 as a rebate to consumers.

8 MR. MARK: And do you have a view, Dr. Rivard, as to
9 whether there will be any upward impact on customer bills
10 as a result of this measure, taking into account all of the
11 offsetting factors you've spoken of so far?

12 DR. RIVARD: If you allow for the global adjustment,
13 it's my estimate that there likely will be a reduction in
14 the overall bills of consumers?

15 MR. MARK: A reduction in overall bills?

16 DR. RIVARD: Yes, sir.

17 MR. MARK: You see that as a real possible outcome
18 here?

19 DR. RIVARD: I believe that it is a possible outcome,
20 yes.

21 MR. MARK: Now, you've told us your view that
22 arbitrage might entirely, almost entirely, offset the
23 upward price pressure. Mr. Campbell, is that what was
24 communicated to the IESO board when you submitted your
25 recommendation on November 8th?

26 MR. CAMPBELL: That was not the figure that we used
27 for arbitrage when we spoke to the board in -- at the
28 November meeting. In Dr. Rivard's models, he's continued

1 to refine his models since that time, which is reflected in
2 his current testimony.

3 But, at that time, what we wanted to use as a number
4 for arbitrage was a figure that Dr. Rivard was confident
5 would, if anything, overestimate the consumer impact; that
6 is, the impact on consumer bills.

7 And so we used a 50 percent arbitrage figure for
8 purposes of those calculations, as I say, recognizing that
9 in Dr. Rivard's view, at least that amount of arbitrage
10 impact was certain.

11 MR. MARK: All right. And, Mr. Campbell, if you could
12 turn up - and you other gentlemen, as well, please - tab 4
13 of the small compendium you have there.

14 MR. KOZLIK: Excuse me, do you have another copy of
15 the compendium, please?

16 MR. MARK: I think we can find one for you.

17 And, Mr. Campbell, at tab 4 we have the document
18 entitled, "Market Rule Amendment Proposal." Is that the
19 actual proposal that went before the Board?

20 MR. CAMPBELL: That's correct.

21 MR. MARK: All right. And there is a description and
22 rationale, and then we have this table. This table was
23 part of the -- if we look over at page 4 of 5, this table
24 went to the board?

25 MR. CAMPBELL: Yes, it did.

26 MR. MARK: All right. And let's look at that table
27 for a moment. And we've looked at it somewhat today, and I
28 know you are familiar with it.

1 And we look at the third line down, see we see reduced
2 impact due to arbitrage. Is that the 50 percent number you
3 referred to a few moments ago?

4 MR. CAMPBELL: Yes, that's correct.

5 MR. MARK: Now, Dr. Rivard, Mr. Campbell has spoken of
6 continuing analysis on your part. Has that indeed been the
7 case?

8 DR. RIVARD: Yes, it has.

9 MR. MARK: And what have you done since the amendment
10 proposal that we see here and today?

11 DR. RIVARD: We've continued to further our analysis
12 on the elasticity estimates of the export response, and we
13 found that our analysis now indicates a very highly elastic
14 response, so it's quite an effective response.

15 We've done something called an event analysis that
16 looks at several incidents when there was a sudden upward
17 pressure on the HOEP relative to the New York price and
18 studied the response of exporters, and, once again, found
19 through that event analysis a very strong response, as well
20 as a quick return, if you will, of the gap between the HOEP
21 and the New York prices.

22 And we've also done further study of the conditions in
23 the New York market.

24 MR. MARK: And did you obtain any external assistance
25 in doing any of those analyses?

26 DR. RIVARD: We -- yes, we did. We worked with Dr.
27 Mel Fuss and Dr. Angelo Melino from the University of
28 Toronto in terms of the econometric analysis that we did,

1 yes.

2 MR. MARK: And as a result of the work that you have
3 done since then, has your opinion as to the amount of the
4 price increase which would be mitigated by arbitrage
5 changed since the November time?

6 DR. RIVARD: I would say that the impact on the HOEP
7 -- or the strength of the arbitrage impact, it would be
8 closer to the 100 percent level than it would certainly to
9 the 50 percent level.

10 MR. MARK: And what degree of confidence do you have
11 in that conclusion?

12 DR. RIVARD: I'm particularly confident in that, yes.

13 MR. MARK: And so if we go back to the chart at page
14 4, Dr. Rivard, and I don't think we have to go through the
15 offsets for the CMSC reductions and the rebate in the
16 global adjustment, but going right to the bottom line,
17 where this says a net customer cost in cents per kilowatt
18 hour of 4/1000ths of a kilowatt hour, what's your opinion
19 today as to the likely impact relative to even that amount?

20 DR. RIVARD: This is based on 50 percent, so I would
21 have to say it would be a further reduction of that.

22 MR. MARK: Now, Dr. Rivard, are we able to determine
23 whether there is a direct financial benefit to the province
24 -- people of the province of Ontario from reducing those
25 export sales?

26 DR. RIVARD: Yes, we did a cost benefit analysis that
27 indicated there would be a \$6.6 million improvement in the
28 system efficiencies within the region, as well as a net

1 surplus gain or a net wealth gain to all Ontarians of
2 between 7 million and 14 million, depending on the strength
3 of arbitrage.

4 MR. MARK: So is that the number that's called an
5 efficiency gain?

6 DR. RIVARD: The efficiency gain is the \$6.6 million,
7 and that's per year.

8 MR. MARK: So, I'm sorry, I may not have listened.
9 And what's the overall benefit to Ontario as a whole?

10 DR. RIVARD: Between 7 million and 14 million, and
11 that's per year.

12 MR. MARK: What is your estimate now, aside from that,
13 Dr. Rivard, of what the reduction will be to the CMSC
14 payments as a result of this change?

15 DR. RIVARD: I think in tab I of my evidence, if I
16 look at the entire change in the uplifts, it's around \$14
17 million, I believe. Tab I is where we have the cost
18 benefit analysis.

19 MR. MARK: So that the Board has the references, Dr.
20 Rivard, are the event analysis and the expanded econometric
21 analysis that you did and spoke about the ones that appear
22 at tabs G and H of the prefilled evidence?

23 DR. RIVARD: Yes. Tab G is the event analysis and tab
24 H is the econometric work.

25 MR. MARK: Mr. Kozlik, before the recommendation was
26 made to the board of directors, did you examine
27 alternatives to a 3X ramp rate multiplier?

28 MR. KOZLIK: Yes. The market pricing working group

1 was focussing, really, on four alternatives. One was to
2 put the multi-interval optimization or MIO algorithm into
3 the pricing algorithm. Another was moving to a 1X ramp
4 rate multiplier. The third was the concept of retaining
5 the 12X ramp rate multiplier but applying side payments to
6 generators who provided ramping service or a dispatch
7 service. And the fourth was to maintain the status quo.

8 MR. MARK: Describe for us the multiple interval
9 optimization solution and whether it was or wasn't a
10 solution that you looked upon favourably.

11 MR. KOZLIK: The MIO is a methodology that has been
12 included in the dispatch algorithm, whereby the program
13 looks forward for known situations that are coming to it in
14 terms of changes of output or changes in generator status,
15 and it effectively prepares the system for those
16 conditions. It looks for 11 intervals.

17 We put that in place in June of 2004, and hence that's
18 why the market pricing working group was started to look at
19 MIO in the pricing algorithm.

20 That investigation was taking a long time and
21 continued to take a long time because it's a controversial
22 issue to decide how to model MIO in the unconstrained or
23 pricing algorithm.

24 There were three methods -- actually, there were at
25 times even five methods that were being debated in terms of
26 how to implement MIO.

27 The efficiency gains that we believe were going to
28 come from MIO varied, of course, depending on which

1 methodology was used. In some, we saw virtually no
2 efficiency gains from a move to MIO.

3 In others we saw moderate efficiency gains, but in no
4 instance were there efficiency gains that would have
5 exceeded what we see coming from the 3X ramp rate change.

6 MIO was going to have quite an expense to implement it
7 into the pricing algorithm, and, as a result of the
8 relatively low efficiency gains and the costs and the
9 multiple possible MIO approaches, we felt it inferior to
10 the 3X option.

11 MR. MARK: What about the alternative of going to a 1X
12 multiplier?

13 MR. KOZLIK: Yes, we looked at the simulations in
14 terms of upward pressure on price due to a 1X ramp rate
15 multiplier. I think there are two things to note there.
16 One of them is that in many hours the 1X ramp rate
17 multiplier was creating a price that was even higher than
18 the costs of dispatch. In effect, it was overshooting.
19 That's probably because it's not incorporating the ability
20 to look forward.

21 The other is that it had definitely the most
22 significant impact on price. The simulations show that the
23 pressure upward on price, it may not have had an impact on
24 price but certainly the price pressure was in the 11 to 12
25 percent range. So, in comparison to what was existing for
26 the 3X ramp rate, that's three to four times larger.

27 For those reasons we felt that it was more reasonable
28 to go with the 3X ramp rate.

1 MR. MARK: What about the side payments option?

2 MR. KOZLIK: There were several versions of side
3 payments that were discussed. In every instance, the side
4 payments involve generators receiving payments outside of
5 the energy price for the ramping service that they're
6 providing.

7 Because those payments are outside of the energy
8 price, two things happen. One is that there are no
9 efficiency gains to be had. There is no response to price,
10 then, because the price doesn't have those features in it.
11 Secondly, because they are outside of the energy price and
12 in the uplift, these are non-transparent costs that are
13 unhedgeable by consumers or producers, and also are
14 unaffected by the global adjustment, or outside of the
15 global adjustment --

16 MR. MARK: Given --

17 MR. KOZLIK: -- in the OPG rebate.

18 MR. MARK: Given those factors, why was this even an
19 option on the table?

20 MR. KOZLIK: It was an option on the table because at
21 one point it looked like both consumers and generators were
22 willing to go in this direction. As we could see, people
23 on the opposite side of an issue coming to a possible
24 mutual answer, we certainly wanted to give that fair
25 justice and plenty of time for full analysis.

26 MR. MARK: And was there every any agreement or
27 consensus amongst stakeholders about the side payments
28 option?

1 MR. KOZLIK: No, it didn't materialize.

2 MR. MARK: Mr. Campbell, let me ask you about the last
3 option.

4 What about the status quo? Was that an option?

5 MR. CAMPBELL: It was an option that we considered,
6 and we considered against, of course, the other range of
7 alternatives that were being looked at. It was a solution
8 that when we considered it really meant that we would not
9 capture the benefits that I outlined earlier for the 3X
10 proposal. We recognized that the 3X proposal had no
11 implementation costs and would provide us with -- or
12 essentially no implementation costs, and would provide us
13 with the range of benefits that we described. And the
14 judgment was that, given the IESO's accountability to make
15 improvements to the market, that this was - that is, the
16 status quo - was an alternative that there were no
17 compelling reasons to adopt it.

18 We had compelling reasons to proceed with an
19 alternative that would produce benefits, and sticking at
20 the status quo would, of course, avoid those benefits and
21 in our judgment was not consistent with our accountability
22 to make improvements to the market in these circumstances.

23 MR. MARK: Now, gentlemen, let me ask you a few
24 questions about some criticisms that have arisen from time
25 to time about the alternative that was selected. There has
26 been some suggestion that this issue might go away if you
27 move to the day-ahead market.

28 What do you say about this, Mr. Kozlik?

1 MR. KOZLIK: Certainly the day-ahead market that exist
2 in any neighbouring jurisdictions and all that I am aware
3 of in North America, the day-ahead markets represent hedges
4 to the real-time price; effectively they're like contract
5 positions from the day-ahead going into real-time.

6 As such, they should converge to the real-time price,
7 and, in fact, we see that in other markets. So if those
8 day-ahead prices do converge to the real-time price, and
9 the real-time price has inefficiencies in it, then those
10 inefficiencies will also spill over to the day-ahead
11 market. In any design that is consistent with those
12 markets, I do believe that this issue has to be addressed
13 in any event, despite the fact that we are trying to move
14 towards a day-ahead market.

15 I might also say that the circumstances that would
16 lead to a successful day-ahead market design in Ontario are
17 being investigated by us right now, and there are many
18 features of the Ontario market that make us realize that we
19 will have to be conducting an extensive investigation about
20 the extent to which we are going to be able to accomplish a
21 day-ahead market in Ontario.

22 MR. MARK: Would DAM overtake the need for the change
23 in the ramp rate multiplier if it was not introduced in
24 accompaniment with locational marginal pricing?

25 MR. KOZLIK: If it was accompanied by locational
26 marginal pricing, then the ramp rate problem would be
27 addressed by the introduction of locational marginal
28 pricing.

1 MR. MARK: And do you have a view, Mr. Kozlik, or even
2 Mr. Campbell, as to the likelihood of the government of
3 Ontario moving to a locational marginal pricing --

4 MR. KOZLIK: I defer --

5 MR. MARK: -- regime?

6 MR. CAMPBELL: I think it's very unlikely in the
7 foreseeable future. It was -- certainly locational
8 marginal pricing has been considered a couple of times,
9 most recently over the course of last fall, and it was made
10 clear at that time that as a matter -- that the government
11 would not be moving away from the uniform pricing system
12 and adopting a locational marginal pricing system for the
13 province.

14 MR. MARK: Now, Mr. Kozlik, there's also been
15 reference in the materials to a version of DAM that was
16 spoken about on a recent occasion by Dr. Carr from the OPA.
17 You're familiar with that?

18 MR. KOZLIK: Yes, I am.

19 MR. MARK: And what can you tell us about the
20 suggestion that that idea that Dr. Carr spoke about might
21 resolve the issue without having to change the multiplier?

22 MR. KOZLIK: As I understand the design that Dr. Carr
23 was suggesting, it involved the day-ahead market being a
24 market for slower ramping generation that could move from
25 hour-to-hour levels, and then contemplated the real-time as
26 being a balancing market for faster ramping facilities to
27 handle the shorter-term variations in supply and demand
28 balances.

1 That market would require certainly the design of the
2 day-ahead market itself, but also a very significant
3 re-think of what the real-time market was going to be. I
4 see that as a very large piece of work, and one that is not
5 going to be materializing soon in Ontario.

6 MR. MARK: Is it even one that there's been a decision
7 on, whether to pursue it or not?

8 MR. KOZLIK: No, there's been no decision at all.

9 MR. CAMPBELL: And, Mr. Mark, if I could just add, I
10 think the features that Dr. Carr was looking for when he
11 talks about that kind of model have, at least in part, been
12 replicated by the hybrid market that we have, where a good
13 deal of that base load slow-ramping generation is already
14 price-controlled through the global adjustment mechanism.

15 MR. MARK: Another criticism that was raised,
16 gentlemen, is the proposition that there's no evidence that
17 generators are under-compensated for ramping costs. Is
18 that an appropriate criticism, in your view, Mr. Kozlik?

19 MR. KOZLIK: I am not addressing the issue of the ramp
20 rate multiplier to address whether or not there is under-
21 or over-compensation of generators. I did make -- we did
22 make the statement that relative to any other market where
23 there are not ramp rate multipliers, that the market is
24 under-compensating generation.

25 However, the goal of the pricing improvements that we
26 are after is increases in efficiency.

27 MR. MARK: Right. So is your proposal at all based
28 upon or does it have reference to generator cost recovery

1 or generator profits?

2 MR. KOZLIK: No, it doesn't.

3 MR. MARK: Is it solely related to price as opposed to
4 cost?

5 MR. KOZLIK: It's to create the price drivers that
6 will drive to efficiency.

7 MR. MARK: And, similarly, there's a related criticism
8 that the ramp rate solution only pays generators -- sorry,
9 that a proper ramp rate solution should only pay generators
10 who provide ramping. What about that criticism?

11 MR. KOZLIK: To have the price be not reflective of
12 the needs for the ramping, and therefore some generators
13 being paid lower prices than others, leads to inefficient
14 price signals going to different generators, depending on
15 their circumstance. Efficiency is best achieved when the
16 costs of dispatch are reflected to all participants in the
17 same way.

18 MR. MARK: And would making payments to selected
19 generators be consistent or inconsistent with the present
20 market design?

21 MR. KOZLIK: The present market design uses a clearing
22 price methodology. We do have to make individual payments
23 to generators to compensate for the lack of transmission in
24 the pricing algorithm, but the clearing price methodology
25 is the basis of the market.

26 MR. MARK: Now, Mr. Campbell, as we know, of course,
27 there was a recommendation made to the board of directors
28 at the same time to authorize a distribution to customers

1 from the transmission rights clearing account.

2 Firstly, can you tell us what that account is and what
3 the sums in that account represent?

4 MR. CAMPBELL: Yes. The transmission rights clearing
5 account relates to the transmission rights market, a
6 separate market that we operate. And what that market
7 provides is the opportunities for traders on the interties
8 to hedge their congestion risk for transactions across
9 those interties.

10 So the transmission rights clearing account
11 accumulates the funds that are collected first the auctions
12 of transmission rights, then from the congestion rents
13 across the interties, and then pays out or disperses from
14 that total the amounts that are due to the holders of those
15 transmission rights as they mature. So the transmission
16 rights clearing account, if you will, is a bucket that
17 accumulates and disperses all of those, all of those funds.

18 Well, that's what it is.

19 MR. MARK: And we see in reference the Board materials
20 to the notion of a surplus in that account. Can you
21 accumulate a surplus?

22 MR. CAMPBELL: Yes, and in fact the fund did
23 accumulate a significant surplus over time, and that
24 surplus is made up of the actual auction revenues that are
25 collected in the course of the operation of the
26 transmission rights market.

27 MR. MARK: And what options does the corporation have
28 with respect to the surplus?

1 MR. CAMPBELL: The surplus, which, as I say, is these
2 auction revenues collected -- the auction revenues that are
3 paid by participants in that market, the traders that
4 participate in that market, can be -- there's really three
5 things that can happen. One is that those funds can simply
6 be held in that account as an appropriate cushion against
7 the vagaries of that market.

8 Obviously, the market can move one way or the other,
9 and it makes good prudent sense to hold a cushion of --
10 against those market movements. So that's one use.

11 The other thing that can be done is to change what's
12 called the confidence factor with respect to the
13 transmission rights market, which is, in essence, the
14 amount of rights that the IESO is prepared to issue on the
15 interchange ties. The more rights that one issues, the
16 more likely it is that there are going to be draws on the
17 clearing account, of course.

18 So there's a judgment that's made about how much to
19 hold in that account that has to do with the confidence
20 factor or the number of rights that are sold.

21 The third aspect is that the rules permit the payment
22 of a surplus in that account out to consumers.

23 MR. MARK: Now, Mr. Campbell, is there any connection
24 between the amount of the surplus and the ramp rate
25 multiplier?

26 MR. CAMPBELL: No.

27 MR. MARK: So can you tell me why the recommendation
28 for the disbursement out of the transmission rights

1 clearing account surplus was made concurrently with the
2 recommendation with respect to the ramp rate multiplier
3 change?

4 MR. CAMPBELL: The IESO believed that the change to
5 the 3X ramp rate would have negligible impact on customers'
6 bills, but it was absolutely clear to us that some
7 stakeholders simply thought we were wrong in that regard.
8 And this payment was approved for disbursement in
9 conjunction with the move to 3X to provide an added level
10 of assurance to customers that they would not feel a
11 significant bill impact when this change was made.

12 MR. MARK: Now just a few questions in concluding,
13 gentlemen, and not necessarily in any particular order.

14 Mr. Campbell, it's been suggested by some that the
15 IESO disregarded the question of possible wealth transfer
16 and customer impacts when evaluating this proposal. Is
17 that so?

18 MR. CAMPBELL: That is not so. As pointed out at
19 paragraphs G and H - or , I'm sorry - 125 and 126 of our
20 evidence, which is on page 29 of our evidence, as pointed
21 out there, we look at it both from the point of view of the
22 overall efficiency improvements in Ontario, and that's the
23 work that Dr. Rivard spoke to earlier, and we also took the
24 view that it was important to consider wealth transfers and
25 the impact of price on customers, and we have done so.

26 MR. MARK: Did you consider, Mr. Campbell, in your
27 analysis, whether and when the OPG rebate, which enters
28 into your customer bill calculation, might change?

1 MR. CAMPBELL: Yes, we did. And that's pointed out at
2 paragraph 139 of our evidence, which can be found at page
3 32 of that evidence.

4 I want to make a distinction here between the global
5 adjustment and the OPG rebate.

6 The global adjustment of the 80 percent impact
7 accounts for just under 60 of those 80 percentage points.
8 The global adjustment is certainly, I think, seen by all
9 as, at the moment, a long-range feature for the Ontario
10 market. The OEB is putting in place a regulatory scheme to
11 deal with that, and so I don't think there's much doubt
12 that at any time in the near term, or well out beyond the
13 2009 figure that was mentioned, that the global adjustment
14 is going to disappear. It seems to be a permanent part of
15 the regulatory features of the hybrid market.

16 MR. MARK: I just want to be clear on the math. Does
17 that account for 60 percent of the 80 percent?

18 MR. CAMPBELL: No, it's 60 of the 80 percentage
19 points.

20 MR. MARK: Okay.

21 MR. CAMPBELL: In fairness, it's just under 60. The
22 remaining 20-some-odd points is covered by the OPG rebate.

23 Now, in the OPG rebate, I think, as we point out in
24 our evidence, there are a variety of scenarios that could
25 happen.

26 First, the government could choose to extend the
27 rebate, as they have done already once, in which case the
28 overall mitigation level beyond 2000 - I think it's May

1 2009 - would remain unchanged.

2 I fully expect that there will be constituencies who
3 encourage the government to do just that, as there were the
4 last time it was extended.

5 The second thing that could happen would be the
6 government could choose to have the rebate cease
7 altogether. In that case, obviously the combined
8 mitigation effect would be reduced.

9 As we point out in our evidence, if that happened,
10 nothing else happened, no change in coal-burn, then the
11 mitigation would be reduced from the 80 to the just under
12 60, as I spoke.

13 The third option, of course, is to remove the cap, but
14 in circumstances where coal-burn in Ontario is declining.
15 And that could happen either because of a policy decision
16 to run other generation in advance of coal, or simply
17 through the natural policy reduction that's going to happen
18 in coal-burn in the province, and there is, of course, a
19 question as to how quickly that would happen.

20 But, to the extent that coal use declines and the
21 contracted facilities that are coming into place to replace
22 the coal picks up that difference, then that 60 percent
23 will rise back toward the 80 percent.

24 To make a judgment about the mitigation between the 60
25 and 80 percent, you have to take into account: Is it
26 likely to continue? What are the forces that are likely to
27 be active in working to have it extended? And you have to
28 make a judgment about what you see happening to the coal-

1 burn in the province and to the extent it's replaced by the
2 contracted facilities.

3 When you combine all that together, I think those are
4 the factors you need to weigh in making a judgment as to
5 how long it's going to continue past the It's in place
6 already, relative to 2009.

7 MR. MARK: Is that the earliest it would disappear, if
8 it ever did disappear?

9 MR. CAMPBELL: Yes.

10 MR. MARK: Mr. Kozlik, at the risk of getting to a
11 level of detail that I may not understand, I just want you
12 to see if you can clarify the issue which we seemed to have
13 some problem with this morning with Dr. Murphy, which is
14 that comparison of was it 1X or was it 3X, and was MIO
15 involved. We had that particular document, which was at
16 volume 2 of our prefiled, section viii, tab 9.

17 MR. KOZLIK: Right. I believe that's the e-mail from
18 Andy Hee to Paul Murphy?

19 MR. MARK: Yes.

20 MR. KOZLIK: Mr. Murphy asked Mr. Hee specifically to
21 do an analysis on one particular hour. And he asked this
22 because it happened to be an hour where there was a price
23 spike in our market as it exists today. Those actual
24 prices are reflected in the first column, titled "actual
25 price." These are the 12 intervals in the particular hour.

26 So, in doing the simulation - which Mr. Hee did for
27 Mr. Murphy as to what the results would be with a 3X ramp
28 rate multiplier, which is, of course, what we recommended

1 to our board - the first thing Mr. Hee did was rerun his
2 models with the 12X ramp rate multiplier that exists today
3 to check whether or not he was getting reasonable outcomes
4 relatively to what actually happened. And that's what the
5 second column is.

6 With great confidence that he had a well-calibrated
7 model, he then went on to calculate what would be the price
8 impact with the 3X multiplier rather than the 12X, and
9 that's what the third column is. That's not anything to do
10 with MIO; that's a straight replacement of a 12X with a 3X
11 in our pricing algorithm.

12 MR. MARK: At that particular point in time with a
13 particular capacity.

14 MR. KOZLIK: For one exact hour. Yes.

15 MR. MARK: To be clear, this was not run with MIO?

16 MR. KOZLIK: This was not run with MIO.

17 MR. MARK: Gentlemen, those are my questions -- sorry?
18 Is there anything any of you want to add?

19 MR. KOZLIK: No.

20 MR. MARK: Right. Those are my questions. My friends
21 in the panel may have some questions for you.

22 **QUESTIONS FROM THE BOARD:**

23 MR. RUPERT: I have some questions which I'll hold
24 that the end, but there's one I want to ask now just to
25 help me. It has to do with the chart that, Mr. Rivard, you
26 took us through. The top price there of \$67/MWh, in the
27 typical kind of transaction like this where you're seeing
28 these uneconomic exports, what kind of generator is that?

1 DR. RIVARD: What generator would provide that
2 megawatt? Remember, it's the shadow price.

3 MR. RUPERT: Right.

4 DR. RIVARD: So it's the cost of getting another
5 megawatt at that point, so it's really no specific
6 generator that is providing that megawatt. But it would
7 generally be coming from generators in the region, which
8 will be either -- and this is an average price, so once
9 again, it's difficult to say. It could be the expensive
10 energy-limited hydro. It could be some of the gas-fired
11 plants that could be affecting that price.

12 MR. RUPERT: To the extent that it is energy-limited
13 hydro that is also subject to the OPG rebate which Mr.
14 Campbell just talked about, if we were looking just at a
15 single transaction, and I realize it's highly stylized to
16 deal with one hour and one transaction, but would it be
17 fair to say that while there is this \$26 uplift charge that
18 you have on the chart, that there may well, in fact, be
19 some money being returned to consumers in Ontario via
20 rebate on that if the generator is actually going to be
21 receiving a higher price or not? If they're receiving -- I
22 guess they're receiving HOEP, or can you tell me?

23 DR. RIVARD: This generator is constrained-on, and it
24 receives a payment for being constrained-on and keeps that
25 payment as quite part from the global adjustment -- or,
26 sorry, in this case the OPG rebate.

27 MR. RUPERT: I just want to clarify that. I think
28 you've answered my question. And so there would be -- even

1 if that generator were one that were subject to the OPG
2 rebate, the fact is the rebate is based upon the spot price
3 it receives in the marketplace, which would be \$49 and not
4 the higher price?

5 DR. RIVARD: That's right.

6 MR. RUPERT: Okay, I understand.

7 MR. MARK: I just want to make sure there's no
8 misunderstanding. I thought it was clear in their evidence
9 that the rebate doesn't apply to the uplift charges.

10 MR. RUPERT: No, I understand. I understand. Thank
11 you.

12 MR. KAISER: Just to follow up on that, if you reduce
13 inefficient exports by increasing price, can you reduce
14 efficient exports at the same time?

15 DR. RIVARD: If there are situations where the --
16 there was an efficient export and the price was pushed
17 above cost, then that could happen, yes. But, as I say,
18 our analysis looks at the entire time period, and the
19 balance of these, as the MSP report has said, is they're
20 usually -- 53 percent of the time they're inefficient.

21 MR. KAISER: What is the order of cross-examination?
22 Do we have parties wishing to proceed before Mr. Rodger?

23 MS. DeMARCO: I don't have any questions for this
24 panel, Mr. Chairman.

25 MR. KAISER: All right. Any questions?

26 MS. ERZETIC: No questions.

27 MS. AVERY: We don't have any questions.

28 MR. KAISER: Mr. Millar, any questions?

1 MR. MILLAR: I do have a few questions. I was
2 planning to go after Mr. Rodger, because I thought he might
3 deal with them, but I leave it in your hands, or if Mr.
4 Rodger has a preference.

5 MR. KAISER: Your choice.

6 MR. RODGER: I'm happy to go first, Mr. Chairman.

7 MR. KAISER: All right.

8 **CROSS-EXAMINATION BY MR. RODGER:**

9 MR. RODGER: Panel, are you familiar with the evidence
10 of TransCanada in this case, the report that was filed on
11 March 9th? I just wonder if you could turn up page 2 of
12 that report, please.

13 MR. KOZLIK: Page 2 of 14?

14 MR. RODGER: Yes.

15 MR. RODGER: And starting at line 2, the report reads:

16 "TransCanada explains that, one, the 12X ramp
17 rate multiplier (the 'Multiplier') is actually
18 applied to the dispatch interval for purposes of
19 the market price calculation; two, the Multiplier
20 is inconsistent with the optimization objective
21 of the market rules; three, ramp is actually an
22 ancillary service and payment for it has nothing
23 to do with the dispatch interval (or the
24 multiplier) presently in use under the market
25 rules."

26 And then on this page, and also elsewhere, TransCanada
27 makes the claim that, really, this being portrayed as
28 payments for ramp rate is really a bit of a misnomer, that

1 really what we're talking about here has nothing to do with
2 ramping and ramping costs. Do you agree with that?

3 MR. KOZLIK: I would agree. This is a calculation of
4 the appropriate price in the market. I leave it at that.

5 MR. RODGER: Now, Mr. Campbell, if I could turn you to
6 the decision of the IESO board of directors on this issue.
7 We filed that as part of the AMPCO application, tab 5.

8 MR. MARK: It's actually, in the compendium I handed
9 out today, Mr. Rodger, Mr. Chair, at tab 3, if you wanted
10 to look at it that way.

11 MR. RODGER: And what I'd like to do, Mr. Campbell, to
12 start is to take into account the Board's decision
13 yesterday on relevance, but take certain things off the
14 table, and then ask you a couple of questions in the
15 context of that decision of yesterday.

16 And I just want to refer to the bottom paragraph on
17 page 1, the rationale, which reads as follows:

18 "In making the decision to change the ramp rate
19 multiplier, the board considered a substantial
20 set of materials, including written comments
21 received on the market rule amendment proposal,
22 additional written comments from stakeholders to
23 the IESO on the subject of the ramp rate
24 multiplier over 2006, IESO's management's
25 responses, the management recommendation as
26 documented in the August 16th, 2006 report
27 entitled 'Addressing the 12X ramp rate
28 multiplier', and the information as set out in

1 the rule amendment proposal published on December
2 27, 2006."

3 Now, if you look at the materials that were put before
4 the board of directors on this issue and you remove all
5 these kind of stakeholdering reports and so on, can you
6 advise me as to what was the information of a purely
7 economic nature that the IESO board had before it when it
8 considered as the change?

9 MR. CAMPBELL: I think the information of a purely
10 economic nature was as you've heard described here and in
11 our written testimony, with the exception of some of the
12 refinements of his work that Dr. Rivard has taken out.

13 MR. RODGER: Because I guess what I'm trying to
14 understand, after we've culled the material over the past
15 24 hours, and seeing the key reference points in an
16 economic context that the board looked at on these four
17 options that you've described in this report --

18 MR. CAMPBELL: Well, what, of course, the board looked
19 at was the entire set of materials, which included both
20 that and all of the balance of the considerations that
21 related to this decision. And I think the -- I think
22 they're fairly summarized in the November 8th memorandum,
23 which is at tab 1 of our exhibit filed today.

24 MR. RODGER: I tell you what we're struggling with,
25 Mr. Campbell. Yesterday, when we had the Board's relevance
26 decision, we looked at the economic test that this Board
27 has to apply, and I'm trying to take all the stakeholdering
28 information away and look at kind of the hard economic

1 numbers that the Board would look at to make its decision,
2 given now that we understand that the stakeholdering side
3 of it is irrelevant, frankly, for the OEB's test.

4 So I'm trying to link that economic test that this
5 Board has to apply and the specific information before the
6 IESO board that doesn't take into account the extraneous
7 stakeholdering issues.

8 MR. MARK: Mr. Chairman, I think there's a problem
9 with lack of clarity in that question. I'm not sure if Mr.
10 Rodger actually wants the witness to tell him which
11 physical documents were available to the board, or is he
12 asking for an answer which is, What was the substance of
13 the economic analysis that the board had?

14 Because if he's asking what documents did the board
15 have access to, taking out stuff we may take out of this
16 record, it's going to be a long task. I mean, we could do
17 it, perhaps, but I'm not sure I see the utility of it.

18 MR. KAISER: Mr. Rodger, I'm not sure I'm following
19 your question either.

20 MR. RODGER: I guess I'm wondering if there was any
21 separate documentation that just solely addressed economic
22 issues, but not in the context of the stakeholdering.

23 MR. MARK: Two comments, Mr. Chair.

24 In the November 8th memorandum before you in the
25 compendium, and in the September board memo which is in the
26 materials - and I will get you the reference for that
27 shortly - there was a board memo provided to the board, and
28 there were appendices provided to the board, and the board

1 was directed to material which was available on-line with
2 respect to the work that had been done, because the market
3 pricing working group posted all the analysis and all
4 comments received for public viewing.

5 The September -- I just have the reference now. The
6 September board memo is volume 2, section 5, tab 8.

7 So my first --

8 MR. KAISER: There's also some information in the
9 attachment to Mr. Campbell's memorandum to the board on
10 November 8th with respect to Navigant studies and --

11 MR. MARK: That's right. They would have had a myriad
12 of information that was either before them in summary form,
13 before them in appendices, or that they were directed to
14 through links to the IESO's own site where the analysis was
15 posted.

16 My second comment, Mr. Chair, and Mr. Rodger's remarks
17 reflect a discussion we had last night. There may be
18 documents in the record which originated with or because of
19 the stakeholdering process, but either are entirely or have
20 within it economic analysis, the substance of this. Mr.
21 Rodger is suggesting that those documents should be excised
22 from the record entirely, and of course our position is
23 that's not so. If there's a document which is exclusively
24 about process, it comes out. But we're not taking out
25 documents about substance which were created during the
26 process.

27 That's the substance of the question he's getting at.
28 He's trying to suggest to you, if we take out 99 percent of

1 the documents in this case, because they have something to
2 do with process, tell me what the board had to decide. And
3 that's not the test we're using for excision of the record
4 in this case.

5 MR. KAISER: But also differently, Mr. Rodger, the
6 board wasn't doing a section 33(9) analysis.

7 MR. RODGER: No, I understand, Mr. Chair. In
8 reviewing some of these documents last night, the struggle
9 that we were having is to try and gauge to what extent the
10 board's decision hinged on the output of the stakeholdering
11 process as a compromise end-result, and how much of that
12 was based purely on, kind of, the economic data before
13 them. That's what we were trying to wade through as we
14 looked at the documents.

15 I don't know, Mr. Campbell, if you can help us on that
16 front.

17 MR. MARK: That's a different question, if he wants to
18 ask that one.

19 MR. KAISER: Yes, it is.

20 MR. MARK: Mr. Campbell, do you understand the
21 question that's being suggested now?

22 MR. CAMPBELL: I think I do. And the board was
23 certainly aware of the kinds of benefits that were being
24 contemplated as occurring if this were to take place; that
25 is, the benefit side of the equation, the reduction in CMSC
26 and so on. The board was certainly aware that the costs of
27 implementation were practically nothing so that kind of at
28 the broadest level the cost benefit was very positive.

1 The board was certainly aware that one of the
2 additional factors it wanted to look at was the potential
3 impact on consumers' bills, and that's has been reflected
4 throughout; it's reflected in this memorandum, and it's
5 reflected in the proposal, as to the degree to which there
6 would be a potential impact on customers' bills.

7 Short of going through each and every consideration in
8 terms of the overall benefits for the province, and in
9 terms of the potential impacts that were being discussed
10 with respect to consumers' bills, all of those things were
11 actively considered by the board throughout this process.

12 MR. RODGER: On page 5 of the IESO board of directors'
13 decision --

14 MR. CAMPBELL: Yes.

15 MR. RODGER: -- on the last page, there is reference
16 to the goal of the board, and about halfway down that
17 paragraph, of:

18 ... ensuring enhanced transparency with respect
19 to the energy pricing mechanism in Ontario, and
20 providing the opportunity for stakeholders who
21 did not accept the Board's decision to the OEB
22 for a regulatory review of this market
23 amendment."

24 Given that that was one of the transparency goals, was
25 there any specific discussion at the board of directors
26 meeting with respect to the specific OEB tests that would
27 have to be met?

28 MR. CAMPBELL: Yes.

1 MR. RODGER: Can you describe those tests?

2 MR. CAMPBELL: The company's counsel attends those
3 meetings and advised the board of what the OEB process was,
4 and I spoke to that process as well, but advised the board
5 of the kind of tests that it would face, yes.

6 MR. RODGER: And how did you describe the test in
7 terms of the section 1 objectives of the Act to the Board?

8 MR. CAMPBELL: I don't know that the discussion would
9 have gone to quite that level of detail of going through
10 each and every one of the objects, but the fact that it was
11 related to the objects of the Act, et cetera, would have
12 been described.

13 I know there wasn't a specific document put in front
14 of the board on that, but it was discussed at the meeting.

15 MR. RODGER: Did you also discuss the concept of what
16 unjust discrimination meant? In terms of the --

17 MR. CAMPBELL: Again, I don't recall any particular
18 discussion of it. The Board was dealing with it in the
19 context more of what it had to do and the decision it had
20 to make, and the fact that the OEB would be reviewing the
21 matter and here was the kind of test that they would face
22 wasn't the focus of the Board's attention by any means.

23 MR. RODGER: If I could also return to this net
24 payments chart which we've referred to a number of times.
25 This is at the IESO compendium of materials, tab 4.

26 You've described how the TR clearing account would be
27 used to mitigate price impacts and this \$54 million
28 cushion, if I can call it that. What time period is that

1 amount over? Is that for 2007?

2 MR. CAMPBELL: Yes, in terms of the numbers, the 6.68
3 is, of course, an annual number, and the \$54 million
4 distribution would be spread over 12 months. In effect,
5 it's a one-time payment spread over 12 months; it would not
6 extend beyond the 12 months.

7 This really represents a one-year snapshot for the
8 bottom line of the 47.32, and clearly is not something that
9 could be expected each and every year.

10 MR. RODGER: Do you have any sense of what the balance
11 in the TR clearing account will be in 2008?

12 MR. CAMPBELL: If I could have a moment.

13 My recollection is, at the time -- I couldn't tell you
14 specifically for 2008 because this varies -- but at the
15 time the balance would have been something in the order of
16 70 to 80 million. I could dig up the exact number, if you
17 want, because it's in the record. I know where it is in
18 the record and I can find, but I don't have it at my
19 fingertips.

20 MR. RODGER: That's not my point, Mr. Campbell. I
21 guess my issue is that you have this money in the account
22 today, and it will be mitigating rate impacts over 2007.
23 But the mitigation must be seen as kind of like a one-shot
24 deal. There may or may not be funds in that account in
25 subsequent years.

26 MR. CAMPBELL: Yes, this is clearly kind of a one-time
27 decision in the sense of this particular surplus being paid
28 out over this particular time. I think what the board has

1 said here is that as other surpluses accumulate, and as
2 other market evolution measures come along where it may be
3 appropriate to use it, then it sees these kinds of
4 surpluses as being appropriate for use in these
5 circumstances.

6 MR. RODGER: But you're certainly not looking at any
7 surplus that may be in this account in subsequent years;
8 that this will be an annual disbursement to help mitigate
9 the change that you're proposing. That's not the intention
10 of the organization?

11 MS. CAMPBELL: No, the only decision that's been made
12 at the moment is to take this amount, pay it out over the
13 12 months, commencing with when the 3X goes into place.

14 MR. RODGER: When this Board is considering the issue
15 of price mitigation, it's clear that there may be
16 increasing price impacts in subsequent years, that you
17 can't always rely on this transmission clearing rights
18 account to kind of cushion the pain as we go forward?

19 MR. CAMPBELL: Well, of course our evidence is that
20 there will be no pain going forward, but, subject to that,
21 I think the premise that you're talking about, which is
22 when this series of payments runs out in a year, will it
23 necessarily be continued? There's no commitment to that.

24 MR. RODGER: And I think you mentioned to your counsel
25 in terms of the OPG rebate, it won't disappear before 2009,
26 but after that, who knows? It could disappear. We just
27 don't know at this point.

28 MR. CAMPBELL: I think experience has shown that when

1 that was supposed to happen last time, it didn't. I think
2 there will be powerful constituencies that will be
3 suggesting that it shouldn't, but, yes, it could.

4 MR. RODGER: And with global adjustment, your evidence
5 was, I believe, that you anticipate that this is going to
6 be here perhaps for the mid or long term, but, again,
7 there's no guarantee of that, either, is there?

8 MR. CAMPBELL: I think that is not my evidence. I
9 think what I said was I was highly confident that it would
10 be in place for the foreseeable future.

11 MR. RODGER: Now, Dr. Murphy had a discussion with
12 some of my friends earlier today about the so-called free
13 rider issue, that there was certain types of generation,
14 particularly base load, that would be paid under this 3X
15 ramp rate. It would be paid even though they effectively
16 couldn't ramp. Is that a fair description of what we mean
17 by a free rider in this case?

18 MR. KOZLIK: We would never call them free riders.
19 They will be paid by the market clearing price, as will all
20 generators.

21 MR. RODGER: Have you ever done any calculation as to
22 what, for example, base load nuclear units would receive
23 under a 3X scenario on an annual basis?

24 MR. KOZLIK: The majority of base load nuclear
25 generators will not receive anything, because they're
26 operating under regulated prices.

27 MR. RODGER: Will any nuclear base load unit receive
28 anything? The reason why --

1 MR. KOZLIK: Yes, we're aware that there is -- Bruce B
2 is operating under a contract which offers a floor price.
3 However, if the market price is above that floor price,
4 then they receive the market price.

5 However, Bruce A is on a fixed-price contract, and all
6 of the OPG nuclear assets are under fixed prices through
7 regulation.

8 MR. RODGER: Now, I've completely lost what the
9 reference is with these thousands of pages of documents,
10 but I seem to recall in some -- I thought it was an IESO
11 board report. There was a handwritten note that said,
12 "Bruce B \$15 million a year corrected". Could I take that
13 to mean that that would be the payment to Bruce B, \$15
14 million a year?

15 MR. KOZLIK: I also couldn't find the reference at
16 this moment, but I believe it was 15.5.

17 MR. RODGER: I see. And that's an annual payment?

18 MR. KOZLIK: That would be annual.

19 MR. RODGER: Mr. Kozlik, you had a discussion with Mr.
20 Mark about your goal of efficiency and efficiency gains.
21 And I'm just trying to understand that in the context of
22 the other evidence we've heard and the prefiled evidence.
23 When you talk about an efficiency gain, are you basically
24 talking about price drivers to increase efficiency, price
25 increases? Is that really the bottom line of what you
26 mean?

27 MR. KOZLIK: It isn't limited to price increases.
28 Price decreases drive efficiency, as well. Efficiency is

1 the price driving the appropriate behaviour, yes.

2 MR. RODGER: And price could either be upwards or
3 downwards in your --

4 MR. KOZLIK: Price should reflect, as much possible,
5 the cost of dispatch to drive efficient actions.

6 MR. RODGER: And in the context of our discussion on
7 ramp rate, would it be fair to say that most of those price
8 drivers are going to be price increases rather than price
9 decreases?

10 MR. KOZLIK: There are some price increases and price
11 decreases, but overall it averages out to be a price
12 increase. But we don't expect a price increase, because we
13 expect the exports to adapt sufficiently to mitigate any
14 upward pressure.

15 MR. RODGER: Now, you've also described the history of
16 12X that was to be temporary, that would be replaced at
17 some point and you're looking for an enduring solution. Is
18 3X the enduring solutions that you hoped for?

19 MR. KOZLIK: We believe that 3X represents the balance
20 that produces the best outcome with the unconstrained
21 price.

22 MR. RODGER: So is it a permanent solution, long-term
23 solution?

24 MR. KOZLIK: I don't believe that we'll be revisiting
25 the ramp rate for a long time.

26 MR. RODGER: Because in some of the information before
27 the Board, and in evidence such as TransCanada -- I know
28 it's referenced, I just saw it on the page, but the idea

1 that this again, 3X, was a temporary measure, and, first of
2 all, do you agree with that or is this really the end
3 state? This is the permanent end state?

4 MR. KOZLIK: I believe some...

5 [Witness panel confers]

6 MR. KOZLIK: I believe that the record would show that
7 I even said those words back in the August/September
8 periods, where I was hoping that it was a transitional
9 mechanism to a different world. I have to admit that my
10 outcome, as we stand here today, is less bullish on the
11 ability to move to that world than it was then, mainly
12 because of the fact that back then there was a substantial
13 amount of discussion about the possibility of introducing
14 locational pricing.

15 But that has been dashed since.

16 MR. CAMPBELL: Mr. Kozlik's heart is broken.

17 MR. RODGER: I'm sure it could be repaired by the
18 day-ahead market.

19 Now, in your discussion about MIO, am I correct when I
20 say that at least at one point in this process, MIO, in the
21 unconstrained consequence, that was your first option?

22 MR. KOZLIK: It was.

23 MR. RODGER: It was.

24 MR. KOZLIK: When we went into this exercise, we
25 thought that that was going to be the best alternative.

26 MR. RODGER: And why have you not chosen to pursue
27 that option?

28 MR. KOZLIK: For fear of getting even more discussion

1 of the theory of the second best. I think this is an
2 example of it playing out. We are in a second-best world,
3 with the fact that transmission constraints cannot be
4 reflected in the price. And while it had great
5 common-sense appeal, that by using the same look-ahead
6 logic in the unconstrained or the pricing algorithm as
7 exists in the physical algorithm, that that would drive
8 efficiencies, when we looked at the results we were very
9 surprised that there was very little efficiencies to be
10 gained with MIO, and somewhat confused.

11 When we had the benefit of our counsel from our
12 consultant from NERA, Mr. Falk, he was able to help us to
13 understand why it is we may be seeing what we were seeing,
14 and that is that this MIO algorithm being placed in the
15 unconstrained is still significantly different than how MIO
16 would work in the constrained -- and may even be using
17 resources to prepare the system in its unconstrained world
18 that, in fact, aren't even available for operation, and at
19 times could be sending the opposite signal.

20 So when we took a hard look at MIO in the
21 unconstrained, it was an eye-opener to us and I think an
22 example of the second-best world we're living in.

23 MR. RODGER: Mm-hm.

24 MR. KOZLIK: And when we looked at the 3X option, it
25 produced much better results.

26 MR. CAMPBELL: Mr. Rodger, if I could just add to
27 that. When Mr. Kozlik speaks of the theory of the second
28 best, as folks have taught me, the theory of the second

1 best, as I -- as it's been explained to me, doesn't mean
2 you don't do it. It means, study it carefully and
3 understand the consequences of an action before you go in
4 that direction. And I believe that's what we've done.

5 MR. KOZLIK: And if I could add further on MIO, I said
6 in my testimony that there were, at times, as many as five
7 versions of MIO to use in the unconstrained run, and they
8 had very different outcomes. And even the one that was
9 most aggressive on changing the price wasn't producing the
10 efficiency gains that 3X was.

11 Given the number of options that were out there, the
12 lack of efficiency, plus the fact that it was going to be a
13 fairly costly endeavour to engineer this into the pricing
14 algorithm, the 3X was a better option.

15 MR. RODGER: Could you give us any more detail, Mr.
16 Kozlik, on what you mean by the costly nature?

17 MR. KOZLIK: We had estimates, and I believe we shared
18 them with the market pricing working group in a meeting at
19 the Chelsea Inn, end of March, and we estimated it -- it
20 was rough, but between 200 and 500,000 to incorporate it
21 into the unconstrained algorithm.

22 MR. RODGER: Up to 500,000. And how much timewise?

23 MR. KOZLIK: Yes. I believe that we estimated then it
24 was in the neighbourhood of six months of additional
25 stakeholdering and development work for whatever time the
26 decision was made.

27 MR. CAMPBELL: With respect to that estimate, Mr.
28 Rodger, certainly from my perspective, I was very concerned

1 that given that the analysis showed the range of potential
2 price impact -- you've seen the arguments here, in the
3 course of this process, around potential price impact. And
4 in addition to everything else that Mr. Kozlik has pointed
5 out, there was a concern that we would require the same
6 amount of time to deal with exactly the same kind of
7 issues, plus all of these other disadvantages.

8 MR. RODGER: You've also spent time describing this
9 uneconomic export problem, but would you agree with me that
10 as long as we have uniform prices in Ontario, it is
11 unlikely that the uneconomic export problem will disappear?

12 MR. KOZLIK: We will be addressing the uneconomic
13 problem, but we will not be solving the uneconomic problem.
14 There will still be uneconomic exports possible, as long as
15 we have the wedge between the HOEP and the actual cost of
16 dispatch that you inevitably get with an unconstrained run.

17 MR. RODGER: And what is the condition that you would
18 need to have to eliminate the possibility of uneconomic
19 exports?

20 MR. KOZLIK: The one that is most obvious is
21 locational pricing.

22 MR. RODGER: Those are my questions. Thank you, sir.

23 MR. KAISER: Thank you, Mr. Rodger. Mr. Millar, do
24 you have questions?

25 MR. MILLAR: Yes, Mr. Chair. I'll be very brief.

26 Good afternoon, Panel, my name is Mr. Millar, and I'm
27 counsel for Board Staff. Oh, did you have questions, Mr.
28 Buonaguro?

1 **CROSS-EXAMINATION BY MR. BUONAGURO:**

2 MR. BUONAGURO: My name is Michael Buonaguro and I'm
3 counsel for the Vulnerable Consumers Energy Coalition.

4 MR. MARK: Sorry, could you repeat that maybe a bit
5 slower.

6 MR. BUONAGURO: Sorry. Let me clear the decks. My
7 name is Michael Buonaguro, counsel for the Vulnerable
8 Energy Consumers Coalition. Good afternoon, Panel.

9 I'd like to start with some questions that tie into
10 some of what Mr. Rodger just went through.

11 We were talking or you were speaking about that the 3X
12 ramp rate was supposed to be at least at one point was
13 supposed to be a temporary measure.

14 I believe back in January 2006, and the reference I
15 have is your material, volume 1, section 4, tab 6, slide
16 14. It's a slide called "Enduring Solution" and it I'll
17 read it to you:

18 "An enduring retail price solution is desired:

19 Reducing ramp rate to a lower value (6X, 3X) as
20 an arbitration solution."

21 So it appears, at least back in January, you were
22 looking for an enduring solution to the ramp rate, and that
23 you weren't looking at something like arbitrarily changing
24 the multiple; is that correct?

25 MR. KOZLIK: These are slides from January 2005.

26 MR. BUONAGURO: Yes, January 20th, 2005.

27 MR. KOZLIK: That would be the market pricing working
28 group I believe you would be referring to?

1 MR. BUONAGURO: Yes.

2 MR. KOZLIK: That's correct. I did enter this at the
3 first meeting of the market price working group, and state
4 that it wasn't my inclination to move to something that
5 wasn't either solidly grounded in the physical realities of
6 what the generators could do -- well, basically that's it.
7 I did not at that point think we'd be here talking about
8 3X.

9 MR. BUONAGURO: Then I believe in April 2006 - and the
10 reference there is section 4, tab 30, page 18 of your
11 material - I have a quote from the IESO stating that:

12 "With so much market evolution ahead of us, the
13 direction we take in addressing is it 12X ramp
14 rate multiplier alone should be recognized as
15 relatively short-lived. Implementation timelines
16 should be brief and implementation costs should
17 be small."

18 So there's an indication there of switching to a
19 short-term solution.

20 MR. KOZLIK: That was also correct. That was my
21 mindset at the time.

22 MR. BUONAGURO: Right.

23 MR. KOZLIK: And it's one that I can't share the same
24 opinion of for today, and mainly because of this clear
25 statement that we are not pursuing locational marginal
26 pricing in Ontario at this time.

27 MR. BUONAGURO: One final quote, and this is from
28 section 4, tab 42, page 2, paragraph 10, which I believe is

1 the same quote that Mr. Rodger gave:

2 "Today's decision on immediate actions to address
3 the 12X ramp rate will be a temporary measure."

4 When you made the decision to go to 3X, it was still
5 contemplated to be a temporary measure? That's how I
6 understand that.

7 MR. KOZLIK: Even at that point, especially at that
8 point, we had just asked the market pricing working group
9 to investigate locational pricing. That was a request of
10 the SAC, the stakeholder advisory committee, at their July
11 meeting. They specifically requested market pricing to
12 look at locational pricing. So that was even more true at
13 that moment in time.

14 MR. BUONAGURO: So in the earlier quote where there's
15 a reference to market evolution, that's what you're talking
16 about, the potential for a locational market?

17 MR. KOZLIK: The movement to locational pricing would
18 definitely fall into the category of market evolution.

19 MR. BUONAGURO: And that possibility was what was
20 driving you from an enduring solution to a short-term
21 solution?

22 MR. KOZLIK: It wasn't driving us to a short-term
23 solution.

24 MR. BUONAGURO: But it made a temporary measure
25 acceptable?

26 MR. KOZLIK: It made a temporary -- yes, I would agree
27 with that.

28 MR. BUONAGURO: I think somebody mentioned that your

1 heart was broken --

2 MR. KOZLIK: That was my boss.

3 MR. BUONAGURO: -- that, LMPs, locational marginal
4 pricing - forgive me if I stumble over some of the acronyms
5 - is at least for the near term off the table, I guess we
6 can call it?

7 MR. KOZLIK: We're proceeding on any initiative we're
8 looking at, assuming that we're not going to have
9 locational marginal pricing.

10 MR. BUONAGURO: Right. Now, I obviously have a bit of
11 a script here, but there's a quick question I should ask
12 you before I forget to ask you.

13 When you're talking about the analysis, or when the
14 Panel is talking about the analysis about exports, was the
15 analysis restricted to exports to New York or did the
16 analysis cover all exports out of Ontario?

17 MR. KOZLIK: I believe Dr. Rivard would know more than
18 me about that.

19 DR. RIVARD: It looked at exports to New York, yes.

20 MR. BUONAGURO: Right. So there is no similar
21 analysis for the rest of exports? I'm assuming there are
22 some?

23 DR. RIVARD: The vast amount of exports that are on
24 our system are to New York, and that was the focus.

25 MR. BUONAGURO: Thank you. There was some discussion
26 about the 1X MIO multi-interval optimization option, and
27 our understanding is, as late as March of 2006 - and the
28 reference is section 4, tab 10, pages 579, and there are

1 other references to it - that that particular option, the
2 1X MIO option, was considered the best alternative based on
3 efficiency considerations. Is that true?

4 MR. KOZLIK: That was our expectation.

5 MR. BUONAGURO: Right. I believe your consultant,
6 NERA, is it?

7 MR. KOZLIK: NERA, yes.

8 MR. BUONAGURO: Reached a similar conclusion in April
9 of 2006. And the reference there is section 4, tab 28,
10 page 18, third paragraph.

11 MR. KOZLIK: I believe that our consultant hadn't done
12 any analytics on these, and said logically it probably
13 would be the best answer. But it's also that same
14 consultant who we received the advice of: Make sure that
15 when living in a second-best world you look closely at the
16 decisions that are being made.

17 MR. BUONAGURO: It appeared that, if you could call it
18 ranking, the 1X MIO option continued to be number 1, as far
19 as September of 2006, and that would be in responses to
20 stakeholders document which is found at section 4, tab 48,
21 page 3.

22 MR. KOZLIK: Tab 48?

23 MR. BUONAGURO: Yes.

24 MR. KOZLIK: These are comments by a stakeholder, and
25 there is a comment beside it, "IESO management response as
26 agreed."

27 MR. BUONAGURO: Right. But some of the stakeholders
28 were convinced?

1 MR. KOZLIK: I believe the IESO management response to
2 that to be an error. It says "agreed." No question it
3 says agreed. However, at that time, seeing what 3X could
4 do relative to 1X MIO is the reason why 3X was our
5 recommendation.

6 So I -- that -- I don't agree with that comment. We
7 made an error there.

8 MR. BUONAGURO: So maybe you can help me understand,
9 because the word of the day seems to be "efficiencies."

10 MR. KOZLIK: Right.

11 MR. BUONAGURO: And you've said that the 3X is the
12 preferred solution now, because it is most efficient; is
13 that fair?

14 MR. KOZLIK: Yes.

15 MR. BUONAGURO: And when you --

16 MR. KOZLIK: Of the options that were available.

17 MR. BUONAGURO: Of the options available. And I think
18 the alternatives were, in addition to 3X, you had MIO; and
19 I suppose you mean MIO 1X?

20 MR. KOZLIK: Can I --

21 MR. BUONAGURO: Sure.

22 MR. KOZLIK: As to whether or not it was the most
23 efficient is a tough call. It's the best balance, in our
24 opinion.

25 MR. BUONAGURO: Okay, balance between efficiency and
26 what?

27 MR. KOZLIK: Well, as an example, if we were to go to
28 the 1X ramp rate multiplier, there may be many hours when

1 it would be a very efficient solution. There may be other
2 hours where it isn't because it overshot.

3 MR. BUONAGURO: When you say 1X multiplier, do you
4 mean 1X multiplier on a myopic system?

5 MR. KOZLIK: Yes, I do. Yes.

6 MR. BUONAGURO: I know enough that I know the
7 difference, that there is a difference. All right. So
8 just continue.

9 MR. KOZLIK: But we had concerns about when it
10 overshoots and we had concerns about the degree of upward
11 price pressure that it applied relative to what -- 3X.
12 And, actually, it was in discussions among our whole team,
13 including Mr. Campbell, that we felt that the best balanced
14 solution was the 3X.

15 MR. BUONAGURO: Okay, I'm going to have to get back to
16 that in a second, but my understanding, from the beginning
17 of your examination-in-chief, you mentioned that you have
18 two algorithms that you're working with. You have a
19 pricing algorithm and you have a costing algorithm; right?

20 MR. KOZLIK: A pricing algorithm and a dispatch
21 algorithm.

22 MR. BUONAGURO: And the dispatch reflects the actual
23 costs, or tries to reflect the actual costs of dispatch?

24 MR. KOZLIK: The dispatch algorithm is the one that
25 actually dispatches resources on the system, so it has to
26 reflect the exact physical situation in order to maintain
27 reliability.

28 MR. BUONAGURO: And I understood that when we talk

1 about efficiency, you are trying to match the pricing
2 algorithm, or whatever the pricing algorithm outputs, to
3 what -- the dispatch algorithm outputs, so they're in
4 synch?

5 MR. KOZLIK: That's -- yes.

6 MR. BUONAGURO: Right. I further understand, or it's
7 been explained to me, that the MIO 1X model, if you were to
8 change the pricing algorithm from myopic, which it is now,
9 to an MIO, and from a 12X ramp rate to a 1X ramp rate, that
10 that would produce the most efficient pricing algorithm
11 insofar as it matches the dispatch algorithm?

12 MR. KOZLIK: I'm sorry, I'm going to have to ask you
13 to repeat that.

14 MR. BUONAGURO: Sure. I'll try. Currently you have a
15 myopic 12X pricing algorithm; right?

16 MR. KOZLIK: Yes.

17 MR. BUONAGURO: And you have an MIO -- well, you have
18 your dispatch algorithm, whatever it is, and I think it's
19 based on MIO.

20 MR. KOZLIK: It has the MIO methodology, and of course
21 it operates on 1X.

22 MR. BUONAGURO: 1X, right. So, at least in theory,
23 you are moving -- changing the pricing algorithm to MIO 1X,
24 which is what you had suggested at the beginning of this
25 cycle, I guess, in terms of being the best solution -- and
26 I think you're saying you changed your mind.

27 MR. KOZLIK: Yes.

28 MR. BUONAGURO: But I understand that still, at least

1 in theory, that that would move you closer -- that would
2 move the pricing algorithm and the dispatch algorithm
3 closer to synch and, therefore, be the most efficient; is
4 that not true?

5 MR. KOZLIK: It certainly moves them closer to synch
6 in terms of the decision-making process that they use.
7 However, the outcomes are still substantially different,
8 and the primary reason why the outcomes are substantially
9 different is because the pricing algorithm is ignoring
10 transmission constraints, and you can use any generator
11 available to the system.

12 However, the dispatch algorithm doesn't have that
13 luxury. So the pricing algorithm, in using an MIO
14 methodology, is at times using generators that are bottled
15 on the system as facilities that it can prepare the system
16 with. So it's falsely preparing the system, and it's those
17 differences that cause the differences in outcome.

18 MR. BUONAGURO: Now, if you're changing the pricing
19 algorithm just by moving to 3X, how does it compare in
20 terms of the dispatch algorithm? Are you saying that it's
21 superior than moving to MIO 1X?

22 MR. KOZLIK: Yes. It was a surprise to us, but, yes.

23 MR. MARK: Mr. Chairman, I think this witness has been
24 asked this question no less than three times and perhaps
25 several more times. I am wondering if there's much utility
26 in asking it yet again.

27 MR. KAISER: One more time, Mr. Buonaguro.

28 MR. BUONAGURO: Well, okay. Are you saying that

1 changing the pricing algorithm to 3X produces pricing
2 results which are closer to your existing dispatch
3 algorithm than if you were to move the MIO 1X?

4 MR. KOZLIK: Yes.

5 MR. BUONAGURO: Can you tell me where that is in the
6 evidence?

7 [Witness panel confers]

8 I can take an undertaking on that.

9 MR. KOZLIK: No, no.

10 MR. BUONAGURO: All right.

11 MR. KOZLIK: I think it's best expressed in our August
12 16th document, which is in our materials under section 4,
13 tab 46 that I think I was taken to earlier, and in
14 paragraph 12, where it states that, after the bracket:

15 "The shape of the prices throughout the day was
16 only marginally changed from the shape using the
17 12X multiplier. The conclusion was that the
18 efficiency gains of implementing MIO in the
19 market schedule were going to be marginal."

20 MR. BUONAGURO: But, with respect, I don't think that
21 answers my question. That doesn't -- I don't think that
22 illustrates how 3X produces prices which are closer to what
23 your dispatch algorithm produces than does the MIO 1X.

24 MR. KOZLIK: And the 3X price calculations were
25 attached to the market pricing working group minutes and...

26 [Witness panel confers]

27 MR. KOZLIK: And they were also published for
28 discussion in our webcast. It's in section VII, tab 5.

1 MR. BUONAGURO: Maybe I can try to shorten it. Are
2 you saying it's not as efficient as 3X because it doesn't
3 change the price very much? I think that's what that line
4 says.

5 MR. KOZLIK: Because it doesn't align the price with
6 the shadow prices that are produced by the dispatch
7 algorithm; that's right.

8 MR. BUONAGURO: My consultant says he understands.
9 I'm going to take that.

10 I understand also, in terms of evaluating MIO, one of
11 the complicating factors is that there are at least five
12 different ways of implementing it?

13 MR. KOZLIK: Yes.

14 MR. BUONAGURO: But that at the end of the day, in
15 terms of evaluating those five methods as between each
16 other, the preferential one or the best one is the MIO
17 incremental?

18 MR. KOZLIK: I think there's a lot more discussion to
19 be had as to what is the best one.

20 MR. BUONAGURO: Thank you. Those are my questions.

21 MR. KOZLIK: Thank you.

22 MR. KAISER: Mr. Millar.

23 MR. MILLAR: Before I start this time, I will check to
24 make sure there's nobody else.

25 **CROSS-EXAMINATION BY MR. MILLAR:**

26 MR. MILLAR: Thank you. My name is Michael Millar.
27 I'm counsel for Board Staff. I have a couple of
28 clarification questions arising from a question that was

1 asked by the Chair. I will warn you up front, I'm a
2 complete neophyte in these areas and my questions may in
3 fact reveal nothing by my own ignorance, but please bear
4 with me. Please don't be afraid to dumb it down a little.

5 Let me start with this, just to make sure I have the
6 concept correct here. I believe that one of the problems
7 that the IESO believes the new ramp rate will help to solve
8 is the issue of inefficient exports to New York; is that
9 correct?

10 DR. RIVARD: Yes, that's correct.

11 MR. MILLAR: And the way this is supposed to work, if
12 I understand correctly, is that a lower ramp rate will lead
13 to higher HOEP prices, and that will lead to less exports;
14 is that correct?

15 DR. RIVARD: The lower ramp rate will put upward
16 pressure on the HOEP.

17 MR. MILLAR: That in turn --

18 DR. RIVARD: Towards the shadow prices in those
19 regions. That will drive the arbitrage or the reduction of
20 exports that you're speaking of, yes.

21 MR. MILLAR: That in turn should reduce exports.

22 DR. RIVARD: Correct.

23 MR. MILLAR: Mr. Kaiser asked you a question relating
24 to the fact that increased pressure on HOEP will also lead
25 to a reduction in efficient exports; is that correct?

26 DR. RIVARD: I think the question that was asked was
27 is it possible that there could be efficient exports and
28 that they could actually be reduced as well. And to the

1 extent that there are situations where the HOEP goes above
2 the actual costs of dispatch, then that would work in the
3 opposite direction.

4 MR. MILLAR: Currently about approximately half of the
5 exports are efficient and half are inefficient?

6 DR. RIVARD: The market surveillance report show that
7 53 percent of the trades were inefficient.

8 MR. KOZLIK: Trades with New York?

9 DR. RIVARD: Trades with New York, yes.

10 MR. KOZLIK: From May to October?

11 DR. RIVARD: That's correct.

12 MR. MILLAR: Thank you. I may ask my colleague, Mr.
13 Fraser, you filed a cost benefit analysis as part of your
14 prefiled evidence. I assume you gentlemen are familiar
15 with this document.

16 MR. KOZLIK: Yes.

17 MR. MILLAR: I'm not sure if you can read it on the
18 screen. I'm just trying to get some use of our monitors
19 here. If you can't, I assume you probably have copies. I
20 think it's filed, I have it under tab I. I forget where
21 that is. In fact, it seems to be in better focus now. If
22 you wish to pull up a paper copy that's fine, but I'm only
23 going refer to a couple of things.

24 If you look under point 2, number 2, the second-last
25 sentence says, "The estimated average hourly reduction in
26 exports is 65 MW."

27 Do you see that?

28 DR. RIVARD: That's correct.

1 MR. MILLAR: Just underneath that you run a
2 calculation where you come to -- at the bottom of that
3 calculation, you get the annual efficiency gain of 6.6
4 million?

5 DR. RIVARD: That's correct.

6 MR. MILLAR: Does this cost benefit analysis assume
7 that all of the avoided exports are inefficient?

8 DR. RIVARD: The way it's presented here was done on
9 an hourly average to provide the illustration of how the
10 efficiencies would be gained, and so in that sense it
11 would. The way we'd calculated it was to look at every
12 hour and calculate the estimated response by hour based on
13 the upward pressure on the HOEP, and so it would capture
14 all the possible changes in exports and when the efficiency
15 gains by hour. That's also reported in our technical
16 appendix, which was, I believe, in our written evidence --
17 yes, it was in our technical evidence, in our written
18 evidence.

19 MR. MILLAR: To make sure I'm clear here, and you may
20 well have answered the question, but as I say, I'm new to
21 this so I need it very simple. Does this cost benefit
22 analysis take into account the fact that you will be losing
23 some efficient exports?

24 MR. MARK: Sorry, that wasn't his testimony. He's not
25 testified you will lose efficient exports. He said it
26 could happen. As I understand the analysis, they don't
27 expect to. Maybe Dr. Rivard could clarify that.

28 DR. RIVARD: Sorry, can you repeat the question,

1 please?

2 MR. MARK: My friend Mr. Millar's question included an
3 assumption that when you implement this change, one result
4 will be that you'll be eliminating some efficient export
5 sales. And I don't think that was your testimony. You
6 said that could happen, but do you have an expectation as
7 to whether that will happen?

8 DR. RIVARD: It's --

9 MR. MARK: Is that helpful, Mr. Millar?

10 MR. MILLAR: If I'm incorrect in stating that
11 assumption, thank you, Mr. Mark. Maybe I'll back up, then.
12 You've stated it's possible that some efficient exports
13 will not happen now. Is that likely to happen? It seems
14 to me currently almost half of them are efficient. Are we
15 talking about the same proportion of exports that we're
16 going to lose between efficient and inefficient?

17 DR. RIVARD: No.

18 MR. MILLAR: Why is that?

19 DR. RIVARD: It also depends on the prices in New York
20 and the shadow price, how big those are as well.

21 MR. MILLAR: I don't want to be difficult here, but is
22 it likely that some efficient exports will be lost?

23 DR. RIVARD: It's possible, yes.

24 MR. KOZLIK: But...

25 DR. RIVARD: Sorry, Mr. Kozlik may have a...

26 [Witness panel confers]

27 MR. MILLAR: I'm sorry, the mike.

28 DR. RIVARD: Mr. Kozlik says it's possible but highly

1 unlike, and I agree.

2 MR. MILLAR: To help us out, can you explain why it's
3 possibly but highly unlikely, when close to half are
4 efficient?

5 MR. MARK: Dr. Rivard, perhaps I can help. Do you
6 have a percentage of what export sales in total may be
7 impacted by this?

8 DR. RIVARD: What percentage? It may be a minimal
9 percentage. I don't have a rough estimate, but a minimal
10 magnitude.

11 MR. MARK: If you'll permit me, Mr. Chairman, just to
12 try and clarify this. As I understand, it's not your
13 expectation that anything close to 50 percent of export
14 sales will disappear, is it?

15 DR. RIVARD: No. I think I tried to answer this
16 simply: What we did was an hour-by-hour estimate. We
17 allowed for the possibility that there could be
18 inefficient exports. I can't quantify -- or sorry, at
19 times were efficient and we could lose those efficient
20 exports. We built this into our hourly model. When we ran
21 it, we came up in total with \$6.6 million worth of
22 efficiency gains. That would have allowed the possibility
23 that efficient exports could have gone away. This was a
24 simple presentation to show, in total, what they would be.
25 So the estimate is 6.6 million, allowing for the
26 possibility that efficient exports go away.

27 MR. MILLAR: I think that was my question.

28 DR. RIVARD: I can't tell you the precise number.

1 MR. MILLAR: And I think you may have answered it, but
2 I guess what you're telling me is this analysis accounts
3 for the possibility that some efficient --

4 DR. RIVARD: Yes.

5 MR. MILLAR: -- exports will be lost --

6 DR. RIVARD: Yes.

7 MR. MILLAR: -- and that's included in this?

8 MR. KOZLIK: Yes, if I could perhaps help to
9 understand the scope. This analysis is looking at a 65-
10 megawatt reduction of exports. Mr. Rivard has mentioned
11 that the market surveillance panel estimated that 53
12 percent of the exports to New York over the period May to
13 October were inefficient. Over the period May to October,
14 the amount of exports to New York was actually 3.7 terawatt
15 hours. Now, to understand in terms of megawatts, that's
16 just under a thousand megawatts. The sort of reduction
17 that he's talking about is the in the area of 65 on a
18 thousand, or just under a thousand.

19 MR. MILLAR: Yes, and I wasn't really speak speaking
20 to the volume or the quantum.

21 MR. KOZLIK: Oh, I'm sorry.

22 MR. MILLAR: All I wanted to know was if you
23 considered in this analysis that you will not only be
24 losing inefficient export, you'll probably or possibly, at
25 least, be losing inefficient [sic] exports.

26 DR. RIVARD: Right, and I say, it's actually in our
27 technical appendix. It's actually stated that way.

28 MR. MILLAR: Right. Thank you. No more questions.

1 MR. KAISER: Thank you, Mr. Millar.

2 **QUESTIONS FROM THE BOARD:**

3 MS. NOWINA: I have a couple of questions. If I can
4 take you back to where we've been so many times before, the
5 market rule amendment proposal, the calculations. I just
6 want to refer to that as we look at this.

7 Just for my clarification, Mr. Campbell, the
8 transmission rights clearing account, so would you have
9 recommended the reduction in ramp rate to the IESO board if
10 you had not had a surplus in that account?

11 MR. CAMPBELL: Absolutely.

12 MS. NOWINA: All right. So if we look at this
13 calculation and you stop at the line "net costs before
14 transmission rights clearing account payout", that's really
15 the economics of this proposal; is that correct?

16 MR. CAMPBELL: Taken on its own, without the
17 transmission rights payment, that's correct. It's
18 4/1000ths of a cent per kilowatt hour, if you assume no
19 more than 50 percent arbitrage; and, of course, Dr. Rivard,
20 having refined his analysis is of the view that it would be
21 higher now.

22 MS. NOWINA: All right.

23 MR. CAMPBELL: Stronger.

24 MS. NOWINA: But if we remove any assumptions about
25 the transmission rights clearing account, whether or not
26 that would be clear, you end up with those economics and
27 you would have made the proposal on that basis?

28 MR. CAMPBELL: That is correct.

1 MS. NOWINA: Thank you. Mr. Kozlik, regarding Bruce
2 B, I would like to understand a little bit more this \$15.5
3 million payment. Was that \$15.5 million an annual increase
4 in payments to Bruce B if there is a reduction in ramp
5 rate?

6 MR. KOZLIK: Yes.

7 MS. NOWINA: All right. Is that \$15.5 million part of
8 any of the numbers on this page? Would it be part of the
9 49 million?

10 MR. KOZLIK: Just one minute.

11 [Witness panel confers]

12 On this table, there is a line that is titled,
13 "Post-GA/rebate gross impact million dollars, 19.75".

14 MS. NOWINA: Yes.

15 MR. KOZLIK: 15.5 million of that goes to Bruce Power.

16 MS. NOWINA: Thank you, Mr. Kozlik.

17 MR. KOZLIK: And the impact to the consumer is less,
18 because there is the CMSC savings and IOG savings.

19 MS. NOWINA: Right. Thank you. Those are my
20 questions.

21 MR. RUPERT: Just a couple of quick questions. Dr.
22 Rivard, you said at some point, I think in response to
23 questions from Mr. Mark, that not only do you think that
24 the impact might be more than 50 percent as a result of the
25 arbitrage, export arbitrage thing, but that this rule
26 change could even go so far as to result in an overall
27 reduction in bills.

28 Is that overall reduction -- just to go back to the

1 question Ms. Nowina just had, are you saying that that
2 \$6.68 million on that chart could in fact turn into a
3 negative number? Am I looking at the right number?

4 DR. RIVARD: 6.68 is the net impact. Yes, that could
5 turn into a negative number such that consumers' bills
6 would actually go up -- go down. So that number would --
7 that's correct.

8 MR. RUPERT: And that -- just explain that to me in
9 words how that happens. So they raise the price, and
10 you're saying that somehow just the magic of the arbitrage
11 reduces the HOEP? Or is it somehow just getting rid of the
12 CMSC payments and other stuff that would do that? What
13 would be the primary driver?

14 DR. RIVARD: Let's speak in the limit. And I guess
15 this is presented in Appendix I. In the limit, arbitrage
16 is perfect, say, so there's no effect at all on the HOEP.
17 So consumers on their energy bills don't pay any more. But
18 still, the fact that we've gone to a better ramp rate means
19 that these uplift charges have been reduced. We don't have
20 to make as many constrained-on, constrained-off payments.

21 So in the limit, while their energy price has not
22 increased, the uplift charges go down so their bill goes
23 down. I think based on the analysis that we did, we've --
24 it's -- if the price were to -- the HOEP were to increase
25 by 1 percent or less, we're in the area -- allowing for the
26 global adjustment, we're in the area that the bill
27 reduction would actually go down.

28 MR. CAMPBELL: Mr. Rupert, just my -- I do arithmetic.

1 I don't do what Dr. Rivard does, but if you take the 50
2 percent and make it a 100 percent reduction and the
3 arithmetic flows through, you will find it falls out that
4 the effect of the CMSC/IOG savings will make that number
5 positive.

6 The 19.75 goes to zero and the 13.7 is a benefit,
7 then, that flows to the consumer's bill.

8 MR. RUPERT: Yes, I guess -- I think you've answered
9 the question, but you're saying, in effect, that if it were
10 100 percent rather than 50 percent of the chart, so that
11 the result that Mr. Campbell just talked about, that result
12 occurred, that the \$13.07 million reduction to CMSC
13 payments would be completely unchanged; that the impact of
14 going from 50 percent to 100 percent would have no impact
15 at all on the CMSC/IOG line on your chart?

16 DR. RIVARD: Yes, it would just be eliminating those
17 constrained-on and constrained-off things, that's correct.

18 MR. RUPERT: Thank you. Another area of this
19 inefficient or now efficient export question that Mr.
20 Millar just had. Just so I'm clear on what an efficient
21 export is, and I would like to just refer to your chart.
22 If an inefficient export is one where the cost of the
23 generator, if you will, has turned on to supply at \$67, in
24 your example, is higher than the New York price -- I think
25 that's what we're saying is an inefficiency; right, where
26 it's costing us 67 and we're netting 55 from a
27 province-wide perspective?

28 DR. RIVARD: Right.

1 MR. RUPERT: So an efficient --

2 DR. RIVARD: I figured out the problem. We're sharing
3 the same mike. Thanks.

4 MR. RUPERT: So just I'm clear, an efficient export
5 would be one where the shadow price in the intertie zone
6 is, to use your numbers here, less than \$55?

7 DR. RIVARD: If the shadow price was less than \$55,
8 then it would be an opportunity for an efficient export.

9 MR. RUPERT: Efficient. So let's just assume in this
10 example that the shadow price is 53, and leaving aside the
11 transaction costs, because that doesn't really matter in my
12 example.

13 If the effect of the ramp rate change were to push the
14 \$49 HOEP above the 53 shadow price, is that an example of
15 how this kind of rule change might turn -- might result in
16 what is currently an efficient export becoming -- not
17 occurring, I guess, is the -- is that what would happen?

18 DR. RIVARD: If the HOEP went above the shadow price,
19 so above the 53, as in your example, there could be a
20 reduction in exports that would have otherwise been
21 efficient. But I guess, once again, our data, the HOEP --
22 based even on our simulations, periods where the HOEP would
23 be 3X, would be above the shadow price, are very, very
24 rare.

25 MR. RUPERT: Thank you.

26 The last question, and I think this is for you, Mr.
27 Kozlik, and it goes back to a document you just referred to
28 a little while ago. I know it's in several places. I have

1 it as tab 3 of the initial AMPCO filing, but it's your --
2 and I believe it was your notes, a document presented
3 September 5th, 2006, stakeholder advisory committee, which
4 went through -- it was entitled "Addressing the 12X ramp
5 rate multiplier."

6 MR. KOZLIK: Okay.

7 MR. RUPERT: And you were actually at the paragraph a
8 bit earlier that I wanted to ask you about, which is at
9 page 3, paragraph 12.

10 MR. KOZLIK: Just one second. Yes, I have it.

11 MR. RUPERT: This is the one that talks about three
12 different methodologies for incorporating MIO were
13 discussed.

14 MR. KOZLIK: Yes.

15 MR. RUPERT: One of them had a reduction in price of
16 0.5 percent. One of them had an increase of 0.3 percent,
17 and a third one called the MIO high-slice price would
18 result in an increase of 2.6 percent.

19 MR. KOZLIK: That's correct.

20 MR. RUPERT: Now, that sentence that talks about those
21 price changes starts out by saying:

22 "IESO price simulation results indicate that on
23 average MIO prices were close to the current
24 prices."

25 MR. KOZLIK: Yes.

26 MR. RUPERT: Now, the third of those prices is 2.6
27 percent, which happens to be, I suspect by sheer fluke, the
28 same number that your analysis of net payments from the 3X

1 ramp rate market starts out with.

2 MR. KOZLIK: Sheer fluke.

3 MR. RUPERT: Sheer fluke. In this discussion, though,
4 you've described that, on average, these are close to
5 current prices. I just want to understand what you were
6 trying to say in here about 2.6 percent. Are we saying
7 that 2.6 percent is pretty close, or are you referring to
8 something else?

9 MR. KOZLIK: I suspect that an element of my editorial
10 comments crept in here. There are three options here:
11 Incremental, modified, and high-slice. It's the high-slice
12 that has, for me, the least theoretical grounding, so when
13 I look at modified and incremental, one was a very slight
14 reduction, one was a very slight increase, and that for me
15 is very little change from the status quo.

16 MR. RUPERT: One last question, and that's on the TR
17 account, Mr. Campbell. What do the market rules permit the
18 IESO do to do? Money can be kept in the account, it
19 appears, or it can be disbursed to consumers. Are there
20 other options for that money?

21 MR. CAMPBELL: It can be, the surplus can just be
22 accumulated in the account and held as a cushion against
23 operation of the market, and the other way that that's
24 affected is by dint of changing the confidence factor
25 around the number of TRs that we issue.

26 So we issue more TRs. You would want to hold more in
27 the account. By changing the number of transactions you
28 are permitting to go through the market, that will have an

1 effect on how the Board exercises its discretion in the
2 application of those funds. It may choose to hold on to
3 them because it is increasing the amounts of rights that
4 are going through the market, and therefore believes that
5 over time it will need a stronger cushion.

6 MR. RUPERT: If I recall, on the day, or the day after
7 the board issued an order to stay this rule change pending
8 this hearing of this process, am I right that the IESO
9 announced that the disbursement of the TR account would
10 also not be happening as a result of a stay of this rule
11 change?

12 MR. CAMPBELL: The decision that the board made at the
13 time was simply that on the commencement of the 3X change,
14 in that same month -- this amount would be paid out over 12
15 months. Now, if there's going to be a payout, it's going
16 to be to consumers. The real question is when.

17 What the board said is we'll make a payment. It will
18 start there. And the reason was, as I've explained
19 earlier, that it felt that that was an appropriate timing
20 given level of concern that was being experienced around
21 the potential pricing impact of this, even though we
22 believed it would be minimal.

23 MR. RUPERT: Those are all my questions. Thanks.

24 MR. KAISER: Dr. Rivard, I just have one final
25 question, again going back to this famous chart on the cost
26 impacts.

27 The 2.6 percent increase that we started off with and
28 ended with about a 1.50 a megawatt hour got cut in half by

1 the arbitrage to about 64 cents. And then you went away
2 and redid some elasticity estimates with Dr. Fuss and
3 others, and the 50 percent increased. I think you said in
4 your evidence it was closer to a hundred than it was to 50.

5 In your best judgment, what's the arbitrage impact now
6 in light of the later evidence?

7 DR. RIVARD: As I said, I can't give you a precise
8 estimate, but it's closer to the hundred percent.

9 MR. KAISER: If we were trying to base, through some
10 calculations or arithmetic, as Mr. Campbell said, would we
11 be safe using 75 percent?

12 DR. RIVARD: That's probably a reasonable number to
13 use.

14 MR. KAISER: Thank you.

15 MR. MARK: I just have a few questions in reply.

16 **RE-EXAMINATION BY MR. MARK:**

17 MR. MARK: Dr. Rivard, you have been asked some
18 questions about the table, and most particularly you were
19 asked some questions by Mr. Rupert about the possibility of
20 the bill impacts becoming positive in the sense of
21 reductions.

22 At what percentage of arbitrage does it flip? In
23 other words, at what point? At 50 percent we have the
24 4/1000ths of an increase. At what percent of arbitrage
25 does that number, in fact, turn into a positive bill
26 impact?

27 DR. RIVARD: I think my statement was that if the
28 increase in the HOEP is less than a percent, that's when it

1 flips. It wasn't a statement about arbitrage per se.

2 MR. MARK: Fine. As I read this here in this analysis
3 it says 2.6 percent reduced by 50 percent, so you've
4 essentially an upward pressure of 1.3 cents that feeds into
5 the rest of this analysis. 1.3?

6 DR. RIVARD: That's correct.

7 MR. MARK: What you're saying is, if that gets down to
8 1 cent --

9 DR. RIVARD: One percent.

10 MR. MARK: -- one percent, that that's when you will
11 see the positive bill impacts?

12 DR. RIVARD: That's correct. So, as suggested, if it
13 was 75 percent, it would be clearly past the 1 percent that
14 I told you. So you would be at the positive.

15 MR. MARK: In my back of the envelope, it suggests
16 that the percentage where that flip occurs appears to be
17 somewhere between 60 and 65 percent, rather than 50
18 percent.

19 DR. RIVARD: Yes, okay.

20 MR. MARK: And the 60 to 65 percent, you've been asked
21 about certainties. How certain are you that the arbitrage
22 impact will be at least in the range of 60 to 65 percent?

23 DR. RIVARD: I'm confident.

24 MR. MARK: Now, you were asked a question by one of my
25 friends, and I apologize for forgetting who, about the free
26 rider issue. Mr. Kozlik, let me ask you.

27 The suggestion was that because all generators would
28 receive this new HOEP, that there would be free riders. Is

1 that the way the system works now anyways?

2 MR. KOZLIK: No, and I think in my answer I said we
3 would not consider them free riders. It's a market
4 clearing price methodology.

5 MR. MARK: Even today under the market clearing price
6 system, does a generator who provides power get the HOEP
7 even if his bid price is lower?

8 MR. KOZLIK: Yes, it does.

9 MR. MARK: Now, one last question, Dr. Rivard. Some
10 of the questions from my friends talk about first the price
11 moving up and then moving down. In your evidence you
12 talked about upward pressure and downward pressure. Can
13 you tell us, does this, in fact, happen sequentially where
14 you see a price increase and then you see a price decrease?
15 Or is it an instantaneous event where you have a settled
16 number?

17 DR. RIVARD: Once the exporters or the traders know
18 that 3X will be going in place, the adjustment would be
19 fairly quick and the kind of the equilibrium a gap would be
20 realized.

21 MR. MARK: You expect they would act in advance, in
22 terms of they would --

23 DR. RIVARD: They would take in the information that
24 the 3X is going to affect the HOEP, put the upward
25 pressure, and certainly have that information in their
26 decision-making process prior to that 3X taking place. So
27 by the time 3X came into place, they would have factored in
28 the upward pressure on the HOEP, yes.

1 MR. MARK: We would see the net result rather than
2 this cycle of up and down?

3 DR. RIVARD: I assume there's going to be some initial
4 learning as they learn how the 3X ramp rate affects, but
5 over a short time they would incorporate that in, and we
6 wouldn't see the kind of up and down that you're referring
7 to, yes.

8 MR. MARK: How short a time 'til these guys learn
9 what's coming and we get a stable settled price?

10 DR. RIVARD: It's difficult to say how short a period
11 of time, but --

12 MR. MARK: Days?

13 DR. RIVARD: It would happen within days.

14 MR. MARK: Thank you. Those are my questions, Mr.
15 Chair.

16 MR. KAISER: Thank you, Mr. Mark. We'll take the
17 afternoon break to this point and come back in 15 minutes
18 with the next panel.

19 --- Recess taken at 4:10 p.m.

20 --- On resuming at 4:31 p.m.

21 MR. KAISER: Please be seated.

22 MR. MARK: Mr. Chair, the next witness is Mr. Jonathan
23 Falk, and I ask that he be sworn.

24 MR. KAISER: Thank you.

25 **IESO - Panel 2**

26 **Jonathan Falk; Sworn**

27 MR. MARK: Mr. Chairman, I don't intend to go through
28 the CV in oral evidence. It has been filed and that's

1 acceptable to Mr. Rodger, and Mr. Rodger has also agreed
2 that Mr. Falk can be accepted as an expert in economics, in
3 particular with respect to electricity markets. Thank you.

4 MR. KAISER: Please proceed.

5 MR. MARK: Thank you, Mr. Chair. And we have
6 endeavoured to shorten the oral testimony in view of the
7 hour, and I, of course, commend the written evidence to the
8 Board.

9 **EXAMINATION-IN-CHIEF BY MR. MARK:**

10 MR. MARK: Now, Mr. Falk, your report for this
11 proceeding appears at tab 2 of the evidence of the
12 Independent Electricity System Operator, and do you adopt
13 that evidence today?

14 MR. FALK: I do.

15 MR. MARK: Right. Now, you did an earlier report for
16 the IESO earlier in 2007. That appears -- 2006. That
17 appears at volume 1 at section 4, tab 28. And can you tell
18 me, Mr. Falk, what was the nature of your retainer with
19 respect to the first report?

20 MR. FALK: Yes. NERA, the firm I work for, was
21 consultant -- was called in -- I can't remember whether it
22 was January or February of 2006. Ken Kozlik called and
23 said that they were seeking advice on how best to deal with
24 the ramp rate in the context of the 12X ramp rate issue in
25 Ontario, and that he wanted us to think about the question
26 to help him sort through some of the issues of what the
27 best way to adjust, if at all, the 12X ramp rate would be,
28 and to prepare a report which summarized our conclusions.

1 MR. MARK: And your advice and conclusions in that
2 regard are contained in, as I said before, the March 2007
3 report?

4 MR. FALK: That's correct.

5 MR. MARK: Sorry, the May 2006 report, my apologies.

6 MR. FALK: May 2006, yes, that's it.

7 MR. MARK: And then were you contacted more recently
8 in connection with this proceeding, which contact resulted
9 in the March 9, 2007, report?

10 MR. FALK: Yes. That would have been in early March.

11 MR. MARK: And in connection with that report, were
12 you asked to comment on the efficiency gains analysis
13 contained in the IESO evidence in this proceeding?

14 MR. FALK: I was certainly asked to read it and to
15 figure out whether or not the methodology in it made sense.

16 MR. MARK: Right. And what conclusion did you come to
17 with respect to the methodology?

18 MR. FALK: I think as a method of estimating at least
19 one facet of the efficiency gains from the move from 12X to
20 3X, that the methods used were appropriate to estimate that
21 facet and the results at least looked to me to be sensible.

22 MR. MARK: All right. And do you have a view as to
23 whether, in terms of the qualitative -- quantitative
24 direction of the results of the efficiency gain analysis,
25 they appear consistent with your earlier objections and
26 advice?

27 MR. FALK: Again, qualitatively, they're certainly
28 working in the right direction. As to the specific

1 magnitudes, you know, on the assumption that the data is
2 right and the work appears all competently done, I think
3 the quantitative numbers are right, as well, but in the
4 time I had, I certainly didn't check any of that.

5 MR. MARK: But, qualitatively, you're satisfied it's
6 moving in the right direction?

7 MR. FALK: Absolutely.

8 MR. MARK: And with respect to the policy analysis
9 underlying the work done by the IESO in connection with
10 this proceeding, what's your view as to the consistency of
11 that with your previous advice and recommendation?

12 MR. FALK: I think it's firmly grounded in the report
13 that I wrote when -- in May of last year.

14 MR. MARK: Now, Mr. Falk, do you have a view as to
15 whether it's advisable to endeavour to align dispatch and
16 pricing algorithms?

17 MR. FALK: I think to the extent you can do so, it's
18 probably a good idea.

19 MR. MARK: And why is that?

20 MR. FALK: Again, by aligning the -- sorry. The
21 dispatch algorithm is running the system as efficiently as
22 it can run, and the shadow prices, if you will, the value
23 of an extra megawatt up or down coming off of that system,
24 or the reserves -- it's actually a co-optimized system of
25 energy and reserves. The values coming off of that system
26 signal the true resource costs of providing electricity in
27 Ontario.

28 So the closer the pricing algorithm is to giving the

1 same result that the true cost algorithm is giving -- and
2 when I say "cost", I'm not talking about the cost to the
3 generators themselves, I don't know anything about that,
4 but I'm talking about the cost to -- as revealed through
5 the algorithm, through the shadow prices.

6 The closer it comes to lining up with that, the easier
7 it is to make both short-run efficient decisions in
8 consumption, as well as longer-run decisions in both
9 consumption and in production and in decisions to build new
10 units and the specific characteristics that those units
11 have.

12 MR. MARK: And does it make sense to do that even in a
13 hybrid market such as the one we have here?

14 MR. FALK: I think you have to think about it. You
15 have to look at what the specifics are and look at the
16 likelihood that there are -- that there are other
17 distortions that somehow undermine what it is that you
18 think you're doing by making a partial step to alignment.

19 But, having done that, once you've thought about that
20 problem and thought about it carefully, then to the extent
21 you are coming closer to aligning prices with costs, in a
22 hybrid market or, frankly, in any market, you're doing a
23 good thing.

24 MR. MARK: And that process, you said, of being sure
25 to look carefully at consequences, is that the second-best
26 theory we've heard so much about before?

27 MR. FALK: We have heard a lot about that, haven't we?
28 Yes.

1 MR. MARK: And your view of the second-best theory, do
2 you share the view of Dr. Murphy that you shouldn't proceed
3 with any incremental change unless you're satisfied that it
4 will improve all distortions?

5 MR. FALK: Well, I don't think -- we certainly --
6 that's not the test. The test is not whether all
7 distortions will be eliminated by any choice you make. I
8 think, as I heard Dr. Murphy this morning, his statement
9 said you can't prove any particular change, any particular
10 incremental change in a system that contains other
11 inefficiencies.

12 It's very, very difficult to prove that that change is
13 a truly beneficial one. And I think that's a correct
14 proposition.

15 But we're not talking about the proof of a graduate
16 student that this is a better welfare situation than that.
17 We're talking about making policy here. And I think in
18 practice, we're forced all the time to make policy
19 decisions that, based on our best evidence, looks like an
20 improvement to the situation. And I think that's what we
21 have here.

22 And all the theory of the second best says is don't
23 just look at one thing; think about all the things, all the
24 effects that something has, and the state that you're in
25 when you start those changes before you make any
26 incremental change.

27 MR. MARK: When was your first involvement with the
28 Ontario market?

1 MR. FALK: It was in -- I can't recall the exact year.
2 I believe it was 2000. NERA was hired to help at the --
3 with the market rules as the original market rules were
4 being developed in advance of the market.

5 I did a lot of work back then on congestion management
6 settlement credits and penalty functions, and some work on
7 the export -- the export rules. I was essentially in
8 residence for about two months here working on those
9 questions.

10 MR. MARK: And have you continued to have exposure to
11 and involvement in this market since then?

12 MR. FALK: I've had some involvement in the market
13 since then on and off. My firm has had more. We were
14 involved in the OPA solicitation. We helped run that
15 auction. So...

16 MR. MARK: So based on everything you know about the
17 system from your previous and current involvement, have you
18 seen any evidence to suggest that the 3X change proposed
19 should not proceed?

20 MR. FALK: None.

21 MR. MARK: Now, as part of your review, Mr. Falk, I
22 understand you looked at the analysis of the impact on
23 exports. Do you have a view, Mr. Falk, as to whether the
24 IESO is correct in their assertion that upward price
25 pressure from this change will work to reduce inefficient
26 export sales?

27 MR. FALK: Again, qualitatively, it has to be in that
28 direction. As to the quantitative impact, I've seen the

1 very high elasticities that have been estimated,
2 elasticities on the order of 5, which suggests that the
3 upward price pressure will lead to a substantial drop in
4 exports; at least, substantial relative to the amount of
5 the price increases.

6 Again, crediting those results, that all looks right
7 to me.

8 MR. MARK: Do you have a view on the correctness of
9 Mr. Rivard's conclusion [sic] that the change proposed here
10 will result in a reduction in the CMSC payments?

11 MR. FALK: I think it's inarguable that that's the
12 direction it has to go in. Again, that is simply a
13 function of better aligning all by itself the prices with
14 the dispatch algorithm.

15 MR. MARK: One of the options that's been talked
16 about, Mr. Falk, is the side payments option. Do you have
17 a view on whether or not or how those contribute to
18 efficiency and whether side payments is an option which
19 should be pursued?

20 MR. FALK: The first thing that happens is side
21 payments completely take off the table all demand side
22 efficiencies. Those are now off the table because
23 consumers don't really see those differences in any way
24 that they can take advantage of them through the HOEP.

25 The second thing that happens is it highly attenuates
26 any ability for dynamic efficiency because it's hard to
27 figure out - again, in the absence of very complicated
28 simulations of this market - whether or not building a

1 particular unit with particular characteristics
2 accomplishes anything.

3 By contrast, when the price expresses itself through
4 the HOEP, I think you can see those results directly, and
5 so that puts the obvious pressure on for both dynamic
6 demand and supply efficiency and short-run demand
7 efficiency.

8 MR. MARK: Thank you, Mr. Falk. Those are my
9 questions.

10 MR. KAISER: Mr. Rodger.

11 **CROSS-EXAMINATION BY MR. RODGER:**

12 MR. RODGER: Thank you, Mr. Chairman. Just a couple
13 of questions, Mr. Falk. Going back to your May 16th, 2006,
14 report, I believe it was your evidence to Mr. Mark that
15 your conclusions in that report are valid today; is that
16 correct?

17 MR. FALK: I've read it several times in the last
18 couple of days and I don't see anything I want to take
19 back.

20 MR. RODGER: On your March 9th report, you've
21 explained that you've been asked to comment on the
22 efficiency gains analysis of the IESO, but you have not
23 been asked to verify the accuracy of the IESO's analysis;
24 is that correct?

25 MR. FALK: That's correct.

26 MR. RODGER: And on paragraph 5 on page 1 of your
27 March 9th report, I want to read one passage from paragraph
28 5, about halfway down, which reads:

1 "Subsequent investigation by the IESO suggests
2 that costs of moving to a multi-interval
3 optimization algorithm in the market schedule
4 would be extensive and that transition costs
5 could be squandered as the Ontario market evolves
6 to alternative market mechanisms."

7 Could you give me your understanding of what you mean
8 by "alternative market mechanisms" that the Ontario market
9 is evolving to?

10 MR. FALK: I don't know. We're speculating about the
11 future. I was not aware, when I wrote that, nor was I
12 aware until a few minutes ago, that Mr. Kozlik's heart had
13 been broken. Let me put it another way.

14 Market design is always a moving target. It's not
15 clear to me that any one mechanism, however permanent you
16 make it, means that it will be there forever. But what I
17 do know is that spending a bunch of money to do something
18 that doesn't seem to have a great deal of benefit doesn't
19 look like a great idea.

20 It might be a great idea in the long run. If we were
21 going to an LMP, for example, an LMP which ought to reflect
22 MIO, then I guess maybe we'd recognize that the change to
23 the ramp rate won't have many benefits now, for the reasons
24 that Mr. Kozlik talked about just a couple of minutes ago.
25 But we're going there anyway; we might as well spend the
26 money.

27 If we're not going there, though, and we don't get the
28 benefits out of it, there's no particular reason to spend

1 the money.

2 MR. RODGER: Let's assume that Mr. Kozlik is correct,
3 and others, that locational marginal pricing just isn't on
4 in Ontario. Would that give you regard to rethink this
5 statement where MIO may in fact be a solution at some point
6 for Ontario?

7 MR. FALK: Well, unfortunately, then it cuts the other
8 way. If that's true, then we go back to the other grounds
9 Mr. Kozlik just discussed, which is, on the assumption that
10 we never get LMP, now we have the situation that the lack
11 of locational signals in these prices unfortunately
12 interact with the MIO in such a way that you don't get any
13 of the benefits.

14 So now you are spending money with no benefits.

15 MR. RODGER: Those are my questions. Thank you.

16 MR. KAISER: Thank you. Mr. Millar.

17 MR. MILLAR: Nothing for me, Mr. Chair.

18 MR. KAISER: Mr. Mark.

19 MR. MARK: That concludes our evidence, Mr. Chair.

20 MR. KAISER: Thank you.

21 MR. MARK: I should just say, though, in accordance
22 with the agreement with Mr. Rodger, Dr. Fuss' written
23 testimony is taken as evidence in the proceeding. There's
24 no need to call him but it's in his evidence.

25 MR. KAISER: Yes, we understood that. Thank you, Mr.
26 Falk.

27 MS. DeMARCO: Just one preliminary matter, Mr. Chair,
28 while Mr. Hamal's making himself comfortable. You've just

1 received an updated black-lined version of Mr. Hamal's
2 evidence correcting four typographical errors which he'll
3 go through.

4 MR. KAISER: Thank you.

5 MS. DeMARCO: No substantive merit.

6 MR. MILLAR: Mr. Chair, with your permission we'll
7 mark that as Exhibit K2.7.

8 MR. KAISER: Thank you.

9 **EXHIBIT NO. K2.7: BLACKLINED VERSION OF EVIDENCE OF**
10 **MR. HAMAL**

11 MS. DeMARCO: Panel members, I'd like to introduce
12 Cliff Hamal, an economist with LECG. Can I ask that Mr.
13 Hamal now be sworn.

14 **APPrO - PANEL 1**

15 **CLIFF HAMAL; Sworn**

16 MS. DeMARCO: Mr. Chair, I've had discussions with my
17 friends and they also have agreed that Mr. Hamal may be
18 admitted as an economist for the purpose of providing his
19 expert opinion on the economic issues associated with the
20 ramp rate considerations that are the subject matter of
21 this proceeding. If you're fine with that, Mr. Chair, we
22 will dispose with going through the process of qualifying
23 him.

24 MR. KAISER: Yes, that's acceptable.

25 MS. DeMARCO: Thank you.

26 **EXAMINATION-IN-CHIEF BY MS. DeMARCO:**

27 MS. DeMARCO: Mr. Hamal, what is your current
28 position?

1 MR. HAMAL: I am a principal with the consulting firm
2 LECG.

3 MS. DeMARCO: How have you come to be involved in this
4 3X ramp rate proceeding?

5 MR. HAMAL: I was called by members of APPrO, very
6 early, early, probably March 1, and asked to look at
7 evidence on this issue and prepare materials that have been
8 presented to the Board. This follows work that I did last
9 summer that's been referenced, having to deal with
10 calculating ramp costs.

11 MS. DeMARCO: And what materials did you consider in
12 order to do that?

13 MR. HAMAL: I considered all the materials that had
14 been presented in this proceeding prior to the date of my
15 filing, plus I considered what I think were all of the
16 market surveillance panel reports.

17 MS. DeMARCO: Have you been involved in the
18 preparation of the evidence that's now before the Board?

19 MR. HAMAL: Yes, I have.

20 MS. DeMARCO: That evidence is located in our
21 compendium of documents at tab 1, for the Board's
22 reference.

23 Does this still represent your view?

24 MR. HAMAL: Yes. There are a couple of typographical
25 errors that I think we'll correct, but this does represent
26 my views.

27 MS. DeMARCO: Would you like to take us through those
28 now, Mr. Hamal?

1 MR. HAMAL: Certainly. If you turn to page 12; this
2 is the carry-over paragraph 18. You'll notice the fourth
3 bullet down at the very end has a typographical error. It
4 has a ", and" that can be deleted, so that the "NOx." is
5 how it should end, with the footnote 11. That's the first
6 typo.

7 On the bottom of that page, in footnote 11, there's an
8 incorrect tab reference. It references tab IV, 14. It
9 should be tab VIII, 10.

10 Continuing on page 15, in the footnote -- the
11 footnotes, plural, there's a couple of page reference
12 errors. Footnote 14 is to page 147. It actually should be
13 a two-page reference, from 147 to 148.

14 And footnote 15 is incorrect in referencing 147. It
15 should be a reference to page 148.

16 Lastly, on page 17, the carry-over paragraph 25,
17 you'll notice in almost near the very end of that
18 paragraph, there's a reference to the infamous 4/1000ths of
19 a cent, and I have an extra zero in there. It should be
20 0.004, deleting one of those zeros, cents/KWh.

21 So those are the typographical errors in my report.

22 MS. DeMARCO: Thank you, Mr. Hamal. Do you now adopt
23 that evidence as filed?

24 MR. HAMAL: I do.

25 MS. DeMARCO: With the Board's indulgence, we do have
26 some very brief direct questions for Mr. Hamal today.

27 Mr. Hamal, what does your evidence address?

28 MR. HAMAL: My evidence addresses the economic issues

1 associated with the choice between the 3X and 12X ramp rate
2 assumption.

3 MS. DeMARCO: And can you summarize your general
4 concerns associated with the current 12X ramp rate
5 multiplier, set out in your evidence.

6 MR. HAMAL: Yes. What we have now is dispatch being
7 done with recognition of the actual limitations on the
8 units, but the pricing being done based on 12X ramp rate
9 assumption, which is clearly not reflecting their actual
10 capabilities. So there is a mismatch.

11 There is a mismatch between the prices and the
12 dispatch, and that mismatch leads to a number of
13 inefficiencies and a distortion of the price signals.

14 I outline this starting in paragraph 1, which is on
15 page 3 of my evidence, and I talk about the distortion of
16 the price signals that result starting in paragraph 6.

17 MS. DeMARCO: And what are the specific implications
18 of that price dispatch mismatch for the Ontario electricity
19 system?

20 MR. HAMAL: I've identified eight. Working through my
21 evidence, the customers are not paying the true cost of the
22 electricity they consume. This is referenced in paragraph
23 11.

24 The customers have a diminished opportunity for demand
25 responsiveness as a result, which is in paragraph 14.

26 There are diminished incentives and the current
27 mechanism is not conducive to conservation, load management
28 and demand side management, which is referenced in

1 paragraph 16 in my evidence.

2 On the generation side, the signal impedes
3 improvements in the generator operating costs and
4 availability, which is paragraph 15.

5 If I can pause here for a moment, these combination of
6 elements lead to a discrimination against consumers and
7 generators that want to participant in a market where the
8 prices truly reflect the need for supply and demand at the
9 instant that they'd like to provide it. So those who would
10 like to be particularly responsive to price signals do not
11 have that opportunity.

12 Going on, another problem in the market is exports are
13 being subsidized by Ontario customers, which I reference in
14 paragraph 18.

15 There are increased emissions in Ontario, increased
16 carbon dioxide, sulphur dioxide, and NOx, which I reference
17 in paragraph 18, and the current system detracts from
18 reliability, which I address at the beginning of the end of
19 paragraph 18 and on into paragraph 19.

20 Finally, the dampening of the natural volatility is
21 likely to lead to increased prices for Ontario consumers
22 over the long term, and I address that in paragraph 17.

23 MS. DeMARCO: So, in your opinion, Mr. Hamal, do these
24 concerns warrant a change in the current 12X ramp rate?

25 MR. HAMAL: Yes. Absolutely.

26 MS. DeMARCO: And, in your view, are these concerns
27 about the 12X ramp rate valid, even in a hybrid market
28 where many generators are subject to government contracts?

1 MR. HAMAL: Absolutely. We have to recognize the
2 market as it exists. The current market does have -- is a
3 hybrid market, but we first need to recognize the nature of
4 those contracts and arrangements with the generators in
5 Ontario. The vast majority of the generators in Ontario
6 are subject to real-time price signals. They have a strong
7 incentive to respond to real-time price signals.

8 The mechanism by which that is done depends upon the
9 individual contracts that are available, but that's the
10 market we have and those are the incentives that they
11 provide.

12 I address this starting in paragraph 19 and continuing
13 on to paragraph 21 and 22, and I note that I'm not alone in
14 this conclusion. The market surveillance panel, as we've
15 seen a considerable amount of evidence today, has been
16 addressing this.

17 As someone who's stepped back and recently read all
18 the reports, what I noticed is an increasing trend in those
19 reports talking about the detail, the problems, being more
20 and more expansive about, specifically, the effect of the
21 12X ramp rate assumption, dampening price signals and
22 causing problems to the market.

23 In my paragraph 20, starting on page 14, I have a very
24 long quote from the market surveillance panel talking about
25 three different areas of problems.

26 In retrospect, recognizing just how much we've been
27 focussing on the market surveillance panel, I would include
28 the introductory statement, and if you wanted to look, this

1 is on tab 13 of the compendium of documents that I
2 provided, page 147, but I think I can just read it to you.
3 And it's just the sentence that introduces this paragraph,
4 because it sums it up quite succinctly, I think:

5 "The market surveillance panel has recently said
6 the real-time price signals generated by an
7 efficient wholesale market are central to the
8 economic success of the new hybrid market for
9 several reasons..."

10 and then it goes on to talk about these reasons.

11 But clearly the market surveillance panel has been
12 quite clear about that.

13 I have another statement at paragraph 21 quoting from
14 the market surveillance panel and talking about the
15 long-term investment, because clearly, if you don't have
16 the right price signals, you don't have the right basis for
17 making decisions about the future and decisions -- even
18 under a hybrid market where those decisions are made by
19 regulators or some other agency, you don't have the right
20 signals about what the values of electricity is to the
21 market.

22 And the market surveillance panel said, and I'm
23 quoting from the bottom of my excerpt here:

24 "These signals..." - and of course they're
25 meaning the price signals - "...may also help the
26 OPA and OEB avoid or minimize the potential for
27 over-investment that can occur in a centrally
28 planned regulatory regime. The cost of this

1 over-investment is ultimately borne by the
2 province's ratepayers through the global
3 adjustment."

4 And that's the end of that quote.

5 So they're clearly recognizing the long-term
6 implications of having distorted price signals, and I agree
7 with this analysis by the market surveillance panel.

8 MS. DeMARCO: Thank you. The IESO has proposed a
9 change to a 3X ramp rate through this market rule
10 amendment. What are your general views on that?

11 MR. HAMAL: Oh, I think it should be done. I think
12 the evidence is quite clear, and, as I begin in paragraph
13 23 of my evidence, we have done a lot of research and
14 review - and I mean collectively, many of the people in
15 this room and the processes in these province - to look at
16 this option.

17 It's been studied. It's ready to be implemented. It
18 can be done at effectively no cost, and it can be done now.
19 And I see no reason for waiting.

20 MS. DeMARCO: Have you reviewed the IESO's cost impact
21 analysis information, including in this filing?

22 MR. HAMAL: Yes, I have.

23 MS. DeMARCO: And what are your views on the IESO's
24 cost impact analysis and conclusions?

25 MR. HAMAL: I have looked at that cost analysis
26 starting in 24, paragraph 24 of my evidence, and going all
27 the way through 33. If I can, I'd like to talk about both
28 the IESO and AMPCO's review of that, as I understand it.

1 It looks reasonable. I haven't done a replication or
2 detailed analysis, but it's clear that there are dampening
3 of price signals. It is clear that there will be some
4 price changes. It's clear that the kind of adjustments
5 we've been talking about all day today should be made to
6 that calculation.

7 What I notice is the criticism that's been made by, as
8 I understood it, AMPCO about the arbitrage effect. I don't
9 think it's correct to ignore that arbitrage effect. It's
10 not clear to me where AMPCO stands on that at this point,
11 but it is clear to me that there would be an arbitrage
12 adjustment that need be made, and the one that's made looks
13 reasonable and conservative. It's clear to me that there
14 should be some adjustment for congestion management,
15 settlement credits, and also for intertie offer guarantees.
16 I think therefore it's reasonable.

17 In looking at their analysis, though, I think there is
18 something that's missing, and I don't think it's been given
19 enough focus today. That is that the efficiencies we're
20 trying to achieve have to do with changes in behaviour.
21 I'll admit right off that these are hard to predict,
22 exactly what generators and load will do in response to
23 better price signals, but I think the evidence is quite
24 clear that people respond to price signals. That's what we
25 use price signals for.

26 So, while I can't quantify it either, I think it's
27 wrong to ignore, and I don't think we should ignore that
28 what we're really trying to do in a large way is change

1 behaviour, to get it more incented to producing electricity
2 when it's needed, to back off electricity when it's not
3 needed, and moving to better price signals is likely to do
4 that. That's an effect that has been missed in the
5 analysis done that we focussed on today.

6 MS. DeMARCO: Thank you. Have you received the AMPCO
7 economic analysis filed on Monday, March 26th, 2007?

8 MR. HAMAL: Yes, I have.

9 MS. DeMARCO: And have you had the opportunity to
10 review that analysis?

11 MR. HAMAL: I have.

12 MS. DeMARCO: What are your views on the AMPCO
13 economic analysis?

14 MR. HAMAL: I have four points I'd like to make, and I
15 would have rather done this in writing because these things
16 get to be complicated, but I'll go through these four
17 items. I'm, of course, referring to Dr. Murphy's report.

18 The first point, and we've touched on it already, has
19 to do with the fact that we have a hybrid market. We do
20 have a hybrid market; that's what exists in Ontario.
21 There's no denying that. But the hybrid market leaves
22 price signals for generators to respond, and gives them
23 strong incentives to respond. If they don't respond, while
24 they may be covered by contracts, and we can look at the
25 clean energy supply contracts in particular, while those
26 are structured in a way that allows for a certain expected
27 return to those generators, if they miss an hour of
28 production when they're supposed to run, when the price

1 says to run, that's money out of their pocket that they
2 didn't get. They're not going to be made up in some way.
3 They're going to lose that money that really is essential
4 for them to earn the kind of earnings that was contemplated
5 when they structured those contracts. So they have a very
6 strong incentive to provide energy.

7 It's true for many of the other contracts in the
8 hybrid market; not all of them, but many of them. And so
9 we clearly need to recognize that those price signals have
10 meaning.

11 The second item I'd like to touch on has to do with
12 the -- I guess it's the second-best effect, and concerns
13 whether there's any proof that it will lead to any greater
14 overall efficiency. In the middle of page 3 of Dr.
15 Murphy's report, he states:

16 "There is no reason to believe that an increasing
17 prices by moving to a 3X ramp rate would improve
18 overall efficiency."

19 I disagree.

20 Now, what I've try to do is look at this submission to
21 understand what the basis for this is. The only
22 calculation that's in here, that's referenced, is the
23 improvements on uneconomic exports, which I think we've
24 talked about today, including that is not only net benefit
25 to consumers but the Ontario market overall.

26 The rest of these changes, there's a lot of talk here
27 about we don't know which way it would go. And again, I
28 can't speak for Dr. Murphy and his opinion on that. To me

1 it's quite clear. We're ignoring an important constraint
2 in the marketplace. When you ignore an important
3 constraint, you lead to the inefficient outcome. By moving
4 toward 3X ramp rate I think we will capture some of those
5 efficiencies. So I disagree with that. And I wanted to
6 point out what I view as sort of a lack of support for that
7 conclusion.

8 The third item I want to turn to is on page 4 of his
9 evidence. It's a statement that I had a great deal of
10 trouble with in reading.

11 "The IESO's analysis shows that the introduction
12 of a 3X ramp rate plus MIO would result in prices
13 that are essentially the same under the 12X
14 approach with myopic pricing."

15 This is a statement we've talked about quite a bit.

16 I frankly am not certain where Dr. Murphy lands, at
17 this point, because at some point we are told that that was
18 not 1X but it was 3X. Sometimes we were told that it was
19 MIO or it wasn't MIO. I do have a couple of observations
20 to make.

21 I now understand, as a result of his testimony this
22 morning, for at least some period of time, the support for
23 that statement was to be found in what I believe is the
24 IESO's original evidence, section 6, I believe.

25 MS. DeMARCO: I believe it's section 8, tab 9.

26 MR. HAMAL: That's right. Section 8, tab 9. Thank
27 you.

28 I'll preface this because it's not clear at the end of

1 his testimony whether this was really his reliance or not,
2 but it certainly was mentioned at one point in time.

3 Again, he's looking at this to conclude that there's
4 no change in going from 3X to 12X. When you look at this
5 analysis, which is a one-hour, 12-interval analysis,
6 represented by an internal e-mail and not presented as a
7 report, as far as I know, to anyone externally, on its face
8 it looks like a pretty inadequate way to draw a conclusion
9 about the market overall.

10 The second thing I notice is, and the columns aren't
11 quite clear, but we have a simulated price and then on the
12 right-hand side we have a 3X price as was described by the
13 IESO.

14 There are no differences here. So, again, it's
15 correct to say this analysis shows that there's no
16 difference. But that just means we don't have a good hour
17 to evaluate the effect of going from 3X to 12X. This
18 really is not telling about the issues that are before the
19 Board.

20 If you read the fourth paragraph, the one with the
21 redaction, it says that:

22 "The last available fossil unit had a certain
23 price, and thus all fossil units were exhausted.
24 As a result market claim price was met by Hydro
25 resources, which are assumed to have an infinite
26 ramp rate."

27 Now we understand why there's no difference here.
28 We've picked an hour where the 3X ramp rate or the 12X ramp

1 rate clearly has no value or meaning because the Hydro
2 units can respond virtually instantaneously. I don't
3 understand how anyone could rely on this analysis to draw
4 any conclusions.

5 The second choice of support for this sentence
6 appeared to have been in the IESO's original analysis,
7 section 3. This is the first volume, tab 4.

8 Again, I'm reaching quite a bit to say that this is
9 the support for this analysis. But I'm trying to
10 understand it.

11 There's a memo at the front, and it ends at page 4.
12 And the next page is a table "Simulation results from
13 sandbox testing of MIO pricing 1."

14 MS. DeMARCO: I'm sorry, Mr. Hamal. For the Board's
15 convenience, could you restate the reference?

16 MR. HAMAL: The IESO's filing of February -- the first
17 volume, section iii, tab 4.

18 MR. RUPERT: So I'm clear, Mr. Hamal, this is the one
19 that starts out with the draft minutes of the 24th meeting
20 of the market price working group?

21 MR. HAMAL: That's right.

22 MR. RUPERT: Okay.

23 MR. HAMAL: And it has four pages of text, and then a
24 table.

25 And, again, this point it sort of has been suggested
26 might support the statement that was made in Dr. Murphy's
27 evidence. And it looks at the difference between -- the
28 table at the top, 12X ramp rate MCP, and there's a string

1 of numbers for different days, representative days that
2 were studied.

3 The next has MIO incremental. And I had a brief
4 discussion -- looking at this, you'll see that the top
5 shows the actual numbers. The lower table shows the
6 differences. So it gives you an idea if one should be
7 higher or lower. And the average overall days is a minus
8 0.5, which appears to be rather small.

9 I understand that there are some issues with this
10 analysis, about whether it's constrained run or
11 unconstrained run, but clearly there is a small change
12 here, and I think that's one of the problems we're having
13 is the whole effect that's being debated, even at the worst
14 case, which I think makes no sense at all. 2 percent is
15 small.

16 It's not small when it comes out of someone's pocket,
17 but the changes are all at such a low level that you can't
18 just dismiss these and say -- you know, that's what we're
19 studying. We're studying whether it's worth making these
20 small changes of a percent or less than a percent.

21 What's interesting about this table to me is, if you
22 look at the incremental, it averages minus 0.5, but on
23 individual days, sometimes it's plus, sometimes it's minus.
24 At one time it's minus 8. This is significant, and I think
25 that's a message that's being lost here in what we're
26 trying to do.

27 The average cost of course is important to consumers,
28 but the signal we're trying to get is the instantaneous

1 amount, and we expect it to go up higher and go down below.
2 On average, it's pretty close to being the same price it
3 was before, but the value is coming from when the spikes
4 occur going high and low, and getting a response to that.
5 That's where we're going to get our efficiency gains.

6 We're fortunate that we can get the efficiency gains
7 and have effects even analyzed here, which are quite small.

8 So I don't understand this statement and what support
9 we have for it, because I think -- and I'm back in Dr.
10 Murphy's testimony, and what really strikes me about this
11 ties into the fourth point that I want to address in his
12 submission.

13 At the bottom of the next paragraph, and this is a
14 number we've talked about quite a bit, and he says,
15 "involves a wealth transfer of \$225 million." Now, I have
16 a lot of issues with that number. I don't think it's
17 right. I don't think there's many aspects having to do
18 with arbitrage and congestion management settlement
19 credits, OPG rebates -- there's many things with that that
20 I would take issue with.

21 But what strikes me about it is, in two paragraphs, he
22 goes from saying there's no price difference and there's a
23 wealth transfer of \$225 million. Now, I don't need any
24 additional backup than what's right here. As I say, they
25 both can't be right, and I don't know how one can represent
26 both of these issues at the same time.

27 I think the facts are that there will be price
28 differences in the intervals. Those price differences in

1 the intervals are important, but we're fortunate, when
2 going to a more efficient outcome here, that they tend to
3 cancel each other off, and the net effect on consumers is
4 actually quite, quite modest. Those are my comments on
5 this report.

6 MS. DeMARCO: So, in conclusion, Mr. Hamal, what is
7 your view on the proposed 3X ramp rate market rule
8 amendment?

9 MR. HAMAL: I think there's overwhelming evidence that
10 it makes sense. It will lead to a more efficient market.
11 It can be done at low cost and done now, and it should be.

12 MS. DeMARCO: Thank you. Those are my questions. I
13 offer Mr. Hamal for cross-examination and questions of the
14 Board.

15 MR. KAISER: Thank you. Mr. Rodger.

16 **CROSS-EXAMINATION BY MR. RODGER:**

17 MR. RODGER: Thank you, Mr. Chairman. Mr. Hamal, if I
18 could refer you to page 7 of your report, please. The
19 heading of this page is "The 12X ramp rate impedes the
20 stated Ontario policy goal of having customers pay the true
21 cost of electricity that they consume."

22 And you have an italicized passage in the middle of
23 the page, and part of it reads:

24 "In determining the welfare effects of
25 regulation, the first point to note is that a
26 competitive equilibrium achieves a social welfare
27 optimum."

28 Is this concept commonly referred to as the Pareto

1 optimum?

2 MR. HAMAL: I think that's fair, yes.

3 MR. RODGER: And how would you define Pareto optimum?

4 MR. HAMAL: Without getting overly econometric jargon,
5 it's the best you can do under those circumstances when
6 looking at single changes to the market.

7 MR. RODGER: Now, in the second sentence, it reads:

8 "Thus, if price regulation causes price to
9 deviate from marginal cost in an economy that is
10 currently at a competitive equilibrium, then
11 regulation will result in a suboptimal allocation
12 of resources."

13 Can you tell me, sir, if this conclusion still holds
14 if we were starting from a position which is not a
15 competitive equilibrium?

16 MR. HAMAL: I don't know -- it seems to me that you're
17 asking -- I don't understand the question. If we're not
18 starting from competitive equilibrium in a Pareto optimum,
19 the best we can do --

20 MR. RODGER: Mm-hm.

21 MR. HAMAL: Are you asking me, then, if we cause a
22 regulation to deviate from that -- I mean...

23 MR. RODGER: Well, I'm looking at this quote in your
24 testimony.

25 MR. HAMAL: Let me --

26 MR. RODGER: Go ahead.

27 MR. HAMAL: I think you're asking me about second-best
28 solutions, which of course are in my testimony and I talk

1 about it, and they're something we need to be concerned
2 about.

3 So it is true that if you don't start from a
4 competitive equilibrium that's Pareto optimum - we don't
5 have the perfect world, which doesn't exist - then we need
6 to be concerned about other facts, but it doesn't mean that
7 we ignore making any changes or don't give some thoughtful
8 consideration to trying to make the market better.

9 MR. RODGER: All right. Earlier today I gave you a
10 quote from a textbook entitled "Welfare Economics" by
11 Boadway and Bruce, and the quote that I asked you to look
12 at dealt with this basic problem of --

13 MS. DeMARCO: I don't mean to interrupt my friend, but
14 I wonder if that might go into evidence.

15 MR. KAISER: Do we have that, Mr. Rodger?

16 MR. MILLAR: Exhibit K2.8, Mr. Chair.

17 MS. DeMARCO: I'm sorry, I've just received an excerpt
18 of the quote, and further to our discussions, we asked for
19 the full text to be put in. So I wonder if that might be
20 put into evidence.

21 MR. RODGER: Which full text?

22 MS. DeMARCO: The full excerpt that was provided to
23 Mr. Hamal.

24 MR. HAMAL: Chapter 4 has in its title "The Theory of
25 Second-Best," and my request was if we were to be asked
26 about that, then we could deal with the full textbook
27 regarding that issue.

28 MR. RODGER: I have the full textbook here.

1 MR. HAMAL: And I have the excerpt here.

2 MR. MARK: I think, Mr. Chairman, the witness has a
3 document which is different than the one Mr. Rodger handed
4 out, and I think the document the witness has should be our
5 exhibit.

6 MS. DeMARCO: And I understand that copies of that
7 document have been made and should go into evidence.

8 MR. MILLAR: Do we have copies to circulate? I guess
9 we're striking the current 2.8 or, Mr. Rodger, do you still
10 wish that to be on the record?

11 MR. RODGER: That's the only quote I intend to refer
12 to, but the witness certainly can refer to other parts of
13 the chapter if he so wishes.

14 MR. MILLAR: Well, for lack of knowing what to do, I
15 will keep Exhibit K2.8 as you circulated it. Ms.
16 DeMarco --

17 MS. DeMARCO: Mr. Millar, if I could suggest, the
18 excerpt from the full chapter is being now circulated, so
19 it is more appropriate for the full chapter to go into
20 evidence as Exhibit K2.8.

21 MR. MILLAR: If there's no objection to that, we will
22 then call that Exhibit K2.8, and that is chapter 4 of
23 "Welfare Economics" by Boadway and Bruce; is that correct?

24 MR. HAMAL: That's correct.

25 MR. MILLAR: Thank you.

26 **EXHIBIT NO. K2.8: CHAPTER 4 FROM TEXTBOOK ENTITLED**
27 **"WELFARE ECONOMICS" BY BOADWAY AND BRUCE**

28 MR. RODGER: So the quote that I wanted to refer you

1 to reads as follows --

2 MR. SIDLOFSKY: Sorry, Mr. Chair, due to a small
3 technical problem, I was only able to make a few copies of
4 the chapter on the break. I have one for now that I can
5 hand up to the Board. We can provide more. I simply
6 wasn't able to do it over the afternoon break.

7 MR. KAISER: That's fine. Why don't you do that?

8 MS. DeMARCO: I'm happy to give up my copy, as well,
9 should it assist the Board.

10 MR. RODGER: So the quote that I'm taking from this
11 chapter on page 131 reads as follows:

12 "Unless these policies correct for all
13 distortions and market failures so as to bring
14 about a first best Pareto optimum allocation, the
15 remaining conditions for a Pareto optimum
16 provide, in general, no guidance. In other
17 words, although it may be desirable to set price
18 equal to marginal cost in, say, a public utility,
19 if all of the other Pareto optimum conditions are
20 satisfied, it may or may not be desirable if any
21 one of the other conditions is not satisfied."

22 Would you agree with this statement, sir?

23 MR. HAMAL: Not taken in isolation. But I recognize
24 the full context in which this chapter is written, I
25 agree.

26 MR. RODGER: How would one go about determining when
27 to ignore certain aspects to have economic model you are
28 using and when you would use all of its implications?

1 MR. HAMAL: I refer to this chapter to use it as
2 guidance in answering your question. Frankly, to use it to
3 discuss what we spent a fair amount of time on this
4 morning, this idea that because of the theory of second
5 best somehow means that economists can't give any guidance
6 on what we should do in these circumstances of imperfect
7 markets -- it's been my experience that economists rarely
8 reach that conclusion that they have no guidance they can
9 provide. This chapter speaks to that.

10 The chapter is called "Market failure and the theory
11 of second best." It's chapter 4. It follows chapters 1,
12 2, and 3, which talk about a perfect market. It's
13 important to recognize that up to chapter 3 is talking
14 about a perfect market, so that I could read the following
15 quote. On page what I think is 103, which is the second
16 paragraph of this chapter, it says:

17 "It is fairly obvious that as description of
18 actual markets the competitive market assumptions
19 of chapter 3 are unrealistic."

20 This idea that we need to work with perfectly competitive
21 markets, and that's the only place where we can give
22 guidance, really doesn't reflect the reality of the world
23 we live in. There are very few perfect markets.

24 What do we do? We have a situation where we don't
25 have a perfect market, and we try to make it better; of
26 course we try to make it better. I don't know if this is
27 true or not, but someone mentioned there were 150 to 200
28 changes to this market that have been made since it's

1 opened. And it's reasonable to expect markets to evolve
2 and to get better.

3 What I found particularly interesting about this
4 chapter on this issue is page 133. There's a title, in
5 section 4.2 - this is a section heading that's titled:
6 "Evaluating efficiency gains small changes."

7 I'll state right now, that's what I think we're
8 facing, is a small change to the market for an efficiency
9 gain. It says:

10 "Although the foregoing discussion implies that
11 second-best welfare economics will be difficult
12 to treat in many cases, the task is not
13 impossible. One approach that eliminates many of
14 the difficulties associated with the second-best
15 approach is the second better, or nth best
16 approach, where only small changes in a distorted
17 economy are evaluated."

18 And there's a cite to another document:

19 "This approach considers only a small
20 differential change in, say, some set of
21 distortions. The benefits of adopting this
22 approach are three-fold."

23 Then it goes on to describe that, and I could read
24 this into the record, but if we have this whole document
25 in, I think that's fine.

26 This says, in response to your question, yes, we have
27 to worry about second best issues. But where the changes
28 are small, where the changes clearly identify efficiencies,

1 where we give thoughtful consideration to the outcome, then
2 of course economists have views on that, and it can make
3 sense to move in that direction.

4 MR. RODGER: One of the themes of your paper is that
5 the 12X ramp rate significantly distorts price signals.
6 That's the heading on page 5 of your report. You think
7 that the use of a 1X ramp rate would also distort price
8 signals?

9 MR. HAMAL: I'm concerned about a price dispatch
10 mismatch. Going to 1X would still result in a dispatch.
11 It certainly wouldn't lead to a fictitious ramp rate
12 assumption. It sounds like it's going in the right
13 direction, but it doesn't lead to the complete matching and
14 elimination of that mismatch because of the issue of MIO.

15 MR. RODGER: So 1X still ruts in some price
16 distortions; is that fair?

17 MR. HAMAL: That would be some mismatch, yes.

18 MR. RODGER: How would you determine the extent of the
19 distortions caused by ramp rates? How would you gauge
20 that?

21 MR. HAMAL: Ramp rates - I'm going back to the 12X
22 which we have now, and as I discuss in my testimony, I
23 think it's around paragraph 7 - when we use a 12X ramp
24 rate, we're ignoring ramp rate assumptions. There are a
25 lot of units, not all of them, and certainly there is slow-
26 moving units that don't change very much, but the kind of
27 units that typically respond to price changes, you know,
28 over the course of an hour, can pretty much swing from high

1 load to low load. That is a ballpark. That's the kind of
2 capability units have.

3 When we multiply the ramp rate by 12 we eliminate
4 consideration of ramp rate in setting prices. Well, that's
5 not true. It's a real constraint that the IESO needs to
6 consider when they dispatch the system.

7 When I look at the option in front of the Board of
8 moving to a 3X ramp rate, we're moving pragmatically in the
9 right direction, toward recognizing this constraint, and
10 that's the conclusion I reach.

11 MR. RODGER: Do I take it from that that it's really
12 not possible, then, to determine the extent of the
13 distortions caused by variation ramp rates, whether it's
14 12X, 3X, 1X?

15 MR. HAMAL: I don't know what you mean by "the extent
16 of the distortions". The price dispatch mismatch could be
17 calculated. That price signal distortion could be
18 calculated for sure.

19 There has been talk about shadow prices and
20 differences between shadow prices and 12X ramp rate
21 pricing, and that would go -- I haven't looked at the
22 detail of that analysis, but that would go a long way, I
23 think, to answering your question.

24 MR. RODGER: It's just one line I want to put to you,
25 sir. It's found in the IESO filing, volume 1, Roman III,
26 tab 26. This is a NERA slide deck. And the heading is
27 "Neither myopic dispatch nor 12X" --

28 MS. DeMARCO: I'm sorry, what page are you referring

1 to, Mr. Rodger?

2 MR. RODGER: Slide 11.

3 MS. DeMARCO: Is that the one entitled -- oh. Okay.
4 Thank you.

5 MR. RODGER: And it's entitled: "Neither myopic
6 dispatch nor 12X ramp rate reflect actual dispatch."

7 The third bullet is:

8 "Both the myopic 1X dispatch and 12X ramp rate
9 are distortions."

10 Then the next bullet says:

11 "In principle, if all elements of pricing were
12 done close to actual dispatch, neither 12X or 1X
13 myopic would produce an efficient result."

14 Do you agree with those statements of NERA, sir?

15 MR. HAMAL: The first bullet is, they're all
16 distortions. I think that's -- I agree with that. It's
17 consistent with there being a price dispatch mismatch.

18 I'm trying to read -- all principles, if all...

19 [Witness peruses document]

20 As I sit here, I'm not sure what is meant by if all
21 principles of pricing were done close to actual dispatch.
22 I'm just not sure what that means.

23 MR. RODGER: So you can't comment on whether you
24 agree?

25 MR. HAMAL: I haven't studied this, and sitting here
26 I'm just not sure how to interpret that so I can't comment
27 on that.

28 MR. RODGER: Let me ask you it this way. Are you

1 aware that we have uniform pricing in Ontario?

2 MR. HAMAL: Yes.

3 MR. RODGER: A uniform system of pricing. Do you
4 think that that causes distortions?

5 MR. HAMAL: Yes.

6 MR. RODGER: Are you familiar with the regulated price
7 plan in Ontario? The regulated price plan?

8 MR. HAMAL: To customers?

9 MR. RODGER: Yes.

10 MR. HAMAL: Yes.

11 MR. RODGER: And does that cause distortions?

12 MR. HAMAL: I know less about that. I believe it
13 causes some distortions on load. It's not clear to me that
14 that causes distortions to generators.

15 MR. RODGER: How about Ontario government policies
16 that regulate prices for most of Ontario's generators? Do
17 you think that causes distortions in the market?

18 MR. HAMAL: That's the hybrid market. I think it
19 needs to be recognized -- I'm not sure that it causes
20 distortion. Those are contracts which control how to
21 create different sets of incentives largely for the
22 generators there are in the market to follow price signals,
23 but the details of that would have to be considered
24 depending on what issue we were facing.

25 MR. RODGER: How about the existence of market power?
26 Do you think that creates the potential for market
27 distortions relative to perfect competition?

28 MR. HAMAL: I don't -- you're asking me to accept the

1 principle that there's market power in Ontario as it
2 currently exists. I do a lot of market power work. I'm
3 not willing to accept that.

4 MR. RODGER: What I'm trying to understand, sir, is,
5 considering all of these imperfections and distortions of
6 the Ontario market, how do you characterize the distortions
7 that result from 12X, in your view?

8 MR. HAMAL: I characterize them as a problem in the
9 market that can be fixed now at no cost and result in
10 direct improvements. I mean, we've got price signals whose
11 job it is to motivate people to respond, and I'll look at
12 this -- this applies to the conservation side, it applies
13 to the load side, but it also applies to generators.

14 And right now, if a generator had a choice between
15 saying my ramp rate is two megawatts a minute or my ramp
16 rate is 3 megawatts a minute, it has almost no incentive to
17 go to the higher, more aggressive number that would give it
18 an obligation to respond greater, because there's no price
19 out there.

20 So if that was a choice to a generator, it would -- my
21 advice, as an advisor, would be to pick the 2X. Why commit
22 yourself to something that could give you a problem?
23 That's depriving the IESO of supply in that instant,
24 because it's not going to have as many people responsive to
25 price.

26 And that's a real reliability issue. That's a
27 distortion that I think we should correct.

28 MR. RODGER: And is there a way that you think that

1 the distortions caused by 12X could be ranked against all
2 the other distortions in the Ontario market?

3 MR. HAMAL: Yes.

4 MR. RODGER: And how is that?

5 MR. HAMAL: We could rank it on the availability of
6 making a correction and the cost of making a correction.
7 It seems to me this is available to us right now, in this
8 room, to make this correction, and it could be implemented
9 at what I understand to be essentially no cost.

10 I'm not aware that any of the other problems in the
11 Ontario market are so readily available for correction.

12 MR. RODGER: So, in your view, what would be the top
13 criteria to go through that exercise?

14 MR. HAMAL: Well, I'm just -- one criteria is how
15 available it is and what the costs of implementing it are.
16 I mean, you know, are there other criteria? Which provides
17 better benefits, which provides economic value? I'm sure
18 there's many other ways you could rank options, but I think
19 -- I'm a practical guy. We should take practical and
20 pragmatic steps to improving the market.

21 MR. RODGER: Thank you, sir. Those are my questions.

22 MR. KAISER: Thank you, Mr. Rodger. Mr. Millar.

23 MS. AVERY: If I could have one clarification
24 question, sir.

25 MR. KAISER: Yes.

26 **CROSS-EXAMINATION BY MS. AVERY:**

27 MS. AVERY: It's in connection with Madame Panel
28 Member's question earlier today, about the IESO estimate

1 that Bruce B might receive another \$15.5 million as a
2 result of the proposed market rule amendment.

3 MR. HAMAL: Could you speak up, please?

4 MS. AVERY: Certainly. Madame Panel Member earlier
5 today had a question about the IESO estimate that Bruce B
6 might, in itself, receive another \$15.5 million as a result
7 of the proposed market rule amendment or the move to 3X
8 ramp rate.

9 Can you tell me how difficult it is to estimate the
10 impact of a market rule amendment such as this one, and
11 particularly this one, on any one generator?

12 MR. HAMAL: I think it's very difficult. We need to
13 have a lot of information that I haven't seen that hasn't
14 been presented and hasn't been discussed. I don't know
15 where that number came from, but we'd need to do a lot of
16 review in understanding how you would do such an analysis,
17 if it's even possible.

18 MS. AVERY: And would some of that information that
19 you would need to have are the forward contracts themselves
20 and the terms of those contracts?

21 MR. HAMAL: Certainly. To the extent that that
22 supplier is covered under forward contracts, they're not
23 going to see any of the benefits or any of the change in
24 market prices, because they've already sold that output.

25 MS. AVERY: And in connection, then, with Dr. Rivard's
26 evidence earlier today that arbitrage may have effectively
27 eliminated any change in the HOEP, how would that affect
28 any analysis about the impacts on any one particular

1 generator?

2 MR. HAMAL: Well, that's just another problem of
3 trying to understand where that number came from in the
4 first place. Obviously, if arbitrage were to eliminate
5 this price difference, then that number would most
6 certainly be wrong, but we don't even know what assumptions
7 go under it.

8 MS. AVERY: Thank you, sir.

9 MR. KAISER: Thank you. Ms. DeMarco, do you have
10 anything by --

11 MS. DeMARCO: I do not.

12 MR. KAISER: Thank you, Mr. Hamal.

13 MR. HAMAL: Thank you.

14 MS. AVERY: Sir, it appears that TransCanada will be
15 the last panel today, and I will be proffering Bill Taylor
16 or Mr. William Taylor today as our witness to speak to the
17 evidence that has been filed.

18 I understand it was filed as Exhibit 14, as well as a
19 CV, which was also filed as Exhibit 14, and so if I could
20 have Mr. Taylor go up to the panel table and get sworn in,
21 that would be helpful.

22 **TRANSCANADA - Panel 1**

23 **William Taylor; Sworn**

24 **EXAMINATION-IN-CHIEF BY MS. AVERY:**

25 MS. AVERY: Now, Mr. Taylor, before I have you adopt
26 the evidence or the prefiled evidence as your evidence in
27 this proceeding, I'd like for you to clarify for us an
28 error that's found on page 13, line 16, of the evidence.

1 MR. TAYLOR: Certainly. We have one small correction
2 to our evidence on page 13, line 16. That line starts
3 with, "The market design adopted by the Federal Energy
4 Regulatory Commission."

5 We'd like to change the word "adopted" to
6 "considered." That's the only change we have.

7 MS. AVERY: And apart from that one change, then you
8 do adopt the prefiled evidence and your curriculum vitae as
9 your evidence for this proceeding?

10 MR. TAYLOR: I do.

11 MS. AVERY: Sir, can you please outline for the Board
12 your education and also your role at TransCanada.

13 MR. TAYLOR: Certainly. Briefly, on my education, I
14 have a Bachelor's of applied science degree in civil
15 engineering and a power engineering certificate. In
16 addition, I've -- which isn't on my CV, but I've taken some
17 advanced management training at the Harvard Business
18 School, and I've worked at TransCanada for the last 11
19 years, 22 years in total of energy industry experience.

20 My title at the present time for TransCanada, my
21 responsibilities are -- relate to our eastern power
22 division. I'm the vice president of our eastern commercial
23 division, which encompasses responsibilities for
24 TransCanada's operating assets in Ontario, Quebec, the
25 Maritime provinces of Canada, New York State, and the New
26 England states.

27 I reside in Westborough, Massachusetts, and we operate
28 those operations from our office there.

1 MS. AVERY: Now, unless it would be useful for the
2 Board for me to go through his evidence in brief, I would
3 simply proffer Mr. Taylor for cross-examination at this
4 point.

5 MR. KAISER: Thank you. Mr. Rodger?

6 MR. RODGER: No questions.

7 MR. KAISER: Mr. Millar?

8 MR. MILLAR: Nothing from me, sir.

9 MR. KAISER: Thank you, Mr. Taylor.

10 MR. TAYLOR: Sir. It was an easy day's work.

11 **PROCEDURAL MATTERS:**

12 MR. KAISER: Mr. Rodger, Mr. Mark, we've considered
13 the proposal you put forward this morning with respect to
14 argument. That's acceptable.

15 MR. RODGER: Fine. Thank you.

16 MR. KAISER: So we'll proceed on that basis.

17 MR. MARK: So I think the only thing -- the other
18 thing we have to deal with, Mr. Chairman, is this issue of
19 the excision of the evidence. There have been some efforts
20 which have gone back and forth. I'm not entirely apprised
21 of the status. I think they're in Mr. Rodger's hands to
22 comment on the excisions that were identified by the other
23 parties.

24 MS. DeMARCO: Mr. Chair, if I could be of assistance,
25 Mr. Sidlofsky and I were just having a discussion. A draft
26 document has been circulated, and I think the ball is in my
27 court to verify two small changes to that document, and in
28 five or so minutes I imagine we could probably tender this

1 to you. So you can see precisely what...

2 MR. KAISER: Do you need us to stay for this or not?
3 Can we leave it on the basis that you'll come back to the
4 Board if there's a problem? It sounds like you're almost
5 home on this.

6 MS. DeMARCO: I think that's fair, from my
7 perspective. I don't know about --

8 MR. KAISER: So, we'll expect you to file that
9 document.

10 MR. MARK: If we can solve this in five minutes, I'd
11 rather do it, rather than getting back-sliding.

12 MR. KAISER: Do you want us to take a break?

13 MS. DeMARCO: You don't even have to leave. If I can
14 just scoot down there and see.

15 [Off-the-record discussion]

16 MR. MARK: Mr. Chairman, I think they need a couple of
17 minutes to true up a copy. I think the exercise is done.
18 I think they need a couple of minutes to true up copy and
19 it's done.

20 MS. DeMARCO: Mr. Chair, would you like us to read it
21 into the record, or would you prefer to be handed a
22 redacted copy of the document?

23 MR. KAISER: The latter would be better.

24 I think if there's agreement, we accept that you could
25 send us the document. Just to put on the record that you
26 have something that you, Mr. Sidlofsky, and Mr. Mark agree
27 to.

28 MR. MARK: Why don't you do this. Let's file one copy

1 of it as is, and then I'm sure Mr. Sidlofsky or Ms. DeMarco
2 will file and circulate a typed version of it.

3 MR. KAISER: That's fine.

4 MS. DeMARCO: Or if we could ask Mr. Millar to make a
5 copy and distribute that, that would also be great. Then
6 we'll file an updated copy at some point. Not today.

7 MR. KAISER: That's fine. Why don't you mark one, and
8 let's give this an exhibit number, Mr. Millar, please.

9 MR. MILLAR: Exhibit K2.9. What will we call this,
10 Mr. Rodger or Ms. DeMarco?

11 MS. DeMARCO: It's the list of materials affected by
12 Board order on relevance, materials to be...

13 MR. KAISER: Struck from the record.

14 MS. DeMARCO: Affected, I guess, because it's --

15 MR. MILLAR: Is it the list of materials being struck
16 or kept on?

17 MR. MARK: They'll be either struck or redacted.

18 MR. KAISER: So does this document indicate which
19 portions are to be redacted from those that are not being
20 entirely removed?

21 MS. DeMARCO: Yes, Mr. Chair.

22 **EXHIBIT NO. K2.9: LIST OF MATERIALS AFFECTED BY BOARD**
23 **ORDER ON RELEVANCE, MATERIALS TO BE STRUCK OR REDACTED**

24 MR. SIDLOFSKY: Yes, sir, we do have a copy now to
25 hand out.

26 MR. KAISER: Right. Give that to Mr. Millar. He'll
27 make copies.

28 MR. MILLAR: Mr. Chair, I don't think there's any need

1 for us to sit while I make copies.

2 MR. KAISER: No, that's fine. I was just --

3 MR. MILLAR: I'm not aware of there being anything
4 else, but I'll leave that to my friends.

5 MR. KAISER: On this basis, this concludes the
6 hearing. We look forward to receiving your argument, Mr.
7 Rodger, on Monday, as agreed, and the reply argument was to
8 come in on Wednesday, and your reply was Thursday.

9 MR. MARK: That's correct.

10 MR. KAISER: Thank you, gentlemen. Thank you, ladies.
11 Thank you for getting through this today.

12 --- Whereupon the hearing adjourned at 5:53 p.m.

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ONTARIO ENERGY BOARD

FILE NO.: EB-2019-0242

AMPCO Motion

VOLUME: 3

DATE: November 29, 2019

BEFORE:	Cathy Spoel	Presiding Member
	Emad Elsayed	Member
	Susan Frank	Member

THE ONTARIO ENERGY BOARD

Association of Major Power Consumers of Ontario
(AMPCO)

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

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Friday, November 29, 2019,
commencing at 9:34 a.m.

VOLUME 3

BEFORE:

CATHY SPOEL	Presiding Member
EMAD ELSAYED	Member
SUSAN FRANK	Member

A P P E A R A N C E S

LJUBA DJURDJEVIC	Board Counsel
DAVID BROWN	Board Staff
CHRIS CINCAR	
MICHAEL BELL	
CIERAN BISHOP	
CHERIDA WALTON	
LILLIAN ING	
IAN MONDROW	Association of Major Power
LAURA VAN SOELEN	Consumers in Ontario (AMPCO)
GLENN ZACHER	Independent Electricity System
DANIEL GRALNICK	Operator (IESO)
PATRICK DUFFY	
EVAN BARZ	Association of Power Producers of
	Ontario (APPrO)
EWA KRAJEWSKA	Kingston Cogen Limited Partnership
GIAN MINICHINI	(KCLP)
MARK RUBENSTEIN	School Energy Coalition (SEC)

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1 Friday, November 29, 2019

2 --- On commencing at 9:34 a.m.

3 MS. SPOEL: Good morning, please be seated.

4 Good morning. The Board is sitting this morning on
5 the continuation of AMPCO's application to revoke market
6 rule amendment, EB file -- sorry, OEB file EB-2019-0242.

7 Before we begin, are there any preliminary matters?
8 If not, Mr. Zacher, I believe we have your witnesses up
9 this morning.

10 MR. ZACHER: Yes, that's right, Madam Chair. David
11 Short and Candice Trickey from the IESO, so they should
12 probably be affirmed.

13 **INDEPENDENT ELECTRICITY SYSTEM OPERATOR - PANEL 5**

14 **Candice Trickey,**

15 **David Short; Affirmed.**

16 MR. ZACHER: Madam Chair, Panel members, you should
17 have just a brief compendium, which is simply the IESO's
18 evidence without the exhibits, and perhaps we should mark
19 that as the next exhibit.

20 MS. DJURDJEVIC: That will be K3.1.

21 **EXHIBIT NO. K3.1: IESO COMPENDIUM.**

22 **EXAMINATION-IN-CHIEF BY MR. ZACHER:**

23 MR. ZACHER: Thank you.

24 Ms. Trickey, Mr. Short, could you provide your names
25 and briefly introduce yourself to the Panel, by way of
26 explaining your roles at the IESO and how they relate to
27 the matters at issue in this proceeding.

28 MR. SHORT: My name's David Short. I am the senior

1 director of capacity market design. My responsibilities
2 include the development of the TCA, including market rules.

3 MS. TRICKEY: And my name is Candice Trickey. I am
4 the director of demand-side strategy and support at the
5 IESO. My role there is essentially to work with the
6 demand-side resources in the province and ensure that we
7 are effectively helping them participate in the Ontario
8 markets. I am also the chair of the demand response
9 working group that works with the demand response
10 resources, and also, I am leading the stakeholder
11 engagement that is looking at the issue of whether or not
12 energy payments should be provided to demand-response
13 participants when economically activated.

14 MR. ZACHER: Thank you. And both of you are familiar
15 with the evidence the IESO's pre-filed in this proceeding,
16 including the IESO's answers to interrogatories, and I just
17 want to confirm that each of you adopt that evidence as the
18 IESO's evidence today.

19 MR. SHORT: Yes, I do.

20 MS. TRICKEY: Yes, I do.

21 MR. ZACHER: So I would like to just ask some
22 background questions that I hope might provide some helpful
23 context and assist the Panel.

24 To start off, can you briefly explain how capacity
25 needs in Ontario have been secured to date and briefly what
26 the reasons are for transitioning the current demand only
27 response auction to a TCA and subsequent phases of the
28 capacity auction.

1 MR. SHORT: Sure. With regards to the first question
2 of I guess how we secure capacity, essentially we have
3 three ways today. We have got Ontario Power Generation's
4 or OPG's rate-regulated fleet, which, the OEB manages that
5 for cost recovery. We have contractor resources either
6 through the Ontario Electricity or Electric Financial
7 Corporation, OEFC, or the IESO. That's a bit of a mix of
8 capacity and energy-type contracts. And the third is --
9 currently today is the demand response auction, and that is
10 our first full attempt at a capacity-based market mechanism
11 with certain obligations in the energy market.

12 And the second question, sorry, can you repeat that?

13 MR. ZACHER: Just generally the reasons for
14 transitioning the DRA to a broader capacity auction.

15 MR. SHORT: So the IESO believes that one of the ways
16 we can provide a cost-effective and reliable solution for
17 consumers is to have an open, transparent, and competitive
18 process that is technology-neutral. We had a plan with
19 regards to the incremental capacity auction as kind of the
20 ultimate product and, seeing the pending gap in capacity,
21 we looked to resolve that by trying to figure out what's
22 the most optimal solution. And we believe that an auction
23 would be the best approach. And we looked around the -- we
24 already had a demand response auction that was functioning.
25 It had many of the core elements ultimately that we were
26 looking for in an open and transparent competitive process.

27 And so in conversations with the DR community there
28 was always this knowledge that the DR community and the DR

1 auction would be transitioned to a more broader resource --
2 sorry, a broader auction where more resources would compete
3 to supply capacity.

4 And so we thought we would start with the core
5 fundamentals of the DRA, the demand response auction, and
6 begin to add new features, new design features, and of
7 course our plan was to add more resources to the mix to
8 have them all compete to supply capacity to meet Ontario's
9 needs.

10 MR. ZACHER: Mr. Short, was another reason that the
11 IESO required additional resources other than demand
12 resources to meet Ontario's capacity needs or would demand
13 resources on their own have been sufficient?

14 MR. SHORT: If you look forward to the evidence that
15 we have submitted, there's a 4,000 megawatt-plus gap for
16 capacity in 2023. The demand response auction to date
17 clears around just over 800 megawatts. There's about 1,000
18 megawatts of offered or I guess qualified capacity that can
19 participate.

20 So simple math, 1,000 megawatts versus a 4,000
21 megawatt shortfall, DR on itself can't meet that future
22 need, and so when we look forward we need a mix of
23 different resources. We wanted to enable things like
24 capacity imports from other jurisdictions like Quebec, New
25 York, Michigan. We needed to look at what available
26 generation was in Ontario. There's over 600 megawatts of
27 contract generation that could be available for an auction.

28 And so when you add up things like -- even like

1 storage, storage is a new product. Maybe it can help meet
2 that need. So when you add up the capabilities maybe from
3 all these other resources, that would meet our 4,000-
4 megawatt need, but DR itself can't do that.

5 MR. ZACHER: Okay. And have you learned anything from
6 either the previous, call them OPA-based contract DR
7 programs, or the DRA in terms of integrating DRA's
8 resources into an auction or into the IESO market more
9 generally?

10 MS. TRICKEY: Yeah, I think there's been a few things
11 that we've learned. The previous demand response 3
12 program, contract-based program, that was run by the OPA
13 was taken over by the IESO and transitioned into what was
14 called capacity-based demand response program.

15 That program really -- it required a certain number of
16 activations, and it based activations not on the market
17 price, it based activations on other factors, and I think
18 you heard Dr. Rivard speak about this yesterday. What
19 resulted was that we were activating those resources when
20 it maybe wasn't the most efficient thing to do. There were
21 other resources that would have been more cost-effective to
22 activate.

23 I think, you know, again, we talked about at length
24 yesterday, generators in the business to generate, loads
25 are in the business to do something else, but when it makes
26 sense they can be a really useful addition to the
27 electricity market, but I think for that reason we'd rather
28 see them doing their core business when that's the most

1 cost-effective thing for them to do, and we found that in
2 the DR3 program that wasn't always happening from an
3 operational perspective.

4 So that's one thing that we looked to rectify by
5 putting them into the market and having market prices
6 activate or create the activation signal for them.

7 I think another piece that we -- I don't know if we
8 learned or that we worked on through the transition was, so
9 there was this demand response 3 program that was run, and
10 we had a plan to move the demand response resources into an
11 auction mechanism for much the same reasons Mr. Short
12 described.

13 In doing so we wanted to make sure that we provided
14 stability and certainty for those resources so that we knew
15 that they had a pathway to move from a contract-based
16 structure to a market-based structure.

17 So the first thing we did was we took the rules of the
18 demand response 3 program and embedded them in the IESO
19 market rules, so that we could operate those resources and
20 that contract, but operate them under the market rules. So
21 we're sort of creating a transition first to allow us to
22 operate those contracts.

23 And that allowed us then to start to establish the
24 rules and mechanisms for the demand response auction, give
25 us time to set that up properly, give us time to let those
26 resources know that that would be the next stage, when
27 those auctions would happen, and give them an off-ramp so
28 if they wanted to move from the contract to the auction,

1 that they could. And if they're economic in that auction,
2 that they had a smooth pathway from the contract mechanism
3 to the auction mechanism. So that was something that we
4 intentionally ensured was enabled so that they had
5 certainty that again, if they wanted to and were economic
6 to do so, they could move from one mechanism to the next
7 without interruption.

8 And we staged the timing of the following auctions
9 because not all of the contracts ended at the same point.
10 They ended at different points in time, so we also looked
11 at timing the auction so that again, they could move from
12 one to the next, if that was their intent, smoothly.

13 MR. ZACHER: Thank you. Presently and moving forward
14 as well, is are there any sort of notable differences in
15 how demand response resources are treated relative to
16 supply resources, in either the capacity market or the
17 energy market?

18 MR. SHORT: So yes, there are differences. As Brian
19 Rivard -- sorry, as Dr. Rivard noted yesterday, the IESO
20 strives to treat all resources as equally as possible. You
21 know, we think that we try and -- we recognize, as a former
22 controller manager, in a perfect situation every resource
23 is instantly flexible and has an infinite amount of fuel.
24 But that's just not the case. It doesn't reflect reality,
25 and that's okay.

26 We look at all the resources and try and optimize them
27 and try -- again, as Dr. Rivard said, we try and extract,
28 we think, the greatest value that we can out of them to

1 make sure we can, you know, both be reliable and provide a
2 cost effective solution ultimately benefiting ratepayers.

3 So we look to remove barriers. We may discover
4 barriers as we go ahead and operate the market, and we'll
5 try and remove those. But they may not be instantaneous.
6 First you have to discover them, you have to validate, and
7 then develop the plan over time to correct them. But it's
8 not an instantaneous fix.

9 So when it comes to the question that was related to
10 like HTR or DR, we recognize that -- and it's transitioned
11 again from contract-based structures at the OPA through to
12 the IESO for market-based structure. But we recognize
13 there's certain limitations and it's okay, we account for
14 that.

15 For example, they require a notification. So a
16 standby notification has to be issued from the day ahead at
17 about -- I think it's 3 o'clock in the afternoon up until 7
18 o'clock the day of. And so we can't just wait and phone
19 them up an hour or five minutes ahead of time and say go
20 ahead and reduce your load for some resources, which is HTR
21 resources.

22 And so we have to give them that standby notice and
23 once they're on standby, we have to give them a subsequent
24 time to get activated. And so about two-and-a-half hours
25 to three hours ahead of time, we will give them a signal to
26 say you may need to reduce your load, or you will need to
27 reduce your load and here's -- to meet your capacity
28 obligation. And they require that time.

1 And when we dispatch them or schedule them, they are
2 only scheduled for one-hour chunks, anywhere from one-hour,
3 to four-hour. And once we use them for even just one hour,
4 we can't use them again for the rest of the day.

5 There's things like -- because the loads also can be
6 aggregated, they can be virtual loads. We call them
7 virtual, but they're real. But that's the term the IESO
8 uses; maybe not the best term, but that's the term we use.

9 It could be things like household air conditioners,
10 hot water tanks. I am not sure how they do their business,
11 but we don't have visibility to that. We don't have a
12 meter that we can read in real time. If you're a physical
13 resource, like a dispatchable load, we get five-minute
14 telemetry.

15 And it's okay for us again. We looked at the program,
16 we looked at the concept, and we thought it's an acceptable
17 solution for these virtual resources not requiring real
18 time telemetry going back to our control room. It's
19 updated every six seconds, as an example.

20 So there's a number of things that we do accommodate
21 for and plan for. And just like every other resource, for
22 look for ways to optimize it as best we can.

23 MR. ZACHER: Just to be clear, are those
24 accommodations unique to DR resources in particular, HDR,
25 or would those apply to generators as well?

26 MR. SHORT: So the ones I just spoke about are
27 specific to HDR, but there are other accommodations. So
28 for example, if you are an import in another jurisdiction,

1 there's scheduling protocols we have to adhere to between
2 us and a neighbouring market.

3 If you're a generator in Ontario, sometimes you
4 require more time to start up, or you may have to run for a
5 particular period of time before you can shut down. So
6 there are other accommodations we make.

7 MR. ZACHER: Okay. So I'd just like to turn now to
8 some of the matters that are at issue in this case, and ask
9 some questions.

10 Can you tell me how the IESO has responded to AMPCO's
11 past concerns about energy payments, and its more recent
12 request to resolve the issue of energy payments before
13 moving ahead with the TCA, or any future capacity auctions.

14 MS. TRICKEY: Okay, yes. So as you mentioned, AMPCO
15 and the demand response community did raise this issue a
16 few years ago, the issue of, you know, a design to have
17 energy payments when activated. It was raised through the
18 demand response working group. At the time, I think, you
19 know, likely largely related to what was going on in the
20 US, the fact that decisions had been made, as we've
21 discussed, to provide those types of payments.

22 So it was something we agreed to look at through the
23 demand response working group. As provided in our
24 evidence, we did initiate a study with Navigant to look at
25 the issue. Essentially, we asked Navigant to do a
26 jurisdictional scan, understand what other jurisdictions
27 were doing, and to look at the arguments for and against.
28 You know, understanding a lot of debate had happened in the

1 US markets on this, a lot of people on both -- good, smart
2 people on both sides of the argument had articulated lots
3 of different arguments. We wanted to understand what those
4 arguments were on both sides of the question, and what that
5 -- what are some of the implications if we were to do
6 something like this in Ontario.

7 So that study was initiated, completed, provided in
8 our evidence, and I would say at the end of the day it was
9 inconclusive in that it did demonstrate there are a lot of
10 good arguments on both sides, and that a lot of
11 considerations to make. It also indicated that there
12 wasn't -- that there were a lot of questions about whether
13 there really would be a benefit in Ontario to providing
14 this type of payment to demand response resources.

15 We completed the study, discussed those implications
16 and findings with the demand response working group. From
17 the IESO's perspective, it didn't appear to be something
18 that would create a lot of benefit and it was a lot of
19 work. So we asked stakeholders is this a priority at this
20 time. The response we received at that time was that it
21 was not a priority, so we set that aside to work on other
22 issues.

23 And, you know, as we're well aware, the issue came up
24 again when the IESO initiated the transitional capacity
25 auction, so we -- understanding this was an important issue
26 to stakeholders, we regrouped, took a look at our work
27 plans again, and agreed to initiate more work on the
28 question. So we've agreed to initiate another study

1 following on the heels of the Navigant study, taking what
2 it had found, going to the next stage to understand what
3 would a benefit look like -- or how would this work in
4 Ontario, is there a benefit, what would a net benefit test
5 look like.

6 So we've currently engaged the Brattle Group to
7 complete that study. We initiated stakeholder engagements
8 in September, recognizing this a big question as we have
9 discussed. This is a change to the fundamental
10 underpinnings of our market, the fundamental design of our
11 electricity market, not something we undertake lightly. So
12 we needed to ensure that we talked to stakeholders about
13 this, get their feedback on it.

14 So as I said, we initiated a stakeholder engagement in
15 September, opened to all stakeholders to get their insights
16 into it. We provided them with a proposed scope of study,
17 and asked for feedback on that and we're just in the
18 process of working through that at the moment.

19 MR. ZACHER: And just when is that to be concluded,
20 and what ultimately will be the upshot of that study?

21 MS. TRICKEY: Right. So as I said, we asked for
22 feedback on the proposed scope. We are meeting with
23 stakeholders early next month to discuss their feedback,
24 finalize the scope of the study, and we have Brattle
25 starting the work on this, and then we will complete that
26 and provide a decision on the matter by next May is the
27 timeline that we've committed to.

28 MR. ZACHER: Okay, and then that will inform the

1 IESO's decision?

2 MS. TRICKEY: Yeah, so -- yes, the intent is to get
3 the study, stakeholder feedback on the study, and the IESO
4 needs to then make a decision as to whether we believe this
5 is an appropriate change to make to our market structure.
6 We will make that decision and discuss that decision with
7 stakeholders by next May.

8 MR. ZACHER: Okay, and just a follow-up. So why not,
9 Ms. Trickey, wait until the study's complete and the issue
10 of energy payments for demand response resources, if at
11 all, if any, is resolved before forging ahead with the TCA
12 or ensuing phases of the capacity auction?

13 MS. TRICKEY: Right, okay. So I think there's two
14 things to consider here. As I said, this is a fundamental
15 change to our market, not something we want to -- we can
16 implement without significant stakeholder engagement and
17 study, and that does take time. And then the second piece
18 is really, we do see this looming capacity gap coming,
19 something that we need to address to ensure reliability in
20 the province, and that's something that we need to get
21 started on right away. I will talk a little bit more about
22 the first one, and then I'll pass over to my colleague to
23 talk more about the timing of the capacity gap and how
24 we're addressing that.

25 So again, if we look at this issue, major change to
26 our market, something that we are considering and talking
27 to stakeholders with and are doing a study on. But in
28 addition to it being a major change, we haven't really seen

1 any evidence that indicates that it's a needed change, that
2 it will result in benefits to the demand response
3 participants or even benefits to the province, and I think
4 there's even evidence to suggest that it could increase
5 costs to consumers because of the unique structure of
6 Ontario's market with the global adjustment, something
7 we've talked about over the last few days.

8 Those are important considerations, so it's not
9 something that we can undertake and just say, okay, we'll
10 do it and move forward. So we do want to take our time. I
11 believe we've put forward an aggressive schedule to get
12 that work done and come to a decision, but nonetheless we
13 are committed to working through that over the next number
14 of months and coming to a decision by May.

15 So, again, that's the sort of schedule for the study
16 and that question. The separate question is how do we
17 proceed on the capacity market and address the capacity
18 gap, so I will pass it over to Dave to talk to that.

19 MR. SHORT: Thanks. So TCA -- in our evidence we
20 talked about this pending capacity gap in 2023. We needed
21 to -- and we need to -- we still need to move forward with
22 incremental changes in a phased approach to addressing that
23 need. There are -- this is the first time we've run a
24 capacity auction with supply side or at least we want to
25 run an auction for the first time with supply side
26 resources. The last four auctions have been demand
27 response only.

28 So adding the resources introduces challenges and

1 complexities to the mix. But overall there's a net benefit
2 in terms of, again, increased competition and of course
3 trying to get ready to meet that future need.

4 So if you think, if I can provide a couple examples,
5 if somebody said, I want to add imports today to an auction
6 that we're going to run tomorrow, the answer would be, I
7 can't do that, because I don't have agreements from -- I
8 need operating agreements between, say, New York ISO, the
9 system operator in New York, and ourselves, and we are in
10 the process of trying to have those conversations, but that
11 takes time in trying to iron out the details on how to
12 trade capacity.

13 That's not to say that New York State is supplying
14 gas, it's just working out the mechanics of how we would
15 transact that.

16 Conversely, once we have those agreements, there's
17 nothing compelling New York State first of all to make this
18 their number-one priority. There's also nothing compelling
19 a generator in New York State to have to participate in our
20 auction.

21 And so the intent is to run the auctions, prove they
22 are a viable product as far as introducing new resources,
23 because we want to attract those resources to the auction
24 and get them to compete with everybody else. And so if
25 you're a generator in New York State, once the agreements
26 are reached, then it allows them and affords them the
27 opportunity to compete, but it doesn't compel them to
28 compete.

1 Another example can be storage. It's relatively new
2 to the -- to Ontario. We have got a -- we have had pump
3 storage at Beck for decades, but as far as the smaller
4 storage it's relatively new product. We have plans to
5 integrate it into our next auction, but there's nuances to
6 it. It behaves differently. I talked earlier about, we
7 want to be on a level playing field, but we have to respect
8 their differences.

9 So we've got a load -- so a storage product behaves as
10 a load and a generator, and so how do you effectively
11 integrate that into a future capacity auction? We are not
12 sure it's perfect yet, but we need to start, and so we are
13 planning to start that with the June 2020 auction.

14 So when it comes to this auction -- sorry, the
15 proposed December 2019 auction for the TCA, the intent was
16 to simply add the first round of new resources, which was
17 off-contract dispatchable generators.

18 MS. TRICKEY: Maybe I can add a few points to the
19 complexity of something like this. I think one thing to
20 recognize is that you don't know what you are going to get
21 when you launch an auction. You know, you launch an
22 auction, it takes time to set it up and get it out there
23 and put it out there, and then you need to see who comes to
24 market. And do a sufficient number of resources come to
25 market? If you are not getting the kind of uptake that you
26 expect or need through that, now you need time to enact
27 something different or make changes to the auction.

28 But given the timelines we have, I think if an auction

1 mechanism wasn't working, we would need time likely to do
2 something different.

3 I think the other thing that's important to recognize
4 with auctions, and this I can speak to from my experience
5 in operating the demand response auction, is it's a long
6 cycle time to make changes. So as we have talked about,
7 it's an annual product typically. You need to -- it sort
8 of works in a number of phases, so you announce that you're
9 going to do an auction so that everybody can get ready to
10 participate in it, you have the auction, and then you need
11 to give people time between the auction and when they
12 deliver on their obligation to get ready to deliver on
13 their obligation, then they deliver on the obligation;
14 while you are in the middle of delivering on that
15 obligation we are running the next auction to get ready for
16 the next period.

17 So it's cyclical, but it's a long cycle, so to test
18 and make sure that it's going to work you need to give
19 yourself a long lead time to incorporate learnings and
20 changes, and from what we have seen in the DR auction it
21 can be as long as three years just to make one change.
22 Some things can happen more quickly, but recognizing
23 there's sort of a stage of learning in each portion of the
24 auction and you're only holding this thing on an annual
25 basis, you do need to give yourself a long lead time to
26 incorporate those types of things.

27 MR. ZACHER: Thank you. And can you just touch on the
28 impact of the Board's recent stay decision earlier this

1 week and how that impacts the IESO's plans if any, if at
2 all?

3 MR. SHORT: So we announced, I think it was on
4 Wednesday, that we've -- we will be running the demand
5 response auction. We contemplated waiting and running the
6 TCA until -- if there's an outcome of this decision --
7 potentially sometime in January, but the reality is we have
8 a pending capacity gap for the summer of 2020, and so,
9 given the time it takes participants to get ready post-
10 auction to the first obligation, the start of the
11 obligation period, there's not enough time for them to get
12 ready, in our opinion.

13 And so we opted to run the auction, the DRA,
14 essentially at the same time we would have run the TCA,
15 which is December 4th. You know, we essentially, from a
16 TCA perspective, we have lost a year of opportunity when it
17 comes to the period from May of 2020 through 'til April of
18 2021 for generators, off-contract generators, to
19 participate.

20 I think if we're -- you know, it's not -- we're still
21 afforded opportunities, two more chances to continue to
22 evolve the auction, assuming we are allowed to provide with
23 TCA and capacity auctions in general, we need to get ready
24 for that, the pending gap in 2023. It's not just 2023, I
25 keep mentioning that, but it the gap continues and grows
26 beyond 2023.

27 So I think -- next week, for example, we have our
28 stakeholder session on the June 2020 auction. Another one

1 we've -- actually, draft market rules and manual wills be
2 posted this week for the June 2020 auction. So that's --
3 we need to keep moving forward; we can't lose time. It
4 will be challenging, but we think we can still engage the
5 community and engage other resources to get ready for that
6 2023 need.

7 MR. ZACHER: Just to clarify, Mr. Short,
8 notwithstanding that you've lost some time, do you -- is
9 the IESO still in a position to move forward with a
10 capacity auction mechanism to address current needs, and
11 ultimately the 2023 gap?

12 MR. SHORT: Yes, we are at this point, assuming we are
13 allowed to continue and operate the auction, and the next
14 planned auction is in 2023 -- sorry, the next planned
15 auction is June of 2020.

16 You know, alternatives, if we are not able to execute
17 the auction, then that creates some challenges for us. You
18 know, we need to look at -- getting for 2023 and beyond is
19 not as simple as waiting until 2022 and flipping a switch
20 and saying we now have all the rules.

21 We now have, even if we have to go -- so if we can't
22 run an auction, we have to look at alternatives -- or we
23 can't run a capacity auction, we may have to look for
24 alternatives and that could mean some, you know, smaller
25 auctions where we run a DR-only auction, and a generator-
26 only auction, and an importer-only auction.

27 It really doesn't make sense, though, because the
28 whole point of a capacity auction is to get all those

1 resources competing together to supply capacity. It's all
2 in theory the same capacity product, and so we want them
3 all running in an open, competitive process, not boxed off
4 in mini-auctions.

5 And another alternative may have to be some semblance
6 of a contract, if we can't run the auction, because we do
7 have to get ready NERC requirements -- sorry, the North
8 American Electrical Reliability Corporation, as the
9 standards authority for Ontario, wants to know what our
10 plans are.

11 So we have to establish those plans and start moving
12 forward with them. Whether it's contract opportunity or an
13 alternative auction, we need to start moving forward now.

14 MR. ZACHER: Can I ask you -- and Chair Spoel alluded
15 to this in a question, I think at the end of the day
16 yesterday, is whether one of the purposes of the TCA, or
17 capacity auctions more generally, is specifically to save
18 or prevent certain off-contract generators from going out
19 of business, so that they will be available in a few years.

20 Is that a fair characterization of the purpose?

21 MR. SHORT: I would say -- no, I wouldn't characterize
22 it that way. The IESO wants to run a competitive and open
23 process where all resources have an opportunity to compete
24 in the supply capacity. It's not -- we're not picking a
25 winner or loser in this case. We are trying to again
26 provide that open competition, technology neutral, down the
27 road.

28 So it's -- sorry, technology neutral and we will add

1 resources down the road as we continue to expand the
2 auction.

3 So, you know, with respect to an off-contract
4 generator, we recognize that -- and I've talked about it
5 before, this pending need is not just a DR; DR can't do it
6 alone. And so when we look at the possible opportunities
7 to obtain capacity, it comes from generators, certainly.
8 We've got 27 generators, 640 some megawatts that are off
9 contract today.

10 I don't know if they are all willing and able to
11 compete in an auction, but I would like to give them that
12 opportunity to compete.

13 We know that other jurisdictions have capacity that
14 could be available to Ontario from, say, Quebec or New
15 York. I'd like to give them the opportunity to compete and
16 supply capacity to Ontario.

17 So over time, you know, we've had this essentially a
18 sandbox, where DR's been -- I'll say somewhat protected from
19 the rest of the playground. They have been -- we have been
20 working with them to improve the product, add features,
21 improve the test results of capacity. But we think that
22 it's time to let other resources compete.

23 And, you know, if I look at generators, I am not
24 picking generators to say we are not guaranteeing -- I'll
25 pick on Kingston Cogen. I am not guaranteeing them they
26 will get a capacity obligation if they're -- you know, if
27 we open the auction up. It's simply giving them the
28 opportunity to compete.

1 If they remain economic, then they will be successful
2 and they may beat out a DR provider that is less economic,
3 if they are a higher price in the end.

4 But it's a matter -- I also look at the risk going
5 forward to 2023. We need to be kind of all hands on deck,
6 as far as all the available opportunities to meet that
7 4,000 megawatt need. Could we do it with resources other
8 than generators that are off contract? Probably,
9 hopefully.

10 But if you've got a resource that's already built and
11 it's in the ground and assuming it's -- I don't know the
12 state of Kingston Cogen, not to pick on them again, but if
13 the facility is still up and running and viable, then why
14 not afford them that opportunity to stay around. It's
15 likely they are a less -- sorry, a more -- sorry, a less
16 costly resource to ratepayers ultimately than say building
17 a brand new gas generator from scratch to supply the need
18 in 2023.

19 So we are not picking winners and losers. We are
20 really just trying to provide that competitive process.

21 MR. ZACHER: Thank you. Let me just switch gears for
22 a moment. As you know, AMPCO says the demand response
23 resources will but put at it a competitive disadvantage
24 vis-a-vis generators in the capacity auction, because they
25 may need to include the cost of potential energy market
26 activations in their TCA bids and. And you heard Dr.
27 Rivard explain yesterday why he does not believe that is
28 the case.

1 What's the IESO's reasons for disagreeing with AMPCO's
2 position?

3 MS. TRICKEY: As I have said, we have agreed to look
4 at this issue. You know, it's something that the IESO will
5 study and make a decision on whether or not there is a
6 benefit to doing this in Ontario.

7 However, you know, given the situation we're in, the
8 position we're in, we also think it's important to
9 understand what are the implications of not doing that
10 immediately.

11 And we ultimately do believe that there is an
12 opportunity for loads to reflect their costs in both
13 markets. As was described at length yesterday, the
14 fundamental design is such that they're able to reflect
15 their costs for providing capacity in the capacity auction,
16 and in the energy market, they're able to manage their
17 costs by reflecting that in their energy market bid. So
18 there is an opportunity in both markets.

19 As I said, we are willing to look at the issue more
20 closely, see if there's something we are missing. We will
21 do that. But in the meantime, from a practical standpoint,
22 we also look at what is the actual risk of activation. So
23 what is the risk that they are going to have activation
24 costs that they are unable to capture if we, you know, take
25 it to that place where we say there is some sort of cost
26 that they can't capture in the energy market, what is the
27 risk that that cost is actually going to occur in the
28 current market.

1 And given that they have rarely, if ever, been
2 activated over the last number of years, we don't see that
3 there's a risk that they are going to be activated and
4 therefore not going to have -- they won't have those costs
5 and won't need to reflect those costs in their capacity
6 auction offer.

7 I think if we look at the other markets as well, the
8 evidence from LEI and from our Navigant study also shows
9 that even with an energy payment, demand response resources
10 are rarely activated. We see that they have the
11 opportunity to manage this risk, and so we don't see that
12 there's a risk in this period for them to need to reflect
13 that in their capacity auction offer, so that we can
14 proceed carefully on both fronts at the same time.

15 MR. ZACHER: And just to pick up, what's the value --
16 what's the value of these resources, DR resources, if they
17 are not being activated?

18 MS. TRICKEY: Yeah, that's a great question. They
19 really are valuable to Ontario. It probably starts to
20 sound like I am picking on them; given my job title, I
21 probably shouldn't do that. But they are valuable to
22 Ontario.

23 I think it's important to understand, though, that we
24 have separate markets because we try to separate the value
25 of each type of service that's provided.

26 So in the capacity market, they are very valuable
27 because they, from what we've seen in the demand response
28 auction, provide fairly inexpensive capacity, so the

1 availability. They can provide that availability fairly
2 inexpensively, compared to what some types of generators
3 can, or other types of resources. And we have seen those
4 prices come down over the last number of years.

5 So I think they have proven that they are valuable
6 capacity resource, and they could be even more valuable if
7 we enable them to compete against other resources, because
8 they can demonstrate that in terms of providing capacity
9 and that availability that they're able to help us manage
10 those costs, keep those costs competitive.

11 The energy market is a separate matter and runs under
12 separate economics. But I think actually, before I go to
13 that, it's important to understand, as Dave mentioned, we
14 have to buy certain amount of -- or we have to secure a
15 certain amount of capacity for the province to meet our
16 reliability standards.

17 That amount is over and above what we would typically
18 use on a normal day. Even on a hot summer day when we
19 expect to be at our peak, we still need to have more
20 available because, as we see, you know, the typical hot
21 summer day isn't always going to be what's going to occur.
22 There will be extreme days. There will also be days where
23 large resources are suddenly on outage unexpected, so we
24 have to be able to prepare for those types of
25 contingencies.

26 So there are reliability standards required that we
27 secure enough capacity to meet those types of extreme
28 situations, so that means we are buying more capacity than

1 we need. You can think of it as insurance. We are buying
2 that insurance. We hope not to have to use it, but we have
3 to buy it nonetheless.

4 So that's the capacity market. When I look at the
5 energy market, we only activate the resources that we need.
6 You know, we have to meet that minute-to-minute, second-to-
7 second demand for electricity, so we are only activating
8 what we need, which means that a certain segment of the
9 resources are rarely, if ever, going to be activated.

10 The way things work in Ontario, we try to use market
11 economics to set who gets activated, as Brian talked about,
12 so we're going to activate the least expensive resources
13 first.

14 In the energy market, loads are typically the most
15 expensive resources, and that's not a problem, that's just
16 a fact. That's what they are. They are in the business to
17 do something else. So it's expensive for them to interrupt
18 that, so we accept that, give them the ability to bid as
19 high as they need to to cover -- to manage their costs, and
20 it just so happens, like I said, they tend to be the most
21 expensive resources, so they are going to be the last ones
22 to be activated, and in fact they are rarely if ever going
23 to be activated, because we have to have that capacity for
24 insurance purposes.

25 So they do provide value in both markets in the
26 capacity. They help keep our capacity costs low, and I
27 think I would rather -- if we are going to have resources
28 that are sitting around and not activated very frequently,

1 I would rather that be a demand response resource that has
2 other things to do than a generator that has nothing else
3 to do, so I think that's an important part of the whole
4 picture. So I think that there is value there.

5 On the energy side, the value that they provide is if
6 we really, really do need them, they can prove that they
7 can be there and provide that emergency type of response.

8 So I think there is a lot of value, it's just
9 understanding how that value fits into the different
10 services that we need.

11 MR. ZACHER: Thank you. So I think this is my last
12 question. Member Frank at the end of the day yesterday
13 referenced out of market startup costs that some generators
14 are eligible for under the IESO's generation cost guarantee
15 program and expressed some concern that demand response
16 resources, to the extent that they have the sorts of
17 equivalent costs that were referenced by Mr. Anderson in
18 the example he provided, don't have those same
19 opportunities to recover those costs.

20 And I am wondering if you can just comment or shed, if
21 you're able to shed any light on that.

22 MS. TRICKEY: So what I can do is explain you a little
23 bit more about what the program is and what's intended, and
24 I think Dave can talk a little bit more about why -- the
25 sort of operational considerations for that type of
26 program.

27 MR. ZACHER: You are talking about the GCG, or the
28 generator cost guarantee program?

1 MS. TRICKEY: Yeah, so the real-time generation cost
2 guarantee program is a program that we created to manage a
3 reliability risk, and the risk was that generators wouldn't
4 come to market because they wouldn't be able to recover
5 sufficient costs to recover their costs in the market.

6 So we created this program that essentially provides
7 them a make-whole payment or compensation for situations
8 when they come to market and the market doesn't actually
9 cover their minimum costs, they'd get this type of a
10 payment.

11 I am going to come back to how that works and how it's
12 relatable to some other things, but maybe it might help to
13 understand why we need that kind of thing. So I will let
14 Dave speak to that.

15 MR. SHORT: So not every generator is eligible to
16 participate in the program. It's really been developed for
17 what we call non-quick start. I think Dr. Rivard mentioned
18 that yesterday. So if you're, for example, a combined-
19 cycle gas plant, so you have, say, two or one or three gas
20 turbines that run or generate electricity, and the wastes
21 -- the exhaust is essentially then kind of captured and
22 crated and moved to a steam turbine, where the waste heat
23 creates more electricity, so basically you could have two
24 steam -- sorry, two gas generators and one steam generator.

25 There's implications in start-up. You can't -- I
26 talked earlier about in a perfect world you'd flip a switch
27 and the generators would be online in a second. The
28 reality is some of them take six, seven, eight hours to

1 start up, so if you say six hours, just do some math here
2 -- hope I get the math right -- if you need them at six
3 o'clock at night and the market dictates -- says there's a
4 signal here that we are going to hit the winter peak,
5 they're economic at that point, so we need them online.

6 The challenge is if you're now having to start six
7 hours ahead of time the market price may be low, and
8 there's start-up costs associated with going from pushing
9 the button to start to the point where you're at your -- we
10 call it minimum loading point, but it's kind of your --
11 your lowest point where the unit's stable and ready to be
12 dispatched, and that has to be done in advance of that six
13 o'clock need.

14 And so there's costs associated with, you know, gas.
15 I think it was talked about yesterday, gas costs to go to
16 start the generator, there's wear and tear on the turbine
17 to start the generator, and other costs, and those are --
18 that's part of the program, is to capture those types of
19 things, but the fundamental component is that it's
20 reliability need, because we need them online by dinner
21 time, essentially. And so we have to look at the costs
22 associated with getting them ready to be online at that
23 time.

24 MS. TRICKEY: So how does this type of program relate
25 to the market in general? There are a number of places
26 where we provide this type of program, and I would
27 generally characterize it as, there are certain
28 circumstances where resources are required to operate in

1 the market at a price which they've indicated is
2 uneconomic, so where their costs aren't going to be
3 covered.

4 When we see those types of situations it's typically
5 our practice to provide some sort of compensation or make
6 whole payment to ensure that the market ultimately -- where
7 the market isn't sending the right signal or isn't enabling
8 the right type of activation we can ensure that the
9 resources still come to market.

10 So there are a number of situations where this can
11 happen. Dave's explained the real-time generation cost
12 guarantee example. For dispatchable loads, there are times
13 in the market where they are asked to reduce when the
14 market prices in their area or their particular market
15 price isn't -- isn't the active price at the time, so we're
16 activating them when it's uneconomic. In that case we
17 provide them a payment that makes up the difference between
18 their offer and -- or, sorry, their bid and the market
19 price.

20 The same thing for generators. When generators are
21 tested, we provide the same type of thing, because when we
22 test them we may be bringing them on at a time when the
23 market price is lower than what they need to recover, so
24 we, again, we recover the differences.

25 This is also something we recognized was a problem for
26 the hourly demand response resources. When we got into the
27 most recent conversations about the energy payments issue,
28 IESO stepped back to take a look at the issue and

1 understand it a little bit better, and recognizing that
2 because we were proceeding with the transitional capacity
3 auction, we were actually creating a situation where hourly
4 demand response resources wouldn't be able to always have
5 the opportunity to manage their costs.

6 So as I said earlier, we need to make sure that all
7 resources are able and ready when we call on them. Because
8 demand response resources aren't typically called on often,
9 we test them regularly to make sure that they are ready and
10 able when we need them. So we typically test them once per
11 obligation period or up to two times per period. So they
12 can be tested two to four times a year.

13 And we recognize when we test them we are bringing
14 them on at a price that's below what they've -- sorry, yes,
15 below. It's confusing when we think generators versus
16 loads, but we are bringing them on at a price that's
17 uneconomic for them, where they said they would rather be
18 consuming.

19 So in that case, we recognize that there are costs
20 that they are not capturing or managing, so we have
21 recently instituted rules and a process to enable us to
22 provide them some compensation in those scenarios, so that
23 when we test them, we can feel sure that they're -- they
24 will come, they will be -- they will be tested, they will
25 be -- can be activated and tested in that scenario, and
26 then we will provide compensation to make up the
27 difference, or provide some compensation for that scenario.

28 So there's lots of times when we do this type of

1 thing. We recognize generally the market doesn't always do
2 -- doesn't provide the signal we need, or we need to
3 activate them at a time when the market is uneconomic to do
4 so, and we think it's the right thing to provide
5 compensation to manage that; so we have done that.

6 We started the process a few months ago. We've
7 recently, I think just this week, had the market rules
8 approved for that, and we will be implementing that prior
9 to the next obligation period.

10 MR. ZACHER: And, Ms. Trickey, just to clarify, so
11 those tests costs that -- test activation costs that HDR
12 resources incur, those are costs that they cannot avoid, I
13 gather, through their -- by including those costs in their
14 energy market bids. Is that correct?

15 MS. TRICKEY: Correct. So they've offered in at,
16 let's say, \$1,500 in the energy market, saying I want to
17 consume as long as the price is up to \$1,500. When we test
18 them, the prices aren't going to be \$1,500. It's going to
19 be, you know, probably likely a day -- sort of a normal day
20 when we don't have anything going on, or no concerns for
21 reliability, so the prices might be \$20.

22 So we recognize they would rather be consuming in that
23 circumstance. So we are activating them when it's not
24 economic for them to do so. So we do -- we have settled on
25 a compensation mechanism to provide them some top-up to
26 recognize that they are not covering all their costs in
27 that scenario.

28 MR. ZACHER: Okay. And how does that compare to the

1 other costs that Mr. Anderson referenced in the example in
2 his affidavit? Are those other costs, call them in-market
3 costs, that they are able to avoid or manage through their
4 energy offers -- energy bids, rather?

5 MS. TRICKEY: I think the concept is the same, in the
6 sense that what they're asking for is to ensure that they
7 are able to recover their costs, or manage their costs. In
8 this case, we recognize a situation where we didn't believe
9 that they could, we are providing that compensation.

10 I think in the case that we are talking about here
11 under an economic activation, our market design is such
12 that they can manage that through their energy offers. So
13 they offer at the price that they think is the right price
14 to be activated at, and if there's no real risk of being
15 activated at that price, then there's no cost to be
16 considered there in terms of adding something to a capacity
17 auction.

18 MR. ZACHER: Thank you, those are my questions.

19 MS. SPOEL: Thank you, Mr. Zacher. I think you're
20 next up, Ms. Krajewska.

21 **CROSS-EXAMINATION BY MS. KRAJEWSKA:**

22 MS. KRAJEWSKA: Thank you, Members of the Panel. Good
23 morning, Mr. Short and Ms. Trickey. My name is Ewa
24 Krajewska, and I am counsel to KCLP. I would like to start
25 off by going back to the stay decision, and the IESO's
26 decision to run a DRA auction on December 4th, 2019.

27 I think my client would like to understand whether it
28 was open or possible for the IESO to wait to delay the TCA

1 auction that was originally scheduled on December 4th until
2 the -- sorry?

3 MS. SPOEL: Sorry, I am just wondering, I am conscious
4 a bit of the time. We have to get through all of this
5 today because some of us are in another hearing on Monday.
6 I know your client's anxious to know about it, but I am not
7 sure it's going to be relevant to the decision that the
8 Board, the Panel has to make in this case.

9 So if it's something you can explore offline, perhaps
10 that would be helpful.

11 MS. KRAJEWSKA: I was just going to have one question
12 on this. I was not going to explore it at length.

13 MS. SPOEL: Fine, because we just don't really have
14 time.

15 MS. KRAJEWSKA: I understand. Was it possible for the
16 IESO to delay the TCA auction until February, until after
17 this Board released its decision?

18 MR. SHORT: I will be brief as well. The answer is
19 no, we couldn't. We have the pending reliability or
20 capacity gap for the summer of 2020, if we wait until
21 February to run an auction, it's not enough forward period
22 between the completion of the auction results and the start
23 of the obligation period on May 1st.

24 So could we have pushed it off maybe like a week or
25 two, possibly, but we felt it was necessary to run a DRA to
26 secure the capacity required, and to give participants
27 enough time to be ready for the May 1st obligation period.

28 MS. KRAJEWSKA: Thank you. And you've spent some time

1 in your evidence in-chief talking about the forecasted
2 capacity gap for 2023. And I understand from your evidence
3 that demand response resources are not going to be
4 sufficient to meet that capacity gap, correct?

5 MR. SHORT: That's correct.

6 MS. KRAJEWSKA: And that one of the ways, in order to
7 meet that gap, is to use off-contract generators?

8 MR. SHORT: It's to afford them the opportunity to
9 compete, yes.

10 MS. KRAJEWSKA: And has the IESO considered other ways
11 of ensuring that off-contract generators will be around by
12 2023 to be able to participate in that -- to provide that
13 capacity, for example, by providing them with a fixed
14 contract?

15 MR. SHORT: In short, no, other than the brief
16 conversation I had just a few moments ago. The intent is
17 to be able to run a capacity auction and enable that to be
18 the mechanism to acquire capacity.

19 We believe auctions provide the open, transparent
20 competitive process. It puts pressure on everybody to be
21 as economic as possible, and it's not favouring one type of
22 resource over another. It's allowing all the resources
23 that we can enable to compete.

24 MS. KRAJEWSKA: So would your evidence be that from an
25 economic or efficiency perspective, it's preferable to use
26 a capacity auction rather than a fixed contract?

27 MR. SHORT: For the purposes of where we're trying to
28 run the capacity auction, yes, there's -- I think that

1 there's other opportunities for -- and the IESO has
2 recently announced the stakeholder engagement for resource
3 adequacy. That's a broader question of different types of
4 resources.

5 But essentially, for the purpose of the design of the
6 TCA and small evolution it was proposing to get ready for
7 2023, we think that's the right mechanism.

8 MS. KRAJEWSKA: And perhaps a more efficient mechanism
9 than providing a fixed-term contract?

10 MR. SHORT: We believe so, yes.

11 MS. KRAJEWSKA: And I wanted to go back to the process
12 for approving the amendments. I understand that the IESO
13 has a technical panel that discusses proposed market
14 amendments rules. Is that correct?

15 MR. SHORT: I believe they review the rules to assess
16 whether the rules ultimately meet the intent of the design.

17 MS. KRAJEWSKA: And who sits, broadly speaking, on the
18 technical panel?

19 MR. SHORT: Oh, you are going above my capabilities
20 here. I believe there's a -- just generally, I will
21 Generalize. If you need something more specific, I will
22 report back.

23 But essentially, you've got, I think, a few generator
24 reps, customer reps. There's a trader -- I think there's a
25 trader rep. So we have got about -- I think there's 12 or
26 13 people that sit on the technical panel, and they
27 represent a variety of stakeholder interests, as kind of a
28 high-level comment.

1 MS. KRAJEWSKA: And would it be accurate to say that
2 four of those panel members are energy consumers such as
3 AMPCO?

4 MR. SHORT: I believe that's right.

5 MS. KRAJEWSKA: And that three of those four members
6 voted in favour of the amendments?

7 MR. SHORT: That would be correct.

8 MS. KRAJEWSKA: And that the only member who voted
9 against the amendments was AMPCO?

10 MR. SHORT: Correct.

11 MS. KRAJEWSKA: And I believe there was another
12 organization, called AEMA, that were originally concerned
13 about the proposed amendments and how they would treat
14 demand response resources. Is that correct?

15 MR. SHORT: That's correct. And I believe, just for
16 clarity, they represent -- I think they are in the "other"
17 category. We have different categories of technical panel
18 members. I believe they are in the "other" category.
19 Again, I can confirm that if required.

20 MS. KRAJEWSKA: What do you mean by "other" category?

21 MR. SHORT: So again, we -- other service providers I
22 believe is how we characterize that. There's certain
23 people we try and entice on to the panel, but, yes, AEME
24 was concerned about it and ultimately voted in favour of
25 the -- to recommend the rule.

26 MS. KRAJEWSKA: And AEME represents other demand
27 response resources?

28 MR. SHORT: Yes.

1 MS. KRAJEWSKA: And there's a question that came up
2 yesterday from Board Staff about -- that discuss some of
3 the purposes in the Electricity Act, and as you'll recall,
4 one of the purposes of the Electricity Act is to promote
5 energy conservation. And Dr. Rivard I think was kind of
6 unable to speak to this, so I'd like to ask you, what is
7 the difference between demand response and energy
8 conservation?

9 MS. TRICKEY: That's the other half of my job. So for
10 the purposes of, you know, how Ontario -- or how the IESO
11 sort of manages things, we do look at demand response and
12 energy efficiency or conservation as very different things.

13 I will start with energy efficiency. Really energy
14 efficiency is acknowledging that there's ways to -- you
15 know, everybody uses electricity, but there's always a
16 better way to use it. You can always get more efficient,
17 whether it's just changing out your lightbulbs or changing
18 out your equipment, use more efficient equipment so that it
19 uses less electricity. There's lots of things we can do to
20 use less electricity so that we are using the province's
21 resources more efficiently overall.

22 We have a number of programs that we run to help
23 businesses, AMPCO's customers being, you know, users of
24 this type of service, we help them review or implement
25 measures and initiatives that help them use electricity
26 more efficiently. So instead of using -- you know, they
27 can use less on a consistent basis.

28 So energy efficiency or conservation is about sort of

1 a consistent and -- a consistent change that lasts over
2 time, not something that you need to operate or manage,
3 it's just, you just use less. So it could be as simple as,
4 like I said, changing a lightbulb to one that uses less
5 electricity. That's energy efficiency or conservation.

6 Demand response is actually working within the market
7 to provide a reduced -- to reduce your usage on a signal.
8 So it's something that we activate and we operate, and it's
9 part of the market. So it's saying that in a given hour if
10 you need me to I can use less, but it's not about being
11 overall more efficient, it's really about saying I can use
12 less in this time period if you need me to. But there's a
13 cost to doing that, and it typically may mean that they
14 have to change something in their process. So it's more
15 about activating and responding to a signal as opposed to
16 just using electricity more efficiently.

17 MS. KRAJEWSKA: And Ms. Trickey, you mentioned in your
18 evidence that the IESO considered a payment -- an energy
19 payment to demand response resources and canvassed kind of
20 the other jurisdictions and other markets and came to a
21 preliminary conclusion that that may not be appropriate
22 because of some of the unique features of the Ontario
23 market, and in particular you noted the global adjustment
24 in Ontario; do I have that right?

25 MS. TRICKEY: Correct.

26 MS. KRAJEWSKA: And do you agree with the evidence
27 that was given earlier this week that the global adjustment
28 covers about 80 percent of consumer electricity bills in

1 the province?

2 MS. TRICKEY: That sounds about right.

3 MS. KRAJEWSKA: However, that as a result of the ICI
4 program, class A consumers, which include demand response
5 resources, are treated differently for the purpose of the
6 global adjustment.

7 MS. TRICKEY: Class A consumers have an opportunity to
8 manage the amount of the global adjustment that they pay by
9 responding to peak. So by in essence being a demand
10 response resource and when the system really is at its
11 peak, they can reduce their consumption in those hours.
12 And if they do so successfully and do it when we hit those
13 peaks, they have an opportunity -- they will then reduce
14 the amount of the global adjustment that they pay in the
15 following year.

16 So it's in essence a similar type of thing as our
17 demand response program, but it's got a different signal, a
18 different purpose, and a different way of being activated,
19 but it does -- it's the same type of response, and it does
20 afford them the opportunity to lower the amount of global
21 adjustment that they pay in a future period.

22 MS. KRAJEWSKA: And if I am a demand response -- Class
23 A consumer demand resource and I am very good at figuring
24 out which days are going to end up being the peak days,
25 what does that mean in terms of my electricity bill the
26 following year?

27 MS. TRICKEY: If you are successfully able to reduce
28 your electricity usage to zero in those hours, in what turn

1 out to be the top five hours for the province, then you
2 will pay zero for the global adjustment in the following
3 year.

4 MS. KRAJEWSKA: So you will only pay the other balance
5 of the 20 percent of the electricity bill that is not the
6 global adjustment?

7 MS. TRICKEY: If that's what the divide is, then, yes,
8 you will only pay the remaining costs.

9 MS. KRAJEWSKA: Let me just -- I will just take a
10 quick look at my notes. I think I am almost done.

11 Thank you, those are all my questions.

12 MS. SPOEL: Thank you. Mr. Mondrow?

13 MR. MONDROW: Thank you, Madam Chair. Good morning
14 again. Madam Chair, I don't think Mr. Zacher in his
15 fervour marked his compendium as an exhibit. Perhaps we
16 should do that --

17 MS. KRAJEWSKA: He did.

18 MR. MONDROW: Oh, I am sorry. I keep missing that.
19 My apologies, Mr. Zacher.

20 MS. SPOEL: Yes, K3.1.

21 MR. MONDROW: Thank you. In that case I would like to
22 mark our compendium as an exhibit, which I assume will then
23 be K3.2.

24 MS. DJURDJEVIC: Yes, that will be K3.2.

25 **EXHIBIT NO. K3.2: AMPCO COMPENDIUM FOR IESO PANEL 5.**

26 MR. MONDROW: Thank you. And Madam Chair, you have
27 our compendium up on the dais, and in the back of the
28 compendium there are two loose documents which I will --

1 which were integrated by me late last night and I didn't
2 circulate them by e-mail or otherwise get them in time to
3 be bound yesterday, but I will refer to them as I go. I
4 did bring copies. Not everyone has a copy. I ran out of
5 paper. But I have provided copies to the witnesses and the
6 IESO and those of my friends that were early enough to get
7 the worm, as it were, and I will refer to those as I get to
8 them and mark them separately if I could.

9 MR. BARZ: Sorry to interrupt. I just saw this
10 morning at around 10:00 an e-mail went across with some
11 initial documents. Is that --

12 MR. MONDROW: Those are the same documents, so those
13 documents have now been circulated by e-mail, but I don't
14 have more copies in the hearing room. Thank you.

15 MR. BARZ: Okay.

16 MS. SPOEL: Okay. Perhaps at the break some copies
17 could be -- extra copies could be made for those who need
18 them. I'm assuming you'll be taking more --

19 MR. MONDROW: Sure. Sure. What --

20 MS. SPOEL: -- more than half an hour, I assume, Mr.
21 Mondrow?

22 MR. MONDROW: Yes, I will --

23 MS. SPOEL: There will be a break and you can make --

24 MR. MONDROW: Happy to do that. Just --

25 MS. SPOEL: -- after the break.

26 MR. MONDROW: Just to remove the mystery, there are
27 three letters which were submissions to the DRWG expressing
28 concern about activation payments, and I am just going to

1 take the witnesses to those when we get there, but I am
2 happy to make additional copies at the break. I don't
3 think it's contentious material, but I will make copies and
4 make sure everyone has them, thank you.

5 MS. SPOEL: Thank you.

6 **CROSS-EXAMINATION BY MR. MONDROW:**

7 MR. MONDROW: Thank you for your comprehensive direct
8 testimony, Mr. Short and Ms. Trickey. It saves me a little
9 bit of time.

10 If we could start in Exhibit K3.2, which is the AMPCO
11 compendium, at tab 1. And at tab 1 we have produced an
12 excerpt from the Navigant report that you referred to
13 already. And Ms. Trickey, I think you confirmed that
14 Navigant's remit was to do a jurisdictional scan and kind
15 of document arguments in favour and against activation
16 payments for DR resources, and then note differences
17 between the other jurisdictions in Ontario; is that an
18 accurate paraphrase?

19 MS. TRICKEY: Yes.

20 MR. MONDROW: Thank you. And so if we could start on
21 the first page behind the Navigant cover that I have
22 excerpted here.

23 There were no page numbers on the study, at least not
24 the version I have, but you'll see the heading "3, Economic
25 efficiency arguments", and then you see the heading "3.1,
26 Against activation payments in Ontario", and then the
27 heading down the page "3.1.2, Disproportional benefits".

28 `And if you then go over to the next page, the first

1 full paragraph, it begins the underlying factor. And it's
2 on the screen at the top there. I am just going to read
3 that in.

4 "The underlying factor of this argument," so
5 again this is disproportional benefits argument,
6 "is the claim that DR is not a resource in the
7 same way that generation is. A generating
8 resource is providing a product and is paid for
9 that. Opponents of DR utilization payments argue
10 that since DR does not own the power they are not
11 consuming, they should not be paid additionally
12 for not consuming it. Despite this argument,
13 FERC's final 745 ruling was based on the premise
14 that negawatts and megawatts are functionally and
15 economically equivalent."

16 From the market's perspective, Ms. Trickey, do you
17 agree with FERC's premise that negawatts and megawatts are
18 functionally and economically equivalent?

19 MS. TRICKEY: I think that Dr. Rivard did a nice job
20 of explaining how our market works, and how there are
21 differences. I don't know that talking about functional
22 equivalency is probably the best place for me to step in.

23 As I said, we have launched a study, we are looking at
24 this question, and we will make a decision on whether or
25 not we think this is the right path forward for Ontario's
26 market early next year.

27 MR. MONDROW: So at the moment, you are not in a
28 position to agree or disagree with FERC's premise. Is that

1 your answer?

2 MS. TRICKEY: I think FERC was looking at a certain of
3 Set of circumstances in the US market, and had a goal of
4 enabling -- or removing barriers to demand response
5 participation in those markets. That's something we want
6 to look at as well.

7 But just because that was a barrier in FERC's market
8 doesn't mean it's barrier here. And just because something
9 was agreed on in FERC's market doesn't mean that we should
10 necessarily adopt it here. As we talked about, there
11 are --

12 MR. MONDROW: Ms. Trickey, that's not what I asked
13 you, with great respect.

14 What I asked you is whether you disagree or agree with
15 FERC's premise, as cited in Navigant, that negawatts and
16 megawatts are functionally and economically equivalent, and
17 I have added the caveat from the market's perspective.
18 Could you answer that question?

19 MS. TRICKEY: I am not an economist. I am not going
20 to get into whether I believe something is functionally and
21 economically equivalent. I don't think that's what I am
22 here to answer.

23 MR. MONDROW: Let's look at the next paragraph,
24 Navigant continues considerations Ontario:

25 "This argument is based on a premise that a
26 megawatt of electricity curtailed (negawatt) is
27 not equivalent to a megawatt of electricity. The
28 argument assumes the cost of curtailment or value

1 of lost load for a DR resource is immaterial.

2 When other disproportional benefits argument is
3 considered valid in Ontario" -- sorry.

4 "Whether the disproportional benefits argument is
5 considered valid in Ontario depends on whether
6 this premise is accepted."

7 So the premise cited there by Navigant is the
8 assumption that the cost of curtailment or the value of
9 lost load for a DR resource is immaterial.

10 Do you think the cost of curtailment for a DR resource
11 is immaterial?

12 MS. TRICKEY: I don't know whether the cost is
13 immaterial. All we know is what those resources offer or
14 bid into the energy market, and that those bids reflect
15 their willingness to consume. What their actual value or
16 cost is, I am not privy to.

17 MR. MONDROW: Thank you. Could we go to your
18 compendium? So this is Exhibit K3.1, paragraph 39.

19 And I am sorry, I provided Ms. Walters this morning
20 with a list of references and I said I would go into the
21 IESO's evidence. Since I've identified that their
22 compendium, Ms. Walter's, is complete, so if it's easier to
23 use that, by all means that will work. I wasn't sure that
24 they had every page in there, but now I am. Thank you. It
25 may be easier for the screen.

26 So paragraph 39, this goes to the issue of frequency
27 of activation, and I think either one or both of you spoke
28 that this morning.

1 So paragraph 39 confirms that dispatchable loads have
2 been economically dispatched less than 1 percent of the
3 time, but they had been dispatched; is that right?

4 MS. TRICKEY: Correct.

5 MR. MONDROW: And how many hours is 1 percent of the
6 time? Is that about 1,000 hours?

7 MR. SHORT: So if we look back over the last -- just
8 give me just a second to find that --

9 MR. MONDROW: I am sorry. I should clarify this
10 references the paragraph above, just so I am not misleading
11 you. And the reference is actually, in fairness, 1 percent
12 of the time between May and December 2016.

13 MR. SHORT: Just give me a second while I find the
14 right reference.

15 Since May 1st, 2016. So first of all, HDR resources
16 have not been economically dispatched except for, I think,
17 one occurrence.

18 MR. MONDROW: One occurrence in 2019 for three hours,
19 as I recall your evidence. Is that right? July 2019. I
20 will take you to it in a few minutes. Why don't you finish
21 your answer.

22 MR. SHORT: Okay, you can take me to it. So with
23 respect to the number of activations for dispatchable
24 Loads, if you average it out over since May of -- May 1st,
25 2016, it averages around ten hours a year. The -- it's
26 about 3.8 years, so do the math; it's about ten hours a
27 year, roughly.

28 MR. MONDROW: Do you have your full set of evidence

1 before you there, Mr. Short, with all of the exhibits?

2 MR. SHORT: I am going to say I think so. If not, I
3 will let you know.

4 MR. MONDROW: That's fine. Could you go to Exhibit 3?
5 Exhibit 3 should be an OEB -- an IESO response to OEB Staff
6 Interrogatory No. 8.

7 There we -- it's on the screen, I will just wait to
8 make sure you have that. Do you have that?

9 MR. SHORT: Sorry, yes, I do.

10 MR. MONDROW: Could you go to page 2? There's a table
11 on page 2.

12 MR. SHORT: Okay, I see it.

13 MR. MONDROW: And the table lists the activations
14 under the DRA by year for dispatchable load resources.

15 MR. SHORT: Correct.

16 MR. MONDROW: Right?

17 MR. SHORT: Yeah.

18 MR. MONDROW: Okay. And then if you look at line 11
19 on that same page -- sorry, line 13 on that same page,
20 that's the reference I referred to a minute ago. There was
21 an activation for an HDR resource in July 2019.

22 MR. SHORT: Yes, I see that, thank you.

23 MR. MONDROW: So the point is these activations have
24 Occurred, and you would agree with that, I assume?

25 MR. SHORT: Yeah, less than 1 percent of the time,
26 yes.

27 MR. MONDROW: Okay. Now your evidence is that DR
28 resources can manage their activation risk through their

1 energy bids. And you spoke about that this morning, Ms.
2 Trickey, I think that's what you were referring to.

3 So I am going to ask you to follow along with me a
4 very simple example, and you can write it down if you want.
5 I will give you three numbers.

6 Assume a DR resource with a capacity obligation, so
7 they are getting availability payments, a widget
8 manufacturer, 5 megawatt demand response position in the
9 capacity market, value of loss load \$750 per megawatt-hour.
10 That's number one, the first the number.

11 Shut down cost, \$800 a megawatt-hour; that's the
12 second number.

13 So if I am understanding this protective energy bid
14 concept properly, in order to preclude being out of pocket
15 or losing value, the IESO would have that widget
16 manufacturer bid into the energy market at the sum of its
17 value of loss load, \$750 a megawatt-hour, and its cost of
18 activation, \$800 a megawatt-hour. So the bid would be
19 \$1,550 a megawatt-hour, and that would preclude activation
20 at an uneconomic level; is that right?

21 MS. TRICKEY: I think that the examples that Dr.
22 Rivard took us through yesterday show something different.
23 I think what this is saying is that everything -- well, A,
24 I don't actually know what the shutdown costs are in that
25 \$800, and I obviously can't speculate; and B, I don't know
26 how much of that is something that should be captured in
27 the capacity auction or couldn't be captured elsewhere.

28 So I am not in a position to say, yes, I can add those

1 numbers and get the same number, but I don't know that gets
2 to the outcome you are asking --

3 MR. MONDROW: Maybe you misunderstood my question. I
4 asked you to make some assumptions. I asked you to assume
5 value of loss load at \$750 a megawatt-hour and I asked you
6 to assume -- maybe I didn't qualify; fair enough --
7 incremental shutdown costs, so costs incurred to shut down,
8 let's say gas, fuel, of \$800 a megawatt-hour.

9 And if you assume those two numbers, value of loss
10 load plus the gas that we consumed if they're curtailed, if
11 they shut down, at least shut down their demand, what
12 you're saying, what the IESO is saying is they should bid
13 \$1,550, and that way if the price is below that they won't
14 be activated and they won't lose any value. That's what
15 you're saying they should do in the energy market to manage
16 their risk, isn't it? Have I got that wrong somehow?

17 MS. TRICKEY: Can you just repeat exactly what the
18 question is in that again for me?

19 MR. MONDROW: Sure. If their value of loss load is
20 \$750 a megawatt-hour and they have to burn gas that costs
21 them \$800 a megawatt-hour if they are curtailed to keep
22 their factory from freezing up in order to protect
23 themselves from being activated and incurring a loss, they
24 should bid, according to the IESO, \$1,550, which is the sum
25 of \$750 and \$800, and that way, below that price they won't
26 be activated and they won't incur a loss; right? You said
27 they could manage their risk in the energy market. I am
28 giving you the simplest example possible. I don't see how

1 this is contentious.

2 On my assumptions -- I am not asking you to agree with
3 the assumptions, I am asking you to take them and tell me
4 if I have got the right energy bid in order to manage that
5 risk.

6 MS. TRICKEY: I understand, and I don't think it's
7 that simple. I think it's difficult to understand what in
8 those costs can be captured in their capacity auction
9 offer.

10 MR. MONDROW: They didn't capture any of them in their
11 capacity offer auction.

12 MS. TRICKEY: So their capacity auction offer is zero?

13 MR. MONDROW: I don't know what it is, but they didn't
14 capture any of it.

15 MS. TRICKEY: I don't think that I can comment on
16 what's an appropriate bidding strategy. Again, as I have
17 said, they have an opportunity in the energy market to
18 reflect their costs and in all likelihood not get
19 activated.

20 MR. MONDROW: You agree -- will you agree that a DR
21 resource has a value of loss load, and if they're
22 curtailed? The -- no, let me think about this for a
23 minute.

24 I will come back to this. I have some time, so let me
25 come back to this.

26 If energy prices go above the level at which
27 generators have been contracted, for those periods of time
28 -- first of all, does that happen? Do prices ever go above

1 contract prices so that there's no debit to the GA? And by
2 debit I mean charge. Maybe that's not the right term.

3 MS. TRICKEY: I think there was a time when the global
4 adjustment actually resulted in payments to consumers. So
5 a reverse from what we see today.

6 MR. MONDROW: Yeah, it was called the provincial
7 benefit at the time. It took a while to change that name,
8 but eventually it was changed.

9 MS. TRICKEY: Yes, not so much a benefit anymore.
10 Remind me again your question?

11 MR. MONDROW: The IESO gets five-minute energy prices,
12 right?

13 MS. TRICKEY: Correct.

14 MR. MONDROW: And in any of those five-minute
15 intervals does the energy price go above the contract
16 levels for generators?

17 MS. TRICKEY: So does the --

18 MR. MONDROW: Okay. This isn't that complicated, Ms.
19 Trickey. I am really not trying to fool you here.

20 MS. TRICKEY: I --

21 MR. MONDROW: Let me break this down for you.
22 Generators have contracts which guarantee them a certain
23 amount of revenue when they run; right? And if energy
24 prices are below the guaranteed revenue they get paid and
25 the global adjustment gets a charge; right?

26 MS. TRICKEY: I think that's the basics of how some of
27 those contracts work --

28 MR. MONDROW: And if energy prices are above the

1 contract level the global adjustment doesn't get a charge
2 because the -- and the generator is dispatched and makes
3 that money, they're held whole. You know, we don't have to
4 top them up and you don't charge the global adjustment;
5 right?

6 MR. SHORT: So we don't have access to all the
7 contract provisions. There are different -- but on a
8 general level there are -- some generators, the price goes
9 up. There's an opportunity for them to obtain revenue from
10 the markets above their contract prices. There may be some
11 revenue-sharing associated with that, and the GA is also
12 comprised of a number of other costs as well, not just the
13 generator.

14 MR. MONDROW: There are hours in the year in which the
15 energy market clears at a price above which they would need
16 to be a charge to the global adjustment; right?

17 MR. SHORT: Specific to some of the contracts, yes.

18 MR. MONDROW: So there is a zone between contract
19 prices and peak energy prices where dispatching demand
20 response and lowering the energy price might not result in
21 an offsetting global adjustment charge; right?

22 MR. SHORT: So we haven't seen a significant period of
23 time where prices have been higher than, I believe, for,
24 say, deeming or contract prices are, but I suppose it's
25 possible.

26 MR. MONDROW: And on a five-minute basis have you seen
27 prices in the category that you just mentioned?

28 MR. SHORT: Over the course of time I am sure there

1 has been.

2 MR. MONDROW: And the global adjustment trigger for a
3 rate regulator like hydroelectric facilities is about \$45 a
4 megawatt-hour?

5 MR. SHORT: I don't know that number.

6 MR. MONDROW: You don't know that? Really?

7 MR. SHORT: I'm --

8 MR. MONDROW: Sorry, I didn't mean to be pejorative,
9 just surprised.

10 MR. SHORT: I don't look at what OPG's rate-regulated
11 rates are. I don't care. From a dispatch perspective,
12 they offer in the market at their appropriate costs,
13 whatever that may be, and our tool dispatches them based on
14 those offer prices. I don't know if their prices reflect
15 anything related to their rate regulation.

16 MR. MONDROW: Do five-minute prices ever go above
17 \$2,000 a megawatt-hour?

18 MR. SHORT: They're capped at \$2,000.

19 MR. MONDROW: Do they ever go to \$2,000?

20 MR. SHORT: I suppose it's theoretically possible. I
21 would have to go and check and see if it has. I don't
22 think I have ever seen it myself.

23 MR. MONDROW: You have never seen a five-minute price
24 go to \$2,000?

25 MR. SHORT: I personally haven't, no.

26 MR. MONDROW: Okay.

27 MR. SHORT: I don't watch the real-time energy price
28 all the time, I am sorry.

1 MR. MONDROW: You don't have to apologize for that. I
2 never watch it.

3 MR. SHORT: It's exciting.

4 MR. MONDROW: Sometimes I do watch it.

5 MR. SHORT: It goes from \$12 to \$20.

6 MR. MONDROW: I look at your graph sometimes on those
7 days, but you don't have to apologize.

8 My friend talked to you, Ms. Trickey, about the ICI
9 and DR response -- not DR response -- I guess demand
10 response, but industrial response to the ICI and their
11 ability to lower their allocation of global adjustment.

12 And as I understand it, the IESO planning outlook has
13 confirmed that that peak shifting behaviour or peak
14 lowering behaviour by those ICI customers has allowed the
15 IESO to avoid approximately 1400 to 1500-megawatts of
16 capacity.

17 Is that your understanding of how the program has
18 worked to date?

19 MR. SHORT: Yes, from how the planners develop their
20 capacity forecast, they use a number approximately what you
21 mentioned. That's from the 2018 perspective; the number is
22 updated annually.

23 MR. MONDROW: Great, thanks. Madam Chair, I am not
24 sure when you want to take a break. I am moving to another
25 area. I can continue, or break.

26 MS. SPOEL: This would be convenient. Why don't we
27 resume at -- just to make sure we actually start on time,
28 let's resume at 11:25. That should give everybody adequate

1 time.

2 --- Recess taken at 11:07 a.m.

3 --- On resuming at 11:26 a.m.

4 MS. SPOEL: Please be seated. Thank you, Mr. Mondrow.

5 MR. MONDROW: Thank you, Madam Chair. Ms. Trickey, we
6 are going to go back to my example and see how far we can
7 get.

8 I am going to ask you to assume what Dr. Rivard
9 referred to as a fixed avoidable cost is what's in the
10 capacity offer and that there are two components of the
11 energy offer. One is the value of loss load, which I said
12 was \$750 a megawatt-hour. That's the value that the
13 customer gets from consuming and so the value that it loses
14 from not consuming. Okay so far? And the second number is
15 \$800. That's the cost of gas to fire up and keep warm the
16 steel plants when they're not consuming electricity. Okay
17 so far?

18 And so you talked in your direct about DR resources
19 managing their risk through their participation in the
20 energy market, and I am suggesting to you that managing
21 that risk of the value of loss load and the incremental gas
22 costs, the \$750 and the \$800, would dictate that the DR
23 resource puts in an energy bid of at least the total of
24 those two numbers, \$1,550.

25 Can you accept that would be a protective approach by
26 that DR resource?

27 MS. TRICKEY: Yes, I can accept that.

28 MR. MONDROW: Thank you. And if HOEP goes to \$1,400

1 in that scenario there's no activation; correct?

2 MS. TRICKEY: Correct.

3 MR. MONDROW: And the value loss is the HOEP, which
4 the DR resource pays, \$1,400, minus the \$750 value of loss
5 load, because they are manufacturing and they are getting
6 that. So the value loss is the extent to which HOEP
7 exceeds their value of loss load, and that works out to be
8 \$650 a megawatt-hour; right? They lose value in that
9 scenario even -- they are not activated and they lose \$650
10 per megawatt-hour of value in that scenario?

11 MS. TRICKEY: I think you're reaching beyond my
12 economic capabilities. I am not sure --

13 MR. MONDROW: Not possible, because mine are lower
14 than yours. That is not possible. So we are going to slow
15 down and do it again, unless I am making a mistake, which
16 is possible, but I don't think so.

17 So we have got HOEP at \$1,400, which means the DR
18 resource --

19 MR. ZACHER: Excuse me, I am reluctant to interject,
20 but Mr. Mondrow's client has had opportunity to put in
21 evidence on these points, to ask IRs on these sorts of
22 issues, and he is simply putting theoretical assumptions to
23 the witness panel which, in my submission, are not
24 appropriate. He has had all the opportunity in the world
25 to put in evidence and ask the panel questions based on
26 actual evidence from AMPCO members or DR participants or to
27 more specifically ask IRs on this. But this is, in my
28 submission, an inappropriate line of questioning.

1 MS. SPOEL: Mr. Mondrow, what are you hoping to
2 achieve through --

3 MR. MONDROW: If I told you that how I am going to --
4 no, I am just joking. I understand.

5 MS. SPOEL: -- there's no surprises -- no, we are not
6 Perry Mason here. This is a no surprises --

7 MR. MONDROW: If there were surprises here then the
8 one hour of direct yesterday and the one hour of direct
9 today would have been objected to, which I didn't. This is
10 not about surprises. My cross-examination is not about
11 surprises. My --

12 MS. SPOEL: If you can give us some maybe help by
13 giving us some idea of --

14 MR. MONDROW: Absolutely.

15 MS. SPOEL: -- what you are trying to achieve through
16 this --

17 MR. MONDROW: Absolutely. And I am not asking the
18 witnesses -- I am sorry, Madam Chair, to interrupt you.

19 MR. ZACHER: Madam Chair, my concern is --

20 MR. MONDROW: Hold on --

21 MS. SPOEL: So I asked Mr. --

22 MR. MONDROW: -- you stated your concern.

23 MS. SPOEL: I understand your concern, Mr. Zacher. We
24 are all doing all this, this whole case, in a very short
25 time frame, which is necessitated by the legislation. It
26 would be nice for all of us if we had more time, including
27 us. It would be nice if we had more time to do all this.
28 We don't, so I think we have to be cognizant of the fact

1 that not everything's necessarily being done in exactly --
2 necessarily be done in the most efficient way, so let's get
3 through it. So Mr. Mondrow, perhaps you could explain
4 where you are going with this and then we can determine
5 whether or not it's an appropriate line of questioning.

6 MR. MONDROW: Absolutely. Thank you, Madam Chair.
7 All I am trying to determine is that on this protective
8 bidding strategy which the IESO has talked about in its
9 evidence, it talked about in its direct, Dr. Rivard has
10 talked about extensively yesterday, there are zones where
11 there is actually a value loss and there are zones where
12 there is actually an unrecoverable incremental cost, and
13 the numbers are not -- I don't put the numbers to the
14 witnesses for them to accept that those are accurate
15 numbers, I am simply trying to illustrate how a shift in
16 HOEP can result either in a value loss or an actual out-of-
17 pocket uncompensated cost. That's the point of the
18 examples.

19 And I tried to keep them as simple as possible so that
20 I wouldn't be bringing in other economic concerns and
21 tripping anyone up. I mean, it's two numbers and -- three
22 numbers and math, and that is what I was intending to do if
23 the Panel finds it helpful.

24 MR. ZACHER: I mean, Madam Chair, my concern is that
25 -- and I appreciate that time is constrained relative to
26 other proceedings, but my friends had a lot of opportunity
27 to put in affidavits. They put in what was a four-page or
28 five-page affidavit from Mr. Anderson. The example -- this

1 steel example emerged in direct examination the other day.
2 If it was relevant it could have been addressed in Mr.
3 Anderson's affidavit or in other evidence, and my friend's
4 now purporting to ask the Panel questions based on this
5 suggested example, theoretical example, provided by Mr.
6 Anderson with no opportunity to have responded to that with
7 the IESO's evidence.

8 MR. MONDROW: Sorry, this wasn't provided by Mr.
9 Anderson. This is a cross-examination. I am setting up a
10 premise and asking a question. There's no evidence from
11 Mr. Anderson. There's no suggestion that the numbers are
12 reflective of any actual costs.

13 MR. ZACHER: I think there has got to be a foundation,
14 an evidentiary foundation for the questions that he is
15 asking.

16 MS. SPOEL: Well, I think -- well, we heard a lot of
17 evidence yesterday from Dr. Rivard which was new to us, so
18 he had a lot of examples with numbers about how people
19 might behave, how different resources might behave. Those
20 were updated and were new yesterday. We found them quite
21 interesting. I am finding -- I will say "we", assuming
22 that my fellow Panel members agree with me -- we find all
23 of this whole topic quite difficult. There's a lot of --
24 and we want to make sure we understand how it works. We
25 want to understand how payments are made, what people base
26 their bids on, what goes into them, whether it's the
27 capacity bid or the energy price bid.

28 So I think it's helpful to have the IESO witnesses

1 explain how some of these things work, and hopefully
2 through Mr. Mondrow's cross-examination he elicits some of
3 that, and if he doesn't we might have to ask those
4 questions later, so I think there has been a lot of new
5 material this week and not from AMPCO.

6 MR. ZACHER: Thank you.

7 MS. SPOEL: So I think there was a lot of things
8 raised by Dr. Rivard yesterday, and I think it's quite fair
9 to put some of those premises to the IESO witnesses, and
10 Mr. Mondrow's client did not know what was going to say
11 until yesterday on some of the topics.

12 MR. ZACHER: Understood, thank you.

13 MS. SPOEL: Please proceed.

14 MR. MONDROW: Thank you, Madam Chair.

15 MS. SPOEL: And accepting that they are not
16 economists.

17 MR. MONDROW: Understood, and it's really not a long
18 line of questioning. I appreciate the Panel's indulgence.

19 So Ms. Trickey, I think the question we left off on
20 was, I asked you to accept that HOEP goes to \$1,400.
21 There's no activation. You accepted that far.

22 And my question was, under that scenario, given the
23 assumptions I asked you to accept and you accepted, there
24 is an economic -- I won't say economic. There is a value
25 loss to the DR resource which is represented by the
26 difference between HOEP -- I suggested 1,400 -- and the
27 value of loss load, the value it gets from consuming, and
28 that amount is \$650 a megawatt-hour; do you accept that?

1 Not the math, but the concept -- well, sorry, not the
2 numbers are accurate, but the concept of the value loss in
3 that kind of scenario?

4 MS. TRICKEY: I am not trying to be difficult, but I
5 don't believe I am in a position to follow what you're
6 proposing. It's -- it's outside of my capabilities.

7 MR. MONDROW: Okay, let's go to my last question on
8 this.

9 Let's assume HOEP goes to \$1,700 and there's
10 activation on this resource because it bid 1,550. So you
11 run the DR auction. That's what would happen; right? Yes?

12 MS. TRICKEY: Yes.

13 MR. MONDROW: Okay. And it incurs -- I asked you to
14 accept it incurs gas cost, and I asked you to accept that
15 number was 800. And you were willing to accept that. So
16 it's activated, it burns \$800 worth of gas, but it doesn't
17 recover that \$800, right?

18 MS. TRICKEY: Again, I don't know why -- there may be
19 other mechanisms that some of that cost could be recovered
20 in the capacity auction offer, their availability payments.

21 I don't think we have gotten to a point where we can
22 so finely bucket every single cost and define them in these
23 very precise ways. I haven't seen any information that
24 would help me do that. I know Dr. Rivard walked through a
25 lot of stuff yesterday, and what he provided us was the
26 basic underpinnings of how the market is intended to work.

27 Is it working that way today? Is there evidence? Is
28 there information that would help me understand that

1 there's something different happening here that we've
2 missed? There may be, and that's exactly why we are
3 undertaking this study to see if there is something we are
4 missing, is there another way to look at this, is there
5 some element of cost that demand response resources aren't
6 able to avoid and that would be better captured in a
7 different way. What they asked for is energy payments as a
8 way to manage that.

9 So two pieces; I think we need to look at, you know,
10 what they're asking us and do a thorough study and
11 understand what's missing, because there's clearly a
12 disconnect or we wouldn't be here today. We are committed
13 to looking at that.

14 But we also understand that what AMPCO has asked for
15 is an energy payment as a solution. We have a lot of
16 concerns with that as a solution, based on the evidence
17 that we've seen so far.

18 MR. MONDROW: Would you have fewer concerns if AMPCO's
19 request was for an activation payment, and we jettisoned
20 the word energy?

21 MS. TRICKEY: That's not the question they've asked us
22 to answer.

23 MR. MONDROW: I am not asking you what they asked you.
24 I am asking you that question: Would you have fewer
25 concerns?

26 MS. TRICKEY: We may, and we would be willing to
27 undertake looking at that as a different option. But
28 that's not what we have been asked to undertake.

1 MR. MONDROW: Well, sorry, asked by whom? By AMPCO?
2 Is that your reference?

3 MS. TRICKEY: Correct.

4 MR. MONDROW: Okay. Thanks. Maybe this is Mr. Short,
5 I am not sure. The topic of energy payments for DR
6 resources was raised as early as -- I think your evidence
7 says the lead-up to the DRA. Do you recall that evidence,
8 Mr. Short?

9 MR. SHORT: If you can point me to where you're
10 referring to, that would be helpful.

11 MR. MONDROW: Sure, yeah. If you look at your
12 examination-in-chief compendium, which has your evidence,
13 paragraph 50.

14 "In the lead-up to the launch of the DRA, some
15 stakeholders had inquired about energy payments
16 or utilization payments in the DRA. However, the
17 immediate priority was to implement the DRA."

18 So that would have been about 2014?

19 MR. SHORT: I think I can agree. I think that was
20 related to transitioning DR3 participants and CBDR over to
21 the capacity-based product solely, which was the DRA.

22 MR. MONDROW: And that was about 2014?

23 MR. SHORT: It's -- yeah I see the footnote, yes.

24 MR. MONDROW: And the topic was not given priority at
25 the time?

26 MS. TRICKEY: I apologize, Mr. Mondrow. I'm sorry,
27 what topic wasn't given priority at that time?

28 MR. MONDROW: Energy payments or utilization payments

1 in the DRA.

2 MS. TRICKEY: Was not given priority? Was this -- I
3 apologize. I am having a hard time following the timeline
4 we are working on.

5 MR. MONDROW: Wow, paragraph 50.

6 "In the lead up to the launch of the DRA some
7 stakeholders had inquired about energy payments
8 or utilization payments in the DRA ..."

9 Good so far?

10 MS. TRICKEY: Yes.

11 MR. MONDROW: In and around 2014?

12 MS. TRICKEY: Yes.

13 MR. MONDROW: "However, the immediate priority was to
14 implement the DRA," which I read as saying the energy
15 payment or utilization payment topic was not given priority
16 at the time. Fair?

17 MS. TRICKEY: Yes.

18 MR. MONDROW: Thank you.

19 MS. TRICKEY: This is a little before my time, so it
20 was taking me a minute to catch up. So thank you.

21 MR. MONDROW: No problem. Paragraph 51:

22 "In early 2017, some DRWG, demand response
23 working group, members again raised this issue on
24 the basis that other jurisdictions provide both
25 energy and availability payments."

26 So we see it was raised again in 2017, and your
27 evidence footnotes a January 31st, 2017, DRWG presentation
28 on DR stakeholder priorities for 2017.

1 In our compendium, Exhibit K 3.2, that's at tab 2.
2 Could you turn that up, please? You'll see the first page
3 behind our tab 2 is just the cover page for the DR
4 stakeholder priorities for 2017.

5 And if you go to page number 12 -- I think we gave you
6 the whole presentation, but if you go to page number 12, we
7 see the context in which the issue was raised was
8 preparation for future incremental capacity auction.

9 And then the issue itself is noted following that page
10 at page 19, if you could turn to page 19. And you see
11 point number 14 on page 19? You have to say yes.

12 MS. TRICKEY: Yes.

13 MR. MONDROW: Well, you don't have to say yes. You
14 could say no, but you have to say something.

15 MS. TRICKEY: I'll say something.

16 MR. MONDROW: Okay, just to be clear. Point number 14
17 says: "Reinstate utilization payments for DR activations."

18 I gather, and there's been some evidence on this, that
19 reinstate means there was some previous demand response
20 programs that did include -- granted, not energy payments,
21 but energy payments, some of which you testified about this
22 morning, correct?

23 MS. TRICKEY: That is correct.

24 MR. MONDROW: Okay. And the distinction between
25 activation payments and energy payments, as I understand
26 it, is that activation payments when you refer to them are
27 administratively or contractually determined. They are not
28 necessarily what's paid to resources bidding into and

1 clearing the energy market.

2 MS. TRICKEY: That's correct.

3 MR. MONDROW: Okay. And if we look at paragraph 45 of
4 your evidence -- so again this is your examination-in-chief
5 compendium -- we see reference there to the final OPA
6 demand response program, the DR3 program, which had
7 contract set activation payments fixed to \$200 per
8 megawatt-hour.

9 That's the program that one of you -- sorry, I forget
10 which one it was -- spoke to earlier this morning, correct?

11 MS. TRICKEY: That's correct.

12 MR. MONDROW: Okay. And what was the purpose of those
13 payments?

14 MS. TRICKEY: The contract structure for those
15 programs was to split the payments for demand response in
16 this program into two pieces. Part of it was an
17 availability payment, and part of it was a fixed activation
18 payment for when those resources were activated.

19 MR. MONDROW: And that was the \$200 per megawatt-
20 hour --

21 MS. TRICKEY: Correct.

22 MR. MONDROW: -- the fixed activation payment. And
23 that was intended to compensate the resources for any costs
24 of activation?

25 MS. TRICKEY: I wasn't part of designing that. I
26 can't say exactly what they were intending. But that is,
27 you know, that's a reasonable assumption to make.

28 MR. MONDROW: Okay. And at paragraph 46 of your

1 evidence, you talk about the capacity-based demand response
2 or CBDR program, and that's the program that continued the
3 fixed \$200 per megawatt-hour utilization payment until
4 expiration of the DR3 contracts?

5 You talked about that, I think, this morning as well.

6 MS. TRICKEY: Yeah, that's correct. That was the
7 program or the set of rules that the IESO created so that
8 we could seamlessly transfer the resources that were
9 willing and able to go from a contract structure into a
10 market structure to do that, because the IESO and OPA
11 weren't merged at that time. The IESO had to create a set
12 of market rules that essentially replicated the DR3
13 program, so we created those rules, called that the
14 capacity-based demand response program.

15 So it was really the same program, just under a
16 different name, to enable the IESO to operate it at that
17 time under the same contract structure. And again, as I
18 said, the intent of that was to provide a stable transition
19 from the contract structure to the auction structure.

20 MR. MONDROW: Could you go to our compendium, please,
21 Exhibit K3.2, tab 3. And you should find behind that tab a
22 copy of a market rule amendment submission form, and if you
23 have that you'll see that it's -- on the first page it was
24 a form submitted by IESO staff, and under part 2 where it
25 says "Title", it says "delete references to the
26 transitional demand response and emergency load reduction
27 programs".

28 And then if you turn over onto the next page in the

1 box, you see under the heading "background", the first of
2 those programs, the ELRP, which was brought into effect
3 June 20, 2006 as a reliability initiative, gave
4 participants opportunity to receive standby and activation
5 payments to reduce load during emergency periods identified
6 by the IESO.

7 So -- and by way of context, this market rule
8 amendment was to remove references to those programs, as I
9 understand it from reading it, because they were spent.
10 But it does reveal the trail that this ELRP program also
11 contained both standby and activation payments for demand
12 reduction; will you accept that?

13 MS. TRICKEY: Yes.

14 MR. MONDROW: Okay. And the next paragraph refers and
15 starts with the word "similarly". "The transitional demand
16 response program (TDRP)", which I don't think we've talked
17 about yet; is that right?

18 MS. TRICKEY: Not that I recall.

19 MR. MONDROW: Okay, me either. And again we see
20 economic assistance was given for voluntarily reducing
21 demand based on market price signals. That's the last part
22 of the sentence.

23 And it's my understanding that that was -- included
24 activation payments of up to \$500 a megawatt-hour; do you
25 know if that's correct by any chance?

26 MS. TRICKEY: I can't verify that.

27 MR. MONDROW: Okay. Could I ask you to undertake to
28 verify if there were activation payments for that program

1 and, if so, what the parameters were? I wasn't able to
2 find it.

3 MR. ZACHER: That's fine.

4 MR. MONDROW: Thank you.

5 MS. DJURDJEVIC: That's our first undertaking today,
6 J3.1.

7 **UNDERTAKING NO. J3.1: TO VERIFY IF THERE WERE**
8 **ACTIVATION PAYMENTS FOR THE TRANSITIONAL DEMAND**
9 **RESPONSE PROGRAM, AND IF SO, WHAT THE PARAMETERS WERE.**

10 MR. MONDROW: In any event, I think what we have seen
11 over the last few minutes is there has been some history of
12 demand response resource activation payments at the IESO
13 and prior to that the OPA; is that a fair conclusion?

14 MS. TRICKEY: There have been different structures
15 with -- meant to incent demand response -- or load
16 participants to respond to some sort of activation by the
17 IESO. Each one has its own objectives and goals and
18 structures but, yes, you are correct in that a number of
19 them -- and historically that was a fairly common practice,
20 to provide both -- two types of payments.

21 MR. MONDROW: And we saw a few minutes ago that in
22 2017, along with discussions regarding evolution of the
23 demand response auction, the topic was raised again by DR
24 market participants?

25 MS. TRICKEY: Correct.

26 MR. MONDROW: And we know that Navigant was engaged in
27 July 2017 and produced their paper, and you have referred
28 to that.

1 Just while we are on that, if we go to paragraph 53 of
2 your evidence, so this is compendium Exhibit K3.1,
3 paragraph 53. You will see following the preamble of the
4 paragraph there is a table, and this table is inserted in
5 the evidence, Ms. Trickey, I gather, to document the
6 arguments for and the arguments against activation payments
7 as reported by Navigant.

8 MS. TRICKEY: That's correct.

9 MR. MONDROW: And these are not Navigant's arguments,
10 these are arguments that were raised by others in other
11 jurisdictions that Navigant attempted to capture and
12 catalogue, essentially; is that fair?

13 MS. TRICKEY: That's correct.

14 MR. MONDROW: Okay. And I think you might have
15 already said this, but am I correct that no definitive
16 conclusions were drawn by the IESO in respect of its work
17 culminating in the Navigant report in respect of activation
18 payments or energy payments?

19 You can look at paragraph 57 of your evidence if it
20 helps you.

21 MS. TRICKEY: You are going to have to bear with me.
22 Can you repeat your question? I apologize.

23 MR. MONDROW: Am I correct to say that following the
24 consideration of the Navigant report, the IESO did not
25 reach any definitive conclusions on the appropriateness of
26 activation or energy payments for DR resources?

27 MS. TRICKEY: Our conclusion was that there were lots
28 of arguments on either side and nothing definitive that

1 said that this was -- this would be a benefit and that
2 there were -- there was evidence that indicated that it
3 might actually create a cost to consumers.

4 MR. MONDROW: But no definitive conclusions; fair?

5 MS. TRICKEY: Right. We didn't -- we -- what we
6 articulated to stakeholders that we didn't see anything
7 that indicated we should proceed and we asked stakeholders
8 for feedback on that decision at that time.

9 MR. MONDROW: Can you go to paragraph 57(e) of your
10 evidence. It's still on the same page, just a little
11 farther down.

12 And you say in your evidence, the royal you, so Mr.
13 Short, jump in when you feel it's appropriate:

14 "Based on the quantity of stakeholder feedback
15 received the IESO did not see a strong interest
16 from the DRWG on the topic of utilization
17 payment. Only two members submitted feedback on
18 and members declined to present their views for
19 discussion at the DRWG."

20 Now, one of the loose documents that will have been in
21 the back of your compendium is a stapled package of paper,
22 the cover page on which is a City of Toronto letterhead,
23 and it says "comments to Independent Electricity System
24 Operator, IESO, Stakeholder Engagement Working" -- sorry.
25 "Stakeholder engagement for demand response working group
26 on March 1st, 2018".

27 Do you have that in front of you, that package, small
28 package?

1 MS. TRICKEY: Yes, we do.

2 MR. MONDROW: And Madam Chair, with the assistance of
3 Board Staff, for which we are appreciative, everyone should
4 now have hard copies of this as well, and I'd ask if it
5 could be marked as an exhibit, please.

6 MS. DJURDJEVIC: So you're -- okay. So just to
7 clarify, so you have three documents here that were not
8 part of the compendium and you are going to mark each one
9 as an exhibit?

10 MR. MONDROW: No, I think we can mark the stapled
11 package as an exhibit and I will walk through those three.

12 MS. DJURDJEVIC: I have a couple stapled packages. Is
13 this from the City of Toronto or the -- there is also a
14 Northland Power presentation.

15 MR. MONDROW: Oh.

16 MS. KRAJEWSKA: I'm sorry, Madam Chair, it's just not
17 clear to me which three documents we should be looking at.
18 I have the first one, which is the City of Toronto one, but
19 I have other loose documents. I just want to --

20 MR. MONDROW: The documents weren't stapled. The ones
21 the Board Staff produced weren't stapled. That's the cause
22 of the confusion. I apologize. There are three letters.
23 We can mark them separately. That's fine. The witnesses
24 have it as a stapled package. The people that were not
25 earliest to the hearing have the individual packages. I
26 think the dais package is stapled.

27 MS. SPOEL: It is, yes.

28 MR. MONDROW: It is. So the first page is comment --

1 it is the City of Toronto letterhead and it's three double-
2 sided pages and a blank page. The second is a letter on
3 Rodan letterhead, and the third is a letter on EnerNOC
4 letterhead. I had proposed to label those as an exhibit.
5 I'm indifferent. Whatever counsel feels is appropriate.

6 MS. SPOEL: Probably easier to make them as one
7 exhibit --

8 MS. DJURDJEVIC: We do -- yes, that one I have as one
9 stapled package, and we can make that as K3.3.

10 MR. MONDROW: Thank you.

11 **EXHIBIT NO. K3.3: STAPLED PACKAGE OF DOCUMENTS FROM**
12 **AMPCO.**

13 MR. MONDROW: And I apologize to my friends whose
14 papers are not stapled.

15 So K3.3, and I have kind of just walked through it,
16 but Mr. Short and Ms. Trickey, the first page there is a
17 City of Toronto submission to the DRWG March 1st, 2018, so
18 that's the post-Navigant discussion. And if you turn to
19 the first page after the cover page and you look at the
20 bottom, there's a heading there in the middle of the page,
21 a little lower than the middle, "IESO utilization payment
22 presentation". And if you look at the recommendation from
23 the City of Toronto it says:

24 "Based on the goal for fairness among
25 participants, the city recommends that the IESO
26 consider the participant perspective, the
27 economic risk associated from repeated
28 activations, and inability to recover costs. In

1 summary, utilization payments to generators
2 provide compensation for all costs from
3 activation, while DR participants risk multiple
4 activations with no correlating method for cost
5 recovery."

6 So City of Toronto was one of the parties that
7 expressed a concern on this topic; fair?

8 MS. TRICKEY: That is what this reads as, yes.

9 MR. MONDROW: Okay. The next document is a March 29,
10 2018 letter on Rodan Energy Solutions letterhead, and if
11 you look at the bottom of the first page, there is a
12 heading that says "utilization payment discussion".

13 And I am not going to read in the whole thing; feel
14 free to read it, if you wish. But starting under that
15 heading and then going down on the next page, there's a
16 second heading, "utilization payment discussions-fairness".
17 And two the paragraphs under that heading, and all of that
18 similarly expresses a concern about the topic of
19 utilization and energy payments for DR resources.

20 Will you accept that?

21 MS. TRICKEY: Yes.

22 MR. MONDROW: Okay. And then the third document is
23 the EnerNOC letter, also March 19th, 2018, and then down
24 the page of that letter is heading number 2, "utilization
25 payment". There is similarly a discussion that expresses a
26 continuing concern about energy/utilization payments for
27 DRA participants. You'll see that in the first sentence
28 under the heading. That continues on to the next page,

1 which is the last page of the letter.

2 At the bottom of the partial paragraph at the top of
3 that page, there is a reference to FERC 745, which we have
4 talked about for some time. So there is a third party that
5 expressed a concern about utilization or energy payments
6 for DR resources. Fair?

7 MS. TRICKEY: That's how it reads, yes.

8 MR. MONDROW: So when your evidence says only two
9 parties expressed a concern, we know at least three parties
10 expressed a concern, right?

11 MS. TRICKEY: We'd have to go back and look at the
12 record to see how the timing of all these elements played
13 out. But I accept that that's what they are expressing in
14 these documents. If there's an error in that statement,
15 it's possible that something -- but I can't confirm that.

16 MR. MONDROW: Sorry, the City of Toronto submission is
17 March 21st, 2018. The Rodan submission is March 29th,
18 2018. The EnerNOC submission is March 19th, 2018, and
19 paragraph 57 of your evidence, if you look back at your
20 compendium, says that you offered DRWG working group
21 members observations on March 1st, 2018.

22 Is there anything unclear to you about that timing?

23 MS. TRICKEY: It would appear there that may be a math
24 error in terms of numbers. But I don't have a concern with
25 saying that.

26 MR. MONDROW: Thank you. And 57(e) also says -- so
27 you said only two members, but we now know at least three
28 members submitted feedback. Maybe it's just three, in

1 fairness, because I didn't find any more feedback on it.

2 "And members declined to present their views for
3 discussion at the DRWG."

4 What does that mean, declined to present their views
5 for discussion? That means it wasn't discussed at this
6 working group meeting?

7 MS. TRICKEY: That's how I would read that.

8 MR. SHORT: Sorry, if I could add I just pulled the
9 meeting notes from March 1st and the rough math there was
10 23 different organizations in attendance.

11 So I guess if three out of 23 expressed concerns, I
12 guess we can probably accept that.

13 MR. MONDROW: Let's go to your evidence, which you'll
14 have in that bigger cerlox package, Exhibit 14. I think
15 those are the minutes you just pulled, Mr. Short, so if we
16 could look at that together.

17 That's the demand response working group minutes from
18 March 1st, 2018. I think that's where you got your
19 participant numbers, Mr. Short, the first page there.

20 MR. SHORT: That's correct, yeah.

21 MR. MONDROW: Yeah, so did you look over at the fourth
22 page there, by any chance? Item Number 4 says utilization
23 payments. Do you see that?

24 MR. SHORT: Yes.

25 MR. MONDROW: And do you see the discussion continues,
26 or at least the minutes of that discussion continue to the
27 top of page 6?

28 MR. SHORT: Yes.

1 MR. MONDROW: Is that a discussion about utilization
2 payments reflected in those minutes?

3 MR. SHORT: Yes.

4 MR. MONDROW: So when you say members declined to
5 present their views for discussion, that's not quite true,
6 is it?

7 MR. SHORT: So there's an opportunity to provide
8 comments, but we seek formal comments as well after the
9 meeting. So the reference is trying to get more formal
10 feedback on materiality of the issue.

11 MR. MONDROW: And you got three letters?

12 MR. SHORT: Yes.

13 MR. MONDROW: Okay. So it was discussed at the
14 meeting and you got three letters afterwards, right?

15 MR. SHORT: Correct.

16 MR. MONDROW: Okay, thanks. And then if you go to
17 paragraph 79 of your evidence, so again you can use your
18 compendium for direct examination, Exhibit K3.1.

19 This issue of utilization or energy -- sorry,
20 activation or energy payments for DR resources was most
21 recently raised in the context of the TCA discussions, and
22 that would have been February 2019. Is that correct?

23 MR. SHORT: Yes, that's correct.

24 MR. MONDROW: Okay. Could you go with me to tab 21 --
25 sorry, Exhibit 21 of your evidence. So that would be the
26 bigger cerlox-bound package again.

27 And this is another set of minutes that you attach to
28 your evidence from the DRWG, and that's February 12th,

1 2019, and I am going to go to page 10 of those minutes --
2 sorry, I am going to go to page 11 of those minutes at the
3 moment.

4 MS. SPOEL: Sorry, Mr. Mondrow, I am lost. Is this in
5 your compendium?

6 MR. MONDROW: No. I am referring to three different
7 documents; my compendium, their compendium, and then the
8 IESO filed evidence, which is their compendium plus the
9 exhibits to their evidence.

10 So the exhibits the witnesses will have in a bigger
11 cerlox package, and I dearly hope you have those as well.

12 MS. SPOEL: And which?

13 MR. MONDROW: And I am looking at Exhibit 14 of the
14 IESO evidence. Is that right? No, no, sorry, my mistake.
15 I am looking at what's tab 21 or Exhibit 21. I think they
16 actually refer to it as Exhibit 21.

17 MS. SPOEL: These aren't exhibits to Mr. Short's
18 affidavit?

19 MR. MONDROW: No, it's not Mr. Short's affidavit.
20 Following the affidavit, the IESO filed that very helpful
21 package of evidence, which restated or extracted from the
22 affidavit and provided a bunch of exhibits.

23 MS. SPOEL: Okay, I don't think I have that with me.

24 MR. ZACHER: Madam Chair, sorry to interrupt. So the
25 IESO evidence, we did provide cerloxed copies for the
26 Panel.

27 MS. SPOEL: Okay, they haven't made it up here yet.
28 If we can have those.

1 MS. DJUDJEVIC: Just to clarify, Mr. Zacher. I am
2 looking at this large bound volume, and my understanding
3 was that this was being replaced with the smaller
4 compendiums. Are the Panel supposed to --

5 MR. MONDROW: Sorry, Mr. Zacher, but I am referring to
6 that large volume.

7 MS. SPOEL: Ms. Djurdjevic, it doesn't really matter
8 if you can just give them to us, because we don't have them
9 right now and people are referring to them.

10 I think this stuff has all been pre-filed and trying
11 to guess what I am going to need each morning isn't
12 perfect. So since they are there, if you can distribute
13 them, that would be great.

14 MS. DJUDJEVIC: Okay. So do we need to give this an
15 exhibit number as well?

16 MS. SPOEL: I don't think it's necessary because this
17 stuff has already been filed. It's all already on the
18 record as far as I know, thank you.

19 MR. MONDROW: Sorry about that, Madam Chair.

20 MS. SPOEL: That's fine. I am just trying to make sure
21 that we are able to follow along because this only shows
22 part of it. And, sorry, we are tab 21?

23 MR. MONDROW: Tab 21.

24 MS. SPOEL: Thank you very much.

25 MR. MONDROW: And if I can go to page 11 of those --
26 this is the DRWG minutes for February 12th, 2019.

27 And this, Mr. Short, is where you talk about, minuted
28 starting on page 11, the evolution of the DRA, correct?

1 MR. SHORT: Uh oh, I think I think just broke my
2 button.

3 MR. MONDROW: How convenient. Just kidding, just
4 kidding. We will get you another one.

5 MR. SHORT: I can show you the pieces if you want. I
6 guess my mic is on all the time now.

7 MR. MONDROW: If you like your fingers you'd better
8 take it easy.

9 MR. SHORT: It's on now. Okay. Well, it's on.

10 MR. MONDROW: Page 11 --

11 MR. SHORT: Is this transcribed as well?

12 MR. MONDROW: Absolutely. It will figure prominently
13 in our argument as well.

14 Page number 11, please.

15 MR. SHORT: Okay. Sorry, I am there, yes.

16 MR. MONDROW: Thanks. So this is -- the minutes here
17 reflect the discussion that you led on -- involving the DRA
18 platform.

19 MR. SHORT: That's correct, yeah.

20 MR. MONDROW: Okay. And I won't necessarily take you
21 through all this, but you see what we have here and what
22 you have done generally with your minutes is you record --
23 the minute-taker records the participants' comments, and
24 then the IESO response and the participants' comments are
25 in normal font, and the IESO response is in italicized
26 font, and we see on that page the -- starting with the
27 second participant, so it says:

28 "A participant noted that the technical planning

1 conference focused on 2023 and changes for 2020
2 as ambitious engagement on this evolution needs
3 to start right away and has to include other
4 opportunities for DR to create a level playing
5 field."

6 And then you see the next participant comments:

7 "A participant asked if other opportunities for
8 load such as utilization payments for DR and
9 operating reserve opportunities for HDR will be
10 part of the discussion involving the DR."

11 And then the next participant comment:

12 "A participant stated that is it problematic for
13 the IESO to pick and choose which revenue
14 opportunities to provide for different resources.
15 Opening up the DRA to generators for a DR
16 capacity payment but not the ancillary services
17 market or utilization payments for DR is an
18 example of this."

19 And then if you look -- not the next -- the
20 continuation of that participant comment, but the next one:

21 "A participant asked if a market participant
22 providing capacity in the ICA or the evolved DRA
23 would get compensated equally whether it is
24 generation or a reduction in compensation."

25 And essentially all your responses -- all the IESO's
26 responses through you, Mr. Short, were: We will be looking
27 at that. We need to look at that in more detail. Is that
28 a fair synopsis of that discussion?

1 MR. SHORT: So at the meeting it was the first time we
2 discussed the concept that TCA -- there were a number of
3 concerns that were raised at the meeting, and we went
4 through those, and certain things we addressed through the
5 evolution -- or the stakeholding with respect to TCA
6 capacity market-related, and other things were -- remained
7 with the DRWG, other items remained with the DRWG.

8 MR. MONDROW: And the utilization/energy payment or
9 activation/energy payment is in the latter category,
10 remained with the DRWG?

11 MR. SHORT: When we looked at the issue with respect
12 to the capacity auction, it was our -- so we have
13 essentially two products we were looking to acquire. One
14 is energy and one is capacity. The utilization payment at
15 the concept at the time, which has now evolved to, I guess
16 energy payments, which, aptly, named applies to energy, and
17 so when we looked at the history with DRWG and it was
18 focused on DR members, we were looking to evolve the DRA
19 beyond just the demand response participants.

20 At the time we thought it was an appropriate venue to
21 continue the conversations, and then subsequently as the
22 issue continued to be discussed we realized it needed a
23 broader engagement, and that's why we actually pulled it
24 out of the DRWG and invited other participants to attend,
25 such as generators, traders, et cetera.

26 MS. SPOEL: Mr. Short, I don't want to interrupt, Mr.
27 Mondrow, but I am just looking at these minutes and I am
28 looking at who was at the meeting on February the 12th, and

1 I am not sure who all these participants are, but I think
2 -- I don't know how many of them are actually demand
3 resource suppliers, if you want to call them that. An
4 awful lot of them -- well, I mean, obviously there's IESO
5 staff, there's OPG is a generator, as far as I know, some
6 of them are distribution companies. It seems to me this is
7 a very broad range of people, which is -- I am not
8 questioning the membership at all, I am just wondering to
9 what extent you could rely on this group to get a consensus
10 about what the interests of the demand resource or whether
11 you can get that at the meeting, given the numbers of
12 parties here who aren't -- don't supply demand resources.
13 I don't know if Toronto Hydro does demand resource. I
14 don't know -- some of these people -- some of these
15 participants I don't know. I am not sure what Union Gas's
16 role is. But sort of give me a bit of -- it would help if
17 I had some kind of idea what reviews you are trying to get
18 with the composition of this broad stakeholder group -- or
19 working group. You just said opening it up to generators,
20 but there's quite a few generators represented here
21 already, I think.

22 MS. TRICKEY: I think it's important to note that we -
23 - the IESO holds a number of stakeholder engagements. Some
24 of them are specific to a topic. Sometimes we have working
25 groups like what we have with the demand response working
26 group, and that may be focused on a certain sector or
27 resource type or a group of people.

28 Typically when we're engaging on a broad topic we

1 might use multiple forums to talk about the same thing, so
2 I think that's part of maybe what you're looking for. So
3 we wouldn't just go to one forum. If there's multiple
4 forums where a topic could be of interest, we will go to
5 multiple forums.

6 And I think it's also typical that just because we
7 call something the demand response working group doesn't
8 mean that the only people there are demand response
9 providers. You know, sometimes other types of other
10 sectors have interests in the things we are discussing,
11 even though we are trying to focus a forum on a certain
12 topic.

13 So I don't know that you could look at one meeting and
14 say that we were trying to definitively make a
15 determination based on the makeup of stakeholders at a
16 certain meeting.

17 MS. SPOEL: Okay, thanks.

18 MR. MONDROW: Mr. Short, if we could then go to
19 Exhibit 23 of your evidence, so just stay with the same
20 document.

21 MR. SHORT: Sorry, can I just have a couple seconds?
22 I just wanted to look up something if you don't mind.

23 MR. MONDROW: Sure.

24 MR. SHORT: Sorry, just to add to Candice's answer,
25 the February 12th meeting was the first meeting that we
26 talked about -- the first meeting that we had talked about
27 the -- I believe the TCA concept outside of Peter Greg's
28 presentation to the OEN at the end of January. I believe

1 that's the case. This was also the meeting where Kingston
2 Cogen, I believe John Windsor came to present the
3 conversation about, I guess, including generators in the
4 demand response auction, so that may have attracted some
5 additional participation, but again, the majority of the
6 folks that were there I think are still demand response
7 participants. I just wanted to add that context to why the
8 meeting might have been a bit more broader than just a
9 DRWG.

10 MS. SPOEL: No, that's fine. Thank you. I appreciate
11 that. I just, I guess I was referring back to your
12 comment, and it was actually with respect to the March 1st
13 meeting, where you say based on the quantity of stakeholder
14 feedback received the ISO did not see a strong interest
15 from DWRG (sic) on the topic of utilization payment. I am
16 just thinking that if there's a lot of people at the
17 meeting who aren't actually demand response providers,
18 maybe the quantity of feedback isn't -- is maybe not the
19 measurable. I was just exploring that a little bit.

20 MS. TRICKEY: I think it's also important to
21 understand --

22 MS. SPOEL: Yeah, I am not suggesting they shouldn't
23 be there --

24 MS. TRICKEY: No, no, I --

25 MS. SPOEL: -- I understand, and it's not a vote, so I
26 understand that. I was just wanting to get a feeling for
27 what you're trying to achieve --

28 MS. TRICKEY: Yeah.

1 MS. SPOEL: -- were you looking for consensus in these
2 working groups? Who is there? How does it inform going
3 forward?

4 MS. TRICKEY: Right. It's not a perfect science,
5 obviously, figuring out how to proceed on items. I think
6 what the IESO is striving to do with these engagements and
7 particularly with the demand response working group is
8 understand what are the concerns and items that they would
9 like us to talk about. Invariably there are far more items
10 that they would like us to address than we can possibly
11 address at any given time, and they are not the only ones.
12 Everybody has got a long list of things they would like us
13 to do, so it's our job to try to figure out what is the
14 most important or are the most important items at any given
15 time.

16 We don't dispute the demand response participants saw
17 energy payments as an issue and have for a number of years.
18 But again, we have tried to balance over the years what
19 we're focusing on and, you know, are we focusing on the
20 most important items to the majority of participants.

21 Maybe we don't always get it right, but that's the
22 balance that we are striving to achieve.

23 MS. SPOEL: Thank you. Sorry, Mr. Mondrow.

24 MR. MONDROW: No, thank you, Madam Chair. So I want
25 to go to Exhibit 23, now, Mr. Short, of your evidence,
26 which is another -- perhaps the next DRWG meeting, April
27 25th, 2019.

28 So now we are in April 2019 with a similar list of

1 participants. And then if you go to page 3, under the DR
2 auction path to success in the TCA, it looks like there is
3 a presentation from Enel X. Is that what that is?

4 MR. SHORT: Yes.

5 MR. MONDROW: Just looking at the first paragraph, it
6 describes the presentation.

7 "Enel X led stakeholders through their discussion
8 on removing barriers to DR and improving
9 efficiency in the TCA. Participants broadly
10 noted that the Enel X presentation highlighted
11 the challenges that all demand resources face,
12 and that these challenges have become more
13 important as competition with other resources are
14 being rapidly introduced. Participants wanted to
15 make sure that the issues identified will be
16 resolved in time for the TCA."

17 And if you go over to next page, page 4 of the
18 minutes, under the heading "discussion and next steps in
19 evolving DR participation", this is a discussion led by a
20 woman, it looks like, from the IESO.

21 It records:

22 "The IESO led stakeholders through a broad
23 discussion evolving DR participation, including
24 the future of DRWG and the DRWG work plan. The
25 discussion became centred on the need and
26 rationale for utilization payments for DR, and
27 participants stressed that utilization payments
28 are a priority for DR."

1 The next paragraph talks about the FERC decision. The
2 IESO replied in the italics now that in Ontario,

3 "utilization payments would receive the same
4 types of challenges that they did during the
5 stakeholdering of FERC order 745, and the IESO
6 would need a made-in-Ontario rationale supported
7 by a good business case to consider it. If the
8 priority for the DRWG is to address utilization
9 payments, then it can move forward on this. But
10 asked if there were other priorities, given how
11 rarely DR gets dispatched."

12 Then the minutes say:

13 "Participants emphasized the utilization payments
14 have also been on their list as a priority, but
15 the IESO dictates priorities. It made a
16 unilateral decision to make DR compete with
17 merchant generators on a condensed timeline,
18 which is why participants have escalated the
19 discussion on utilization payments."

20 The IESO's response is recorded there:

21 "The IESO replied that the next steps would be to
22 determine how to move forward from the Navigant
23 paper released in December 2017."

24 We are now in April 2019.

25 "On utilization payments, the IESO is open to any
26 new rationales for utilization payments and
27 models from other markets. A participant asked
28 for a direct response on the key NOX presentation

1 points. The IESO replied that it will respond to
2 these points, and the meeting adjourned."

3 So not resolved at the meeting, at this meeting any
4 way, what the IESO would do, other than it would respond,
5 right?

6 MS. TRICKEY: Correct.

7 MR. MONDROW: Okay. Can we go back to your evidence
8 at paragraph 82?

9 So paragraph 82 footnotes those minutes, and at the
10 end of paragraph 82 of your evidence, it says in the last
11 sentence:

12 "The IESO however advised stakeholders that the
13 issue of energy payments would be further
14 considered as part of the DRWG, including
15 prioritization -- it should be of the issue as
16 part of the issue as part of the 2019 DRWG work
17 plan, and that the IESO would follow up on the
18 Navigant paper and consider a made-in-Ontario
19 rationale supported by a good business case."

20 The footnote again is to those minutes. I didn't see
21 that statement minuted. Is that an error in the minutes,
22 or is this evidence not quite accurate?

23 MS. TRICKEY: I think you're asking me if this
24 particular statement is correct, so what's in quotes and
25 footnoted is a correct reflection of what happened in the
26 meeting.

27 I'd have to go back and look further at that. It's
28 not apparent to me what -- is there a disconnect or isn't

1 there right on the surface at the moment. But I am not
2 sure. Is that what you are asking?

3 MR. MONDROW: That's what I am asking.

4 MS. TRICKEY: I can't comment on that without taking a
5 further look at this.

6 MR. MONDROW: Okay. In any event, you have now posted
7 a draft engagement plan as of August 22nd, to look at
8 energy payments for economic activation of DR resources.
9 And you talked about that this morning, right?

10 That plan is now posted and active, correct?

11 MS. TRICKEY: Correct.

12 MR. MONDROW: Okay. And you testified already you
13 anticipate a resolution of that by June 2020.

14 MS. TRICKEY: Yeah, actually May 2020, but yes.

15 MR. MONDROW: With an IESO decision by June 2020, I
16 think. That's what the timeline says but.

17 MS. TRICKEY: Sure.

18 MR. MONDROW: May or June; it doesn't matter. We are
19 going to get a resolution of that issue.

20 MS. TRICKEY: Yes.

21 MR. MONDROW: Okay. And will that study consider
22 activation payments as distinct from energy payments?

23 MS. TRICKEY: Our understanding is that what
24 stakeholders want us to address is energy payments
25 specifically as per what has been implemented by -- or was
26 requested by FERC. That's what our study is looking at.

27 MR. MONDROW: So all of these minutes we looked at,
28 they actually refer to activation/energy payments, right?

1 You saw those references as we went through them.

2 MS. TRICKEY: Correct.

3 MR. MONDROW: And so do you think you should maybe
4 look at activation payments as well as energy payments?

5 MS. TRICKEY: We don't have a concern with looking at
6 that. But again, what we understand we have been asked to
7 look at is energy payments.

8 MR. MONDROW: Asked by whom?

9 MS. TRICKEY: By stakeholders, and AMPCO in
10 particular.

11 MR. MONDROW: Okay --

12 MR. SHORT: Sorry, if I could add, we in earlier
13 conversations about utilization in the first concept, I
14 guess, of energy payments was at a TCA stakeholder session.
15 I remember the confusion with myself and some other folks
16 in the IESO, because we had thought it was a utilization
17 activation exercise. And it was at that point we realized
18 that the conversation had shifted to an energy -- sorry, an
19 energy utilization which is a more -- this is basically
20 anybody, anybody who has load that responds and reduces
21 consumption would be eligible for an energy payment as
22 opposed to something that was specifically -- we had
23 thought earlier was specifically related to a smaller class
24 of participants.

25 So it was a bit -- you know we were -- so that's where
26 we thought the tone changed from utilization to an energy-
27 specific one.

28 MR. MONDROW: Do you think it would be wise to look at

1 activation payments or compensation for DR activation
2 costs?

3 MS. TRICKEY: Again, we are responding to what
4 stakeholders have asked us to respond to.

5 MR. MONDROW: Okay. In the interim, you are still
6 working on the capacity auction evolution. You testified
7 to that, Mr. Short, this morning.

8 MR. SHORT: Yes.

9 MR. MONDROW: And given the complexity, you'd agree it
10 would be imprudent not to continue to work on that?

11 MR. SHORT: Given the need to be ready for 2023 and
12 beyond, yes.

13 MR. MONDROW: Madam Chair, I am moving to a new topic.
14 It would be a convenient time for me, if it's convenient
15 for the Panel to break.

16 MS. SPOEL: Certainly, let's resume at 1:30.

17 --- Luncheon recess taken at 12:25 p.m.

18 --- On resuming at 1:32 p.m.

19 MS. SPOEL: Good afternoon, please be seated.

20 All right, Mr. Mondrow.

21 MR. MONDROW: Thank you, Madam Chair.

22 Ms. Trickey, Mr. Short, could you please turn up tab
23 16 of your evidence. So it's Exhibit 16, I guess, of your
24 evidence. We are in the big cerlox-bound package now. And
25 what you should see is that presentation entitled "capacity
26 update, stakeholder advisory committee, August 14th, 2019".
27 And I am going to ask you to turn, when you get there, to
28 page 4. This would be Exhibit 16 of your evidence.

1 And on page 4, you will see a chart that says
2 "preliminary resource adequacy outlook summer"; do you have
3 that, Mr. Short?

4 MR. SHORT: Yes, I do.

5 MR. MONDROW: And this is a graphic representation of
6 the impending capacity gap or need, as you have testified
7 to already, and we see two lines, with existing resources
8 and without existing resources. The line that runs through
9 the zero, is that zero a capacity including reserve margin?

10 MR. SHORT: Are you referring to both lines or...

11 MR. MONDROW: Well, sorry, I don't mean the graph
12 lines, I mean the axis that runs through zero.

13 MR. SHORT: Sorry, I understand now.

14 MR. MONDROW: So that break-even, where capacity
15 matches requirement, is that a post -- that includes
16 reserve margin, that zero --

17 MR. SHORT: I believe that's all-inclusive of --
18 including the margin, yes --

19 MR. MONDROW: Right. And what's your reserve --
20 what's the IESO's reserve margin now? 18, 20 percent,
21 something like that?

22 MR. SHORT: I don't know off the top of my head unless
23 it's in the evidence.

24 MR. MONDROW: Well, I'm not sure, but let's find out
25 together, maybe. If we could go to -- actually, we will
26 come back to that. For now it includes -- it's harder to
27 go back and forth, but it includes reserve margin as far as
28 you know?

1 MR. SHORT: As far as I understand, yes --

2 MR. MONDROW: Okay. That's great. Thanks. And if
3 you could just look with me on page 7 of this presentation,
4 and here is a listing of -- and it's titled "options
5 available to meet capacity requirements".

6 So we have got -- the second bullet is the capacity
7 auction, and then it talks about three more options. You
8 referred to some of these briefly this morning. Energy
9 efficiency programs. There's a Hydro Quebec firm import of
10 500 megawatts, and it says "available until 2030 for one
11 summer commitment period under the terms of the HQ energy
12 deal".

13 Does that mean it's only available once or once per
14 year?

15 MR. SHORT: It's only available once.

16 MR. MONDROW: So you call on it for one year.

17 MR. SHORT: Or it's only for the summer periods. So
18 it's 500 megawatts of capacity, and we can call in a summer
19 period.

20 MR. MONDROW: In each summer or only one summer --

21 MR. SHORT: No, just one summer.

22 MR. MONDROW: So you have got to pick your summer.

23 MR. SHORT: Correct.

24 MR. MONDROW: Okay. And you talk about, opportunities
25 may exist to optimize and shift nuclear availability. Am I
26 correct that in addition to this list you are -- meaning
27 the IESO is now considering potential contracts for
28 capacity outside of the auction?

1 MR. SHORT: We're starting -- I think I mentioned
2 earlier we're starting our resource adequacy engagement in
3 January to talk about alternatives to the ICA, which was
4 intended to -- the ICA was intended to secure capacity
5 starting in -- the first auction was intended to run in
6 2022 for a commitment period that started in May of 2025.

7 MR. MONDROW: Okay. And if you could turn with me,
8 then, to page -- sorry, Exhibit 17 of your evidence, the
9 next exhibit. This is the NERC, North American Electric
10 Reliability Corporation, 2018 long-term reliability
11 assessment. You filed this, as I recall, in support of
12 your forecast, including the 2023 capacity gap, as you have
13 been calling it. And if we go to page 15 of this NERC
14 document, this is the -- the page that has text entitled
15 "NPCC Ontario". And am I correct that this is the Ontario
16 section of the report that talks about the mid-2020s
17 capacity gap?

18 MR. SHORT: Yes, that's correct.

19 MR. MONDROW: And it says in the first line:

20 "The anticipated reserve margin falls below the
21 reference margin level in the mid-2020s to 18.6
22 percent."

23 So I assume what that means is that the gap is
24 actually a gap relative to the capacity requirement
25 inclusive of the 18.6 percent reserve margin. Sorry, it
26 falls to 18.6 percent, so the reserve margin that you have
27 is actually something above 18.6 percent. Would that be an
28 accurate read of this?

1 MR. SHORT: Sorry, just for my benefit could you
2 repeat the question one more time?

3 MR. MONDROW: Yes, so the first sentence says:

4 "The anticipated reserve margin falls below the
5 reference margin level in the mid-2020s to 18.6
6 percent."

7 So that's the capacity gap, as I understand it, which
8 means your reserve margin is something more than 18.6
9 percent.

10 MR. SHORT: So I -- and I believe the reserve margin
11 is calculated every year based on a number of factors, and
12 it may fluctuate year to year. So from this perspective
13 right now I think we are assuming 18.6 percent, but I
14 believe in a new version coming out that number actually, I
15 believe, goes up, so every year we publish a new long-term
16 reliability outlook or NERC publishes it, and I think that
17 number fluctuates in year to year based on the assumed
18 generation that's available to meet demand.

19 MR. MONDROW: Can we go to page 56 of the report,
20 please.

21 So this is a chart entitled "summary of 2023 peak
22 projections by assessment area and interconnection". And I
23 will ask you to look down several lines to the NPCC Ontario
24 line. And here we see peak demand in megawatts in the
25 first column, 21,589. In the second-last column we see
26 25,456. And in the last column we see an anticipated
27 reserve margin of 18.62 percent.

28 So this indicates to me that in 2023 the capacity gap

1 that you have been referring to is translatable into a
2 decline in your reserve margin down to 18.62 percent, at
3 least as of the time of the forecast reflected in this
4 report. Is that how you would read that?

5 MR. SHORT: So I am not 100 percent familiar with the
6 exact calculation to develop that, but I think the -- I
7 believe the 18.6 -- just making sure I have got my numbers
8 right -- 18.6 percent is a calculation based on our
9 expected need to be reliable based on the fleet that we
10 have or are anticipated to have.

11 And so I -- yes, I can attest the number is 18.6
12 percent based on the latest calculation we have done.

13 MR. MONDROW: So that means in 2023 what you
14 anticipate having is a reserve margin of 18.62 percent,
15 lower than perhaps optimal, or dictated by NERC, but still
16 a reserve cushion. That's how I would read that chart; is
17 that correct?

18 MR. SHORT: Sorry, could you repeat the question? My
19 apologies.

20 MR. MONDROW: The capacity gap that we have been
21 talking about means that in 2023 you anticipate as of the
22 time of this forecast having an 18.62 percent reserve
23 margin rather than a higher reserve margin.

24 MR. SHORT: So I am not entirely sure how the
25 calculation -- I am not sure if it's a one-for-one
26 relationship. So I am happy to go back and provide more
27 information as to in terms of how we calculate the 18.6
28 percent, if we are allowed to do that.

1 MR. MONDROW: You are certainly allowed to do that,
2 and what I am interested in -- and the Panel or others may
3 have a different interest, but what I am interested in
4 understanding, when you say there's a 4,000-plus megawatt
5 capacity gap in 2023, how much reserve margin is left
6 after, if that gap is realized? That's what I would like
7 to know, and I think it's 18.62 percent, and that's what I
8 am asking if you could confirm.

9 MR. SHORT: I am not sure how -- okay, so from -- the
10 easier number to look at is back on the -- is the graphs
11 that we talked about at the SAC presentation, where there's
12 an over 4,000-megawatt gap that is calculated based on the
13 NPCC NERC criteria to determine that number. I am not sure
14 if it's entirely translatable, or what the reason is to try
15 and translate that into 18.6 percent.

16 I am not quite following you, because I don't run an
17 auction based on 18.6 percent. I run an auction based on
18 the numbers, the absolute number that the planners
19 calculate based on a forecast of the resources that are
20 available. It's like a probabilistic calculation to say I
21 need -- I am going to use a rough number -- sorry. I will
22 just use a rough number of 30,000 megawatts we need. And
23 in 2023, we only have, I will say again rough numbers,
24 26,000. And so that translates into the 4,000-megawatt
25 need.

26 MR. MONDROW: I understand that. But if you look, it
27 doesn't come out -- in the copy I am looking at, it doesn't
28 come out very clearly.

1 But if you look down to eastern interconnection,
2 Quebec interconnection, Texas interconnection, those all
3 are shaded actually on this table. And I think they are
4 shaded because they have reserve margins significantly
5 below the NERC criteria.

6 MISO, second row from the top, has a 16.84 percent
7 reserve margin. What I am trying to get a sense of is,
8 when we talk about a capacity gap, are we going to run out
9 of capacity gap? Or are we talking about not meeting NERC
10 requirements, but still having a cushion.

11 I am not going to debate with you whether that's
12 appropriate or inappropriate. I am just trying to
13 understand it at the moment. That's why I am asking the
14 question.

15 MR. SHORT: So every area calculates what is they
16 believe is the appropriate reserve margin based on their
17 fleet, and that MISO -- sorry, mid continent system,
18 independent system operate -- independent system operator
19 which is MISO, for example, they would look at maybe a
20 heavier wind fleet, more coal, and they would use their
21 effective capabilities of those fleets to calculate what
22 they believe they need to maintain reliability, and that
23 ends up being produced in kind of a minimum percentage
24 reserve requirement.

25 Ontario would do the same thing when it comes to our
26 fleet.

27 MR. MONDROW: Sorry, Mr. Short, I am not -- I am under
28 a time constraint, and I am not asking you that.

1 MR. SHORT: Okay, I am --

2 MR. MONDROW: I appreciate you are trying to be
3 helpful. In 2023, if you realize the 4,000-plus capacity
4 gap you are currently forecasting according to your
5 evidence, what would the reserve margin be if you don't
6 address it. That's what I would like to know.

7 So if you would like to undertake a calculation,
8 that's the calculation I am interested in.

9 MR. SHORT: Okay, I can do that.

10 MR. ZACHER: That's fine.

11 MR. SHORT: Okay. Sorry, he is supposed to do that?

12 MR. MONDROW: Thank you.

13 MS. DJUDJEVIC: So I will make that undertaking J3.2.

14 **UNDERTAKING NO. J3.2: TO CALCULATE A RESERVE MARGIN**
15 **FOR 2023, IF THE FORECASE 4,000-PLUS CAPACITY GAP IS**
16 **NOT REACHED**

17 MR. MONDROW: Sorry if I cut you off. I have a lot of
18 stuff to cover with you, so that's why. But I appreciate
19 your attempt to be helpful.

20 So now I want to talk about addressing that gap, and I
21 am going to go through this, I hope, relatively quickly. I
22 don't think it's contentious, and I am just going to ask
23 you to confirm some of the timing.

24 So the first auction was to be held, as we know,
25 December 2019, and it was to cover a one-year period
26 commencing in May 2020. And that one-year period was
27 composed of two commitment periods, a summer and a winter
28 period, correct?

1 MR. SHORT: Yes, that's correct.

2 MR. MONDROW: And the forward period, which is the
3 period between the auction and the commitment period -- am
4 I right? That's what the forward period is?

5 MR. SHORT: Between the end of the auction and the
6 start of the commitment period, yes.

7 MR. MONDROW: Was six months, was to be six months?

8 MR. SHORT: I believe it's roughly five months, but...

9 MR. MONDROW: Okay. And the target capacity, do we
10 have that on the record somewhere? What was that?

11 MR. SHORT: I believe 675 megawatts was the target
12 capacity.

13 MR. MONDROW: And you said generation registered was
14 how much? Four generators, but do we have the capacity?

15 MR. SHORT: I'm not entirely sure if I should divulge
16 That, because that indicates the supply mix for the
17 upcoming auction. So I can tell you how many folks
18 registered.

19 MR. MONDROW: Four, we know that.

20 MR. SHORT: It's five now, actually. It was five; we
21 have now taken them out.

22 MR. MONDROW: Okay. But you can't give us the --

23 MR. SHORT: I would like to be able to, I will just
24 throw this out there. The amount of people that are
25 participating in terms of the quantities, it may give folks
26 an unfair or more information, and maybe it could influence
27 the outcome of the auction. So I am not sure that's the
28 right thing to do is to give out that information.

1 MR. MONDROW: These fine. Can you tell me if it was
2 more than 600 or less than 600 megawatts? Would that
3 compromise...

4 MR. SHORT: I can say for certain it was less than 600
5 megawatts. Are you going to keep going down until I say I
6 can't -- sorry.

7 MR. MONDROW: No, no, no. I thought about it but I am
8 not going to.

9 MR. SHORT: I appreciate that, thank you. I am going
10 to start to sweat at some point.

11 MR. MONDROW: It's not important enough for me, and I
12 don't want to compromise your position, thank you.

13 So new auction number one, subject to the outcome of
14 this process perhaps, is scheduled to be held June 2020.
15 Again a one-year period and in that respect, commencing May
16 2021.

17 MR. SHORT: Yes.

18 MR. MONDROW: Two commitment periods, summer and
19 winter?

20 MR. SHORT: That's correct.

21 MR. MONDROW: An 11-month forward period for that
22 auction?

23 MR. SHORT: I agree with that math, yes.

24 MR. MONDROW: Thank you. Do you know what the target
25 capacity is likely to be?

26 MR. SHORT: As far as how we develop the target
27 capacities at this point, because we are transitioning from
28 a process where the DRA was -- so the demand response

1 auction, the target numbers were typically driven by the
2 results of a long-term energy plan directive that we had
3 from the government. We are trying to transition away from
4 that now. We are also trying to transition to again being
5 ready for the 4,000-plus megawatt need in 2023.

6 So what we developed was -- we called it a reliability
7 assurance value target capacity, where we would start to
8 increment the target capacity. It could be above our
9 planning requirement in order -- so we didn't have this
10 massive jump from a lower capacity value to this 4,000-
11 megawatt value, again as part of our plan to enable both
12 the IESO and the sector to be ready for 2023.

13 MR. MONDROW: For your planning value, though, if we
14 look at that chart that we looked at a few minutes ago,
15 that would give us the planning value as opposed to the
16 target value. Is that fair?

17 MR. SHORT: It's fair for this year. As an example,
18 though, that graph we were referring to as part of the SEC
19 presentation, it was already outdated when it was
20 published. So it shows, for example, December 2020. There
21 is -- if you look at that graph, there is no adequate
22 capacity need for the summer. But through the course of
23 our development of the 18-month outlook -- sorry, it's not
24 called an 18-month outlook anymore. The report, I think
25 it's called the reliability outlook. I might be misquoting
26 a number, or the report, it takes into account more recent
27 information and so --

28 MR. MONDROW: Do you have any more recent information

1 than that?

2 MR. SHORT: I believe the reliability outlook number
3 is public at this point. We looked at a number of
4 combinations and the actual planning need is -- I think it
5 was roughly, off the top of my head, about six -- sorry,
6 not six -- 580, 570 megawatts was the actual planning need,
7 and we looked at where we were with the last demand
8 response auction, which was roughly a 600-megawatt -- I
9 think a 600 and change megawatt target capacity need, and
10 going between where we are today versus where we need to be
11 for 2023, we had already stakeholdered with participants
12 for the summer of 2020. We were going to use a value of
13 675 megawatts, so that's what we published for the TCA and
14 that's what we have kept for the DRA.

15 MR. MONDROW: So that would be the June 2020 auction?

16 MR. SHORT: Sorry, no, I was talking ability December.

17 MR. MONDROW: I don't want to go through that again at
18 the moment, thank you.

19 MR. SHORT: Sorry, I didn't want to waste your time.

20 MR. MONDROW: I'm going to come back to that in a
21 minute. So we have auction number 1 now June 2020.
22 Auction number 2 currently scheduled for December 2020 for
23 a one-year commitment period commencing May 2022. So
24 that's two seasonal commitment periods, summer and winter,
25 and an 18-month forward period, correct?

26 MR. SHORT: I think it was 17 months, but roughly 18,
27 17 is close.

28 MR. MONDROW: Auction number 3 in 2021, this is for

1 the one-year period commencing May 2023. So that is your
2 capacity gap crystallization --

3 MR. SHORT: Correct.

4 MR. MONDROW: -- based on current -- relatively
5 current forecasts. And again you anticipate two seasonal
6 commitment periods, summer and winter, and again an 18
7 month forward period, give or take.

8 MR. SHORT: Yes, at this time we have not established
9 the audit committee date for 2021.

10 MR. MONDROW: Okay. Would you undertake to provide
11 the most updated planning need for each of those next three
12 currently planned auctions? Could you do that?

13 MR. SHORT: Yeah, I --

14 MR. ZACHER: Is there one?

15 MR. SHORT: Yeah, I am trying to think there's a
16 public -- there's an annual planning outlook that hasn't
17 been published yet, and we are waiting for that to be
18 finalized. We certainly can provide the report -- the
19 report -- reliability outlook, I think it's called. We can
20 certainly provide that. That was published a couple months
21 ago.

22 MR. MONDROW: The most recent one you are able to
23 provide.

24 MR. SHORT: Yeah, certainly we can do that.

25 MR. ZACHER: That's fine.

26 MS. DJURDJEVIC: That will be Undertaking J3.3.

27 **UNDERTAKING NO. J3.3: TO PROVIDE THE RELIABILITY**
28 **OUTLOOK.**

1 MR. MONDROW: Thank you. In your evidence, Mr. Short
2 -- you can look at paragraph 3B, if you wish, but I don't
3 think this will be contentious -- you say that:

4 "There are existing non-committed generators
5 coming off-contract which may in the absence of
6 the TCA choose to wind down their operations."

7 You recall that testimony?

8 MR. SHORT: Sorry, I was just trying to figure out
9 where you were.

10 MR. MONDROW: Paragraph 3B.

11 MR. SHORT: Yes, I agree, yes.

12 MR. MONDROW: Okay. And do you know what the
13 probability is of that, of any of those generators choosing
14 to wind down their operations?

15 MR. SHORT: We looked at what was available off-
16 contract, and I think in one of our interrogatories we
17 provided -- I think there was roughly 27 generators over
18 640 megawatts that was theoretically available.

19 As far as their plans to wind down, we have
20 information, for example, from Kingston Cogen presenting
21 information as one example.

22 MR. MONDROW: Okay. Do you have information from
23 other generators?

24 MR. SHORT: So in looking at the options to
25 essentially solve the 2023 need, we know what's available
26 as far as that capacity goes, and we look at things like
27 what's available from imports, what's available from
28 generators, and it's -- and so in totality when you add

1 generators, potential storage, potential imports, DR,
2 that's where we get to our 4,000-megawatt need --

3 MR. MONDROW: Sorry, Mr. Short, that's not what I
4 asked you.

5 MR. SHORT: Okay.

6 MR. MONDROW: What I asked you was, you said in your
7 evidence:

8 "Off-contract non-committed generators may, in
9 the absence of the TCA, choose to wind down their
10 operations."

11 I asked if you had a probability for that. I gather
12 this answer is no --

13 MR. SHORT: No, I haven't developed a statistical
14 probability on that, no.

15 MR. MONDROW: Would you say greater or less than 50
16 percent probability?

17 MR. SHORT: I really don't think I can comment on
18 that.

19 MR. MONDROW: You can't comment because you don't
20 know?

21 MR. SHORT: I don't specifically know the financial
22 businesses of all those generators, no, I don't, sorry.

23 MR. MONDROW: Okay. Could you say high, medium, or
24 low probability?

25 MR. SHORT: I don't -- again, I don't know. We've --
26 you know, there's -- we have heard from Kingston Cogen.
27 They are a good example. Maybe there's more representative
28 of them.

1 MR. MONDROW: Okay. Could you go to tab 4 of our
2 compendium, K3.2. This is your response to AMPCO
3 interrogatory 4 from November 20th, 2019. And we asked you
4 about this, the basis for your information, and you gave us
5 a response in part A, and I am not going to read it. You
6 can if you wish. But you footnote the Kingston Cogen -- in
7 part B you actually footnote the Kingston Cogen
8 presentation, which you didn't provide, but we have it.
9 And I provided a copy to you and everyone else in the room.

10 Madam Chair, it was posted on the IESO website, and
11 it's a slide presentation entitled "Demand response program
12 expanding DR2 on contract to stranded generators, February
13 12th, 2019". I wonder if we could mark that as an exhibit,
14 please.

15 MS. DJURDJEVIC: That will be Exhibit K3.4.

16 **EXHIBIT NO. K3.4: KINGSTON COGEN SLIDE PRESENTATION**
17 **ENTITLED "DEMAND RESPONSE PROGRAM EXPANDING DR2 ON**
18 **CONTRACT TO STRANDED GENERATORS, FEBRUARY 12TH, 2019".**

19 MR. MONDROW: Thank you. And your footnote -- sorry,
20 one sec.

21 The statement you quoted from Kingston Cogen in your
22 interrogatory response, Mr. Short -- this is part B of your
23 response to AMPCO interrogatory 4 -- is, you say:

24 "Generators communicated their perspective
25 through various channels. For example, in a
26 presentation to the DRWG Kingston Cogen noted
27 that provided generators -- sorry, providing
28 generators access to a capacity auction 'would

1 help secure the long-run viability of
2 uncontracted generation as future capacity
3 resources in Ontario'."

4 I didn't see anywhere in the presentation, though,
5 where KCLP or Northland said absent the TCA they would be
6 winding down operations. Is there somewhere in here that
7 you think they said that?

8 MR. SHORT: Just give me a second to have a look.

9 MR. MONDROW: Sure.

10 MR. SHORT: So I believe the quote seems accurate in
11 terms of, this would help secure the long-term, long-run
12 viability. I think the gist of the presentation was they
13 were interested in securing -- providing capacity for
14 Ontario, and the expansion of the DRA would be one, I
15 think, opportunity for them to supply capacity.

16 MR. MONDROW: Okay. You say in part A of the response
17 to AMPCO's interrogatory, the same one we were looking at,
18 Interrogatory No.4, that some generators -- you're aware
19 that some generators have begun the deregistration process.

20 Can you tell me how many you meant when you said
21 "some", can you briefly describe the process, and can you
22 tell me, is it a reversible process?

23 MR. SHORT: So I'm going to -- so with respect to the
24 deregistration process, a participant applies to the IESO
25 to deregister their facility. We do a -- we have the
26 option to do an assessment. There could be a local --
27 maybe there is a generator that will help support voltage,
28 and would do an assessment as to whether that generator is

1 going to cause a problem say with system voltage --

2 MR. MONDROW: Problem by going off?

3 MR. SHORT: Yes, for example. And so if there's a
4 local issue we can certainly continue conversations with
5 the generator. But essentially, once they are have
6 completed the deregistration process they can disconnect
7 from the grid.

8 MR. MONDROW: Right --

9 MR. SHORT: And then I think the second question was
10 is it reversible?

11 MR. MONDROW: They can reconnect subject to another
12 assessment, I assume?

13 MR. SHORT: Yes, they can either not complete the
14 process or they can reregister.

15 MR. MONDROW: Right. And how many generators have
16 applied to do that? Can you tell me?

17 MR. SHORT: I don't have an answer off the top of my
18 head. Like, again, our goal is to get ready for the 4,000-
19 megawatt 2023 need. I know I have said it again. I will
20 keep saying it, is that demand response alone can't do it,
21 and so we are looking for other folks to provide -- to have
22 that opportunity, and if you've got 600 megawatts of
23 generation that's potentially economic, that seems to me
24 like the right thing to try and do is to give them an
25 opportunity to compete in auction, the same thing with
26 imports, storage, so we are trying to be -- we are not
27 picking generators, we are trying to give them an
28 opportunity to solve the 2023 need and beyond.

1 MR. MONDROW: Can you go to paragraph 37 of your
2 evidence, please. Actually, we will start at paragraph 36,
3 obviously right above 37. And if you have that, you see in
4 paragraph 36 you say:

5 "DRA participants have been activated in the
6 energy market in very limited circumstances since
7 the DRA was launched 2015. This is likely due to
8 the relatively high prices at which DRA
9 participants have bid into the energy market."

10 In the next paragraph you say:

11 "During this period the hourly Ontario energy
12 price, HOEP, has averaged approximately \$25 per
13 megawatt."

14 You contrast that to the load bid prices of \$1,500 per
15 megawatt to approximately \$1,700 per megawatt. What does
16 the average HOEP have to do with deactivation?

17 MR. SHORT: So the intent was to demonstrate -- again,
18 this is on averages -- was to demonstrate that demand
19 response, specifically dispatchable loads and HDR
20 resources, bid into the energy market at relatively high
21 prices. I think we talked about that a lot during the
22 proceeding.

23 So when it comes to the probability of activation,
24 again it's a demonstrative number. On average, HOEP sits
25 around \$25 and so there's quite a gap. The intent was to
26 show there's quite a gap between energy prices and the bid
27 prices of HDR and dispatchable load resources.

28 MR. MONDROW: Okay. Between average energy prices and

1 the bid prices?

2 MR. SHORT: Yes. It's a demonstrative number, yes.

3 MR. MONDROW: Demonstrative of what? The average
4 energy price?

5 MR. SHORT: The gap between the average energy price
6 and the average bid price of dispatchable loads and HDR
7 resources.

8 MR. MONDROW: Right. Your insurance; Ms. Trickey
9 referred to them as insurance.

10 MR. SHORT: The capacity numbers, yes.

11 MS. TRICKEY: Perhaps I could clarify. What I said
12 was when we purchase capacity, a certain amount of that
13 capacity is insurance, meaning that it's not expect we'll
14 will use it, but we need to have it there on standby.

15 What actual resource becomes -- acts like that
16 insurance really depends on how it's priced in the energy
17 market.

18 MR. MONDROW: And you said DR resources are very
19 valuable in providing insurance.

20 MS. TRICKEY: I said they are valuable in that they
21 are a relatively inexpensive capacity resource, so we think
22 that they provide value to the market.

23 MR. MONDROW: Well, we will look at the transcript and
24 see what you said.

25 MR. SHORT: Maybe it would be helpful to -- during a
26 time of, say it's a hot summer day or cold winter day when
27 we've got a higher load profile generation, there may be
28 outages. We plan for a certain amount of outages and we

1 could -- we also run a market that is regionally connected.
2 And so when we do our capacity calculations, the standards
3 look at -- you to look at Ontario almost as an island. And
4 so you don't actually -- you don't actually consider the
5 timelines because there are no firm capabilities --

6 MR. MONDROW: Is this something to do with \$25 per
7 megawatt?

8 MR. SHORT: Yes, it does.

9 MR. MONDROW: Okay.

10 MR. SHORT: So when we have a shortage condition,
11 prices could be ramping up a little bit in Ontario. But
12 because, say, Quebec, or New York State, or Michigan has
13 market capable energy that they could sell to Ontario and
14 we transact that, rather than, say, activating having the
15 price come up and potentially picking up a more expensive
16 Ontario generation resource, or potentially demand response
17 if it gets really high, we can pick up more economic
18 resources from other jurisdictions as an import. And
19 that's done every hour; we assess, we look for the most
20 economic solution.

21 So that is not counted on in our capacity obligations
22 because that's our capacity calculations. Again we are
23 following NERC and MPCC requirements, but that helps to
24 mitigate the market prices.

25 So that's where I was going with this is you may not
26 see higher prices because we have got opportunities during
27 these shortage conditions, for example, to bring in more
28 economic resources from other jurisdictions.

1 MR. MONDROW: Would it be possible, without too much
2 effort, to produce a distribution graph, that would be
3 fine, of five-minute interval real-time energy prices in
4 \$200 increments, between \$25 and whatever the maximum was
5 over the last five years?

6 Is it easy to run that, or is it a lot of work?

7 MR. SHORT: Can you say it one more time again, so I
8 can make sure I understand.

9 MR. MONDROW: I am interested in getting a
10 distribution that will show us how often -- how often and
11 by how much prices on average, just in orders of magnitude.

12 And I am just asking whether that's a report that can
13 be pulled easily, or whether it takes a lot of work.

14 MR. SHORT: So if I can repeat to make sure I
15 understand it, you are looking for essentially the number
16 of intervals over -- you said over the last five years?

17 MR. MONDROW: Yeah.

18 MR. SHORT: Five years where prices have exceeded \$200
19 for a particular interval?

20 MR. MONDROW: No, you gave us \$25 as the reference
21 price.

22 MR. SHORT: Sorry, you're talking from 25 to 200?

23 MR. MONDROW: No 25 to whatever the maximum was in
24 that period.

25 MR. SHORT: So I think I understand. So the number of
26 intervals where prices exceeded \$25?

27 MR. MONDROW: No.

28 MR. SHORT: No, I am still not --

1 MS. SPOEL: Maybe I can help because I think -- it's a
2 distribution. So how many hours are you at 25 more or
3 less, how many hours might you be at 225, how many at 425,
4 how many at 625, and I am assuming it's going to look
5 something like this, you know.

6 MR. SHORT: Sorry, I thought was were talking about
7 gaps. I thought we were looking at differences between
8 numbers.

9 MS. SPOEL: No, how much of your market do you end up
10 buying at 25, how -- you know, in a bar chart, right.

11 MR. SHORT: Okay.

12 MS. SPOEL: The bar I zero up to 200, the bar of 200
13 up to 400 -- whatever it is, just to give us an idea of
14 what the distribution is.

15 MR. SHORT: Got that. That's easy enough to do, yes.

16 MR. MONDROW: Thank you, Madam Chair.

17 MS. DJUDJEVIC: That will be Undertaking J3.4.

18 **UNDERTAKING NO. J3.4: TO PRODUCE A DISTRIBUTION GRAPH**
19 **OF FIVE-MINUTE-INTERVAL REAL-TIME ENERGY PRICES IN**
20 **\$200 INCREMENTS, BETWEEN \$25 AND THE MAXIMUM OVER THE**
21 **LAST FIVE YEARS.**

22 MR. MONDROW: Could you look at paragraph 105, please,
23 of your evidence? You say in paragraph 105 that:

24 "The IESO does not expect any energy payments to
25 be material in the December 2019 commitment
26 period. Therefore, the IESO does not expect that
27 the availability of an energy payment would
28 influence frequency of activations of DR

1 resources."

2 Why is the frequency of activation of DR resources --
3 that actually doesn't make sense, hold on. I caught
4 myself. I don't think that's going to be very helpful to
5 anybody. I am going to confuse both of us, so I am going to
6 move on.

7 I would like to talk about the rule making process a
8 little bit. You had some of this earlier with counsel for
9 KCLP, I believe. Is it fair for me to conclude that the
10 IESO, based on your evidence, that the IESO Board in
11 considering market rules and in particular the amendments
12 in issue in this proceeding, relied on the advice provided
13 to it by the technical panel?

14 MR. SHORT: I think the Board takes into consideration
15 a recommendation or not of the technical panel for rule
16 amendment. It may not be the only consideration.

17 MR. MONDROW: I am sure it's not the only
18 consideration, but it is a material, if you pardon the
19 expression, consideration?

20 MR. SHORT: I assume it's probably material, yeah.

21 MR. MONDROW: Okay. And the IESO, in its submissions
22 in this matter and your position, is that this Board should
23 certainly be cognizant of the technical panel's detailed
24 consideration of the market rule amendments and the
25 objections or concerns raised?

26 MR. SHORT: I believe that's part of the process that
27 we provide to the Boards.

28 MR. MONDROW: But this, the Ontario Energy Board, this

1 Hearing Panel...

2 MR. SHORT: Sorry, I was referring to --

3 MR. MONDROW: That's a relevant consideration for this
4 Hearing Panel, that the technical panel carefully
5 considered this and had a full and frank discussion and
6 determined 11 to 1 to pass the amendments.

7 MR. SHORT: Just to clarify, I was referring to our
8 IESO board, not the Panel, sorry.

9 MR. MONDROW: My fault, not yours.

10 MR. SHORT: Sorry, could you repeat the question,
11 please?

12 MR. MONDROW: It's the IESO's position that the
13 technical panel's consideration and endorsement of the
14 amendments is an important consideration for this Hearing
15 Panel to bear in mind in adjudicating this application?

16 MR. SHORT: I think that's fair, yes.

17 MR. MONDROW: Thank you. The amendments in question
18 were submitted to the technical panel on August the 6th, is
19 that right, 2019? It's paragraph 91 of your evidence, if
20 it helps.

21 MR. SHORT: Yes, that's correct.

22 MR. MONDROW: They voted August 13th.

23 MR. SHORT: Yes.

24 MR. MONDROW: And they got the legal brief, the so-
25 called AMPCO AEMA legal brief on August 12th, right?

26 MR. SHORT: Yeah. I think if you look at the response
27 to -- I guess it was AMPCO's interrogatory, I believe.

28 MR. MONDROW: Number 5 probably.

1 MR. SHORT: Number 5 kind of explains the process
2 where the joint legal brief was supplied on, I think it was
3 the 9th, and it was provided to IESO management, and
4 ultimately through conversation it was provided to the
5 technical panel.

6 MR. MONDROW: Okay. The day before the vote?

7 MR. SHORT: Correct.

8 MR. MONDROW: Okay.

9 MR. SHORT: And that was after consultation with AMPCO
10 and AEMA.

11 MR. MONDROW: Do you know when it was provided by
12 AMPCO and AEMA? Your interrogatory response says July
13 19th, if --

14 MR. SHORT: Yup.

15 MR. MONDROW: -- that's of any assistance. Is that
16 right?

17 MR. SHORT: I believe that's correct, yes.

18 MR. MONDROW: Okay. Would you agree with me that at
19 that technical-panel meeting there was extensive and
20 somewhat controversial discussion on the appropriateness of
21 these amendments in connection with the utilization payment
22 issue in particular?

23 MR. SHORT: Yeah, I think it was demonstrating the
24 complexity of the question. There was a lot of folks
25 concerned about the impact to the foundation of the energy
26 market, so, yes, there was.

27 MR. MONDROW: Sorry, there were also a lot of folks
28 concerned about the unavailability of activation payments;

1 right?

2 MR. SHORT: I don't -- yeah. There were some, yes.

3 MR. MONDROW: Okay. Can you look at tab 6 of our
4 compendium, which is Exhibit K3.2.

5 MR. SHORT: Okay. I have it.

6 MR. MONDROW: I don't think these have been filed
7 before, so I just want to make sure you identify them so we
8 can refer to them later on.

9 These are the minutes from that technical-panel
10 meeting; right?

11 MR. SHORT: That's correct.

12 MR. MONDROW: Okay. And attached to these minutes, if
13 you look at the back, is the -- Appendix A is actually the
14 rationale that each technical-panel member submitted, and
15 that's what's been filed to date at least in this process.

16 MR. SHORT: Yeah, the input to the rationale for their
17 vote is key, and it's also provided to our board, the IESO
18 board, when it comes to making their decisions.

19 MR. MONDROW: And would the IESO board have been
20 provided, though, with the full minutes or just the
21 rationale?

22 MR. ZACHER: It's included in the IESO's required
23 filings.

24 MR. MONDROW: Sorry, I am not sure that --

25 MR. ZACHER: So as you know, the IESO is required to
26 file --

27 MR. MONDROW: When I say "board" I mean the IESO
28 board. Maybe I haven't been clear enough.

1 MR. ZACHER: That's right, yeah.

2 MR. MONDROW: Sorry. So the minutes would have been
3 provided to the IESO board together with the rationale
4 appendix; is that right, Mr. Zacher?

5 MR. ZACHER: I believe so, but all of this material
6 has been filed in this proceeding, so everything that was
7 supplied to the IESO board has been filed.

8 MR. MONDROW: Well, I don't know if these were filed,
9 so can we just -- Mr. Short, I will assume -- well, I guess
10 I will ask for an undertaking if you could just confirm
11 that the IESO board received the technical-panel minutes of
12 meeting as well as the rationale summary when they
13 considered the amendments; would that be okay?

14 MR. ZACHER: I mean, it's part of what's been filed in
15 this proceeding, but I don't mind taking an undertaking and
16 confirming that.

17 MR. MONDROW: So you mean I could look it up? Is that
18 what you are telling me?

19 MR. ZACHER: Yeah, that's right.

20 MR. MONDROW: Okay, that's fine. I will look it up.

21 MR. SHORT: I can look at my computer.

22 MR. MONDROW: That's okay. Thank you for being polite
23 about it, Mr. Zacher.

24 Mr. Anderson was asked by your counsel, I believe, on
25 day one to confirm that the representative on the technical
26 panel voted in favour of the amendments, and I just want to
27 take you to what the minutes say about her concerns. And
28 you can see that starting at the bottom of page 3 of the

1 minutes.

2 But maybe just to save time, if possible, would you
3 accept that it was Sarah Griffiths, who I think your
4 counsel was referring to as representative of AEMA, and she
5 expressed at this meeting some considerable reservation
6 about the market-rule amendments absent resolution of the
7 activation or energy payment issue. Would you agree with
8 that?

9 MR. SHORT: So I agree with the comments that are in
10 the minutes, and I also refer you to her comments with
11 respect to the vote. I recognize she had reservations, but
12 she is also supportive of markets and competition to meet
13 IESO's need for capacity. That's probably one of the
14 reasons why she voted in favour.

15 MR. MONDROW: If we could go to page 5 at the bottom,
16 just to capture -- I mean, she talks about this throughout,
17 but I have a limited amount of time with you, so let's
18 start at page 5 at the bottom, where it says "Ms.
19 Griffiths":

20 "Ms. Griffiths said that members within her
21 constituency had not been activated in the energy
22 markets, while adding that the TCA was a new
23 option and its rules should be right from the
24 beginning. It was on that basis that AEMA and
25 AMPCO submitted their comments during the TCA
26 stakeholder engagement and directly to the
27 technical panel. Ms. Griffiths expressed her
28 personal view that it was very important to move

1 forward with the TCA in December and that
2 cancellation of the ICA represented an overall
3 threat to some forms of market design."

4 So can I conclude from that statement, Mr. Short --
5 and you were at the meeting, not me -- that Ms. Griffiths
6 expressed concerns but on a personal basis voted in favour
7 of the amendments? Is that what happened?

8 MR. SHORT: So the best person to ask is probably
9 Sarah, but I would suggest that it was her view. Whether
10 it was hers or her representing Enel X I am not entirely
11 sure, but I can say as noted she is interested in moving
12 markets forward and supporting competition.

13 MR. MONDROW: Can we look back at page 3, bottom of
14 the page, "Sarah Griffiths said the community she
15 represents". Do you have that?

16 MR. SHORT: Yes, I do.

17 MR. MONDROW: "the community she represents has always
18 supported the transitional capacity auction, as
19 well as the initiative to expand the demand
20 response auction and include more resources.
21 However, ever since demand response resources
22 were migrated from the Ontario Power Authority
23 contract program, there has been a concern about
24 market fairness, given that DR providers are not
25 paid for meeting their energy dispatch
26 requirements. She noted a concern that the issue
27 has remained on the demand response working group
28 agenda, the development of market rules and

1 design has not advanced, and now the issue has
2 become a fast-track priority. She said the legal
3 brief submitted to the panel by the Advanced
4 Energy Management Alliance and the Association of
5 Major Power Consumers of Ontario called for a
6 six-month delay in TCA Phase 1 to address
7 concerns regarding the potential discriminatory
8 nature of the market rules."

9 Will you agree with me when I suggest that that
10 passage and others in these minutes indicate that while
11 Sarah Griffiths voted in favour of the market amendments it
12 was not without reservation, and she expressed those
13 reservations to you in the meeting?

14 MR. SHORT: Yeah, that's certainly fair.

15 MR. MONDROW: Thank you. Am I also correct that part
16 of the technical panel's deliberations and ultimately the
17 decision of the members to approve the minutes was premised
18 on repeated representations from you, Mr. Short, that the
19 IESO was going to take a good hard look at this issue? Is
20 that fair?

21 MR. SHORT: I think that's -- both myself as Ms.
22 Trickey were at the meeting and expressed the fact that we
23 would move forward with the energy payment issue.

24 MR. MONDROW: Which is precisely what you are doing.
25 You followed through with that.

26 MR. SHORT: Yes.

27 MR. MONDROW: I also want to note before I leave these
28 minutes, at the bottom of page 6, an exchange, Mr. Short,

1 that you were involved with with David Brown of the OEB,
2 who I am tempted to call Dr. Brown, but I will call Mr.
3 Brown.

4 Mr. Brown, OEB asked -- this is the bottom of
5 page 6 --

6 "asked for clarification of the statement in the
7 legal brief that the IESO had advised demand
8 response participants to build utilization
9 payments into their auction offers. Mr. Forsythe
10 said loads had been looking for a provision
11 similar to utilization payment, and the IESO
12 wasn't prepared to allow it, but advised entities
13 to build the provision into their bids. In the
14 new TCA rules, that advice applies to loads but
15 not generators, which would incur costs and
16 receive no corresponding payments. Mr. Brown
17 asked what equivalent provisions would apply to a
18 generator entering the market today. Mr. Samant
19 said he would assume the rules would be
20 unchanged. Ms. Griffiths said the requirement to
21 add the energy payments affected the
22 competitiveness of her constituency's energy
23 bids, potentially requiring bidders to adjust
24 their option offers accordingly."

25 Mr. Brown asked whether the advice to loads would be
26 the same today. Mr. Short said it would still be up to
27 loads to decide how they wanted to participate in the
28 capacity auction.

1 So it seems to me, Mr. Short, that you were fully
2 aware of this concern, and that the DR community had at
3 least advised you that they had to build costs into their
4 capacity bids that generators didn't, and that was a
5 problem for them.

6 Was that your understanding of that discussion?

7 MR. SHORT: So through the course of the conversation,
8 I think it's reasonable what's been commented on here that
9 it's a concern for the community which is -- and it's a
10 complex issue again why we wanted to complete the study
11 with the intention of moving forward with the energy
12 payment study, but also moving forward with the TCA with
13 respect to our reliability need.

14 MR. MONDROW: So can we look at paragraph 99 of your
15 evidence, please? And the question is:

16 "What is the IESO's response to Mr. Anderson's
17 statement about the IESO proposing that
18 participants in the DRA include work-around
19 payments in their bids?"

20 And your answer is:

21 "The IESO does not know what Mr. Anderson is
22 referring to in this statement. It is up to a
23 DRA participant to determine their auction bid
24 prices, including what costs they factor into
25 their bids."

26 So looking at this -- hopefully fairly, Mr. Short --
27 it appears to me that what you answered is you're not aware
28 of the IESO ever advising DR resources to include

1 activation costs in their capacity bids, not saying you
2 weren't aware that they were doing it or at least they said
3 they were doing it, right? You were aware that they said
4 they were doing it?

5 MR. SHORT: Just give me a moment, please.

6 MR. MONDROW: Sure. So you did answer the question I
7 think accurately, I am assuming. I am just trying to
8 clarify your answer.

9 MR. SHORT: I may be incorrect, but I believe --
10 without taking the time to do all the cross referencing, I
11 believe this comment 99 was in response to Mr. Anderson's
12 affidavit on paragraph 15, where he says:

13 "I am informed by AMPCO members and verily
14 believe that an existing dairy processes, an IESO
15 proposed work-around has sometimes been used."

16 I think we were referring to the specifics of that
17 work-around.

18 MR. MONDROW: Right. So in fairness to you, I think
19 what this evidence is telling me anyway is you are not
20 aware of the IESO ever advising anyone to do that. What
21 you are not saying here is that you are not aware that
22 people have advised you that that's what they do.

23 Is that a fair read of your statement in paragraph 99?
24 I am not suggesting -- sorry, I will let you finish.

25 MR. SHORT: No go ahead, sorry.

26 MR. MONDROW: I am not suggesting you knew the IESO
27 told someone to do it and you lied. What I am suggesting
28 is when you answered the question, what you answered in

1 response to Mr. Anderson's affidavit is you're not aware of
2 the IESO ever telling anyone to do it.

3 But I think what we have seen, and I am asking you to
4 agree that you, at least, are aware that that's what people
5 say -- some people say they do, they build a work-around
6 into their bid.

7 MR. SHORT: Yeah, I think that's fair.

8 MR. MONDROW: Okay, thanks.

9 MR. MONDROW: Mr. Short -- sorry, I almost called you
10 Mr. Anderson. You have hair and he doesn't, so that can't
11 be the case. I told him I would get that in.

12 Mr. Anderson testified on Monday that if a DR resource
13 takes consumption down in response to an ICI program
14 incentive -- we talked about those earlier today -- and
15 thus was unavailable in accord with its DRA requirements,
16 so this is a capacity obligated demand response resource,
17 it would be subject to a claw-back of availability
18 payments. Is that correct?

19 MR. SHORT: I think I can answer it this way. If a
20 demand response resource, it's getting long here, wishes to
21 manage their availability, they can reduce their offer --
22 sorry, their bid in the energy market and we will claw back
23 some of their fees through their availability payments
24 through a non-performance -- sorry, through a non-
25 performance charge, which could be an availability charge.

26 MR. MONDROW: And Mr. Anderson testified that in peak
27 months, summer and winter, it's a two-to-one clawback
28 ratio, is that right?

1 MR. SHORT: So, yeah, it is two-t-one. However, they
2 get the availability payment. So there's -- I will call it
3 say it's a dollar, say it's a dollar, we give them a dollar
4 for that particular interval. So it's not over the course
5 of the month; it's just the particular interval that they
6 have dropped their offer down, sorry their bid down.

7 And so if it's one dollar, is there -- I will call it
8 their availability payment for that particular interval, we
9 will claw back a dollar of that, so essentially net zero on
10 some months, it goes to 1.5 or it could be up to two times.
11 So the net out would be, I guess worst case, a one-time
12 non-performance charge, because we give one and take away
13 TWO, the net is minus 1.

14 MR. MONDROW: Okay, yeah, fair enough. And the highest
15 clawback, the lowest net, would be during peak demand
16 periods, generally middle of summer or middle of winter.

17 MR. SHORT: Yes.

18 MR. MONDROW: Which is also in system peaks,
19 obviously.

20 MR. SHORT: Typically, yes, although we have seen
21 system peaks now in September for the last three years and
22 our intent was to change the rules for the December 2019
23 auction. But those have been rolled back now, so hopefully
24 we won't have a system peak in September again.

25 MR. MONDROW: Can you go to tab 8 of our compendium,
26 please? So again, this is exhibit K3.2.

27 This is an excerpt from Dr. Rivard's evidence, and I
28 am looking at paragraph 52. I am actually looking at the

1 part of the paragraph at the top of page number 29 of Dr.
2 Rivard's evidence. And you will see in the middle of that,
3 that last paragraph on page 29, Dr. Rivard writes:

4 "In effect, the ICI rewards DR resources that are
5 also class A consumers by compensating them twice
6 for making their generator available, once
7 through the avoidance of the global adjustment,
8 which recovers the capacity cost of the committed
9 generator, and once through the availability
10 payment."

11 But given the clawback, that's not the case, is it?

12 MS. TRICKEY: I think what Dr. Rivard was referring to
13 is the fact that as we have talked about, demand response
14 resources may choose to also participate in the ICI, which
15 would mean that they would want to reduce their load to
16 miss those peak hours, to enable them to do that and still
17 participate in the demand response auction. We require
18 them to signal the fact that they're reducing their
19 response for the ICI participation by putting in a bid
20 below \$100.

21 We won't get into the mechanics of it, but essentially
22 that tells us, hey, I am now reducing my demand for the
23 purposes of the ICI, not for the DRA auction.

24 So as you have identified, that does mean that in
25 those hours, we claw back what we paid them, and if it's a
26 peak hour, we claw back double.

27 So yes, there will be hours where they won't
28 receive -- if they do both where they won't receive that

1 availability payment. I think what Dr. Rivard's referring
2 to is the fact that they still receive that payment through
3 the rest of the year. So they can -- some of the
4 investment that they might need to undertake to be able to
5 be a demand response participant, say, it's investing in
6 controls or other things to help them be able to do that,
7 you could consider that some of that investment -- well, a
8 lot of the investment could be paid for through the money
9 that they save in the ICI and that they're also getting
10 availability payments through the demand response auction.

11 So you could see that they are getting some form of
12 compensation through two different things for being able to
13 do the same thing. I think that we have tried to separate
14 the two so that it's at least -- so that they are not
15 getting that availability payment in the hours that they
16 are reducing for the purposes of the ICI, but I think his
17 point was that some of that investment -- they're able to
18 recover that investment in two different ways.

19 MR. MONDROW: He said they get compensated twice.
20 They don't get compensated twice in the same hour; right?

21 MS. TRICKEY: They don't get compensated twice in that
22 hour; that's correct.

23 MR. MONDROW: Thanks. Could you go to tab 9 of our
24 compendium, please. Ms. Trickey, I think this is probably
25 for you, because I think you had addressed this topic in
26 your direct this morning. So just before we get to the
27 topic, tab 9 of our compendium, which is Exhibit K 3.2, is
28 a copy of a presentation from the demand response working

1 group meeting materials dated June 19th, 2019, and if you
2 look at the agenda which is on page 2, one of the agenda
3 items at 10:50 a.m. was scheduled to be "presentation
4 discussion cost recovery for out-of-market activation
5 payments HDR resources proposal". That's what you were
6 talking about this morning, Ms. Trickey; is that right?

7 MS. TRICKEY: That's correct.

8 MR. MONDROW: Okay. And if you go to page 37 of the
9 presentation -- I didn't reproduce the whole presentation,
10 just the section -- the purpose is described there as:

11 "Discuss a proposal to provide HDR resources cost
12 recovery for out-of-market activations -- i.e.,
13 testing or emergency activations -- consistent
14 with treatment of other resource types."

15 And at the bottom of page 38 you say:

16 "Observe bid prices and stakeholder feedback
17 indicate that activation costs explicit and
18 opportunity can be significant for HDR
19 resources."

20 So Ms. Trickey, would you agree that activation costs
21 explicit and opportunity can be significant for HDR
22 resources?

23 MS. TRICKEY: I agree with the statement there, which
24 I think is really indicating that when we look at bid
25 prices the bid prices are quite high. That indicates to us
26 that what they are factoring into when they want to consume
27 is a very high cost, so, yeah, I would agree with that.

28 MR. MONDROW: And if you look with me at page 40, last

1 bullet says:

2 "In the context of the proposed capacity
3 auctions, where HDR will be competing against
4 other resources types, how these costs..."

5 And we are talking about the out-of-market activation
6 costs:

7 "...are recovered will potentially impact market
8 efficiency."

9 Do you agree with that statement?

10 MS. TRICKEY: Yes, I do.

11 MR. MONDROW: Okay. Mr. Short, on Monday Mr. Barz on
12 behalf of APPrO took Mr. Anderson to a graph showing HDR
13 performance testing failure rates. Are you familiar with
14 that issue generally?

15 MR. SHORT: We're familiar, but actually, Ms.
16 Trickey's probably more familiar.

17 MR. MONDROW: Oh, okay. That's fine. Nice punt.

18 MR. SHORT: If that's okay.

19 MR. MONDROW: Yes, that's fine. Ms. Trickey, you
20 should go to -- sorry, I am getting punchy -- can you go to
21 tab 10 of our compendium, Exhibit K3.2. And this is yet
22 another set of minutes. This is the demand response
23 working group meeting notes June 19th, 2019, and I am going
24 to look at page 4 at the bottom.

25 And at page 4 at the bottom there's a comment
26 italicized, which I think means it's an IESO -- recording
27 of an IESO comment:

28 "The IESO acknowledges that HDR is a new resource

1 and that there is an opportunity for the IESO to
2 better understand their level of performance and
3 what is holding HDR resources from passing tests,
4 whether it is the testing methodology or the
5 capabilities of the resource, the IESO is open to
6 further discussions."

7 Would you agree with that statement, Ms. Trickey?

8 MS. TRICKEY: Yes.

9 MR. MONDROW: Thanks. And one last question for you,
10 Mr. Short, please. If you could look with me at tab 10 of
11 our compendium. This is another excerpt from the affidavit
12 of Dr. Rivard. I want to read to you paragraph 91.

13 MR. SHORT: You mean tab 11?

14 MR. MONDROW: Oh, did I say tab 10? I'm sorry, tab
15 11, yes, thank you, last tab, paragraph 91.

16 Dr. Rivard says:

17 "The presence of the global adjustment means that
18 the FERC net benefits test will rarely if ever be
19 satisfied in Ontario. Furthermore, there would
20 be significant complications for the IESO to
21 implement the net benefits test in Ontario due to
22 the global adjustment. In my opinion, the
23 evidence shows that there is no net benefit --
24 nice little play on words -- to even further
25 studying the merits of the application of the net
26 benefits test in Ontario."

27 So having received Dr. Rivard's evidence, Mr. Short,
28 and read it, are you now going to abandon that project?

1 MR. SHORT: Sorry, are you referring to the energy
2 study project?

3 MR. MONDROW: Yeah.

4 MR. SHORT: That's actually -- I am going to punt
5 again.

6 MR. MONDROW: Nice. Ms. Trickey, are you going to
7 abandon the project?

8 MS. TRICKEY: No, we -- as I said, we are committed to
9 completing that project, and that is something that we will
10 be looking at as part of that, is how would a net benefit
11 study play out in Ontario.

12 MR. MONDROW: Thank you very much, Ms. Trickey, Mr.
13 Short, and Madam Chair, just before thanking you, I would
14 also like to also thank Ms. Walters for helping with the
15 flipping back and forth. She did an excellent job. Thank
16 you very much.

17 MS. SPOEL: Thank you, Mr. Mondrow.

18 I think, Mr. Rubenstein, you're next.

19 MR. RUBENSTEIN: Yes, I am.

20 MS. SPOEL: Okay, great. And what materials -- do we
21 have a list or anything of what materials you might be
22 referring to, or are they all in this large binder -- oh,
23 you have got your own compendium. Have I got it?

24 MR. RUBENSTEIN: So I will be referring to a couple
25 things, so the first is K3.1, which was IESO's examination
26 document.

27 MS. SPOEL: I found it.

28 MR. RUBENSTEIN: So that's document number 2, but

1 document number 1 is essentially the K3.1, which is simply
2 the examination compendium from the IESO which has the
3 IESO's evidence.

4 MS. SPOEL: Great, thank you.

5 MR. RUBENSTEIN: As well as, I have a compendium, if
6 we can mark that short compendium, just a few documents, on
7 the record.

8 MS. DJURDJEVIC: That very large tome of a few pages
9 will be Exhibit K3.5.

10 **EXHIBIT NO. K3.5: SEC COMPENDIUM FOR IESO PANEL 5.**

11 MR. RUBENSTEIN: And the last thing is -- and I --
12 just from some discussions that were brought up, I may
13 refer to -- I told my friend, so it may come up on the
14 screen, but it's from K1.6. This was that -- IESO's cross-
15 examination compendium of Mr. Anderson, but it's a very
16 short amount, and if I do refer to it, it will be brought
17 up on the screen, so you don't need to --

18 MS. SPOEL: Okay, thank you, because I am not sure we
19 have that --

20 MR. RUBENSTEIN: -- dig that out.

21 MS. SPOEL: -- in the room any more, thank you.

22 **CROSS-EXAMINATION BY MR. RUBENSTEIN:**

23 MR. RUBENSTEIN: I just have a couple of sort of grab-
24 bag of areas that haven't been addressed from the cross-
25 examinations today, so bear with me, please.

26 I just want to understand the intent of the TCA as it
27 relates to your evidence and the issue before us. And if
28 we turn -- as I understand it -- you don't need to, I

1 guess, turn up the evidence -- the TCA is the first step in
2 evolving the DRA auction to a more competitive capacity
3 auction; correct?

4 MR. SHORT: That's correct.

5 MR. RUBENSTEIN: And the intent is to -- where
6 historically you've relied on long-term contracts to secure
7 capacity -- is to move it to more of an auction mechanism;
8 correct?

9 MR. SHORT: It's twofold, I think you have said that
10 accurately, about trying to not necessarily sign long-term
11 contracts. We've seen challenges with the -- ultimately
12 the competitiveness, the lack of transparency and the
13 flexibility.

14 The other thing, just a slight suggestion, is we are
15 evolving the DRA to something else, because we're looking
16 to introduce other resources in the next, so demand
17 response auctions, DRs essentially had their own area to --
18 their own kind of exclusive auction, and we are trying to
19 add other resources to the mix to make it more competitive
20 and to broaden the participation so we can meet our 2023-
21 plus needs.

22 MR. RUBENSTEIN: And as I understand, you had a DR-
23 only auction for a number of years, correct?

24 MR. SHORT: Correct, since 2015.

25 MR. RUBENSTEIN: It is the IESO's view that it's been
26 a success.

27 MR. SHORT: In terms of broadening its original intent
28 was to get folks ready for future participation we have

1 certainly increased the level of participation, the
2 megawatts and -- that are acquired and offered into the
3 auction, and as well the price that ultimately consumers
4 would pay has been -- gone down. I think it's just over
5 40 percent since 2015. So you would check the box on a lot
6 of successes.

7 MR. RUBENSTEIN: And I understand from the evidence
8 you have a DR auction, so you have secured demand response
9 capacity over the last few years. But they have been
10 activated very infrequently, correct?

11 MR. SHORT: Correct. As Ms. Trickey indicated,
12 it's -- when we acquire that additional level of capacity,
13 it's usually more of an assurance so we can comply with our
14 standards and make sure we have got sufficient capacity for
15 those the worst -- what planners look for is kind of the
16 worst hour of the worst day of the entire year, and we are
17 trying to plan for that, because that's part of our job, to
18 worry about the what ifs.

19 MR. RUBENSTEIN: If we go to page 2 of our compendium,
20 this is K3.5, we asked -- you had provided some information
21 in the question, not exactly what we asked.

22 But ultimately, as I understand the last auction, the
23 December 2018 auction, which covered a year -- which would
24 cover from May 1st, 2019, to April 30th, 2020, you're
25 expected to ultimately spend on capacity payments
26 \$44 million. Do I have that right, that number right?

27 MR. SHORT: Yes, approximately, assuming resources
28 meet their capacity obligations.

1 MR. RUBENSTEIN: So even with the limited activation,
2 it's your view that that \$44 million provided the value
3 that you've talked about, correct?

4 MR. SHORT: Yes.

5 MR. RUBENSTEIN: All right. If we can go now to your
6 evidence, you can pull this up at K3.1, paragraph 3. So
7 it's on page -- paragraph 3. You have three bullet points
8 -- sorry, I will just wait until you have it.

9 MR. SHORT: Yes.

10 MR. RUBENSTEIN: I take it you lay out three bullet
11 points, and I read these three bullet points as really the
12 reason why you think that TCA is important. That's the best
13 place I could find ...

14 MR. SHORT: Yes.

15 MR. RUBENSTEIN: So I want to first ask about part A.
16 So the first thing you say is it's important for
17 reliability purposes to launch a TCA in December 2019 to
18 progress in the TCA in a phased manner, and ultimately to
19 get to the 2023 capacity gap, correct?

20 MR. SHORT: Correct.

21 MR. RUBENSTEIN: And you talk about the 2023 capacity
22 gap in the evidence and in a lot of the excerpts. And we
23 had asked you in an interrogatory, in SEC number 7 which is
24 on page 11 of our compendium, and the question was, is
25 there a forecast capacity gap before the summer of 2023, if
26 so, please provide details, and your answer is yes. Do you
27 see that?

28 MR. SHORT: Yes, that's the -- if you look at the line

1 that refers to summer adequacy reference outlook without
2 existing resources for 2020, the number there at the time
3 is indicated at 811 megawatts.

4 MR. RUBENSTEIN: Okay. So my first question is: Is
5 the TCA necessary to meet the capacity gap before 2023, or
6 is it only at 2023?

7 MR. SHORT: It's before 2023 as well. We are also
8 preparing for the bigger gap in 2023.

9 MR. RUBENSTEIN: Now, you provided a number of -- you
10 had a long exchange with Mr. Mondrow about the capacity
11 gap. And when I flipped to this while you were having the
12 discussion, the numbers didn't seem to be the same.

13 And I took it -- and I know there's an undertaking
14 about some more updated numbers, but I was just trying to
15 understand the relationship between your response to this
16 specific question and what the actual capacity gap is in,
17 say, 2020, '21, '22.

18 Is this just an outdated table and you are going to
19 provide the updated numbers in response to undertaking
20 showing different things?

21 MR. SHORT: Yeah, this is the information we published
22 in September 2018. And we will look to see if we can find
23 updated information with respect to a reliability outlook
24 that was published maybe a little bit more recently.

25 MR. RUBENSTEIN: Well, you talk about being published.
26 Like is there a more updated number that you have?

27 MR. SHORT: Yes, there is.

28 MR. RUBENSTEIN: And are you only going to provide it

1 if it's published? Sorry, I didn't fully understand.

2 MR. SHORT: So I think we took an undertaking to
3 provide that information.

4 MR. RUBENSTEIN: If it's published or if you have a
5 more updated and you just haven't published it.

6 So I guess the question I asked in this interrogatory
7 -- and I am trying to understand what the actual capacity
8 is, not what information you have published, but what
9 ultimately is the IESO's best view of the gaps in these
10 years are.

11 MR. SHORT: So the information provided in the
12 interrogatory is the best long-term view of information
13 that we have. We also produce short term information as
14 well, and maybe a better response for this interrogatory
15 could have been that reliability outlook information.

16 MR. RUBENSTEIN: And that's what you are going to be
17 providing in that undertaking. All right.

18 MR. ZACHER: We will update. I just noticed one -- I
19 think in this interrogatory response, should it referenced
20 at September 13, 2019? I just want to make sure that it's
21 correct. No, I am wrong; sorry, I apologize.

22 MR. SHORT: 2018.

23 MR. ZACHER: 2018, just wanted to make sure there
24 wasn't a mistake.

25 MS. SPOEL: That's fine, thank you.

26 MR. RUBENSTEIN: So if we go back --

27 MR. SHORT: Sorry, we are trying to answer the
28 question here as succinctly as possible when it comes to

1 the IR response.

2 And so the information was a gap before 2023, and so
3 we provided the latest. So we have long term information
4 which is -- which was that the September 2018 information.
5 So that's what we are trying to provide you, you know, as
6 simplistic as possible.

7 We do update numbers on a more regular basis and that
8 reliability outlook shows, but it might only just show for
9 September, and I would have to look for the information -
10 sorry, it might only show for 2020, and I would have to
11 look at that information.

12 MR. RUBENSTEIN: But even if we looked at the numbers
13 here with respect to that information, so in 2019
14 essentially you are in a surplus. There's no capacity gap,
15 correct?

16 MR. SHORT: Yeah, that's correct.

17 MR. RUBENSTEIN: But you still ran the DR auction in
18 2019 to secure capacity?

19 MR. SHORT: Again, consistent with trying to get ready
20 for 2023, we have viable DR resources and we are looking to
21 continue to support them being available for that future
22 capacity in 2023

23 So no different than generators, we are trying to
24 ensure there's an opportunity for folks to participate,
25 ideally more broadly than just demand response.

26 MR. RUBENSTEIN: And is it your view like --

27 MS. SPOEL: Mr. Rubenstein, I am having some trouble
28 hearing some of your words. If you can sit a little closer

1 to the microphone, it might -- you are soft spoken and
2 sometimes it's hard to hear.

3 MR. RUBENSTEIN: I apologize. This ties into my
4 question on part B of paragraph 3. So in part B you say --
5 and this is essentially, as I understand, what Kingston
6 Cogen's evidence has been, that ultimately as contract --
7 existing generators come off contract, they need some sort
8 of payments to stay in operation until that 2023 when the
9 large capacity gap occurs, correct?

10 MR. SHORT: We are looking for the opportunity to
11 provide that capability --

12 MR. RUBENSTEIN: The opportunity to earn some revenue.

13 MR. SHORT: Yeah, and to supply capacity that we need.

14 MR. RUBENSTEIN: Okay. And then the third thing you
15 talk about is it will increase competition and benefit
16 consumers by allowing participation of new capacity
17 resources and increasing the supply of capacity.

18 I take it what you mean is more bidders in the
19 auction, more capacity that's bid in the auction is likely
20 to lower the clearing price of the auction, correct?

21 MR. SHORT: Yeah. Typically increased competition
22 leads to opportunities for innovation, for maybe better
23 risk management, all sorts of -- it tends to put pressure
24 on price and so it may not result in a lower price, but it
25 usually results in the lowest capacity price.

26 MR. RUBENSTEIN: All right. If I can you to turn to
27 page 9 of our compendium? We asked you: The IESO has
28 provided its view on the expectation regarding the

1 frequency of economic activation of DR resources. On a
2 comparative basis, what is the view of the forecast
3 quantity of energy that generators have capacity
4 obligations as a result of the TCA will produce?

5 So just stopping there, your evidence talks about what
6 your expectation on the activation of DR resources are with
7 energy payments, correct?

8 MR. SHORT: Just give me a second to read it. Sorry,
9 my apologies. Could you repeat the question again now that
10 I have read it?

11 MR. RUBENSTEIN: The first part of that question is in
12 your -- relating to your evidence where you talk about how
13 you just don't expect there's going to be much activation
14 of the DR resources regardless of the energy payment.

15 MR. SHORT: I think we've looked at the history over
16 the first four years, yes, and we think the probability is
17 extremely low.

18 MR. RUBENSTEIN: Essentially, SEC is asking in this
19 question, well, what about at the flip side? How does this
20 work about generator activation? Do we expect in a TCA
21 they are going to be activated very often or not? And your
22 response, as I take it, is we don't really -- paraphrasing
23 -- we don't know, we don't have the history; correct?

24 MR. SHORT: It's up to the participant to provide
25 energy offers, you know, economic for them, and so it
26 depends on how they offer into the market. That will judge
27 -- that will ultimately be how often they get dispatched is
28 based on their economics in the -- under the energy market.

1 MR. RUBENSTEIN: So we don't know -- we don't have a
2 comparative basis then to say if we provide energy payments
3 to DR resources that have a capacity obligation, they may
4 be activated at a certain level. We can't do the exact
5 same thing with respect to the generators who may have a
6 capacity obligation.

7 MR. SHORT: Yeah, it becomes challenging, because we
8 don't know what generators will be successful in the
9 auction -- well, I guess, there won't be any right now, but
10 in June, for example, if we run another auction, we won't
11 know who's successful. Every generator has a different
12 cost profile. It could be a different type of generator,
13 different steam/gas mix, could be a storage facility. We
14 don't know the specifics of their facility.

15 MR. RUBENSTEIN: All right. If you can go to page 10
16 of the SEC compendium. So in this interrogatory -- I will
17 paraphrase, but essentially we were asking your views or
18 analysis regarding the impact on costs that will be borne
19 by consumers by providing energy payments to demand
20 response providers.

21 And your response was you haven't done any analysis,
22 and you essentially pointed us to the comments in the
23 Navigant study; is that correct?

24 MS. TRICKEY: That's correct.

25 MR. RUBENSTEIN: And in the Navigant study that we've
26 talked about they talk about the effect of the global
27 adjustment; correct?

28 MS. TRICKEY: Correct.

1 MR. RUBENSTEIN: And there was some -- I had some
2 discussion yesterday with Dr. Rivard about this, and
3 there's been some others who have had this discussion, and
4 it was essentially that because certain contracts --
5 certain generation that exists already in the system are on
6 long-term contracts or through regulated rates, a reduction
7 that you may get in the market price, HOEP, because of a DR
8 resource is being activated may be essentially clawed back
9 through the global adjustment; do you recall those
10 discussions?

11 MS. TRICKEY: Correct, yes, I do.

12 MR. RUBENSTEIN: And I used OPG as an example, a
13 utility I know well, but essentially they are provided a
14 certain payment amount for their megawatt-hour, and if HOEP
15 is less than that amount then they -- and they are
16 producing, they get essentially a payment from the global
17 adjustment; correct?

18 MS. TRICKEY: Correct.

19 MR. RUBENSTEIN: And I understand similarly, for
20 example, through the FIT -- some of the FIT contracts, wind
21 generators, it's very similar. They are guaranteed
22 essentially a price on a production basis, and they get the
23 difference from the global adjustment, correct?

24 MS. TRICKEY: I am not an expert on all the different
25 contract types, but generally there are different contract
26 types that do provide that top-up if the energy market
27 doesn't provide enough.

28 MR. RUBENSTEIN: I was wondering if there is also the

1 other situation which people have -- feel like I have heard
2 about, and I am not sure is correct, where certain
3 generators are guaranteed an overall revenue, not just a
4 revenue on a per megawatt basis if they produce. And so if
5 a demand-side resource essentially outbids a certain -- one
6 of these generation facilities and thus they are not
7 producing, they still would get a payment from the global
8 adjustment?

9 MS. TRICKEY: I am not an expert. There are so many
10 different contract types that -- and I can't say that I
11 know all of them. I know there are a few types that I have
12 some information on, but I wouldn't want to comment on
13 that.

14 MR. RUBENSTEIN: Fair enough.

15 And as I understand, the problem with the clawback is
16 that -- or the -- what Navigant talks about and what's been
17 talked about is ultimately the benefit that you may get
18 from paying the energy payment may actually be clawed back
19 and customers could be potentially worse off, correct?

20 MS. TRICKEY: Correct.

21 MR. RUBENSTEIN: And that's an issue you are going to
22 be addressing in the context of your engagement, the
23 possibility of a net benefits test, high level.

24 MS. TRICKEY: Correct.

25 MR. RUBENSTEIN: Now, you were asked -- let me ask you
26 about your response. I know your view is ultimately -- if
27 I could take you to your evidence. You mention at
28 paragraph 87 -- my apologies, paragraph 108. You're asked

1 -- or you answer your own question, I guess, in the
2 evidence, where it says:

3 "Will the IESO consider energy payments to DR
4 resources?"

5 And you say:

6 "Yes. While DR resources will not be entitled to
7 receive energy payments if activated under the
8 DCA during the December 29th commitment period,
9 IESO has not made a final determination on the
10 issue."

11 Do you see that?

12 MS. TRICKEY: Yes.

13 MR. RUBENSTEIN: And I know you haven't made a final
14 decision, but does the IESO have any preliminary views on
15 the appropriateness of this?

16 MS. TRICKEY: Yeah, I think that we do have concerns,
17 and that's why we wanted to take the time to do a proper
18 study. If we thought it was an obvious answer, I think we
19 would have proceeded. But as there's been lots of
20 discussion with the various types of concerns and -- but,
21 you know, that doesn't mean that we haven't missed
22 something, so, you know, yes, we have concerns and, yes, we
23 intend to complete the study to make a final determination.

24 MR. RUBENSTEIN: Is that the same concern about why
25 you would launch a study or in the context of all the
26 discussions that you have had since the filing of the AMPCO
27 application, the sitting here listening to us, I assume the
28 discussions you internally have about the issue -- is there

1 any concerns that you have that -- or you have learnt that
2 you just -- simply hasn't been brought out during these
3 discussions? And by discussions, sorry, I mean in the con
4 text of this hearing.

5 MS. TRICKEY: It's certainly been very informative,
6 helpful in our deliberations. I can't say that I've
7 learned anything brand-new, but it's certainly helped
8 deepen understanding of the various positions and
9 considerations.

10 MR. RUBENSTEIN: Now, my understanding from a document
11 that was included in your counsel's cross-examination
12 compendium to Mr. Anderson -- and this is in K1.6, tab 12,
13 if that can just be -- and I hadn't seen this document
14 before, so I apologize. If it can just be put up, and this
15 is tab 12, sorry.

16 And my understanding is this is a submission from the
17 market surveillance panel to inside the engagement that
18 you're undertake -- stakeholder engagement on energy
19 payments, correct? Is that your understanding of what this
20 document is?

21 MS. TRICKEY: Yes.

22 MR. RUBENSTEIN: And as I go down the page on this, to
23 the last paragraph here on that page, it talks about order
24 745, and then further down it talks about:

25 "Loads are not paying the wholesale price but
26 seen as a barrier to fully participating in the
27 wholesale market in order 745. The study should
28 determine what market benefit, if any, would be

1 achieved by expanding energy payments of loads.
2 It is not evident that the stated goal laid out
3 in order 745 is appropriate or necessary in
4 Ontario. In the present situation a DR resources
5 that is activated saves the spot price on its
6 demand reduction analogous to a generator being
7 paid the spot price for its production. On this
8 basis an energy payment to DR resources looked
9 like a double payment and a number of
10 stakeholders appear to be urging the IESO to
11 accept order 745 as a definite ruling on this
12 issue, but the Ontario situation is different,
13 and we may share the same objectives as FERC."

14 Do you see that?

15 MS. TRICKEY: Yes.

16 MR. RUBENSTEIN: And so I take it this is -- I don't
17 want to overstate this, but as I understand, the MSP had
18 some similar initial views, I will say, than what we heard
19 yesterday from Mr. Rivard?

20 MS. TRICKEY: I think that's fair to say. I mean, my
21 interpretation of the MSP's concern here is that they are
22 raising a point that the -- one of the concerns that was
23 raised under FERC order 745 was the lack of an incentive
24 for some types of resources to really respond to the
25 wholesale electricity market price.

26 So if you're a small consumer and you're on a retail
27 rate, or like you would be in Ontario, you are on the
28 regulated price plan, if you avoid consuming because we

1 dispatch you off, you're not avoiding that wholesale price.

2 So if the wholesale price is a thousand dollars in
3 some hour, that retail price or the RPP price is still
4 going to be, you know, 7 cents or whatever -- I won't do
5 the conversions, but a lot lower. If an aggregator take as
6 whole bunch of those small loads and aggregates them to
7 participate in the demand response auction, as I have said,
8 our model is that, you know, avoiding the energy price
9 should be the appropriate incentive for them to be
10 dispatched off in the energy market.

11 Well, if you are not actually paying that price, you
12 are not avoiding it and therefore, there's a mis-matched
13 incentive.

14 So one of, I think, the goals for FERC's order was to
15 provide the energy payment to those loads, so that they now
16 had an incentive to respond to the price, which is very
17 different from what we're talking about here.

18 But I think -- and I am not saying that that was the
19 whole concern that FERC was looking at, but it was one of
20 them and it has come up in various discussions on the
21 issue. I believe it was brought up in the LEI paper, it
22 was brought up in the Navigant paper. I don't recall if Dr.
23 Rivard brought it up, but it is one of the underpinnings of
24 why FERC wanted to introduce that and it is different than
25 what we're talking about here.

26 So I don't know if that's what you are getting at, or
27 is that answering your question?

28 MR. RUBENSTEIN: Sure. Yes.

1 MS. TRICKEY: One of the additional complications of
2 this exciting issue.

3 MR. RUBENSTEIN: Lastly, I just want to understand
4 just the practical implication of what happens.

5 So assume that AMPCO is successful on this review.
6 The Board essentially revokes the transitional capacity
7 auction provisions and says essentially, for the reasons
8 that AMPCO had put forward, that there's no -- it's
9 discriminatory, because you're not providing some sort of
10 compensation activation or energy payments, that's why
11 we're doing it.

12 So the matter goes back, as I understand it, to the
13 IESO for reconsideration. I just want to understand the
14 timeline of how this is going to work.

15 So I understand you're undertaking a consultation on
16 this issue with the results, and based on what you said in
17 paragraph 87 of your evidence, you expect that you'll
18 finish that consultation in June 2020. Do I have that
19 correct?

20 MS. TRICKEY: Yes, and I believe I corrected Mr.
21 Mondrow earlier with May. I think the stakeholder
22 engagement page indicates May, but June, July, it's all
23 pretty close. So yes, we will say that time next year.

24 MR. RUBENSTEIN: So sometime in June and July, so
25 that's already -- there's another auction that would have
26 expected to be undertaken, correct, that you will not --
27 that will not be at least in the trance -- will not be a
28 transitional capacity auction, correct?

1 MS. TRICKEY: I think that that's a bit premature to
2 say definitively.

3 MR. RUBENSTEIN: Well, I don't understand. If
4 ultimately the plan is to at last complete this, I guess.
5 How would you -- how would you run the auction?

6 MS. TRICKEY: Can I just look for something quickly?

7 MR. RUBENSTEIN: Sure.

8 MS. SPOEL: Mr. Rubenstein, how much longer do you
9 think you're likely to be?

10 MR. RUBENSTEIN: This is my last, a minute or two.

11 MS. SPOEL: Okay, fine, thank you. So we want some
12 time for Board questions later.

13 MS. TRICKEY: There are a range of outcomes, I think
14 is the short answer really. It depends to some degree on
15 what the Board decides and what's included in that decision
16 to some degree on how, you know, whether we can get to, get
17 this study and what the outcomes of the study are. And I
18 am talking about the decision on the energy payments and
19 how that may be factored into the next auction or not.

20 And I think -- is that answering your question?

21 MR. RUBENSTEIN: I am just trying to understand the
22 practicalities, because as I understand, your evidence is
23 you need to run these auctions so we can get ready for 2023
24 and I just want to practically understand how this will
25 play out if AMPCO is successful, because I don't fully
26 understand.

27 MR. SHORT: Just to reiterate, we do have concerns.
28 We want to run a June 2020 auction, just so we are clear,

1 and we're obviously concerned about anything that would
2 prevent us from doing that.

3 MR. RUBENSTEIN: As I understand, in June 2020 or July
4 2020, you will be completed the stakeholder engagement.
5 And if ultimately the output of that is we should have some
6 sort of payment, energy payments, just to be clear, as I
7 understand, it's then at that point then you start the
8 process of amending the market rules to include that,
9 correct?

10 MS. TRICKEY: If we were to proceed in a typical
11 orderly way, absolutely, then, you know, what -- I guess
12 some of the dates I have been getting tripped up in my mind
13 is it says in our stakeholder engagement that we would
14 present a draft decision to stakeholders in May 2020.
15 That's the disconnect I have had over those different
16 dates.

17 But at any rate, we would present a decision, we would
18 move forward. If that decision was to move forward, then
19 if we were to move forward in an orderly way, yes, then we
20 would start the process of figuring out how to do that and
21 implementing that.

22 And I think if that's the case, then the June 2020
23 auction that we're talking about would proceed under the
24 same basis as today, that there wouldn't be an energy
25 payment in that.

26 MR. RUBENSTEIN: And if one of the outcomes of that is
27 that you need to have a net benefits test, would I expect
28 that that may take additional time to determine how to do

1 that with all the contracts and all the complexities of the
2 Ontario market, correct?

3 MS. TRICKEY: Correct.

4 MR. RUBENSTEIN: And so after the June 2020, the
5 December 2020 is the next auction after that?

6 MS. TRICKEY: Correct.

7 MR. RUBENSTEIN: And there was some discussion with
8 Mr. Mondrow that the forward period is increasing over
9 time, correct?

10 MR. SHORT: Yes, that's correct.

11 MR. RUBENSTEIN: But the 2019 auction was going to be
12 five months. Do I take it that that is really the minimum
13 amount of time you need? I know that these are longer
14 auction time periods, the forward periods are longer.

15 But it's really the five months. That's the minimum
16 amount of time you need from having the market rules --
17 from running the auction to the commitment period. Is that
18 fair?

19 MR. SHORT: I believe that's part of the stakeholder
20 process that we have had to determine to develop the DRA,
21 and we are looking to transition that to the TCA, which
22 could mean longer, which our plan is to increase the
23 forward periods.

24 MR. RUBENSTEIN: Well, under the original -- under the
25 market rules that have been stayed, it was going to be five
26 months, correct?

27 MR. SHORT: That's correct, yes.

28 MR. RUBENSTEIN: That was a TCA auction?

1 MR. SHORT: That was the first one transitioning from
2 the DRA to the TCA, yes. So again, we aren't looking to do
3 a big change when it came to the forward period. That was
4 going to wait until the June 2020 auction.

5 MR. RUBENSTEIN: Can I take from that that the minimum
6 amount of time that the IESO and participants say they need
7 as the forward period is five months?

8 MR. SHORT: I think for the December 2019 auction,
9 that's correct.

10 MR. RUBENSTEIN: But we can't say that for some of the
11 Others?

12 MR. SHORT: I think that's part of the stakeholdering
13 conversations we are have having right now.

14 MR. RUBENSTEIN: So we don't know if the June one gets
15 pushed off, you can still run a transitional capacity
16 auction if the market rules are passed to meet the May 1st,
17 2021, commitment period, if it gets pushed off.

18 MR. SHORT: So it -- there's a combination of the two
19 I guess, as to engaging what stakeholders are interested --
20 what's feasible. But it's also again our plan to
21 essentially try and solve the 2023 problem by 2021. In
22 order to do that, we start to -- have to start moving up
23 the forward periods.

24 MR. RUBENSTEIN: I know you are going to stakeholder.
25 But just with the best information we have today, it's the
26 last day of the hearing, so it's last time we will.

27 In my understanding, so for the May 1st, 2021, to
28 April 2022, you had produced June 20th as the auction date.

1 Do I take it that really, at worst case scenario, you could
2 actually run that in December, similar to what your plan
3 was for this year?

4 MR. SHORT: So I am trying to be helpful.

5 MS. SPOEL: Mr. Short, can I make a suggestion? We
6 are getting -- Mr. Rubenstein, you are a good ten minutes
7 or so over your estimated time.

8 MR. RUBENSTEIN: I have no more questions.

9 MR. SMITH: I am going to suggest that we take our
10 break now. You can think about the answer to that
11 question, and then when we come back you can answer the
12 question and we can move on to the next party, and that
13 will maybe save us all some time, and given the time of day
14 and the fact it's Friday afternoon and we all want to get
15 out of here, can we resume at 3:25 and just really have a
16 short break. Thank you.

17 --- Recess taken at 3:13 p.m.

18 --- On resuming at 3:27 p.m.

19 MS. SPOEL: Thank you, please be seated. All right,
20 Mr. Short. I think we left it that you were going to think
21 about the answer to the question that Mr. Rubenstein posed
22 to you, which was how long do you need? Could you delay
23 the start of the transitional capacity auction currently
24 scheduled for June 2020 if you needed more time to
25 implement things like any changes that might be made as a
26 result of our decision, or not, or any other changes that
27 might be required.

28 MR. SHORT: And if I've also got a five months kind of

1 the minimum.

2 MS. SPOEL: Yes.

3 MR. SHORT: I think it got it now. Sorry, it's
4 getting late.

5 So I think from our perspective right now, five
6 months, give months or take a few weeks, is the minimum
7 time. As we add new resources, that time may change.

8 What we also have -- we've lost essentially an
9 iteration right now, and we have laid out a plan to get to
10 where we think we need to be. So the combination of those
11 two items is of what stakeholders we think need, and our
12 plan to move the forward period to be ready in 2021 for
13 2023. We think the time frames are accurate, give or take,
14 you know, maybe a few weeks here or there.

15 Did I relatively answer the question, please?

16 MR. RUBENSTEIN: It's enough.

17 MR. SHORT: It's enough, okay. I appreciate your
18 indulgence.

19 MS. SPOEL: I think now it's your turn, Ms.
20 Djurdjevic.

21 **CROSS-EXAMINATION BY MS. DJURDJEVIC:**

22 MS. DJURDJEVIC: Thank you, Madam Chair. Staff has a
23 few questions and I want to sort of give you a bit of
24 context.

25 We have had a lot of in evidence the hearing about DR
26 resources, and we have been using the example of physical
27 dispatchable load. For example, the steel mill that Mr.
28 Anderson discussed and has been put to other witnesses.

1 And Staff has some questions about the other type of
2 DR participant, which is virtual DR resources. And I'd
3 like to start by -- well, first of all, we have a
4 compendium. The Panel has it on the dais, so we will make
5 that Exhibit 3.6.

6 **EXHIBIT NO. K3.6: BOARD STAFF COMPENDIUM FOR**
7 **IESO PANEL 5**

8 MS. DJURDJEVIC: And I am looking at tab 1, which
9 is -- okay, it's the May 3rd, 2019, post auction report.
10 And the very top box is you'll see -- I know it's very
11 tiny, but basically it shows the amount of capacity that
12 was committed for the summer and winter periods.

13 And then there's a breakdown if you look at the
14 columns for each season, you'll see there's physical DR
15 cleared and there's virtual DR for the summer commitment
16 period. And then moving over to the right, you have the
17 same information for the winter commitment period. Do you
18 see that?

19 MS. TRICKEY: Yes.

20 MS. DJURDJEVIC: And you'll see that under the
21 physical DR column for summer, the amount that cleared was
22 143.4 megawatts. And similarly for the winter commitment
23 period, physical DR that cleared was 168.4-megawatt. Do
24 you see that?

25 MS. TRICKEY: Yes.

26 MS. DJURDJEVIC: Now under the virtual DR that
27 cleared, we have for the summer period 407, and for the
28 winter period 472 megawatts. Do you see those numbers?

1 MS. TRICKEY: Yes.

2 MS. DJURDJEVIC: Now, would you agree, subject to
3 check, these numbers indicate that virtual DR resources
4 make up just 74 percent of the capacity in both the summer
5 and winter commitment periods?

6 MS. TRICKEY: That sounds about right.

7 MS. DJURDJEVIC: And you spent a bit of time this
8 morning during your examination-in-chief talking about
9 virtual DR resources. And given that this is three
10 quarters of the DRA market, Staff would like to understand
11 those category participants a little better.

12 So we have a few questions and if you don't have the
13 answer, but it is something you can find out, then this can
14 all be done by way of an undertaking in order to keep
15 things moving.

16 So starting -- what, for example, is a virtual DR?
17 Could you give us an example?

18 MS. TRICKEY: Sure. A virtual DR resource is really
19 simply a resource that's not -- it's typically a group of
20 resources. So it's not a large physical resource connected
21 to the grid that we see as sort of one big resource, like a
22 big industrial plant. It's a collection of small resources
23 typically connected at the distribution side of the grid
24 and aggregated up to one larger resource by an aggregator.

25 So it could be, you know, a hundred different places
26 all -- that are all in a similar area, all connected up and
27 operated by an aggregator rather than directly by the IESO.

28 MS. DJURDJEVIC: And does the IESO have any kind of

1 visibility or information as to how the virtual DR
2 resources bid in the DRA auction?

3 MS. TRICKEY: So in the auction, they would bid as --
4 so as I said, so let's say there's ten small resources in
5 one zone, an aggregator goes out and signs contracts with
6 those ten resources and said to aggregate them into one
7 resource. What the IESO sees is -- let's say that adds up
8 to 10 megawatts, we would see that as one resource of 10
9 megawatts in a zone submitted to the DR auction by an
10 aggregator as a virtual resource.

11 MS. DJURDJEVIC: And how is this resource activated,
12 if they are activated?

13 MS. TRICKEY: So the aggregator submits energy bids
14 for that -- let's call it again a 10-megawatt resource,
15 they submit bids into the energy market for this resource
16 for the amount that's available in any given hour. And
17 then it is the aggregator'[s job to work with those
18 individual facilities, businesses, whatever they are, to
19 dispatch them, so to make sure that they actually reduce
20 their load when -- if activated.

21 MS. DJURDJEVIC: And do you know, when they are
22 activated, like what happens. You mentioned they reduce
23 their load, but so far we have heard about, you know, a
24 plant shutting down and we can sort of conceptualize that.

25 But can you give us some insight into when a virtual
26 DR is activated, how does that activation process, that
27 shutting down, whatever it is, the reduction load happens?

28 MS. TRICKEY: It could be any one of many, many

1 different things. It could be a grocery store that is
2 turning off -- turning their chillers down for a few hours.
3 It could be a retail store turning down lights. It could
4 be somebody with some sort of behind-the-meter storage
5 device or something that they turn on and turn off their --
6 turn on to reduce the load that we see.

7 It's kind of endless. It could actually even be a
8 couple of thousand homes where one aggregator would reduce
9 your air conditioning, like take your thermostat and reduce
10 your air conditioning load over a large area, and do that
11 as a way of reducing load.

12 MS. DJURDJEVIC: Thank you. And can you tell us
13 anything about the kinds of cost these virtual DRs might
14 face when they're activated? So for example, the grocery
15 store with the chiller dialling down, or homes turning down
16 their ACs? Do we have any insight into that?

17 MS. TRICKEY: What the actual costs are? I mean,
18 again, there's so many variations as to what they can be
19 doing.

20 I think it's easy to say that they all have some cost
21 in the DR aggregator that has to go out and obtain these
22 customers, set up agreements with them, and gather, collect
23 the data that they need to submit to us, do all that work
24 to participate in the DRA. So there's certainly costs
25 there.

26 And then what the other costs are really depends on
27 what kind of resources. If it's a bunch of thermostats and
28 the homeowners aren't looking for any sort of incentive,

1 then there's no cost there. If it's a business that has to
2 reduce their production in some way, then obviously there's
3 some sort of opportunity cost. It could be anywhere, all
4 over the map.

5 MS. DJURDJEVIC: We have some information that IESO
6 provided in response to IRs. This is at Tab 2 of the
7 compendium. You can turn it up, but you don't need to. I
8 am only referring to it to point out that the information
9 that was provided is all with respect to physical either
10 dispatchable load or physical hourly demand response. But
11 we don't have information about the virtuals.

12 So I am going to ask if the IESO can provide any
13 information similar to this type of information, or
14 actually exactly the same -- and we can do this by way of
15 an undertaking. So I'd be looking for information as to
16 the number of virtual DR participants, total megawatt
17 capacity for the group, if it's different from what we see
18 in the post-auction report that we looked at at tab 1.
19 Thirdly, the average hourly consumption for both the 2018
20 and '19 commitment periods. And then lastly, the average
21 hourly consumption for the highest five hours in 2018, if
22 it's possible. Is it possible for the -- would you guys be
23 willing to give an undertaking to provide that kind of
24 information if available?

25 MS. TRICKEY: Just give me one second to look at this.

26 MS. DJURDJEVIC: Certainly.

27 MS. TRICKEY: Okay, so just to make sure I understand,
28 so what we did provide is -- or, sorry, you're looking for

1 this -- these numbers for virtual resources only. Okay.

2 And, sorry, could you go through, again --

3 MS. DJURDJEVIC: Yeah, so similar to what you know you
4 have in front of you, so the number of participants, the
5 total megawatt capacity for -- that cleared if it's
6 different from the post-auction report that we have, or
7 tell us it's the same if it's the same.

8 MS. TRICKEY: I don't mean to be difficult, but I want
9 to stop you at each one. The number of participants, by
10 that do you mean the number of aggregators submitting these
11 or do you mean the actual number of contributors, as I
12 said, like --

13 MS. DJURDJEVIC: The aggregators, the --

14 MS. SPOEL: Can I make a suggestion? If you go back
15 to the post-auction summary report, the names of all the
16 demand response participants are listed, and maybe the
17 easiest way -- and then you've got the totals at the top of
18 virtual versus physical DR cleared. Maybe the easiest
19 thing would be -- and not do it now, but maybe the easiest
20 thing would be to go down that list and just indicate which
21 one is virtual -- I am assuming Toronto Hydro, for example,
22 is virtual, but maybe it's not, and just go down and let us
23 know which ones are virtual and which ones are physical,
24 and then we can add them up, because they are all there.

25 MS. DJURDJEVIC: We could do that --

26 MS. SPOEL: That might be a simple way of doing it
27 without a lot of extra work.

28 MS. DJURDJEVIC: All right. Okay --

1 MS. SPOEL: Does that give you the -- does that give
2 you the information you want?

3 MS. DJURDJEVIC: We are just looking at the number of
4 participants -- from this document we can't tell which ones
5 are which, but if the IESO has some visibility into that,
6 so advise of the number of participants, and then the
7 second point was the total megawatt capacity cleared for
8 this group if it's different from the post-auction report.
9 And then thirdly, the average hourly consumption for both
10 of the commitment periods --

11 MS. TRICKEY: So can I ask you, what do you mean by
12 "average hourly consumption"? Because what you're looking
13 at with every resource that participates is the resource
14 might be -- might consume 10 megawatts on a given hour, but
15 only 2 megawatts of that is actually what they offer in, so
16 I am just trying to understand, are you looking for a...

17 MS. DJURDJEVIC: So if -- and I understand you have
18 indicated before that these are not metered, so I was
19 looking for information that's comparable to what was
20 already provided in Staff IR 4, and if you don't have that
21 information and it's because they are not metered you can
22 just confirm that as part of the undertaking. And I guess
23 the same goes for, you know, my next question, which is
24 what the average hourly consumption for the highest five
25 hours --

26 MS. TRICKEY: Yeah, the hourly consumption for these
27 things, again, it's very difficult to provide that
28 information for a number of reasons, but that would be --

1 we don't have that information.

2 MS. SPOEL: Well, I think maybe that's probably --
3 that might not be public information, what the average --
4 the hourly consumption is for an individual consumer if
5 they're a DR resource, they're mainly -- if they are not
6 virtual they are consuming, and I don't know that that's
7 information that is available on the public record --

8 MS. DJURDJEVIC: And --

9 MS. SPOEL: -- or would be available. I think that's
10 probably confidential information. I don't know, but I am
11 not sure what use you are going to make of it in the
12 context of this application. I mean, it might be nice to
13 know, but do you need to know?

14 MS. DJURDJEVIC: Well, Madam Chair, as we pointed out,
15 this is three-quarters of the market, you know, we really
16 haven't -- it hasn't really been covered in this
17 proceeding, and it might be -- there might be some -- and
18 we don't have any information about it, and it might be
19 relevant to the Panel, but I understand that if there's
20 certain information that is -- it's not available or if
21 it's proprietary, that's the answer to that, and the
22 witnesses can just give us that information, and we already
23 have the undertaking, they are going to advise which
24 participants are the virtual participants, and then if the
25 capacity's different, so can we get that undertaking at
26 least?

27 MS. TRICKEY: I believe we can do that, yes.

28 MS. DJURDJEVIC: Yes, okay. That will be J3 point --

1 MR. ZACHER: As long as we understand what it is.

2 MS. TRICKEY: So, okay, can we just to clarify make
3 sure I fully understand? What you are looking for is the
4 number of companies that have submitted virtual -- or that
5 have cleared in the auction with virtual resources, so the
6 number of essentially aggregators, and you are looking to
7 know the number of unique businesses or unique aggregator
8 companies that have cleared the auction? So --

9 MS. DJURDJEVIC: Yes, so, I mean, we look at, you
10 know, we have sort of the information at the top of this
11 document at tab 1 which tells us the total, you know,
12 capacity, and then we have information below that tells us
13 each entity or each participant how much capacity they bid
14 and cleared. So I am just trying to connect the -- as --

15 MS. TRICKEY: I think as -- I apologize, I shouldn't
16 interrupt.

17 MS. DJURDJEVIC: -- as Chair Spoel indicated, maybe
18 just indicate which of those companies -- how many of them
19 are virtual HDR participants.

20 MS. TRICKEY: Yes.

21 MS. DJURDJEVIC: We can do that. Okay.

22 MR. ZACHER: Okay, thanks.

23 MS. DJURDJEVIC: That will be Undertaking J3.7.

24 **UNDERTAKING NO. J3.7: WITH REFERENCE TO THE LIST OF**
25 **DEMAND RESPONSE PARTICIPANTS AT TAB 1 OF THE POST-**
26 **AUCTION SUMMARY REPORT, TO INDICATE THE VIRTUAL DR**
27 **PARTICIPANTS AND TOTAL MEGAWATT CAPACITY FOR THE GROUP**
28 **AND WHETHER IT DIFFERS FROM THE POST-AUCTION REPORT.**

1 MS. DJURDJEVIC: And again, I'm not -- we have
2 information about, again, for the physical participants,
3 about the average energy market bid price data. And we'd
4 like to see if you can -- if the IESO can provide that for
5 the virtual DR participants, and if you would undertake to
6 provide that.

7 MS. TRICKEY: So the average energy market bid for the
8 virtual resources. Is that what I understand?

9 MS. DJURDJEVIC: Yes.

10 MS. TRICKEY: I believe that that would be -- I just
11 want to look at the information --

12 MR. ZACHER: We can -- I am happy, Madam Chair, to be
13 helpful if something's not too onerous. I am just sort of
14 straining to understand the relevance of any of this.

15 MS. DJURDJEVIC: Well, the information we have in the
16 evidence is that the DR response bid is -- you know, they
17 are all bidding at the cap or on the average at about
18 \$1,700 per megawatt-hour, and we are just trying to find
19 out whether that is for all DR participants across the
20 board or whether the dispatchable participants bid higher
21 or lower compared to the virtuals, to get some sense of
22 what -- you know, how each of those types of DR
23 participants are behaving or bidding into the auction.

24 MS. TRICKEY: Certainly. If we need specifics we can
25 provide that. The bid -- average bid information we
26 provided I believe covered all of the types of resources,
27 and I can tell you more generally that, regardless of
28 virtual or physical, they are all bidding at the upper end

1 of the range. But if you need specifics --

2 MR. ZACHER: Madam Chair, we -- yeah, we provided the
3 information the average bid prices for dispatchable loads
4 and hourly demand responses. It's in the record.

5 MS. SPOEL: Okay. I think, Ms. Djurdjevic, given that
6 we are at the end of the last day of this hearing, I think
7 that exploring whole new areas that haven't been covered
8 already either in cross-examination by another -- well, I
9 realize it's the first time the IESO is on the witness
10 panel, but I am not sure what the relevance of how you are
11 going to make a lot of submissions on these numbers if you
12 are just getting them now and -- anyway, I think the
13 evidence is that the average is across the lot, so maybe we
14 can move on from there, because we don't have a lot of
15 time.

16 MS. DJURDJEVIC: We will work with that, and we did
17 ask in an interrogatory, but the only information that was
18 provided in response to the interrogatory was about
19 physical.

20 MS. SPOEL: No, I understand that --

21 MS. DJURDJEVIC: And then there's a --

22 MS. SPOEL: Maybe you can move on to your next area so
23 we can get through this.

24 MS. DJURDJEVIC: Certainly we can.

25 MS. SPOEL: Thank you.

26 MS. DJURDJEVIC: So now I would just like to get your
27 response to some of the comments given by Dr. Rivard in
28 his testimony, and there was a point where he was asked

1 questions by the Panel with respect to the generated cost
2 guarantee program that generators are able to benefit from,
3 and how that contrasts with DRs.

4 I am looking at page 195 of the transcript from
5 yesterday, which we have on the screen and also there's a
6 printout for everybody. It's on the desk and the Panel has
7 it; it's one two-sided page.

8 And looking at the line, starting about line 9, so
9 this is in response or follow up on a conversation that Mr.
10 Mondrow had with Dr. Rivard about this steel mill example,
11 and the startup costs.

12 And Dr. Rivard responds to Member Frank that this was
13 helpful in explaining there's a kind of a similarity to a
14 generator and that when activated, when asked to reduce
15 consumption, it is not just the value of lost load that
16 might be at risk. But they may actually have to incur an
17 out of pocket cost, like burning gas to maintain product to
18 avoid waste.

19 And then over on page 197, again this is continued
20 discussion with Member Frank on this point, and at line 15,
21 so in response to the question, you know, of whether DR
22 resources are being discriminated against if they don't
23 have the kinds of programs, you know, to cover their start-
24 up costs. And Dr. Rivard responds: "Yes, I think that's
25 fair. I think the way they," they being DRs, "are not
26 discriminated against is to be eligible for a cost
27 guarantee, very much like the generator is in terms of the
28 start-up."

1 Now, in the exchange with Mr. Zacher this morning, the
2 IESO seemed to disagree with Dr. Rivard on whether DR
3 resources should receive similar treatment to generators in
4 relation to incremental cost beyond their value of lost
5 load."

6 Is this IESO's position? Did I understand this
7 correctly?

8 MS. TRICKEY: Sorry, are you referring to the
9 discussion we had on the real-time generation cost
10 guarantee or --

11 MS. DJURDJEVIC: Yes.

12 MS. TRICKEY: Yes, okay. My point there was that that
13 program and the intent of that program is to enable -- when
14 we have resources that are required to operate in the
15 market at a price that they have said is not economic, that
16 we enable them to recover some costs as a result of that.

17 That's the intent of the real-time generation cost
18 guarantee program. And my point was that we have other
19 similar programs or approaches that enable the same type of
20 thing when we activate resources out of market, and that we
21 have recently instituted some changes to hourly demand
22 response participants in terms of how they're compensated
23 when that type of situation occurs.

24 That was really the intent there.

25 MS. DJURDJEVIC: I understand that context of your
26 testimony this morning. But I am now going to ask about in
27 the context of the TCA, which is to enhance competition,
28 can you comment on whether if generators have the GCG

1 program and DR resources don't a similar program to recover
2 costs that are similar in nature, how can they compete in
3 the TCA on a level playing field?

4 I wonder if you have a comment on that.

5 MS. TRICKEY: I am not sure that that was the
6 conclusion, and I think my point was that where we have a
7 similar situation, all types of resources, as far as I
8 could tell at this point, do receive similar compensation.

9 MS. DJURDJEVIC: Okay. Thank you very much. Those
10 are all my questions.

11 MS. SPOEL: Thank you.

12 DR. ELSAYED: I want to understand an answer that was
13 provided earlier about if you cannot do the first TCA
14 auction in December as was originally planned, when is the
15 next opportunity to do so, and why?

16 MR. SHORT: The next opportunity to run an auction is
17 in June of 2020. Our plan is to execute an auction with a
18 slightly longer forward period to cover the period starting
19 in May of 2021 until April of 2022. The reason --

20 DR. ELSAYED: I am still not clear. Like the
21 decision, the OEB's decision is going to be issued by the
22 end of January 2020. So why can't you run the auction
23 shortly after that?

24 MR. SHORT: Sorry, is your question related to the
25 December 2019 auction and why we can't delay that?

26 DR. ELSAYED: Yes, why can't you delay it.

27 MR. SHORT: Okay, now I understand, sorry about that.
28 So there's a number of activities that folks have to do

1 once they've cleared the auction. So say we execute the
2 auction in early February, its takes -- I believe it's ten
3 business days to complete the auction, reporting
4 participants and find out they have to actually meet their
5 obligations -- or they have been successful, sorry, in the
6 auction and there's work they have to do we believe that
7 goes out and gets their -- essentially their end use
8 customers ready to participate in the auction.

9 There's things like credentials they have to submit to
10 the IESO, like a financial deposit so-to-speak as well to
11 the -- so there's a number of activities that have to
12 happen and we don't believe that if we wait until
13 essentially to tell participants that are successful in
14 mid-February that they will have sufficient time to be
15 ready for May 1st, because the obligation begins May 1st
16 and they have to be able to provide -- the expectation is
17 they have to provide that full level of capacity obligation
18 May 1st.

19 DR. ELSAYED: Okay. The Navigant study, when was that
20 done?

21 MS. TRICKEY: Roughly 2017.

22 MR. SHORT: Yes, December 18, 2017.

23 DR. ELSAYED: December 18th?

24 MS. TRICKEY: Yes.

25 DR. ELSAYED: And I understood that the results were
26 not conclusive.

27 MS. TRICKEY: That was our view.

28 DR. ELSAYED: I need to understand what that means.

1 MS. TRICKEY: What we asked Navigant to look at was
2 there have been a lot of arguments for, saying that this
3 could be a good thing, and there have been a lot of
4 arguments against, saying no it's not a good thing, that
5 there are problems with it.

6 So we asked Navigant to go look into those reasons and
7 help us understand them, and see how those things may or
8 may not change in Ontario.

9 As well, we asked Navigant to look at are there any
10 unique considerations in Ontario, or implications for
11 implementing something like this in Ontario that we need to
12 understand.

13 And if you sort of walk through their review of each
14 of the pros and cons, there wasn't any -- there was nothing
15 that really stood out to say, yes, this really looks like a
16 great idea. There was a lot of, well, if this happens,
17 this might give you some sort of benefit. If this happens,
18 this might give you some sort of negative impact.

19 Everything was -- there was really nothing you could
20 hang your hat on to say this really sounds like this is a
21 good thing to do. And on top of that, they did also look
22 at this issue of if FERC's net benefit test was intended to
23 ensure that the it wouldn't create additional costs for
24 consumers to implement something like this, when you
25 applied that in Ontario, it appeared that it's possible
26 that that would not be the case in a lot of the hours.

27 So it really called into question whether this was
28 worth doing or not. That's our perspective. I understand

1 others see it differently. But from the IESO's
2 perspective, when we looked at all those things, we didn't
3 really see anything that was compelling to say this was
4 something that we shouldn't move forward on.

5 DR. ELSAYED: Was there any stakeholder engagement
6 associated with the Navigant study?

7 MS. TRICKEY: Yes, we engaged stakeholders in each
8 stage of that study, as we would normally do, to say this
9 is what we are going out to do. When Navigant presented
10 the results of this study, we discussed those results with
11 stakeholders as well.

12 DR. ELSAYED: So what leads you to believe that the
13 one you are embarking on would be any different?

14 MS. TRICKEY: Excellent question. Well, I think what
15 he have asked Brattle to do is to go a step further and to
16 say, okay, if we apply this in Ontario, you know -- so
17 we've asked them to look specifically at the net benefit
18 test and how that might apply in Ontario, so we can inform
19 ourselves on that. And we have also asked them to look at
20 are there other considerations that in the specific Ontario
21 market design, are there things that we're missing, are
22 there elements of the design or sectors or types of
23 resources within that that could benefit from something
24 like this from an energy payment, or are there new
25 learnings that we have received since the Navigant study
26 was done that would inform us on maybe another way to look
27 at this.

28 DR. ELSAYED: So that maybe answers my next question,

1 which is why you waited for two years, I guess, before you
2 embarked on the new study?

3 MS. TRICKEY: The delay, I think, was more so, you
4 know, we had a discussion with stakeholders. It didn't
5 appear at that time to be a priority to continue pursuing
6 the energy payments discussion. When the TCA was
7 introduced stakeholders made it very clear that that
8 created -- put a higher priority on this issue for them
9 because of the TCA coming. So they -- they requested,
10 again very strongly, that we look into it, and as we've
11 discussed, we agreed to do so.

12 DR. ELSAYED: Okay, and can you explain to me what the
13 net benefit test is again? What does it mean?

14 MS. TRICKEY: So the net benefit test that FERC has
15 prescribed is to say that -- so if you have a demand
16 response participant set the market clearing price,
17 presumably they are setting it -- you know, they are
18 setting it because they are setting it lower than whoever
19 would have been above them. Let's assume that was a
20 generator. So they've lowered the energy market clearing
21 price in a given hour. Right now we don't pay that demand
22 response participant an energy payment, so you're adding a
23 payment to the picture, so we are going to add a payment to
24 that, to the market, so now we have to pay the load that
25 energy payment, so does the size of that energy payment
26 offset the savings in the energy price that would be
27 applied to all the consumers in that hour.

28 So if that is a net positive, then they say in that

1 hour there's a net benefit, and in that hour, in that
2 narrow view of a market, they deem that to be a savings and
3 therefore a benefit to move forward.

4 I think what they were trying to avoid was that you
5 got into scenarios where the -- because of the size of the
6 market, because you're now taking that payment and you're
7 spreading it over a pool of participants, depending on how
8 big that payment is, you could get to a point where it
9 actually doesn't reduce -- it doesn't reduce cost to
10 consumers, it actually costs consumers more.

11 So they were just applying that additional test to
12 say, before we go and to this let's make sure that we only
13 do it when there's a cost savings in an hour. So the way
14 that's been applied in the U.S. markets is, it does mean
15 that the loads in theory don't always get an energy payment
16 if they're activated. It's been applied in different ways,
17 but that's the end result of it.

18 MR. SHORT: If I can add too, I think pop -- FERC --
19 as I think Can -- or, sorry, Ms. Trickey indicated earlier
20 is FERC was trying to draw in more loads to participate.
21 These loads were not active in the market at all, and by --
22 and the intent, I think, was to bring more load in to help
23 improve maybe competition in the energy market. We already
24 have substantive load participating, for example, in
25 Ontario, so I am not necessarily sure we would draw in
26 significantly more load than we have today. It's possible.

27 DR. ELSAYED: Okay, thank you. Those are my
28 questions.

1 MS. FRANK: I am going to take us back to basics. So
2 I would like us to go through, and let's start with, what
3 are the rules that were in place for the TCA if it had gone
4 ahead, and so that's -- and I don't want to talk about what
5 might be in the future or what was in the past, I just want
6 to look at those rules and how might that unfold if we
7 would have had both demand response and generators
8 participating.

9 And then what I would like you to do is take me
10 through all the payments each party will get. So, you
11 know, what are they going to get paid for, and start in the
12 capacity market, because I assume that's a simple place to
13 start, and -- so we are going to have -- I assume at the
14 end of day you were assuming there'd be parties who were
15 generators and parties who were load displacement. They
16 would both be selected. You know, the auction would have
17 resulted in both parties being there.

18 Okay. So now they are both there. What does each get
19 paid? First of all start with the capacity market.

20 MR. SHORT: So from a capacity market perspective we
21 would include -- so the participants would offer in the
22 capacity market their organization-based megawatts, so how
23 many megawatts do I want to get in auction. We would stack
24 that up, we would build up the stack, and where essentially
25 the last megawatt crosses our demand curve, and it's --
26 maybe my hand is in the air -- it's a downward sloping
27 demand curve, so the more megawatts that we would acquire
28 are usually acquired at -- are acquired at a lower cost.

1 Conversely, if prices are higher we acquire less megawatts,
2 so it's actually -- when we say "downward sloping", it
3 allows flexibility in terms of more megawatts that we can
4 acquire.

5 But essentially, where you cross that line, all the
6 resources get paid that are successful, get paid the same
7 price.

8 MS. FRANK: So it doesn't matter if you are a
9 generator or load displacement. Per megawatt you are
10 getting exactly the same price.

11 MR. SHORT: Correct.

12 MR. FRANK: Okay. Do you get paid anything else in
13 the capacity market except for that price?

14 MR. SHORT: From a capacity market perspective that's
15 the only payment that they would receive is an availability
16 payment.

17 MS. FRANK: Okay. So there's no activation payment of
18 any sort in the capacity market.

19 MR. SHORT: That's correct. There is none.

20 MS. FRANK: So we have to go over to energy market to
21 find what else is happening; is that true?

22 MR. SHORT: That's fair, yes.

23 MS. FRANK: Okay. On the energy market there's -- the
24 first thing, the simple thing, is that a generator gets
25 paid at the market price for what they generate; right?
26 That's -- that one's a straightforward, simple one; right?

27 MR. SHORT: Yes, that's correct.

28 MS. FRANK: Okay. And there's no payment to the load

1 displacement group if they happen to consume any energy.

2 There's nothing -- they get nothing paid.

3 MR. SHORT: They consume up to the point where their
4 bid price is, and that's the point --

5 MS. FRANK: No, no, remember, I am assuming that they
6 have both been activated and I am looking at who is getting
7 paid what. The generator is not getting paid because they
8 are putting --

9 MR. SHORT: Yes, they are supplying electricity to the
10 grid --

11 MS. FRANK: However, the load displacement may well be
12 using some other type of energy. They may be having their
13 own, you know, behind-the-meter generator. Who knows what
14 they have got, but they are using something in order to not
15 take any load off the grid.

16 MR. SHORT: Or they could be not using something --

17 MS. FRANK: No, but my -- some are using something.
18 We can go there.

19 MR. SHORT: Yes, that's true.

20 MS. FRANK: So some are using something. They get no
21 payment for that.

22 MR. SHORT: Correct.

23 MS. FRANK: Or is there any way of them getting paid?
24 I keep on thinking there's something else in the
25 marketplace that I am not aware of, and what makes me think
26 that is you recently said, Ms. Trickey, you said they have
27 recently implemented changes to the hourly demand response,
28 and I thought, oh, does that mean you are paying for

1 something? The other thing you said earlier is that you
2 have an availability payment.

3 MS. TRICKEY: Right.

4 MS. FRANK: So I thought, is that something in the
5 energy market? Is there something else that people are
6 getting paid when they are on the load side of the
7 equation?

8 MS. TRICKEY: Okay. So let's stick with -- the energy
9 market generator, as you have said, accurately -- yes, they
10 get the energy price when they are producing. If the
11 demand response participant is activated because the price
12 gets too high for them, then, correct, they do not receive
13 a payment. They are not paying for energy and they are
14 also not receiving any payment.

15 However, what I was referring to earlier is there can
16 be occasions when we test them -- we test to sure that they
17 can do what they say they are going to do. When we do that
18 we activate them at a price that's much lower than what
19 their energy bid is.

20 So they're saying, I want to be consuming, and we are
21 saying, I am sorry, I need to test you in this hour, so you
22 are not going to consume. In those situations we do
23 provide them a payment.

24 MS. FRANK: But that payment has nothing do with --

25 MS. TRICKEY: But that's not what we are talking about
26 here.

27 MS. FRANK: -- activating them in the normal course
28 of --

1 MS. TRICKEY: Correct. Yes, that's not what we are
2 talking about here; that's correct.

3 MS. FRANK: And there's no expectation that that type
4 of payment would actually start under the current market
5 rules, that --

6 MS. TRICKEY: Correct. So we do not have any
7 contemplation or any rule -- we have not created any rules
8 that would allow an energy payment to a load for reducing
9 their consumption in an hour based on the energy price.
10 The availability payment you talked about, that's how we
11 pay for the capacity market. So the capacity market says
12 you cleared the capacity market, you have an obligation now
13 for 10 megawatts. The way we pay for that is the
14 availability payment, and the way we make sure that we are
15 doing it only when they're actually available rather than
16 saying, oh, we will just give you \$50,000 for the year, we
17 -- they bid into the energy market the amount that they
18 have available. They say I have got 10 megawatts available
19 this hour; I have only 5 megawatts available next hour. So
20 we pay for the capacity through that availability payment
21 in each hour based on the amount of megawatts that they bid
22 in to say that this is how much I have got available for
23 you.

24 MS. FRANK: Okay. So I am back to the capacity
25 totally equal treatment.

26 MS. TRICKEY: Yes.

27 MS. FRANK: No difference there.

28 MS. TRICKEY: Correct.

1 MS. FRANK: On the energy, though, there is a
2 difference.

3 MS. TRICKEY: There is a difference.

4 MS. FRANK: And the difference is more than just the
5 payment for the energy that's being input into the system.
6 There's also this notion of -- I am going to forget the
7 term, the true-up if you're not getting enough money.

8 And my feeling is that that relates to the costs that
9 it takes for the generator to participate.

10 MS. TRICKEY: Correct.

11 MS. FRANK: There might be a variety of items.

12 MR. SHORT: There is only some generators. For
13 example, if you are a hydro-electric generator, you don't
14 get that money because there's no startup cost. You just
15 open the wicket gates and away you go.

16 MS. FRANK: I assume also with load displacement not
17 everybody would get -- not everybody incurs some costs in
18 order to participate, but some people do.

19 MS. TRICKEY: Yes, you probably all have some sort of
20 cost. Just how big it is and how often it occurs probably
21 varies greatly, like it does with generators.

22 MS. FRANK: So for generators, there's a way to
23 recognize a difference in generators and the experience
24 they are going to have once they get activated. There's a
25 way to pay for those who need to be paid and not pay for
26 those who don't need to be paid.

27 It's not uniform. It's a like originally you had the
28 \$200, and it didn't matter what their experience was. It's

1 more specific for the generators.

2 MS. TRICKEY: Yes. But as I have tried to
3 distinguish, that's really about the fact that there's
4 something requiring them to be in the market when they're -
5 - they're not economic. So I think it's -- I think it's a
6 side issue is really what I am saying. It's a different
7 thing and --

8 MS. FRANK: But if the load had costs, you've said
9 repeatedly that what they have to do with those costs is to
10 add them to their capacity bid, meaning that they're now
11 less competitive because they have got a cost in there that
12 a generator doesn't need to put in, right?

13 MS. TRICKEY: I believe that's what's at issue here,
14 and I think what we're saying is that our market design
15 looks at things a little bit differently. It's really
16 trying to incent loads to consume when it makes the most
17 sense for their business, rather than -- and I think that's
18 what Brian's -- Dr. Rivard's testimony and examples was
19 trying to walk us through, was that in this type of market
20 design, it doesn't necessarily make sense to pay an
21 additional amount to that load.

22 Now, I think that there were questions about is there
23 some slice of cost that maybe don't fit perfectly into his
24 examples and that maybe there's evidence of, but we haven't
25 really been able to quantify or understand fully in this
26 hearing.

27 That's a possibility and maybe that's something that
28 we need to explore. But it's not something that's been

1 quantified or verified, and I think going back to, you
2 know, we have this design. The design is meant to create
3 efficient participation from all types of participants, and
4 I think what Dr. Rivard's examples show is that it
5 typically does.

6 MR. SHORT: I think Dr. Rivard also said, too, that if
7 he was the economist working for one of these companies, he
8 would probably have -- I forget the adjective he used, but
9 it was a very minuscule risk, and so he wouldn't be
10 factoring that into the other opportunity -- like it was
11 basically he wouldn't factor that into the capacity cost.

12 MS. FRANK: But then would you also say for a
13 generator -- I assume it's the same minimal risk that a
14 generator would be activated that it is that a load would
15 be activated. It's the same minimal expectation.

16 MR. SHORT: I can't say that for certain. Generators
17 tend to offer a little lower, and they may be activated
18 more frequently than a load.

19 MS. TRICKEY: I think it's important to think about
20 what a generator is in the business to do versus what a
21 load is in the business to do, if we are talking about --

22 MS. FRANK: But if they are in the capacity market, I
23 assume they are similar in terms of what they brought
24 forward. They are there about the capacity market. They
25 are not really playing in the energy market; they are
26 playing in the capacity market.

27 That's what this is about, right? We are talking
28 about the capacity market, and we are trying to figure out

1 how do we have that capacity available and ensure that when
2 we need it, it's there and we can call upon it.

3 It doesn't matter what we call upon, if it's a
4 reduction in load or if it's generated -- it doesn't
5 matter. It just matters that it's there when we need it.

6 MS. TRICKEY: I think the issue at hand is actually
7 about the energy market. But I understand that for the
8 demand response participant, they see -- every participant
9 looks at all of the markets and all of their opportunities
10 to get revenue, to provide a service and get a revenue for
11 that. And they look across all of them and try to
12 understand what the best way to manage their costs across
13 those things is.

14 And I think what we're really talking about is how
15 people participate in the energy market, and how they get
16 paid in the energy market.

17 Now, I understand that AMPCO sees that because of the
18 way they participate in the energy market, they feel it
19 puts them at a disadvantage in the capacity market. Our
20 point is that two things, I think, one, first that we don't
21 see the disadvantage. We are willing to be convinced
22 Otherwise. We will work through that with them.

23 But in the meantime, if there is some disadvantage
24 that happens there, at the moment that disadvantage is not
25 material.

26 MS. FRANK: But there is a disadvantage in the rules.
27 Would you go there?

28 MS. TRICKEY: No, so --

1 MS. FRANK: I am not saying a large amount. I am just
2 saying literally applied, there is a payment that happens
3 -- and if you just for the moment we are trying to you keep
4 saying, well, that's the energy market; it's not capacity
5 market.

6 But in reality it's what do people get paid, and
7 there's a difference in what people get paid depending upon
8 what they have to offer. If they're a load or a generator,
9 there's different payment streams.

10 MS. TRICKEY: I wish it were that simple, I really do.

11 MS. FRANK: Well, you'd better try to convince us it
12 isn't, because it sure seems that simple to me. So you
13 haven't done it yet, so give you another try.

14 And I am not focussing on the energy piece. am about
15 the activation piece, because I do believe for some load
16 customers, there are activation charges -- not for all, but
17 for some. And for those where there is an activation
18 charge, I don't understand how they get paid.

19 And if you say with the current rules, there's a way
20 they get paid for it, you've convinced me that they are
21 being fairly treated and there's no discrimination.

22 MS. TRICKEY: I think the only thing that I can
23 provide you is that historically speaking, prior to the
24 demand response auction, there were loads participating in
25 the Ontario market without any capacity payment or any
26 energy payment. They simply participated and provided --
27 they watched the market price and they reduced their load
28 when it made sense for them to do so.

1 They also participated in an operating reserve market,
2 but that was a different, a different mechanism different
3 payment stream.

4 So I think, and I think is the point that Dr. Rivard
5 was trying to make, was that there isn't necessarily a need
6 for an additional payment stream to make this make sense,
7 that the capacity auction payment alone should be
8 sufficient to incent loads to do what makes sense for their
9 business and to provide a service to the Ontario market.

10 MS. FRANK: Could there not also be a way for the
11 capacity payment to make generators want to participate?
12 If the generators included their -- I'll call them
13 incremental costs upon activation in their capacity bid,
14 that would do it.

15 MS. TRICKEY: There's different ways to structure the
16 different markets and some places have an energy-only
17 market. So you don't have capacity payments and energy
18 payments for generators, and that can work as well. That's
19 just not the design that we have here in Ontario.

20 MS. FRANK: The challenge is how can our design in
21 Ontario under the current rules make sure that it doesn't
22 matter who you are. You are going to be treated equitably.

23 MS. TRICKEY: Maybe another thing that I can point to
24 is in the U.S. markets when FERC was debating this there
25 were jurisdictions where there was both the exact same
26 structure that we have here where generators and loads
27 could participate in a capacity auction together, both
28 received capacity payments, they can both operate in the

1 energy market together, generators received payments, loads
2 did not, so the same as what we have today here. That --
3 that was -- that went on for quite a number of years.

4 Now, FERC decided that they wanted to do something
5 different to encourage more loads to participate, but as I
6 tried to explain earlier, that was -- I am sure there were
7 many reasons for it, but one of the reasons was about the
8 fact that what you didn't see participating in those
9 markets were loads that were paying something other than
10 that wholesale price, they were paying some sort of retail
11 rate, so they really didn't have an incentive to
12 participate in the energy market. That was really what
13 brought them to that decision.

14 Now, they applied it more broadly than that, but I
15 don't think it was about creating some -- it wasn't about
16 saying that every resource that participates in every
17 auction or every market needs to receive a payment, that it
18 did recognize that there is -- there is an efficient way to
19 run the energy market, and that that is for generators to
20 get paid and loads to pay or not pay when they don't
21 consume.

22 I know that's not the answer you are looking for --

23 MS. FRANK: I am looking for this equity, the non-
24 discrimination. That's what I am looking for, and I am
25 just not hearing it. That's my -- I would like to hear it,
26 because I do agree with you that having transmission --
27 having generation and load both participating in the
28 auction is the way to go and it's the way to get the -- you

1 know, you need to get there. The problem is you need to
2 get there in a way that you don't discriminate, and that's
3 what I haven't quite heard, how the current rules do that.

4 So no problem with the idea that not only generators
5 and load but many, many other sources as well need to be
6 all considered if we are going to have a viable market, you
7 know, a decade from now.

8 MS. TRICKEY: There may be a sliver of costs here, a
9 slice of costs there, a bucket of costs that we haven't
10 accurately captured or understood, and there may be a way
11 to deal with that --

12 MS. FRANK: But there isn't today. That's the bottom
13 line.

14 MS. TRICKEY: There isn't today, but I would also
15 argue that an energy payment is not the way to do it. So
16 an energy payment --

17 MS. FRANK: You know what? I have no trouble -- I am
18 not sold on an energy payment at all. I am just sold upon
19 at the end of the day it doesn't matter who you are, this
20 technology-neutral notion that we have heard that applies
21 and people are treated equitably.

22 And I know the argument is always, well, it's not a
23 material thing, but it becomes more material over time. It
24 may not be material today, but it grows over time, so if we
25 have a rule in place that is discriminatory today it
26 becomes a more serious problem, you know -- I used a
27 decade, but even shorter than that. Once you increase the
28 number of parties that are participating, the quality

1 changes. Nothing else?

2 MS. TRICKEY: We -- again, we don't feel that the
3 current rules are discriminatory. We do believe that there
4 is a fair and efficient market structure in place that's
5 been used in many other places and continues to be used in
6 many other places and is established in the same way, but
7 it doesn't sound like I can convince you of that.

8 MS. FRANK: I think we will stop.

9 MS. SPOEL: I just have a couple of questions. One of
10 the questions, just picking up, Ms. Trickey, on a point you
11 just made about, that the loads should consume when it's
12 best for their business and that from an economic
13 perspective that's best for the economy and that, you know,
14 that's the way things should operate, and I think you cited
15 Dr. Rivard's evidence in support of that.

16 Isn't it really up to the businesses to decide when it
17 makes sense for them to operate and when it maybe makes
18 sense for them not to, as opposed to structuring the
19 electricity market in a way to encourage, you know,
20 manufacturers of widgets or whoever as to when it's the
21 right time to manufacture and when it's the right time to
22 not?

23 MS. TRICKEY: I would agree, absolutely, and I believe
24 what Dr. Rivard's evidence was trying to show was that that
25 is how it works, that is how the market works, that if
26 loads are paying at a price at which they are willing to
27 consume, then they are making the rational decision for
28 their business.

1 What I believe he tried to show is that when you add
2 an energy payment on to that you're providing some form of
3 additional payment that isn't necessarily needed, so
4 it's -- while it may look efficient in that one hour, it's
5 not good for the whole. It's giving them an advantage over
6 the generator.

7 MS. SPOEL: But is it good for the electricity. I
8 think you also said earlier -- and I don't have the
9 reference, but I think you did say that for capacity given
10 that it's really to cover the -- help me here -- the gap --
11 not the gap, but the extra capacity you have to have beyond
12 what you are actually going to use, that DR is a very
13 inexpensive way to have that.

14 So if you, from the electricity market point of view,
15 as opposed to broader economic considerations of the
16 economy as a whole, is it not -- would it not be reasonable
17 to assume -- sorry, too many double negatives. Is it fair
18 that it would make sense to keep as many of those demand
19 response resources available for that purpose, for that
20 covering the gap if you happen to need it to make sure you
21 have the adequate reserves, that you don't want to lose --
22 you don't want to lose them, any more than perhaps than
23 you want to not have generators available when you need
24 them. But because it's an inexpensive way to provide that
25 coverage, it's in the interest of the market to have it
26 there through the capacity option -- through capacity
27 payments?

28 MS. TRICKEY: I think there's two things to consider

1 there. First, demand response can only be available if
2 they're consuming. So they have to stop doing something in
3 order to provide that response. So --

4 MS. SPOEL: Yeah, fair enough.

5 MS. TRICKEY: -- typically that means they are going
6 to stop producing their widgets or doing something in their
7 business. If it doesn't mean that, then potentially it
8 just means there is an inefficiency there, there's a better
9 way to manage their electricity, so I think that's an
10 important part.

11 The other thing is, I expect there is a limit to how
12 much demand response is efficient in the market. I don't
13 know what it is, but the more demand response we get as
14 part of our capacity makeup, the more it will be activated.

15 So, you know, if it's a small sliver it can be that
16 type of insurance and only -- and be rarely activated, and
17 I could be wrong, but I think that most businesses, from
18 what I hear from them, they are happiest when they are the
19 insurance. They are really just there to be rarely
20 activated, because they have better things to do. They
21 want to run their business.

22 So the more that we get, it gets to a point where,
23 well, now we actually have to start activating them more
24 frequently, and their costs are going to go higher, and --
25 now, some may be willing and able to do that, and that's
26 good, but what you are going to see is their prices are
27 going to rise because they're going to be activated more
28 frequently.

1 MS. SPOEL: And does that apply to the virtual
2 resources as much as to the, let's say the steel mill that
3 Mr. Anderson referred to --

4 MS. TRICKEY: I think everybody's set a limit. Like,
5 even you and me, you know, we may be okay having our air-
6 conditioner cycled off on a hot day every now and then --
7 well, first off, it's only going to work on a hot day, so
8 there is a limit to when that's actually available to us,
9 and second off, if every day was hot and we were getting
10 cycled off every day, I think we would all get a little
11 frustrated with that and say, enough of that. I just want
12 my air-conditioning.

13 So I think in every case there's a limit to it. What
14 that limit is, it depends on the type of resource it is,
15 but ultimately there is a limit.

16 MS. SPOEL: Okay. I have a -- this is more -- this is
17 really a question of curiosity. On the page that Ms.
18 Djurdjevic took you to with the demand response auction
19 post-auction summary report, which lists the resources, I
20 wondered why the price -- the auction clearing price in the
21 northeast is \$200 per megawatt per day, whereas everywhere
22 else it's 317 -- well, 318 in the summer and 317 in the
23 winter. Is that because in effect, you're running -- I
24 don't know how many regions. It looks like about eight or
25 nine -- you are actually running a series of mini auctions
26 because it's regional, and is that why the price is
27 different. But somehow magically, in every region except
28 for the northeast, they all turned out to be the same?

1 Like I just -- it was one of those anomalous numbers that
2 popped out at me, and I wondered what that meant.

3 MS. TRICKEY: Always helpful to get the ops guy to
4 help me with these things.

5 In essence, yes, we run the auction in every region
6 because we can only -- each region we have to look at
7 separately, and say how much demand response can we
8 accommodate in this region, can we operate is how much is
9 okay to have...

10 MS. SPOEL: Because it's a grid.

11 MS. TRICKEY: Yeah, and each region of the grid. So
12 we run the auction in each region and it just so happens
13 that there's only one region where the amount of demand
14 response that's economic is more than we can accommodate.
15 So it clears at a much lower price because of supply and
16 demand.

17 MS. SPOEL: They have more than you need.

18 MS. TRICKEY: Exactly.

19 MS. SPOEL: I had a previous question, which was is
20 demand response in Thunder Bay the same as in Windsor, and
21 it's not. They are not interchangeable.

22 MS. TRICKEY: No, and we have to apply the DR
23 resources to the region in which they're located, so that
24 we can operate them and balance the system regionally as
25 well.

26 MS. SPOEL: Okay, that's really helpful, thank you.
27 Let me just look and see if I had anything else. I think
28 those are all my questions. Thank you very much. Mr.

1 Zacher, do you have any re-examination?

2 MR. ZACHER: I am tempted to ask some questions
3 arising from Member Frank's discussions, but I think Mr.
4 Mondrow would object and it's Friday afternoon, so I will
5 leave that to our submissions. I just have one quick line
6 of questions.

7 Ms. Trickey, do you understand AMPCO's position to be
8 that DR resources should be entitled to energy payments in
9 the energy market, or some other form of activation
10 payment?

11 MS. TRICKEY: My understanding is that they are
12 looking specifically for energy payments.

13 MR. ZACHER: And do you recall when Mr. Mondrow
14 suggested to you that the IESO's energy payment engagement
15 should in fact be considering activation payments for
16 demand response resources?

17 MS. TRICKEY: Yes, I do.

18 MR. ZACHER: And has AMPCO provided input on the
19 proposed scope of the energy payments engagement and study
20 to be done?

21 MS. TRICKEY: I believe they have, yes.

22 MR. ZACHER: Okay. And I have asked Staff if they
23 could just put up on the screen what is tab 11 from the
24 IESO's earlier cross-examination compendium of Mr.
25 Anderson. And maybe if we could just go to the first page
26 of that -- sorry, the cover page. I'm sorry, the cover
27 page at tab 11. Okay.

28 Do you recognize that, Ms. Trickey, as AMPCO's

1 submission?

2 MS. TRICKEY: Yes, I do.

3 MR. ZACHER: And if we could just scroll down to the
4 top of the next page -- sorry, the page after that. Okay,
5 right there.

6 And do you see what AMPCO -- what has AMPCO said about
7 what the scope of the engagement should be beginning at the
8 first full paragraph?

9 MS. TRICKEY: My understanding of what they're asking
10 for is that we narrowly scope -- more narrowly scope the
11 consultation to deal with how to implement energy payments
12 consistent with other FERC and non-FERC jurisdictions --
13 it's too late for me to be reading -- rather than as to pay
14 them.

15 So my understanding of what they are asking for there
16 is that we maintain the scope of the consultation to look
17 at energy payments specifically.

18 MR. ZACHER: Okay, and if we could just scroll down to
19 the bottom of that same page -- stop there.

20 So you see number 1, it says "proposed problem
21 statement".

22 MS. TRICKEY: Yes.

23 MR. ZACHER: And what was the problem statement?

24 MS. TRICKEY: The proposed problem statement -- when
25 demand response resources are economically activated, they
26 will be --

27 MR. ZACHER: No, what was --

28 MS. TRICKEY: Oh, what was our proposed...

1 MR. ZACHER: Yes.

2 MS. TRICKEY: Pardon me, give me one second. So our
3 proposed problem statement was should DR resources receive
4 energy payments for in-market activations.

5 MR. ZACHER: And what has AMPCO now proposed?

6 MS. TRICKEY: When demand response resources are
7 economically activated, they will be compensated for the
8 service provided to the energy market at the market price
9 for energy, provided they have the capability to balance
10 supply and demand as an alternative to a generation
11 resource, and when dispatched if that demand resource is
12 cost effective, as determined by the net benefits test.
13 How should the net benefits test be constructed in Ontario
14 to ensure cost effectiveness.

15 MR. ZACHER: Thank you, those are my questions.

16 MS. SPOEL: Thank you Mr. Zacher. We have set aside -
17 - and thank you, Ms. Trickey and Mr. Short, for your very
18 helpful comments. I know it's been a very long day, so I
19 hope you have a more restful weekend.

20 We have set aside two days at the end of next -- not
21 next week, the week after, I think it's the 12th and 13th
22 of December for oral argument for all parties, so that we
23 can proceed along this with in a timely manner.

24 I would suggest we leave it with the parties and Board
25 Staff to work out scheduling of oral argument for those
26 Days, recognizing that everybody's got to have time to fit
27 it in, and respond to each other and respond appropriately
28 and so on.

1 MR. ZACHER: Madam Chair, I've got one suggestion and
2 really leave it -- it's obviously in your hands. But this
3 is obviously a matter that there's been -- that the
4 schedule is compressed, dealing with issues as you
5 indicated --

6 MS. SPOEL: Yes, we are fully aware of that.

7 MR. ZACHER: -- that you don't deal with every day and
8 I wonder if it might be helpful, in advance of oral
9 argument, if the parties filed written submissions and they
10 could perhaps be brief, limited to a certain number of
11 pages. But I wonder if that might assist the panel.

12 MS. SPOEL: Well, we had a bit of a discussion about
13 this actually at the break. Let us think about that and we
14 will get Board Staff to communicate with you on that issue.
15 I understand it can be helpful, but if parties are going to
16 do that, we are definitely going to set a limit because we
17 don't want a hundred pages of submissions.

18 We don't have -- that's part of the purpose of having
19 oral submissions here is to kind of keep it within
20 reasonable constraints. So maybe a few pages summarizing
21 your position would be helpful, but I really mean a few
22 pages. Otherwise, we will never get this done because I
23 find it's more efficient.

24 It's often more efficient to hear people and we can
25 ask questions and so on. But it might be useful, so let us
26 -- we will think about that and we will let you know by
27 Monday morning. How's that?

28 MR. ZACHER: Thank you.

1 MS. SPOEL: Mr. Rubenstein, you had a comment?

2 MR. RUBENSTEIN: I was just going to ask -- well, if
3 you are going to think about it. The question was is that
4 a mandatory requirement?

5 MS. SPOEL: Oh, well, that's another good question. I
6 don't -- this is the problem and everybody, let us, you
7 would prefer not to have to file something in writing.

8 MR. RUBENSTEIN: I have competing obligations that I
9 am trying to fit in over the next two weeks.

10 MS. SPOEL: I understand that and so do we. So, yeah,
11 we will think about that. I would say probably not. I
12 don't think -- but it may be that AMPCO and the IESO, being
13 the two main parties, AMPCO being the applicant being
14 IESO's rule, maybe those two parties should file something
15 brief in writing so that everyone else knows what the
16 arguments are going to be about, maybe.

17 So let's -- it's late in the afternoon so we will
18 think about that, and we will have Board Staff get back to
19 you on Monday.

20 And if there are any tables -- definitely if there are
21 any tables or any exhibits of numbers or anything like that
22 that you want to refer to in your submissions, in your oral
23 submissions, definitely provide those to us in writing, so
24 you can certainly -- you can use those kinds of aids, so
25 you don't have to be telling -- we don't want -- it's hard
26 to follow numbers if we don't have them in front of us, so
27 there's -- to the extent any of that evidence is involved
28 -- those kinds of submissions are involved, definitely

1 provide us with a little help. Yeah. It doesn't all, you
2 know -- we don't have to have it all done orally, but,
3 yeah, we will think about that.

4 Okay. Anything else before we break? All right.
5 Thank you very much. We will see everybody, or some of
6 you, most of you, back here on December the 12th.

7 --- Whereupon the hearing adjourned at 4:39 p.m.

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DECISION AND ORDER

EB-2021-0136

HYDRO ONE NETWORKS INC.

**Application for leave to reconductor electricity transmission lines
in the cities of Toronto and Mississauga**

BEFORE: Michael Janigan
Presiding Commissioner

Robert Dodds
Commissioner

David Sword
Commissioner

December 2, 2021



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1 OVERVIEW

This is a Decision and Order of the Ontario Energy Board (OEB) on an application filed by Hydro One Networks Inc. (Hydro One) for permission to reconductor existing transmission circuits in the municipalities of Toronto and Mississauga (Application). The Application also seeks approval to perform related enabling work and to replace some existing skywire with optical ground wire.

The transmission lines, associated facilities work and skywire replacement proposed by Hydro One are referred to as the Richview by Trafalgar Reconductoring Project, or Project. A map showing the location of the Project is attached as Schedule A to this Decision and Order. Hydro One also applied to the OEB for approval of the forms of agreements it offers to affected landowners.

The OEB grants Hydro One's application for leave to construct and approves the forms of land use agreements set out in the Application. This approval is based on an examination of the project need, project costs, reliability and quality of service, and forms of land use agreements. The leave granted through this Decision and Order is subject to the OEB's conditions of approval that are attached as Schedule B to this Decision and Order.

2 CONTEXT AND PROCESS

Hydro One applied to the OEB on July 16, 2021 under section 92 of the *Ontario Energy Board Act, 1998* (OEB Act) to reconductor circuits R19TH and R21TH between the Richview Transformer Station (TS) and Tomken Junction, and existing transmission circuits R14T and R17T between Richview TS and Trafalgar TS, to perform related enabling work, and to replace skywire associated with circuits R14T/R17T with optical ground wire.

Hydro One has also applied to the OEB under section 97 of the OEB Act for approval of the forms of land use agreements it proposes to offer landowners affected by the project.

The OEB issued a Notice of Hearing on August 6, 2021. The Association of Power Producers of Ontario (APPrO), Capital Power Corporation (CPC), the City of Mississauga, and Environmental Defence (ED) applied for intervenor status. APPrO, ED and the City of Mississauga also applied for cost eligibility.

Procedural Order No. 1 granted intervenor status to APPrO, CPC, the City of Mississauga and ED, granted APPrO and ED cost eligibility, and established the application's procedural schedule. The OEB also approved a late intervention request from the Independent Electricity System Operator (IESO).

OEB staff, APPrO, CPC, the City of Mississauga and ED filed interrogatories. Hydro One responded to them on October 8, 2021. Hydro One also responded to follow up questions from ED, in lieu of a technical conference.

OEB staff, APPrO and ED filed submissions. Hydro One filed its reply submission on November 12, 2021.

3 DECISION OUTLINE

Section 92 of the OEB Act requires leave of the OEB for the construction, expansion or reinforcement of electricity transmission lines. Section 96(2) of the OEB Act limits the scope of the OEB's review in an application under section 92 to the interests of consumers with respect to prices and the reliability and quality of electricity service. As part of its review of a project's impact on prices, the OEB typically considers the need for a project and alternatives to the proposed project.

The OEB's findings on the Project's costs and impacts on prices (which includes an analysis of Project need and alternatives), reliability and quality of service, forms of land use agreements, and the conditions of approval are addressed in the following chapter.

4 DECISION ON THE ISSUES

4.1 Project Need and Alternatives

Hydro One seeks approval to reconductor four existing 230 kV circuits between Richview TS and Trafalgar TS. The Project addresses a need identified by the IESO for increased transfer capability east of the Flow East Towards Toronto (FETT) interface by 2026. The need for the Project was described by the IESO in its letter dated December 10, 2020:

Supply capacity in eastern Ontario is expected to decline over the next decade contributing to a provincial need for capacity and, because of limits on the transfer capability of the FETT interface, ~4,000 MW of that capacity will have to be sited east of the FETT interface by 2026. To reduce the amount of capacity that must be sited in eastern Ontario, the IESO is recommending this Project, which is expected to be completed by 2026 and will increase the transfer capability of the interface by ~2,000 MW. This Project would reduce the risk to reliability in having to acquire a large amount of capacity in eastern Ontario and would enable more resources to compete to meet provincial needs.¹

The IESO stated that the decline in supply capacity that it referenced in its letter is attributable to nuclear retirements and nuclear refurbishment outages and could be further impacted as generation contracts expire towards the end of the decade.² The IESO concluded that, if transfer capability across the FETT interface is not increased to address anticipated generation declines to the east, applicable transmission security and resource adequacy reliability criteria will not be met starting in 2026.

The IESO considered non-transmission alternatives to the Project including conservation, new domestic supply and imports. The IESO concluded that addressing the identified need by acquiring these types of capacity represented an unacceptable reliability risk.³ The IESO also considered one transmission alternative: a new double-circuit 230 kV line connecting Trafalgar TS and Oakville TS with new switching facilities at Trafalgar TS; however, the alternative was not recommended because it would perform worse in the long-term, involve greater environmental disturbance and present higher implementation/permitting risk.⁴ The IESO also noted that the proposed Project

¹ Exhibit B / Tab 3 / Schedule 1 / Attachment 1

² Exhibit B / Tab 3 / Schedule 1 / Attachment 3 / p.3

³ Exhibit B / Tab 3 / Schedule 1 / Attachment 3 / p.6

⁴ Exhibit B / Tab 3 / Schedule 1 / Attachment 3 / p.10

conforms with the Provincial Policy Statement under the *Planning Act*, which establishes that the use of existing infrastructure and public service facilities should be optimized and opportunities for adaptive re-use should be considered before consideration is given to developing new infrastructure and public service facilities.

OEB staff submitted that it supports the proposed solution, considering the IESO's evidence on need, its assessment of transmission and non-transmission alternatives and Hydro One's and the IESO's interrogatory responses.

ED submitted that it "supports the efforts of [IESO] and Hydro One to increase the transfer capability in the relevant pathway to meet transmission reliability and resource adequacy needs" and that the project will "increase the geographic area in which new resources can be located, which will increase competition and result in ratepayer savings." ED further submitted that, after reviewing interrogatory responses, it would not be cost effective to upsize the conductor to reduce line losses beyond the one proposed by Hydro One. ED indicated that it has concerns with Hydro One's line loss evaluation processes, however, that such matters are more appropriately considered in Hydro One's ongoing 2023-2027 rates case proceeding⁵.

APPrO submitted that the needs assessment performed by the IESO "does not satisfy the requirement under the OEB's Standard Transmission Leave to Construct Issues List to demonstrate that the RTR Project is the preferred option to address the current supply need, as opposed to implementing a different solution." Among other things, APPrO submitted that the IESO did not adequately demonstrate its conclusion that imports, or existing/new capacity are unable to meet the identified need, that the IESO inappropriately relied on its "knowledge of the market" as grounds for decision making, and that the IESO did not appropriately consult with stakeholders when determining its recommended solution.

APPrO also submitted that "the IESO's failure to complete a [locational marginal pricing (LMP)] analysis and to consider how the [Richview by Trafalgar Reconductoring Project] could influence the relevant and usefulness of the price signal, or impact market participant investment decisions". APPrO submitted that the lack of an LMP analysis "undermines the relevance of the market price to proponents capable of providing competitive alternative supply solutions and cost savings for consumers and undermines the value of LMP to the market as a whole".

⁵ EB-2021-0110

APPrO did not submit that the OEB should deny Hydro One's Application. However, APPrO submitted that the OEB should include in its Decision an order requiring that any future IESO needs assessment filed in support of any leave to construct application include, at a minimum, the following additional items:

- "Results of public stakeholder engagement undertaken related to the supply need, completed sufficiently in advance so as to allow proponents enough time to develop and submit alternative solutions for consideration"
- "Comprehensive description of all assumptions and methodologies used in the underlying resource adequacy study, including supply resource attribute requirements such as run-time duration, ramp rate, peaking capacity, and seasonal preference"
- "Resource cost and performance input data comparison as part of any alternative solutions analysis "
- "Electricity grid priority connection areas for alternative supply options and imports"
- "Potential compensation framework options for alternative supply resources offering reliability services"

In its reply submission, Hydro One stated that "clear and substantial" evidence has been provided to establish project need, and that the Project has been shown to be the most cost-effective solution to address the need. Hydro One, with the assistance of the IESO, also addressed APPrO's submissions on the Project's needs assessment by stating:

- The Project has a lower implementation risk than other alternatives and will remove locational constraints on participation in future supply resource procurements
- The IESO is not confident that 2,000 MW of new supply resources east of FETT can be acquired by 2026 and that the uncertainty presents an "unacceptable risk" in its ability to meet reliability standard requirements.
- The IESO is of the view that "a specific stakeholder engagement with supply resources would not have changed the outcome of the IESO's assessment". The IESO further stated that it already provides stakeholders with opportunities to engage with the IESO and through these engagements the IESO has become aware of some interest in developing supply resources east of the FETT interface, however, most of these projects were at a preliminary stage and none

of the proponents for these projects indicated an in-service date of 2026 or earlier.

- The IESO acknowledges that the IESO's Market Renewal Program (which includes the implementation of LMP) and other market mechanisms may eventually provide the needed investment signals for supply resources. However, the IESO submitted that "the required price signals and investment decisions simply could not have been made in an acceptable timeframe to satisfy the reliability need that will arise in 2026" and that "a do-nothing scenario is not an acceptable option to address a pressing reliability need".

Hydro One also addressed APPrO's request for an OEB order to establish additional minimum criteria for future leave to construct applications. Hydro One stated that a section 92 application is not the appropriate forum for the OEB to consider such a request, and that if the OEB sees merit in the items requested by APPrO, that they are more suitably explored through a formal policy consultation. Doing so would ensure other potentially impacted OEB-licensed transmitters and impacted parties have an opportunity to provide input and make submissions on proposals. Hydro One requested the OEB to set aside APPrO's request and consider its validity and appropriateness at a future date, if it believes one is necessary.

Hydro One also submitted that "Hydro One and the IESO do not believe it would be appropriate to establish APPrO's suggested criteria as minimum requirements for a need assessment". Hydro One explained that "the circumstances of individual leave to construct applications and the corresponding need assessments vary widely, and there is no one-size-fits-all assessment". As an example, Hydro One stated that "a requirement to conduct public stakeholdering of the relevant supply need and identify potential compensation framework options for alternative supply resources in every case (as suggested by APPrO) would be cumbersome and unnecessary where non-wires alternatives are incapable of meeting an identified reliability need".

Findings

The OEB finds that the Richview by Trafalgar Reconductoring Project is in the public interest in accordance with the considerations of price, reliability, and quality of electricity service as set out in section 96(2) of the OEB Act and therefore approves a leave to construct for this project. The OEB accepts that, at this juncture, there is a need for the Richview by Trafalgar Reconductoring Project and the 2,000 MW of electricity east of FETT in anticipation of the planned shutdown of OPG's Pickering

nuclear generation in 2026. Given the proximity of the date when the replacement capacity will be needed, no alternatives are currently available to meet the anticipated demand.

While not opposing the leave to construct, APPrO has expressed dissatisfaction with the process to arrive at the application for project approval. In particular, APPrO noted shortcomings of the approach of the IESO and Hydro One to alternatives to developing sufficient power resources east of FETT - an approach that might have been more cost effective, promoted competitive supply alternatives and the implementation of LMP. APPrO recommended a number of process requirements to prevent what it felt were obstacles to meeting needs with the best solutions.

While the OEB agrees with Hydro One that specific directives concerning the requisite evidence and the expected advance preparation of a transmission leave to construct application are best addressed in the filing requirements, there are some general observations of a practical nature that the OEB wishes to make concerning the optimal circumstances for leave to construct application approval.

- The OEB acknowledges the key role of the IESO as set out in the provisions of the *Electricity Act* to ensure adequate, reliable and secure supply of electricity. The OEB recognizes as well the IESO's expert understanding of the market. Its support of this and other leave to construct applications is an important evidentiary component in the OEB's approval of a leave to construct application. However, similar to the acceptance of any expert evidence, the factual basis for IESO recommendations must be clear and understood by the OEB, and an applicant must be prepared to provide that basis beyond the support provided by the expert status of the IESO. The determination of the public interest by the OEB requires this inquiry.
- The OEB expects that, where possible, timely examinations of alternatives to construction of transmission facilities take place such that alternatives are not dismissed as being unable to be implemented simply because of a lack of time. Note the recent OEB IRP Decision with respect to natural gas facilities specifically tried to ensure that there was a sufficient time runway for the consideration of the best way to meet perceived system facilities' needs.⁶ The consideration of such alternatives is in keeping with the OEB's responsibilities pursuant to section 92 of the OEB Act as well as the IESO's statutory objectives for supporting a diversification of energy sources under the *Electricity Act, 1998*. In order to carry

⁶ EB-2020-0091

out those responsibilities and objectives, robust stakeholdering and advance planning with potential capacity providers need to be undertaken as part of initial project steps.

4.2 Project Costs

Hydro One estimated that the Project will cost \$60.9 million, of which \$56.3 million is capital and will be added to Hydro One's rate base, and \$4.6 million is to fund removals and will not be capitalized. The cost estimate was prepared in accordance with the recommended practice of the AACE International Cost Estimate Classification System and has a level of accuracy +30%/-20%.

Hydro One's Project cost estimate includes a \$2.7 million contingency that represents approximately 5% of the total project cost, before contingency. Hydro One stated that the contingency estimate, developed using an industry standard risk assessment framework, is within the range of 5% to 15% of direct costs similar to other line construction projects recently undertaken by Hydro One.

Hydro One cited three of its previous transmission projects for purposes of cost comparison. Each of the three comparators involved reconductoring existing 115 kV or 230 kV circuits. Hydro One explained that the scope of the Project differs from the comparator projects because it requires additional planning, safety requirements, execution time and resources. Hydro One stated that these additional complexities contribute to a comparatively higher cost per circuit km for the Project. The cost of the comparator projects was between \$0.4 million and \$0.6 million per circuit km. Hydro One estimated that the Richview by Trafalgar Reconductoring Project will cost \$0.8 million per circuit km.

OEB staff did not take issue with Hydro One's cost estimate for the Project. OEB staff submitted that Hydro One followed a reasonable process for developing its project cost estimate and that it followed a reasonable process for assessing project risks and developing a contingency estimate. OEB staff also submitted that Hydro One provided a reasonable explanation of the differences in per circuit km costs between the Project and comparator projects.

OEB staff submitted that the transmission options assessed in Hydro One's application have different levels of cost estimate confidence and that these differences were communicated through interrogatory responses. OEB staff submitted that it has no concerns with the fact that Hydro One and/or the IESO have assessed options that have different levels of cost estimate confidence. However, OEB staff submitted that, for future applications, "it would be informative if Hydro One clarified the confidence of its

cost estimates for all options considered in the pre-filed evidence”. OEB staff also submitted that “it would assist if Hydro One would explain the appropriateness of a recommended option in light of any differences and overlaps of confidence distributions among options considered.”

In its reply submission, Hydro One stated that it “is open to providing these clarifications as requested by Board Staff”. Hydro One stated that, if needed, such clarifications should become part of the “Chapter 4 Applications under Section 92 of the Ontario Energy Board Act”, of the “Filing Requirements for Electricity Transmission Applications.”

Findings

The OEB finds the estimated Project cost of \$60.9 million acceptable.

Hydro One followed a reasonable process for developing its project cost estimate and followed a reasonable process for assessing project risks and developing a contingency estimate.

The OEB would note, however, that it must ultimately determine the prudence of the approved facilities’ construction costs. Estimates that are provided with a leave to construct application should be qualified with the degree of confidence associated with that estimate and the reason for the same.

4.3 Impact on Price of Electricity Service

Hydro One estimated that the Project will increase the network pool revenue requirement by 0.41%, which will increase the 2021 OEB-approved rate of \$4.90 kW/month to \$4.92 kW/month.

Hydro One estimated that the Project will increase the typical residential customer bill by \$0.03 per month, assuming a monthly consumption of 700 kWh.

OEB staff submitted that the consumer impacts of the Project are appropriate given the need for the project, its costs and its alternatives.

Findings

The OEB finds that the estimated consumer impacts of the Project are appropriate given the need for the project, its costs and its alternatives.

4.4 Reliability and Quality of Service

Hydro One filed the Final System Impact Assessment (SIA) prepared by the IESO and the Final Customer Impact Assessment (CIA) prepared by Hydro One.

The SIA concluded that the project is expected to have no material adverse impact on the reliability of the integrated power system. The CIA concluded that the project can be incorporated without any adverse impact on Hydro One Transmission customers.

Hydro One also filed IESO planning analysis which concluded that the Project will help meet reliability standards specified by the North American Electric Reliability Corporation (NERC), the Northeast Power Coordination Council (NPCC), and the IESO.

OEB staff submitted that it does not have any concerns about the reliability and quality of service associated with the Project, considering Hydro One and the IESO's evidence, interrogatory responses, and the conclusions of the SIA and CIA.

Findings

The OEB accepts that the Project will have no material adverse impact on the reliability of quality of service of the integrated power system. This acceptance is based Hydro One's and the IESO's evidence, interrogatory responses, and the conclusions of the SIA and CIA.

4.5 Land Matters

Hydro One stated that the Project will be completed within the existing right-of-way and that it will "rely predominantly on statutory easement rights it enjoys on Infrastructure Ontario Bill 58 lands and one City of Mississauga property to construct, operate and maintain the proposed reconductored circuit transmission facilities."⁷

Hydro One stated that no new permanent land rights are expected to be required. However, Hydro One has requested OEB approval of two agreements that it will use to obtain land rights for the Project, should they be necessary: a Temporary Land Rights Agreement and a Damage Claim Agreement. Hydro One stated that the two proposed agreements were approved by the OEB in previous leave to construct applications.

⁷ Exhibit E / Tab 1 / Schedule 1 / p.3

OEB staff submitted that it has no issues or concerns with Hydro One's proposed forms of agreements, and that the agreements are consistent with those approved during previous OEB proceedings.

Findings

The OEB finds the proposed forms of agreements are acceptable. The agreements are consistent with those approved during previous OEB proceedings.

4.6 Conditions of Approval

Under subsection 23(1) of the OEB Act, the OEB may, in making an order, impose such conditions as it considers proper.

OEB staff submitted that the standard conditions of approval attached to Procedural Order No. 1 should be placed on Hydro One. Hydro One stated that it agrees to the proposed standard conditions.

Findings

The OEB finds that the standard conditions of approval attached to Procedural Order No. 1 should be placed on Hydro One.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Hydro One Networks Inc. is granted leave, pursuant to section 92 of the OEB Act, to construct the Richview by Trafalgar Reconductoring Project as described in the Application.
2. Leave to construct is subject to Hydro One Networks Inc. complying with the Conditions of Approval set forth in Schedule B.
3. The OEB approves the proposed forms of agreements that Hydro One Networks Inc. has offered or will offer to each owner of land affected by the Richview by Trafalgar Reconductoring Project.
4. Eligible intervenors shall file with the OEB and forward to Hydro One their respective cost claims in accordance with the OEB's Practice Direction on Cost Awards on or before **December 9, 2021**.
5. Hydro One shall file with the OEB and forward to intervenors any objections to the claimed costs of the intervenors on or before **December 16, 2021**.
6. If Hydro One objects to any intervenor costs, those intervenors shall file with the OEB and forward to Hydro One their responses, if any, to the objections to cost claims on or before **January 14, 2022**.
7. Hydro One Networks Inc. shall pay the OEB's costs of, and incidental to, this proceeding upon receipt of the OEB's invoice.

DATED at Toronto December 2, 2021

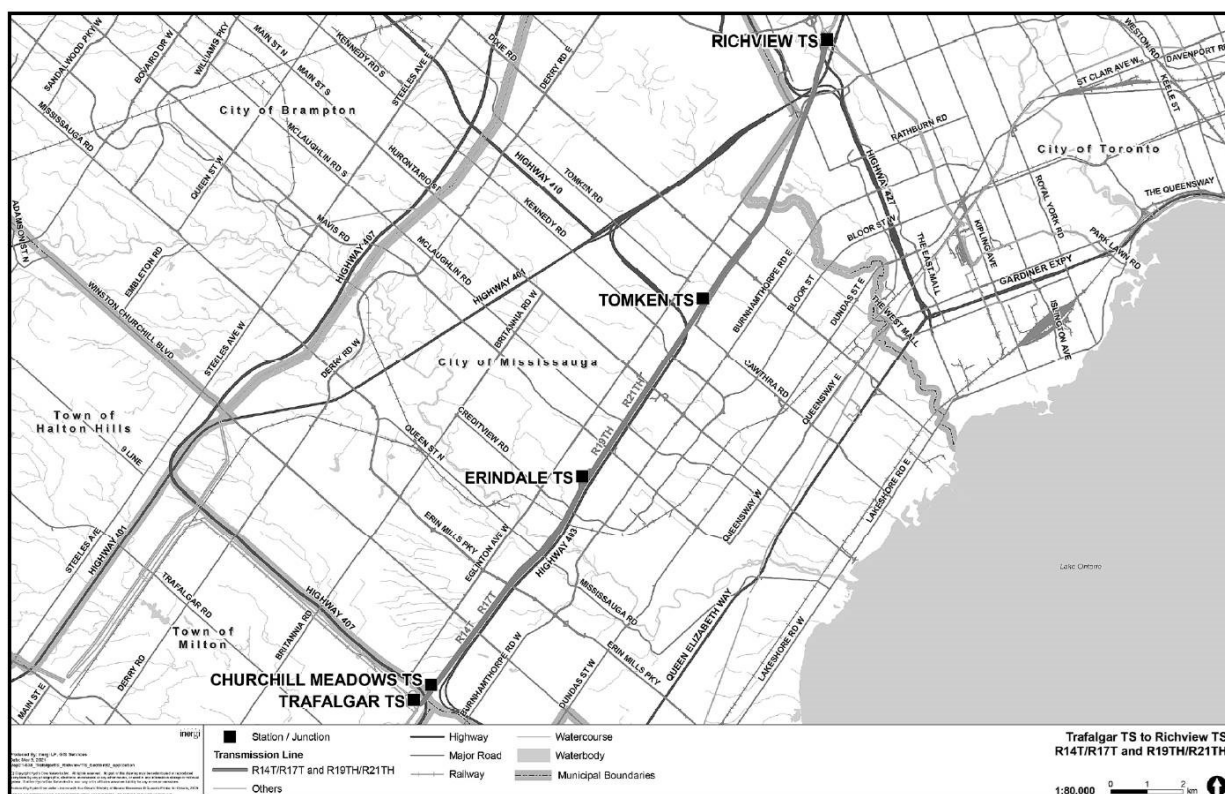
ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar

SCHEDULE A
DECISION AND ORDER
HYDRO ONE NETWORKS INC
EB-2021-0136
DECEMBER 2, 2021

**SCHEDULE A - RICHVIEW BY TRAFALGAR RECONDUCTORING
PROJECT MAP
HYDRO ONE NETWORKS INC.
EB-2021-0136
DECEMBER 2, 2021**



SCHEDULE B
DECISION AND ORDER
HYDRO ONE NETWORKS INC
EB-2021-0136
DECEMBER 2, 2021

**STANDARD CONDITIONS OF APPROVAL
FOR ELECTRICITY LEAVE TO CONSTRUCT APPLICATIONS
HYDRO ONE NETWORKS INC.
EB-2021-0136**

1. Hydro One shall fulfill any requirements of the SIA and the CIA, and shall obtain all necessary approvals, permits, licences, certificates, agreements and rights required to construct, operate and maintain the project.
2. Unless otherwise ordered by the OEB, authorization for leave to construct shall terminate 12 months from the date of the Decision and Order, unless construction has commenced prior to that date.
3. Hydro One shall advise the OEB of any proposed material change in the project, including but not limited to changes in: the proposed route, construction schedule, necessary environmental assessment approvals, and all other approvals, permits, licences, certificates and rights required to construct the project.
4. Hydro One shall submit to the OEB written confirmation of the completion of the project construction. This written confirmation shall be provided within one month of the completion of construction.
5. Hydro One shall designate one of their employees as project manager who will be the point of contact for these conditions, and shall provide the employee's name and contact information to the OEB and to all affected landowners, and shall clearly post the project manager's contact information in a prominent place at the construction site.



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

DECISION AND ORDER

EB-2021-0243

ONTARIO ENERGY BOARD

**Generic Hearing on Uniform Transmission Rates-Related Issues
and the Export Transmission Service Rate**

BEFORE: Lynne Anderson
Presiding Commissioner

Pankaj Sardana
Commissioner

Anthony Zlahtic
Commissioner

November 24, 2022



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1 OVERVIEW

This is a Decision by the Ontario Energy Board (OEB) on the first phase of a hearing commenced on its own motion under sections 19, 21 and 78 of the *Ontario Energy Board Act, 1998* to consider various issues related to Ontario's Uniform Transmission Rates (UTR). The first phase of the hearing focuses on reviewing and setting the Export Transmission Service (ETS) rate.

In this Decision the OEB makes the following key determinations:

- The OEB will set an ETS rate. The OEB concludes that there should be no “free riders” on the transmission system.
- The OEB is adopting the cost-based methodology provided in the report by Elenchus: *Export Transmission Service Rate Cost Allocation Methodology* (2021 Methodology), but has given consideration to the electricity market design in Ontario and market conditions when determining how costs for the domestic transmission network are allocated. The OEB will apply a 20% allocation factor for network costs. This results in an ETS rate of \$1.78/MWh.¹
- The new ETS rate will be effective January 1, 2023 and will remain at that level for two years for a period of stability. Effective January 1, 2025, the ETS rate will escalate annually based on the Revenue Cap Index (RCI) for Hydro One's transmission business.

¹ Undertaking JT 2.3.

2 CONTEXT AND PROCESS

Hydro One Networks Inc. (Hydro One) filed an application with the OEB on August 5, 2021, for approval of its 2023-2027 transmission and distribution rates.² Included in that application was evidence filed by Hydro One related to the ETS rate. Subsequently, the OEB decided to address the ETS rate through a generic proceeding to lend focus to the issue and facilitate participation by transmitters and other stakeholders.

The OEB issued a Notice of Hearing for the Generic UTR Issues proceeding on October 15, 2021. On November 30, 2021, the OEB issued Procedural Order No. 1, which established the timetable for a written interrogatory process and approved parties as intervenors. The approved intervenors in this proceeding are:

- Anwaatin Inc. (Anwaatin)
- Association of Major Power Consumers in Ontario (AMPCO)
- Association of Power Producers of Ontario (APPrO)
- Consumers Council of Canada (CCC)
- Canadian Manufacturers & Exporters (CME)
- Energy Probe Research Foundation (Energy Probe)
- ENWIN Utilities Ltd. (ENWIN)
- Hydro One
- Independent Electricity System Operator (IESO)
- London Property Management Association (LPMA)
- Niagara-on-the-Lake Hydro Inc.
- Ontario Power Generation Inc. (OPG)
- Mr. Naren Pattani
- Pollution Probe
- Power Workers' Union (PWU)
- School Energy Coalition (SEC)
- Vulnerable Energy Consumers Coalition (VECC)

OEB staff also participated in the proceeding.

The OEB issued its Decision on the Issues List on January 28, 2022. Interrogatories were submitted by intervenors and OEB staff by March 28, 2022. Hydro One and the IESO provided responses to the interrogatories on May 13, 2022.

² EB-2021-0110.

On April 1, 2022, the OEB issued Procedural Order No. 2, in which the OEB accepted APPrO's proposal to file expert evidence from their consultant, Power Advisory, and established a timetable for the filing of this evidence, interrogatories on the expert evidence, a technical conference, a presentation day, and an untranscribed discussion among parties.

APPrO filed expert evidence in this proceeding on May 27, 2022. Interrogatories were submitted by intervenors and OEB staff on the APPrO evidence by June 17, 2022. APPrO provided responses to the interrogatories by July 8, 2022.

A technical conference was held on July 28 and 29, 2022; the presentation day was held on August 4, 2022; and the untranscribed discussion among intervenors and OEB staff was held on August 8, 2022.

In Procedural Order No. 3, issued August 26, 2022, the OEB revised the timelines for the filing of submissions as requested by VECC. Intervenors and OEB staff filed submissions on September 6, 2022, and responses to the submissions on September 26, 2022.

3 DECISION ON THE ISSUES

3.1 Background

History of the ETS Rate

As part of the regular operation of Ontario's electricity market, Ontario imports and exports electricity on an hour-by-hour basis across interties with two Canadian provinces (Manitoba and Quebec) and three U.S. states (Minnesota, Michigan, and New York).

The Ontario ETS rate set by the OEB is applicable “for the use of the transmission system in Ontario to deliver electrical energy to locations external to the Province of Ontario, irrespective of whether this energy is supplied from generating sources within or outside Ontario.”³

The OEB approved Ontario's first ETS rate of \$1/MWh on May 26, 2000, in its decision on Hydro One's transmission revenue requirement application for the year 2000.⁴

Since that time, the ETS rate has been set in Hydro One's transmission rates revenue requirement proceedings, including in 2007, 2010, 2013, 2015 and 2020.⁵ Areas of review have included its purpose, methodology, proposed rate options, comparison to other jurisdictions and impact on electricity markets. Once approved, Hydro One's revenue requirement, which incorporates the impact of external revenue earned from ETS, is incorporated into the OEB-approved UTRs.

As part of the proceeding for Hydro One's 2011 and 2012 transmission revenue requirement and rates, Charles River Associates (CRA) was retained to prepare a qualitative analysis of the future effect of several ETS rate scenarios, with respect to exports and wheel-through volumes, ETS tariff revenue, and the Hourly Ontario Energy Price (HOEP). The OEB increased the ETS rate to \$2.00/MWh for 2011 and 2012, based on the directional preference of the CRA study, and the absence of any particular analytical underpinning for the then-current rate. The OEB also made it clear in that

³ 2022 Ontario Uniform Transmission Rate Schedules, EB-2021-0276.

⁴ RP-1999-0044. Ontario Hydro Networks Company Transmission Cost Allocation and Rate Design. May 26, 2000. Hydro One was called “Ontario Hydro Networks Company” when it filed RP-1999-0044.

⁵ EB-2006-0501, EB-2010-0002, EB-2012-0031, EB-2014-0140, EB-2019-0082.

decision that subsequent panels assessing the level of this rate should not regard the new rate as having any particular precedential value.⁶

In 2012, CRA further reviewed tariff rates and structures in neighbouring markets.⁷ CRA also assessed several proposed rate options. In its June 2013 decision, the OEB directed Hydro One to “perform a cost allocation study to establish a cost basis for the ETS rate” in its next cost of service transmission rate application.⁸

In response, Hydro One submitted an ETS rate cost allocation study, prepared by Elenchus Research Associates Inc. (Elenchus), as part of its 2015-2016 transmission revenue requirement application.⁹

Elenchus recommended an ETS rate of \$1.70/MWh for 2015 and 2016 as reflective of the cost of providing ETS, based on its proposed methodology. For the purpose of reaching a settlement, all parties agreed to an ETS rate of \$1.85/MWh “on the understanding that the methodologies, assumptions and scenarios used in the Elenchus study does not have precedential value and may be challenged in subsequent proceedings.”¹⁰ The OEB approved the settlement of the \$1.85/MWh ETS rate for 2015 and 2016. The OEB has subsequently approved the continuation of the ETS rate at \$1.85/MWh to the end of 2022.

Evidence in Current Proceeding

Hydro One filed evidence relating to the ETS rate as part of its application in the EB-2021-0110 proceeding, including:

- A cost allocation study prepared by Elenchus
- An ETS jurisdictional review prepared by CRA
- A commentary prepared by the IESO on the implications of changes to the ETS rate for Ontario’s electricity market

⁶ EB-2010-0002, Decision with Reasons, p.75.

⁷ EB-2012-0031, Exhibit H1, Tab 5, Schedule 2, Appendix B, Charles River Associates, Export Transmission Service (ETS) Tariff Study, May 16, 2012.

⁸ EB-2012-0031, Decision and Order, June 6, 2013.

⁹ EB-2014-1040, Exhibit H1, Tab 5, Schedule 1, Attachment 1, Elenchus, Export Transmission Service Rate - Cost Allocation Methodology, May 7, 2014.

¹⁰ EB-2014-0140, Hydro One Networks Inc., Test Year 2015 and 2016 Transmission Rates Settlement Agreement, p.25.

This evidence was placed on the record of the current proceeding. Furthermore, the OEB requested that Hydro One and the IESO provide clarification of their recommendations for the ETS rate. Hydro One and the IESO subsequently filed a joint submission regarding the ETS rate (Joint Submission).¹¹ The Joint Submission document includes (a) a summary of relevant background information regarding the ETS rate, (b) clarifications from Hydro One and the IESO as to their respective recommendations on the ETS Rate, and (c) copies of three reports relating to ETS rates which were previously filed in the EB-2020-0110 proceeding.

Elenchus 2021 Cost Allocation Study

The 2021 Elenchus cost allocation study (Elenchus 2021 Study) in this proceeding is an update to its 2014 cost allocation methodology (Elenchus 2014 Study). This update considered:

- Direction from the OEB to Hydro One to review the allocation of shared network asset-related costs to exports
- The OEB's March 22, 2018, *Report on Pole Attachment Charges*¹²
- Elenchus' jurisdictional review of cost allocation methodologies
- The IESO's treatment of exports
- Export service curtailment in recent years and expected near-term curtailment

In its decision on Hydro One's 2020 to 2022 transmission rate application, the OEB directed Hydro One to undertake further work on developing a cost-based ETS rate. Specifically, the OEB stated that:

Hydro One supported intervenor arguments that a cost allocation methodology that includes the allocation of shared network costs to exporters should be provided in Hydro One's next transmission rebasing application. The OEB agrees. This study should include different scenarios to take into consideration the fact that exporters do not receive the same priority access as domestic service until they are scheduled. The OEB agrees with the OEB panel for the ETS Decision that export service should continue to be viewed as a separate

¹¹ Hydro One and IESO Joint ETS Rate Submissions, October 14, 2021.

¹² EB-2015-0304, Report of the Ontario Energy Board, Wireline Pole Attachment Charges, March 22, 2018.

class. This study should be filed with Hydro One's next transmission rebasing application.¹³

The OEB also stated that:

Shared network facilities have been paid for by domestic customers. The OEB has determined that the use of shared network facilities by exporters needs to be considered in setting the ETS rates.

The Elenchus 2021 Study stated that it discussed with the IESO how exports are treated in Ontario compared to domestic customers. The IESO considers exporters to be a "curtailable" class. The IESO quantified for Elenchus the number of hours per year when exports were curtailed from 2016 to 2020, as well as the number of peak hours when exports were curtailed.¹⁴

More details about Elenchus' methodology are provided in Section 3.3 of this Decision.

CRA Jurisdictional Review

Hydro One engaged CRA to update its jurisdictional review to reflect current export transmission service rates in other jurisdictions, the rationale behind those rates and how market implications are considered in the setting of export transmission service rates in those jurisdictions. Most jurisdictions included in the 2021 CRA study apply Open Access Transmission Tariff (OATT) rates for export services, which promote competitive and non-discriminatory transmission access. All Canadian provinces operate within the OATT framework except Ontario and Alberta.

IESO Commentary

In its commentary, titled *Market Implications of the ETS Rate*, the IESO provided an overview of intertie trading in Ontario and discussed the implications of an increased ETS rate for the Ontario market.

The IESO introduced the fact that in addition to paying the ETS rate, intertie traders exporting energy from Ontario pay the Intertie Congestion Price (ICP). The ICP is a dynamic pricing mechanism administered by the IESO that allocates access to interties when there is more demand than capability.¹⁵ The IESO also commented that the

¹³ EB-2019-0082, Decision and Order, April 23, 2020, p.180.

¹⁴ Elenchus ETS Rate Cost Allocation Report, July 21, 2021, p.23.

¹⁵ Hydro One and IESO Joint ETS Rate Submissions, October 14, 2021, Attachment 3, p.2 and Exhibit JT-1.3, p.8.

market implications of a higher ETS rate would be expected to include a reduction of exports, a decrease in ICP revenues, and a reduction in the operational and economic benefits that exports provide.¹⁶

APPrO's Expert Evidence

On May 27, 2022, APPrO submitted a report titled *Expert Report for the Market Impacts of Changes to the ETS Rate*, which was prepared by Power Advisory.

In its report, Power Advisory provided comments on Elenchus' proposed methodology. Power Advisory also described its analysis of the financial impact of raising the ETS rate, consistent with the Elenchus methodology options, and of lowering the ETS rate to \$0/MWh.¹⁷

In not accepting Elenchus' cost allocation methodology, Power Advisory concluded that:

Overall, a large increase in the ETS rate will likely increase total system costs that will have to be recovered from Ontario ratepayers and result in higher rates. While the shifting of fixed costs to exporters through a higher ETS rate may initially appear to be beneficial for Ontario ratepayers, the reality is that it may reduce the province's ability to economically manage its baseload and sub-marginal cost supply, leading to greater curtailment (and domestic costs)

Conversely, a reduction in the ETS rate to \$0/MWh over the 2018 to 2021 timeframe is likely to have reduced total system costs for Ontario ratepayers.¹⁸

3.2 Continuation of Export Transmission Service Rate

The first issue on the OEB-approved issues list for this proceeding is whether it is appropriate to continue to rely on an ETS rate and on ICP to charge for export service.

OEB staff and all parties except Pollution Probe and APPrO supported the continuation of a non-zero ETS rate. Those in favour of continuing a non-zero ETS rate provided the following main points:

¹⁶ Hydro One and IESO Joint ETS Rate Submissions, October 14, 2021, pp.10-11, and Attachment 3, pp.2-3.

¹⁷ Power Advisory, *Export Report for the Market Impacts of Changes to the ETS Rate*, May 2022, pp.5-6.

¹⁸ Power Advisory, *Export Report for the Market Impacts of Changes to the ETS Rate*, May 2022, p.46.

- ETS and ICP do different things, one is not a substitute for the other:
 - ETS rates recover transmission costs from exporters. It is a regulated rate that reduces transmission costs for domestic users.
 - The ICP is market-driven, based on the willingness of an exporter to pay when interties are congested. The ICP should be thought of as part of the price that exporters pay for energy, not a payment for their use of the transmission system. Exporters only make one bid into the energy market for the cost of the commodity, which includes what the exporter is willing to pay to export energy through a specific intertie.
- Non-congested volumes do not generate any ICP revenues from exporters. The ETS rate generates revenues from any use of the transmission system. Exporters make use of both the transmission network and interties for their exports, and therefore should pay for both.
- Several parties argued that everyone who uses a system should pay their allocated share of it, and the OEB should give weight to the “no free riders principle”. SEC and Mr. Pattani cited evidence that between 2017 and 2021, more than half of export volumes were not subject to congestion and were not subject to any ICP.
- Some parties also noted a 2019 report of the Brattle Group which commented that congestion costs “are not costs that are associated with the physical transmission system, but instead are costs of the *energy* that is sent through the system.”¹⁹ (Emphasis in original).
- Eliminating the ETS rate would result in cross-subsidization from transmission ratepayers to the energy market, which is counter to the electricity deregulation objective of separating transmission and energy businesses; would reduce cost transparency; and would be contrary to ratemaking principles of user pay, cost causality, and fairness. Hydro One submitted that only ETS revenues specifically offset transmission costs for Ontario customers, and ICP offsets costs in the electricity market.

¹⁹ The Brattle Group, *Analysis of the TRCA Surplus Allocation Methodology, Prepared for the Ontario Independent Electricity System Operator*, October 4, 2019, p.19.

- ICP revenues that are disbursed through the Transmission Rights Clearing Account (TRCA), and are credited to domestic customers, are reflected on customers' bills through Account 1580 (Wholesale Market Service Charges), which is allocated differently than transmission costs through the uniform transmission rates (UTRs) or retail transmission rates (RTSRs).

The IESO supported the continuation of the ETS rate. The IESO noted that the combination of the ETS and ICP has been in place since market opening and is well suited to the unique characteristics of the Ontario system. The fixed ETS has provided Ontario with a degree of revenue certainty from exports while allowing the dynamic ICP to extract the highest value possible from each export transaction.

The IESO disagreed with the characterization of exporters as free riders because they must compete in a marketplace that maximizes the amount that they are willing to pay for any given transaction. The IESO stated that exports contribute to the cost of the Ontario transmission system through both the ETS and the ICP, although the two mechanisms differ.

In contrast to the submissions described above, Pollution Probe and APPrO each submitted that the ETS rate should be reduced to zero.

APPrO disagreed that the ICP should be thought of as part of the price that exporters pay for energy, stating that the IESO's intertie zonal price that is used to establish the ICP is only higher than the hourly Ontario energy price (HOEP) because of limited capacity on the interties. APPrO summarized the evidence supporting its submission that the purpose of the ICP is "to allocate scarce transmission system intertie capacity through price signals when an intertie is congested."²⁰ APPrO also reiterated that if the ETS rate were set based on Elenchus' methodology, exporters would be paying twice for intertie capacity, once through the ETS rate and once through the ICP.

APPrO submitted that both the IESO evidence and the Power Advisory Report showed that a non-zero ETS rate would prevent some otherwise economically efficient exports to flow, reducing the value of exports to Ontario's domestic consumers.

²⁰ APPrO Responding Submission, September 26, 2022, pp.13.

APPrO also disagreed with the use of the no free riders principle. APPrO submitted that the argument that exporters may otherwise benefit from the transmission system without paying for it “is not sufficient reason to justify the imposition of an ETS rate when the evidence demonstrates that Ontario consumers would, in the aggregate, be economically worse off by doing so.”²¹ APPrO pointed to Power Advisory’s description of exports as an “opportunity service” that will only use excess transmission capacity that is inefficiently being used by domestic customers and submitted that there is no cost causation by exporters.

VECC submitted that APPrO’s argument that there is no cost causation is based on a narrow definition. A broader interpretation would be based on the “user pay” / “user benefit” principle, as well as the OEB’s 2019 decision on ETS rates that determined that the use of shared network facilities by exporters should be considered in setting ETS rates.

Pollution Probe submitted that an ETS of zero would enable the IESO to continue to use exports as a tool to manage supply and demand, in addition to generating net economic benefits for Ontario ratepayers. Pollution Probe also stated that a zero ETS rate reduces administrative costs and simplifies market transactions. A reduction of market barriers would support Distributed Energy Resources (DERs).

Hydro One responded to Pollution Probe noting that it has not been demonstrated that a zero ETS rate is needed to maintain the level of benefits currently or historically derived from exports in Ontario. Finally, Hydro One submitted that Pollution Probe did not provide any evidence to support its assertion that a zero ETS rate will remove barriers for DERs in Ontario.

APPrO submitted that it is not appropriate to continue to rely on an ETS rate and on ICP to charge for export services because electricity exporters’ use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest. APPrO submitted that the OEB “has a positive obligation to refrain from establishing any rate for exports use of the transmission system pursuant to section 29(1) of the OEB Act.”²²

²¹ APPrO Submission, September 6, 2022, p.13.

²² APPrO Submission, September 6, 2022, pp.5,8,10.

Section 29(1) of the OEB Act provides that:

On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

APPrO submitted that the relevant product market is the use of transmission capacity for exports, and that this market meets the two-part test for exercising forbearance under section 29 of the OEB Act, as set out by the OEB in the Natural Gas Electricity Interface Review proceeding.²³ APPrO submitted that the issue of whether exporters' use of the transmission system is subject to competition through the ICP mechanism that is sufficient to protect the public interest under Section 29(1) of the OEB Act is a "threshold issue" that the OEB must consider before considering issues put forward in the other submissions.

In their responding submissions, SEC, Hydro One, VECC, and OEB staff submitted that APPrO's section 29 argument should be rejected. SEC and Hydro One submitted that APPrO raised the issue of forbearance too late in the proceeding to allow for the appropriate procedural steps. These parties also submitted that APPrO's argument is flawed because it has not considered the differing purposes of the ICP and the ETS rate and has incorrectly applied the elements of section 29(1).

SEC and OEB staff submitted that the OEB does not regulate exporters, set ICP prices, or allocate access to the interties. SEC submitted that the fact that the users of a service engage in competitive activities is not the same thing as the service itself being competitive. It is the use of the transmission system that the ETS rate is intended to cover.

²³ Natural Gas Electricity Interface Review, EB-2005-0551. The OEB established a two-part test. The first part of the test requires an assessment of whether there is competition in the relevant market. The second requires an assessment whether the level of competition is or will be "sufficient to protect the public interest".

OEB staff compared the circumstances of Ontario's non-regulated natural gas storage services with the regulation of export transmission service. It noted that parties wanting to access the non-regulated gas storage capacity must compete for it, similar to the competition between electricity exporters for access to the province's interties during periods of congestion. However, parties accessing the competitive gas storage capacity must still pay regulated rates to transport gas to and from the storage facilities.

CRA's Evidence

Several parties noted that CRA's evidence showed that while the ICP is unique to Ontario, other jurisdictions address the cost of congestion from exporters through locational marginal pricing (LMP), which does not currently exist in Ontario. These parties pointed out that none of the jurisdictions which have LMP consider the congestion costs collected through LMP to be an offset to transmission costs or intertie costs and almost all those jurisdictions also charge exporters a cost-based rate for use of the transmission system.

SEC noted that, according to the CRA report, in most other jurisdictions it surveyed there is no distinction between the rates domestic and export customers are charged for use of the transmission system. Most are well above the current \$1.85/MWh ETS rate. Where there is a difference between classes of customers, it is usually based on a reciprocal arrangement between jurisdictions. Hydro One and Mr. Pattani noted that the CRA review did not find any jurisdiction with a "zero" regulated transmission network charge for export out of state or province.²⁴ Hydro One also noted that all neighbouring jurisdictions to Ontario have some form of rate for export transmission service which is linked to the recovery of a portion of the local transmitters' revenue requirements.

APPrO disagreed with the argument that other jurisdictions extract the same value as the ICP from exporters through the LMP. APPrO made the point that the IESO's Market Renewal Program, which the IESO is currently preparing to implement, includes the introduction of LMP in Ontario. If the argument were correct then the IESO would be able to eliminate ICP with the introduction of LMP; however, the *Single Schedule Market High-Level Design* published by the IESO in August 2019 states that the IESO is proposing to retain the ICP after the introduction of LMP. APPrO submitted that this demonstrates that the ICP and LMP "are fundamentally different." APPrO further

²⁴ Hydro One Submission, September 6, 2022, p.5; Pattani Submission, September 6, 2022, p.2.

submitted that the distinction between LMP and ICP is also reflected in the financial instruments that are offered to hedge the underlying risk.

APPrO noted that while the U.S. jurisdictions considered by CRA have largely recovered costs for use of the transmission system on a cost-basis, CRA also acknowledged that none of those other jurisdictions have anything equivalent to Ontario's market-based ICP mechanism. APPrO submitted that a comparison to those other jurisdictions is therefore not helpful to address whether it is appropriate to continue to rely on an ETS rate and ICP to charge for export service because the existence of ICP makes Ontario's circumstance unique and a unique approach is required.

Power Advisory's Evidence

In its report, Power Advisory analyzed Ontario's energy exports in the 2018-2021 period and determined that had the ETS rate been set higher than \$1.85/MWh, the incremental revenue from the higher ETS rate would be more than offset by an increase in related costs, including a reduction in congestion rents, and an increase in curtailed energy from baseload supply.

Power Advisory also determined that setting the ETS rate to \$0/MWh over the same period would have resulted in "a net benefit for Ontario ratepayers, as the higher congestion rents and system-wide benefits offset the reduction in ETS-related revenues."²⁵

Several parties submitted that Power Advisory's analysis reflects past conditions, and does not reflect potential future changes, such as changes to Ontario's electricity market, the amount of intertie capacity, and the demand and supply mix in Ontario or adjoining markets. This means that lowering the ETS would not necessarily be advantageous going forward.

SEC pointed out that half of the four-year period analyzed by Power Advisory was during the COVID-19 pandemic, when decreased electricity demand led to increases in surplus baseload generation in Ontario, as well as surplus generating capacity in neighbouring jurisdictions. SEC also submitted that in coming years the OEB may make changes to OPG's Surplus Baseload Generation Variance Account and the Hydroelectric Incentive Mechanism that would have a material impact on the need for exports to reduce hydroelectric spill and that the financial impact of hydroelectric spill

²⁵ Power Advisory Submission, May 2022, p.10.

that would occur from changes in export volumes is a significant factor in Power Advisory's analysis.

SEC also submitted that Power Advisory's methodology significantly overstated the financial impact of a change in the ETS rate. SEC said the problem with data used by Power Advisory is that it assumes a direct relationship between HOEP and export volumes, but the R^2 value of this relationship is only 0.077, therefore this direct relationship cannot be assumed. Both SEC and OEB staff noted that there was no sensitivity analysis done on the results, and this reduced the insight that could be drawn from Power Advisory's estimates. SEC and VECC provided confidential calculations to demonstrate how Power Advisory's results overestimated the impact of a higher ETS rate.

In its responding submission, APPrO submitted that SEC's approach is flawed because it ignores the price elasticity of export volumes within each pricing bucket. APPrO disagreed with the criticism that Power Advisory's evidence did not account for uncertainty about the future. APPrO submitted that when deciding whether a class of services is subject to competition sufficient to protect the public interest, the wording of Section 29(1) of the OEB Act allows for the use of historical evidence and data and analysis of future conditions is not required. APPrO also submitted that if the OEB decides that there is insufficient evidence to assess the applicability of Section 29(1) of the OEB Act, the OEB should undertake an additional discovery process to ensure that it gives all the parties an opportunity to present expert evidence.

APPrO also disagreed with arguments that Power Advisory's evidence should be discounted due to the presence of uncertainties and approximations. APPrO pointed out that Power Advisory was accepted as an expert in energy market and energy policy analysis and submitted that, with the exception of the IESO, Power Advisory is best positioned to comment on the impact of exports on the system.

APPrO submitted that the Power Advisory study used the best available historical data and can and should help inform OEB decision making. APPrO also submitted that it is a breach of the accepted prohibition against the introduction of new evidence in argument for SEC and VECC to introduce new confidential calculations and analysis in their arguments. APPrO further submitted that Power Advisory witnesses did not have a chance to respond to this new material on the record. APPrO submitted that the OEB

should disregard, or limit consideration of, the new “evidence” filed by SEC and VECC and associated arguments.²⁶

Findings

The OEB will set an ETS rate. The OEB concludes that there should be no “free riders” on the transmission system. In continuing to set an ETS rate, the OEB’s assessment is that the ETS rate and the ICP mechanism are pricing mechanisms that signal fundamentally different aspects of how the transmission system is used for export transactions. The OEB accepts that the ETS rate is a charge for the use of the transmission system for exports, whereas the ICP mechanism is a market-based pricing framework intended to efficiently ration constrained transmission capacity. The OEB finds that it is appropriate to consider both ETS and ICP to (a) fairly price the use of Ontario’s transmission system; and (b) determine the manner in which the demand for scarce transmission capacity on specific transmission corridors is efficiently priced and allocated to exporters at specific points in time.

APPrO argued that as a threshold question the OEB should determine whether to refrain from setting an ETS rate because there is sufficient competition to protect the public interest through the ICP. The OEB disagrees. The ETS rate is for the use of the transmission system, which is a monopoly service used by both domestic customers and exporters. The exporters using this transmission system are engaged in competition. That does not make the use of the transmission system a competitive service.

APPrO also argued that the OEB should disregard the calculations by SEC and VECC based on the Power Advisory evidence. While the OEB agrees that further analysis to test Power Advisory’s assumptions could be helpful, the OEB acknowledges that Power Advisory and other stakeholders did not have the opportunity to test that analysis through the discovery process. Therefore, the OEB has given the calculations little weight.

The OEB found the evidence from CRA helpful to understand the differences between Ontario and other jurisdictions, in particular that no neighbouring jurisdictions have an ICP mechanism. This uniqueness supports an approach that considers both the transmission system and market operations when setting the ETS rate.

²⁶ APPrO Responding Submission, September 26, 2022, pp.9-10.

3.3 Approach to Setting Export Transmission Service Rate

3.3.1 Cost Allocation

Elenchus 2014 Cost Allocation Methodology

The Elenchus 2014 Study proposed a cost allocation methodology to determine the ETS rate. The main characteristics of Elenchus' recommended methodology were that:

- Dedicated export network asset costs were allocated to the export customer class
- Export customers were considered "interruptible", and therefore, no shared network asset-related costs were allocated to the export customer class
- Shared network operations, maintenance and administration (OM&A) costs were allocated to export customers
- 12 Coincident Peak (12CP) was used as the allocator. The 12CP allocator is the sum of the demand for each customer class at the hour of each month's maximum system demand using the last year for which information was available.²⁷

Elenchus 2021 Cost Allocation Methodology

For the Elenchus 2021 Study, the cost allocation methodology was updated with respect to shared network asset-related costs. Specifically, Elenchus stated that:

Since exporters are able to use the transmission system much of the time, even at the times of Ontario system peak, Elenchus believes that a reasonable basis exists for Shared Network Asset-related costs to be allocated to exports based on the principle of cost causality.²⁸

According to Elenchus, in 2019 and 2020 exports were curtailed close to 20% of the time. In the five peak hours in each of the past five years, exports were curtailed in 11 out of the 25 hours and 10% of volumes were curtailed in those hours.²⁹

Accordingly, augmenting Elenchus' 2014 cost allocation methodology to add a methodology for allocating shared network asset-related costs to export customers was

²⁷ Elenchus ETS Rate Cost Allocation Report, July 21, 2021, pp.11 and 16-18.

²⁸ *Ibid*, p.6.

²⁹ *Ibid*, p.5.

a focus of the Elenchus 2021 Study. Elenchus described this as “taking into consideration the fact that exporters do not receive the same priority access as domestic service until they are scheduled.”³⁰ Elenchus provided three such methodology options in its report. These options are described in Section 3.3.2, below.

Elenchus also stated that, if export customers are allocated a portion of Shared Network Asset-related costs, then export customers should also be allocated a portion of external revenues received by Hydro One for use of their assets. Elenchus recommended that full external transmission revenues be allocated by the same methodology as shared network asset-related costs.

OEB staff and most parties supported the use of a cost-based approach to set the ETS rate. It was noted that the OEB has stated in past decisions that it is seeking a cost-based ETS rate. Some parties argued for the use of a fully allocated cost-based methodology and that there is no justifiable reason for domestic volumes and export volumes to be treated differently with respect to the use of the same transmission assets. OEB staff submitted that a cost-based approach is fair because it aligns with cost causality principles. In the case of the ETS rate, a cost-based approach aligns with the principle of “user pay” or “no free rider”: it assigns costs to those who use the Ontario transmission system in proportion to their use of it. A cost-based approach is also transparent because it relies on inputs that are generally available, and which are accessible by the public. It also involves a rate-setting process that is “public, participatory and which allows for scrutiny of evidence and arguments.”³¹

However, several parties submitted that the cost-based approach should be balanced with other considerations as follows:

- The IESO submitted that the two competing objectives that the OEB was trying to balance when it established the ETS rate in 2000 – the recovery of a portion of the total transmission system costs from exporters while minimizing impediments to trade with other jurisdictions – remain relevant today. The IESO further stated that given the characteristics of the Ontario grid, the need to facilitate trade has increased significantly.
- The IESO argued that a solely cost-based approach to set the ETS rate would not be an optimal solution because this would not provide any consideration to the role that the ETS has in export volumes and would fail to consider other

³⁰ *Ibid*, p.5.

³¹ OEB Staff Submission, September 6, 2022, p.5.

benefits that exports provide to Ontario, including any congestion revenue that results from the ICP, could result in increased costs for Ontario consumers. The IESO also noted that exports are not a primary driver of investment in the transmission system.

- Hydro One submitted that cost allocation should be used as a starting point; however, the ETS rate should balance recovery of an appropriate level of transmission costs from exporters with the objective of achieving broader cost and system benefits, including taking into consideration the potential impacts on the ICP. Hydro One submitted that rate design principles such as those of full cost recovery, fairness and efficiency are among the principles that the OEB should consider in determining the ETS rate.
- SEC submitted that the rate should be cost-based, while still considering the broader market implications affecting domestic customers. SEC submitted that, in addition to allocating a portion of intertie costs, a portion of shared network asset costs should be allocated to exporters because exporters use them to transmit export energy.
- CME submitted that the ETS rate should be informed, but not mechanistically determined, by cost allocation principles. The different level of service received by exports, the operational benefits provided by exports, and the additional ICP costs paid by exporters should also be considered when setting the ETS rate.
- Anwaatin submitted that the ETS should be set using a balanced approach, at a level that avoids material negative impacts to electricity reliability.

SEC and Mr. Pattani submitted that costs should be allocated to exporters in line with the “beneficiary pays” principle, referencing the U.S. Federal Energy Regulatory Commission’s description that “The cost of transmission facilities must be allocated to those ... that benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits.”³² SEC also submitted that the OEB has applied the beneficiary pays principle in different contexts, and has adopted this beneficiary pays guiding principle to allocate costs for certain new infrastructure under the Transmission System Code.

³² SEC Submission, September 6, 2022, pp.8-9; Pattani Submission, September 6, 2022, p.8.

Anwaatin submitted that the approach used to set the ETS rate should help to facilitate the efficient export of low-carbon electricity from Ontario into neighbouring jurisdictions with comparatively higher-emissions electricity systems.

The IESO agreed that a low ETS rate could assist in reducing regional emissions by facilitating the export of low carbon electricity from Ontario to neighbouring U.S. jurisdictions and, by extension, a higher ETS could increase regional emissions.

VECC noted that reducing emissions in other jurisdictions is not reflected in either the OEB's statutory objectives, or the Minister's current mandate letter to the OEB. VECC submitted that the impact on emissions should not be a primary consideration in setting the ETS rate.

APPrO submitted that if the OEB decided that a non-zero ETS rate should be continued, a principled cost-based approach should be used to establish the ETS rate.

Findings

The OEB agrees with using a cost allocation methodology as the basis for determining the ETS rate within the context of broader policy considerations currently facing Ontario's electricity grid. This point was also noted by Elenchus who pointed out that, while its latest study allocated shared network asset-related costs based on cost causality, the extent to which the OEB should change the ETS rate to reflect those network costs was a policy question for the OEB.

The OEB has opted to use a 20 percent allocation of network costs (inclusive of other transmitters' revenue requirements) underpinned by Elenchus' latest cost allocation methodology. The 20 percent weight has been deliberately set after considering broader policy issues (instead of one of the three scenarios initially undertaken by Elenchus in its 2021 Study). These policy considerations include accepting the IESO's evidence that the need for open power markets to facilitate trade has increased significantly due to the current characteristics of the Ontario grid, and that the Ontario electricity marketplace is in a period of transformative change and attendant uncertainty. Furthermore, given the (still) significant amount of surplus baseload generation, the IESO's Market Renewal Program, the need to procure significant amounts of generation, and uncertainty around the shutdown of the Pickering nuclear generating station, increasing the ETS rate to one of the rate levels suggested by Elenchus' three scenarios is not appropriate at this time.

The OEB found the study undertaken by Power Advisory and the evidence and submissions of the IESO helpful in its deliberations. The OEB accepts that there could

be an inverse relationship between the ETS rate and revenues collected via the ICP mechanism and accepts that increasing the ETS rate above \$1.85/MWh could have an impact on ICP revenues. The OEB agrees with the IESO that the Power Advisory analysis would have benefited from consideration of price spreads between domestic and intertie markets and from a formal econometric analysis that yielded export and import price elasticities. Such a study would have complemented Elenchus' cost allocation study and presented a clearer statistical basis for determining impacts that a change in the ETS rate would have on export and import volumes. Absent such an analysis, the OEB is left with only a "directional" indication of the impact that a change to the ETS could have on export and import volumes.

3.3.2 Inclusion of Network Charge

The Elenchus 2021 Study provided three methodological options for setting the ETS rate, all of which result in increasing the ETS rate from the current \$1.85/MWh.

Each of the options uses a forecast 2023 network revenue requirement for Hydro One and actual 2020 load and consumption data. Elenchus proposed that the three options be adjusted to include other transmitters' approved network revenue requirements. Elenchus noted that it made the same suggestion in its 2014 Study.³³ The rates described below reflect this adjustment.

The first option, known as the "Fully Allocated Model", allocates shared network asset-related costs using an unadjusted 12CP export allocator. The unadjusted export allocator captures curtailments to export demands that may have occurred during the coincident peak periods that were included in the 12CP calculations. Elenchus stated that the unadjusted 12CP allocation of shared network asset-related costs between domestic and export customers "will reflect each customer group's use of the transmission system, including the impact of service curtailment to export customers."³⁴ The Fully Allocated Model results in an ETS rate of \$6.54/MWh.

The second option, known as the "Hybrid Model", discounts the export demand 12CP allocator by 50%, "as a proxy for a hybrid model, half-way between no allocation and full

³³ Elenchus' 2021 report shows that the adjustment from a rate based on Hydro One's 2023 network revenue requirement to a rate including the network revenue requirements of all transmitters, including Hydro One, amounts to an increase of 7.77%. Elenchus ETS Rate Cost Allocation Report, July 21, 2021, p.35.

³⁴ Elenchus, Export Transmission Service Rate Cost Allocation Methodology, July 21, 2021, p.29.

allocation” of shared network asset-related costs to exports.³⁵ The Hybrid Model results in an ETS rate of \$3.66/MWh.

The third option, known as the “Curtailment Model”, discounts the export demand 12CP allocator by 20% based on the service curtailment that affected exports in recent years. Assuming that exports were curtailed 20% of the hours in recent years, the model adjusts export demands to 80% of their actuals. In this way, the model allocates shared network asset-related costs to exporters based on 80% of the actual export class 12CP over the period considered. Elenchus stated that the Curtailment Model provided a more direct link between the reduction of shared network asset-related costs allocated to exports and the number of hours in which they are curtailed. The Curtailment Model results in an ETS rate of \$5.42/MWh.

OEB staff and most intervenors supported the use of Elenchus’ methodologies, at least as a starting point for setting the ETS rate, because using a fully allocated costing model as a starting point ensures an equitable treatment of customers and upholds the “no free riders” principle. Most of these submissions supported the Curtailment Model because it accounts for the different level of service received by the export class compared to the domestic class.

While there was significant support for Elenchus’ methodologies, several parties supported a specific rate that was different from the rates that result from those methodologies. VECC and SEC separately proposed scaling Elenchus’ results to account for additional factors. Both SEC and VECC submitted that the Curtailment Model is appropriate because it reflects the extent to which exports are subject to curtailment in Ontario.

SEC submitted that 20% is a reasonable amount to discount the share of network asset costs allocated to exporters. SEC argued that the difference in service between export loads and domestic loads is not significant because in the last five years for the top five peak hours, only in 11 of those 25 hours were some exports curtailed, and when they were, it only amounted to 10% of those scheduled.

SEC submitted that the OEB should initially set the ETS rate at the half-way point between the Elenchus Curtailment Model value of \$5.42 and the current ETS rate, resulting in an ETS rate of \$3.64/MWh. SEC submitted that this would appropriately balance ensuring exporters pay a share for their use of the transmission system, while

³⁵ *Ibid*, p.29.

recognizing the broad impacts a change may have to domestic customers on other parts of their bill, due to the unique nature of the Ontario electricity market.

VECC submitted that the ETS rate should initially be increased to \$3.00/MWh. VECC argued that \$3.00/MWh is less than one-third of the difference between the current \$1.85/MWh rate and the \$5.48/MWh rate that resulted from VECC's recommended adjustments to the Elenchus cost allocation methodology, and only slightly more than 50% of the \$5.48/MWh. The \$1.15/MWh increase is only slightly more than the \$1.00/MWh increase approved by the OEB its 2010 decision.

Mr. Pattani noted that exports are curtailable and supported Elenchus's Hybrid Model as being a balanced approach. Mr. Pattani submitted that the ETS rate should be set at \$3.66/MWh. Mr. Pattani also submitted that Elenchus' Curtailment Model may be reasonable to use in the future; however, if it were applied immediately it would result in a larger step change from the current \$1.85/MWh rate.

Some parties recommended phasing-in changes to the ETS rate over several years. LPMA ultimately recommended a phased-in ETS rate increase starting at \$2.00/MWh in 2023 and increasing by \$0.50/MWh per year from 2024 to 2027, inclusive, resulting in a rate of \$4.00/MWh in 2027.

OEB staff submitted that, given the uncertainties and risks, the precautionary principle ought to be considered when implementing changes to the ETS rate. OEB staff described the precautionary principle as the notion of 'better be safe than sorry' amidst a lack of categorical proof of some potential future harm. OEB staff submitted that power system operability is an important issue that warrants ongoing consideration and recognition.

OEB staff noted that increasing the ETS rate to \$5.42/MWh would amount to an increase of 193% relative to the current rate. OEB staff submitted that the impact of this increase on the export class should be mitigated. OEB staff recommended phasing in an increase to the ETS rate over 12 years to recognize uncertainties around the potential electricity market and operability implications of an increase to the ETS rate; and to allow opportunity for learning and, if necessary, adaptation.

The IESO agreed with OEB staff that the precautionary principle should be applied in setting the ETS rate. The IESO stated that in its view, the evidence in this proceeding has not demonstrated that consumers will derive benefits from increasing the ETS rate above the current \$1.85/MWh level that would be commensurate with the countervailing risks.

SEC and the IESO submitted that the OEB should reject the OEB staff proposed 12-year phase-in proposal because the ETS is less than 10% of the total amount collected from exporters and therefore does not require mitigation, and a lengthy phase-in means that the rate will never be cost-based.

The IESO submitted that a phase-in period is not consistent with the precautionary principle and does not address the IESO's concerns about the operability and economic risks associated with a higher ETS rate. The IESO submitted that an annual adjustment in the ETS rate is unnecessary because intertie trading is not directly impacted by inflationary pressures.

Hydro One did not make a submission on a specific ETS rate. Hydro One noted that the OEB's rate design process for electricity distribution rates is an example of a rate design process which does not recover 100% of the costs identified through a cost allocation study, but instead a range of revenue-to-cost ratios is considered acceptable by the OEB. Hydro One submitted that a similar methodology could be used for setting the ETS rate by limiting the changes to the ETS rate such that a revenue-to-cost ratio is within an OEB-prescribed range.

CME noted the number of unknowns and submitted that the ETS rate should be reduced to \$1.50/MWh, to test whether this results in a net benefit to ratepayers, as expected by Power Advisory's analysis.

VECC disagreed with CME's proposal because any insight this might provide on the impact of a lower or higher ETS rates at the time of review may not be the same impact going forward. VECC also submitted that it is extremely complex to evaluate the impact of an ETS rate over a historical period relative to a hypothetical alternative rate.

Energy Probe stated that the ETS rate should fairly compensate ratepayers for the use of the transmission system and interties; however, it should not be a deterrent to export trading. Energy Probe submitted that the ETS rate should be increased to \$2.00/MWh based on the current ETS rate of \$1.85/MWh escalated by the approximate increase in Hydro One transmission rate base since the OEB's 2015 decision in which the \$1.85/MWh rate was set. However, VECC responded that it was unclear how Energy Probe's number was derived because the Network Service charge has increased 44.4% since 2015.

APPrO submitted that a cost-based ETS rate should allocate the cost of dedicated interconnection assets to exports and imports using the intertie 12 CP allocator as recommended by Elenchus.

APPrO submitted that a maximum of 20% of shared network costs should be allocated to export customers in the cost allocation model because exports:

- Receive a lower level of service than domestic transmission customers
- Are not a driver of transmission investment decisions
- Provide economic, system and operational benefits beyond ETS revenues

APPrO also referenced an application to the Alberta Utilities Commission by the Alberta Electric System Operator (AESO) in which the AESO proposed a tariff for the Export Opportunity Service (XOS) rate on the basis that exporters would contribute 20% bulk system and local system fixed costs. In that application, the AESO stated that the charge in the proposed tariff reflected the historical basis for prior export opportunity rates.

VECC submitted that APPrO's proposed adjustments to Elenchus' cost allocation methodology should be rejected because this approach mixes issues related to cost causality/user pay with other considerations such as operational and system benefits. that are generally considered to be matters of rate design. VECC argued that the AESO's approach is the exception as opposed to standard utility practice and the factor used by the AESO is really 25%, not 20%.

During the Technical Conference, APPrO requested that Elenchus carry out specific analyses by way of undertaking to calculate the ETS using an allocation of 20% for network costs. This option would result in a decrease to the ETS rate from the current \$1.85/MWh to \$1.78/MWh.³⁶

The IESO submitted that from a purely operational perspective, it would prefer an ETS rate of zero to reduce the risk of having to take control measures. However, it acknowledged that the risks are manageable at the current rate and it is not strongly advocating for an ETS rate of zero in this proceeding.

The IESO submitted that any increase in the current ETS rate above \$1.85/MWh would be a concern for the IESO because in its operational experience, even a relatively small increase in the ETS rate could have a material impact on heavily traded interties such as New York where price margins are already small.

³⁶ Undertaking JT 2.3.

The IESO submitted that the evidence in this proceeding has not demonstrated that consumers will derive significant benefits from a higher ETS rate. The IESO stated its expectation that any additional revenue gained from an increase in the ETS rate would be largely offset by a reduction in congestion rents due to the inverse relationship between the ETS rate and the ICP.

SEC noted that the IESO filed no quantitative analysis to model the operational impacts of a change to the ETS rates, and it is not appropriate to set rates based on the comfort of the IESO with the current ETS rate.

Pollution Probe submitted that if the OEB decides to maintain an ETS rate greater than zero then the rate should be lower than the current \$1.85/MWh. AMPCO submitted that the evidence did not provide sufficient rationale to justify changing the ETS rate from the existing \$1.85/MWh level.

VECC noted the diverse interests in the proceeding and that the ultimate balancing of these considerations lies with the OEB.

Findings

As noted in Section 3.3.1, above, the OEB will apply a factor of 20% for the allocation of network costs inclusive of other transmitters' revenue requirements. The OEB agrees with Elenchus' position that if a portion of the network charge is allocated to exporters, then a portion of the external revenues should be allocated to them as well. This results in an ETS rate of \$1.78/MWh.³⁷

The OEB has heard the submissions of parties and OEB staff that the goal should be a fully-allocated cost that is phased-in over time. However, the OEB concludes that while the ETS should be based on the cost of the transmission system, consideration should also be given to market design in Ontario and market conditions, such as the level of surplus base load generation. Market conditions are discussed in more detail in the next section. Further, as noted by the IESO and APPrO in this proceeding, the transmission system in Ontario is unique in that exports:

- Are subject to curtailment and therefore the service to exporters has less certainty than the service to domestic transmission customers
- Are not a driver for transmission investment decisions

³⁷ Undertaking JT 2.3.

- Provide system, operational and economic benefits through ICP revenues credited to domestic and export customers through the IESO's disposition of the TRCA

Rate design can be complex, and often requires an element of judgment after the cost allocation exercise. As Mr. DesLauriers from CRA said at the Technical Conference:

I would agree that rate design is complex. There is a cost allocation step that probably needs to take place first to establish the cost basis, but determining the proper rate to collect those costs, you know, is an art more than a science, and is a complex decision that has to take into account many competing objectives.³⁸

The OEB has applied its judgement in how to balance the outcome of the cost allocation study with the impact of the ETS rate on the electricity market.

3.3.3 Consideration of Market Conditions

In its commentary on the market implications of the ETS rate, the IESO stated that:

Revenue from the ETS is only one component of the value that Ontario receives from exports and historically has been the smallest component of the economic benefits associated with exports. When setting the ETS [rate], consideration should be given to maximizing the operational and economic benefits provided by exports by minimizing transaction costs. Any increase in the ETS rate will reduce the value of interties, leading to less system flexibility and higher costs for Ontario consumers.³⁹

The IESO estimated that exports of energy from Ontario contributed between \$330 and \$520 million annually to Ontario between 2017 and 2021 in the form of congestion rent payments, ETS revenue, payment of uplifts and avoided system costs.⁴⁰

The IESO also submitted that:

Evaluating the risk associated with an increase of the ETS rate is particularly difficult at the present time as the Ontario market is facing a time of transformative change and attendant uncertainty in the years ahead due to, amongst other things, the emerging capacity need in 2025 (documented in the IESO's Annual Planning Outlook (the "APO")), the roll out of [the Market Renewal

³⁸ Transcript Technical Conference July 28, 2022, pp.79-80.

³⁹ Hydro One and IESO Joint ETS Rate Submissions, October 14, 2021, Attachment 3, p.3.

⁴⁰ IESO Submission, September 6, 2022, p.9.

Program] by the IESO, and volatile commodity prices. ... [E]xports have become increasingly important in recent years to ensure the reliable operation of the Ontario grid and any increase to the ETS [rate] would introduce additional uncertainty at a time when market participants are managing these changes. From the IESO's perspective, there is a need for stability in the market where possible and a strong desire to avoid unnecessary additional changes to the market during this period.⁴¹

Several parties submitted that it is appropriate to consider the market and operational impacts that the IESO described in the proceeding. Some argued that this is a reason to leave the ETS rate as is. However, several parties took issue with some aspects of these considerations.

SEC stated that it is understandable that the IESO will have a natural bias towards the operational implications, but if the IESO felt so strongly about the risks generated by a significantly higher ETS rate, it should have undertaken quantitative analysis to demonstrate with some certainty that the risk may materialize and impact its ability to manage the electricity system. SEC and VECC also submitted that when the OEB previously doubled the ETS rate from \$1/MWh to \$2/MWh, the IESO did not claim that this caused any material operational issues or financial impacts.

Several parties and OEB staff commented that recent experience cannot be used to predict the future benefit of exports to domestic customers. SEC cited the following reasons:

- Based on the IESO's 2021 *Annual Planning Outlook*, periods of surplus baseload generation, are expected to fall significantly.
- The IESO's forecast of surplus baseload generation is subject to further change due to changes in the IESO's supply procurement plans.
- The IESO's Market Renewal Program will be the largest change to Ontario's electricity market since market opening and both the IESO and Power Advisory note that market renewal may impact exports.

⁴¹ IESO Submission, September 6, 2022, p.12.

- The biggest driver of export activity is the price spread, which is highly influenced by the specific market conditions in neighbouring jurisdictions, several of which are facing supply mix changes.

VECC agreed with the IESO that exports generate additional economic benefits for domestic consumers in addition to the revenues generated by the ETS rate. VECC acknowledged that the potential impact of a change in the ETS rate on these benefits should be considered by the OEB. VECC, however, did not accept the IESO's submission that a small increase in the ETS rate could have a material impact on Ontario's heavily traded interties, and submitted that the response to a higher ETS rate could be highly variable. In VECC's view, some of the benefits attributed by the IESO to intertie trading are related more to the existence of the interties than to the level of export volumes. However, VECC acknowledged that the ability to use exports to manage surplus baseload generation provides operational benefits. VECC stated that there is no magic number at which the ETS rate creates an unacceptable level of risk, and little insight into the impact of changing the ETS rate going forward with changing market/system conditions.

Mr. Pattani made many of the same points as SEC, OEB staff and VECC. Mr. Pattani also submitted that there were no objective, forward-looking assessments of the impact of the ETS rate on avoided system costs, and of future congestion rents in the proceeding and that uplift charges paid by exports should not be considered benefits or credits to domestic customers, but instead reflect the costs of facilitating export service.

OEB staff submitted that electricity market and operability implications ought to be considered when setting the ETS rate, but that neither the IESO nor Power Advisory had proven that increasing the ETS rate would result in increased curtailment of Ontario generation. OEB staff also submitted that the offsetting relationship between the ETS rate and the ICP increases the uncertainty around how much a change to the ETS rate would impact export volumes.⁴²

In its responding submission, the IESO disagreed with OEB staff and noted that no party seriously challenged the IESO's evidence.

APPrO submitted that arguments that historical data may not be a good indicator of the future because the future will be different than the past should be rejected, because the same position is true for most OEB decisions. APPrO also submitted that any concerns

⁴² OEB Staff Submission, September 6, 2022, p.18.

about the impact of changes to the ETS rate can be addressed through the process used to revisit and adjust the rate in the future.

Pollution Probe stated that arguments in support of a higher ETS rate are based on theoretical interpretations of siloed regulatory fairness and cost allocation principles, rather than real market impacts, public interest and what is needed in Ontario to meet consumer and policy needs. Pollution Probe further submitted that the IESO is in a unique position to understand how all the moving parts fit together and that strong consideration should be given to broader public and system benefits.

Findings

It is clear that there is significant surplus baseload generation in Ontario at this time, and that exports can assist with mitigating the cost of this surplus. An ETS rate that is too high may inhibit exports to the point of affecting the operation of the electricity market, which could increase costs to Ontario consumers. The OEB is therefore discounting the allocation of shared network costs of the transmission network from 100% to 20% in setting the ETS, as previously discussed in Section 3.3.2. The allocation of network costs could be adjusted in future proceedings if there is a material change in the market design or in the quantity of surplus baseload generation. The OEB has determined that it will consider the market design and conditions in the electricity market in setting the ETS rate, just as it expects that the IESO will consider the existence of the ETS rate in the design of the market.

The IESO has been working on a Market Renewal Program for several years. The most recent information released by the IESO revised the implementation date of the Market Renewal Program to May 2025.⁴³ Furthermore, the *Annual Planning Outlook* from the IESO forecasts a reduction in surplus base load generation in the future.⁴⁴ Both the Market Renewal Program and generation supply/demand balance may have an impact on exports in the future. This is expected to be a consideration when the OEB sets the ETS rate in the future. The OEB is satisfied that it is appropriate to wait to assess the outcomes from the transformative changes to the electricity market expected from the Market Renewal Program and the pace of energy transition, before considering a significant change to the ETS rate.

⁴³ Market Renewal Energy Project Implementation | Engagement Day September 22, 2022.

⁴⁴ IESO Annual Planning Outlook, December 2021, p.49.

3.3.4 Term of Rate

VECC submitted that the initial change to the ETS rate should occur six to 12 months after the Decision date, approximately mid to late 2023. VECC submitted that this timeline would give exporters time to adjust to the change.

OEB staff recommended that the current ETS rate of \$1.85/MWh should be retained for 2023 to provide lead-time to affected parties. OEB staff suggested increasing the ETS rate to \$2.15/MWh in 2024 and then implementing OEB staff's phase-in approach, increasing the ETS rate by approximately \$0.30/MWh per year.

OEB staff acknowledged that its proposed approach does not account for changes in underlying transmission costs, including inflation. OEB staff stated that this was intended as a means of rate mitigation.

SEC, APPrO, Hydro One, and the IESO submitted that the implementation of any changes to the ETS rate should consider the impact on export transactions, noting that by the end of 2022, transmission rights will have been sold for the period ending December 31, 2023. Accordingly, the IESO and Hydro One submitted that a new ETS rate should not be implemented until January 1, 2024.

With respect to implementing a new ETS rate in conjunction with its 2023 transmission rates, Hydro One noted that in its joint transmission and distribution rate application that is currently before the OEB, Hydro One has assumed that the ETS rate will remain at the current level of \$1.85/MWh.⁴⁵

Hydro One responded to SEC's suggestion that new ETS rates should be implemented immediately following the closing of the September auction period, which Hydro One understood to mean October 1, 2023. Hydro One submitted that implementing a new ETS rate mid-year should be avoided as it would impact UTRs and may necessitate leaving UTRs interim until late in 2023 to enable them to be updated to reflect a change in the ETS rate as of October 1st. Hydro One submitted that any changes to the ETS rate should be made effective January 1st of a given year.

Hydro One proposed that:

- There be no annual mechanistic adjustments to the ETS rates for simplicity and stability

⁴⁵ Hydro One Responding Submission, September 26, 2022, p.22.

- The ETS rate be set every five years concurrent with Hydro One's transmission rebasing applications to balance having a rate that can be updated based on costs with an approach that does not impose excessive administrative costs
- The next review be a few years after the implementation of the IESO's Market Renewal Program
- The next review be through a generic hearing rather than Hydro One's next rebasing application

Many other parties also submitted that the ETS rate should be reviewed at the time of Hydro One's next transmission cost-based application, at which time there should be a better understanding of the implications of upcoming changes to the Ontario electricity market and supply mix. The IESO stated that setting the ETS rate for a five-year term would provide stability in the face of upcoming market and system changes and the associated uncertainty. Other submissions included:

- A shorter review term if there has been a material market or system change
- Having the next review a period of time after the Market Renewal Program is implemented
- Having the review six months to a year before Hydro One's next transmission rebasing application

VECC and LPMA submitted that at the time of the next ETS rate review the cost allocation study should be updated based on updated cost information from Hydro One's application. LPMA also submitted that it may also be necessary to phase-in any change to the ETS rate that results from the review to better understand the implications of upcoming changes to the Ontario electricity market and supply mix.

OEB staff submitted that the ETS rate should be reviewed every ten years, beginning in 2029, with OEB discretion to initiate interim reviews if required. OEB staff made the point that scheduling the review between Hydro One cost-based rate applications is advantageous to levelize the workload for all parties and allow for focus on the ETS rate.

APPrO submitted that the simplicity and certainty of a fixed and stable ETS rate is of "paramount importance" to exporters who must factor the ETS rate into decisions and their market behaviour. Mr. Pattani also submitted that the ETS rate should be held steady during the rate-setting term, to provide rate stability.

Several parties submitted that the ETS rate should be adjusted annually until the next review to avoid cross-subsidization between domestic and export customers when UTRs increase and the ETS rate does not.

SEC described two options for adjusting the ETS rate annually. First, the ETS rate could be adjusted using the same annual transmission Revenue Cap Index (RCI) adjustment that is approved for Hydro One. CME, VECC and LPMA supported this approach. Second, the ETS rate could be adjusted annually based on the percentage annual increase in the Network Service Rate component of the UTRs. SEC described the benefit of the second option as being that it accounts for the change in the costs of all transmitters, including those building new transmission lines in coming years, not just Hydro One.

Hydro One submitted that annually adjusting the ETS rate would likely result in regulatory complexity for the IESO, that collects the ETS rate, and for exporters that make decisions based on the ETS rate.

Findings

In section 3.3.2 above, the OEB determined that the ETS rate will be set at \$1.78/MWh, effective January 1, 2023, for a period of two years. The OEB acknowledges that the final costs for Hydro One's transmission operations are subject to update through Hydro One's 2023-2027 Joint Distribution and Transmission Rates Application proceeding.⁴⁶ However, this would still be based on a forecast. To provide certainty for the next two years, the OEB is setting the rate on a final basis.

The OEB is setting the ETS rate on a two-year basis to allow for a period of stability, given forward contracts that may already be in place in the electricity market. Effective January 1, 2025, the ETS rate will escalate annually based on the RCI for Hydro One's transmission business. The ETS rate will now be based on Hydro One's forecast transmission costs. Forecast transmission costs are the basis for Hydro One's revenue requirement, which will be escalated by the RCI. It is therefore appropriate to escalate the ETS by the same RCI mechanism to reflect increasing costs.

Some parties argued that an ETS rate that changes annually will increase regulatory complexity. It is not clear to the OEB how an ETS rate that changes annually is any more complex than annual changes to the UTRs that the IESO manages. The OEB

⁴⁶ EB-2021-0110.

concludes that any added complexity is justified by an ETS rate that will reflect increasing costs. The OEB reiterates that the ETS rate will be kept at the approved level for two years to provide a period of transition.

The OEB will review the ETS rate again at the time of Hydro One's next rebasing application for its transmission operations, expected for 2028 rates. The OEB considered an earlier review of the ETS rate. However, the magnitude of the ETS revenue with a current forecast of \$37.4 million, in comparison to the overall transmission revenue requirement, which was close to \$2 billion for 2022, led the OEB to conclude that the cost of an earlier review was not warranted. However, the OEB requires the IESO to notify the OEB of any material change to electricity market conditions or forecasts that could make an earlier review appropriate, for future consideration.

Hydro One shall prepare an updated cost allocation study based on Hydro One's transmission costs at the time of its next rebasing application for its transmission operations. The OEB will determine at that time whether the matter of the ETS rate will be heard through a generic hearing or as part of Hydro One's application.

3.4 Other Matters

3.4.1 Applicability to Other Transmitters

LPMA and OEB staff each submitted that they agree with evidence submitted by Hydro One that ETS revenue should continue to accrue solely to Hydro One.

LPMA submitted that it does not support Elenchus' recommendation to adjust the ETS rate to include other transmitters' approved network revenue requirements, because only Hydro One owns interties.

In its responding submission, Hydro One made clear that there are two distinct issues:

1. whether the network assets of all transmitters should be used in the calculation of the ETS rate
2. whether ETS revenue should be paid to other transmitters

Hydro One confirmed its support for continuing the existing process in which ETS revenue is paid solely to Hydro One as the sole owner and operator of Ontario's interties. Hydro One also submitted that this approach is simpler to administer and achieves the same outcome for customers.

Hydro One also confirmed its support for Elenchus' recommendation that the ETS rate be calculated based on the network assets of all Ontario transmitters because they own network assets that are used by exporters. Hydro One also submitted that Elenchus' recommendation is consistent with the OEB's finding in its 2020 decision that the use of shared network facilities by exporters should be considered in setting the ETS rates.

Findings

The ETS rate will only apply to Hydro One. The OEB agrees with Hydro One's submission that it would require additional administration for the ETS to apply to all transmitters, and there would be no net difference to the outcome. This is because the revenue from the ETS is an offset (decrease) to both the network revenue requirement of each transmitter and the total used to set the UTRs.

The OEB also finds that the calculation of the ETS rate will include the network assets of all Ontario transmitters. The OEB agrees that this is appropriate because exporters make use of the network assets and are being allocated a portion of these costs and offsetting external revenues.

3.4.2 Market Data

SEC, VECC and OEB staff submitted that additional analysis should be undertaken to inform future reviews of the ETS rate on how changing the ETS rate impacts export volumes, congestion rents, and electricity market performance. VECC argued that this information would assist the OEB in understanding how future ETS rate decisions may affect system operations and efficiency.

SEC and VECC both suggested that the OEB create a working group of interested parties to determine the scope, data requirements, and methodology for a study. In its responding submission, the IESO stated that it would participate in an ETS working group if this proposal were accepted by the OEB.

OEB staff recommended that a monitoring and analysis program should be led by an independent party, such as the IESO, working either on its own or in collaboration with other parties. The purpose of this program would be to help understand how changing the ETS rate affected operability, electricity markets and any other relevant considerations.

The IESO cautioned against mandating further studies or ongoing monitoring by the IESO. The IESO stated that:

In the IESO's view, the relevant considerations in setting the ETS rate have been well defined, albeit in a largely qualitative manner, in this proceeding. The IESO is skeptical that the results of any further study will provide greater clarity to parties than what is available at this time. Any further study of the ETS rate will, by necessity, be premised upon assumptions and forecasts that would likely be the subject of the same types of disputes that have arisen in this proceeding.⁴⁷

The IESO also stated that it does not do economic forecasting, and that actual market conditions will result from a multitude of factors. The IESO indicated that it would likely need to retain a consultant to conduct further study.

Pollution Probe submitted that the IESO should complete a study on the benefits, costs, and risks of the ETS rate to key stakeholders to inform a future ETS rate proceeding. Pollution Probe submitted that the study should include the following:

- Net economic benefits to Ontario ratepayers, including operation cost savings
- Technical and operational risks to Ontario's baseload generation fleet
- Impact on the capabilities of Ontario's power generation infrastructure
- Health and outlook of Ontario's wholesale energy trading markets
- Hydro One intertie assets⁴⁸

APPrO submitted that OEB should not prescribe disclosure of any market information, as the IESO is best equipped to conduct a process to consider all of the relevant factors, competing views, potential risks, and scope of such disclosure.

Findings

The OEB invited parties to make submissions regarding IESO market data disclosure and future market studies by Hydro One or the IESO to assist in determining the ETS rate methodology in a future proceeding.⁴⁹ Submissions did not identify additional market data that the IESO should make available. However, several parties identified a need for additional quantitative analysis that should be conducted either through an IESO led working group or a monitoring program. The OEB notes the IESO's disagreement with participants. Notwithstanding, the OEB sees merit in participants' recommendation that a future review of the ETS rate would benefit from quantitative

⁴⁷ IESO Submission, September 6, 2022, p.17.

⁴⁸ Pollution Probe Submission, September 6, 2022, p.10.

⁴⁹ Presentation Day, Transcript, p.144.

analysis and agrees with APPrO that the IESO is best equipped to do so. The OEB directs the IESO to generate a report that aligns with the timing of Hydro One's next cost allocation update. This report should include, without limitation, relevant market data and analysis together with a recommendation on the ETS rate that incorporates consideration of the implications of the Market Renewal Program, the domestic supply/demand outlook and impact on interties exports.

The OEB would have benefited from a formal independent econometric study that yielded export/import price elasticities in setting the ETS rate. Given the previously noted policy issues, however, the OEB expects that such a study will be equally informative in the future once the IESO's Market Renewal Program has been implemented and when Ontario's supply-demand mix is less uncertain.

3.4.3 Disposition of Transmission Rights Clearing Account (TRCA)

Currently ETS revenue is an offset to Hydro One's transmission revenue requirement resulting in lower rates to domestic customers. The IESO market also has a TRCA that is disposed from time to time to wholesale market participants based on set criteria. When TRCA amounts are disposed to electricity distributors, the amounts flow through the wholesale market service charge variance account (Account 1580) to consumers. Transmission costs flow through the transmission variance accounts (Accounts 1584 and 1586). This results in differences in how the ETS revenues and amounts from the TRCA flow to different end use customers. This approach may be appropriate. But given this difference, the OEB will undertake a review to determine if the existing mechanism used by electricity distributors to account for TRCA amounts included on their IESO invoices remains appropriate.

3.4.4 Should Other Approaches or Settlements be used for setting the ETS?

LPMA submitted that if the OEB adopted a cost-based methodology for setting the ETS rate, then a settlement-based approach should not be permitted. LPMA submitted that if a settlement-based approach were used to set the ETS rate, other rates would be impacted due to the "zero sum" nature of cost allocation and other affected customers may not be represented in the proceeding or settlement process. If the OEB were to adopt some other methodology, then LPMA submitted that a settlement-based approach could be permitted. However, everyone impacted should be at the settlement table.

SEC submitted that settlement would be an appropriate process for setting the ETS rate because of the need to balance two fundamentally different approaches to rate-setting.

The IESO submitted that it would not preclude the continued use of a settlement-based approach to set the ETS rate. The IESO also submitted that it does not believe there is a mechanistic formula which can be used to set the ETS rate, because of the dynamic nature of the electricity market and the anticipated future changes to the Ontario grid.

APPrO submitted that a settlement-based approach should not be used to set the ETS rate, restating that certainty in the ETS rate is of paramount importance to exporters and a settlement-based approach introduces significant uncertainty to setting the ETS rate. APPrO also submitted that if a settlement-based approach is desired, the ICP already accomplishes this, and a settlement based ETS rate is not necessary.

LPMA submitted that, going forward, the OEB should direct Hydro One to investigate the use of the network charge as a component of the ETS rate. Instead of allocating shared network costs and shared network OM&A expenses to domestic and export pools, these costs would be allocated to the network pool. One network charge would then be determined based on the aggregate of the domestic and export demands and this network charge would be one component of the ETS rate. The remainder of the ETS rate would continue to be based on dedicated interconnect capital costs and dedicated interconnect OM&A expenses, which would be allocated to domestic customers (based on import use) and to export customers.

Hydro One submitted that LPMA's proposal should be rejected because there is broad support for Elenchus' cost allocation methodology, and therefore it is not necessary to investigate alternative methodologies.

Findings

The OEB finds the issues of other approaches to be moot given that a cost-based approach will be used to set the ETS rate until 2028. The OEB expects that future panels can determine whether the ETS rate should continue to be set using a cost-based approach, whether further studies are warranted beyond those directed in this Decision, whether a settlement-based approach is appropriate, or whether other approaches should be adopted.

4 IMPLEMENTATION

The OEB is setting the ETS rate at \$1.78/MWh effective January 1, 2023, for a period of two years. Therefore, no further steps are required at this time. This rate will supersede the ETS rate on the 2022 Ontario Uniform Transmission Rate Schedules, which will be updated in due course following the completion of the EB-2021-0110 proceeding.

The RCI determined in the EB-2021-0110 proceeding will apply to the ETS rate effective January 1, 2025, and each year thereafter until the effective date of Hydro One's next rebasing for its transmission business.

The OEB notes that the Hydro One ETS revenue forecast as part of the EB-2021-0110 proceeding is \$37.4 million for 2023 and \$37.1 million for 2024 based on an ETS rate of \$1.85/MWh. The new rate of \$1.78/MWh that will be effective in 2023 and 2024, and adjusted thereafter, will result in differences between this forecast revenue and the actual revenue. This difference will be recorded in the Excess Export Service Revenue Variance Account (Account 2405) for future disposition. The OEB considers it appropriate for Hydro One to dispose of the balance in this variance account on an annual basis commencing when the balance for 2023 is final until the effective date of the next transmission rebasing.

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The ETS rate shall be set at \$1.78/MWh, effective January 1, 2023.
2. Effective January 1, 2025, the ETS rate shall be adjusted annually using the RCI determined in the EB-2021-0110 proceeding.
3. The Excess Export Service Revenue Variance Account (Account 2405) balance shall be disposed of on an annual basis, commencing when the balance for 2023 is final.
4. Hydro One shall prepare an updated cost allocation study based on Hydro One's transmission costs at the time of its next rebasing application for its transmission operations.
5. The IESO shall generate a report that aligns with the timing of Hydro One's next cost allocation update that includes relevant market data and analysis together with a recommendation on the ETS rate that incorporates consideration of the implications of the Market Renewal Program, the domestic supply/demand outlook and impact on interties exports.
6. Intervenor shall submit their cost claims no later than December 8, 2022.

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

Please quote file number, **EB-2021-0243** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at the [File documents online page](#) on the OEB's website.

- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online page](#) of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

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

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Michael Price at Michael.Price@oeb.ca and OEB staff counsel, James Sidlofsky James.Sidlofsky@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

DATED at Toronto November 24, 2022

ONTARIO ENERGY BOARD

Nancy
Marconi

Digitally signed by Nancy
Marconi
Date: 2022.11.24
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File No. 061604.000048

September 6, 2022

BY EMAIL AND RESS

Nancy Marconi
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Generic Proceeding on UTR-Related Issues and the Export Transmission Service Rate
Association of Power Producers of Ontario ("APPrO") Submission
OEB File Number: EB-2021-0243**

We are counsel to APPrO. Please find attached APPrO's submission in the above referenced proceeding, pursuant to Procedural Order No. 3.

Yours Truly,

A handwritten signature in black ink that reads 'J Vellone'.

John A.D. Vellone

cc: All Parties (email)
David Butters (APPrO)
Brady Yauch and Travis Lusney (Power Advisory LLC)

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Generic Hearing on Uniform Transmission Rates Related Issues and the Export Transmission Service Rate.

**SUBMISSIONS OF THE
ASSOCIATION OF POWER PRODUCERS OF ONTARIO**

FILED: September 6, 2022

APPrO

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I. INTRODUCTION

1. On August 5, 2021, Hydro One Networks Inc. (“**Hydro One**”) filed an application with the Ontario Energy Board (the “**Board**” or “**OEB**”) under section 78 of the *Ontario Energy Board Act, 1998*, seeking approval for changes to the rates that Hydro One charges for electricity transmission and distribution, beginning January 1, 2023 and for each following year through to December 31, 2027 (OEB File No. EB-2021-0110).¹
2. In that application, Hydro One filed evidence respecting setting an Export Transmission Service (“**ETS**”) rate, including an updated cost allocation study by Elenchus Research Associates, an updated jurisdictional review by Charles River Associates, and a commentary on market implications of the ETS rate prepared by the Independent Electricity System Operator (“**IESO**”).
3. As part of Procedural Order No. 1 in EB-2021-0110, the OEB commenced a separate, generic proceeding on its own motion to deal with the ETS rate, as part of various other issues related to Ontario’s Uniform Transmission Rates (“**UTR**”). The OEB stated that addressing the ETS in the generic UTR hearing will lend focus to the issue and facilitate participation by transmitters and other stakeholders without requiring them to intervene in the much broader EB-2021-0110 proceeding. The OEB also requested that Hydro One and the IESO submit their views on what ETS rate should be adopted, and the requested that Hydro One clarify whether it proposes to adopt any of the cost allocation options identified in its ETS evidence.
4. On October 15, 2021, the OEB issued the Notice of Hearing for EB-2021-0243 in respect of a generic hearing on UTR-related issues, the first phase of which will focus on reviewing and setting the ETS Rate (this first phase will be referred to herein as the “**ETS Proceeding**”).
5. APPrO would like to acknowledge the OEB for considering the ETS rate issue by way of a generic proceeding. APPrO is supportive of generic proceedings when they deal with matters of the broader public interest that fall outside the four corners of a typical revenue requirement application (such as the Hydro One JRAP). With this generic proceeding, the

¹ EB-2021-0110

OEB has created an opportunity to have a more fulsome exploration of evidence around not only the costs, but also the broad range of benefits exports provide to Ontario consumers. As DERs and new technological developments continue to challenge our regulatory assumptions in new and interesting ways, APPrO believes that these types of generic proceedings will provide an excellent forum for broader evidentiary discovery and public interests debates to take place.

6. On January 28, 2022, the OEB issued its decision on the issues list and described the fundamental issue to be determined in the ETS Proceeding:

“...this proceeding will determine whether there will continue to be an ETS rate, given the presence of the ICP charges in the market, and if so, how and when that ETS rate would be set.”

7. On April 1, 2022, the OEB issued Procedural Order No. 2 directing that any written submissions from OEB staff and intervenors shall be filed with the OEB and served on all parties by September 2, 2022. On August 26, 2022, the OEB issued Procedural Order No. 3 and revised the deadline for submissions to September 6, 2022.
8. The Association of Power Producers of Ontario ("APPrO") makes these written submissions with respect to this ETS Proceeding. APPrO has organized its submissions in accordance with the Approved Issues List.

II. EXECUTIVE SUMMARY

9. APPrO's principal position is that the ETS rate be discontinued given the presence of the ICP charges in the market. Electricity exporters' use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest, and therefore the OEB should refrain from establishing any rate for exports use of the transmission system pursuant to section 29(1) of the OEB Act.
10. Electricity trading over the interties is an active, competitive marketplace, making intertie capacity a scarce and valuable resource. The evidence demonstrates that exports on the

transmission system are competitive and no single trader has market power, particularly:

- (1) transmission system capacity in all instances will include the use of capacity on the interties for exports;
- (2) geographic markets for exports are diverse, including NYISO, ISO-EN, MISO, Manitoba Hydro and Hydro Quebec;
- (3) no concerns, either past, present or future, have been raised by the IESO over the past decade about market share or concentration measures related to ICP; and
- (4) there are few barriers to entry to participate in ICP.

11. Forbearance also protects the public interest. Competition will generally serve to minimize the private and social costs of providing service to consumers who are willing and able to pay the cost of rendition. The IESO Evidence as well as the Power Advisory Report both demonstrate that regulation, by way of imposing any non-zero ETS rate, results in an increased transaction cost that serves to prevent some otherwise economically efficient exports from flowing thereby reducing the overall value that exports create for Ontario's domestic consumers. By contrast, the competitive ICP mechanism dynamically adjusts to changing market conditions, ensuring that Ontario ratepayers gain the most value possible from exports.
12. Comparisons with other jurisdictions analyzed by Charles River Associates ("**CRA**") are not helpful to address whether it is appropriate to continue to rely on an ETS rate and ICP to charge for export service. CRA acknowledged that none of those other jurisdictions have anything equivalent to Ontario's market-based ICP mechanism and the existence of ICP makes Ontario's circumstance unique.
13. Finally, and in the alternative, should the OEB determine that an ETS should continue to exist alongside ICP, APPrO submits that a principled cost-based approach reflects an appropriate starting point to establishing an appropriate ETS rate. Since both mechanisms are intended to offset intertie infrastructure costs to Ontario consumers, exporters are required to pay twice for use of capacity on the transmission system, once through the ETS rate and again, for intertie capacity, through the ICP mechanism. APPrO submits that a cost-based ETS rate should be based on the following:

- Assets dedicated to interconnect should be allocated to both exports and imports using the intertie 12CP allocator as recommended by Elenchus in Section 6.2 of the Elenchus Study.
- ICP revenues collected by the IESO for use of intertie capacity from both imports and exports should be accounted for in the cost-allocation model in the manner set out in the updated response to JT-2.4 to ensure that intertie users are not paying twice for the same service (i.e. use of intertie capacity).
- Because exports receive a significantly lower level of service than other domestic customers,² because of the significant other economic and operational benefits associated with exports, and because the network is not designed to accommodate exports, a maximum of 20% of shared network costs should be allocated to export customers in the cost allocation model. This approach ensures that exporters are not “free riders” but also ensures that the principles of cost causality, and similar cost for similar level of service are respected.
- Finally, in the event a cost allocation model produces a proposed ETS rate that is less than zero, APPrO recommends that the ETS rate be set at \$0/MWh for that period so that surplus funds from the ICP will continue to go to benefit domestic consumers.

III. ISSUE #1: Is it appropriate to continue to rely on an Export Transmission Service (ETS) rate and on Intertie Congestion Pricing (ICP) to charge for export service?

14. APPrO submits that it is not appropriate to continue to rely on an ETS rate and on ICP to charge for export services.
15. The OEB first considered competing arguments in support of both the ETS rate and ICP in its RP-1999-0044 Decision with Reasons issued May 26, 2000 (the “**RP-1999-0044 Decision**”). After considering competing proposals and submissions made by Ontario Power Generation and Ontario Hydro (as it then was), the OEB at that time determined that:

² As shown in Table 6 of the Elenchus Report, exports were curtailed in 35% of hours in 2016, reducing to 22% of hours in 2019.

“The Board notes the general expectation that, under the Market Rules, the congestion management system of the IMO will yield some net revenue that will be credited to transmission customers (market participants). Assuming these expectations are fulfilled, at this point it is not possible for the Board to assess whether the net revenue arising from the congestion management will be greater or less than the revenue from the \$1/MWh flat rate proposed by OHNC or the ceiling proposed by OPG, also \$1/MWh. Given all of the other many market opening issues, the Board’s preference for OHNC’s revised proposal of a flat rate is mainly because of its simplicity.”³

16. At that time, the OEB panel struggled to assess whether the net revenue arising from ICP would be greater than or less than the proposed ETS rate. We now have the benefit of years of historical experience with exports paying both an ETS rate and an ICP market based mechanism.
17. In this context:
 - Hydro One and the IESO have provided an account of how the ETS rate has evolved since this original decision in Sections 2 and 3 of their joint ETS Rates Submission filed October 14, 2021 (the “**Joint ETS Rates Submission**”).
 - The IESO has provided an account of the market design changes impacting the ICP mechanism at pages 10-11 of the IESO’s evidence (the “**IESO Evidence**”),⁴ including a recent change in 2021 to the Transmission Rights Clearing Account (“**TRCA**”) disbursement methodology that serves to increase the TRCA disbursements to domestic loads to 98%.
18. This OEB panel now has the benefit of clear and compelling historical evidence that demonstrates that with the ICP mechanism in place electricity exporters’ use of the Ontario transmission system is subject to competition sufficient to protect the public interest.

³ The RP-1999-0044 Decision at para. 3.8.24.

⁴ IESO Evidence titled Market Implications of the Export Transmission Service Rate dated July 2021 and included at Attachment 3 to the Joint ETS Rates Submission [**IESO Evidence**].

19. It is on the basis of this historical evidence and their recognized expertise in energy markets and energy policy analysis that Power Advisory LLC (**“Power Advisory”**) provided their expert report on the market impacts of changes to the ETS Rate filed in this proceeding on May 27, 2022 (the **“Power Advisory Report”**).
20. As stated by the IESO, electricity trading over the interties is an active, competitive marketplace, making intertie capacity a scarce and valuable resource.⁵

“Intertie trading is a competitive marketplace: As part of the regular operation of the electricity market, Ontario efficiently imports and exports electricity on an hour-by-hour basis delivered across interties with two Canadian provinces (Manitoba and Quebec) and three U.S. states (Minnesota, Michigan, and New York). Electricity trading over the interties is a competitive marketplace driven by profit-seeking traders transacting based on the expected electricity price differences between jurisdictions. These factors make intertie capacity a scarce resource resulting in traders competing for access to these resources.”⁶

21. In this context, the role played by the ETS rate in this competitive marketplace is summarized by Power Advisory as follows:

“In Power Advisory’s view, the current market design used to set prices at the province’s intertie supports the overall economic efficiency of the grid by providing a transparent and competitive value on Ontario’s energy supply. Increasing the ETS rate – which acts as a transactional cost – reduces the overall efficiency of energy trading and the province’s electricity sector as a whole. All of the evidence in this proceeding is clear that export customers do not impose a cost on Ontario’s electricity grid. Given that energy exports are a net benefit for Ontario ratepayers and do not impose

⁵ HONI IR Responses, Energy Probe 3(f); EB-2021-0243, Technical Conference Transcript (Day 1), page 170 online: <<https://www.rds.oeb.ca/CMWebDrawer/Record/752216/File/document>> [**Technical Conference Transcript (Day 1)**]

⁶ IESO Evidence at page 2.

any costs on Ontario ratepayers, the ETS rate should continue to be set at a low level to further enable the economic efficiency of energy trading.”⁷

22. Power Advisory’s opinion is entirely consistent with the position and rationale set out by the IESO at pages 12-13 of the Joint ETS Rate Submission.
23. In this context, APPrO submits that electricity exporters’ use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest.
24. When considering the public interest, APPrO’s makes reference to the following OEB statutory objectives:⁸
 1. To inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service.
 2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
25. With respect to the first objective, the OEB has stated that in a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs.⁹ This is true of the ICP, which provides exporters with a choice to adjust their bids to attempt to gain access to limited intertie capacity on the transmission system. This is not true of the ETS rate, which serves to function as a fixed transaction cost on all transactions – making some transactions uneconomic.
26. With respect to the second objective, the OEB statutory mandate is quite broad as it relates to economic efficiency and cost effectiveness. It is not limited in scope to transmission (or to a cost allocation exercise for transmission costs). Rather, it encompasses generation, transmission, distribution, sale and demand management of electricity. As a consequence,

⁷ Power Advisory Report at para. 22.

⁸ *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s.1.

⁹ OEB Decision EB-2005-0551, Natural Gas Electricity Interface Review Proceeding, November 7, 2006, at page 48, online: <https://www.oeb.ca/documents/cases/EB-2005-0551/Decision_Orders/dec_reasons_071106.pdf> [**NGEIR Decision**]

when assessing the public interest, APPrO submits that the OEB must factor into its consideration all of the broader benefits associated with electricity exports, not only the benefits associated the ETS rate.

27. When considering the public interest, it is important to note the following compelling evidence:

- Exports from Ontario have historically contributed to reduce fixed system costs for domestic consumers through the ICP, ETS, uplifts, and avoided system costs, and that the value attributable to the ETS rate component was less than 12% of the total economic value that exports contributed to Ontario between 2017 and 2020.¹⁰
- The Power Advisory Report provides a simplified, easy to understand, model based on their expertise and available historical data that demonstrates empirically that decreasing the ETS rate to \$0/MWh would increase the net economic value received by domestic consumers from exports, and conversely that increasing the ETS rate to \$6.54/MWh would decrease the net economic value received by domestic consumers from exports.¹¹
- The IESO “directionally agrees with the analysis and conclusions that Power Advisory undertook”¹² and the IESO noted that the Power Advisory analysis was conservative.¹³
- Exports also provide the IESO with operational benefits, providing flexibility that enables system operators to address power system needs and reliably manage the grid during changing conditions.¹⁴ This includes reducing the risk of the IESO having to take costly control actions such as curtailing nuclear units.
- The IESO believes that “reducing the ETS rate to zero would best encourage the efficient use of electricity and promote economic efficiency in the Ontario

¹⁰ IESO Evidence at Table 1 at page 9 of 17.

¹¹ Power Advisory Evidence at Table 1 at page 10.

¹² TC Transcript dated July 28, 2022 at page 115, lines 19-21.

¹³ TC Transcript dated July 28, 2022 at page 116, line 24 – page 119, line 1.

¹⁴ IESO Evidence at pages 8-9.

market.”¹⁵ APPrO agrees.

28. Because electricity exporters’ use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest, APPrO submits the OEB has a positive obligation to refrain from establishing any rate for exports use of the transmission system pursuant to section 29(1) of the OEB Act.

29. Section 29(1) of the OEB Act provides:

Refrain from exercising power

29 (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

30. In the *Natural Gas Electricity Interface Review* (“**NGEIR**”) proceeding, the OEB set out a two part test for exercising forbearance under section 29 of the OEB Act.¹⁶ The first part requires an assessment of whether there is competition in the relevant market. The second part requires an assessment of whether the level of competition is or will be “sufficient to protect the public interest”.¹⁷ In this context, it is not necessary to find that there is perfect competition in a market to meet the statutory test of “competition sufficient to protect the public interest”; what economists refer to as a “workably competitive” market may well be sufficient.¹⁸ If the factual record indicates that there is or will be competition sufficient to protect the public interest, the OEB must refrain from regulating the activity.¹⁹

31. In consideration of the first part of the NGEIR test, APPrO submits that:

¹⁵ Joint ETS Rates Submission at Section D titled “IESO Position and Rationale” at pages 12-13.

¹⁶ NGEIR Decision

¹⁷ Energy Regulation in Ontario at § 2:27

¹⁸ NGEIR Decision at page 26.

¹⁹ OEB Decision EB-2014-0012, Union Gas Limited, April 9, 2015, at page 5, online:

<<https://www.rds.oeb.ca/CMWebDrawer/Record/473354/File/document>> [**Union Gas Decision**]

- The relevant product market is the use of transmission capacity for exports. Unlike domestic loads, exporters' use of transmission system capacity will in all instances include the use of capacity on the interties. Because of this, exports will always be subject to the operation of the market based ICP mechanism.
- The relevant geographic market relates to exports from the Province of Ontario to neighbouring jurisdictions where physical intertie capacity exists. This currently includes the grids operated by NYISO, ISO-NE, MISO, Manitoba Hydro and Hydro Quebec.²⁰
- The ICP has been carefully designed and effectively operated by the IESO for more than a decade to facilitate healthy competition and like all aspects of the IESO-administered markets is subject to effective and continuous oversight by the OEB's Market Surveillance Panel ("**MSP**"). Neither the IESO, nor the MSP, have expressed any concerns with regards to market share and concentration measures related to the ICP. In addition, because the MSP continuously monitors the operation of the ICP in their semi-annual monitoring reports, the OEB can be assured that, however unlikely, any future issues relating to market share and concentration would be quickly identified and addressed by the IESO.
- There are few barriers to entry to participate in the ICP and export electricity from Ontario. In Ontario, an entity would need to register as an "energy trader", which is a type of IESO market participant, in accordance with Market Manual 1.5 and obtain a wholesaler license from the OEB. The IESO publishes a list of registered market participants which demonstrates that, as of the date of these submissions, there are more than 50 entities registered as energy traders in Ontario.²¹ In addition, an entity may also need to comply with applicable legal requirements for trading in electricity in the applicable neighbouring jurisdiction depending on the nature of the trade.

32. In respect of the second part of the NGEIR test, APPrO submits that the evidence in this

²⁰ Power Advisory Report at paras 54 & 55; EB-2021-0243, IESO – Market Implication of the Export Transmission Service Rate, July 2021, Attachment 'C' at page 2, online: <<https://www.rds.oeb.ca/CMWebDrawer/Record/728429/File/document>> [**IESO Report**]

²¹ <https://www.ieso.ca/en/Sector-Participants/Registered-Participants>

proceeding, as already summarized above, supports a conclusion that exporters' access to transmission capacity is subject to a competitive ICP market based mechanism that is sufficient to protect the public interest.

33. J.C. Bonbright believed that competition will generally serve to minimize the private and social costs of providing service to consumers who are willing and able to pay the cost of rendition.²² Regulation should only be put in place when there is good evidence to show that, without regulation, policy objectives will not be met.²³ Regulation, in Bonbright's view, is a very poor substitute when an industry is naturally competitive.²⁴ At most, regulation is a supplement or partial alternative to competition, resorted to on a largely *ad hoc* basis to secure particular objectives which it is thought cannot be obtained by competition:²⁵

Regulation, at best, is a pallid substitute for competition. It cannot prescribe quality, force efficiency, or require innovation, because such action would invade the sphere of management. But when it leaves these matters to the discretion of industry, it denies consumer the protection that competition would afford. Regulation cannot set prices below an industry's costs however excessive they may be. Competition does so, and the high-cost company is compelled to discover means whereby its costs can be reduced. Regulation does not enlarge consumption by setting prices at the lowest level consistent with a fair return. Competition has this effect. Regulation fails to encourage performance in the public interest by offering rewards and penalties. Competition offers both.²⁶

34. Bonbright's words ring true in the context of the evidence filed in this proceeding. The IESO Evidence as well as the Power Advisory Report both demonstrate that regulation, by way

²² J.C. Bonbright, *Principles of Public Utility Rates*, (Public Utilities Reports: 1988), at page 29 [Bonbright]

²³ Government of Canada, Competition Bureau of Canada, Balancing regulation and competition, online: <<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04141.html>>

²⁴ Bonbright at page 30.

²⁵ Lee Loevinger, quoted in C.F. Phillips, Jr., *The Regulation of Public Utilities* (Arlington: Public Utilities Reports, Inc., 1993), at page 49.

²⁶ C. Wilcox, *Public Policies Toward Business*, (Illinois 1966) at page 476.

of imposing any non-zero ETS rate, results in an increased transaction cost that serves to prevent some otherwise economically efficient exports from flowing thereby reducing the overall value that exports create for Ontario's domestic consumers. By contrast, the competitive ICP mechanism dynamically adjusts to changing market conditions, ensuring that Ontario ratepayers gain the most value possible from exports.

35. Some parties may argue that the ICP, by design, will result in zero dollars in intertie congestion revenue in hours when there is no congestion on a particular intertie. Those exporters, it might be argued, are "free riders" in that they benefit from use of the transmission system without paying for it.
36. APPrO disagrees. This alone is not sufficient reason to justify the imposition of an ETS rate when the evidence demonstrates that Ontario consumers would, in the aggregate, be economically worse off by doing so. In addition, since exports are systematically curtailed prior to any domestic load,²⁷ they will never prevent a paid use of the transmission system. Rather, as explained by Power Advisory, exports are an "opportunity service" that will only utilize excess transmission capacity that is inefficiently being used by domestic customers.²⁸ The needs and activities of competitive exporters (e.g., volume and direction of transactions) as a result of normal market conditions are not considered by the IESO when planning the transmission system, and so are not a driver of investment decisions.²⁹ Put another way, there is no cost causation.
37. The OEB itself has cited two principle reasons in its own prior decisions under Section 29 of the OEB Act for adopting a light-handed approach to regulation. First, competition rather than regulation could produce better outcomes in terms of the quantity and prices of goods and services, all of which would maximize social welfare. Second, regulatory costs are not limited to the financial burden on utilities and ultimately customers, but also include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no

²⁷ TC Transcript dated July 28, 2022 at page 177, line 16 to page 178, line 2.

²⁸ Power Advisory Report at para 49.

²⁹ HONI IR Responses at OEB Staff 10; Power Advisory Report at para. 47.

market power.³⁰

38. In this proceeding the evidence supports, and indeed the IESO agrees, that by forbearing the OEB would best encourage the efficient use of electricity and promote economic efficiency in the Ontario market. In addition, by forbearing the OEB would be avoiding future regulatory costs associated with the need to establish a new ETS rate from time to time.
39. While the U.S. jurisdictions considered by CRA have largely recovered costs for use of the transmission system on a cost-basis,³¹ CRA also acknowledged that none of those other jurisdictions have anything equivalent to Ontario's market-based ICP mechanism.³² As a result, a comparison to those other jurisdictions is not helpful to address this first issue. The existence of ICP makes Ontario's circumstance unique. And a unique approach is required.
40. Finally, APPrO respectfully requests that the IESO consider and respond to this final aspect of its submissions in reply. In light of the fact that it is likely that exports will change into the future as markets and supply mix within Ontario and neighbouring jurisdictions continue to evolve, should the OEB decide to forebear and not set an ETS rate would the IESO be willing to undertake to (1) monitor developments in export and associated benefits as they change over time; and (2) report back to the OEB if the IESO is no longer of the view that reducing the ETS rate to zero would best encourage the efficient use of electricity and promote economic efficiency in the Ontario market.
41. If the OEB decides to forebear under Section 29(1) of the OEB Act, then the term of that decision should continue for an indefinite term until such time as the IESO is no longer of the view that reducing the ETS rate to zero would best encourage the efficient use of electricity and promote economic efficiency in the Ontario market.

³⁰ OEB Decision EB-2005-0551, Natural Gas Electricity Interface Review Proceeding, November 7, 2006, at pages 24-26, online: <https://www.oeb.ca/documents/cases/EB-2005-0551/Decision_Orders/dec_reasons_071106.pdf> [NGEIR Decision]

³¹ TC Transcript dated July 28, 2022 at page 73, lines 6-12.

³² TC Transcript dated July 28, 2022 at page 54, line – page 55, line 1.

IV. **ISSUE #2: If an ETS rate were to continue to exist alongside ICP, what approach should be used to set the ETS rate?**

42. It is APPrO's principal position that electricity exporters' use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest, and therefore the OEB should refrain from establishing any rate for exports use of the transmission system pursuant to section 29(1) of the OEB Act.
43. In the alternative, should the OEB determine that an ETS should continue to exist alongside ICP, APPrO submits that a principled cost-based approach reflects an appropriate starting point to establishing an appropriate ETS rate. In-fact, APPrO was alone in arguing in EB-2019-0082 that the OEB should adopt the cost-based results of the Elenchus cost allocation study that was filed at that time.³³
44. APPrO further submits that the following key principles should be weighed by the panel when establishing an appropriate methodology to set an ETS rate:
- **Simplicity and certainty** in the ETS rate is of paramount importance to exporters, who must factor this particular transaction cost into a complex series of market-based decisions that ultimately inform their market behaviour. Forebearing and not setting an ETS rate, as well as a fixed and stable ETS rate are both simple and certain. Alternative proposals – such as complex formulas that frequently change the ETS rate or those that may propose variance accounts to retroactively adjust the ETS rate – should be rejected. By giving exporters certainty on what their transaction costs will be prior to participating in a market, the OEB will facilitate more economic exports in the market. If exporters need to estimate what those transaction costs may be, they will most likely include a risk premium associated with that estimate, and some otherwise economic exports may as a result not flow.
 - To avoid creating windfall winners or losers, **the timing of any changes** to the ETS rate should account for the impact on the economics of market transactions that have already closed based on the date of the OEB's final Decision and Order. As of the

³³ Available online: <https://www.rds.oeb.ca/CMWebDrawer/Record/662629/File/document>

date of these submissions, auctions have already closed for financial transmission rights for the period ending September 30, 2023, and assuming the OEB is able to issue a decision in this proceeding by the end of 2022, TRs will have been sold for the period ending Dec. 31, 2023.³⁴

- **Exports drive broader economic and operational benefits beyond ETS revenues.** APPrO has already discussed this evidence at length in response to issue 1 above, and it is fully explored in both the IESO Evidence and the Power Advisory Report. When factoring in these broader economic and operational benefits, any increase in the ETS rate will make domestic ratepayers worse off.
- **The inimitable nature of exports should inform the setting of an ETS rate.** The following are two of the unique features of exporters that should inform the setting of an ETS rate:
 - Exports receive a lower level of service than other transmission customers – they are curtailed prior to any domestic load so that they will never prevent a paid domestic use of the transmission system.³⁵ As a result, exports are an opportunity service that only utilize excess transmission capacity that is being inefficiently used by domestic customers.³⁶
 - The needs and activities of competitive exporters (e.g., volume and direction of transactions) as a result of normal market conditions are not considered by the IESO when planning the transmission system, and so are not a driver of investment decisions.³⁷

45. Exporters are required to pay twice for use of capacity on the transmission system, once through the ETS rate and again, for intertie capacity, through the ICP mechanism.

46. It is the undisputed evidence of the IESO that “[b]oth mechanisms are intended to offset

³⁴ The current TR auction schedule is available online at: <https://www.ieso.ca/en/Sector-Participants/Calendars/Market-Calendars/2022-Transmission-Rights-Auction-Schedule>

³⁵ TC Transcript dated July 28, 2022 at page 177, line 16 to page 178, line 2.

³⁶ Power Advisory Report at para 49.

³⁷ HONI IR Responses at OEB Staff 10; Power Advisory Report at para. 47.

intertie infrastructure costs to Ontario consumers.”³⁸

47. However, the revenues collected through the ICP are never actually remitted to Hydro One transmission to offset those intertie infrastructure costs. Instead, TRCA balances above disbursed primarily to the benefit Ontario consumers.³⁹
48. APPrO sought to explore what might happen if this situation were to be corrected. APPrO asked Elenchus to re-run their cost allocation model assuming that, in one scenario ICP revenues, and in a second scenario TRCA balances, were instead remitted directly to Hydro One transmission in the same way that other transmission service revenues (such as ETS rates collected) are remitted to Hydro One. In the updated responses to JT2.4 and JT2.5 filed August 11, 2022, Elenchus updated their cost allocation study to appropriately apportion the ICP (and TRCA balance) revenue streams between exporters and domestic customers to reflect the source of each such revenue stream. The response is summarized in Table 1 below.

Table 1: A Revised Cost-Based Approach with ICP / TRCA Revenues Being Appropriately Accounted For.

Cost-Based ETS Rate	JT-2.4 (ICP revenues)	JT-2.5 (TRCA balances)
Fully Allocated (100% 12 CP)	\$1.19	(\$3.37)
Hybrid Model (50% 12 CP)	(\$1.48)	(\$6.04)
Curtailment Model (80% 12 CP)	\$0.16	(\$4.40)

49. The approach explored by APPrO in JT-2.4 and JT-2.5 is not entirely novel. As explained by CRA in their March 29, 2021 updated jurisdictional review that in New York:

³⁸ Exhibit I, Tab 1, Schedule 34, page 2 (Response to OEB Staff 34(b))

³⁹ Exhibit JT-1.3.

“As per the NYISO OATT Schedule H, the wholesale transmission service charge (TSC) recovers each Transmission Owner’s embedded costs, as well as the transmission component of their control area costs, and is determined separately for each load zone. **The TSC is adjusted to account for revenues from** grandfathered agreements, **financial transmission rights, and congestion payments**. The net of all these quantities for each Transmission Owner is divided by the total annual billing quantities (MWh) to give a \$/MWh rate.”⁴⁰

50. For the foregoing reasons, APPrO submits that a cost-based ETS rate should be based as follows:

- Assets dedicated to interconnection should be allocated to both exports and imports using the intertie 12CP allocator as recommended by Elenchus in Section 6.2 of the Elenchus Study.
- ICP revenues collected by the IESO for use of intertie capacity from both imports and exports should be accounted for in the cost-allocation model in the manner set out in the updated response to JT-2.4 to ensure that intertie users are not paying twice for the same service (i.e. use of intertie capacity).
- Because exports receive a significantly lower level of service than other domestic customers,⁴¹ because of the significant other economic and operational benefits associated with exports, and because the network is not designed to accommodate exports, a maximum of 20% of shared network costs should be allocated to export customers in the cost allocation model. This approach ensures that exporters are not “free riders” but also ensures that the principles of cost causality, and similar cost for similar level of service are respected.
- Finally, in the event a cost allocation model produces a proposed ETS rate that is less than zero, APPrO recommends that the ETS rate be set at \$0/MWh for that period so that surplus funds from the ICP will continue to go to benefit domestic

⁴⁰ Joint ETS Submissions at Attachment 2, Section 3.2.

⁴¹ As shown in Table 6 of the Elenchus Report, exports were curtailed in 35% of hours in 2016, reducing to 22% of hours in 2019.

consumers.

51. APPrO submits that a settlement-based approach should not be used to set the ETS rate. As discussed above, certainty in the ETS rate is of paramount importance to exporters and a settlement-based approach introduces significant uncertainty to setting the ETS rate. Exporters need to understand, in advance, what their transaction costs will be prior to participating in a market. However, if a settlement-based approach is desired, the ICP already accomplishes this and a settlement based ETS rate is not necessary.
52. APPrO does not have any submissions in respect of what other methods for setting the ETS rate should be considered.
53. APPrO submits that the ETS rate should be set every five years in a generic proceeding.

V. OTHER MATTERS

54. At the conclusion of the presentations on August 4, 2022, the OEB Panel requested additional submissions on what types of information should be made public by the IESO in the future (PD-1, Export bids p-q pairs, etc.).⁴²
55. The OEB should not prescribe disclosure of any market information as part of this proceeding as the IESO is best equipped to conduct a more comprehensive process to consider all of the relevant factors, competing views, potential risks, and scope of such disclosure through its stakeholdering processes, if necessary.

VI. CONCLUSION

56. For the reasons above, the elements set out by the Board in NGEIR for an application under section 29(1) of the OEB Act have been met. Electricity exporters' use of the Ontario transmission system is subject to competition through the ICP mechanism sufficient to protect the public interest.
57. Accordingly, APPrO respectfully requests that the OEB grant an Order pursuant to section

⁴² Presentations Transcript at pages 143-145.

29 of the OEB Act and refrain from regulating and approving the terms, conditions and rates for the ETS rate.

58. In the alternative, APPrO respectfully requests that the OEB set the ETS rate in accordance with the methodology proposed in “Issue 2” above, pursuant to Chapter 10, Section 4.5 of the IESO Market Rules.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF SEPTEMBER, 2022.

BORDEN LADNER GERVAIS LLP

Per:

A handwritten signature in dark ink, appearing to read "J Vellone", written in a cursive style.

John A.D. Vellone

CITATION: Sunsource Grids Inc. v. University of Windsor, 2023 ONSC 5621
COURT FILE NO.: CV-13-20063
DATE: 20231005

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Sunsource Grids Inc., Plaintiff/Defendant by Counterclaim

AND:

University of Windsor, Defendant/Plaintiff by Counterclaim

BEFORE: Howard J.

COUNSEL: Yan David Payne and Hashim Syed, for the Plaintiff

Tom Serafimovski and Josephine Stark, for the Defendant

HEARD: Written submissions

COSTS ENDORSEMENT

Overview

- [1] The plaintiff, Sunsource Grids Inc. (“Sunsource”) brought an action for damages against the defendant, University of Windsor (the “University”), in the amount of \$40 million for breach of contract, misrepresentation, and intentional unlawful interference with economic relations, seeking \$14.5 to \$15.6 million in compensatory damages and \$25 million in punitive damages.
- [2] Following a lengthy trial, which spanned over three years, and for comprehensive written reasons for judgment released October 28, 2022,¹ the trial judge in this matter, Verbeem J., dismissed Sunsource’s action in its entirety and allowed the University’s counterclaim in part, ordering the plaintiff to pay the defendant \$21,800 plus prejudgment interest.
- [3] In para. 1331 of his *Trial Decision*, Verbeem J. fixed a schedule for delivery of the parties’ costs submissions. The University and Sunsource delivered their various submissions in accordance with the prescribed schedule.²

¹ *Sunsource v. University of Windsor*, 2022 ONSC 6047 (S.C.J.) [*Trial Decision*].

² See the University’s cost submissions dated November 17, 2022 (the “University’s Main Submissions”); Sunsource’s responding cost submissions dated December 5, 2022 (“Sunsource’s Responding Submissions”); and the University’s reply cost submissions dated December 8, 2022 (the “University’s Reply Submissions”).

- [4] Mr. Justice Verbeem retired from the court, for medical reasons, effective December 15, 2022.
- [5] Pursuant to the endorsement of then Regional Senior Justice Thomas dated December 15, 2022,³ made under clause 123(7)(a) of the *Courts of Justice Act*,⁴ I was directed to determine the outstanding issue of costs.
- [6] The parties have been unable to agree on costs.
- [7] I have read and considered all the submissions, bill of costs, offers to settle, and other materials received, as well as the *Trial Decision* in its entirety.
- [8] The position of the University is that, *inter alia*, it is entitled to its costs of the proceeding on a substantial indemnity basis, totalling \$640,589.62 all-inclusive, and that the cost award should be made, on a joint and severable basis, against Sunsource and its principal, Mr. Marlon Hurst, personally.
- [9] The position of Sunsource is that any costs awarded to the University should be calculated on a partial indemnity basis and no costs should be made against Mr. Hurst.

Governing Legal Principles

- [10] In Ontario, cost awards in civil law matters are governed by s. 131 of the *Courts of Justice Act* and, in most cases, rule 57.01 of the *Rules of Civil Procedure*.⁵
- [11] Subsection 131(1) of the *Courts of Justice Act* confers upon the court a general discretion to determine costs, in the following terms:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.
- [12] It has been said that making an award of costs is inherently an exercise of judicial discretion. Indeed, the Supreme Court of Canada and our Court of Appeal have held that, “costs awards are ‘quintessentially discretionary.’”⁶
- [13] That said, the discretion conferred by s. 131(1) of the *Courts of Justice Act* is expressly made subject to the “rules of court.” Rule 57 of the *Rules of Civil Procedure* deals with the awarding and fixing of costs in civil proceedings and provides guidance in the exercise of

³ *Sunsource Grids Inc. v. University of Windsor*, 2022 ONSC 7097 (S.C.J.).

⁴ *Courts of Justice Act*, R.S.O. 1990, c. C.43.

⁵ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

⁶ *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39, [2009] 2 S.C.R. 678, 102 O.R. (3d) 319, at para. 126. See also *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27; *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at para. 43.; and *Fielding v. Fielding*, 2015 ONCA 901, 129 O.R. (3d) 65, at para. 67.

the court's discretion by enumerating circumstances and factors that the court may consider when determining costs. In this regard, subrule 57.01(1) provides that:

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs.

- [14] The indemnification of the successful party is a paramount objective – but not the only one – to be served by a costs order.⁷ Our Court of Appeal has recognized that: “[m]odern costs rules are designed to foster three fundamental purposes: (1) to partially indemnify successful litigants for the cost of litigation; (2) to encourage settlement; and (3) to discourage and sanction inappropriate behaviour by litigants.”⁸
- [15] In *DUCA Financial Services Credit Union Ltd. v. Bozzo*, Cumming J. described the “normative approach” to costs awards in Ontario as follows:
- ... first, that costs follow the event, premised upon a two-way, or loser pay, costs approach; second, that costs are awarded on a partial indemnity basis; and third, that costs are payable forthwith, i.e., within 30 days. Discretion can, of course, be exercised in exceptional circumstances to depart from any one or more of these norms.⁹
- [16] In fixing the amount of costs to be awarded, the court’s objective is not to reimburse a litigant for every dollar spent on legal fees. “The fixing of costs is not a bookkeeping exercise.”¹⁰ Rather, in exercising its discretion, a court must produce a result that is fair and reasonable in all the circumstances.¹¹ The “overriding principle is reasonableness.”¹²
- [17] As the Ontario Court of Appeal observed in its leading decision in *Boucher v. Public Accountants Council (Ontario)*: “[o]verall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.”¹³
- [18] The court should also consider the totality of the costs award to ensure that it is not disproportionate to the amount recovered.¹⁴ That is consistent with the directive of subrule 1.04(1.1) of the *Rules of Civil Procedure* that in applying the rules, “the court shall make orders and give directions that are proportionate to the importance and complexity of the

⁷ *Watterson v. Canadian EMU*, 2018 ONSC 301 (Div. Ct.), at para. 8.

⁸ *Serra v. Serra*, 2009 ONCA 395, 66 R.F.L. (6th) 40, at para. 8, citing *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22. See also *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.), at para. 26. Five broad purposes were identified by Perell J. in *Sheppard v. McKenzie*, [2009] O.J. No. 3677, 2009 CanLII 46175 (S.C.J.), at para. 17.

⁹ *DUCA Financial Services Credit Union Ltd. v. Bozzo*, 2010 ONSC 4601 (S.C.J.), at para. 5.

¹⁰ *Bondy-Rafael v. Potrebic*, 2019 ONCA 1026, 441 D.L.R. (4th) 658, 47 C.P.C. (8th) 245, at para. 64.

¹¹ *Ibid.*, at para. 7. See also *Kuzev v. Roha Sheet Metal Ltd.*, 2007 CarswellOnt 4338, 227 O.A.C. 3 (Div. Ct.), at para. 6, citing *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21, 22 C.P.C. (4th) 235 (C.A.) [cited to O.R.], at p. 247 per Morden A.C.J.O., and *Zesta Engineering Ltd. v. Cloutier*, [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (C.A.), at para. 4, and quoting *Moon v. Sher*, [2004] O.J. No. 4651, 246 D.L.R. (4th) 440 (C.A.), at para. 30 per Borins J.A.

¹² *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66, 312 D.L.R. (4th), at para. 52.

¹³ *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.), at para. 26. See also *Bondy-Rafael v. Potrebic*, at para. 53.

¹⁴ *R & G Draper Farms (Keswick) Ltd. v. Nature’s Finest Produce Ltd.*, 2016 ONCA 626, 133 O.R. (3d) 395, at para. 23.

issues, and to the amount involved, in the proceeding.” That said, while the consideration of proportionality “is necessary to the soundness of any costs award and to ensure the health of the justice system,” the overarching principle remains that the order for costs must be fair and reasonable.¹⁵

[19] I am guided by these governing principles here.

Analysis

Presumptive entitlement

[20] As I have reviewed above, the indemnification of the successful party is a paramount objective in making costs awards, and the “normative approach” in Ontario is that costs should follow the event.

[21] There is no reason to depart from the presumptive rule here. The University was clearly the successful party here; the action against it was dismissed in its entirety, and its counterclaim was allowed in part, albeit in a relatively modest amount. The University did not engage in any conduct that would disentitle it from costs. The University is entitled to its costs of the action and its counterclaim.

The scale of the costs award

[22] One of the central disputes between the parties is the question of the scale of the award. The University submits that it should be awarded costs on an elevated scale. Sunsource maintains that the award of costs should be made on the partial indemnity scale.

[23] More particularly, the University seeks its costs of the proceeding on a substantial indemnity basis in the all-inclusive amount of \$640,589.62, being the total of \$393,540 claimed for fees, \$51,160.20 for HST on those fees, \$173,353.47 for disbursements, and \$22,535.95 for HST on the taxable disbursements. In the alternative, the University claims that it should recover its costs from the commencement of the proceeding up to September 29, 2017 (the date of its first Rule 49 offer) on a partial indemnity basis, and thereafter on a substantial indemnity basis.

[24] There is no real disagreement between the parties as to the legal principles that apply to claims for an award of costs on an elevated scale. An award of costs on an elevated scale is justified in only very narrow circumstances. As our Court of Appeal said in *Net Connect Installation Inc. v. Mobile Zone Inc.*:

An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behaviour worthy of sanction: *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (Ont. C.A.) at para. 28. Substantial

¹⁵ *Bondy-Rafael v. Potrebic*, at para. 64.

indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.¹⁶

- [25] On the latter point, I note that the University does not claim costs on a full indemnity basis.
- [26] The University's claim for substantial indemnity costs is based on both grounds identified in *Net Connect*. The University argues that its offers to settle were more favourable to Sunsource than the result at trial and also the losing party plaintiff engaged in behaviour that is worthy of sanction by the court.

The University's offers to settle

- [27] The University served an offer to settle upon the plaintiff by letter dated September 29, 2017, offering to settle all claims of the plaintiff on the basis of the University withdrawing its counterclaim and paying Sunsource the all-inclusive amount of \$25,000. The offer was expressed to remain open until one minute after the commencement of trial.
- [28] I note that Rule 49 offer, made in September 2017, was extended to Sunsource some eight months before the first day of trial commenced. However, the offer was rejected by Sunsource.
- [29] It goes without saying that the University's offer to settle of September 2017 represented a significantly more favourable result for Sunsource than the outcome of the trial, where its action was dismissed in its entirety. Had Sunsource accepted the offer back in September 2017, it would have at least had some positive recovery¹⁷ and would have almost certainly avoided liability for payment of the defendant's costs and, for its part, the University would not have had cause to incur the very significant legal costs that attend a lengthy trial spanning three years.
- [30] I also note that, although the University concedes it was not a written Rule 49 offer, the University did make a further settlement offer during a mid-trial settlement conference that was conducted before me, at which point the University offered to pay the plaintiff the all-inclusive sum of \$100,000 to resolve the proceeding and avoid further trial costs, including the fees of the experts that were retained by the University to testify at trial. Again, Sunsource dismissed the offer. Indeed, to my mind, it is not unfair to say that, with a rather dismissive countenance, Mr. Hurst rejected the offer out-of-hand at the mid-trial conference before me.

¹⁶ *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766, 140 O.R. (3d) 77, at para. 8 [*Net Connect*]. See also *Mars Canada Inc. v. Bemco Cash & Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, at paras. 42-44 per Strathy C.J.O.

¹⁷ There is no evidence before me as to what payment arrangements existed between Sunsource and its counsel, whether contingency fee agreement or otherwise.

- [31] Subrule 49.10(2) of the *Rules of Civil Procedure* provides for certain cost consequences when a plaintiff dismisses a defendant's offer to settle, as follows:

Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing;

(b) is not withdrawn and does not expire before the commencement of the hearing; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.

- [32] However, appellate courts have repeated held that the language of subrule 49.10(2) makes it "clear that the rule has no application where the plaintiff fails to recover any judgment."¹⁸

- [33] Many courts have noted that in *Strasser*, where the defendant made an offer of \$30,000 in a case where the plaintiff's action was ultimately dismissed at trial, the Court of Appeal went on to endorse an award of partial indemnity costs up to the date of the offer and substantial indemnity costs thereafter, based on the principles enunciated in rule 57.01, reasoning that the defendant was entitled to "a bonus" for making an offer in the face of a claim that was dismissed.¹⁹

- [34] That said, the case law has continued to develop since the Court of Appeal's 1990 decision in *Strasser*. More recently, the Court of Appeal explained in *Iannarella v. Corbett* that:

The development of this court's approach to awards of substantial indemnity costs has evolved since *Strasser*, as this court noted in *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66 (Ont. C.A.). Outside of rule 49.10, to make such an award as a matter of judicial discretion the court must find that the party has been guilty of egregious misconduct in the proceeding. See *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280 (Ont. C.A.), at para. 92 and *McBride Metal Fabricating Corp. v. H & W Sales Co.* (2002), 59 O.R. (3d) 97 (Ont. C.A.), at para. 39. I can see no basis in this case

¹⁸ *S & A Strasser Ltd. v. Richmond Hill (Town)* (1990), 1 O.R. (3d) 243, 49 C.P.C. (2d) 234 (C.A.) [*Strasser*], at p. 245 (cited to O.R.). See also *Dermann v. Baker*, 2019 ONCA 584, 436 D.L.R. (4th) 321, at para. 24; and *Brownhall v. Canada (Ministry of National Defence)* (2007), 87 O.R. (3d) 130 (Div. Ct.), at para. 70.

¹⁹ *Strasser*, at p. 246.

on which the trial judge could have found such misconduct on the appellants' part.²⁰

- [35] Thus, the question then becomes whether there is egregious conduct on the part of the plaintiff. And that, in turn, takes us to the second ground on which the University submits that it should have its costs on a substantial indemnity basis.

Misconduct worthy of court sanction

- [36] It is well settled that allegations of fraud or other similarly serious misconduct that are placed on the record by a plaintiff and pursued at trial may expose that plaintiff to costs on a substantial indemnity basis if such allegations are ultimately found to be totally without merit by the trial judge.
- [37] Some of the earlier case law was canvassed by Blair J. (as he then was) in his 1992 decision in *131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, where the court held that:

The real question at issue is whether the defendants, or some of them, should be awarded costs on a solicitor-and-client scale, as opposed to the normal party-and-party scale.

The power to make such an award is clearly within the discretion of the court. It is equally clear, however, that such a power is only exercised in special and rare cases. See, for example, *Foulis v. Robinson* (1978), 8 C.P.C. 198, 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (C.A.) and *S & A Strasser Ltd. v. Richmond Hill (Town)*, *supra*.

Cases where allegations of fraud are made and found to be totally unfounded fall into this latter category. So, too, do cases involving "other allegations of improper conduct seriously prejudicial to the character or reputation of a party", which are found in the result to be totally unfounded: *Re Bisysk (No. 2)* (1980), 32 O.R. (2d) 281 (H.C.), per Robins J. at p. 287 [O.R.].

In my opinion this matter is one of those special and rare cases where solicitor-and-client costs are warranted. The action was pleaded and pursued throughout on the basis that the defendants had "wrongfully and maliciously conspired ... to injure the plaintiff by appropriating the transaction and its attendant benefits for the benefit of Vasa, McGorman, Cowper and [518092 Ontario Limited]". The statement of claim alleged as well that Mr. Elliott and Mr. Boys had "made false statements to the plaintiff ... and failed to disclose material information to the plaintiff for the purpose of misleading the plaintiff".

Mr. Pozhke was unrelenting in pressing this theme during the trial. In cross-examination, he readily accepted and adopted the suggestion that the

²⁰ *Iannarella v. Corbett*, 2015 ONCA 110, 124 O.R. (3d) 523, 65 C.P.C. (7th) 139, at para. 139. But see *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2021 ONCA 520 [OZ Merchandising], at para. 84.

defendants had “stolen” his interest in the property. Counsel for the plaintiff continued to advance the conspiracy and misconduct arguments in closing, although, in addition, he did draw upon the claims of inducing breach of contract and intentional interference with economic relations (neither of which claim was pleaded).

Allegations of “appropriating” a transaction, and of “stealing” an interest in property are serious allegations, as is the allegation that one has made “false statements” for the “purpose of misleading”. They go to the heart of a person’s integrity, and to my mind, are analogous to allegations of fraud. They are “allegations of improper conduct seriously prejudicial to the character or reputation of a party”. In this case, I have held them to be quite unfounded.

As Mr. Justice Rosenberg said in *Procor Ltd. v. U.S.W.A.* (1990), 71 O.R. (2d) 410, 65 D.L.R. (4th) 287 (H.C.) at p. 437 [O.R.]:

Solicitor-and-client costs may be justified where a defendant unjustly accuses a plaintiff of fraudulent and dishonest conduct, (and) persists in those assertions through to and including trial without being able to substantiate them.

So, too, where a plaintiff unjustly asserts such allegations against a defendant, with the same unsubstantiated results.²¹

[38] The decision of Blair J. in *131843 Canada* was cited with approval by the Ontario Court of Appeal in *Twaits v. Monk*, where the court simply held that: “[s]olicitor-client costs may be ordered in cases where allegations of fraud are shown to be totally unfounded.”²²

[39] More recently, in *Pichelli v. Vuletic*, LeMay J. of this court took note of the decision in *131843 Canada* and subsequent authorities and applied them to the circumstances before the court there. His discussion, as follows, is instructive for present purposes:

All of the [defendant] Adair parties advance essentially the same argument on this point. In essence, that argument is that the costs of this case should be on a substantial indemnity basis because the allegations of fraud and other malfeasance made against them were unsubstantiated. In this regard, my attention was directed to an unreported decision of Jennings J. in *Rasmussen v. H.R. Trucking Inc.*, where he stated:

[6] These Defendants request costs on a substantial indemnity basis. My jurisdiction to make such an award rests in part on Section 131(1) of the *Courts of Justice Act*, R.S.O. 1990 c. C43. Nothing in the provisions of Rule 57.01 affects my power under

²¹ *131843 Canada Inc. v. Double “R” (Toronto) Ltd.*, [1992] O.J. No. 3879, 7 C.P.C. (3d) 15 (Ct. J. (Gen. Div.)) [131843 Canada], at paras. 8-15.

²² *Twaits v. Monk*, [2000] O.J. No. 1699, 8 C.P.C. (5th) 230 (C.A.), at para. 2 per curiam (Carthy, Rosenberg, O’Connor JJ.A.). “

Section 131(1) of the *Courts of Justice Act* to award costs on a substantial indemnity basis.

[7] In *Murano v. Bank of Montreal*, (1998), 41 O.R. (3rd) (222), the Court of Appeal approved the finding of R.A. Blair J. (as he then was) in *131843 Canada Inc. v. Double "R" (Toronto) Ltd.*, (1992) 7 C.P.C. (3rd)(15), that there are two classes of cases which may result in an award of solicitor and client costs, viz:

(a) cases where allegations of fraud are made, and these allegations are determined to be totally unfounded;

(b) cases involving "other allegations of improper conduct seriously prejudicial to the character or reputation of a party", and these allegations are determined to be wholly unfounded.

[8] In *Unisys Canada Inc. v. York Three Associates Inc.*, [2001] O.J. No. 3777, the Court of Appeal cited *Murano* in support of the proposition that unsubstantiated allegations of fraud, misconduct or dishonesty or other conduct analogous thereto, is sufficiently reprehensible to warrant awarding costs on a substantial indemnity basis.

Similar findings were made in *Manning v. Epp* (2006 CanLII 35631 (ONSC) at paragraphs 7-8) and *Baryluk v. Campbell* (2009 CanLII 34041 (ONSC) at para. 10).

In addition, Mr. Adair points [to] *Hamilton Cab Company Inc. v. Gill* (2017 ONSC 4545 (Ont. S.C.J.)), where Reid J. stated (at paras. 32 to 34):

The claims by the Gill defendants that Mr. Dean fabricated diary entries after the fact to support his defence of the counterclaim were equivalent to allegations of fraud. They were unsupported and ultimately failed. It is one thing to allege that a lawyer failed to meet a required standard of care in the provision of legal advice. It is another and much more serious attack on a lawyer's reputation to submit that the lawyer was guilty of fraud. Mr. Dean is a solicitor with 43 years' experience. The majority of his practice is in the area of real estate. It is no surprise that he needed to fully and vigorously defend the claims made against him which I found were unjustified.

The complexity created in this case by the variety of defences raised by the Gill defendants and the counterclaim by them against Mr. Dean, the need for cross examinations on affidavits and ultimately case management by me required the joint involvement of both Hamilton cab and Mr. Dean.

Based on the foregoing, and a consideration of all the factors set out in Rule 57.01, I am satisfied that there should be an award of

substantial indemnity costs payable by the Gill defendants to Hamilton Cab and Mr. Dean.

When these factors are considered, the Adair parties argue that they should be entitled to substantial indemnity costs. The Pichelli parties advanced claims of, *inter alia*, fraudulent misrepresentation, deceit, conversion and breach of fiduciary duty. The Adair parties argue that these causes of action were an attack on their integrity. I agree. In both cases, the pleadings of the Pichelli parties were a claim that the Adair parties had behaved in a fraudulent manner.

...²³

- [40] In the result in *Pichelli*, LeMay J. went on to find that “substantial indemnity costs are appropriate for all of the Adair Defendants.”²⁴
- [41] In the instant case, the wide-ranging allegations of serious misconduct, fraudulent behaviour, and other allegations of improper conduct seriously prejudicial to the character or reputation of the defendant’s personnel, as advanced by Sunsource, were generally described by the trial judge in his *Trial Decision* in the following terms:

The plaintiff’s action is premised, in part, on allegations that the University engaged in misconduct in the formation of the research agreement contract, its performance of the contract, and false representations it made to the plaintiff concerning its contractual performance. The plaintiff also alleges that the University engaged in intentional tortious conduct during the term of the contract and after its conclusion that was intended to and did, in fact, unlawfully interfere with the plaintiff’s economic relations. Specifically, Sunsource alleges that the University:

- a) unduly and unfairly pressured it to execute the research agreement even though the plaintiff was not satisfied with the contract’s terms;
- b) counselled it to falsely exaggerate the value of its proposed contributions in the parties’ grant proposal for funding through the FedDev ARC initiative, despite the plaintiff’s objections;
- c) engaged in little, if any, of the research and development activities that the University was obligated to perform under the terms of the research agreement;
- d) misallocated the federal grant proceeds that it received from the FedDev for the research agreement, to other unrelated University projects, in which the plaintiff was not involved;

²³ *Pichelli v. Vuletic*, 2019 ONSC 3178 (S.C.J.) [*Pichelli*], at paras. 22-25.

²⁴ *Ibid.*, at para. 32. I also note that with reference to the unreported decision of Jennings J. in *Rasmussen v. H.R. Trucking Inc.* that was quoted by LeMay J. in *Pichelli*, the judgment of Jennings J. awarding costs on a substantially indemnity basis was subsequently upheld by the Court of Appeal: see *Rasmussen v. H.R. Trucking Inc.*, 2008 ONCA 540, at para. 6.

- e) falsified documents that it filed with the FedDev administrator concerning the identities of students who contributed to the project;
- f) wrongfully denied the existence of the parties' oral agreement and falsely asserted that the plaintiff's failure to deliver its in-kind contributions during the term of the research agreement constituted a breach of the contract by the plaintiff;
- g) consistently lied to the plaintiff about the status and results of the research project;
- h) had an obligation under the research agreement to support the plaintiff's application for a utility patent with respect to IP related to the switch concept that was developed before the parties entered into the research agreement and failed to do so;
- i) had an obligation under the research agreement to support Sunsource's efforts to obtain private sector investors and investments during the term of and after the research agreement and failed to do so;
- j) failed to provide its contractually prescribed deliverables at the end of the research agreement's term, including a functional control algorithm and hardware-based prototype of the switch technology.²⁵

[42] Later in his *Trial Decision*, Verbeem J. described the plaintiff's claim for breach of the University's duty of honest performance in the following terms:

Sunsource posits that the University repeatedly breached its duty of honest performance of the research agreement, throughout and after the FedDev project period because:

1. The University misrepresented the extent of Sunsource's alleged non-performance of its contractual obligations, both to Sunsource and the FedDev administrator.
2. The University lied about or misrepresented the extent of its own contractual performance, both to Sunsource and the FedDev administrator, and mislead the plaintiff to believe that it engaged in significant efforts and substantial progress was being made.
3. The University unjustifiably refused to acknowledge its contractual obligation to support Sunsource's utility patent "upgrade" and feigned ignorance with respect to the nature and requirements of a novelty report.

²⁵ *Trial Decision*, at para. 16.

4. The University withheld disclosure of technical information required by Sunsource, in furtherance of its scheme to usurp the switch technology for itself and to leverage more favourable terms for itself in the parties' post Fed-Dev Development Agreement negotiations.²⁶

- [43] Commenting on Sunsource's pleading as a whole, the trial judge observed that, "[here,] the amended statement of claim alleges bad faith conduct by members of the University and particularizes the alleged fraudulent and misleading conduct of the University; the University's alleged efforts to usurp the technology; and the University's alleged effort to deal exclusively with VPI [a third-party investor, Vengeance Power Incorporated]."²⁷
- [44] In particular, Sunsource and/or Mr. Hurst made serious allegations of impropriety against, especially, Dr. Narayan Kar, a professional electrical engineer and an esteemed professor in the University's electrical engineering department (whom the trial judge found to be "exceptionally qualified"²⁸ and a "credible and believable witness"²⁹), Ms. Heather Pratt, the University's Executive Director of Research and Innovation Services (whom the trial judge found to be a "highly knowledgeable and informative witness" whose evidence was "credible" and "highly reliable"³⁰), and Mr. Horst Schmidt, who worked under Ms. Pratt in the University's Office of Research Services (whom the trial judge found to be a "credible witness"³¹).
- [45] I note that the *Trial Decision* is replete with a multitude of references by the trial judge to the allegations of fraud and other egregious conduct that the plaintiff made against the University and its personnel.
- [46] For example, the trial judge expressly noted the plaintiff's allegations of "fraudulent misrepresentation,"³² of how the University "denies that it engaged in fraud ... or that it falsified records,"³³ that the University's Dr. Kar "coached him [Mr. Hurst] to submit values ... that were fraudulently inflated,"³⁴ that Dr. Kar "unfairly pressured him [Mr. Hurst] to proceed with ... fraudulently inflated in-kind contribution values,"³⁵ (and yet) Mr. Hurst "did not express any concerns about fraudulently inflated in-kind contribution values,"³⁶ that Mr. Hurst "maintains that during the meeting, he said that he was concerned about defrauding the federal government,"³⁷ that "there is no contemporaneous documentation supporting Mr. Hurst's evidence that he believed that the

²⁶ *Ibid.*, at para. 767.

²⁷ *Ibid.*, at para. 1319.

²⁸ *Ibid.*, at para. 51.

²⁹ *Ibid.*, at para. 445.

³⁰ *Ibid.*, at para. 481.

³¹ *Ibid.*, at para. 446.

³² *Ibid.*, at para. 20. In the same vein, see also paras. 398, 817, and 846.

³³ *Ibid.*, at para. 25.

³⁴ *Ibid.*, at para. 72.

³⁵ *Ibid.*, at para. 73. In the same vein, see also para. 309.

³⁶ *Ibid.*, at para. 87.

³⁷ *Ibid.*, at para. 91. In the same vein, see also paras. 92 and 94.

value of Sunsource's in-kind contributions were inflated or that he believed the parties were actively defrauding the FedDev,"³⁸ that "Mr. Hurst posits, in his evidence, that the content of the attestation form is fraudulent,"³⁹ that "Mr. Hurst testifies that every student and research associate, apart from Dr. Iyer and Dr. Lu who received funds through the FedDev grant, did so fraudulently,"⁴⁰ that Mr. Hurst's "evidence in that regard founds his assertion that the University engaged in fraud and it created falsified documents,"⁴¹ that the issues raised by the plaintiff included "whether the University breached the contract, whether the University lied about its contractual performance, and the merits of the plaintiff's fraud and falsified document allegations,"⁴² that Mr. Hurst's "assertions of fraud made against the University, ... which is linked to its claim that the University breached its duty of honest performance of the contract,"⁴³ that the "plaintiff characterizes Mr. Schmidt's statement during the phone call as a fraudulent or negligent misrepresentation,"⁴⁴ that "the plaintiff has asserted several instances of what may, in common parlance, be referred to as fraud, deceit, and conspiracy,"⁴⁵ that "Sunsource submits that the University engaged in fraudulent conduct,"⁴⁶ "all of the students who are the subject of the fraud allegations,"⁴⁷ that the "plaintiff appears to posit that ... through Mr. Schmidt's conduct, the University engaged in the tort of fraudulent misrepresentation,"⁴⁸ etc.

- [47] The trial judge also expressly noted a number of other very serious allegations advanced by Sunsource and/or Mr. Hurst that were akin to fraudulent or other disreputable conduct. For example – and just to canvass a much smaller sample of Mr. Hurst's allegations than the multitude of his express allegations of fraud on the part of the University – the trial judge expressly noted that "Sunsource submits that Dr. Kar is incredible, in part, because he engaged in dishonest conduct by reporting ..., when he knew that his representations in that regard were untrue,"⁴⁹ that "I do not share the plaintiff's view that Mr. Schmidt was intentionally deceitful in his testimony,"⁵⁰ that "the plaintiff posits that the University intentionally misrepresented that Sunsource did not perform the contract,"⁵¹ and that the "plaintiff submits that the University's conduct is so high-handed, malicious, and reprehensible that it justifies a non-compensatory award of punitive damages."⁵²

³⁸ *Ibid.*, at para. 111.

³⁹ *Ibid.*, at para. 296.

⁴⁰ *Ibid.*, at para. 297.

⁴¹ *Ibid.*, at para. 311.

⁴² *Ibid.*, at para. 317.

⁴³ *Ibid.*, at para. 371(b).

⁴⁴ *Ibid.*, at para. 518.

⁴⁵ *Ibid.*, at para. 599.

⁴⁶ *Ibid.*, at para. 780.

⁴⁷ *Ibid.*, at para. 781.

⁴⁸ *Ibid.*, at para. 817. In the same vein, see also para. 818.

⁴⁹ *Ibid.*, at para. 385.

⁵⁰ *Ibid.*, at para. 447.

⁵¹ *Ibid.*, at para. 769.

⁵² *Ibid.*, at para. 1305.

[48] Tellingly, the trial judge himself noted the seriousness of a plaintiff making allegations of fraud, as follows:

Fraud is an exceptionally serious allegation and ought not to be advanced lightly. The onus rests on the party alleging fraud to prove the allegations, on a balance of probabilities: see *Carrington v. Thom*, [1977] O.J. No. 1099 (C.A.). Sunsource has failed to meet its onus.⁵³

[49] In keeping with the latter statement of the trial judge, I note that Verbeem J. found that all of the allegations of fraud, dishonesty, or other disreputable conduct made by Sunsource and/or Mr. Hurst against the University and its personnel were completely without foundation.

[50] In particular, and only by way of illustration of some limited examples, I note that the trial judge found that:

- a. “the allegations of fraud and falsified documents made by Sunsource are without merit”;⁵⁴
- b. “Here, Mr. Hurst’s inaccurate and untrue evidence went to a matter of substance. Specifically, the basis for his assertions of fraud made against the University, in relation to its reporting to the FedDev and its allocation of the FedDev grant proceeds, which is linked to its claim that the University breached its duty of honest performance of the contract.”⁵⁵
- c. “Rather, he [Mr. Hurst] asserted, without reservation or knowledge of any confirmatory evidence, that Dr. Kar engaged in serious fiscal malfeasance. The totality of the evidence does not persuasively support his testimonial assertions, rather it negates them. No FedDev proceeds were allocated to fund travel to France. *This aspect of Mr. Hurst’s evidence demonstrates a testimonial reckless disregard for the truth, and a willingness to assert speculation as fact. It undermines Mr. Hurst’s credibility and the reliability of his evidence.*”⁵⁶ [Emphasis supplied.]
- d. “However, the evidence does not persuade me that Dr. Kar engaged in the dishonest conduct alleged by the plaintiff.”⁵⁷
- e. “I find that Dr. Kar did not engage in dishonest conduct, nor did he make false or fraudulent misrepresentations of fact ...”⁵⁸

⁵³ *Ibid.*, at para. 782.

⁵⁴ *Ibid.*, at para. 300.

⁵⁵ *Ibid.*, at para. 371(b).

⁵⁶ *Ibid.*, at para. 371(c).

⁵⁷ *Ibid.*, at para. 385.

⁵⁸ *Ibid.*, at para. 398.

- f. “In my view, the evidence as a whole does not establish that Dr. Kar falsified records related to the FedDev project or otherwise engaged in fraudulent activity in completing the FedDev attestation form.”⁵⁹
- g. “I accept all aspects of Ms. Pratt’s evidence, including ... Mr. Hurst never contemporaneously expressed any concerns that he or Sunsource were involved in defrauding the federal government through inflated ‘in-kind’ values set out in the FedDev grant application.”⁶⁰
- h. “there is no merit to the plaintiff’s allegations that the University ‘defrauded’ the FedDev program.”⁶¹
- i. “Sunsource has failed to meet its onus. Apart from Mr. Hurst’s conclusory allegations offered in his testimony, the totality of the evidence supports that there were no false or materially misleading statements made by the University to the FedDev, or fraud in the allocation of the proceeds of the ARC grant.”⁶²
- j. “The evidence that the University engaged in fraud, in respect of the foregoing, is slight. ... Although he [Mr. Hurst] acknowledges in his evidence that he did not have the opportunity to observe the students who were contributing to the project ... because he did not attend the lab frequently, Mr. Hurst continued to insist that only Dr. Lu and Dr. Iyer worked on the project.”⁶³
- k. “... I find that the plaintiff has failed to establish that the University’s allocation of the proceeds ... resulted from fraudulent or deceitful conduct by the University. The University did not lie or knowingly mispresent the parties’ respective performances under the contract in its reporting to the FedDev administrator.”⁶⁴
- l. “The plaintiff has not established, on a balance of probabilities, that Mr. Schmidt, or any other member of the University, fraudulently or negligently misrepresented the University’s ownership and interest in any of the IP associated with the switch technology, ... [etc.].”⁶⁵
- m. “I conclude that Mr. Schmidt did not make any untrue, inaccurate, or misleading statements to them during their telephone conversation, or at any other time, whether negligently, recklessly, or fraudulently.”⁶⁶

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, at para. 481(b).

⁶¹ *Ibid.*, at para. 764.

⁶² *Ibid.*, at para. 782.

⁶³ *Ibid.*, at para. 787.

⁶⁴ *Ibid.*, at para. 804.

⁶⁵ *Ibid.*, at para. 826.

⁶⁶ *Ibid.*, at para. 830.

- n. “The University’s actions, viewed in their totality, are not consistent with an attempt to interfere, unlawfully or otherwise, with Sunsource’s economic interests. Rather, I am persuaded, on a balance of probabilities, that the University’s actions were designed to further both the economic interest of Sunsource and its own economic and non-economic interests.”⁶⁷
- o. “Sunsource has failed to prove, on a balance of probabilities, that the University: engaged in an actionable breach of the research agreement; committed the tort of unlawful interference with its economic relations; engaged in fraud; made misrepresentations; or breached its duty of honest performance of the research agreement. Those were the only causes of action asserted against it.”⁶⁸

[51] Moreover, as the trial judge himself expressly noted, the multitude of allegations of fraudulent and other dishonest conduct made by Sunsource and/or Mr. Hurst against the University and its personnel had the effect of prolonging and/or extending the trial itself. There were a number of instances where the trial judge expressly noted that the impact of the plaintiff’s groundless allegations was to increase the length or complicate the conduct of the trial proceedings, where, for example, the trial judge noted the following:

- a. “Mr. Hurst’s assertions of ‘fraud’ resulted in extensive and detailed evidence from Dr. Kar concerning the role each of the identified students, professors, and research associates performed in relation to the Sunsource project during the FedDev project period, the manner in which he determined the value of that respective work and the nature of academic research in general.”⁶⁹
- b. “In addition, the University called evidence from almost every student, and research associate, including Dr. Iyer and Dr. Lu, who either received some portion of the FedDev grant proceeds, or who were identified as providing additional project-related work or contribution in the subsequent attestation form.”⁷⁰
- c. “His [Mr. Hurst’s] adamant testimony that Dr. Lu and Dr. Iyer were the only students that worked on the project during the FedDev project period conflicts with other documentation that Mr. Hurst or Sunsource created. ... In my view, Mr. Hurst’s correspondence evidences that he was aware that students other than Dr. Lu and Dr. Iyer contributed to the switch project and that the project benefited from their contributions. *I find his evidence that only Dr. Lu and Dr. Iyer worked on the FedDev project to be both inaccurate and knowingly untrue.* ... Here, Mr. Hurst’s inaccurate and untrue evidence went to a matter of substance. Specifically, the basis for his assertions of fraud made against the University, in relation to its reporting to the FedDev and its allocation of the FedDev grant proceeds, which is

⁶⁷ *Ibid.*, at para. 848.

⁶⁸ *Ibid.*, at para. 853.

⁶⁹ *Ibid.*, at para. 298.

⁷⁰ *Ibid.*, at para. 299.

linked to its claim that the University breached its duty of honest performance of the contract.”⁷¹ [Emphasis added.]

- [52] In sum, the various allegations of fraud and other misconduct made by Sunsource and/or Mr. Hurst against the University and its personnel, especially, Dr. Kar, Ms. Pratt, and Mr. Schmidt, were found to be completely without merit by the trial judge.
- [53] Those type of allegations go to the heart of a person’s integrity. They are allegations of improper conduct and personal impropriety that are seriously prejudicial to the character or reputation of an individual. Sunsource and Mr. Hurst pursued these allegations to full extent at trial; they were the subject of extensive cross-examination and full argument. And in the end, the trial judge found them to be completely unfounded.
- [54] In my view, such egregious conduct by Sunsource and Mr. Hurst requires severe sanction by the court.
- [55] For all of these reasons, but subject to my consideration of the relevant factors under subrule 57.01(1) of the *Rules of Civil Procedure*, I presumptively find that the University is entitled to its costs of the proceeding on a substantial indemnity basis.

Quantum of the University’s claim for costs

- [56] I have considered all of the factors enumerated in subrule 57.01(1) of the *Rules of Civil Procedure*, not all of which are equally relevant in the instant circumstances (or at all). As such, I do not propose to specifically address each of the factors below.
- [57] However, I would note at the outset that the responding cost submissions of Sunsource do not address any of the factors under subrule 57.01(1) directly, nor do they specifically challenge the quantum sought by the University in its bill of costs. In particular, I note that the submissions of Sunsource take no issue with the hourly rates claimed by counsel for the University, with the number of hours spent, or with the amount of disbursements.
- [58] That said, I have conducted my own review of the University’s bill of costs.
- [59] This was a lengthy and complex proceeding that required 49 days of trial; the parties’ closing argument consumed six days. The issues were dense. At its core, the plaintiff’s case challenged the University’s alleged non-performance of a research agreement between the parties, pursuant to which the University “agreed to carry out specified pre-commercialization, highly experimental, scientific research and development activities with respect to a project entitled ‘Power Point Tracking Based Smart Switch Development for Seamless Transfer Between Solar PV and Grid,’ ... based on a seamless power switching concept.”⁷² The hearing of the case required expert evidence of electrical

⁷¹ *Ibid.*, at para. 371(b).

⁷² *Ibid.*, at para. 2.

engineers and other professionals in order to inform the court's determination of the factual and legal issues in dispute.

- [60] In addition to the electrical engineering and other technological issues, the quantification of damages and the economic issues raised further issues and necessitated the calling of other expert witnesses.
- [61] It was the type of trial where, in my view, it was certainly reasonable to have two counsel attend on behalf of the defendant University. I note that, again, the submissions of Sunsource express no issue with the defendant's need for two lawyers, nor do they allege any duplication of effort, which, to be clear, is not evident on my review of the material.
- [62] Nor is there any challenge by the plaintiff, as I have said, to the hourly rates claimed by defendant's counsel. The bulk of the work on the file was performed by Mr. Serafimovski. All of the work in respect of steps in the proceeding prior to trial were performed by Mr. Serafimovski. Ms. Stark was engaged in the trial process only. Mr. Serafimovski was called to the Bar in 1990 and has 33 years of experience. Ms. Stark was called to the Bar in 1985 and has 38 years of experience. They both claim the same substantial indemnity rate of \$300 per hour (and a partial indemnity hourly rate of \$225). Those rates are beyond challenge, in my view. They are certainly fair and reasonable for counsel of Mr. Serafimovski's and Ms. Stark's considerable experience. Again, Sunsource raised no objection to the hourly rates sought by counsel.
- [63] It is clear that the issues were of considerable importance to both parties. To Mr. Hurst's mind, he was pursuing what he believed to be a \$40 million claim. At the same time, I also accept the University's submissions that:

The issues were of extremely great importance to the University as the action put into question the professional reputation and integrity of the University and its professor and employees. Essentially, allegations of impropriety, conspiracy and misappropriation of government funds were made against Heather Pratt, the Executive Director, Research and Innovation of the University and Dr. Kar, an esteemed professor at the University holding numerous degrees and positions of authority. The dismissal of the action against the University vindicated and restored the reputation of the University, Heather Pratt and Dr. Kar.⁷³

- [64] Sunsource did not provide me with its bill of costs for the action, which would have been helpful for comparative purposes in trying to determine the reasonable expectations of the unsuccessful party respecting costs. In such circumstances, the case law has held that the court may draw an adverse inference against the party who chose or failed to provide the

⁷³ University's Main Submissions, at para. 12.

information and assume that its costs would have matched or exceeded the costs of the successful party. I make that inference here.⁷⁴

- [65] Having considered, *inter alia*, the submissions of the parties and the bill of costs of the University, the offers to settle that were made by the University that were more favourable to the plaintiff than the result at trial, the egregious conduct of Sunsource and Mr. Hurst that requires the court's stern sanction, the relevant factors enumerated in subrule 57.01(1) of the *Rules of Civil Procedure*, and the principles that should guide the court's exercise of its discretion under s. 131 of the *Courts of Justice Act* to award costs, I find that the all-inclusive amount of \$640,589.62 represents a fair, reasonable, and proportionate award of costs for the successful defendant in the circumstances of this case.
- [66] Accordingly, I fix the University's costs of the proceeding, on a substantial indemnity basis, in the all-inclusive amount of \$640,589.62, being the total of \$393,540 claimed for fees, \$51,160.20 for HST on those fees, \$173,353.47 for disbursements, and \$22,535.95 for HST on the taxable disbursements.

Award against Mr. Hurst Personally

- [67] The University seeks an order that Mr. Hurst be made personally responsible, on a joint and several basis with Sunsource, for payment of the entire cost award.
- [68] On behalf of Mr. Hurst, Sunsource's Responding Submissions take exception to the University's request. They raise a preliminary objection and argue that Mr. Hurst was never notified or advised at any stage of the proceeding that the University intended to seek costs against him personally. They submit that it would be procedurally unfair to Mr. Hurst to award costs against him personally.⁷⁵
- [69] I disagree. I am satisfied there has been no procedural unfairness. There is no merit to the objection that insufficient notice has been given. The very same objection was made by the non-party who was ordered to pay costs personally – which objection was dismissed by the Divisional Court – in *Marcos Building Design v. Lad*.⁷⁶
- [70] On this preliminary point, I agree completely with the reply of the University, which I accept and adopt as my own reasons, as follows:

Until such time as the decision was released and the findings of this Honourable Court were made, the University had no basis to give notice to Mr. Hurst of an intention to seek costs against him personally. Mr. Hurst was

⁷⁴ *Frazer v. Haukioja*, 2010 ONCA 249, 101 O.R. (3d) 528, at para. 73; *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508, 264 D.L.R. (4th) 557 (Div. Ct.), at paras. 24-27; *Hague v. Liberty Mutual Insurance Co.*, [2005] O.J. No. 1660, 13 C.P.C. (6th) 37 (S.C.J. per Nordheimer J. (as he then was)), at para. 16.; *Morgan v. Morgan*, 2017 ONSC 838, at para. 17; and *Pichelli*, at para. 34.

⁷⁵ Sunsource's Responding Submissions, at para. 11.

⁷⁶ *Marcos Building Design v. Lad*, 2021 ONSC 4900, 75 C.P.C. (8th) 383 (Div. Ct.) [*Marcos Building*], at paras. 11-12.

given ample notice of the intention of the University upon service of the Submissions on Costs of the University within 20 days of the date of the decision. In the circumstances of this case, this was ample notice to Mr. Hurst, further supported by the fact that the majority of the Submissions of Costs of Sunsource relate to the issue of awarding of costs against a non-party.⁷⁷

- [71] On behalf of Mr. Hurst, Sunsource submits, relying on the Divisional Court’s decision in *Middlesex Condominium Corp. No. 232 v. Bodkin*,⁷⁸ that a court may order costs against a non-party only if the three-part “man of straw” test is satisfied, i.e., that the non-party has status to bring the action, that the named plaintiff is not the true plaintiff, and that the named plaintiff is a “man of straw” put forward to protect the true plaintiff from liability for costs.⁷⁹
- [72] I agree with the submissions of Sunsource that the “man of straw” test is not met in the instant case and that, for the reasons set out in Sunsource’s Responding Submissions, each prong of the three-part test fails when applied to the circumstances here.⁸⁰
- [73] However, I also agree with the reply submissions of the University that the “man of straw” test has no application here. The University has not alleged or argued that Sunsource is a “man of straw.” That is not the basis of its claim that costs ought to be awarded against Mr. Hurst personally.⁸¹
- [74] It is not the case, as Sunsource asserts, that a court may order costs against a non-party *only* if the “man of straw” test is satisfied. That is certainly one basis for liability, but it is not the only one.
- [75] The Ontario Court of Appeal has confirmed that the court has inherent jurisdiction to award costs against a non-party in appropriate circumstances. As the Court of Appeal said in *OZ Merchandising*, the court “has inherent jurisdiction to award costs against a non-party. That discretion is exercised sparingly in cases involving ‘gross misconduct, vexatious conduct, or conduct that undermines the fair administration of justice,’”⁸²

⁷⁷ University’s Reply Submissions, at para. 4. I note that Sunsource’s Responding Submissions total 16 paragraphs in length. Of those 16 paragraphs, the first 12 paragraphs are devoted to the issue of whether costs should be awarded against Mr. Hurst personally.

⁷⁸ *Middlesex Condominium Corp. No. 232 v. Bodkin*, sub nom. *Middlesex Condominium Corp. No. 232 v. Middlesex Condominium Corp. No. 232 (Owners and Mortgagees of)*, 2014 ONSC 106 (Div. Ct.) [*Middlesex Condominium*]. I note that the 2014 decision of the Divisional Court in *Middlesex Condominium* was decided before the 2017 decision of the Court of Appeal in *1318847 Ontario*, infra at fn. 82, as well as the 2021 decision of the Court of Appeal in *OZ Merchandising*.

⁷⁹ Sunsource’s Responding Submissions, at para. 4, citing *Middlesex Condominium*, at para. 24.

⁸⁰ See Sunsource’s Responding Submissions, at para. 6.

⁸¹ University’s Reply Submissions, at para. 2.

⁸² *OZ Merchandising*, at para. 89, quoting *1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, 134 O.R. (3d) 411 D.L.R. (4th) 340 [*1318847 Ontario*], at paras. 66 and 76 per Strathy C.J.O. See also *Marcos Building*, at para. 10.

[76] The trial court in *OZ Merchandising* described the court's authority in the following terms:

Superior courts have the inherent jurisdiction to order non-party costs in situations where the non-party has initiated or conducted litigation in a manner that amounts to an abuse of process: "[s]ituations of gross misconduct, vexatious conduct, or conduct that undermines the fair administration of justice . . . can be envisioned" (*1318847 Ontario Ltd. v. Laval Tool & Mould Ltd.*, 2017 ONCA 184, 134 O.R. (3d) 641 (Ont. C.A.), at paras. 66, 76). Strathy C.J.O. described the policy rationale for such an award as follows:

[S]afeguarding public confidence in the fair administration of justice depends on preserving the availability of court facilities for justifiable proceedings and not permitting the costs of proceedings to be needlessly inflated, particularly at a time when delays and costs of litigation are so concerning from the perspective of access to justice (*1318847 Ontario Ltd.*, at para. 87).⁸³

[77] Above all else, what is pre-eminently clear from the authorities is that, while the court does have the inherent jurisdiction to award costs against a non-party in the appropriate circumstances, that discretion is to be exercised sparingly and with caution.⁸⁴

[78] Against this legal background, I would note the factual circumstances of the instant case. Sunsource is not a publicly traded company. Sunsource does not have a large board of directors with numerous individuals who make decisions by consensus.⁸⁵ Rather, it is a closely held company. I am advised that Mr. Hurst is the sole officer and director of Sunsource.⁸⁶ I am advised that the only directing mind of Sunsource is Mr. Hurst.⁸⁷ In this regard, I note the following submissions of the University:

The Plaintiff and Marlon Hurst throughout this proceeding continued to advance allegations of conspiracy, fraud, misappropriation of funds and attempts to usurp the technology of a research partner against the University and its employees and professors, particularly, Dr. Kar. *The allegations continued throughout the closing arguments and were endorsed and pursued by Marlon Hurst personally.* These were serious and reprehensible allegations, none of which were found to be supported by the evidence. *Although the Plaintiff is a corporation, its only directing mind is Marlon Hurst. The allegations of fraud, misappropriation of funds, conspiracy and the attempts to usurp the technology were made by Marlon Hurst, personally, and as the directing mind of the Plaintiff corporation.* As such, Mr. Hurst should be responsible for the reprehensible allegations attempting to tarnish the reputations of the

⁸³ *OZ Merchandising Inc. v. Canadian Professional Soccer League*, 2020 ONSC 119 (S.C.J.), at para. 53, affirmed 2017 ONCA 184.

⁸⁴ See, for example, *1318847 Ontario*, at para. 68; *OZ Merchandising*, at para. 89; and *Marcos Building*, at para. 10.

⁸⁵ University's Reply Submissions, at para. 3.

⁸⁶ *Ibid.*

⁸⁷ University's Main Submissions, at para. 13; and University's Reply Submissions, at para. 3.

University, Heather Pratt and Dr. Kar by way of an Order for costs against him personally.⁸⁸ [Emphasis added.]

- [79] I also note that in Sunsource’s Responding Submissions, Sunsource took no issue with and voiced no opposition to the factual submissions of the University as emphasized in the quoted passage above.
- [80] I also note that, tellingly, throughout his *Trial Decision*, there were a number of instances where Verbeem J. referred to Sunsource and Mr. Hurst as being essentially interchangeable. In this regard, I note, for example, the following passages from the reasons for judgment of the trial judge, where he made the following statements [emphasis added throughout]:
- a. “The totality of the evidence establishes that in the last few weeks of the 11-month FedDev project period, and specifically *at the behest of Sunsource (Mr. Hurst)*, Dr. Kar and Mr. Schmidt began to work on a draft budget and ...”⁸⁹
 - b. “*Sunsource/Mr. Hurst never expressed a concern or objection* to any member of the University that the stated values of its in-kind contributions were inflated.”⁹⁰
 - c. “Dr. Kar and the students in his lab were never prohibited by the University from *communicating with Mr. Hurst/Sunsource* at any time.”⁹¹
 - d. “Dr. Kar engaged in good faith efforts to produce a novelty report in a form and with content that was *acceptable to Mr. Hurst/Sunsource*.”⁹²
 - e. “Third, *Sunsource’s position, as disclosed by Mr. Hurst’s evidence*, presumes that ...”⁹³
 - f. “Pursuant to the research agreement, *the plaintiff through Mr. Hurst, was obligated to expend 400 hours* interacting with the University’s research and development team ...”⁹⁴
 - g. “I also *reject Sunsource’s position (and Mr. Hurst’s evidence)* that the software-based prototype delivered by the University did not function ...”⁹⁵

⁸⁸ University’s Main Submissions, at para. 13.

⁸⁹ *Trial Decision*, at para. 488.

⁹⁰ *Ibid.*, at para. 512, p. 110.

⁹¹ *Ibid.*, at para. 512, p. 112.

⁹² *Ibid.*, at para. 512, p. 113.

⁹³ *Ibid.*, at para. 687.

⁹⁴ *Ibid.*, at para. 696.

⁹⁵ *Ibid.*, at para. 748.

- h. “Mr. Dorweiler’s understanding of the relevant contextual background and related interactions between Sunsource (Mr. Hurst) ...”⁹⁶

- [81] These references of the trial judge provide insight into the close identity of Sunsource with Mr. Hurst. Requests of the personnel of Sunsource’s contracting party were made “at the bequest of Sunsource (Mr. Hurst).” The “concerns or objections” of Sunsource were “expressed” by Mr. Hurst. University staff and students “communicated” with Sunsource by communicating with Mr. Hurst. Efforts to meet the contractual demands of Sunsource, the contracting party with the University, had to be “acceptable” to Mr. Hurst. The “position” of Sunsource as a party to the contract and the litigation was disclosed through the evidence of Mr. Hurst. The contractual obligations of Sunsource to “expend 400 hours” was to be performed by Mr. Hurst personally expending those hours. The trial judge’s rejection of a position taken by Sunsource as plaintiff was a function of the trial judge’s rejection of the evidence of Mr. Hurst. The expert retained by Sunsource to give opinion evidence as to business valuation and quantification of damages, i.e., Mr. Dorweiler,⁹⁷ had “interactions” with Sunsource by having interactions with Mr. Hurst.
- [82] Consistent with the observations and reasons for judgment of the trial judge, I note that at the mid-trial settlement conference before me, Mr. Hurst alone spoke for Sunsource (apart from legal counsel). Mr. Hurst alone presented as having sole decision-making responsibility for the positions of Sunsource on any settlement proposals. Mr. Hurst did not have to contact anyone to obtain authority. Mr. Hurst had the authority to reject the University’s settlement overtures. Mr. Hurst was the person – and the *only* person – directing the litigation on behalf of Sunsource.
- [83] The insights of the trial judge, his comprehensive reasons for judgment, the material before me, and my own direct experience with Mr. Hurst at the mid-trial settlement conference all satisfy me that Mr. Hurst personally was in full control of the instant litigation commenced by Sunsource. Mr. Hurst personally controlled Sunsource’s conduct throughout the litigation. Mr. Hurst bears responsibility for Sunsource’s litigation, including its settlement positions, litigation choices, and conduct at trial.
- [84] I would add three more examples that demonstrate Mr. Hurst’s personal and integral control of the litigation conduct of Sunsource at trial.
- [85] The first example involves the so-called “oral agreement” that Mr. Hurst pursued at length in his evidence at trial. As referenced above, one of the allegations advanced by Sunsource was that the University failed to deliver a “hardware-based prototype of the switch technology.”⁹⁸ Mr. Hurst testified at trial that at the parties’ “close-out” meeting of April 5, 2013, he was told that the University did not do so because Sunsource did not provide the solar panel array required under the terms of the FedDev research agreement.⁹⁹

⁹⁶ *Ibid.*, at para. 1012.

⁹⁷ *Ibid.*, at para. 1009.

⁹⁸ See *ibid.*, at para. 16(j).

⁹⁹ *Ibid.*, at para. 199.

Dr. Kar testified that the University could not deliver a hardware-based prototype to Sunsource because Sunsource did not provide the necessary components to build one.¹⁰⁰ In his evidence, Mr. Hurst reaffirmed that he believed that the parties had previously orally agreed to defer the solar array upgrade until after the FedDev was completed.¹⁰¹ Dr. Kar testified that there never was an oral agreement to defer Sunsource's obligation to provide the solar array upgrade, which was necessary to develop a more reliable hardware-based prototype.¹⁰²

- [86] As such, the existence of the so-called “oral agreement,” as posited by Mr. Hurst was a critical piece at trial for Sunsource's position as to the parties' respective obligations of performance of the research agreement.
- [87] Understandably, the trial judge spent some considerable time considering the existence of the alleged oral agreement to defer Sunsource's performance of its contractual obligations under the research agreement. Ultimately, the trial judge rejected the suggestion that the parties ever entered into such an oral agreement.¹⁰³
- [88] Moreover, it was on account of Mr. Hurst's assertion of the existence of this alleged “oral agreement” deferring Sunsource's performance of its contractual obligations under the research agreement that caused the trial judge to make serious findings of credibility *against* Mr. Hurst personally. In this regard, I note, in particular, the following passages from the trial judge's *Trial Decision*:

One of the most troubling aspects of Mr. Hurst's evidence concerns his testimonial assertion that sometime during summer 2012, the parties entered into an “oral agreement” that amended the research agreement. Specifically, he asserts that the parties agreed to defer Sunsource's obligation to provide and install solar panels and racking that were identified as part of Sunsource's in-kind contributions in the terms of the research agreement and required to be supplied during the research agreement period. He asserts the parties agreed that the solar upgrade would be supplied sometime after the end of the research agreement/FedDev project. Mr. Hurst relies on the alleged oral agreement to answer the University's claim that Sunsource breached the research agreement by failing to provide its in-kind contributions, before the end of the research agreement's term. After considering this aspect of Mr. Hurst's evidence in the context of the totality of the evidence, I do not accept that the parties made the alleged oral agreement.

Mr. Hurst's testimony with respect to the making of the alleged oral agreement is not corroborated or confirmed by any other cogent evidence. Instead, the balance of the evidence overwhelmingly contradicts Mr. Hurst's evidence on the point. I not only reject this aspect of Mr. Hurst's evidence as untrue, but

¹⁰⁰ *Ibid.*, at para. 196.

¹⁰¹ *Ibid.*, at para. 199.

¹⁰² *Ibid.*, at para. 200.

¹⁰³ See, for example, *ibid.*, at paras. 318, 319, and 365.

*based on his persistent and adamant testimonial instance that the oral agreement was made, I conclude that this aspect of Mr. Hurst's evidence was a deliberate attempt to create an innocuous explanation for Sunsource's failure to fulfill its contractual obligation to provide its requisite in-kind contributions during the term of the research agreement. ...*¹⁰⁴

- [89] As I have referenced, the trial judge made fairly damning (and repeated) findings of credibility against Mr. Hurst. The trial judge held as follows:

When Mr. Hurst's evidence is considered in the context of the evidence as a whole, it leaves me with significant concerns over his credibility, as well as the reliability of aspects of his evidence. As a result, I am generally not persuaded by Mr. Hurst's evidence. When his evidence conflicts with the evidence of other witnesses, unless I expressly state otherwise, I prefer the evidence of other witnesses over the evidence of Mr. Hurst. I will explain.

*I had the opportunity to listen to and observe Mr. Hurst testify over the course of several days. Although he is exceptionably personable and passionate, when considered in the context of the evidence as a whole, I find that aspects of his evidence amount to incredible after the fact re-characterizations of narrative events, that are designed to place Sunsource (and himself) in the best possible position and the University, in general, and Dr. Kar, Ms. Pratt and Mr. Schmidt, in particular, in the worst possible position.*¹⁰⁵ [Emphasis added.]

. . . .

This area of his [Mr. Hurst's] testimony relates to a material matter in this proceeding, namely, whether Sunsource breached the research agreement and to what extent. It is a matter about which *an honest witness* is unlikely to be mistaken. *Given the nature and extent of the untrue assertions that underwrote this aspect of Mr. Hurst's evidence, I am left to conclude that it was an attempt to manufacture a justification for Sunsource's failure to perform its contractual obligations prescribed by the FedDev research agreement. As a result, I do not find Mr. Hurst to be a credible witness and I generally reject his evidence when it conflicts with the evidence of other witnesses, including Dr. Kar, Mr. Schmidt, Ms. Pratt, and Ms. Kaps, except in instances where I expressly accept his evidence over that of another witness.*¹⁰⁶ [Emphasis added.]

- [90] The second example that demonstrates Mr. Hurst's personal control over the litigation conducted by Sunsource at trial involves the personal allegations that Mr. Hurst made against Mr. Schmidt over allegedly race-based comments that, Mr. Hurst says, were made

¹⁰⁴ *Ibid.*, at paras. 318-319.

¹⁰⁵ *Ibid.*, at paras. 307-308. The restrained language of the trial judge on the latter emphasized passage will not be lost on anyone.

¹⁰⁶ *Ibid.*, at para. 370. See also paras. 371-372.

by Mr. Schmidt during a telephone conversation that occurred on April 16, 2013. The trial judge dealt with the issue as follows:

Finally, I reject Mr. Hurst's evidence that Mr. Schmidt advised him during an April 16, 2013 telephone conversation that any future development agreement would be between VPI and the University, and that Sunsource's role would be greatly diminished in any further development efforts, or that the University would be the only party to any future patents. I reach that conclusion for the following reasons.

First, as I have previously explained, I have determined that Mr. Hurst is not a credible witness. There is no confirmatory evidence to support his assertions concerning Mr. Schmidt's alleged statements. Although he sent an email to Ms. Pratt alluding to a disturbing conversation with Mr. Schmidt, he does not disclose specifics in the email.

Mr. Schmidt attributes Mr. Hurst's email to a call in which he and Mr. Hurst engaged in an argument after Mr. Hurst asked him for a letter stating the University did not own any switch-related IP, and he refused, which was part of Mr. Hurst's ongoing telephone calls, badgering him for such a letter. Mr. Schmidt refused to accede to Sunsource's request that it relinquish its joint rights to IP developed under the FedDev. They argued. I accept that evidence, and find the content of that conversation is consistent with Mr. Hurst's reference to a disturbing call.

I do not accept that Mr. Schmidt made racial comments. He has explained that he did not do so, at any time, and I accept his evidence. I also accept Mr. Schmidt did not make the comments that Mr. Hurst attributes to him about Sunsource's role in future projects, and IP and patent ownership. I do not find that he ever made those types of assertions including before the March 25, 2013 budget was released.

Second, there is no credible evidence that during their subsequent call, Mr. Hurst advised Ms. Pratt about Mr. Schmidt's alleged utterances concerning the University's plan to exclude Sunsource from further development and patent activities, *or race-based comments*.¹⁰⁷ [Emphasis added.]

- [91] These passages and their references to the evidence at trial provide further support for my conclusion that it was Mr. Hurst who personally controlled the direction of the plaintiff at trial. The evidence of the alleged race-based comments, the making of which the trial judge rejected (again rejecting the evidence of Mr. Hurst), go to issues that involve Mr. Hurst only. As a corporation, Sunsource has no socially-constructed "race." The so-called "race-based comments" were not directed at Sunsource, the corporate plaintiff, at all; they were directed (allegedly) at Mr. Hurst, personally. And they became an issue at the trial involving Sunsource, the corporate plaintiff, only because Mr. Hurst personally placed

¹⁰⁷ *Ibid.*, at paras. 586-590.

them in issue, because (he believed) they had been directed at him personally. In short, on this point, the trial about Sunsource became a trial about Mr. Hurst.

- [92] The third example that demonstrate Mr. Hurst's personal control of the litigation conduct of Sunsource at trial involves the repeated evidence that Mr. Hurst personally gave about the alleged fraudulent activity of the University during his testimony at trial, all of which was rejected by the trial judge.
- [93] But even though the trial judge rejected the evidence of Mr. Hurst, for present purposes, I would note, by way of example only, the trial judge's treatment of the following evidence of Mr. Hurst:

Although I am satisfied that Mr. Hurst is not a credible witness based on the foregoing, there are also other aspects of Mr. Hurst's evidence that impair his credibility and the reliability of his testimony:

. . . .

- b) His adamant testimony that Dr. Lu and Dr. Iyer were the only students that worked on the project during the FedDev project period conflicts with other documentation that Mr. Hurst or Sunsource created. Specifically, following the January 2013 GE meeting, Mr. Hurst wrote to Dr. Kar, and among other things, specifically stated, "Thank you Dr. Kar for your brilliant dedication to your students, Xiaomin [Dr. Lu] and Iyer and other students who have worked on my project to date. [Underlined emphasis in the original.]

In my view, Mr. Hurst's correspondence evidences that he was aware that students other than Dr. Lu and Dr. Iyer contributed to the switch project and that the project benefited from their contributions. *I find his evidence that only Dr. Lu and Dr. Iyer worked on the FedDev project to be both inaccurate and knowingly untrue.*

In arriving at that conclusion, I am mindful of Mr. Hurst's evidence that his reference to "other students" was simply an error in his email. However, in the context of the correspondence as a whole, it is difficult to accept that the reference to other students who worked on the project, apart from Dr. Lu and Dr. Iyer, was an accidental slip. Contextually, that reference appears to be a deliberate acknowledgement that other students did, in fact, work on the project, which is entirely consistent with the balance of the evidence from informed witnesses, other than Mr. Hurst, that was adduced on that issue at trial.

Mr. Hurst was also adamant that Matthew Hurajt, one of Dr. Kar's other graduate students at the time of the FedDev project, never worked on it. In cross-examination, Mr. Hurst acknowledged that in its "Confidential Business Plan" and other documentation that it

produced, Sunsource expressly identified Dr. Hurajt as “one of the top students at the University of Windsor” and further represented that Dr. Hurajt contributed to Sunsource’s switch project.

In my view, the contradiction between documentation prepared by the plaintiff that identifies Dr. Hurajt as a contributor to the project and Mr. Hurst’s subsequent evidence to the contrary, undermines the truthfulness of the evidence. I have considered Mr. Hurst’s explanation that Dr. Hurajt was erroneously included in the business plan based on information provided by the University and I am not persuaded by it. His evidence establishes that the University contemporaneously advised Sunsource that Dr. Hurajt was contributing to its research efforts and development efforts. The balance of the evidence at trial overwhelmingly supports a finding that Dr. Hurajt contributed value to the project.

Here, Mr. Hurst’s inaccurate and untrue evidence went to a matter of substance. Specifically, the basis for his assertions of fraud made against the University, in relation to its reporting to the FedDev and its allocation of the FedDev grant proceeds, which is linked to its claim that the University breached its duty of honest performance of the contract.

- c) *In the absence of direct knowledge on the point, Mr. Hurst unequivocally testifies that Dr. Kar misallocated a portion of the FedDev grant proceeds and falsified records of the students that worked on the switch project, in order to fund his students’ attendance at an unrelated academic conference in France. His evidence in that regard may have been the product of speculation, but he did not qualify it as such when he gave it. Rather, he asserted, without reservation or knowledge of any confirmatory evidence, that Dr. Kar engaged in serious fiscal malfeasance. The totality of the evidence does not persuasively support his testimonial assertions, rather it negates them. No FedDev proceeds were allocated to fund travel to France. This aspect of Mr. Hurst’s evidence demonstrates a testimonial reckless disregard for the truth, and a willingness to assert speculation as fact. It undermines Mr. Hurst’s credibility and the reliability of his evidence.¹⁰⁸ [Italicized emphasis added.]*

[94] The trial judge also noted that the allegations of fraud that the plaintiff Sunsource pursued even up to closing argument at trial were a function of the evidence and direction of Mr. Hurst, as follows:

During closing submissions, counsel for Sunsource posited that Mr. Hurst’s factual narrative was consistently supported by contemporaneous documentation, which, in turn, bolstered his credibility. Yet several important

¹⁰⁸ *Ibid.*, at para. 371.

aspects of this evidence find no contemporaneous documentary support, including: his asserted concern that the University encouraged and directed him to submit allegedly fraudulently inflated values for Sunsource's proposed in-kind contributions as part of the parties' FedDev grant application; the University supplied him with the specific inflated values to submit; and the existence of an oral agreement between the parties to defer Sunsource's contractual obligation to supply and install an additional 1.5 kW solar array until sometime after the term of the research agreement ended. As I will set out below, the contemporaneous documentation explicitly contradicts the latter aspect of his evidence.

In addition, there are material aspects of Mr. Hurst's evidence on matters of substance that are inconsistent with and contradicted by contemporaneous documentation that he (or Sunsource) created.

For example, Mr. Hurst adamantly testifies that none of Dr. Kar's students, other than Dr. Lu and Dr. Iyer worked on the Sunsource project during the term of the research agreement. In turn, his evidence in that regard founds his assertion that the University engaged in fraud and it created falsified documents relating to both the distribution of FedDev grant proceeds (to students other than Dr. Lu and Dr. Iyer) and the content of the labour attestation form the University eventually produced to the FedDev.¹⁰⁹ [Emphasis added.]

. . . .

The evidence that the University engaged in fraud, in respect of the foregoing, is slight. Mr. Hurst testifies that apart from Dr. Lu and Dr. Iyer, the individuals who received proceeds from the ARC grant had no involvement in the FedDev project. Although he acknowledges in his evidence that he did not have the opportunity to observe the students who were contributing to the project during the FedDev period because he did not attend the lab frequently, Mr. Hurst continued to insist that only Dr. Lu and Dr. Iyer worked on the project.

The University has demonstrated that in addition to Dr. Lu and Dr. Iyer, other students and professors contributed to the Sunsource project during the FedDev period.¹¹⁰ [Emphasis added.]

- [95] To my mind, it is clear from these and other passages in the *Trial Decision* that Mr. Hurst personally is responsible for advancing, or causing the plaintiff Sunsource to advance, the unmeritorious allegations of fraud and other misconduct on the part of the University and its personnel. I find that Mr. Hurst caused the court's process to be the vehicle through which unfounded allegations of fraudulent and other egregious conduct were advanced against the University and some of its senior personnel. As such, I find that Mr. Hurst

¹⁰⁹ *Ibid.*, at paras. 309-311.

¹¹⁰ *Ibid.*, at paras. 787-788.

caused an abuse of the court's process. It is the decisions made by Mr. Hurst and his conduct in directing Sunsource that has undermined the fair administration of justice.

- [96] In other words, as the person directing and controlling the litigation decisions on behalf of the plaintiff Sunsource, Mr. Hurst caused unsubstantiated allegations of fraudulent and other egregious misconduct to be advanced against the University and its personnel. Consequently, the award of substantial indemnity costs that I have found to be payable by the plaintiff Sunsource is a direct result of the choices and decisions made by Mr. Hurst, as the sole person and controlling mind directing the litigation on behalf of Sunsource. In short, Sunsource's decisions were Mr. Hurst's decisions.
- [97] In such circumstances, and on the evidence before me, I am satisfied that the instant case is one of those rare and exceptional instances where the court should sparingly exercise its discretion to make an award of costs against a non-party. On the material before me, it is clear to me that the non-party Mr. Hurst should bear some responsibility for payment of the cost award against Sunsource.
- [98] That having been said, I have turned my mind to the appropriate amount that Mr. Hurst should personally bear or share in the payment of the defendant's costs. Indeed, I have reflected on this difficult question at some considerable length. It has troubled me.
- [99] To my mind, just because I have ordered that the corporate plaintiff must pay the institutional defendant the sum of \$640,589.62 for its substantial indemnity costs of the action does not mean that it should automatically follow that Mr. Hurst, personally, should be liable for payment of that same amount.
- [100] The purpose of the exceptional cost award I have made in this case is to bring home to the unsuccessful party the court's expression of condemnation of that party's conduct in the litigation. In other cases, there may well be other objectives.
- [101] In my view, the amount of the cost award necessary to bring that message home to a corporate party is not necessarily the same amount that is required to bring home the court's condemnation to a personal litigant or non-party.
- [102] Moreover, I am guided by the Court of Appeal's direction that a cost award against a non-party should be made only in sparingly and rare exceptional cases. That direction clearly signals restraint in making such cost awards.
- [103] As such, I think it appropriate to consider what (minimal) amount is necessary to achieve the court's objectives in making the award, and then to fashion an award that achieves the court's objectives but goes no further.
- [104] To be clear, I have no information as to the assets or financial position of either Sunsource or Mr. Hurst personally.
- [105] But that said, I have considered what amount should be imposed on the non-party, Mr. Hurst, personally, in order to bring it home to him that, *inter alia*, the court process

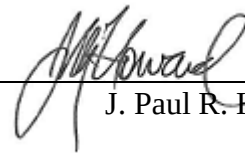
must not be abused, and the court's limited resources must not be expended and wasted through the unnecessary trials of unmeritorious allegations of serious misconduct against public officials. The courtroom is not Mr. Hurst's speculative playground.

- [106] On balance, considering all of the relevant principles, including the primary direction of restraint in such awards, as well as all the material before me, I am satisfied that an award of \$150,000 against Mr. Hurst personally will accomplish the court's objective without any unnecessary overreach.

Conclusion

- [107] Therefore, there shall be an order that Sunsource shall pay the University its substantial indemnity costs of the proceeding in the total amount of \$640,589.62 within 30 days.
- [108] Further, there shall be an order that Mr. Marlon Hurst is jointly and severally liable with Sunsource for payment of \$150,000 of the said total \$640,589.62 award to the University.

(Electronically signed and released)



J. Paul R. Howard
Justice

Date: October 5, 2023

CITATION: Goruk v. Greater Barrie Chamber of Commerce, 2021 ONSC 4046
COURT FILE NO.: 14-757-SR
DATE: 20210602

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sybil Goruk, Plaintiff

AND:

Greater Barrie Chamber of Commerce, Defendant

BEFORE: Justice C. Boswell

COUNSEL: Ronald S. Minken, Kyle D. Burgis and Tejpreet Sambhi, for the Plaintiff

Eric Gionet and Jonathan De Biasi, for the Defendant

HEARD: June 2, 2021

RULING ON BROWNE v. DUNN OBJECTION

[1] Fair trials are the hallmark of the Canadian justice system. While no litigant is entitled to a trial that is perfectly fair, every litigant is entitled to a trial that is fundamentally fair. See *R. v. O'Connor*, [1995] 4 S.C.R. 411, para. 193.

[2] Many principles and rules exist to promote trial fairness. One of them has come into central focus here. It is known as the “rule in Browne and Dunn”¹. Stated generally, it is a requirement that any counsel intending to impeach a witness on a particular aspect of a case, must give the witness the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.

[3] This is a wrongful dismissal action. The defendant’s position is that it had just cause to terminate the plaintiff from her position as the defendant’s executive director. The allegations supporting the assertion of cause largely relate to purported financial irregularities. They are particularized in two paragraphs of the statement of defence.

[4] The plaintiff’s case is in. The plaintiff herself was examined and cross-examined over two full days at the commencement of the case. The defence case has only just begun. The first defence witness is the defendant’s former auditor. As he began to testify about a number of purported financial irregularities, the plaintiff’s counsel objected. He submitted that the defendant should be prohibited from adducing evidence of financial irregularities, in contradiction to the

¹ (1893), 6 R. 67 (H.L.), 1893 CanLII 65 (FOREP)

plaintiff's evidence, on the basis that almost none of the irregularities described in the statement of defence were put to the plaintiff on cross-examination. In other words, he alleged a breach of defence counsel's obligations under Browne and Dunn.

[5] Given the sweeping position of the plaintiff, it was apparent that the Browne and Dunn issue was going to impact on a great deal of the evidence intended to be adduced by the defendant. The taking of evidence was accordingly paused. Counsel were given the opportunity to make detailed submissions on the issue.

[6] The court is asked to determine whether (1) the defendant has breached its obligations under Browne and Dunn and (2) if so, what remedy is appropriate.

THE BASIC RULE

[7] The so-called "rule" in Browne and Dunn is hardly a rule at all. The Supreme Court of Canada has observed that the requirements of the rule are not "fixed", which is to say that they're a little vague. See *R. v. Lyttle*, [2004] 1 S.C.R. 193, 2004 SCC 5, at paras. 64-65.

[8] Fundamentally, the rule is one of fairness. As Watt J.A. observed in *R. v. Quansah*, 2015 ONCA 237, at para. 70, the rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter*, [2013 ONCA 744](#), 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70

ii. Fairness to the party whose witness is impeached:

The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

[9] In addition to considerations of fairness, the rule also tends to enhance the efficiency of the trial process. For instance, should a witness on cross-examination admit the truth of contradictory evidence proposed by the opposing party, then there will be no need to elicit further testimony on the issue. Moreover, addressing the issue in cross-examination avoids the potential need to recall the witness later to afford her an opportunity to respond to the contradictory evidence.

[10] Although widely regarded as part of the law of evidence, the rule in *Browne and Dunn* is not a rule of admissibility. See *R. v. Vassel*, 2018 ONCA 721, at para. 120. If anything, it is a concern about the proper functioning of the adversarial process.

[11] The rule requires a cross-examiner to confront the witness with matters of substance on which the cross-examiner intends to call contradictory evidence. It is not necessary that the witness be confronted with inconsequential details nor where the confrontation would be pointless. In other words, where the witness's answers are a foregone conclusion.

[12] Fairness demands different things in different circumstances. The application of the rule is, in the result, entirely in the discretion of the trial judge. The Supreme Court has directed that the rule not be applied rigidly. See *Lyttle*, as above. In this vein, a trial judge has a wide discretion to determine an appropriate remedy in the event of a breach of the rule.

[13] The “nuclear” remedy – the one favoured by the plaintiff in this case – is for the court to draw an inference, where counsel has failed to cross-examine on a significant point, that the truth of the point is accepted and to prohibit any contradictory evidence to be called about it. But that option is not generally favoured by appellate courts. See for instance, *R. v. McNeill* (2000), 38 O.R. (3d) 212 (C.A.) where Moldaver J.A., as he then was, said the following, at paras. 47-48:

In cases such as this, where the concern lies in a witness's inability to present his or her side of the story, it seems to me that the first option worth exploring is whether the witness is available for recall. If so, then assuming the trial judge is otherwise satisfied, after weighing the pros and cons, that recall is appropriate, the aggrieved party can either take up the opportunity or decline it...

The mechanics of when the witness should be recalled and by whom should be left to the discretion of the trial judge.

[14] In *R. v. Quansah*, as above at para. 117, Justice Watt enumerated a number of factors that a trial judge may wish to consider in fashioning a remedy for an established breach of the rule in *Browne and Dunn*. They include,

- (a) the seriousness of the breach;
- (b) the context of the breach;
- (c) the timing of the objection;
- (d) the position of the offending party;
- (e) any request to permit recall of a witness; and,
- (f) the availability of the impugned witness for recall.

THE ACTION

[15] The plaintiff was fired by the defendant in early 2014. At the time of termination she had worked for the defendant for 17 years. Through the vast majority of that time she was the defendant's executive director.

[16] The plaintiff asserts that the termination was wrongful. She seeks 24 months' wages plus aggravated and punitive damages. The defendant asserts that it had just cause to terminate the plaintiff and denies that she is entitled to any damages.

[17] Broadly, the defendant contends that the plaintiff stood in the position of a fiduciary and that she breached the duty she owed to the defendant in a number of respects, most of which are characterized as financial irregularities.

[18] The particulars of the just cause assertion are contained principally in two paragraphs of the statement of defence, namely paragraphs 22 and 29. I will repeat them here because they are central to the Browne and Dunn issue.

22. On or about March 27, 2014 the Treasurer presented a Memorandum to the Board outlining the results of her Review. The Treasurer's review had uncovered a number of questionable transactions pertaining to the Plaintiff which included the possible improper use of business credit cards, improper expensing of personal items, improper accounting and payment of vacation pay, withholding of audit information from the Board, failure to disclose or concealing of related party transactions from the auditor and the Board, making of certain donations without approval or authority, falsifying internal banking records, failure to obtain dual signatures and approval on all operating disbursements and generally very poor controls were being observed.

...

29. By letter dated April 28, 2014 the Plaintiff was informed of the Defendant's decision to terminate her employment ("the Termination Letter"). The Termination Letter informed the Plaintiff as to the reason for her dismissal as follows:

. . . the Greater Barrie Chamber of Commerce ("the Chamber") have identified the following areas of conduct that have led us to the decision that the immediate termination of your employment for just cause is warranted:

- 1) Financial matters, including non-disclosure:
 - a. unauthorized paid vacation
 - b. undisclosed contracts with family members – non-disclosure to Auditor

- c. numerous expenses submitted with no support
 - d. abuse of "discretionary funds" - no supporting documents
 - e. mismanagement of budget
 - f. numerous restaurant charges - failure or refusal to provide support
 - g. purchase of alcohol contrary to Chamber Constitution
 - h. Monthly payment of personal American Express card with no supporting documentation, annual fee charged to the Chamber
 - i. unauthorized salary increase
 - j. withholding or concealment of information (ie: Audit reports)
 - k. Changing of bank documents
 - (i) altered bank transfer document after it was executed by signatories on behalf of the Chamber;
 - (ii) placing Ms. Goruk as single signature on bank transfer (at time of change of volunteer board) contrary to Chamber Constitution
- 2) Purposely refusing access to the bookkeeper, including refusal to provide details around financial transactions.
 - 3) Continuing to refuse access or provide answers after discussions with the Auditor and confirmation from Auditor.
 - 4) Past Treasurer resignation - previous Treasurer confirms frustrations with above dealings with Ms. Goruk.
 - 5) Current Treasurer continually asking Ms. Goruk for financial information with little or no disclosure provided.

[19] The plaintiff delivered a reply to the statement of defence. She broadly denied breaching any fiduciary duty owed to the defendant. She specifically denied having engaged in any of the conduct alleged at para. 29 of the statement of defence.

[20] Examinations for discovery were held on December 13 and 14, 2017.

THE POSITIONS OF THE PARTIES

[21] It is unusual to be adjudicating a broad Browne and Dunn dispute before the defendant has either tendered the impugned contradicting evidence or otherwise suggested that the plaintiff ought not to be believed based on factors not put to her in cross-examination.

[22] As I noted, however, it became readily apparent a short time after the commencement of the defence case that the plaintiff intended to object, on Browne and Dunn grounds, to a broad range of evidence expected to be tendered by the defendant.

[23] At the outset of argument, I confirmed with defence counsel that they intend to adduce evidence, from a half a dozen witnesses, to support the allegations detailed at paras. 22 and 29 of the statement of defence.

[24] The plaintiff's counsel confirmed that they object to much of that evidence being adduced. Mr. Burgis identified the following issues he says the plaintiff was not confronted with during her cross-examination:

- (a) From para. 22: the allegations of improper use of business credit cards; improper expensing of personal items; improper accounting and payment of vacation pay; the failure to disclose or concealing of related party transactions from the auditor and the Board; making charitable donations without approval or authority; falsifying internal banking records; failure to obtain dual signatures and approval on all operating disbursements; and generally that very poor controls were being observed
- (b) From para. 29, the allegations set out at subparagraphs 1 (b), (c), (d), (e), (f), (g), (h), (i) and k(ii), 2, 3 and 4.

[25] In effect, the plaintiff submits that the defendant's counsel have failed to meet their Browne and Dunn obligations in relation to almost every aspect of the assertion of just cause. From the plaintiff's perspective, those obligations have only been observed with respect to the following allegations: that the plaintiff frustrated the treasurer's attempts to obtain financial records; that she concealed audit reports from the Board; that she took unauthorized paid vacation; and that she altered a bank transfer document after it had been executed by a Board member.

[26] The plaintiff urges the court to infer that defence counsel did not confront the plaintiff with its evidence in relation to the other allegations supporting its assertion of just cause because it accepts the plaintiff's position on those issues. Moreover, the court is urged to prohibit the defendant from tendering contradictory evidence on those issues where there was a Browne and Dunn breach.

[27] The plaintiff's counsel do not accept the appropriateness or fairness of recalling the plaintiff to be further cross-examined on issues where there has been an established Browne and Dunn breach. They say she is a fragile 82 year old woman, whose health problems have been exacerbated by testifying the first time. The defendant had a full opportunity to properly cross-examine her and failed to do so. She should not bear the consequences of that failure. Moreover, recalling her would not be efficient and would prejudice the plaintiff because she has already

closed her case, having made decisions about what confirmatory evidence to call based, in part at least, on the cross-examination conducted by the defendant's counsel.

[28] Counsel to the defendant contend that there has been no breach of the rule in *Browne and Dunn*. They say that all of the issues relating to the assertion of just cause are notorious. The plaintiff has been well aware of those issues since she received her letter of termination. They were subsequently canvassed in the pleadings and in examinations for discovery. The plaintiff is in no way caught by surprise by any of the evidence now sought to be tendered by the defendant. She has had ample opportunity to testify as to her version of events.

[29] Defence counsel point out that many of the contentious issues were covered with Mrs. Goruk in direct examination, or in a general way during cross-examination. They say it is not necessary for them to put every single piece of evidence to her that they intend to rely upon. The plaintiff's position, they say, would require them to do so.

[30] In the event the court determines that the rule in *Browne and Dunn* has been breached, they posit that a fair and simple solution is to permit the plaintiff to provide her position in respect of any impugned issues by way of reply evidence.

DISCUSSION

General Observations

[31] I will make several observations of a general nature before I get into the specific alleged breaches of the rule in *Browne and Dunn*.

[32] In my view, the plaintiff's position is entirely untenable. Her counsel, in effect, seek to convert a rule of fair play into a rule of admissibility. And then they seek a ruling that the core of the defence case be ruled inadmissible. There is nothing fair, nor even reasonable, about such an approach.

[33] Even if the plaintiff is correct about all of the *Browne and Dunn* breaches alleged, fairness to her can still be achieved. But fairness to the process – to the fact-finding function of the process in particular – will not be achieved if I were to impose the remedy sought by the plaintiff.

[34] The aspiration of every trial is to arrive at the truth of a matter and thereby do justice between the parties. Our system of justice has settled on the adversarial model as the one best-suited to get at the truth. It is based on the premise that the truth is most likely to reveal itself when each of the parties is given an opportunity to zealously prepare and present its case in its own self-interest and to challenge the opponent's case with equal zeal.

[35] The plaintiff would essentially have the court hear from only one side in this case, based on the application of a somewhat vague and singularly elastic rule, the overarching purpose of which is to ensure trial fairness. Apart from the inherent irony in that position, it tends to undermine the core, truth-seeking function of the trial. When only one side is effectively heard from, the usual checks and balances of the adversarial system break down. The prospect of the court getting it wrong and settling on a result that is neither just nor fair increases significantly.

[36] This is a civil trial. The bulk of the jurisprudence on Browne and Dunn has arisen in the context of criminal trials. That does not mean that the rule does not apply in the same way in both civil and criminal cases. I can think of no principled reason why it ought not to. But having said that, there are important differences between civil and criminal cases that bear on its application.

[37] In particular, the plaintiff has the benefit of the pleadings, in which the defendant has particularized its allegations against her. She also has the benefit of examinations for discovery during which her counsel were able to extensively probe the position of the defendant on the central issue of just cause. She did not step into the witness box unencumbered by an understanding of the defendant's case against her. She, and her counsel, knew very well what the live issues in the case are and what the defendant's position is on each of those issues. This is the backdrop against which the alleged breaches of the rule in Browne and Dunn must be assessed.

[38] Having made those general observations, I will take a moment to canvass the evidence given in direct and cross-examination by the plaintiff on the central issue of just cause. The plaintiff obviously testified at some length about the history of her employment with the defendant, her job description and the terms of her employment. I do not intend to provide a review of all of her evidence, as much of it is not germane to the resolution of the Browne and Dunn issue. I will focus on the evidence addressing the defendant's assertions of just cause.

Direct Examination

The Discretionary Expense Account

[39] The plaintiff explained that she had a \$4,000 discretionary expense account. She said there were no limits on what it could be used for, save that it had to be related to the activities of the defendant. It was frequently used for taking prospective members out for meals. Often alcoholic beverages would be purchased during the meals. She and several other witnesses she called, testified that no one on the Board ever expressed a concern about how she used the expense account, including the purchasing of alcohol.

[40] In short, she said there were no improper uses of her expense account. Her expenses were reviewed monthly and approved by the Board.

Vacation Pay

[41] The plaintiff testified that the treasurer in 2014, Stella Millis, advised her, during a meeting with the two of them and the defendant's bookkeeper, that she was entitled to vacation pay for those weeks of vacation that she did not use. Ms. Millis, she said, told her that the accumulating vacation pay was a debit in the defendant's books and that she should take it. After the meeting, she said she spoke to the bookkeeper who confirmed that she had correctly understood what Ms. Millis told her and encouraged her to take the vacation pay, which she did.

[42] In short, there were no unauthorized vacations or vacation pay.

The Pay Raise

[43] Mrs. Goruk denied that she had taken an unauthorized pay raise for herself. She said that the Board approved a pay raise for the staff, other than her. The bookkeeper inadvertently applied the raise to all staff, including her. She said she spoke to the bookkeeper and instructed her to correct the error. She was intending on repaying any overpayment.

Undisclosed Related-Party Transactions

[44] The plaintiff testified at length about the fact that both of her sons did work on contract with the defendant; one did catering; another snow-plowing. She explained in detail the process by which each of the sons came to be contracted. She, and several other witnesses she called, said that it was well-known to board members that her sons were doing work for the board. She said she was not aware that she had a personal obligation to advise the defendant's auditor that her sons were doing work for the Board.

[45] In short, there were no undisclosed related-party transactions. More generally, she denied withholding any information from the defendant's auditor.

Unauthorized or Unsupported Expenses

[46] Mrs. Goruk generally denied incurring any unauthorized expenses. Much of her evidence on this issue focussed on travel to annual national Chamber of Commerce conferences. It was in her contract that the defendant would cover her and her spouse's attendance at these conferences. She said she gave all of the supporting documents for these conferences to the bookkeeper.

[47] In short, there were no unauthorized or unsupported expenses.

The Amex Card

[48] Mrs. Goruk explained in detail her use of the Amex credit card. She obtained it for Board use. At the time, it was one of the only cards that would accumulate air miles, which she cashed in from time to time to cover her flights to work-related conferences. She said that Amex would not issue a card in the name of a not-for-profit organization, so it had to be in her name. She naturally expensed the annual fee to the defendant. Now and then she would use it for personal purchases, but would identify those monthly and reimburse the defendant for them.

Sole Signatures

[49] According to the plaintiff, she had sole signing authority on cheques under \$3,000. That was, in her view, never an issue with the Board and was documented policy. Her counsel took some time to go over a series of cancelled cheques on the Board's account and pointed out that she was not the only one to sign cheques on her own.

The Altered Bank Transfer Direction

[50] Mrs. Goruk described in detail how the defendant had conducted some fundraising to support a program whose aim was to attract new family doctors to Barrie. They raised about \$26,000. A decision was made to transfer those funds to a dedicated account, separate from the

defendant's general account. A transfer document was signed by Mrs. Goruk and another Board executive. Later, she said, it was determined that the amount on the transfer was wrong. She said the bookkeeper submitted a revised transfer document to the bank. If it was altered improperly, it was not Mrs. Goruk who did it.

The Allegation of General Mismanagement

[51] Mrs. Goruk denied any mismanagement of the Board's budget. She called several other witnesses, all past presidents, who confirmed this evidence. She testified that the budget was reviewed monthly by the Board and was always in good shape. Indeed, she had improved the defendant's financial circumstances materially in her tenure there.

Frustrating the Treasurer's Access to Financial Records

[52] A considerable amount of testimony was offered about the defendant's new treasurer in 2013, Stella Millis, and the initial difficulties in the relationship between Mrs. Goruk and Ms. Millis. The assertion that Ms. Millis was impeded in her efforts to obtain financial information was addressed in detail. According to Mrs. Goruk, any issues between her and the treasurer were by and large resolved by early 2014 and their relationship was on good terms.

[53] In terms of the resignation of a past treasurer, Mrs. Goruk said she had nothing to do with it.

[54] As should be apparent, Mrs. Goruk testified in detail about each of the defendant's assertions of just cause. She was able to do so because she knew what those assertions are, based on the pleadings and the discovery process.

[55] I will turn now to a brief review of the cross-examination insofar as it related to the just cause issue.

Cross-examination

Expenses

[56] Mrs. Goruk was directed to a copy of the defendant's manual for its directors and executives. She was confronted with the fact that the manual provides her with the authority to incur expenses not exceeding \$1,000 without the Board's approval. She was not otherwise confronted with any particular improper or improperly documented expenses.

Vacation Pay

[57] Mrs. Goruk underwent detailed questioning about her explanation for the vacation pay she took in 2013. She was confronted with a provision in the defendant's policies about vacation weeks not rolling over from year to year. She was also confronted with some financial statements that tend to undermine her version of how and when the discussion about her receiving a cash payment in lieu of holiday time occurred.

Unauthorized Raise

[58] Mrs. Goruk was cross-examined about the 3% raise she received in late 2013. She maintained that it was a bookkeeping error. She was challenged on the assertion that she intended to repay any overpayment and it was pointed out that she had not, in fact, made any reimbursement. She was also confronted about the fact that she did not bring the error to the attention of the Board.

Related-Party Transactions

[59] The plaintiff was confronted with the defendant's employee manual and confirmed it applied to her. She was asked at some length about the requirement to use RFPs (Requests for Proposals) before entering into any contracts for services required by the defendant. She was challenged about not properly using this process when contracting with her sons' companies. She was cross-examined extensively about the contract for snow-plowing services in particular.

The Amex Card

[60] There was minimal cross-examination on the issue of the Amex card. Mrs. Goruk was not confronted with any particular alleged irregularities with respect to her use of the card. She confirmed she used it for personal purchases at times and that the only way the bookkeeper would know if an expense was personal as opposed to business would be for her to identify it.

Sole Signatures

[61] Mrs. Goruk was not specifically confronted about this issue during cross-examination.

The Altered Banking Document

[62] The plaintiff was confronted about her version of events surrounding the altered transfer direction. She was shown the original document on which the alteration is patent. She was confronted with the allegation that she either participated in the alteration or was complicit in it.

Frustrating the Treasurer's Access to Financial Records

[63] Mrs. Goruk was confronted with the defendant's position about her reluctance to assist Ms. Millis with access to the books and records of the defendant. Numerous emails were put to her in support of the defendant's position.

Non-Disclosure to the Auditor

[64] Mrs. Goruk was questioned about her role in terms of the annual audit of the defendant's financial statements. She was confronted with the assertion that she did not tell the auditor about the related-party contracts she arranged between the defendant and her sons' companies.

[65] She was asked about a letter the auditor had provided her in 2013 regarding concerns he had with some aspects of the 2013 financial statement. He referred to them as weaknesses. She was confronted with the allegation that she did not provide a copy of this letter to the Board.

General Mismanagement

[66] Mrs. Goruk was questioned in detail about inquiries being made by the treasurer and about concerns the treasurer raised with respect to the November and December 2013 financial reports. She was not otherwise confronted with any particular accusations of mismanagement.

Analysis

[67] The plaintiff's first Browne and Dunn objection arose yesterday. It related to a series of questions defence counsel put to one of the plaintiff's confirmatory witnesses, a past-president of the defendant's Board. The questions were about the propriety of certain charitable donations made by the plaintiff – one for \$3,000 and another for \$1,000. The plaintiff's counsel objected on the basis that these expenditures had not been raised with the plaintiff. She had had no opportunity to offer an explanation.

[68] I agreed that there was an infringement of the rule in Browne and Dunn. Though the pleadings mention donations obliquely, these specific expenditures had not been put to Mrs. Goruk and she may well have had a perfectly good explanation for them. I offered the plaintiff's counsel the opportunity to recall her at some point either before her case ended, or as a reply witness, to address it. Counsel declined, at least for the time being.

[69] The next Browne and Dunn objection arose during the direct examination of the defendant's first witness. The witness is Thomas Bolland. He is the defendant's former auditor. He was on the cusp of identifying a number of unexplained or questionable transactions identified by the defendant which he said he was shocked to see when they were brought to his attention by a Board member. I do not know what those transactions are because the objection came before his answer.

[70] The reality is, this ruling is a proactive attempt to manage what would otherwise be a recurring string of objections. Without the benefit of knowing what specific conflicting evidence the defendant intends to produce I can deal with the Browne and Dunn issue only generally.

[71] I am provisionally satisfied that the defendant has generally met its obligations under Browne and Dunn. I say that for the following reasons:

- (a) As I identified, the plaintiff is well aware, from the pleadings and the discovery process, what the substance of the allegations are against her and what the defendant's position is on those allegations. That she is so aware can be readily inferred from the fact that she proactively addressed, in her direct examination, each and every assertion made by the defendant in support of their just cause allegation;
- (b) I am satisfied that through a combination of direct examination and cross-examination, the plaintiff has had, and has taken, the opportunity to put her evidence in the record on each of the pleaded allegations supporting the assertion of just cause; and,

- (c) Contrary to her counsel's submission, I am satisfied that she was confronted at length by the defendant's counsel on most of the assertions comprising the claim of just cause.

[72] To this point, I see no unfairness to Mrs. Goruk in the way the evidence has been presented. And I see no unfairness to me, as the trier of fact, in terms of the evidentiary record. I am satisfied that Mrs. Goruk has had an opportunity to address in evidence any of the contradictory evidence or positions of the defence.

[73] Having said all of that, I sense that there may be a shortcoming in terms of some of the particular transactions that the defendant intends to rely upon as "financial irregularities". Thus far I have heard very little in terms of the particulars of alleged improper expenses. I expect that there may be other instances, like the specific charitable donations example, where particular impugned transactions were not, but should have, been put to Mrs. Goruk, both in fairness to her and in fairness to me, so that I have a complete evidentiary record.

[74] I have, in my view, a sufficient vantage point to be able to determine the appropriate remedy should instances arise, going forward, of particular impugned transactions that Mrs. Goruk ought to be given an opportunity to respond to. And that remedy is to have her recalled to respond to any such evidence.

[75] I understand the argument that it is unfair to Mrs. Goruk to have to testify again. I have three comments:

- (a) First, the remedy is designed with fairness to Mrs. Goruk in mind. It will allow her the opportunity to respond to allegations that she ought fairly to have a chance to do;
- (b) Second, I do not anticipate that any further examination is going to be extensive. As I noted above, I am generally satisfied that defence counsel have complied with their Browne and Dunn obligations;
- (c) Third, I do not accept that Mrs. Goruk is the sort of fragile witness for whom providing additional testimony would be oppressive. This is not, for instance, the sort of case where a sexual assault complainant has had to testify in open court about matters of an acutely personal nature and where she has been cross-examined at length about those matters; matters engaging privacy and dignity issues. I am certain that testifying was not a pleasant experience for Mrs. Goruk, particularly at her age. But she has been able to do so from the comfort of her own home or the home of her son. And she has otherwise been an active and engaged participant in the process. She is available and capable of providing supplemental testimony.

[76] The plaintiff's counsel also suggested that Mrs. Goruk has been prejudiced because she has already decided which confirmatory witnesses to call. In my view, this assertion is not persuasive. It is a generic argument, untethered to the particular circumstances of this case. In other words the plaintiff has not articulated precisely how she has been prejudiced in terms of calling other potential witnesses.

[77] There is no presumptive remedy for breaches of the rule in Browne and Dunn. But appellate courts have tended to support recalling the witness as a first choice, where appropriate. In this case it is appropriate.

Steps Going Forward

[78] Subject to any further ruling, the defendant shall be at liberty to adduce its case on just cause as it sees fit. I invite the plaintiff's counsel to identify, however, as the defendant's evidence is adduced, instances where particular "irregular" transactions are identified that Mrs. Goruk has not had an opportunity to address in her evidence, contrary to the principles of Browne and Dunn. I will invite the parties to make brief submissions on any such transactions and a "running list" will be compiled of evidence that Mrs. Goruk will be entitled to address by way of recall.

[79] Counsel may, of course, address with me, and clarifications required with respect to this ruling.

C. Boswell J.

Date: June 2, 2021

CITATION: Sean Omar Henry v. Dr. Marshall Zaitlen, 2022 ONSC 214
COURT FILE NO.: CV-12-459089
DATE: 20220110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SEAN OMAR HENRY, personally and as
Estate Trustee for the Estate of SANDY
ROBINSON

Plaintiffs

- and -

~~DR. MARSHALL ZAITLEN, DR. EDGAR
JAN, DR. JOSEPH FAIRBROTHER, DR.
HILAIRE LOUISE SHEEHAN, DR. VERA
BRIL, DR. ROBERT KURTZ, DR. JOHN
DOE, JANE DOE, JOAN DOE, WILLIAM
OSLER HEALTH CENTRE BRAMPTON
CIVIC HOSPITAL and UNIVERSITY
HEALTH NETWORK TORONTO
GENERAL HOSPITAL~~

Defendants

*Barbara A. MacFarlane and Michael D.
Hodgins, for the Plaintiffs*

*Frank J. McLaughlin, Stephanie Sugar,
and Christine Windsor for the Defendant,
Dr. Marshall Zaitlen*

HEARD: November 8-10, 12, 15-19, 22-
26, 29-30 and December 1-3, 6-10 and 13,
2021

A.A. SANFILIPPO J.

REASONS FOR RULINGS –RULE 53

[1] The trial of this medical malpractice action, with a jury, began on November 8, 2021 and continued for 25 days to December 13, 2021. During the testimony of four medical experts, each of whom had served expert reports under Rule 53 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, each of the parties made objections that evidence was being adduced from the medical

experts that went beyond the substance of the opinions expressed in their reports. I ruled on all such objections at the time that they were made, some with oral reasons and some on the basis of reasons to follow. All the rulings under Rule 53 were made on the same legal framework, which was not disputed by the parties and which I will set out herein, with application of the Rules and legal principles to the substance of the expert report and the nature of the opinions sought to be adduced in testimony.

[2] Due to the rigid and tight schedule for this jury trial and so as to not delay the timely presentation of the expert testimony, certain of these rulings were made on short oral reasons or on the basis of reasons to follow. These are the reasons for these rulings made under Rule 53.

I. BACKGROUND

[3] Sean Omar Henry brought this action on his own behalf and as Estate Trustee for the Estate of his deceased spouse, Sandy Robinson, for damages said to have been sustained by the alleged negligence of Dr. Marshall Zaitlen, a general neurologist. The Plaintiffs alleged that Dr. Zaitlen was the continuing neurologist with primary care in Mr. Henry's treatment from January 29, 2010 to July 20, 2010 and was negligent in the delayed diagnosis and treatment of a spinal dural arteriovenous fistula ("SDAV Fistula"). The Plaintiffs alleged that but for Dr. Zaitlen's negligence, Mr. Henry would not have sustained his injuries.

[4] The Plaintiffs called expert medical opinion evidence from Dr. Gordon Bryan Young, a neurologist; Dr. Albert Cheng, a physiatrist; and Dr. Donald Lee, a neuroradiologist. In addition, the Plaintiffs called two treating physicians, Dr. Timo Krings, an interventional neuroradiologist and Dr. Lesley Carr, a urologist, both of whom delivered expert reports under Rule 53 in order to provide opinions beyond those permissible by a treating physician participant expert.

[5] The Defendant made objections to discrete aspects of the expert opinions proffered in testimony by Dr. Young and Dr. Krings as exceeding the substance of the opinions set out in their expert reports.

[6] The Defendant called expert medical opinion evidence from Dr. Daniel Wong, a general neurologist; Dr. Gerald Brock, a medical doctor specializing in urology and neuro urology; Dr. Anthony Burns, a medical doctor specializing in physical medicine and physical rehabilitation; and Dr. Mark Tarnopolsky, a medical doctor specializing in neurology and neuromuscular disorders. The Plaintiffs made objections to discrete aspects of the expert opinions proffered in testimony by Dr. Wong and Dr. Tarnopolsky as exceeding the substance of the opinions set out in their expert reports.

II. LEGAL FRAMEWORK

[7] The parties did not dispute the governing Rules or the applicable legal principles that pertain to the scope of expert opinion testimony permitted within the substance of the expert's report. Rather, the debate between the parties on their objections in this area was on the construction and application of these Rules and principles.

A. Governing Rules

[8] Rule 53.03 sets out the requirements for expert reports, and provides, in sub-rules 53.03(2.1)(4) to (6), that the substance of the expert's report must include the following:

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion ...

[9] Rule 53.03(3) sets out the sanction where an expert fails to address in their expert report an issue on which the expert seeks to testify at trial, and provides that the expert may not testify at trial with respect to such an issue without leave of the trial judge:

- (3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out [in a report].

[10] The granting of leave under Rule 53.03(3), resulting from non-compliance with Rule 53.03(2.1) is prescribed by Rule 53.08(1), which provides that leave under Rule 53.03(3) "shall be granted", on terms that are just, unless to do so would cause prejudice or undue delay in the conduct of the trial:

If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2) [which includes Rule 53.03(3)], leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

[11] Rule 53.08 requires that the trial judge *shall* grant leave on such terms that are just, unless there will be prejudice to the other party or where to do so will cause undue delay in the conduct of the trial: *Glass v. 618717 Ontario*, 2011 ONSC 2926, at para. 12; *Homes of Distinction (2002) Inc. v. Adili*, 2019 ONSC 7588, at para. 8.

[12] The purpose of Rule 53 "is to avoid surprise at trial, to enable counsel to prepare to challenge the opinion and to allow for efficiency in preparation and trial": *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545, at para. 78. In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (C.A.), at para. 38, the Court stated that Rule 53.03 facilitates "orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial". In *Peller v. Ogilvie-Harris*, 2018 ONSC 725, at para. 8, Justice D.A. Wilson stated that the Rule is designed to achieve "fairness to all parties well in

advance of the trial date so that each party knows the case it has to meet at trial”. Similarly, in *Klitzoglou v. Cure*, 2012 ONSC 3411, at para. 7, Justice McKelvey commented that the delivery of the expert reports enables “a clear understanding of the anticipated evidence of the experts”.

[13] To achieve these objectives, the expert’s report must include “the factual assumptions on which the opinion is based, any research conducted by the expert and any documents relied on by the expert in forming the opinion”: *Hacopian-Armen*, at para. 79.

B. Legal Principles

[14] Prior to the 1985 enactment of Rule 53.03, the Court of Appeal explained that a medical expert must not be confined narrowly to the precise contents of their expert report, but rather may explain and amplify. In *Thorogood v. Bowden* (1978), 21 O.R. (2d) 385 (C.A.), at p. 386, the Court dismissed an appeal that a medical expert had testified beyond the substance of his expert report, stating the following principle:

We interpret the law with respect to medical reports to be that a medical expert is not to be narrowly confined and limited to the precise contents of his report, but he has a right to explain and amplify. What was done here ... was to expand on what was latent in the medical report, and it did not open a new field. In our view, the trial Judge properly concluded that there was no prejudicial surprise here and, therefore, exercised his discretion and properly refused to declare a mistrial.

[15] The long-standing principle that advance notice of the substance of the expert opinion is necessary for trial fairness, in order to prevent “prejudicial surprise” was applied by the Court of Appeal in *Marchand*. At para. 36, the Court of Appeal referred to *Thorogood* and applied its principles, and those in the cases that followed it, to the Court’s interpretation of the requirement under Rule 53.03 that an expert may provide opinion evidence at trial on the substance set out in the expert report. The Court of Appeal stated, at para. 38, that an expert may explain and amplify the opinions contained in their report, but may not testify about matters that go beyond the expert report:

In our view, these cases indicate that the “substance” requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert’s opinion, and the basis for that opinion. Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are “latent in” or “touched on” by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not

unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

[16] In applying these principles, the parameters are clear and well-established. The expert is not restricted to reading from their report, but rather may amplify and explain at trial the substance of their opinion: *Peller*, at para. 14, per Justice D.A. Wilson: “I agree that an expert is not bound by the four corners of the written report, and certainly a trial judge does not expect an expert to get into the witness box and simply read from the written report.” However, the expert may not open a new field in testimony that was not touched on by the expert report, but rather must expressly state the opinion reached by the expert, the reasoning behind the opinion and the evidence, assumptions and research on which the opinion is based.

[17] Within these parameters, trial fairness requires a measured analysis of the principle of latency: discerning that which is latent within the expert report. A narrow application of construing opinions that are “latent in” or “touched upon” by the expert report - holding the expert tightly to the expert report - would serve the objective of ensuring that the party opposite is not taken by surprise and is afforded a fulsome opportunity to know the case that they have to meet. A broader application of determination of opinions that are “latent in” or “touched upon” by the expert report would ensure that there is no prejudice to the tendering party if the opinion evidence were not admitted. These approaches to this analysis are reflected in the case law.

[18] In *Cheesman v. Credit Valley Hospital*, 2019 ONSC 5783, at paras. 78-88, Justice Koehnen carefully analysed the principle of latency and observed that a broad construction of what is latent in an expert report would allow for the filing of a “barebones expert’s report” and leave it to the expert’s trial testimony to expand upon the reasons for the expert’s opinion. Justice Koehnen commented that this would allow for “trial by ambush” that is prevented by holding the expert accountable to the need to provide detail in the expert report: *Cheesman*, at para. 81.

[19] As Justice Koehnen stated, “experts’ reports should not be a game of hide and seek”: *Cheesman*, at para. 87. Similarly, in *Peller*, at para. 14, Justice D.A. Wilson stated that Rule 53 “is not complied with if after reading the statement of opinion, the court is left guessing about what the expert means”, building on the statement in *Hoang v. Vincentini*, 2012 ONSC 1358, at para. 10, aff’d 2016 ONCA 723, 352 O.A.C. 358, that it is “not the job of the Court to search around in the body of an expert report and try and ascertain all the ‘implicit’ opinions contained in it.”

[20] In *Rolley v. MacDonell*, 2018 ONSC 163, at para. 29, Justice Corthorn observed that an overly restrictive construction of the admissibility of expert opinion evidence runs the risk of excluding relevant opinion evidence. Justice Corthorn adopted the statement of Justice Barr in *Hunter v. Ellenberger* (1988), 25 C.P.C. (2d) 14 (Ont. H.C.), at p. 16, as applied by Justice Quinn in *Auto Workers’ Village (St. Catherines) Ltd. v. Blaney McMurtry Stapells Friedman* (1997), 14 C.P.C. (4th) 152 (Ont. Gen. Div.), at para. 19, that “any time a court excludes relevant evidence the court’s ability to reach a just verdict is compromised.” See also, *Kilitzoglou*, at para. 7: “It is apparent, however, from Rule 53.08, that a court should exercise caution in excluding relevant expert opinion.”

[21] In my view, the process for analysis of an objection under Rule 53 based on the principles expressed in *Marchand*, and cases following, is as follows: first, an assessment of whether the substance of the opinion elicited from the expert witness in testimony is expressly contained in the expert's report, or is latent ("touched on") within the report as determined by application of the principles set out above. If so, the expert witness may amplify or explain the opinion in testimony. Second, if the substance of the opinion is not expressly included in the expert report, or latent within it, then the expert may not testify on that opinion without leave of the Court under Rule 53.08(1). In applying Rule 53.08(1), the Court must assess whether the opinion evidence is admissible, in that the expert is testifying within their area of qualification and permissible scope of testimony; whether any party would be prejudiced by the admission of the testimony; whether any prejudice could be addressed through terms or an adjournment; and, whether any adjournment would cause undue delay in the conduct of the trial.

III. ANALYSIS

[22] I will now explain the application of these principles to my rulings on the objections made by the Defendant to discrete elements of the expert opinion evidence in those instances where my rulings were based on reasons to follow. These include objections made by the Defendant to discrete elements of the expert opinion testimony of Dr. Young and Dr. Krings, and objections made by the Plaintiffs to discrete elements of the expert opinion evidence of Dr. Wong and Dr. Tarnopolsky.

A. Dr. Gordon Young

[23] Dr. Gordon Young delivered four expert reports on the issues of standard of care and causation.¹ Dr. Young's evidence was tendered by the Plaintiffs. He was qualified at trial as a medical doctor specializing in neurology and was admitted to provide expert opinion evidence on the issues of standard of care and causation.

[24] Dr. Young wrote, in his report dated March 11, 2013, that Dr. Zaitlen breached the standard of care for the diagnosis of Mr. Henry's condition because he did not investigate the entirety of the spine, which should have included the thoracic cord:

A series of events led to 1. delays in localizing the lesion clinically, 2 arriving at the definitive diagnosis and 3 instituting definitive treatment once 1 and 2 were accomplished. The asymmetry of features, the fluctuating course, the early preservation of reflexes should have caused Dr. Zaitlen to consider that the problem may have arisen higher than the conus and cauda equina.

¹ Expert reports dated March 11, 2013, January 3, 2015, February 27, 2020, and April 22, 2020.

...

While the presentation was not specific for a dural AVM it should have at least been considered in the differential diagnosis and investigation should have included complete imaging of the spine, including especially the thoracic cord. The consultant neurologist is the ultimate resource for diagnosis, which is the essential step before any definitive treatment could be provided. This was markedly delayed in Mr. Henry's case, in fact some 7 months, while had (*sic*) repeated exacerbations that left residual damage.

[25] Dr. Young's opinion that Dr. Zaitlen breached the standard of care by not investigating the entirety of Mr. Henry's spine, including the thoracic cord, resulting in a delay in the diagnosis of Mr. Henry's SDAV Fistula, was reinforced by Dr. Young in his subsequent reports.

(a) Failure to Access Hospital Records

[26] Dr. Young was asked in examination in chief whether Dr. Zaitlen, a treating general neurologist practising in William Osler Hospital, would have access to Mr. Henry's hospital records. Dr. Zaitlen replied in the affirmative. The examining counsel then asked what Dr. Young's expectation would be in terms of the neurologist reviewing the medical records. The lawyer for Dr. Zaitlen objected on the basis that the question went to the issue of Dr. Zaitlen's discharge of his standard of care, and that Dr. Young's reports did not raise this issue. I upheld the objection on the basis of reasons to follow.

[27] The Defendant submitted that Dr. Young's written opinion that Dr. Zaitlen breached the standard of care was not based on his failure to access available medical records. The Plaintiffs conceded that Dr. Young did not write, in any of his four reports, that Dr. Zaitlen breached the standard of care by failing to access available medical records. The Plaintiffs submitted that this detail of breach of the standard of care is latent in Dr. Young's stated opinion that Dr. Zaitlen missed the diagnosis of a SDAV Fistula at a time when appropriate treatment and investigation would have spared him his current disability. The Plaintiffs' submitted that this opinion touches upon the detail that Dr. Zaitlen failed to access available medical records.

[28] I found that the latency urged by the Plaintiffs' goes well-beyond a reasonable reading of any of Dr. Young's four reports. Dr. Young did not write, in any report, any criticism of Dr. Zaitlen for failing to access available medical records, and had a fulsome opportunity to do so over the 7-year span of his reports. I accept the objecting party Defendant's submission that there is not a "hint of this criticism" in any of the reports, and it is not latent or touched on by the reports. I am satisfied that the Defendant was taken by surprise at the suggestion that Dr. Zaitlen's breach of standard of care included failure to access available medical records.

[29] I turned then to consideration of whether leave should be granted to allow this opinion evidence at trial, in accordance with Rule 53.08(1). In considering this issue, I was satisfied that the Defendant had established prejudicial surprise, in that the Defendant could not have known of

this criticism in advance of trial. Indeed, none of the reports delivered by the Defendant's standard of care experts, Dr. Wong and Dr. Tarnopolsky, referred to this issue, showing that it was not evident to them. No party requested an adjournment of the trial to accommodate the delivery of further expert reports. This was consistent with the parties' commitment to conduct this trial within the schedule that had been agreed upon and firmly established to allow for its completion, with a jury, before the Holidays. In this context, no adjournment was even capable of being considered.

[30] Accordingly, I declined to grant leave for the introduction of this expert opinion evidence as the Defendant had established prejudice that was incapable of being addressed by terms as it would result in unacceptable delay in the conduct of the jury trial.

(b) Leaking Blood Vessels

[31] While responding to a question in examination in chief, Dr. Young stated that the MRI report of January 28, 2010 showed that "blood vessels were clearly leaking". The Defendant objected on the basis that Dr. Young did not mention, in any of his reports, that blood vessels were shown to be leaking on the January 28, 2010 MRI report, or any connection between leaking blood vessels and a vascular deformation. The Defendant submitted that when Dr. Young wrote about the clinical signs that ought to have alerted Dr. Zaitlen to investigate the entirety of Mr. Henry's spine, including the thoracic cord, he did not include leaking blood vessels. The Defendant objected to the Plaintiffs developing this line of questioning as a further component of their theory that Dr. Zaitlen breached the standard of care.

[32] The Plaintiffs conceded that "leaking blood vessels" were not mentioned in any of Dr. Young's reports. The Plaintiffs submitted that the presence of leaking blood vessels as a clinical sign requiring further investigation was latent in, or touched on, by Dr. Young's written opinion that "Mr. Henry's presentation, symptoms and signs are really quite typical for [SDAV Fistulas]".

[33] During submissions, the Plaintiffs conceded that they did not intend to elicit evidence of leaking blood vessels as a basis of their claim that Dr. Zaitlen breached the standard of care. The Plaintiffs agreed that Dr. Young tendered this opinion as part of an expansive answer on a question pertaining to Dr. Zaitlen's differential diagnosis, and was not directly adduced in testimony by the examining counsel. The parties thereby agreed that no ruling was required on this objection, and the Plaintiff would proceed without further examination on this area.

[34] Had a ruling been required, I would have upheld the Defendant's objection, determined that Dr. Young could not testify on any failure to identify leaking blood vessels as a ground for Dr. Zaitlen's alleged breach of standard of care as this was a new field that was neither express nor latent in any of Dr. Young's reports. I would have determined, further, that no leave could be granted for this evidence to be adduced at trial as the Defendant had established prejudicial surprise by Dr. Young's failure to refer to this detail in any of his expert reports, and that this prejudice could not be addressed by terms.

(c) Adequacy of Materials sent to Dr. Brill

[35] Dr. Young testified that Dr. Zaitlen referred Mr. Henry to Dr. Vera Bril for a second opinion. Dr. Bril is a neuromuscular specialist and a specialist in electrodiagnosis. In furtherance of the referral, on March 23, 2010, Dr. Zaitlen prepared and forwarded to Dr. Bril a “Request for Consultation” that attached several medical records (the “Referral Materials”).

[36] The Defendant objected to the Plaintiffs’ question of Dr. Young regarding whether Dr. Zaitlen included, in the Referral Materials, Dr. Zaitlen’s Progress Report of March 5, 2010, which pertained to his follow-up examination of Mr. Henry that day. The Defendant submitted that the only reason to lead evidence regarding any inadequacy in Dr. Zaitlen’s transmittal of Referral Materials to Dr. Bril was to support an opinion that Dr. Zaitlen breached the standard of care by negligently providing inadequate records to Dr. Bril in furtherance of her specialist assessment.

[37] Dr. Young did not write, in any of his four reports, that Dr. Zaitlen was negligent in his assembly and transmission of medical records to Dr. Bril for use in her examination and assessment of Mr. Henry. The Plaintiffs submitted that this opinion was latent in a single statement written by Dr. Young in his report of March 11, 2013, at p. 6: “If [Dr. Bril] were truly aware of the fluctuating/relapsing-remitting course of Mr. Henry’s illness I am not sure how she could accept the diagnosis of a myeloradiculopathy as a post-infectious phenomenon. This just does not happen.” The Plaintiffs submitted that a reader of this passage would reasonably have understood that Dr. Bril was not aware of the fluctuating course of Mr. Henry’s illness because Dr. Zaitlen did not provide her with a copy of his Progress Report of March 5, 2010.

[38] I ruled that Dr. Young may answer the question posed and thereby testify to the content of the material that he sent to Dr. Bril on March 23, 2010. Indeed, the content of the Referral Materials was agreed upon by the parties in their certification of the authenticity and truth of the contents of the medical records dated January 27, 2010 to July 28, 2010, marked on consent as Exhibit 3. Accordingly, I denied the objection made by the Defendant to the question posed of Dr. Young regarding whether he included his March 5, 2010 Consultation Report in the Referral Materials. The parties had already agreed that he did not.

[39] This objection was pre-emptive in nature, as the Defendant anticipated that the questioning would lead to an attempt by the Plaintiffs to adduce evidence from Dr. Young that Dr. Zaitlen breached the standard of care by failing to include all relevant medical records in his transmission to Dr. Bril. This question had not been asked, and therefore did not require a ruling. However, as the submissions dealt extensively with this anticipated area of questioning, I stated that if the only reference to this issue in Dr. Young’s reports is the single passage on p. 6 of Dr. Young’s report of March 11, 2013, I would have to be persuaded that any opinion by Dr. Young on standard of care regarding inadequacy of transmission of materials to Dr. Bril is latent in, or arises from Dr. Young’s reports as opposed to opening a new area. The Plaintiffs did not examine further on this area.

(d) Delay in Investigation During the Referral Period

[40] Dr. Young testified that Dr. Zaitlen's role as continuing neurologist with primary care in Mr. Henry's treatment commencing January 29, 2010 did not change by reason of his referral of Mr. Henry to neuromuscular specialist Dr. Bril on March 23, 2010 for a second opinion. The Defendant objected to the examining counsel asking Dr. Young whether, in his expert opinion, Dr. Zaitlen ought to have taken further follow-up steps in investigation of Mr. Henry's condition during the period after Dr. Zaitlen referred Mr. Henry to Dr. Bril and while Dr. Bril's work was pending.

[41] The Defendant submitted that Dr. Young did not write in any of his reports that Dr. Zaitlen's breach of the standard of care included not taking steps to continue with his investigation of Mr. Henry's condition during the period after his referral of Mr. Henry to Dr. Bril. The Defendant submitted that if Dr. Young intended to offer this opinion in testimony at trial, he was required, under Rule 53, to state it in his report. The Plaintiffs submitted that Dr. Young expressly stated this in his reports or, alternatively, that this opinion was latent in Dr. Young's overall opinion that Dr. Zaitlen breached the standard of care through a delay in diagnosis of Mr. Henry's SDAV Fistula. I agreed, for the following reasons.

[42] In his expert report of March 11, 2013, at p. 5, Dr. Young wrote that Dr. Zaitlen was the "ultimate resource" for diagnosis of Mr. Henry's condition, and that he had "markedly delayed" diagnosis for "some 7 months":

The consultant neurologist is the ultimate resource for diagnosis, which is the essential step before any definitive treatment could be provided. This was markedly delayed in Mr. Henry's case, **in fact some 7 months**, while had (*sic*) repeated exacerbations that left residual damage. [Emphasis added.]

[43] The period of 'some 7-months' was clearly understandable, on any fair and reasonable reading, to be the period from the initiation of Dr. Zaitlen's care of Mr. Henry, namely January 29, 2010, to the treatment of Mr. Henry by Dr. Michael Angel, Dr. Brian Best and then Dr. Krings on July 20-25, 2010. This period included the time between Dr. Zaitlen's referral of Mr. Henry to Dr. Bril on March 23, 2010 to Dr. Bril's examination of Mr. Henry on June 2, 2010. Dr. Young's report, taken together, showed that Dr. Young held the opinion that: (i) Dr. Zaitlen was Mr. Henry's consulting neurologist with primary care; (ii) Dr. Zaitlen's delay in diagnosis of an SDAV Fistula was "some 7-months"; (iii) the period of alleged delayed diagnosis and treatment, as commented upon by Dr. Young in the provision of his overall opinion, included the time during which Dr. Bril's work was pending.

[44] The substance of Dr. Young's reports was that Dr. Zaitlen breached the standard of care by delay in diagnosis of Mr. Henry's condition resulting in delay in treatment. In addition to the passage excerpted above from the March 11, 2013 report, Dr. Young wrote, on p. 5, that a "series of events" led to delays in localizing the lesion clinically, arriving at a definitive diagnosis and instituting definitive treatment. In his report of February 27, 2020, Dr. Young wrote, on p. 4, as follows:

It cannot be denied that the diagnosis of spinal dural AVM was missed at a stage when appropriate investigation and treatment would have spared [Mr. Henry] his current disability. ... The diagnosis was never clear when Drs. Zaitlen and Bril saw Mr. Henry and further imaging should have been done and a vascular etiology considered.

[45] In his report of April 22, 2020, at p. 2, Dr. Young wrote that “prompt localization and diagnosis by neuroimaging would have prevented the permanent deficits Mr. Henry suffered later”. Dr. Young wrote this conclusion having provided the opinion that the delay in localization of Mr. Henry’s SDAV Fistula resulted from Dr. Zaitlen’s failure to requisition the appropriate imaging, at p. 1:

In clinical neurology localization is the most important step in arriving at a diagnosis. This should be arrived at as soon as possible, as accurate localization is essential to diagnosis and management. Dr. Zaitlen did not have a clear localization in mind and, although he wondered about a cord lesion [he] did not pursue that with appropriate imaging. [Emphasis in original.]

[46] Dr. Young’s reports, read holistically, show that Dr. Young provided an opinion about the role of a general neurologist with primary, continuing care for a patient, the management of the patient and the role of imaging in reaching a definitive diagnosis. Dr. Young expressed the opinion that Dr. Zaitlen breached the standard of care in attending to these tasks. Dr. Young stated that the breach of standard of care occurred over the “some 7-month” period of Dr. Zaitlen’s care of Mr. Henry. It is, in my view latent in Dr. Young’s reports - if not express - that Dr. Zaitlen’s delay in investigating Mr. Henry’s condition, requisitioning appropriate imaging of the thoracic spine and advancing a diagnosis, was throughout this period. I therefore did not accept that the objecting party Defendant could have reasonably been taken by surprise by Dr. Young testifying to steps that Dr. Zaitlen ought to have taken during the time between his referral to Dr. Bril and the completion of her assessment, as a fair and reasonable reading of Dr. Young’s reports showed that his opinions of Dr. Zaitlen’s breach of duty of care continued through this period.

B. Dr. Timo Krings

[47] Dr. Timo Krings is a medical doctor with specialty in interventional neuroradiology, practicing at Toronto Western Hospital. Dr. Krings treated Mr. Henry on July 24-25, 2010, successfully performing a glue embolization of Mr. Henry’s SDAV Fistula on July 25, 2010. As one of Mr. Henry’s treating physicians, there was no dispute that Dr. Krings was a participant expert, in the manner defined by the Court of Appeal in *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at para. 61, leave to appeal to S.C.C. refused, 36445 (October 19, 2015). Dr. Krings was therefore able to give opinion evidence without complying with Rule 53.03 where “the opinion to be given is based on the witness’ observation of or participation in the events at issue; and the witness formed the opinion to be given as part of the ordinary exercise of his or her skill,

knowledge, training and experience while observing or participating in such events”: *Westerhof*, at para. 60.

[48] In addition to his status as a participant expert, Dr. Krings was admitted to provide opinion evidence on the radiological diagnosis and treatment regarding the issue of causation. Dr. Krings delivered an expert report dated August 17, 2021 in which he provided the opinion that in 2010 he would see a patient with a radiological finding of a SDAV Fistula within 1-2 weeks after referral and follow with a digital subtraction angiography (an attempt to cure through open surgery or endovascular approaches) within 1-2 weeks following the office visit. Dr. Krings provided the further opinion that “Mr. Henry’s outcome would have been better if the [SDAV Fistula] had been diagnosed earlier (because his symptoms did not deteriorate significantly until July 2010 and the prognosis is tied to the level of disability at the time of treatment)”: August 17, 2021 report, p. 3.

[49] Dr. Krings was questioned regarding MRI images taken of Mr. Henry on January 28, 2010, March 14 and 15, 2010 and July 22, 2010. The Defendant objected to Dr. Krings testifying in relation to the July 22, 2010 MRI images, either in his capacity as a participant expert or as a litigation expert under Rule 53. To determine this objection, an admissibility hearing (*voir dire*) was conducted, in the absence of the jury, during which Dr. Krings was examined and cross-examined on the admissibility of this evidence, and I heard submissions. At the conclusion of the admissibility hearing, I denied the objection and allowed Dr. Krings to testify regarding his review of the July 22, 2010 MRI images. I will explain why.

[50] The evidence in the admissibility hearing showed that on July 22, 2010, the staff at William Osler Health Centre created a CD of Mr. Henry’s “MRIs since January including that of 22/7/10”, and sent this to Toronto Western Hospital as part of Mr. Henry’s transfer: William Osler Hospital Records, Ex. 3, p. 242. Dr. Krings stated that he saw and treated Mr. Henry upon his arrival at Toronto Western Hospital and that in all likelihood he saw the July 22, 2010 MRI images. He testified that after diagnosis, he prepared his own MRI imaging to better identify the precise location of the SDAV Fistula in anticipation of performing the angiography. Dr. Krings testified that he did not remember specifically whether he reviewed the July 22, 2010 images as part of his treatment in July 2010, testifying that he has interpreted over 7,000 radiological images annually in the 11 years since these events. Dr. Krings swore that based on his standard or routine practice, the likelihood that he reviewed the July 22, 2010 MRI image in July 2010 before conducting the glue embolization procedure was “very high”.

[51] Dr. Krings was referred to his post-intervention Consultation Report of July 25, 2010 where he wrote that: “Repeat MT imaging was performed on July 22, 2010 which demonstrated the imaging features of a thoracic spinal DAVF”. Dr. Krings recalled that his review would have been of both the July 22, 2010 MRI image and the repeat imaging report, at the time that he conducted the glue embolization procedure.

[52] The Defendant submitted that Dr. Krings should not be allowed to testify to his observations of the July 22, 2010 MRI image in his capacity as a participant expert because he did not have any present specific recollection of the observations made of these MRI images. In regard

to Dr. Krings' qualification as a litigation expert under Rule 53, the Defendant submitted that Dr. Krings' report did not provide sufficient detail of his assessment of the July 22, 2010 MRI image to support his provision of expert testimony on this topic. I rejected both grounds of the Defendant's objection for the following reasons.

[53] First, in Dr. Krings' capacity as a participant expert, I accepted his sworn testimony that there was a high likelihood that he reviewed the July 22, 2010 MRI image as part of his observation or participation in the treatment of Mr. Henry in the period of July 23-25, 2020. Having heard Dr. Krings' testimony in the *voir dire*, and having assessed Dr. Krings as an accomplished expert interventional neuroradiologist whose evidence was credible, reliable and plausible, I was satisfied that he would have carefully followed his routine or invariable practice and considered the July 22, 2010 MRI images as part of his assessment of Mr. Henry's condition. As a participant witness, Dr. Krings could properly provide an opinion that derived from the ordinary exercise of his skill, knowledge, training and experience while observing or participating in Mr. Henry's treatment and care. This is precisely what Dr. Krings did in his review of the July 22, 2010 MRI images and the evidence that he proposed to provide in relation to this review.

[54] I did not accept the Defendant's submission that Dr. Krings should be disqualified from stating any opinion in relation to the July 22, 2010 MRI images because he had no present specific recollection of his assessment on July 23-25, 2010. A physician's testimony as to their routine, ordinary or invariable practice is admissible as evidence of what they did on a specific day, even in the absence of direct evidence: *Turkington v. Lai*, 2007 CanLII 48993 (Ont. S.C.), at paras. 93-94; *Mirembe v. Tarshis*, 2003 CanLII 22082 (Ont. C.A.), at para. 1; *Belknap v. Meakes* (1989), 64 D.L.R. (4th) 452 (B.C.C.A.), at pp. 465-66; *Campbell v. Roberts*, 2014 ONSC 5922, at para. 100(j). The Defendant could not reasonably dispute this principle, as the substance of Dr. Zaitlen's examination in chief was based on evidence of his routine or invariable practice considering his admitted lack of specific recollection of aspects of his treatment and care of Mr. Henry.

[55] Second, Dr. Krings was admitted to provide expert opinion evidence beyond his role as a treating physician/ participant expert, as he complied with Rule 53 by delivery of an expert report. Dr. Krings expressly referred to the July 2010 MRI images in his expert report, albeit he apologized for having mistakenly identified them as having been taken on July 20, 2010 as opposed to the actual date of July 22, 2010, writing as follows:

Mr. Henry's new clinical neurological findings in July prompted the imaging of his thoracic spine on July 20th [sic] where imaging findings were correctly interpreted and the diagnosis of a spinal dural AV fistula was made.

[56] Dr. Krings' expert report expressly stated his opinion regarding the July 22, 2010 MRI images. On the basis of the principles explained in *Marchand*, at para. 36, Dr. Krings could explain and amplify what was in his report, including matters that are "latent in" or "touched on" by the report, which included the July 22, 2010 MRI images.

[57] For these reasons, I ruled, at the conclusion of the admissibility hearing, that I denied the Defendant's objection to Dr. Krings testifying on the July 22, 2010 MRI images.

C. Dr. Daniel Wong

[58] Dr. Daniel Wong is a medical doctor specializing in general neurology, called by the Defendant to provide expert opinion evidence on the standard of care of a general neurologist. Dr. Wong delivered an expert report dated December 20, 2019. Dr. Wong stated his opinion that Dr. Zaitlen met the standard of care in his care and treatment of Mr. Henry.

[59] Dr. Wong was examined on the radiology report of Dr. Hilarie Sheehan of March 15, 2010 (Ex. 3, p. 63) wherein Dr. Sheehan stated that Mr. Henry continued to have enlargement and enhancement of the conus as well as the cauda equina roots, and that his differential diagnosis had not changed. The Plaintiffs objected to Dr. Wong testifying on Dr. Zaitlen's exercise of the standard of care in not acting on Dr. Sheehan's "Impression" that: "Formal imaging of the thoracic spine may also be warranted to exclude abnormality at that level."

[60] The basis of the Plaintiffs' objection was their claim to have had no notice through Dr. Wong's expert report that Dr. Wong would testify on Dr. Zaitlen's discharge of the standard of care in relation to the March 15, 2010 radiology report. The Plaintiffs objected to the statement of any opinion by Dr. Wong regarding whether it was reasonable for Dr. Zaitlen not to have requisitioned MRI imaging of Mr. Henry's thoracic spine after noting the Impression stated in the March 15, 2010 radiology report. The Plaintiffs stated that this opinion is not expressed in Dr. Wong's expert report and is not "latent in" or "touched on" by that report.

[61] I denied the Plaintiffs' objection and ruled that the Defendant could examine Dr. Wong, and adduce his expert opinion evidence, on the March 15, 2010 radiology report, including the statement by Dr. Sheehan that imaging of the thoracic spine "may be warranted".

[62] Dr. Wong's report, on p. 3, makes express reference to the March 15, 2010 radiology report:

The MRI of the lumbar spine with contrast was completed on March 15, 2010. The findings were grossly unchanged. There was persistent enlargement, signal change and enhancement of the conus. The cauda equina roots were enlarged and enhanced.

[63] The Plaintiffs are correct that this statement did not refer specifically to Dr. Sheehan's Impression that imaging of the thoracic spine "may be warranted". However, Dr. Wong goes on to state opinions on Dr. Zaitlen's investigation, including his decision to requisition imaging of the head, cervical spine and lumbosacral spine but not the thoracic spine, as follows:

Mr. Henry initially presented with symptoms of numbness in the perineal area with bladder sphincter dysfunction and complaints of left leg weakness. The initial neurological examination did not demonstrate any

long track signs to suggest a spinal cord localization. Dr. Zaitlen's localization to the conus medularis and lumbosacral roots was reasonable. The MRI of the lumbar spine with contrast did uncover an abnormality at this level which correlated to Mr. Henry's symptoms. There were no symptoms or clinical examination findings to suggest a more proximal lesion, **hence there was no indication for imaging of other areas of the neuroaxis**. He documented a reasonable differential diagnosis and he subsequently obtained the appropriate initial investigations to determine the etiology of the condition. [Emphasis added.]

[64] Dr. Wong explained, further, in p. 6 of his report, that the rationale for imaging the brain and cervical cord was because these are the "areas of highest yield for identifying inflammation", and Dr. Zaitlen's differential diagnosis included inflammatory conditions.

[65] The Plaintiffs' objection that Dr. Wong did not expressly refer to the basis on which Dr. Zaitlen did not heed the radiologist's March 15, 2010 impression that imaging of the thoracic spine "may be warranted" is, in my view, too narrow an interpretation and construction of Dr. Wong's written opinions. Dr. Wong's report, read fairly and holistically, expresses the opinion that Dr. Zaitlen acted reasonably and without negligence in his ordering of imaging. Latent, if not express in this opinion, is that he acted reasonably in declining to order imaging identified by Dr. Sheehan in the March 15, 2010 radiology report. Dr. Wong's expert opinion, in this regard, would come as no surprise to the Plaintiffs, including in consideration of the long-standing positions taken by the parties in this action, the profile of this issue and the overall purpose, scope and substance of the opinions contained in Dr. Wong's report.

[66] Last, this ruling is, in my view, consistent with the scope, application and construction of expert reports, including the principle of "latency" urged by the Plaintiffs in responding to the rulings sought by the Defendant on his objections based on Rule 53. In my view this ruling, as well as the ruling that I will next explain in relation to the Plaintiffs' objection of a discrete element of Dr. Tarnopolsky's evidence, ensures trial fairness in that the same analytical lens through which the issue of latency was applied in addressing the Defendant's Rule 53 objections to the Plaintiffs' litigation experts is consistently applied to the Plaintiffs' Rule 53 objections to Defendant's litigation experts.

D. Dr. Mark Tarnopolsky

[67] Dr. Mark Tarnopolsky is a medical doctor specializing in neurology and neuromuscular disorders. Dr. Tarnopolsky was admitted to provide expert opinion evidence on the issues of standard of care of a general neurologist and causation in this matter.

[68] Dr. Tarnopolsky delivered an expert report dated December 3, 2019 in which he provided opinions regarding whether Dr. Zaitlen and Dr. Bril (at that time a defendant) met the standard of care in their treatment of Mr. Henry, and a report dated October 8, 2021 in which he responded to Dr. Krings' report on the issue of causation. Regarding Dr. Zaitlen's discharge of the standard of

care, Dr. Tarnopolsky wrote that, in his opinion, the evaluation, differential diagnosis and care plan put forth by Dr. Zaitlen met the standard of care expected from a neurologist in 2010.

[69] The Plaintiffs objected to Dr. Tarnopolsky providing any expert opinion evidence on Dr. Zaitlen's discharge of the standard of care in relation to his examination of Mr. Henry on March 5, 2010 on the basis that Dr. Tarnopolsky made no reference to this in his December 3, 2019 report.

[70] The Defendant conceded that Dr. Tarnopolsky did not expressly refer to Dr. Zaitlen's assessment of Mr. Henry on March 5, 2010 in his expert report on standard of care, but submitted that Dr. Tarnopolsky's opinion on standard of care was formulated and expressed in relation to the entirety of the period of Dr. Zaitlen's treatment of Mr. Henry. The Defendant submitted that "it would be a stretch" for the Plaintiffs to contend that they did not know that Dr. Tarnopolsky's opinions were written in relation to the three main assessments conducted by Dr. Zaitlen: January 29, 2010; February 12, 2010; March 5, 2010. I agree.

[71] In the section of Dr. Tarnopolsky's standard of care report entitled "My impression of the clinical situation to date and Dr. Zaitlen's care", Dr. Tarnopolsky addressed the entirety of Dr. Zaitlen's care of Mr. Henry, including the imaging reports requisitioned on March 5, 2010: being the March 14, 2010 MRI imaging of the brain and cervical spine and the March 15, 2010 MRI imaging of the lumbosacral spine. Dr. Tarnopolsky wrote that Dr. Zaitlen's findings were consistent with the "history and examination" presented by Mr. Henry and were all consistent in suggesting an autoimmune/inflammatory condition. Dr. Tarnopolsky concluded in his standard of care report that "Dr. Zaitlen appears to have made a very careful and reasonable conclusion and evaluation plan based upon the evidence available at that time". In my view, it is latent in Dr. Tarnopolsky's expert report on standard of care that the evidence available to Dr. Zaitlen at the time of his treatment included the assessment made on March 5, 2010.

[72] Accordingly, the question posed to Dr. Tarnopolsky regarding Dr. Zaitlen's assessment of Mr. Henry on March 5, 2010 properly arose from his expert report on standard of care. For these reasons, the Plaintiffs' objection was denied.

IV. DISPOSITION

[73] The above reasons are the basis for my trial rulings on the Rule 53 objections made by the Defendant regarding the opinion evidence of Dr. Young and Dr. Krings, and the objections made by the Plaintiffs regarding the opinion evidence of Dr. Wong and Dr. Tarnopolsky, in those instances where the rulings were made with reasons to follow.

A.A. Sanfilippo J.

Date: January 10, 2022