INDEX

TAB #	DOCUMENT
1	*Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A
2	EB-2007-0040 Decision and Order issued April 10, 2007 and corrected April 12, 2007
3	EB-2019-0242, AMPCO Summary of Final Argument, December 9, 2019
4	EB-2019-0242, Oral Hearing T1P16L12 to T1P17L17
5	EB-2015-0275, B-1-1_IESO_Att 3_Elenchus-IESO 2016 Fees Evidence_20160513
6	EB-2019-0002, IESO_IRR_Issues 6-2_6-3_20190430
7	EB-2022-0002, IESO_IRRs_Issue 3.0_20220603
8	Monitoring Report on the IESO-Administered Electricity Markets for the period from May 2015 - October 2015, dated November 2016
9	MRP Benefits Case 2017
10	Market Surveillance Panel Report on the IESO-Administered Electricity Markets for the period from May 2010 – October 2010, dated February 2011
11	Market Surveillance Panel Monitoring Report on the IESO-Administered Electricity Markets for the period from May 2007 - October 2007, dated December 2007
12	*Sean Omar Henry v Dr. Marshall Zaitlen*, 2022 ONSC 214
13	*Hacopian-Armen Estate v Mahmoud*, 2021 ONCA 545
14	Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst's, *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022) (excerpts)
15	*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23
16	*Graat v The Queen*, [1982] 2 SCR 819
17	*Westerhoff v Gee Estate*, 2015 ONCA 206
18	*Starra v Starra*, 2024 ONSC 6613
19	*R v Hayatibahar*, 2022 ONSC 3692
20	*Slover v Rellinger*, 2019 ONSC 6497
21	*Talluto v Marcus*, 2016 ONSC 3340
22	*R v Kruk*, 2024 SCC 7

TAB 10

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

Ontario

Market Surveillance Panel

Monitoring Report on the IESO-Administered Electricity Markets

for the period from
May 2010 – October 2010

Ontario Energy Commission de l'énergie

February 2011

Page Left Blank Intentionally

Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273

Ontario

February 28, 2011

Ms. Cynthia Chaplin
Chair
Ontario Energy Board
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Chaplin:

Re: Market Surveillance Panel Report

On behalf of my colleagues on the Market Surveillance Panel, Roger Ware and Bill Rupert, I am pleased to provide you with the Panel's 17th semi-annual Monitoring Report on the IESO-administered wholesale electricity markets.

This report, covering the period May 2010 to October 2010, is submitted pursuant to Article 7.1.1 of Ontario Energy Board By-law #3.

As you know, Tom Rusnov's term on the Panel came to an end on January 1st, 2011. Tom was appointed to the Panel at its inception in 2002. I would like to recognize and thank him for his enormous contributions to the Panel's work and to each of its reports over the past eight years.

Best Regards,

Neil Campbell
Chair, Market Surveillance Panel

Page Left Blank Intentionally

Table of Contents

Executive Summary i

Chapter 1: Market Outcomes May - October 2010 1

1. Highlights of Market Indicators 1

1.1 Pricing 1

1.2 Demand 2

1.3 Supply 2

1.4 Imports and Exports 2

Chapter 2: Analysis of Market Outcomes 5

1. Introduction 5

2. Anomalous HOEP 6

2.1 Analysis of High Price Hours 6
June 28, 2010 HE 11 8
July 7, 2010 HE 10 11
July 19, 2010 HE 15 14
July 27, 2010 HE 16 and HE 18 17
September 26, 2010, HE 11 22
October 15, 2010, HE 19 25
Overall Assessment of High Price Hours 27

2.2 Analysis of Low Price hours 28

3. Anomalous Uplift 32

Chapter 3: Matters to Report in the Ontario Electricity Marketplace 34

1. Introduction 34

2. Changes Related to Issues Discussed in the Panel's Previous Reports 35

2.1 Market Rule Amendments Relating to Constrained-Off CMSC Payments to Dispatchable Loads 35

2.2 Increased Surplus Baseload Generation and the IESO's Coding Practice when Curtailing Intertie Transactions 36
2.2.1 Introduction 36
2.2.2 History of SBG Events in Ontario 38
2.2.3 Forecasts for Ontario SBG Events 40
2.2.4 Control Actions During SBG Events 43
2.2.5 Import Curtailment History 47
2.2.6 Assessment 48

2.3 New Procedure Relating to the Release of Transmission Service 63

2.4 IESO's Actions to Prevent Transmission Lines from Becoming Overloaded 65

2.5 Loop Flow and the Status of the Phase Angle Regulators (PARs) at the Michigan Interface 66

3. New Matters 67

3.1 Treatment of Transfer Capability Reductions Outside of Ontario 67

3.2 Increased Trading Activity and CMSC Payments in the Northwest Region 70
3.2.1 Introduction 70
3.2.2 Cost of Congestion 74

3.2.3 Trading Activity at the Manitoba Interface 77
3.2.4 Subsidization to Northwest Participants and the Implications on Market Efficiency 78
3.2.5 Assessment 85
3.3 Inefficient Stops and Starts Under the IESO's Generation Cost Guarantee Program 86
3.3.1 Introduction 86
3.3.2 Costs to Loads 88
3.3.3 Short-Term Shutdowns and Restarts 89
3.3.4 Market Efficiency Losses 91
3.3.5 Incentives for Generators to Engage in Short-Term Shutdowns and Restarts 93
3.3.6 Conclusion 95
Chapter 3 Appendix 1: Efficiency Estimation of Multiple Shutdowns 97
Chapter 3 Appendix 2: Simulated CMSC Payments during Export/Import Curtailments 103
Chapter 4: The State of the IESO-Administered Markets 108
1. General Assessment 108
2. Unintended Consequences Caused by the Two-Sequence Market Structure in Ontario 108
3. Ontario's Long-Term Energy Plan 110
4. Implementation of Panel Recommendations from Previous Report 112
4.1 Recommendations to IESO 112
5. Implementation of Panel Recommendations from Other Reports 114
6. Summary of Recommendations 115
6.1 Price Fidelity 115
6.2 Dispatch 115
6.3 Hourly Uplift Payments 116

List of Tables

Table 2-1: Number of Hours with a High HOEP May to October 2007-2010, (Number of Hours) 7
Table 2-2: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports June 28, 2010, HE 11 ($/MWh and MW) 9
Table 2-3: Real-time MCP and Fuel Type of Price Setting Resource June 28, 2010, HE 11 ($/MWh) 11
Table 2-4: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports July 7, 2010, HE 10 ($/MWh and MW) 12
Table 2-5: Prices, Ontario Demand and Imports / Exports July 7, 2010, HE 10 ($/MWh and MW) 13
Table 2-6: Real-time MCP and Fuel Type of Price Setting Resource July 7, 2010, HE 10 ($/MWh) 14
Table 2-7: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports July 19, 2010, HE 15 ($/MWh and MW) 16
Table 2-8: Real-time MCP and Fuel Type of Price Setting Resource July 19 2010, HE 15 ($/MWh) 17
Table 2-9: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports July 27, 2010, HE 16–18 ($/MWh and MW) 19
Table 2-10: Real-time MCP and Fuel Type of Price Setting Resource July 27, 2010, \| HE 16–18 ($/MWh) 21
Table 2-11: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports September 26, 2010, HE 11 ($/MWh and MW) 23
Table 2-12: Real-time MCP and Fuel Type of Price Setting Resource September 26, 2010, HE 11 ($/MWh) 24
Table 2-13: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports October 15, 2010, HE 19 ($/MWh and MW) 26
Table 2-14: Real-time MCP and Fuel Type of Price Setting Resource October 15, 2010, HE 19 ($/MWh) 27
Table 2-15: Number of Hours with Low and Negative HOEPs May to October, 2007 – 2010 (Number of Hours and %) 29
Table 2-16: Low-Priced Supply During Low-Priced Hours May to October, 2010 (MW) 30
Table 2-17: Demand and Excess Low-Priced Supply During Low-Priced Hours May – October 2010 (MW) 30
Table 2-18: Average Monthly Summary Data for Low-Priced Hours May to October, 2010 ($/MWh and MW) 31
Table 3-1: IESO Surplus Baseload Generation Control Actions, Applicable Codes, and Impact on the HOEP 47
Table 3-2: HOEP, MISO Prices, Average Imports, and Export Congestion During Surplus Baseload Generation Events in December 2008 to October 2010 For HE 1-6 and 23-24 when MISO Interties are in Service ($/MWh, MW and Number of Hours) 51
Table 3-3: MCP, Ontario Demand and Net Exports September 4 HE 24 and September 5 HE 1 ($/MWh and MW) 53
Table 3-4: PD Price, Ontario Demand and Exports / Imports September 5, 2010, HE 1 ($/MWh and MW) 54
Table 3-5: Actual and Simulated MCP and HOEP Resulting from IESO Coding of Import Curtailments September 5, 2010 HE 1 (MW and $/MWh) 56
Table 3-6: Price Impact of ADQh Coding in Surplus Baseload Generation Hours January to October 2010 (MW and $/MWh) 58
Table 3-7: Imports and Exports at Manitoba Interface September to August, 2006 - 2010 (GWh) 64
Table 3-8: Revenues, Payments and Average Realized Price by Participant Type May to October, 2009-2010 (GWh and $/MWh) 71
Table 3-9: Annual CMSC Payments May 2002 to October 2010 ($ Millions; Excluding Dispatchable Loads) 76
Table 3-10: Constrained-off Imports and Constrained-on Exports at Manitoba Interface September 2002 to August 2010 (GWh) 78
Table 3-11: Inefficient Imports at the Manitoba Interface January 2009 to October 2010 (MWh and $1 000) 80

Table 3-12: Subsidies to Traders Moving Power In and Out of Ontario or between External Markets At Manitoba and Minnesota Interfaces January 2009 to October 2010 ($000) 84
Table 3-13: Submitted Start-up Costs and CMSC Payments to Generators For Shutting Down and Restarting within Two Hours Under the Generator Cost Guarantee Program May to October 2010 (Number of Events and $ millions) 89
Table 3-14: Estimated Efficiency Loss due to Generators Shutting Down and Restarting Within Two Hours or Less Under the Generator Cost Guarantee Program May to October 2010 (Number of Events and $ millions) 92
Table 3-XX: Monthly Constrained on CMSC Payments Resulting from Generator Shutdowns May 2009 – October 2010 ($1 000) 94
Appendix Table 3-1: Actual and Simulated Market Clearing Price and HOEP for Export Curtailment Using ADQh January 18, 2010 HE 10 104
Appendix Table 3-2: Actual and Simulated CMSC During an Hour with Export Curtailment January 18, 2010 HE 10 ($) 105
Appendix Table 3-3: Actual and Simulated CMSC During an Hour with Import Curtailment September 5, 2010 HE 1 ($) 106
Table 4-1: Summary of IESO Responses to Recommendations in the Panel's August 2010 Monitoring Report 113

List of Figures

Figure 2-1 – Real-time Energy Offer Curve June 28, 2010, HE 11 ($/MWh) 10
Figure 3-1: Number of Hours with Surplus Baseload Generation by Month July 2008 – October 2010 (Hours per Month) 39
Figure 3-2: IESO Projection of Number of Hours with Surplus Baseload Generation Prepared in 2008 for the Integrated Power System Plan, 2010 to 2020 (Hours per Year) 41
Figure 3-3: IESO Forecast of Weekly Minimum Demand and Baseload Generation Prepared in November 2010 for December 2010 to May 2012 (MW) 42
Figure 3-4: Surplus Baseload Generation Events, Nuclear Reductions and Import Curtailments July 2008 to October 2010 (Hours per Month) 48
Figure 3-5: Import Curtailment (Unconstrained Sequence) and Differences Between HOEP and Pre-dispatch MCP during Surplus Baseload Generation Events July 2008 to October 2010 ($/MWh and MW) 50
Figure 3-6: Duration Curve of Median Generator Nodal Price in the Northwest Region November 2009 to October 2010 (% of intervals) 82
Figure 3-7: An Example of Multiple Starts at One Generation Unit (MW per interval) 90
Figure 3-8: Duration Curve of Shutdown Hours at All Generators Under the Generation Cost Guarantee Program May to October 2010 (% of shutdown hours) 91

Executive Summary

This summer 2010 report represents an abbreviated report and does not include the detailed overview of market outcomes historically published in Chapter 1 or a Statistical Appendix. A detailed Chapter 1 and a Statistical Appendix will be published in the comprehensive winter 2010/2011 report.

Overall Assessment

Ontario's IESO-administered wholesale electricity market has operated reasonably well according to the hybrid design set for it over the summer period, May 2010 to October 2010, although there were occasions where actions by market participants or the IESO led to inefficient outcomes. In addition, the Panel continues to identify areas for improvement in the market design. In particular, the Panel has observed numerous complications associated with the two-sequence market structure that have undermined efficiency or increased costs to load with little or no apparent benefit. To this end, the Panel has recommended that the IESO work with stakeholders to examine the feasibility of evolving beyond the two-sequence market structure.

The Market Surveillance Panel (MSP or Panel) did not find an abuse of market power to have occurred in this period. However, an investigation undertaken at the request of a market participant is proceeding and the Panel will report on the outcome of this investigation when it is completed.

The MSP initiated a formal gaming investigation in this period associated with congestion management settlement credit (CMSC) payments. This investigation is ongoing and the Panel will report on the outcome of this enquiry when it is completed.

Demand and Supply Conditions

Ontario Demand totalled 71.5 TWh this summer, up by 4.3 TWh (6.4 percent) compared to the same period last summer. There were increases in demand in every month, relative to the prior year, with the exception of October where there was a small decline of 1.8 percent. Warm weather was an important factor leading to higher demand this summer.

During the period May to October 2010 there was one significant addition to Ontario's generation supply as well as a reduction in coal-fired generation. The Halton Hills generating station, a 632 MW combined-cycle facility located in Halton Hills, Ontario, became dispatchable beginning September 1, 2010 after commissioning since late April 2010. In response to the Ontario Government's requirement that coal-fired generation be phased out by 2014, Ontario Power Generation (OPG) closed down four coal-fired units totalling approximately 2,000 MW of generation capacity in October 2010. These four units represented a reduction to Ontario's supply capacity of approximately 5 percent and a 31 percent reduction in the coal-fired generating capacity in Ontario.

Market Prices and the Global Adjustment

The average Hourly Ontario Energy Price (HOEP) was $39.45/MWh during the recent summer period, representing an increase of 62.5 percent from $24.28/MWh last summer. The higher HOEP was primarily attributable to higher Ontario demand and lower hydroelectric supply during the recent summer period. The highest monthly average HOEP occurred in July 2010 at $50.83/MWh representing the first time the average HOEP exceeded $50.00/MWh since January 2009 ($53.22/MWh).

Although the HOEP increased significantly during this period, the price including the Global Adjustment increased only slightly from $63.05/MWh last summer to $63.98/MWh (1.5 percent) this summer. The Global Adjustment, which averaged $24.53/MWh, exceeded the average HOEP in only one month during this sixth month, summer reporting period (October).

Market Outcomes

There were seven hours in the summer period in which the HOEP exceeded $200/MWh. All instances were consistent with normal supply/demand variation when at least one of the following occurred:

- real-time demand was higher than the pre-dispatch forecast of demand;
- one or more imports failed during real-time; and/or
- one or more generating units available in pre-dispatch become unavailable in real-time as a result of a forced outage or derating.

Over the current reporting period, there were 22 five-minute intervals when the market clearing price (MCP) was set by hydroelectric units at offer prices above $500/MWh, which is approximately the same as the same period last year. However, there was a noticeable increase in the proportion of energy offers above $500/MWh relative to total offers from peaking hydro resources since May 2008 as well as an increase in submitted offers between $400/MWh and $500/MWh from these same facilities. The Panel has asked the MAU to continue to monitor and report on trends in the frequency of high-priced hydro offers that set the real-time MCP.

The number of hours when the HOEP was negative decreased substantially this summer. There were 19 negative-priced hours this summer, which is down from 121 hours last summer (an 84 percent decline). All negative-priced hours this period occurred in September and October.

In the last report, the Panel reported that a change in offer strategy at a nuclear facility led to the lower observed MCPs in April 2010. The impact of the change continued to result in some intervals with MCPs below - $100/MWh over the recent summer period although the frequency of these low MCPs was small. Over the six-month period, there were 28 intervals when the MCP fell below -$100/MWh where nuclear resources were most often

marginal. Individual interval MCP reached a record low of -$128.30/MWh in HE 7 on June 9, 2010, which surpassed the previous record low MCP by $0.15/MWh.

Matters to Report in the Ontario Electricity Marketplace

Market Rule Changes

The IESO implemented an urgent rule amendment on August 27, 2010, temporarily suspending all constrained-off CMSC payments to dispatchable loads in order to address a problem identified by the Panel and discussed in its August 2010 report. On December 3, 2010, the IESO replaced the urgent rule amendment with a new rule amendment, which was designed to eliminate CMSC payments to dispatchable-loads for self-induced ramping. Contrary to the Panel's recommendation, the IESO did not implement a rule change to eliminate CMSC payments to dispatchable loads that were induced by consumption deviation. The IESO believed these payments could largely be recovered through existing authorized processes or would otherwise be significantly limited by a separate rule change implemented on December 3, 2010 that limited the magnitude of constrained on CMSC payments to exports and dispatchable loads.
The Panel has requested that the MAU assess and report on the efficacy of the rules in achieving their intended function.

Surplus Baseload Generation (SBG)

Surplus baseload generation is a condition where market actions, or actions that are required for reliability, regulatory, safety or equipment concerns, require the reduction of imports and/or generation that results in the manoeuvre of nuclear units or the loss of fuel for a generator that is reduced (e.g. hydroelectric spill). In Ontario an SBG event refers to the supply and demand situation in the constrained sequence only. The constrained sequence reflects the actual system conditions and takes into account various transmission limitations within the province and at the interties. In Ontario, an SBG event may not necessarily translate into a low or negative market price. That is because

the market price is calculated using the unconstrained sequence, which ignores internal and to a large extent actual intertie transmission capabilities. In fact, the market price during many SBG hours is often much greater than $0/MWh. This counter-intuitive pricing is caused primarily by fundamental differences between the two sequences as well as by IESO control actions taken to manage SBG conditions.

One action frequently taken to address SBG conditions is to curtail imports. The Panel believes that this control action should be reflected in the constrained sequence only but not in the unconstrained sequence. Curtailing imports is an out-of-market action and removing the imports from the unconstrained sequence tends to increase the market price during the SBG events. This is counter-intuitive, sends an incorrect signal to the marketplace and may increase the IESO's need to resort to additional out-of-market mechanisms to deal with SBG in future hours. The Panel therefore recommends that the IESO eliminate the impact of import curtailments on the unconstrained market schedule.

New Procedure Relating to the Release of Transmission Service

All intertie transactions require obtaining transmission service in both or multiple markets associated with the transaction. A failure to obtain transmission service in one jurisdiction results in intertie transaction failure on the side where the trader has obtained the transmission service.

One reason for intertie transaction failures has been that market scheduling occurred too late in Ontario to allow traders to obtain necessary transmission service in MISO (including Manitoba). To address the issue, the IESO implemented a new procedure on September 8, 2009, providing traders with additional time to arrange transmission service outside of Ontario. Since the implementation of the new procedure, exports by market participants other than Manitoba Hydro have increased significantly, from almost no exports historically to 150 GWh (approximately 68% of all exports on the Manitoba intertie) for the period September 2009 to August 2010. The Panel believes that this is a positive development.

Treatment of Transfer Capability Reductions outside of Ontario

On July 13-15, 2010 there was a transfer capability reduction[1] in Manitoba, which prevented any power from flowing between Ontario and MISO on the Ontario-Manitoba intertie. However, two market participants still offered or bid at the Manitoba interface, as permitted under the current market rules. In two days, Ontario loads paid $163,000 in uplift to two traders for constrained-off imports at the Manitoba interface even though the imports could not possibly have flowed. The Panel is currently assessing the behaviour of these market participants.

The Panel recognizes there are challenges in dealing with external transmission outages/deratings under the current market design. A locational pricing system could be very useful in addressing such issues. In the absence of such a market design, the Panel recommends that the IESO should not make CMSC payments where there are transmission capability reduction outside Ontario that prohibits power flow out of or into Ontario.

Unintended Consequences Caused by the Two-Sequence Market Structure in Ontario

In this report the Panel continues its investigation of market operation in the Ontario Northwest.

The Panel has repeatedly noted the large CMSC payments made to the region, amounts that are far out of proportion for an area which accounts for only a small portion of Ontario generation and load. Cumulative net CMSC payments to dispatchable resources (excluding dispatchable loads) since the start of the market amount to approximately $1.1 billion, of which roughly one-third (or $360 million) was paid to generators and intertie traders in the Northwest area. Of the $360 million in CMSC payments:

- $161 million were paid for not producing,

[1] An outage could result because the transmission line is totally out of service. On other occasions the transfer limit may be reduced to 0 MW because of system reliability.

- $146 million were paid for not importing, and
- $53 million were paid for constrained-on exports / imports / generation.

Many of the outcomes in the Northwest are associated with the two-sequence market design. This design has fundamental defects which are exacerbated by the nature of the surplus supply in the Ontario Northwest area and its limited connections to other areas. Based on additional investigation in this report, the Panel again concludes that Ontario loads receive little or no benefit for the constrained-off payments that they fund through uplift charges. These constrained-off payments neither help to relieve transmission congestion, nor provide accurate price signals to the marketplace.

In this report, as with previous reports, the Panel has recommended that CMSC payments be reduced or eliminated where they do not contribute to market efficiency. Stepping back and looking at the two-sequence structure in Ontario, it is clear that the majority of issues identified by the Panel since the market was established have dealt with inefficiencies introduced by the two-sequence market structure. In addition, the existing two-sequence structure is a barrier to allowing market participants' access to increased efficiencies available to other markets. For example, it causes complications in relation to potential movement to a day-ahead market, broader regional market initiatives being undertaken by neighbouring areas, and efficient management of Ontario's changing supply mix as well as implications for SBG and efficient imports and exports.

The Panel believes that, with the IESO embarking on a "market road map" process, now is the appropriate time to consider replacing the existing two-sequence market structure.

Inefficient Stops and Starts Under the IESO's Generation Cost Guarantee Program

During the most recent monitoring period, the MAU observed that some generation facilities synchronize and operate for their minimum run time, shut down for a short period of time (at times for as little as half an hour), and then resynchronize for another run. This creates higher costs to Ontario loads because the cost of shutting down a

generation facility only to restart that facility several intervals later typically exceeds what it would have cost to keep that same facility online. During the summer period, the MAU observed 426 instances where generators operating under a guarantee went offline, only to restart again within two hours. For the summer 2010 period, the total efficiency loss due to these multiple re-starts was estimated to be $19 million. Nearly all of the efficiency loss was borne by consumers through uplift charges. The Panel also found that approximately 98% of the efficiency loss was associated with two market participants.

The Panel recommends that the IESO amend the Generation Cost Guarantee program to limit generators to one start-up cost guarantee submission per day unless the IESO requests a second start during a day, and re-examine whether the real-time GCG program continues to provide a net benefit to the Ontario market once the Enhanced Day-Ahead Commitment (EDAC) process is implemented.

Ontario's Long-Term Energy Plan

On November 23, 2010 the Ontario Government released its long term energy plan *Building our Clean Energy Future* (the Energy Plan). The Energy Plan represented the first significant update to the Province's long-term energy policy since the release of the OPA's 2007 Integrated Power System Plan. Under the Energy Plan the government has detailed at a high level its investment plans over the next 20 years.

The Plan reflects the changing demand and supply picture of the province anticipated over the next 20 years, change that is significantly influenced by policy initiatives. Demand is anticipated to recover from recessionary levels and be supplied by a fuel mix made up of refurbished nuclear, new nuclear, gas-fired supply and large investments in renewable energy dominated by increased wind, solar and biomass supply as well as increasing combined heat and power developments.

Prices for industrial consumers are forecast to rise by 2.7 percent per year, or 70 percent cumulatively (on a nominal basis) over the next 20 years. Prices for residential consumers, small businesses and farms are expected to double over the next 20 years (a

growth rate of 3.5 percent per year), although almost half of this price increase is expected to be fully realized within the first 5 years (a growth rate of 7.9 percent per year). To reduce the impact of these price increases, the government has introduced a 10 percent rebate for Ontario residential, small business and farm consumers paid for outside of electricity rates.

The electricity consumers in Ontario must pay for these changes in electricity infrastructure and so must also benefit from these investments. In order to achieve long term benefit, the market structure and underlying contracts or rate regulation mechanisms are of paramount importance. The Panel believes that price fidelity of the market can be improved through fundamental redesign and that all contracts or rate regulation structures should include price responsiveness measures to efficiently operate within the planned marketplace.

Recommendations

The Panel has made four recommendations: one related to price fidelity, one related to dispatch and two related to hourly uplift payments. All recommendations are addressed to the IESO.

Price Fidelity

The Panel regards price fidelity as being of fundamental importance to the efficient operation of the market.

Recommendation 3-1 (Chapter 3, Section 2.2.6)

The IESO should not remove imports curtailed to address SBG conditions from the unconstrained market schedule. This could be accomplished by changing how the ADQh code operates with respect to the market schedule.

Hourly Uplift Payments

The Panel examines hourly uplift payments both in respect of their contribution to the effective price and also their impact on the efficient operation of the market.

Recommendation 3-2 (Chapter 3, Section 3.1)

Where there are transfer capability reductions outside Ontario that prohibit power flow out of or into Ontario, the IESO should not make CMSC payments. Possible methods might include but not limited to: removing the related offers/bids, reducing intertie transfer capability to zero, or establishing a mechanism for clawback of the CMSC payments.

Recommendation 3-3 (Chapter 3, Section 3.2.5)

As part of its "market road map" process, the IESO should work with stakeholders to examine the feasibility of replacing the two-sequence design with locational pricing, variable pricing for dispatchable resources or other alternatives.

Dispatch

Efficient dispatch is one of the primary objectives to be achieved from the operation of a wholesale market.

Recommendation 3-4 (Chapter 3, Section 3.3)

(i) ***The IESO should resume work on Stakeholder Engagement 84 regarding elimination of self-induced CMSC payments for ramping down generators and should amend the Generation Cost Guarantee program to ensure that all guaranteed costs are considered as part of the dispatch optimization.***

(ii) ***On an interim basis until after-the-fact start-up cost submissions are capped by generator offer prices and CMSC payments to ramping down generators are eliminated, the IESO should amend the Generation Cost Guarantee***

program to limit generators to one start-up cost guarantee submission per day unless the IESO requests a second start during a day.

(iii) ***The IESO should re-examine whether the GCG program continues to provide a net benefit to the Ontario market once the Enhanced Day-Ahead Commitment (EDAC) process is implemented or as part of its "Market Roadmap" process.***

Page Left Blank Intentionally

Chapter 1: Market Outcomes May - October 2010

1. Highlights of Market Indicators

This Chapter provides a brief summary of the results for the IESO-administered markets over the period May 1, 2010 to October 31, 2010, with comparisons to the same period one year earlier. For ease of reference, the May to October period is referred to as the 'summer period'.[2]

1.1 Pricing

The average Hourly Ontario Energy Price (HOEP) was $39.45/MWh during the recent summer period, representing an increase of 62.5 percent from $24.28/MWh last summer. The lowest monthly average HOEP occurred in October 2010 at $29.39/MWh. With the exception of October 2010, the average monthly HOEP did not fall below $30.00/MWh in any month this summer while never exceeding that price in any month last summer. The highest monthly average HOEP occurred in July 2010 at $50.83/MWh representing the first time the average HOEP exceeded $50.00/MWh since January 2009 ($53.22/MWh).

Although the HOEP increased significantly during this period, the effective prices, which include the Global Adjustment (GA), increased only slightly to $63.98/MWh this summer from $63.05/MWh last summer (or a 1.5 percent increase). The GA, which averaged $24.53/MWh, exceeded the average HOEP in only one month this summer (October) and accounted for 38 percent of total effective price.

[2] Beginning in 2009, the Panel adopted a streamlined format for its summer semi-annual report. More detailed analysis of market outcomes will be provided in the report for the period ending October, 2011.

1.2 Demand

Ontario Demand totalled 71.5 TWh this summer, up by 4.3 TWh (6.4 percent) compared to the same period last summer. There were increases in demand in every month, relative to the prior year, with the exception of October where there was a small decline of 1.8 percent. The largest monthly percentage increases occurred in July and May 2010 at 17.8 and 8.6 percent above the prior year, respectively. Warm weather was an important factor leading to higher demand this summer.

1.3 Supply

There was one significant addition to Ontario's generation supply as well as a reduction in coal-fired generation between May and October 2010. The Halton Hills generating station, a 632 MW combined-cycle facility located in Halton Hills, Ontario, became dispatchable beginning September 1, 2010 after commissioning since late April 2010. In response to the Ontario Government's requirement that coal-fired generation be phased out by 2014, Ontario Power Generation (OPG) closed down four coal-fired units (two Nanticoke and two Lambton units), totalling approximately 2,000 MW of generation capacity in October 2010. These four units represented a reduction to Ontario's supply capacity of approximately 5 percent and a 31 percent reduction in the coal-fired generating capacity in Ontario.

1.4 Imports and Exports

Net exports totalled 3.6 TWh this summer, which is 1.4 TWh (28 percent) lower than last summer.

Exports (excluding linked wheel transactions) declined by 1.0 TWh (11.9 percent) to 7.4 TWh. The largest monthly declines in exports occurred in May and June as exports fell 49.8 percent and 32.1 percent respectively. Approximately 40 percent of exports occurred at the Quebec interties followed closely by the Michigan interties at 37 percent.

Imports (excluding linked wheel transactions) increased slightly from 3.4 TWh last summer to 3.7 TWh this summer, an increase of 0.3 TWh (8.8 percent). Off-peak hours accounted for 54 percent of the total flows, with 50 percent of total import volumes occurring at the Michigan intertie.

Page Left Blank Intentionally

Chapter 2: Analysis of Market Outcomes

1. Introduction

The Market Assessment Unit (MAU), under the direction of the Market Surveillance Panel (MSP), monitors the market for anomalous events and behaviour. Anomalous behaviours are actions by market participants or the IESO that may lead to market outcomes that fall outside of the predicted patterns or norms.

The MAU monitors and reports to the Panel both high and low-priced hours as well as other events that appear anomalous given the circumstances. The Panel believes that an explanation of these events provides transparency with respect to why certain outcomes occurred in the market, leading to learning by all market participants. As a result of this monitoring, the MSP may recommend changes to Market Rules or the IESO dispatch tools and procedures that the IESO employs.

The MAU reviews the previous day's operation and market outcomes on a daily basis, not only to discern anomalous events but also to review:

- changes in offer and bid strategies – both price and volume;
- the impact of forced and extended planned outages;
- import/export arbitrage opportunities as well as the behaviour of traders;
- the appropriateness of uplift payments;
- the application of IESO procedures; and
- the relationship between market outcomes in Ontario and neighbouring markets.

The daily review process is an important part of market monitoring. Identification of anomalous events may lead to discussion with the relevant market participants and/or the IESO. Certain events may trigger more detailed examinations or formal investigations if the event pertains to potential abuse of market power, gaming or efficiency issues,

The Panel defines high-priced hours as all hours in which the HOEP is greater than $200/MWh and low-priced hours as all hours in which the HOEP is less than $20/MWh,[3] including negative-priced hours.

There were seven hours during the latest six-month review period, May through October 2010, where the HOEP was greater than $200/MWh. Section 2.1 of this Chapter summarizes these events and factors contributing to the relatively high HOEPs.

Between May and October 2010, there were 361 hours in which the HOEP was less than $20/MWh, including 19 hours where the HOEP was negative. Section 2.2 of this Chapter reviews the factors typically driving prices to low levels in these hours.

In the January 2009 Monitoring Report, the Panel refined the indicators of anomalous uplift as payments in excess of $500,000/hour for Congestion Management Settlement Credits (CMSC) or Intertie Offer Guarantees (IOG) and $100,000/hour for OR payments. Daily payments of $1,000,000 for CMSC or IOG in the intertie zones are also considered anomalous.[4] During May to October 2010, there were no hours meeting the above criteria related to anomalous uplift events.

2. Anomalous HOEP

2.1 Analysis of High Price Hours

The MAU reviews all hours where the HOEP exceeds $200/MWh. The objective of this review is to understand the underlying causes that led to these high prices. More importantly, it serves the purpose of determining whether further analysis of the design or operation of the market or market participant conduct is warranted.

[3] Depending on fuel prices, $200/MWh is roughly an upper bound for the cost of a fossil generation unit while $20/MWh is an approximate lower bound for the cost of a fossil unit.
[4] See the Panel's January 2009 Monitoring Report, pp. 178-184.

Table 2-1 depicts the total number of hours per month where HOEP exceeded $200/MWh for the last four summer periods.

Table 2-1: Number of Hours with a High HOEP May to October 2007-2010, (Number of Hours)

	Number of Hours with HOEP >$200/MWh			
	2007	**2008**	**2009**	**2010**
May	0	0	0	0
June	2	4	0	1
July	1	3	0	4
August	0	2	4	0
September	0	5	0	1
October	1	3	2	1
Total	4	17	6	7

In previous reports, the Panel has noted that a HOEP greater than $200/MWh typically occurs during hours when at least one of the following occurs:

- real-time demand is much higher than the pre-dispatch forecast of demand;
- one or more imports fail during real-time; and/or
- one or more generating units that appear to be available in pre-dispatch become unavailable in real-time as a result of a forced outage or derating.

In addition, a significant increase in net exports in the unconstrained sequence from one hour to the next can place additional upward pressure on the market clearing price (MCP) in the first few intervals, thereby increasing the HOEP for that hour. Spikes in the MCP in the first few intervals of an hour in which net exports increase became more pronounced after the assumed ramp rate in the unconstrained sequence was reduced from 12 to three in September 2007. The change in the assumed ramp rate removed some of the fictitious energy supply that the unconstrained sequence had perceived to be 'available' to meet increased export demand at the beginning of the hour. This led to higher MCPs in the first intervals of hours in which net exports were increasing.[5]

[5] For more details, see the Panel's July 2008 Monitoring Report, pp. 134-140.

Each of the factors discussed above has the effect of tightening the real-time supply cushion relative to the pre-dispatch supply cushion. Spikes in the HOEP above $200/MWh are most likely to occur when one or more of the factors listed above cause the real-time supply cushion to fall below 10 percent.[6]

June 28, 2010 HE 11

On June 28, 2010 HE 11, the HOEP was $314.84/MWh. Factors that contributed to the price spike included demand under-forecast, wind output less than forecast, and numerous generator outages leading to relatively tight real-time supply conditions.

Prices and Demand

Table 2-2 lists the real-time and pre-dispatch information for HE 11 on June 28, 2010. The MCP reached a high of $509.17/MWh in intervals 10 and 11 and was above $400/MWh in five other intervals. On average, real-time demand came in 444 MW heavier than the forecast in pre-dispatch while there was 100 MW of import failure in HE 11.

[6] The Panel's March 2003 Monitoring Report, pp. 11-16 noted that a supply cushion lower than 10 percent was more likely to be associated with a price spike. The Panel began reporting a revised supply cushion calculation in its July 2007 Monitoring Report, pp. 79-81. It remains the case that when the supply cushion is below 10 percent, a price spike becomes increasingly likely.

Table 2-2: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
June 28, 2010, HE 11
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
11	**1**	53.37	117.12	63.75	19,954	20,114	160	1,564	1,664	100
11	**2**	53.37	119.36	65.99	19,954	20,171	217	1,564	1,664	100
11	**3**	53.37	140.00	86.63	19,954	20,176	222	1,564	1,664	100
11	**4**	53.37	415.13	361.76	19,954	20,327	373	1,564	1,664	100
11	**5**	53.37	174.34	120.97	19,954	20,366	412	1,564	1,664	100
11	**6**	53.37	415.13	361.76	19,954	20,441	487	1,564	1,664	100
11	**7**	53.37	415.13	361.76	19,954	20,503	549	1,564	1,664	100
11	**8**	53.37	415.13	361.76	19,954	20,555	601	1,564	1,664	100
11	**9**	53.37	415.13	361.76	19,954	20,553	599	1,564	1,664	100
11	**10**	53.37	509.17	455.8	19,954	20,588	634	1,564	1,664	100
11	**11**	53.37	509.17	455.8	19,954	20,606	652	1,564	1,664	100
11	**12**	53.37	133.32	79.95	19,954	20,379	425	1,564	1,664	100
Average		**53.37**	**314.84**	**261.47**	**19,954**	**20,398**	**444**	**1,564**	**1,664**	**100**

Assessment

The main factor leading to the high prices in HE 11 was the inaccuracy of the pre-dispatch demand forecast. The pre-dispatch forecast was 19,954 MW while the real-time average forecast was 444 MW (2.2 percent) higher at 20,398 MW. The largest pre-dispatch to real-time demand differences occurred in intervals 11 and 12 of HE 11 at 634 MW (3.2 percent) and 652 MW (3.3 percent) respectively, which coincided with the highest interval MCPs.

Self-scheduling generators produced 189 MW (12 percent) less than forecast in pre-dispatch with approximately half of the shortfall attributable to wind generators. In the one-hour ahead pre-dispatch run for HE 11, wind generators were scheduled to produce 267 MW. In real-time, these generators produced 180 MW, which is 87 MW (33 percent) less than anticipated.

Going into June 28, 2010, there were numerous generator outages including four fossil-fired units and three nuclear units either on planned or forced outage resulting in tight supply conditions. An additional fossil-fired unit was derated by 200 MW. In total there

was approximately 4,700 MW of unavailable generation capacity in HE 11 (13 percent of total domestic generation capacity). Figure 2-1 below illustrates the real-time generation supply curve in HE 11 on June 28, 2010 above 10,000 MW.[7]

Figure 2-1 – Real-time Energy Offer Curve
June 28, 2010, HE 11
($/MWh)

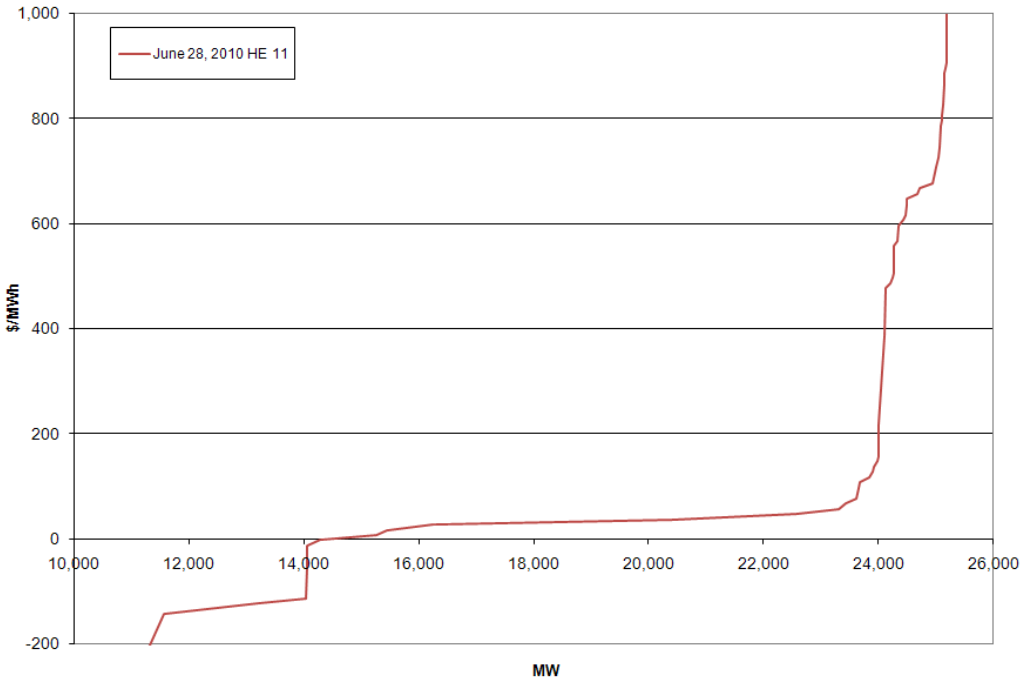


Table 2-3 shows that the real-time MCP was set by hydroelectric resources in all intervals of HE 11 on June 28, 2010, with 7 intervals being set at prices above $400/MWh.

[7] The energy offer curve includes all energy offers from generators, including those that provided operating reserve in HE 11.

Table 2-3: Real-time MCP and Fuel Type of Price Setting Resource
June 28, 2010, HE 11
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
11	**1**	117.12	Hydroelectric
11	**2**	119.36	Hydroelectric
11	**3**	140.00	Hydroelectric
11	**4**	415.13	Hydroelectric
11	**5**	174.34	Hydroelectric
11	**6**	415.13	Hydroelectric
11	**7**	415.13	Hydroelectric
11	**8**	415.13	Hydroelectric
11	**9**	415.13	Hydroelectric
11	**10**	509.17	Hydroelectric
11	**11**	509.17	Hydroelectric
11	**12**	133.32	Hydroelectric
Average		**314.84**	

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

July 7, 2010 HE 10

On July 7, 2010 HE 10, the HOEP was $272.47/MWh. Higher than projected demand, failed imports, and slightly less wind production in real-time all contributed to the price spike.

Prices and Demand

Table 2-4 lists the real-time and pre-dispatch information for HE 10 on July 7, 2010. The MCP in HE 10 gradually increased from $105.21/MWh in the first interval to $167.51/MWh in interval seven before noticeably increasing above $400/MWh in the remaining intervals of the hour. The peak MCP occurred during the final two intervals of HE 10 at $501.87/MWh.

Average Ontario Demand came in at 23,157 MW, which was 490 MW (2.2 percent) higher than the pre-dispatch forecast. The largest interval discrepancies occurred at the

end of HE 10 when the MCPs were highest. Ontario demand was 840 MW (3.7 percent) higher than pre-dispatch demand in the final interval of HE 10.

An increase of 311 MW (75 percent) in net exports during the hour placed additional pressure on the real-time HOEP. The increase in net exports was attributable to 311 MW of failed imports at the Michigan interface. The 311 MW of failed imports resulted from a 200 MW transaction that failed due to inability of a participant to acquire transmission service in the external jurisdiction and a 111 MW transaction that was curtailed due to external conditions in MISO.

Table 2-4: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
July 7, 2010, HE 10
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
10	**1**	64.33	105.21	40.88	22,667	22,699	32	415	726	311
10	**2**	64.33	111.64	47.31	22,667	22,780	113	415	726	311
10	**3**	64.33	121.54	57.21	22,667	22,850	183	415	726	311
10	**4**	64.33	135.05	70.72	22,667	22,987	320	415	726	311
10	**5**	64.33	135.05	70.72	22,667	23,012	345	415	726	311
10	**6**	64.33	161.27	96.94	22,667	23,098	431	415	726	311
10	**7**	64.33	167.51	103.18	22,667	23,233	566	415	726	311
10	**8**	64.33	415.13	350.80	22,667	23,386	719	415	726	311
10	**9**	64.33	415.13	350.80	22,667	23,404	737	415	726	311
10	**10**	64.33	498.42	434.09	22,667	23,430	763	415	726	311
10	**11**	64.33	501.87	437.54	22,667	23,497	830	415	726	311
10	**12**	64.33	501.87	437.54	22,667	23,507	840	415	726	311
Average		**64.33**	**272.47**	**208.14**	**22,667**	**23,157**	**490**	**415**	**726**	**311**

Although less significant in magnitude, lower real-time wind and self-schedule production relative to submitted forecasts also placed additional upward pressure on the HOEP. Self-scheduling and intermittent generators produced 94 MW (6.5 percent) less than the pre-dispatch forecast, of which wind generators produced 67 MW (82.7 percent) less in real-time relative to the pre-dispatch projections.

Assessment

The spike in HOEP in HE 10 on July 7, 2010 was largely a consequence of real-time demand exceeding the pre-dispatch forecast (490 MW) as well as 311 MW of failed imports. Table 2-5 below illustrates the successive changes in forecast demand and scheduled intertie transactions from the final Day-Ahead Commitment Process (DACP) run (19-hours ahead of real-time) up to the one-hour ahead pre-dispatch run. Pre-dispatch prices fluctuated between $47.48/MWh in the final DACP run and $64.33/MWh in the two hours prior to real-time.

Ontario Demand projections fluctuated between 22,603 MW (in the final DACP run) and 22,721 MW (5 hours ahead pre-dispatch run) and were all much less than real-time Ontario Demand of 23,157 MW. As mentioned above, the change in net exports was attributable to a decline in imports from 2,230 MW scheduled in the one-hour ahead pre-dispatch run to 1,919 MW in real-time.

Table 2-5: Prices, Ontario Demand and Imports / Exports
July 7, 2010, HE 10
($/MWh and MW)

Hours Ahead	PD Price ($/MWh)	Ontario Demand (MW)	Imports (MW)	Exports (MW)	Net Exports (MW)
DACP (19)	47.48	22,603	0	n/a	0
10	57.45	22,694	1,883	1,470	(413)
5	50.00	22,721	1276	1,470	194
4	49.56	22,704	1350	1,170	(180)
3	52.02	22,712	1378	1,495	117
2	64.33	22,662	2230	2,645	415
1	64.33	22,667	2230	2,645	415
Real-Time Average	272.47	23,157	1,919	2,645	726

Table 2-6 shows that the real-time MCP was set by hydroelectric resources in nine of the 12 intervals in HE 10 on July 7, 2010 while a gas-fired generator set the MCP in one interval and a dispatchable load set the MCP in two intervals.

Table 2-6: Real-time MCP and Fuel Type of Price Setting Resource
July 7, 2010, HE 10
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
10	**1**	105.21	Gas
10	**2**	111.64	Hydroelectric
10	**3**	121.54	Hydroelectric
10	**4**	135.05	Hydroelectric
10	**5**	135.05	Hydroelectric
10	**6**	161.27	Hydroelectric
10	**7**	167.51	Hydroelectric
10	**8**	415.13	Dispatchable Load
10	**9**	415.13	Dispatchable Load
10	**10**	498.42	Hydroelectric
10	**11**	501.87	Hydroelectric
10	**12**	501.87	Hydroelectric
Average		**272.47**	

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

July 19, 2010 HE 15

On July 19, 2010 HE 15, the HOEP was $218.74/MWh. Import curtailments at the beginning of the hour, demand under-forecast, and a number of deratings at fossil-fired generators all contributed to the high price in HE 15.

Prices and Demand

Table 2-7 presents pre-dispatch and real-time price and demand information for July 19, 2010, HE 15. The MCP spiked up to $485.13/MWh in the first two intervals of the hour before fluctuating between $236.47/MWh and $118.60/MWh for the remaining 10 intervals of the hour.

Real-time demand was higher in all intervals of HE 15 relative to the pre-dispatch forecast of 20,591 MW with the largest demand differences occurring in the last three intervals of the hour (peak difference of 619 MW or 3 percent in interval 11). .

The difference in net exports between pre-dispatch and real-time varied throughout the hour, which is a consequence of the 15-minute scheduling and evaluation of intertie transactions in the external markets.[8] Net exports increased by 132 MW in intervals one to three relative to the pre-dispatch schedule, which placed additional upward pressure on real-time prices. The increase in net exports was due to some import transactions scheduled at the Michigan and Minnesota interfaces that failed due to ramp limitations in the external market and was reflected in all intervals in HE 15. After interval three, net exports declined in real-time relative to pre-dispatch as 225 MW of exports scheduled at the New York interface were failed by the external ISO for security reasons. The quantity of the export failures to New York subsequently increased in intervals 10 to 12 by an additional 163 MW leading to overall declines in net exports of 256 MW occurring in the last quarter of the hour.

[8] The Panel previously recommended that a 15-minute dispatch algorithm would provide efficiency benefits to the Ontario market. See the Panel's December 2007 Monitoring Report, p. 160.

Table 2-7: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
July 19, 2010, HE 15
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
15	**1**	52.19	485.13	432.94	20,591	20,942	351	1,791	1,923	132
15	**2**	52.19	485.13	432.94	20,591	20,951	360	1,791	1,923	132
15	**3**	52.19	236.47	184.28	20,591	20,860	269	1,791	1,923	132
15	**4**	52.19	178.85	126.66	20,591	21,005	414	1,791	1,698	-93
15	**5**	52.19	224.56	172.37	20,591	21,069	478	1,791	1,698	-93
15	**6**	52.19	184.13	131.94	20,591	21,041	450	1,791	1,698	-93
15	**7**	52.19	125.35	73.16	20,591	21,009	418	1,791	1,698	-93
15	**8**	52.19	157.11	104.92	20,591	21,044	453	1,791	1,698	-93
15	**9**	52.19	125.34	73.15	20,591	21,010	419	1,791	1,698	-93
15	**10**	52.19	125.34	73.15	20,591	21,156	565	1,791	1,535	-256
15	**11**	52.19	178.85	126.66	20,591	21,210	619	1,791	1,535	-256
15	**12**	52.19	118.60	66.41	20,591	21,137	546	1,791	1,535	-256
Average		**52.19**	**218.74**	**166.55**	**20,591**	**21,036**	**445**	**1,791**	**1,714**	**-77**

Assessment

A series of forced deratings prior to real-time placed additional upward pressure on prices in HE 15. Three units at a fossil-fired generating station were in service commissioning over the afternoon hours of July 19, 2010. In real-time, the facility produced a combined 219 MW less than what was anticipated in pre-dispatch for HE 15, largely due to an outage of one of the gas-fired units and consequently the loss of output from the facility's steam unit due to the outage. Two additional fossil-fired generators were forced derated by a combined 195 MW over the hour due to fuel source issues. These deratings contributed to a real-time production loss of over 400 MW (1.9 percent of total Ontario Demand forecast in pre-dispatch) relative to the pre-dispatch schedule and were important factors leading to the high HOEP of $218.74/MWh in HE 15.

Table 2-8 shows that the real-time MCP was set by hydroelectric resources in all intervals of HE 15 on July 19, 2010 with the exception of interval 12, which was set by a gas-fired unit.

Table 2-8: Real-time MCP and Fuel Type of Price Setting Resource
July 19 2010, HE 15
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
15	**1**	485.13	Hydroelectric
15	**2**	485.13	Hydroelectric
15	**3**	236.47	Hydroelectric
15	**4**	178.85	Hydroelectric
15	**5**	224.56	Hydroelectric
15	**6**	184.13	Hydroelectric
15	**7**	125.35	Hydroelectric
15	**8**	157.11	Hydroelectric
15	**9**	125.34	Hydroelectric
15	**10**	125.34	Hydroelectric
15	**11**	178.85	Hydroelectric
15	**12**	118.60	Gas
Average		**218.74**	

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

July 27, 2010 HE 16 and HE 18

On July 27, 2010, the HOEP reached $492.89/MWh in HE 16 and $316.46/MWh in HE 18. Tight supply conditions were prevalent as numerous fossil and nuclear units were on forced outage. Ontario Demand was heavier in real-time than in pre-dispatch leading to the high prices in HE 16 while a forced outage to a fossil-fired unit late in HE 17 led to high prices in HE 18. Wind forecast error, especially in HE 18, also contributed to the high real-time prices.

Prices and Demand

Table 2-9 presents pre-dispatch and real-time price and demand information for July 27, 2010, HE 16 to HE 18. Although the HOEP in HE 17 did not exceed $200/MWh, it came close at $194.88/MWh.

The HOEP in HE 16 was $492.89/MWh. The MCPs in the hour fluctuated between $479.13/MWh and $571.80/MWh. The HOEP in HE 17 was $194.88/MWh and was above $200/MWh in seven of the 12 intervals, with the highest MCP occurring in interval 12 at $315.14/MWh. Finally, the HOEP in HE 18 was $316.46/MWh. MCPs in the hour were above $400/MWh during the first seven intervals of HE 18 before gradually declining to less than $110/MWh in the final three intervals.

Demand forecast error was a factor for the high prices in HE 16 and to a lesser extent in HE 17, but was not a factor for the high prices in HE 18. Real-time demand was higher than pre-dispatch demand in HE 16 by 515 MW (2.3 percent) with the highest interval demand difference of 577 MW (2.6 percent) in interval eight, which also coincided with the highest MCP in the hour at $571.80/MWh. Real-time Ontario Demand was between 443 MW and 577 MW higher than in pre-dispatch for all intervals of HE16.

At the beginning of HE 16, the demand forecast was increased for HE 17 to HE 22 by 300 MW as temperatures were higher than anticipated. Ontario demand was 126 MW (0.6 percent) higher in real-time compared to pre-dispatch for HE 17 with the largest interval difference of 198 MW (0.9 percent) in interval seven. By HE 18, real-time demand was lower than the pre-dispatch forecast by 75 MW (0.3 percent) at 22,052 MW.

Table 2-9: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
July 27, 2010, HE 16–18
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
16	**1**	73.00	479.13	406.13	22,002	22,461	459	833	883	50
16	**2**	73.00	479.13	406.13	22,002	22,445	443	833	883	50
16	**3**	73.00	479.13	406.13	22,002	22,481	479	833	883	50
16	**4**	73.00	479.13	406.13	22,002	22,512	510	833	883	50
16	**5**	73.00	498.00	425.00	22,002	22,536	534	833	883	50
16	**6**	73.00	479.13	406.13	22,002	22,468	466	833	883	50
16	**7**	73.00	479.13	406.13	22,002	22,509	507	833	883	50
16	**8**	73.00	571.80	498.80	22,002	22,579	577	833	883	50
16	**9**	73.00	497.00	424.00	22,002	22,554	552	833	883	50
16	**10**	73.00	497.00	424.00	22,002	22,561	559	833	883	50
16	**11**	73.00	497.00	424.00	22,002	22,566	564	833	883	50
16	**12**	73.00	479.13	406.13	22,002	22,537	535	833	883	50
Average		**73.00**	**492.89**	**419.89**	**22,002**	**22,517**	**515**	**833**	**883**	**50**
17	**1**	80.01	157.43	77.42	22,360	22,489	129	426	376	-50
17	**2**	80.01	187.13	107.12	22,360	22,500	140	426	376	-50
17	**3**	80.01	200.70	120.69	22,360	22,518	158	426	376	-50
17	**4**	80.01	157.43	77.42	22,360	22,441	81	426	376	-50
17	**5**	80.01	200.70	120.69	22,360	22,550	190	426	376	-50
17	**6**	80.01	200.70	120.69	22,360	22,513	153	426	376	-50
17	**7**	80.01	200.70	120.69	22,360	22,558	198	426	376	-50
17	**8**	80.01	200.70	120.69	22,360	22,511	151	426	376	-50
17	**9**	80.01	157.43	77.42	22,360	22,447	87	426	376	-50
17	**10**	80.01	200.70	120.69	22,360	22,503	143	426	376	-50
17	**11**	80.01	157.43	77.42	22,360	22,449	89	426	376	-50
17	**12**	80.01	315.14	235.13	22,360	22,351	-9	426	376	-50
Average		**80.01**	**194.68**	**114.67**	**22,360**	**22,486**	**126**	**426**	**376**	**-50**
18	**1**	75.31	501.80	426.49	22,127	22,261	134	486	286	-200
18	**2**	75.31	409.13	333.82	22,127	22,164	37	486	286	-200
18	**3**	75.31	497.31	422.00	22,127	22,178	51	486	286	-200
18	**4**	75.31	409.14	333.83	22,127	22,162	35	486	286	-200
18	**5**	75.31	409.13	333.82	22,127	22,070	-57	486	286	-200
18	**6**	75.31	409.13	333.82	22,127	22,100	-27	486	286	-200
18	**7**	75.31	409.13	333.82	22,127	22,089	-38	486	286	-200
18	**8**	75.31	315.13	239.82	22,127	22,049	-78	486	286	-200
18	**9**	75.31	125.46	50.15	22,127	21,927	-200	486	286	-200
18	**10**	75.31	110.00	34.69	22,127	21,905	-222	486	286	-200
18	**11**	75.31	101.09	25.78	22,127	21,834	-293	486	286	-200
18	**12**	75.31	101.09	25.78	22,127	21,879	-248	486	286	-200
Average		**75.31**	**316.46**	**241.15**	**22,127**	**22,052**	**-75**	**486**	**286**	**-200**

Assessment

One-hour ahead pre-dispatch prices were above $70/MWh for HE 16 to HE 18 on July 27, 2010 as supply conditions were relatively tight. Three nuclear units and four fossil units were forced out of service for a combined 3,700 MW of unavailable capacity (10 percent of total domestic generation capacity).

To further aggravate the tight supply situation, a gas-fired unit was forced out of service in interval 12 of HE 17 with a derate of the associated steam unit, leading to a loss of 350 MW in the unconstrained schedule in the final interval of HE 17 and all of HE 18. The immediate jump in MCP from $157.43/MWh in interval 11 to $315.14/MWh in interval 12 of HE 17 and the sustained high prices in HE 18 were in large part a result of this forced outage event.

Production of self-scheduling and intermittent (including wind) generators was also lower in real-time relative to pre-dispatch from HE 16 to HE 18. Real-time production was 105 MW (10.3 percent) lower in real-time in HE 16. The shortfall was more significant in HE 17 at 130 MW (12.7 percent) and 164 MW (15.4 percent) in HE 18, leading to additional upward pressure on real-time prices.

As shown in Table 2-10 below, the real-time MCP was set by hydroelectric resources in all intervals in HE 16, HE 17, and the first eight intervals of HE 18. Gas-fired units set the price in the remaining four intervals.

Table 2-10: Real-time MCP and Fuel Type of Price Setting Resource
July 27, 2010, HE 16–18
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
16	**1**	479.13	Hydroelectric
16	**2**	479.13	Hydroelectric
16	**3**	479.13	Hydroelectric
16	**4**	479.13	Hydroelectric
16	**5**	498.00	Hydroelectric
16	**6**	479.13	Hydroelectric
16	**7**	479.13	Hydroelectric
16	**8**	571.80	Hydroelectric
16	**9**	497.00	Hydroelectric
16	**10**	497.00	Hydroelectric
16	**11**	497.00	Hydroelectric
16	**12**	479.13	Hydroelectric
17	**1**	157.43	Hydroelectric
17	**2**	187.13	Hydroelectric
17	**3**	200.70	Hydroelectric
17	**4**	157.43	Hydroelectric
17	**5**	200.70	Hydroelectric
17	**6**	200.70	Hydroelectric
17	**7**	200.70	Hydroelectric
17	**8**	200.70	Hydroelectric
17	**9**	157.43	Hydroelectric
17	**10**	200.70	Hydroelectric
17	**11**	157.43	Hydroelectric
17	**12**	315.14	Hydroelectric
18	**1**	501.80	Hydroelectric
18	**2**	409.13	Hydroelectric
18	**3**	497.31	Hydroelectric
18	**4**	409.14	Hydroelectric
18	**5**	409.13	Hydroelectric
18	**6**	409.13	Hydroelectric
18	**7**	409.13	Hydroelectric
18	**8**	315.13	Hydroelectric
18	**9**	125.46	Gas
18	**10**	110.00	Gas
18	**11**	101.09	Gas
18	**12**	101.09	Gas

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

September 26, 2010, HE 11

On September 26, 2010 HE 11, the HOEP was $319.34/MWh. Factors contributing to the price spike include real-time demand greater than the pre-dispatch forecast, the forced derating of a fossil-fired unit during HE 11, and significantly lower wind generation in real-time relative to pre-dispatch.

Prices and Demand

Table 2-11 presents pre-dispatch and real-time price and demand information for September 26, 2010, HE 11. The MCPs successively increased between intervals one to six beginning at $71.86/MWh in interval one. MCPs climbed above $500/MWh in four intervals in the hour and peaked at $547.74/MWh (interval six).

The 243 MW (1.7 percent) average difference between the pre-dispatch and real-time Ontario Demand forecast was one reason for the higher real-time prices. Real-time Ontario Demand was higher than the pre-dispatch forecast in all intervals of HE 11 and the difference exceeded 200 MW in 11 of the 12 intervals in the hour. Ontario Demand differences peaked at slightly above 300 MW in intervals 6 and 11, which is consistent with the highest observed MCPs in the hour of $547.74/MWh and $544.83/MWh respectively.

Table 2-11: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
September 26, 2010, HE 11
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
11	**1**	34.00	71.86	37.86	14,228	14,272	44	1,412	1,393	-19
11	**2**	34.00	99.00	65.00	14,228	14,439	211	1,412	1,393	-19
11	**3**	34.00	99.00	65.00	14,228	14,435	207	1,412	1,393	-19
11	**4**	34.00	128.78	94.78	14,228	14,527	299	1,412	1,393	-19
11	**5**	34.00	283.67	249.67	14,228	14,475	247	1,412	1,393	-19
11	**6**	34.00	547.74	513.74	14,228	14,534	306	1,412	1,393	-19
11	**7**	34.00	543.07	509.07	14,228	14,519	291	1,412	1,393	-19
11	**8**	34.00	227.01	193.01	14,228	14,448	220	1,412	1,393	-19
11	**9**	34.00	272.00	238.00	14,228	14,452	224	1,412	1,393	-19
11	**10**	34.00	472.00	438.00	14,228	14,495	267	1,412	1,393	-19
11	**11**	34.00	544.83	510.83	14,228	14,531	303	1,412	1,393	-19
11	**12**	34.00	543.07	509.07	14,228	14,524	296	1,412	1,393	-19
Average		**34.00**	**319.34**	**285.34**	**14,228**	**14,471**	**243**	**1,412**	**1,393**	**-19**

Assessment

There was little indication from the one-hour ahead pre-dispatch price that real-time prices would be high, as the one-hour ahead pre-dispatch price was $34.00/MWh for HE 11. However, numerous units were on long-term planned outages which are typically observed in the September/October shoulder load period heading into the winter season. There were two nuclear units and seven fossil-fired units on planned outages totally slightly over 4,000 MW of unavailable generation capacity (representing 11 percent of total domestic generation capacity).

Along with the observed demand forecast error, there were two additional factors that contributed to a high real-time HOEP in HE 11. First, a 300 MW forced derating of a fossil-fired unit beginning in interval 5 of HE 11 placed additional pressure on the MCPs for the remainder of the hour. Secondly, wind generators produced much less in real-time than was forecasted in pre-dispatch. Real-time wind generation output was only 5 MW across all units but pre-dispatch projections totaled 115 MW, representing a 110 MW (96 percent) discrepancy. As discussed in previous Panel reports and similar to demand forecast error, wind forecast error is a factor that can contribute to significant differences between pre-dispatch and real-time prices. Over the last six-month period,

pre-dispatch forecasts were on average 19 MW higher than real-time wind production. Although the average difference does not appear large, wind forecast error can have a significant impact on prices in a given hour as shown on September 26, HE 11. Centralized wind forecasting is expected to help reduce hourly wind forecast errors and is due to begin in mid-2012.[9]

Table 2-12 shows that the real-time MCP was set by hydroelectric resources in 10 intervals of HE 11 on September 26, 2010 with the exception of intervals 1 and 4, which were set by gas-fired unit generators.

Table 2-12: Real-time MCP and Fuel Type of Price Setting Resource
September 26, 2010, HE 11
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
11	**1**	71.86	Gas
11	**2**	99.00	Hydroelectric
11	**3**	99.00	Hydroelectric
11	**4**	128.78	Gas
11	**5**	283.67	Hydroelectric
11	**6**	547.74	Hydroelectric
11	**7**	543.07	Hydroelectric
11	**8**	227.01	Hydroelectric
11	**9**	272.00	Hydroelectric
11	**10**	472.00	Hydroelectric
11	**11**	544.83	Hydroelectric
11	**12**	543.07	Hydroelectric
Average		**319.34**	

[9] http://www.ieso.ca/imoweb/marketdata/windpower.asp

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

October 15, 2010, HE 19

On October 15, 2010 HE 19, the HOEP was $544.87/MWh, which was the highest HOEP in the latest six-month period.

Prices and Demand

Table 2-13 presents pre-dispatch and real-time price and demand information for October 15, 2010, HE 19. The one-hour ahead pre-dispatch price for HE 19 was $39.00/MWh, which was $505.87/MWh lower than the HOEP in the hour. The real-time MCP rose above $500/MWh in all intervals with the exception of interval 12 ($92.15/MWh) and peaked at $600.78/MWh between intervals two and eight. Pre-dispatch and real-time net exports were identical at 1,390 MW indicating that intertie transactions did not contribute to higher real-time prices.

Similar to some of the high-priced events summarized previously in this chapter, Ontario Demand forecast error contributed significantly to the high real-time MCPs in HE 19. Real-time Ontario Demand was higher than the pre-dispatch forecast by an average of 376 MW (2.3 percent) in HE 19 and higher over all intervals in the hour. Aside from interval 12, Ontario Demand was at least 324 MW higher in real-time relative to the pre-dispatch projection and climbed above 400 MW in four intervals with a peak of 456 MW in interval seven. The highest Ontario Demand differences occurred in intervals with the highest real-time MCPs of $600.78/MWh in HE 19.

Table 2-13: One-hour Ahead PD and RT MCP, Ontario Demand and Net Exports
October 15, 2010, HE 19
($/MWh and MW)

Delivery Hour	Int	PD MCP	RT MCP	MCP Difference	PD ONT Demand	RT ONT Demand	ONT Demand Difference	PD Net Exports	RT Net Exports	Net Exports Difference
19	**1**	39.00	505.52	466.52	16,636	16,960	324	1,390	1,390	0
19	**2**	39.00	600.78	561.78	16,636	17,081	445	1,390	1,390	0
19	**3**	39.00	600.78	561.78	16,636	17,064	428	1,390	1,390	0
19	**4**	39.00	600.78	561.78	16,636	17,062	426	1,390	1,390	0
19	**5**	39.00	600.78	561.78	16,636	17,058	422	1,390	1,390	0
19	**6**	39.00	600.78	561.78	16,636	17,035	399	1,390	1,390	0
19	**7**	39.00	600.78	561.78	16,636	17,092	456	1,390	1,390	0
19	**8**	39.00	600.78	561.78	16,636	17,030	394	1,390	1,390	0
19	**9**	39.00	578.44	539.44	16,636	17,008	372	1,390	1,390	0
19	**10**	39.00	578.44	539.44	16,636	17,015	379	1,390	1,390	0
19	**11**	39.00	578.44	539.44	16,636	17,018	382	1,390	1,390	0
19	**12**	39.00	92.15	53.15	16,636	16,719	83	1,390	1,390	0
Average		**39.00**	**544.87**	**505.87**	**16,636**	**17,012**	**376**	**1,390**	**1,390**	**0**

Assessment

Going into October 15, 2010, there were ten fossil-fired units and two nuclear units on planned outage representing approximately 4,900 MW of unavailable capacity (14 percent of total domestic generation capacity). Although the demand forecast error was the largest contributing factor to the high price hour in October 15, 2010, a fossil-fired facility was also scheduled to produce 74 MW in pre-dispatch but was not available in real-time.

Self-scheduling and intermittent generation forecast error was not a contributing factor to the high real-time price in HE 19. In fact, self-scheduling and intermittent generators produced 187 MW (13.3 percent) more energy in real-time compared to the pre-dispatch projection. The large discrepancy was almost all due to higher production from wind generation than was not anticipated in pre-dispatch.

Table 2-14 shows that the real-time MCP was set by hydroelectric resources in all intervals of HE 19 on October 15, 2010.

Table 2-14: Real-time MCP and Fuel Type of Price Setting Resource
October 15, 2010, HE 19
($/MWh)

Delivery Hour	Interval	RT MCP ($/MWh)	Marginal Resource (Fuel Type)
11	**1**	505.52	Hydroelectric
11	**2**	600.78	Hydroelectric
11	**3**	600.78	Hydroelectric
11	**4**	600.78	Hydroelectric
11	**5**	600.78	Hydroelectric
11	**6**	600.78	Hydroelectric
11	**7**	600.78	Hydroelectric
11	**8**	600.78	Hydroelectric
11	**9**	578.44	Hydroelectric
11	**10**	578.44	Hydroelectric
11	**11**	578.44	Hydroelectric
11	**12**	92.15	Hydroelectric
Average		**544.87**	

The pricing of hydroelectric units is discussed in more detail in Section 2.1.7 below.

Overall Assessment of High Price Hours

In the last MSP Report, the Panel noted that it did not view the negative implications to the market from high offer prices on certain hydroelectric units to be material due to limited number of intervals where the MCP was set by these resources during the reporting period. However, the Panel noted that a concern may exist if the frequency is to increase in the future.[10] Over the current reporting period, there were 22 five-minute intervals when the MCP was set by hydroelectric units at offer prices above $500/MWh, which is two intervals more than what was observed in the previous summer period.

Over the recent summer period, there was a noticeable increase in the proportion of energy offers above $500/MWh relative to total offers from peaking hydro resources since May 2008. There has also been an increase in submitted offers between $400/MWh and $500/MWh from these same facilities. The higher frequency of high

[10] See the Panel's August 2010 Monitoring Report, p. 112.

priced offers this summer can be partly attributed to poor water conditions in early 2010. However, the number of intervals in which these high-priced offers set the MCP continues to remain relatively low. The Panel has asked the MAU to continue to monitor and report on trends in the frequency of high-priced hydro offers that set the real-time MCP.

2.2 Analysis of Low Price hours

Table 2-15 below presents the number of hours when the HOEP was less than $20/MWh (low HOEP) or negative by month over the last four May-to-October periods. The total number of hours with a low HOEP declined over the latest summer period by 1,258 hours (78 percent) relative to the same months last summer. Although there was a significant drop in low price hours this summer relative to 2009, the total is similar to the number of low-priced hours observed in the 2007 summer period and almost half of the observed hours during the 2008 summer period.

The number of hours when the HOEP was negative has also decreased substantially this summer as shown in Table 2-15 below. There were 19 negative-priced hours this summer, which is down from 121 hours (an 84 percent decline) last summer. All negative-priced hours this period occurred in September and October (nine and ten hours, respectively).

Table 2-15: Number of Hours with Low and Negative HOEPs
May to October, 2007 – 2010
(Number of Hours and %)

	Hours when HOEP<$20/MWh				Hours when HOEP<$0/MWh			
	2007	2008	2009	2010	2007	2008	2009	2010
May	115	193	210	22	0	6	24	0
June	67	87	295	8	0	0	42	0
July	57	144	393	20	0	16	14	0
August	11	126	236	19	0	4	11	0
September	45	90	297	143	1	0	25	9
October	36	84	188	149	0	2	5	10
Total	331	724	1,619	361	1	28	121	19

As outlined in previous Panel reports, the primary factors leading to a low (or negative) HOEP are identified as:[11]

- Low market demand
- Abundant low-priced supply (i.e. nuclear, baseload hydro, self-scheduling and intermittent generation, fossil generation up to minimum loading point, and other hydro generation offering energy at prices less than $20/MWh).
- Demand deviation: the forecast demand that is used in PD is typically different from, and often greater than, the average RT demand that determines the HOEP.
- Failed export transactions: these can place downward pressure on the HOEP as failures represent a reduction in demand in RT relative to PD.

Table 2-16 shows real-time output by generation type and unscheduled generation that offered at prices less than $20/MWh (called 'low price supply') for all low price hours this period. Generation categories are segmented into nuclear, baseload hydro, self-scheduling and intermittent (including wind) resources, and other hydroelectric resources (both run-of-the river and peaking). Run-of-the-river and peaking hydro units may want to operate when market prices are low, especially when an abundant supply of water is available and spilling is the only alternative. Average hourly scheduled imports, excluding linked wheels, during low-priced hours are also included in the low price supply table.

[11] These factors were first identified in the Panel's June 2004 Monitoring Report, pp. 84-85.

Table 2-16: Low-Priced Supply During Low-Priced Hours
May to October, 2010
(MW)

Month	Low-Priced Supply						Total
	Scheduled Nuclear	Scheduled Baseload Hydro*	Scheduled Self-Scheduling and Intermittent	Other Scheduled Hydro	Other Unscheduled Generation (offered <$20)	Imports (excl. linked wheels)	
May	8,253	1,704	1,085	1,016	469	405	12,932
June	8,848	1,544	1,126	1,437	1,316	493	14,764
July	9,398	1,228	1,245	1,212	1,137	702	14,922
August	9,970	1,268	921	1,289	1,391	1,038	15,877
September	10,219	1,386	1,035	1,847	442	1,013	15,942
October	9,694	1,567	1,236	1,851	141	653	15,142
Average	9,794	1,469	1,129	1,724	427	800	15,342

*includes generation at the Beck, Saunders, and DeCew generation stations.

Summary statistics related to the demand conditions during the low-priced hours are presented in Table 2-17. The table includes monthly average Ontario Demand, Exports, and Total Market Demand over the low-priced hours this summer. Excess low-priced supply, which is the difference between low-priced supply (see Table 2-16) and market demand over all low-priced hours is presented in the final column of Table 2-17.

Table 2-17: Demand and Excess Low-Priced Supply During Low-Priced Hours
May – October 2010
(MW)

Month	Number of Low-Priced Hours	Demand			Excess Low-Priced Supply (Supply - Demand)
		Ontario Demand	Exports	Market Demand	
May	22	12,348	641	12,989	-57
June	8	13,159	1,022	14,181	583
July	20	12,431	1,768	14,199	723
August	19	12,833	1,784	14,617	1,260
September	143	12,591	2,471	15,062	880
October	149	12,673	2,201	14,874	268
Average	361	12,626	2,141	14,767	575

On average, excess low-priced supply (including scheduled imports) was 575 MW higher than total market demand during the low price hours between May and October 2010, with a maximum monthly difference of 1,260 MW in August 2010. Excess low- priced supply was -57 MW in May 2010, indicating that the low priced supply was very close to the market demand.

Table 2-18 provides additional summary information by month for all low-priced hours between May and October 2010 including failed net exports, the difference between pre-dispatch demand and real-time average demand (referred to as 'Demand Discrepancy'), and average pre-dispatch and real-time prices. Demand discrepancy can result from demand forecast errors or simply result from differences in peak and average demand within an hour. Pre-dispatch prices during the low price hours over the recent summer period were on average $4.49/MWh higher (38.4 percent) compared to the real-time prices. Abundant baseload supply relative to total demand (575 MW surplus on average) was the most important factor leading to the low HOEP outcomes over the latest summer period, followed by failed net exports (41 MW), and finally demand deviation (36 MW).

Table 2-18: Average Monthly Summary Data for Low-Priced Hours May to October, 2010 ($/MWh and MW)

	Excess Supply	Failed Net Exports (MW)	RT Average Demand (MW)	PD Demand Forecast (MW)	PD to RT Demand Deviation (MW)	HOEP ($/MWh)	Pre-dispatch Price ($/MWh)	Difference (RT - PD) ($/MWh)
May	-57	41	12,348	12,515	167	14.70	23.10	(8.40)
June	583	234	13,159	13,424	265	17.55	25.97	(8.42)
July	723	0	12,431	12,659	228	13.89	24.20	(10.31)
August	1,260	14	12,833	12,955	122	14.55	20.91	(6.36)
September	880	8	12,591	12,606	15	10.16	13.82	(3.66)
October	268	71	12,673	12,660	(13)	11.72	15.20	(3.48)
Average	575	41	12,626	12,662	36	11.68	16.17	(4.49)

In the last report, the Panel reported that a change in offer strategy at a nuclear facility led to the lower observed MCPs in April 2010.[12] The impact of the change continued to result in some intervals with MCPs below - $100/MWh over the recent summer period although the frequency of these low MCPs was small. Over the six-month period, there were 28 intervals when the MCP fell below -$100/MWh where nuclear resources were most often marginal. This figure is lower than the 32 intervals observed in April 2010 alone. The lowest HOEP over the latest summer period was -$38.01/MWh, which occurred in HE 8 on September 6, 2010. Individual interval MCP reached a record low of

[12] See the Panel's August 2010 Monitoring Report, pp. 96-97.

-$128.30/MWh in HE 7 on June 9, 2010, which surpassed the previous record low MCP by $0.15/MWh.

3. Anomalous Uplift

During the period May to October 2010, there were no hours when the anomalous uplift criteria were met. There were no hours when CMSC payments or IOG payments were greater than $500,000 in a single hour, CMSC payments at an intertie group exceeded $1 million for a day, or hourly OR payments were greater than $100,000. The Panel intends to review the criteria used to assess which events should be considered anomalous in the future MSP reports and determine whether an adjustment is appropriate based on current market conditions.

Page Left Blank Intentionally

Chapter 3: Matters to Report in the Ontario Electricity Marketplace

1. Introduction

This Chapter summarises changes in the market related to matters discussed in the Panel's last report that impact the efficient operation of the IESO-administered markets. It also identifies and discusses new developments arising in the marketplace.

Section 2 identifies material changes that have occurred in the market since our last report related to matters discussed in that or prior reports. This section covers five issues:

- market rule amendments relating to constrained-off CMSC payments to dispatchable loads;
- increased Surplus Baseload Generation and the IESO's coding practice when curtailing intertie transactions;
- improvements associated with the IESO's new procedure relating to the release of transmission service;
- the IESO's actions to prevent transmission lines from becoming overloaded; and
- the operational status of the phase angle regulators (PARs) at the Michigan interface.

In Section 3, the Panel comments on three new issues:

- the treatment of transfer capability reductions outside of Ontario;
- increased trading activity and CMSC payments in the Northwest region; and
- multiple starts at gas-fired generators under the Generation Cost Guarantee program.

2. Changes Related to Issues Discussed in the Panel's Previous Reports

2.1 Market Rule Amendments Relating to Constrained-Off CMSC Payments to Dispatchable Loads

In its previous report, the Panel identified that two dispatchable loads had received extremely large CMSC payments for self-induced ramping and consumption deviations during the period of February to May 2010. The Panel concluded that those payments were self-induced and provided no benefit to the market. The Panel recommended eliminating self-induced CMSC payments paid to dispatchable loads resulting from either a voluntary change in consumption or a consumption deviation.[13]

During the period when the Panel was drafting its last report, the IESO worked with the MAU to explore the issues related to self-induced CMSC and search for possible solutions. The IESO implemented an interim urgent rule amendment on August 27, 2010, temporarily suspending all constrained-off CMSC payments to dispatchable loads until a long term solution could be found.[14]

On December 3, 2010, the IESO replaced the interim urgent rule amendment with a new rule amendment,[15] which was designed to eliminate CMSC payments to dispatchable loads for self-induced ramping. Contrary to the Panel's recommendation, the IESO did not implement a rule change to eliminate CMSC payments to dispatchable loads that was induced by consumption deviation. The IESO believed these payments could largely be recovered through existing processes authorized by the market rules[16] or would otherwise be significantly limited by a

[13] See the Panel's August 2010 Monitoring Report, pp. 112-128.
[14] For details, see: http://ieso.ca/imoweb/pubs/mr2010/MR_00373-R00.pdf.
[15] See IESO Market Rule Amendment MR – 00374 (dated October 19, 2010), at http://ieso.ca/imoweb/amendments/mr_Amendments.asp.
[16] The deviation-induced constrained-off payments can be recovered under the provision of Market Rules Chapter 9 Section 3.5.1A. For further discussion, see the Panel's August 2010 Monitoring Report, pp. 112-123.

separate rule change implemented on December 3, 2010 that limits the magnitude of constrained-on CMSC payments to exporters and dispatchable loads.[17]

The Panel has asked the MAU to continue monitoring the CMSC payments to dispatchable loads. The Panel has also requested that the MAU assess and report on the efficacy of the rules in achieving their intended function. In addition, the Panel is investigating whether the conduct of the two dispatchable loads constitutes gaming.

2.2 Increased Surplus Baseload Generation and the IESO's Coding Practice when Curtailing Intertie Transactions

2.2.1 *Introduction*

Surplus Baseload Generation (SBG) is "a condition where market actions, or actions that are required for reliability, regulatory, safety or equipment concerns, require the reduction of generation that results in the manoeuvre of nuclear units or the loss of fuel for a generator that is reduced (e.g. hydroelectric spill)". Baseload generation is defined as the sum of the expected generation of all available: nuclear generators, must-run hydroelectric generation, self-scheduling generators (including commissioning units), intermittent generators (including wind generators), and other generators that typically offer their generation at a value lower than the highest offer for nuclear generation. [18] SBG typically occurs during periods when demand is low.

In a well-functioning market, SBG events should rarely occur. Potential SBG events would normally be signaled through low or negative pre-dispatch market prices.[19] The low or negative prices would in turn incent an increase in domestic consumption, to the degree that it is price-

[17] The deviation-induced constrained-on payments should largely be mitigated under the new rule amendment MR – 00370**,** which uses a replacement bid price of -$50/MWh to cap the amount of the constrained-on payment. For details, see: http://ieso.ca/imoweb/pubs/mr2010/MR-00370-R00-BA.pdf.
[18] Section 1.3 of Market Manual 7.2: http://www.ieso.ca/imoweb/pubs/systemOps/so_NearTermAssessReport.pdf.
[19] The IESO also provides day ahead forecasts of potential SBG conditions. For details, see http://ieso.ca/imoweb/marketdata/sbg.asp.

responsive, and an increase in exports. Similarly, generators and imports would be incented to reduce output. The increase in demand and decrease in supply would create an upward pressure on the price, which in turn would eliminate or reduce the frequency and severity of SBG events.

There are, however, certain factors that limit such responses. To begin with, a pre-condition of price-responsiveness is the presence of an accurate forward price signal. With respect to domestic consumption, consumers (except dispatchable loads) have historically shown limited responsiveness to the real-time price, although some large consumers may be able to increase their consumption or shift their consumption from high price hours to low price hours when an accurate price signal exists. Export response can also be hindered by seams issues between the exporting and importing jurisdiction (e.g. differences in the dispatch frequency and the setting of schedules in the two jurisdictions). In addition, if neighbouring jurisdictions are also experiencing SBG conditions the price-responsiveness may be muted. On the supply side, market rules, programs or contracts may reduce generators' or importers' incentives to respond. In addition, the speed of response of dispatchable resources is limited by the "window" after which offers and bids cannot be changed, which is currently two hours, and the fact that imports and exports are dispatchable on an hourly basis. [20] However, if SBG events persist, this may be indicative of problems with market design, the price signal or operating procedures of the market.

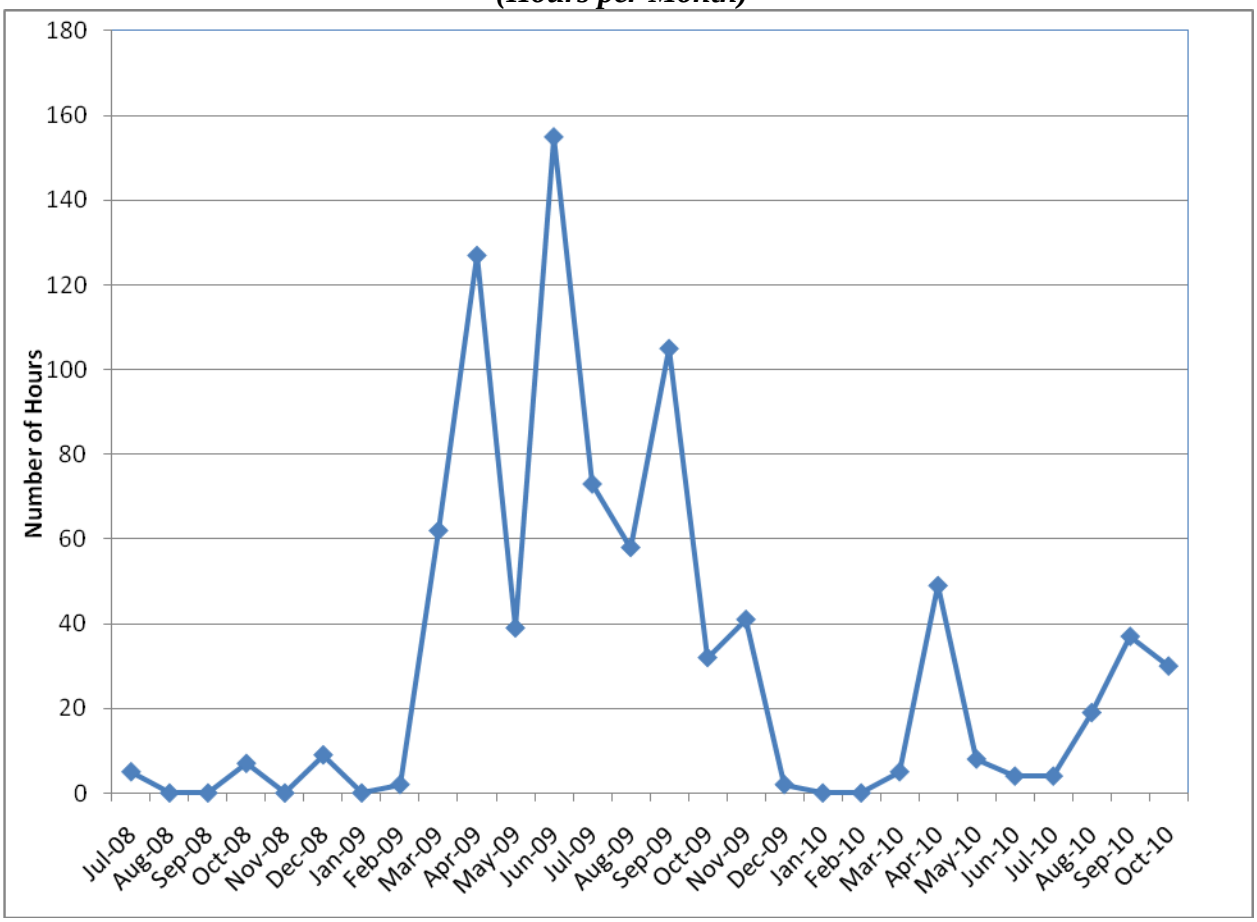
When an SBG event occurs, the market is oversupplied and the system operator has to take manual actions to reduce supply. The purpose of this section is to examine control actions taken by the IESO and their consequences to the market during SBG events.

[20] The Panel has previously recommended that the IESO examine the feasibility of 15 minute dispatch and shorter offer/bid windows, as are currently used by some US markets. See the Panel's January 2009 Monitoring Report, pp. 186-191 and the December 2007 Monitoring Report, pp. 151-160.

2.2.2 *History of SBG Events in Ontario*

In Ontario, SBG conditions used to be rare: they occurred in only 20 hours from the period of market opening in May 2002 to June 2008. The majority of these SBG events occurred during the low-demand Christmas holiday period or the spring freshet period when abundant water was available to hydroelectric generating units. From July 2008 to March 2009, the frequency of SBG events began to increase. The period April to December 2009 was marked by a dramatic increase in SBG events, including a record of 155 hours in June 2009. The frequency of SBG events in 2010 was down significantly from 2009, with the exception of April and September 2010 when there were 49 and 37 hours of SBG respectively. Figure 3-1 below depicts the total number of hours with SBG by month since July 2008. In these events, the IESO had either curtailed imports or dispatched down generation at nuclear units.

Figure 3-1: Number of Hours with Surplus Baseload Generation by Month
July 2008 – October 2010
(Hours per Month)



As discussed in the Panel's July 2009 report, the increase in SBG events in 2009 was caused by several major factors:[21]

- *Lower Ontario demand*: Ontario demand has been decreasing over the last few years.[22]
- *Reduced export capability at interfaces with external jurisdictions*: The increase in SBG events in March and April 2009 were mainly induced by the outages at the New York interface. These outages reduced export capability to New York, which in turn reduced export capability at the Michigan interface (in order to deal with loop flows).

[21] See the Panel's July 2009 Monitoring Report, pp. 218-235.
[22] Ontario demand (i.e. electricity demand by all Ontario consumers) declined by 5.4 percent in May to April 2009/2010 relative to 2008/2009 and declined by 4.6 percent in May to April 2008/2009 relative to 2007/2008. See the Panel's August 2010 Monitoring Report, pp. 48-50.

During this period, total export capability at Michigan and New York was reduced to 655 MW from the usual export capability of approximately 4,000 MW. The New York interface was out of service again in November 2009.

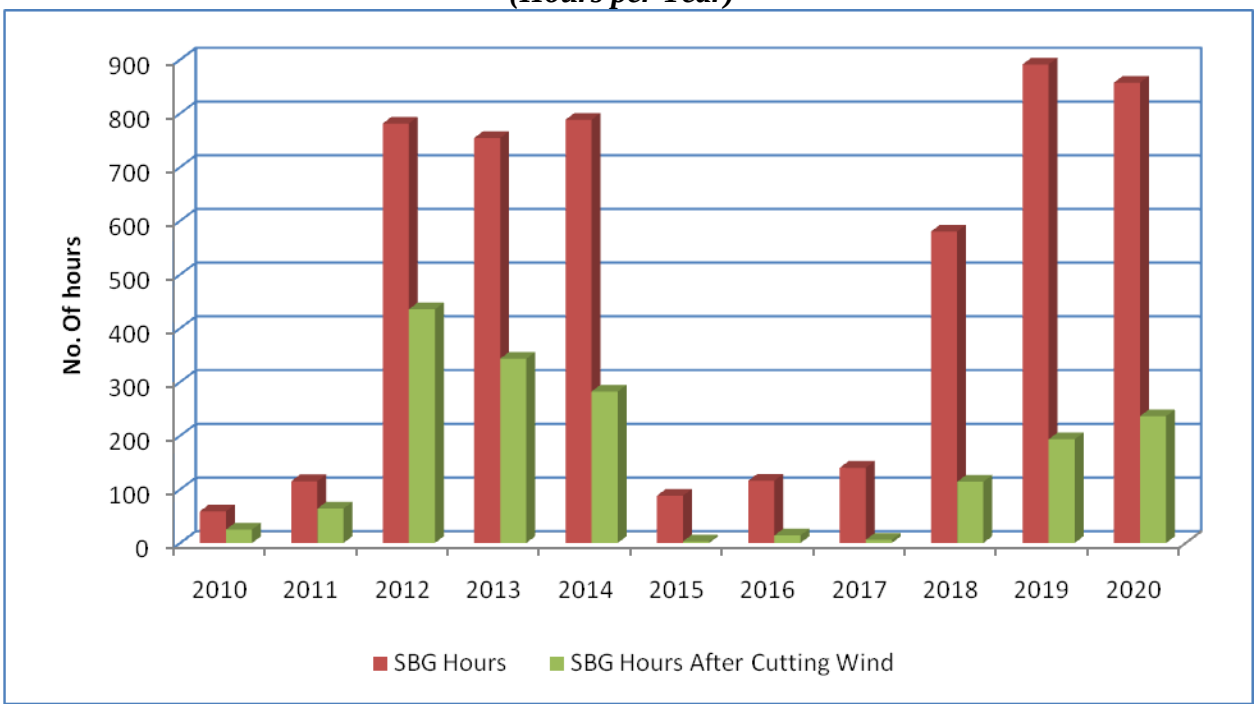
- *Greater supply from hydro generators:* Hydro output in the spring and summer of 2009 was very high as a result of unusually high precipitation levels.
- *Increased wind generation*: Installed wind generation has increased significantly since 2008.[23] Wind is currently treated as non-dispatchable and therefore effectively forms a non-responsive component of baseload supply.
- *Commissioning of gas-fired generation:* Ontario saw a large increase in gas-fired generation capacity beginning in late 2008. Some of these units were commissioning during periods when SBG conditions were present and thus were not dispatchable.

2.2.3 *Forecasts for Ontario SBG Events*

In its 2008 submission for the Integrated Power System Plan (IPSP) review,[24] the IESO predicted an increase in SBG events over the period 2010-2020 (Figure 3-2). Two scenarios were forecast: the first scenario anticipated the continuance of the current market structure where wind generation is non-dispatchable (represented by the red bars); while the second scenario anticipated that market rules would change and that wind generation would become dispatchable (represented by the green bars). If wind generation can be dispatchable and curtailed if needed, the number of SBG hours where alternative control actions are required (e.g. dispatching down nuclear generation or curtailing imports) can be reduced significantly (by roughly 70 percent under these IESO forecast scenarios).

[23] The trend in average hourly wind output is plotted in Chapter 1 of the August 2010 MSP Monitoring Report, p 29.
[24] IESO, "*Operability Review of OPA's Integrated Power System Plan*", April 21, 2008, p.15. For details, see: http://www.ieso.ca/imoweb/pubs/ircp/IESO-Operability_Review_of_IPSP.pdf.

Figure 3-2: IESO Projection of Number of Hours with Surplus Baseload Generation Prepared in 2008 for the Integrated Power System Plan, 2010 to 2020 (Hours per Year)



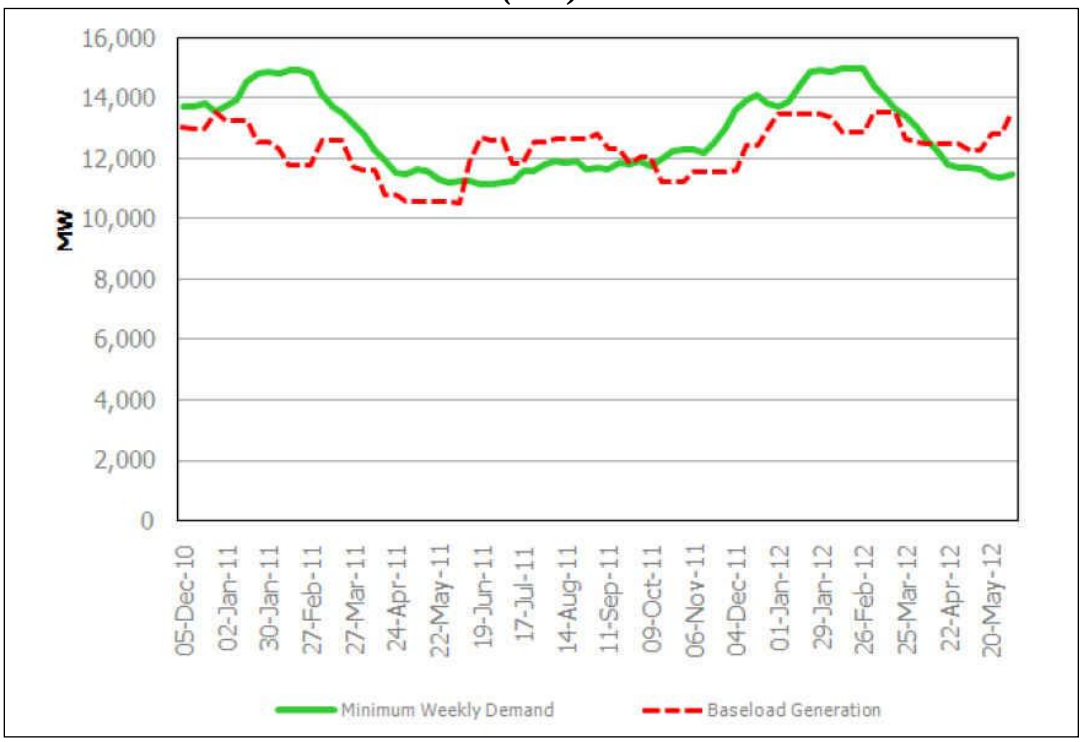
There are two reasons to expect that these 2008 forecasts may understate the frequency of SBG events if wind generation does not become dispatchable.[25] First, the introduction of the OPA's feed-in-tariff (FIT)[26], which occurred subsequent to the publication of the IPSP, has led to a significant increase in expected installed capacity of renewable resources compared to what had been originally forecast under the IPSP. Under the IPSP, the OPA forecast approximately 3,000 MW of installed wind, solar and biomass capacity.[27] In addition to the approximately 1,500 MW of wind currently under contract and operating in Ontario, the OPA is now anticipating as much as 6,600 MW of renewable resources may be contracted for under the FIT program by the end of 2013.[28] Second the vast majority of these new resources are expected to be wind generators.

[25] In fact, there were 156 hours of SBG in January - October 2010, compared to 60 hours in the IESO's 2008 forecast for this period.
[26] See: http://fit.powerauthority.on.ca/Page.asp?PageID=1115&SiteNodeID=1052.
[27] See: http://www.powerauthority.on.ca/sites/default/files/page/4875_D-9-1_corrected_071019.pdf , p.8, table 7. This is composed of 2,594 MW of wind, 88 MW of solar and 233 MW of biomass.
[28] See Ontario Power Authority, 2011-2013 Business Plan, p. 22, at: http://www.powerauthority.on.ca/sites/default/files/news/2011%20-%202013%20Business%20Plan.pdf.

Wind typically produces at higher output levels in the late evening and very early morning when the prevalence of SBG events is greatest.[29]

In 2008, the IESO began to publish SBG forecasts. These SBG forecasts compare expected minimum demand against expected baseload generation on a weekly basis.[30] Figure 3-3 below is replicated from the IESO's 18-Month Outlook for December 2010 to May 2012. The IESO predicts a significant number of SBG events during summer 2011 and winter 2012 (i.e. the period when the dotted red line is above the solid green line).[31]

Figure 3-3: IESO Forecast of Weekly Minimum Demand and Baseload Generation Prepared in November 2010 for December 2010 to May 2012 (MW)



[29] For details, see the Panel's January 2009 Monitoring Report, p. 24. In other markets (e.g. NYISO), a similar result was found: http://www.nyiso.com/public/webdocs/newsroom/press_releases/2010/GROWING_WIND_-_Final_Report_of_the_NYISO_2010_Wind_Generation_Study.pdf

[30] See https://www.ieso.ca/imoweb/monthsYears/monthsAhead.asp.

[31] See: http://www.ieso.ca/imoweb/pubs/marketReports/18MonthOutlook_2010aug.pdf, p.18

2.2.4 *Control Actions During SBG Events*

It is worth clarifying that in Ontario an SBG event refers to the supply and demand situation in the constrained sequence. The constrained sequence reflects the actual system conditions and takes into account various transmission limitations within the province and at the interties. In Ontario, an SBG event may not necessarily translate into a negative market price. [32] That is because the market price is calculated using the unconstrained schedule, which ignores internal transmission capabilities and in general assumes larger intertie transmission capabilities than what the interties are capable of delivering. In fact, as will be demonstrated later in this section, the market price during many SBG hours is often much greater than $0/MWh. This counter-intuitive pricing is caused primarily by fundamental differences between the two sequences as well as by IESO control actions taken to manage SBG conditions. The balance of this section discusses the impact of IESO control actions on the market price signal.

In anticipation of, or during an SBG event, the IESO is authorized (as outlined in the Market Rules and the IESO's internal procedures under the guidelines of the Northeast Power Coordinating Council, i.e. NPCC standards) to take several control actions to ease the supply surplus.[33] Actions and the market consequences of these actions include:

- *Curtail imports*: The primary choice by the IESO to cope with SBG situations is to curtail imports if applicable and effective.[34] When an import is curtailed, the IESO applies a code of ADQh[35] to the transaction. This has the effect of removing the

[32] Conversely, market prices may fall below $0/MWh when SBG conditions do not exist on the system.
[33] See Market Manual, Series 7: *System Operations Manual*, Part 7.2: *Near Term Assessments and Reports*, Section 1.3: *Surplus Baseload Generation*; and Internal Procedure 2.4-2 '*Responding to Market and System Events*', Section 7: *Respond to Surplus Baseload*.
[34] At times, imports may not be curtailed because of export congestion at the interface. Cutting imports would not be implemented in this situation because it would lead to the transmission line becoming overloaded.
[35] The IESO assigns a code for each intertie transaction (for details, see IESO Procedure 2.4-7, '*Interchange Operations')*. The codes include:

- AUTO: transactions that are scheduled by the DSO in the final PD and have never been revised
- NY90: transactions at the NYISO intertie that are checked at 90 minutes before RT
- TLRi: transactions that are curtailed for reliability at the intertie
- TLRe: transactions that are curtailed for external reliability
- MrNh: transactions that have failed due to a lack of ramp or transmission service in external ISOs
- ORA: transactions that are curtailed or scheduled for IESO's operating reserve activation
- OTH: transactions that have failed due to reasons under the participant's control

import transaction from both the constrained and unconstrained sequences. Removing imports from the unconstrained sequence has the effect of increasing the market price, which does not reflect the available imports and the surplus situation.[36] This price increase may in turn attract more import offers and less export bids in subsequent hours, thereby perpetuating or even escalating future SBG conditions, which may require further cutting of imports or other control actions.

- *Increase the Net Intertie Scheduling Limit (NISL)*[37] *to allow an increase in net exports*: The Panel had previously recommended that the IESO review the NISL in order to facilitate larger hourly changes in net exports, particularly during periods of low demand.[38] Assuming a higher NISL is technically feasible, it may improve both system reliability and market efficiency. The IESO implemented a procedure effective December 23, 2008 to increase the hour-to-hour NISL to 1,000 MW, if feasible, when there is an SBG event. The higher NISL affects both the unconstrained and constrained sequence and thus the greater net exports could lead to a higher HOEP. The higher HOEP in this situation, however, should not be considered distorted because it reflects the actual export bids that are available and the scheduling of the increased level of exports is efficiency enhancing. Since introducing the new procedure, the IESO has applied the 1,000 MW limit in 48 hours, of which 40 hours occurred in 2009.[39]
- *Dispatch down baseload hydro generators:* This may be ordered by the IESO even though it means spilling water. This action does not impact the market price because the output adjustment occurs in the constrained but not the unconstrained sequence.

- ADQh: transactions that are curtailed by IESO for resource adequacy (either shortage or surplus)

[36] The price increase is more pronounced when the import transaction had a smaller schedule in the constrained sequence than in the unconstrained sequence (e.g. 100 MW curtailed in the constrained sequence accompanied by 400MW of constrained off imports results in 500 MW removed in the unconstrained sequence).

[37] The NISL is a limit used by both the unconstrained and constrained schedule tools to limit the amount of changes in net exports that can be ramped in or out between two successive hours. It effectively represents a conservative estimate of the collective ramping capability of domestic generators to accommodate the changing level of imports and exports.

[38] See the Panel's July 2008 Monitoring Report, pp. 103-110. More generally, in its July 2007 Monitoring Report, pp. 97-100, the Panel recommended that IESO review whether the default 700 MW limit could be increased.

[39] However, the hour-to-hour change in net exports in the 48 hours was never actually greater than 700 MW. This could be because the net exports were already very large so that the interfaces with export potential were already at or near capacity; there were not additional arbitrage profit opportunities between Ontario and external markets, or other factors.

This has occurred on many occasions, but the magnitude and timing of spill activities is not well documented as data on these events is not readily available to the IESO or to the Panel.

- *Derate coal-fired generators to their "gas support" level*:[40] This action can be initiated by either the IESO or OPG. It is accomplished by derating coal units to an output level lower than their registered minimum loading point (MLP) and requires that the unit be fuelled by natural gas only. Because the reduction below the normal MLP is implemented as a derating, the supply is removed from the market as well as the constrained schedule. Removal from the market schedule increases the market clearing price. The Panel expressed its concerns regarding the market impact of this type of intervention in its July 2008 Monitoring Report.[41] However, this has only happened occasionally and will become less of an issue as coal-fired units produce less overnight and are gradually phased out in the coming years.
- *Shut down or reject the start-up of fossil-fired units:* Some fossil-fired generators may request synchronization even under SBG conditions because they are commissioning, they are participating in a cost-guarantee program, or they are operating as self-schedulers under fixed-price contracts (i.e. the non-utility generator contracts). The IESO can reject such synchronization requests for reliability concerns and may also order operating fossil-fired generators to fully shut down. Unlike the constraining off of output by an online generator, these actions have the effect of increasing the HOEP because offline fossil-fired generators are not considered as available by the unconstrained sequence (or the constrained sequence). Such situations have occurred infrequently and those related to commissioning are expected to occur even less frequently in the future as the vast majority of Ontario's new gas-fired generation has now been installed and commissioned.

[40] Some coal-fired generators can also use natural gas as support, which allows the generator to sustain production at a lower minimum output level, their 'gas support' level.
[41] See the Panel's July 2008 Monitoring Report, pp. 110-112. The Panel observed that the market rules allow for only a single MLP to be registered regardless of the fact that two MLPs may exist depending on the fuel type. The Panel noted that the generator could register the lower MLP and shift its output level from the coal-fired MLP to the gas-support MLP by adjusting its offers. However, a low MLP may increase the generator's risk of being constrained down below its normal MLP in non-SBG situations.

- *Dispatch down or fully shut down nuclear units*: This is generally viewed as an action of last resort because nuclear units are typically designed to produce at their maximum capacity and manoeuvring them can involve significant operational issues and costs. However, some units do have limited flexibility to ramp down when required.[42] At times, a nuclear operator, in consultation with the IESO, may choose to shut down fully even though doing so means the generator must remain offline for 48 hours or even longer for operational reasons.[43] When a nuclear unit is constrained down but not off, the HOEP is not affected because the change only occurs in the constrained sequence. However, if the unit is fully shutdown, HOEP will increase because an offline nuclear unit is regarded as unavailable in the unconstrained (and constrained) sequence.[44]

[42] For example, when performing an SBG manoeuvre Bruce Power does not change the power output of the reactor; rather it relies on redirecting some steam from the turbine generator to the steam condenser. This reduces generator output while allowing the unit to remain ready to increase production when required. For a description of Bruce unit operational flexibility and limitations, see http://ieso.ca/imoweb/pubs/consult/se57/se57-20090703-BrucePower.pdf.
[43] Nuclear unit shutdowns for SBG happened twice in 2009. There were none in 2010.
[44] In the past, the IESO derated a nuclear unit to accommodate the SBG situations in both pre-dispatch and real-time, which led to efficiency loss and an increased HOEP. The Panel, in its January 2009 Monitoring Report, reported the issues and acknowledged that the issues were solved by the IESO after discussions with the MAU. For details, see: http://www.oeb.gov.on.ca/OEB/_Documents/MSP/msp_report_200901.pdf, pp.169-171.

Table 3-1 below summarizes the IESO control actions, their associated codes, and the implications on the HOEP under SBG conditions.

Table 3-1: IESO Surplus Baseload Generation Control Actions, Applicable Codes, and Impact on the HOEP

Action	Code	Affects Constrained Schedule (CS)	Affects Unconstrained Schedule (US)	Eligibility for CMSC	Impact on HOEP
Curtail import	ADQh	yes	Yes (set US equal to CS)	no	Increased
Derate coal-fired generation	MAN or AUTO, depending on the timing	yes	yes	no	Increased
Shutdown or reject the start-up of fossil fired units	MAN or AUTO, depending on the timing	yes	yes	no	Increased
Dispatch down baseload hydro units	MAN	yes	no	yes	No impact
Dispatch down nuclear units	MAN	yes	no	yes	No impact
Shut down nuclear units	MAN or AUTO, depending on the timing	yes	yes	no	Increased
Increase the NISL	n/a	yes	yes	yes	Increased

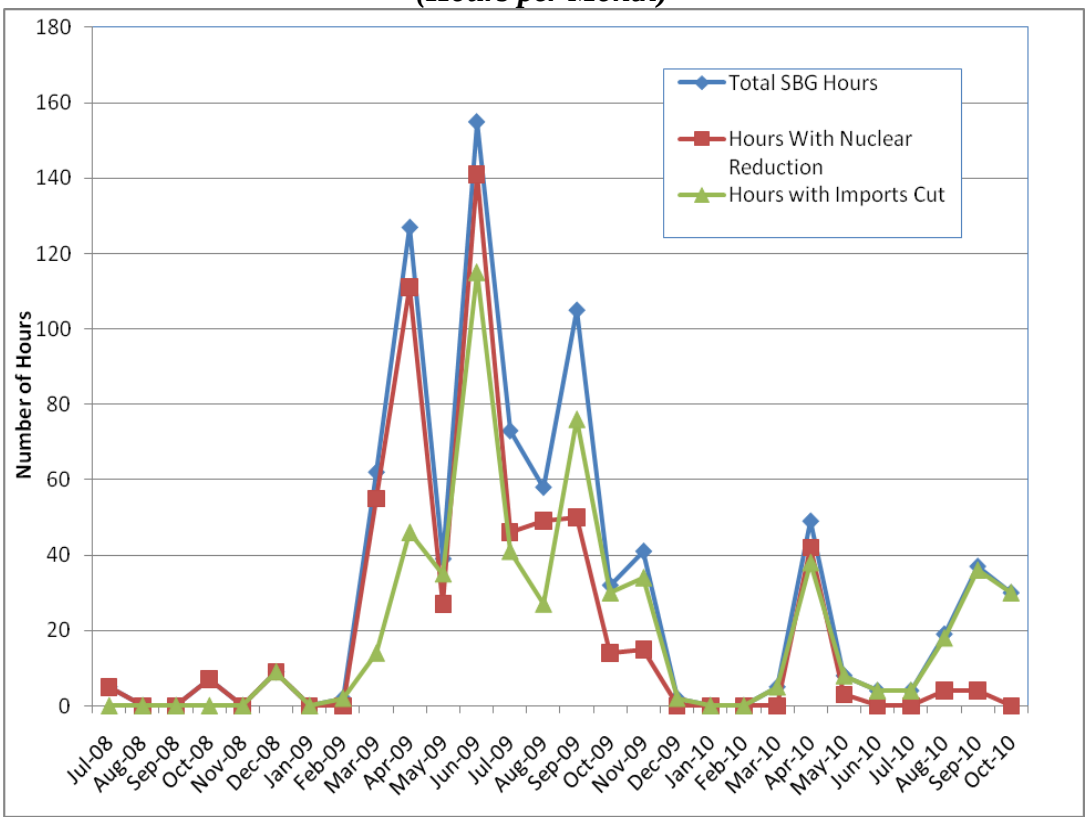
2.2.5 *Import Curtailment History*

In 2009, nuclear units were regularly instructed to reduce production during SBG hours. Since late 2009, import curtailments have replaced reductions to nuclear output as the primary mechanism for alleviating SBG.[45] In 2010 nuclear units have rarely been called upon, with the

[45] In 2009, there was typically export congestion at the Michigan interface, which meant that import curtailment was not a viable option. In 2010, the Michigan interface has rarely been export congested and substantial quantities of imports from MISO have been available for curtailment.

exception of May 2010. This can be seen from Figure 3-4 below, which illustrates on a month-by-month basis for the period July 2008 to October 2010 the total hours of SBG as well as the total hours of nuclear reductions and import curtailments during the corresponding SBG hours.[46]

Figure 3-4: Surplus Baseload Generation Events, Nuclear Reductions and Import Curtailments July 2008 to October 2010 (Hours per Month)



2.2.6 *Assessment*

In this section, the Panel focuses on the impact of the intertie transactions. While it may be necessary for the IESO to cut imports for reliability, the use of ADQh for this purpose has the counter-intuitive effect of increasing the HOEP. The higher HOEP represents a distorted price

[46]Other control actions are not shown on Figure 3-4 because they are rare or are not as readily identifiable as these two key control actions. .

signal to market participants. The higher price could attract higher power flow into Ontario in subsequent hours when in reality Ontario has adequate supply. The higher price also discourages traders from exporting from Ontario, even though Ontario has surplus supply.

To see how the higher HOEP induced by the ADQh code can impact arbitrage opportunities between markets, the Panel examined the off-peak hours when the MISO and NYISO interties were in service.[47] Over this period, HOEP has been increasing during SBG hours, from an average price of -$8/MWh in March 2009 to approximately $20/MWh during the summer of 2010. Associated with the increase in HOEP is a general increase in import curtailment in the unconstrained sequence. For example, the average import curtailment in mid-2009 was generally below 150 MW, whereas it has been above 250 MW in many months in 2010.

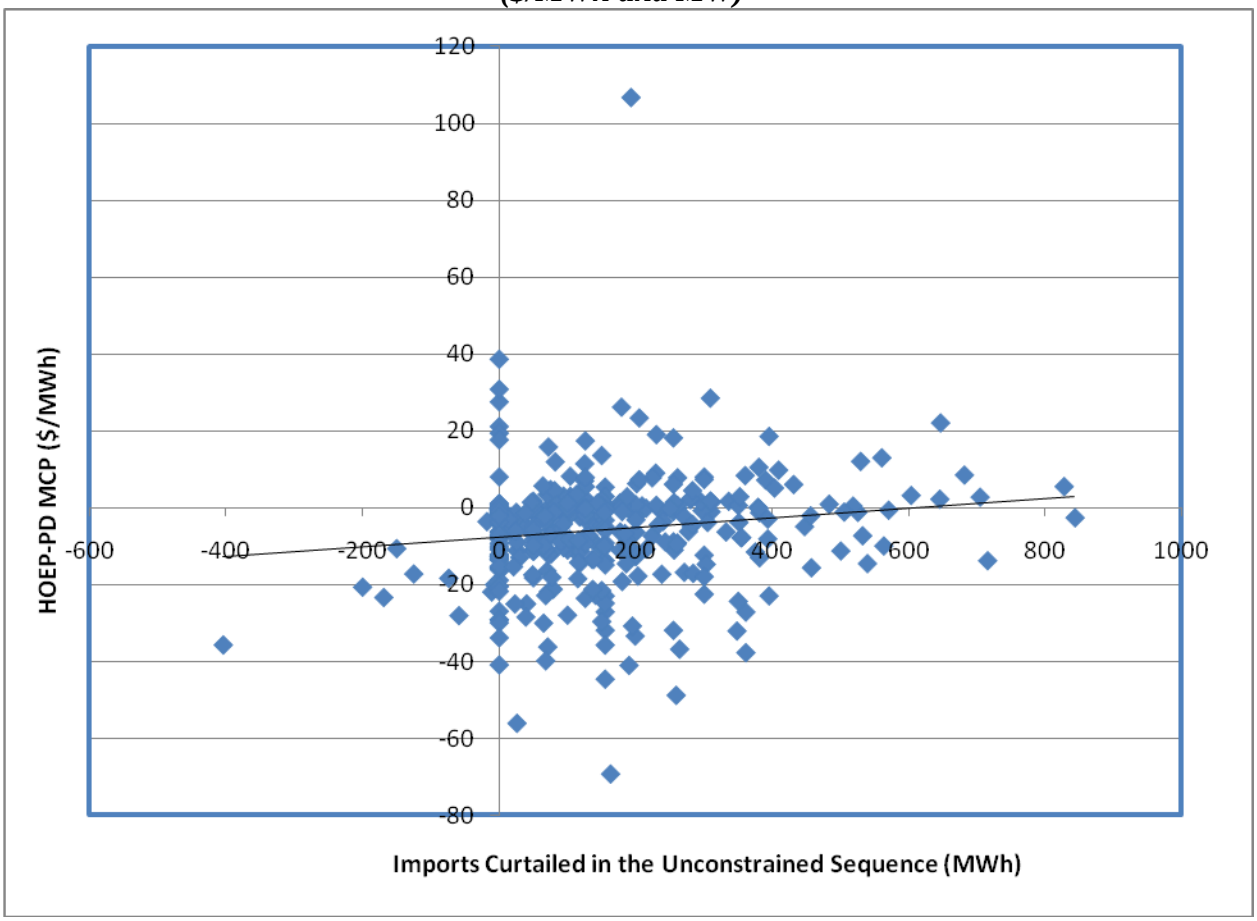
Import curtailment tends to increase the HOEP relative to the pre-dispatch MCP. The scatter plot in Figure 3-5 below reports the difference between HOEP and one-hour ahead pre-dispatch MCP against the unconstrained import curtailment for the period July 2008 to October 2010. The fitted line has a statistically significant upward slope of 0.0126,[48] implying that every 100 MW of import curtailment tends to increase the HOEP by roughly $1.26/MWh relative to the PD MCP, all else being equal.

[47] On-peak hours with SBG conditions are not analyzed because an SBG at an on-peak hour was typically a result of a lack of trading opportunities between Ontario and external markets (e.g. outages/derating at interfaces) and/or involved a shutdown of a full nuclear unit in order to deal with SBG situation for a long period of time.

[48] There are other factors (e.g. steepness of the supply curve, real-time generation outages/derating, ramp rates, etc) that may affect the price difference. This simple regression against the import curtailment provides an indication of how the import curtailment may have affected the price difference. Time constraints precluded development of a more robust model that includes other major factors to isolate the impact of the import curtailment more accurately. The fitted line reported above has the following equation (T-ratios are reported in brackets):

HOEP - PD MCP = -7.6634 + 0.0126*MW curtailed
(-8.0985) (2.8942)

Figure 3-5: Import Curtailment (Unconstrained Sequence) and Differences Between HOEP and Pre-dispatch MCP during Surplus Baseload Generation Events July 2008 to October 2010 ($/MWh and MW)



Given that almost all curtailed imports in the study period were scheduled at the Michigan interface, it is relevant to examine how the import or export profitability at this interface has evolved. Ideally, when there is SBG in Ontario, exporting rather than importing activities should be incented. Table 3-2 below lists (for SBG events during HE 1-6 and 23-24) the HOEP, the MISO price for the MISO_ONT interface (which reflects the Michigan side of the intertie with Ontario), and average hourly imports from Michigan, the number of hours with SBG, and the number of hours with export congestion during hours with import curtailments resulting from SBG. Until April 2010 (with the exception of March, April, and September 2009), the HOEP was typically less than the MISO_ONT interface price during SBG hours, and thus disincented imports and incented exports. However, since May 2010, the HOEP has been approximately

$20/MWh and persistently higher than the MISO_ONT interface price during SBG hours. This has lead to more imports being attracted into Ontario and fewer exports being attracted to Michigan. Notwithstanding 83 hours of off-peak SBG in Ontario since December 2009, the MISO interfaces have not been export congested during these events.

Table 3-2: HOEP, MISO Prices, Average Imports, and Export Congestion During Surplus Baseload Generation Events in December 2008 to October 2010 For HE 1-6 and 23-24 when MISO Interties are in Service ($/MWh, MW and Number of Hours)

Month[49]	HOEP ($/MWh)	MISO's ONT Zone Price ($/MWh)	MISO Price-HOEP ($/MWh)	Average Imports from Michigan (MW)	Number of Hours with SBG	SBG Hours with Export Congestion
Dec-08	-28.99	17.86	46.85	0	4	0
Feb-09	17.49	26.19	8.70	0	2	0
Mar-09	12.10	7.55	-4.55	59	6	0
Apr-09	-6.23	-65.87	-59.64	60	3	0
May-09	-0.97	3.17	4.14	9	29	6
Jun-09	2.95	13.46	10.51	24	69	41
Jul-09	4.51	13.23	8.72	44	27	14
Aug-09	5.99	17.22	11.23	0	10	1
Sep-09	6.87	-6.26	-13.13	230	67	3
Oct-09	10.20	23.61	13.41	68	28	0
Nov-09	12.99	17.33	4.34	0	10	8
Dec-09	14.25	24.96	10.71	0	1	0
Mar-10	15.16	21.21	6.05	52	3	0
Apr-10	12.04	15.78	3.74	54	19	0
May-10	19.08	16.31	-2.77	156	5	0
Jun-10	26.13	5.47	-20.66	138	2	0
Jul-10	19.52	3.53	-15.99	621	2	0
Aug-10	19.59	11.65	-7.94	415	14	0
Sep-10	13.41	-0.12	-13.53	452	13	0
Oct-10	19.03	12.87	-6.16	252	25	0

[49] There were no SBG events during January 2009 and January/February 2010.

An Example: September 5, 2010 HE 1

September 5, 2010 HE 1 was an SBG hour but the HOEP reached $123.96/MWh, which is the highest recorded hourly price for an SBG hour in Ontario.

In the hour, the IESO took several precautionary actions to handle the potential over-supply conditions. Collectively, they resulted in an enormous discrepancy between the HOEP ($123.96/MWh) and the $17.27/MWh price projected in the final pre-dispatch run. Similarly, in the constrained sequence, the final pre-dispatch shadow price at Richview was $17.62/MWh, while in real-time the shadow price reached $137.91/MWh. Neither the PD MCP/Richview shadow price nor the HOEP/real-time Richview shadow price accurately reflected the potential for or the actual SBG conditions. In fact, the high real-time shadow price and HOEP suggested tight supply/demand conditions.

Prices and Demand

Table 3-3 below lists the summary information for September 4, 2010 HE 24 and September 5, 2010 HE 1. The MCP in HE 24 was much higher than the PD price in intervals 1 to 9 of the hour, but well below for the last three intervals. In interval 1 of HE 1, the MCP dramatically increased to $189.95/MWh, well above the projected $17.27/MWh in PD. The MCP stayed above $100/MWh in intervals 1 to 9, then decreased to $79.34/MWh in intervals 10 and 11, and finally dropped to $7.05/MWh in the last interval of the hour.

Table 3-3: MCP, Ontario Demand and Net Exports
September 4 HE 24 and September 5 HE 1
($/MWh and MW)

Delivery Hour	Interval	RT MCP ($/MWh)	PD MCP ($MWh)	Difference (RT-PD) ($MWh)	RT Ontario Demand (MW)	PD Ontario Demand (MW)	RT Net Export (MW)	PD Net Export (MW)
Sep 4 HE 24	1	45.05	13.48	31.57	12,706	12,390	1,554	1,455
	2	45.05	13.48	31.57	12,706	12,390	1,554	1,455
	3	35.05	13.48	21.57	12,637	12,390	1,554	1,455
	4	35.49	13.48	22.01	12,535	12,390	1,658	1,455
	5	35.05	13.48	21.57	12,461	12,390	1,658	1,455
	6	26.63	13.48	13.15	12,379	12,390	1,658	1,455
	7	20.05	13.48	6.57	12,300	12,390	1,658	1,455
	8	20.05	13.48	6.57	12,277	12,390	1,658	1,455
	9	20.05	13.48	6.57	12,246	12,390	1,658	1,455
	10	7.60	13.48	-5.88	12,203	12,390	1,658	1,455
	11	7.20	13.48	-6.28	12,133	12,390	1,658	1,455
	12	7.60	13.48	-5.88	12,123	12,390	1,587	1,455
	Average	**25.41**	**13.48**	**11.93**	**12,392**	**12,390**	**1,626**	**1,455**
Sep 5 HE 1	1	189.95	17.27	172.68	11,997	11,672	2,082	1,940
	2	189.73	17.27	172.46	11,970	11,672	2,082	1,940
	3	166.30	17.27	149.03	11,903	11,672	2,082	1,940
	4	166.30	17.27	149.03	11,927	11,672	2,082	1,940
	5	166.30	17.27	149.03	11,912	11,672	2,082	1,940
	6	119.41	17.27	102.14	11,868	11,672	2,082	1,940
	7	113.34	17.27	96.07	11,784	11,672	2,082	1,940
	8	105.21	17.27	87.94	11,753	11,672	2,082	1,940
	9	105.21	17.27	87.94	11,748	11,672	2,082	1,940
	10	79.34	17.27	62.07	11,738	11,672	2,082	1,940
	11	79.34	17.27	62.07	11,701	11,672	2,082	1,940
	12	7.05	17.27	-10.22	11,560	11,672	1,932	1,940
	Average	**123.96**	**17.27**	**106.69**	**11,822**	**11,672**	**2,070**	**1,940**

Supply and Demand Conditions for HE 1

On September 4, HE 21, the IESO issued an SBG alert for September 5 HE 1 to 8. The alert was intended to provide market participants advance information about the expected market conditions over those hours. At the same time, MISO and PJM also issued an alert of potential SBG in their markets. The SBG situation in such a large footprint limited traders' arbitrage opportunities and the system operators' capabilities for dealing with the situation.

In advance of September 4 HE 24, the IESO observed that, in the absence of other control actions, there would be a reduction in the schedule for a nuclear unit in many intervals of the

hour. In response, 104 MW of imports at the Michigan interface were curtailed in order to avoid manoeuvring the nuclear unit.

The pre-dispatch prices for September 5 HE 1 were persistently low up to three hours ahead. Prior to the two hour ahead pre-dispatch run, a generator reduced its offered quantity at a baseload hydro station by 310 MW. However, this reduction in baseload supply was almost entirely offset by a reduction of net exports by 294 MW in the next pre-dispatch run. Relevant pre-dispatch statistics are reported in Table 3-4 below.

Table 3-4: PD Price, Ontario Demand and Exports / Imports
September 5, 2010, HE 1
($/MWh and MW)

Hours Ahead	PD Price ($/MWh)	Ontario Demand (MW)	Imports (MW)	Exports (MW)	Net Exports (MW)	Main Events
13	-129.00	12,026	0	0	0	
10	-128.4	12,026	0	0	0	
5	4.41	11,795	583	2,666	2,083	
4	4.85	11,795	683	2,766	2,083	
3	-1.00	11,602	558	2,756	2,198	A baseload hydro resource reduced offered quantity by 310 MW
2	17.27	11,747	1,076	2,980	1,904	
1	17.27	11,672	1,040	2,980	1,940	After final pre-dispatch, IESO curtailed 347 MW of imports which translated into a 193 MW curtailment in the unconstrained sequence.

Real-time Conditions in HE 1

Before the real-time run, there was a 50 MW export failure at the NYISO interface. In light of the SBG condition in September 4 HE 24 and a potential reduction in schedules at nuclear units, the IESO curtailed 347 MW of imports from MISO for September 5 HE 1. The 347 MW curtailment translated to only a 193 MW import curtailment in the unconstrained sequence because 154 MW were imports that were scheduled as constrained-on in final pre-dispatch.[50]

[50] The imports were offered at $17.27/MWh and both the final pre-dispatch MCP and the locational zonal price at the interface were $17.27/MWh. In other words, the imports set both the final unconstrained and constrained pre-dispatch price. However, due to the configuration difference between the unconstrained and constrained sequence,

In addition, the real-time demand in the first few intervals in HE 1 was 200 to 300 MW greater than projected in the final pre-dispatch. The higher-than-projected demand placed further upward pressure on the MCP.

Assessment

The high price in the SBG hour was a consequence of higher-than-expected Ontario demand, the baseload hydro reduction and the IESO's coding practice on import curtailments.

To isolate the impact of the coding practice, the MAU ran a simulation which examined the expected outcomes had the import curtailment been limited to the constrained sequence rather than the constrained and unconstrained sequences (i.e. revising the effect of the ADQh code). Table 3-5 reports the import curtailments in both sequences and the actual and simulated MCPs. If the curtailed import had been left as a source of available supply in the unconstrained sequence, the HOEP would have been $54.19/MWh, or $69.76/MWh (56 percent) lower than the actual HOEP.

the imports were scheduled at their full amount in the constrained sequence but not in the unconstrained sequence, leading to 154 MW being constrained on.

Table 3-5: Actual and Simulated MCP and HOEP Resulting from IESO Coding of Import Curtailments September 5, 2010 HE 1 (MW and $/MWh)

Interval	Constrained Sequence Import Curtailment (MW)	Actual Import Curtailment in Unconstrained Sequence (MW)	Actual MCP ($/MWh)	Simulated Curtailment in Unconstrained Sequence (MW)	Simulated MCP ($/MWh)	Difference (Simulated – Actual) ($/MWh)
1	347	193	189.95	0	119.42	-70.53
2	347	193	189.73	0	119.41	-70.32
3	347	193	166.30	0	105.21	-61.09
4	347	193	166.30	0	105.21	-61.09
5	347	193	166.30	0	79.34	-86.96
6	347	193	119.41	0	79.34	-40.07
7	347	193	113.34	0	7.45	-105.89
8	347	193	105.21	0	7.40	-97.81
9	347	193	105.21	0	7.40	-97.81
10	347	193	79.34	0	7.05	-72.29
11	347	193	79.34	0	7.05	-72.29
12	347	193	7.05	0	6.05	-1.00
Average	**347**	**193**	**123.96**	**0**	**54.19**	**-69.76**

One implication of using the ADQh code is that importers and generators are rewarded while exporters and loads are penalized because of a higher HOEP that does not reflect the actual market supply/demand conditions. The counter-intuitive pricing sends an incorrect signal to the marketplace and may increase the IESO's need to resort to non-market mechanisms to deal with SBG in future hours. Increasing the HOEP provides importers with a degree of assurance that an SBG event will not lead to a negative price, thus encouraging them to offer more into the market even though the market is currently oversupplied or is expected to be oversupplied. On the other hand, the increased price can undermine the profitability of exports and discourages exporters from exporting power that would help to alleviate the SBG conditions.

The Panel observed a further impact of this counter-intuitive price at OPG's Beck facility. The Beck facility has six units that can operate as either generators or as pumped storage facilities (i.e. a dispatchable load). In anticipation of low-priced hours, OPG had configured a number of these stations to operate as pumped storage facilities. During HE 1, however, the high price

made these facilities uneconomic and the facilities were not dispatched. Significantly, pumped storage has been promoted as a means to manage SBG conditions, but in this particular instance the facilities were not dispatched because of the high and counter-intuitive price.

Finally, several traders failed a total of 390 MW exports in HE 2, possibly in order to avoid being charged high prices for their transactions.[51] These export failures raised the risk of an output reduction at a nuclear station during HE 2, and in response the IESO cut an additional 400 MW of imports using the ADQh code. The incident highlights the consequence of a distorted price signal on the operation of future hours due to the use of the ADQh code.

Price Impact of ADQh Curtailments

Table 3-6 reports the total number of hours with import curtailments associated with ADQh and its price impact during SBG hours for the period January to October 2010.[52] Based on simulations of the unconstrained sequence with curtailed imports restored (i.e. the import curtailment not being removed from the unconstrained sequence), the HOEP would have been on average -$9.19/MWh in those SBG hours, compared to an actual of $18.07/MWh.

[51] Intertie traders can fail the transactions without notifying the IESO the reasons. However, in a few incidents, intertie traders did call the IESO, indicating that they would fail their transactions because of a high price in Ontario.
[52] There were no SBG events in January and February 2010.

Table 3-6: Price Impact of ADQh Coding in Surplus Baseload Generation Hours
January to October 2010
(MW and $/MWh)

Month	Number of SBG Hours	Average Import Curtailment (MWh)	Actual HOEP ($/MWh)	Average Simulated HOEP (MWh)	Difference (Simulated – Actual) ($/MWh)
Mar-10	5	245	11.99	-6.72	-18.71
Apr-10	39	189	9.37	-1.85	-11.22
May-10	8	354	21.74	4.43	-17.31
Jun-10	4	240	26.63	21.36	-5.27
Jul-10	4	293	22.73	9.78	-12.95
Aug-10	18	503	20.26	-10.78	-31.04
Sep-10	36	313	25.37	-28.5	-53.87
Oct-10	29	279	17.56	-5.14	-22.70
Total/Average	143	293	18.07	-9.19	-27.26

The Panel has previously observed that curtailing exports with the ADQh code during shortage conditions has artificially reduced the market price to a level that does not reflect the shortage situations. As with the import curtailments discussed above, the Panel was concerned that this approach provides distorted incentives to traders and other market participants, and may increase the need for the IESO to take further control actions in future hours. The Panel therefore recommended that exports not be removed from the unconstrained sequence when curtailed for system adequacy reasons.[53] The IESO initially determined this to be at a low priority for further

[53] For details, see the Panel's July 2008 Monitoring Report, pp. 171-180. Because curtailed exports for ADQh are also removed from the unconstrained sequence, the HOEP is decreased, which is inconsistent with the shortage situation at the time.

investigation. [54] However, it recently decided to change the coding practice for export curtailments in such situations.[55]

The IESO's initial response to the Panel's recommendation on the coding practice when exports are curtailed during shortage conditions noted that the change proposed by the Panel would result in further differences between the constrained and unconstrained sequences, which would create an additional uplift burden. The Panel agrees that not removing curtailed exports or imports from the unconstrained sequence will often result in further quantity differences between the two sequences.[56] However, a larger quantity difference does not necessarily result in a higher uplift because the HOEP is changed as well. A higher HOEP tends to increase constrained-off payments, but reduce constrained-on payments, while a lower HOEP tends to reduce constrained-off payments and increase constrained-on payments. The net effect depends on the relative magnitude of the two payments. In two sample cases (one with export curtailments during shortage conditions and the other with import curtailments during an SBG event), the

[54] The IESO's response to the Panel's recommendation was: "As stated in response to the December 2007 report, there are several issues regarding the appropriate market price during curtailment of exports (imports) due to adequacy. The IESO's current practices are based on the belief that the resultant price impacts of curtailed exports do not represent a distortion. Not removing these exports from the unconstrained algorithm would also result in further differences between the constrained and unconstrained sequences, which would create an additional uplift burden for Ontario consumers and would be opposite in direction from the IESO's goal of aligning pricing with actual dispatch. However, the IESO is sensitive to counter-intuitive prices and as stated previously will consider this within the policy review of SE-67, currently assigned a low priority." The Stakeholder Engagement Plan SE-67 is currently put on hold because of other priorities. For details, see:
http://ieso.ca/imoweb/consult/active_consultations.asp

[55] Effective January 10, 2011 the IESO updated its coding practice when exports are curtailed for adequacy reasons. When the adequacy concern is due to bottled resources in real-time, the IESO will apply the TLRi code (which the curtailed transactions from the constrained sequence but leaves them in the unconstrained sequence). When there is a global adequacy concern the IESO will continue to apply the ADQh code. After-the-fact analysis will be relied upon to verify that the proper code was used. See: the IESO's Interim Market Document Change, IESO_IMDC_0160 at http://www.ieso.ca/imoweb/pubs/imdc/IESO_IMDC_0160.pdf.

[56] At times, not removing the unconstrained schedules of curtailed exports (or imports) could lead to a smaller difference between the constrained and unconstrained sequences. For example, an export is scheduled 200 MW in the constrained sequence but 50 MW in the unconstrained sequence (i.e. the export is constrained on). The Ontario demand is 20,000 MW in both sequences, and net exports are 1,000 MW in the unconstrained sequence but 2,000 MW in the constrained sequence (i.e. net exports are constrained-on). If the export is curtailed, but not removed from the unconstrained sequence, the net exports would be 1,000 MW in the unconstrained sequence and 1,800 MW in the constrained sequence. The difference of 800 MW is smaller than 850 MW (=2,000-200-1,000+50) when the 50 MW is removed from the unconstrained sequence

Panel calculated that uplift would have been lower had the curtailed intertie transactions not been removed from the unconstrained sequence.[57]

As a general rule, the Panel believes that the market price should reflect the offer/bid prices of the resources that have been dispatched. However, in certain instances, it is appropriate for the market price to deviate from the offer price of the resources that have been dispatched. Specifically, where the IESO must undertake out-of-market control actions in order to stabilize conditions, such as during shortage or SBG conditions, it is appropriate for the market price to reflect the conditions immediately prior to the out-of-market control action. The IESO's manual intervention to cut imports is an action outside of the market, and its impact on the market price should be minimized. Strictly aligning the price with the offer/bid prices of dispatched facilities during shortage or SBG conditions compromises the market signal and undermines the IESO's own efforts to manage these conditions.

The IESO, following previous Panel recommendations, has revised several of its procedures to allow for the market price to better reflect demand/supply situations following IESO interventions. These revisions include, but are not limited to:

- Removing the emergency imports from the market supply to allow the market price to reflect the tight supply/demand condition;[58]
- Increase the market demand by the estimated amount of reduced demand due to a voltage reduction to allow the price to reflect the tight supply/demand condition;[59]

[57] The Panel assessed the incidents of January 18, 2010 HE 10 and September 5, HE 1. In the two cases, total CMSC payments would have been about $4,000 and $5,600 lower, respectively, had the curtailed exports or imports in not been removed from the unconstrained sequence. Supplementary information on CMSC during these hours is contained in Appendix 2 to this chapter.

[58] Emergency imports are an out-of-market mechanism employed by the IESO in order to increase supply. These imports increase the supply but are priced at -$2,000 in the IESO's real-time tool. In the past, this led to a suppressed HOEP, not reflecting the true shortage conditions. The IESO, following the Panel's recommendation, implemented a new procedure on August 11, 2005 of removing the emergency imports from the supply and thus eliminating the price distortion. For details, see the Panel's June 2004 Monitoring Report, p. 63 and December 2005 Monitoring Report, pp. 73-74.

[59] Voltage reduction is an out-of-market mechanism employed by the IESO in order to reduce demand during extremely tight supply situations. The reduction leads to reduced demand for energy. In the past, this led to a suppressed HOEP, not reflecting the true shortage conditions. The IESO, following the Panel's recommendation,

- Adding Control Action Operating Reserve (CAOR) as an OR source in order to avoid the reduction in OR requirements and thus a collapse in the energy price during OR shortage conditions; [60]

- Not removing reduced nuclear generation from the market schedules during SBG situations;[61] and

- Currently working towards not removing curtailed exports from the market schedule during shortage conditions.

The Panel regards the curtailment of imports during SBG conditions in the same manner as a reduction in nuclear output during SBG conditions. The Panel recommends that the IESO leave curtailed imports in the unconstrained schedule during periods of SBG. This would be consistent with the IESO's approach to reductions in nuclear output during periods of SBG. The Panel further believes that the treatment of curtailed imports during the SBG conditions should be consistent with the treatment of emergency imports during shortage conditions: the former deals with over-supply while the latter with under-supply. The Panel believes that where the IESO relies upon manual actions that are outside of the market, the impact of these interventions on the market price should be minimized.

The current analysis focuses on the implications of the ADQh code on the market price in respect of import curtailments under SBG conditions. As with its prior analysis of export curtailments, the Panel believes that the IESO should avoid distorting the market price when it intervenes with out-of-market actions. Furthermore, the distortion of the market signal in one hour tends to necessitate more intervention in subsequent hours and thus more distortion to the market. The

---

implemented a new procedure on August 11, 2005 of adding the estimated reduction in demand into the total demand and thus eliminated the price distortion. For details, see the Panel's December 2005 Monitoring Report, pp. 73-74.

[60] CAOR is out-of-market action whereby the IESO provides operating reserve through a voltage reduction. Currently, 800 MW of CAOR is applied in real-time. Before the implementation of CAOR, the IESO reduced the OR requirement at times of OR shortage, leading to a suppressed HOEP due to the joint optimization of energy and OR market. The introduction of CAOR eliminated the OR shortage and thus the reduction in the OR requirement, resulting in a more intuitive HOEP. For more details on CAOR, see:
http://www.ieso.ca/imoweb/marketdata/ControlActionOR.asp

[61] See footnote 44.

Panel therefore believes that impact of the ADQh code on the unconstrained market schedule should be eliminated

Recommendation 3-1:

The IESO should not remove imports curtailed to address SBG conditions from the unconstrained market schedule. This could be accomplished by changing how the ADQh code operates with respect to the market schedule.

2.3 New Procedure Relating to the Release of Transmission Service

All intertie transactions require transmission service on both sides of the border. A trader may be able to obtain transmission service on one side but unable to obtain transmission service on the other side. A failure to obtain transmission service in one jurisdiction results in a transaction failure in the jurisdiction where the trader obtained the transmission service.

In Ontario, all intertie transactions that have been scheduled in the final one-hour ahead pre-dispatch are considered firm as they are guaranteed transmission service in Ontario. Traders, however, have to subsequently arrange their own transmission service in other markets (the IESO runs its final pre-dispatch ahead of all other adjacent markets). As a result, failed transactions in Ontario at times are due to the trader being unable or unwilling to obtain transmission service in other markets, particularly Manitoba.

One well-known reason for intertie transaction failures historically was that the IESO released the transmission service too late to allow traders to obtain necessary transmission service in Manitoba and MISO.[62] To address the issue, the IESO implemented a new procedure on September 8, 2009, providing traders with sufficient time to arrange transmission service outside of Ontario.[63] Since the new procedure was implemented, several market participants have successfully acquired transmission service in Manitoba and MISO in order to export from Ontario or import from MISO. The Panel has observed that at times traders have been able to export as much as 200 MW from Ontario to Minnesota through

[62] The transmission service in Manitoba is provided by Manitoba Hydro, which also participates in the Ontario market as an importer and exporter.

[63] Under the old procedure, ETAGs were adjusted 30 minutes before dispatch (T-30) after the 1 hour ahead pre-dispatch (PD) run is complete, with subsequent transmission release. Thus if a trader did not have a schedule in the final one hour ahead pre-dispatch run, the release of its transmission to other traders began only at T-30. Thirty minutes does not allow enough time for market participants to acquire transmission service through Manitoba as well as into or out of MISO. As a result, market participants who did not initially acquire transmission service but were scheduled during the final PD run were forced out of the market and their transactions did not flow. In order to provide market participants with the necessary time to acquire transmission, the IESO now manually adjusts ETAGs 90 minutes before the hour (T-90) to align with the associated two-hour-ahead PD constrained schedule. This should allow transmission to be released in MISO and provide sufficient time for market participants to obtain the necessary service before the final Ontario PD run.

Manitoba, which is an alternative to exports at the Ontario-Minnesota interface. Table 3-7 below reports the total imports and exports at the Manitoba intertie by participant. In the year since the implementation of the new procedure, exports by market participants other than Manitoba Hydro have increased significantly, from almost no exports historically to 150 GWh (approximately 68% of all exports on this intertie) for the period September 2009 to August 2010.

Table 3-7: Imports and Exports at Manitoba Interface
September to August, 2006 - 2010
(GWh)

Period	Imports (GWh)			Exports (GWh)		
	Manitoba Hydro	Others	Total	Manitoba Hydro	Others	Total
Sep 06 –Aug 07	319	225	544	259	1	260
Sep 07 –Aug 08	251	104	355	74	0	74
Sep 08 –Aug 09	231	32	263	176	0	176
Sep 09 –Aug 10	***346***	***19***	***364***	***68***	***150***	***219***
Total	**1,147**	**380**	**1,526**	**577**	**151**	**729**

Increased exports may reduce constrained-off imports from Manitoba and constrained-off generation, and thus reduce constrained-off payments to importers and generators (see Table 3-9 below).[64] As discussed more fully in section 3.2 below, the Panel and the MAU are continuing to monitor the evolution of trading activity on the Northwest interties and its impact on CMSC payments.

[64] For example, assume the HOEP is $30/MWh and the shadow price at the Manitoba intertie is $1/MWh. An import is offered at $5/MWh. Without exports, the import will be constrained-off and Ontario consumers pay $25/MWh of CMSC to the importer for not importing. Assume an export bids in with a bid price of $6/MWh and the shadow price increases to $5/MWh. Then the export is constrained-on but the import is not constrained-off. The exporter pays $6/MWh after receiving the constrained-on CMSC ($30 – ($30-$6)), and the importer is paid $30/MWh for the import which flows. The net result is that Ontario consumers pay $24/MWh of CMSC, which is $1/MWh less than without export bidding. As a result, facilitating more exports tends to reduce total CMSC payments (as long as prices are not negative).

2.4 IESO's Actions to Prevent Transmission Lines from Becoming Overloaded

At times, an intertie may become congested or nearly congested. If a transaction that would relieve the congestion (i.e. any transaction that flows in the opposite direction of the congestion) fails, the transmission line will become overloaded unless the IESO or the counterpart system operator in the other jurisdiction responds by curtailing a transaction flowing in the opposite direction of the failed transaction.

In the Past, the IESO's practice was to attach the TLRi code[65] to the curtailed transaction(s). Because the curtailed transaction or transactions are not removed from the unconstrained sequence under this code, the IESO's manual action may lead to a greater discrepancy between the two schedules. At times the constrained-off CMSC payments may be very large when transactions were offered or bid at a high price.

Unlike the curtailments for internal adequacy discussed in section 2.2 above, these are situations where the cause of the control action is based on an external situation beyond the control of the IESO or Ontario market participants. After MAU identified the impact of this coding practice, and discussed it with IESO personnel, the IESO altered its practice and beginning November 25, 2009 has applied the TRLe code[66] to such situations. This approach reflects the principle that failures due to external causes should be removed from both the unconstrained and constrained sequence as these transactions are not feasible regardless of their bids/offers in Ontario and are not a direct result of IESO initiatives to manage the domestic resource shortage or supply conditions.[67]

---

[65] TLRi means Transmission Loading Relief for intertie or internal transmission.
[66] TLRe means Transmission Loading Relief for external jurisdictions.
[67] See the Panel's July 2008 Monitoring Report, pp. 171-180. In the report, the Panel recommended that (1) For interjurisdictional transactions that fail because of market participants' ('OTH') or external system operators' actions ('TLRe' and 'MrNh'), the MSP recommends the IESO revise its procedures to avoid distorting the unconstrained schedule. This would prevent counter-intuitive pricing results (and would allow traders in those instances to receive the Congestion Management Settlement Credit payment consistent with other situations where such payments are currently available).and (2) The MSP restates the recommendation in its December 2007 report that curtailed exports (or imports) for internal resource adequacy ('ADQh') should not be removed from the unconstrained schedule in order to ensure that actual market demand (or supply) is not distorted**.**

In addition to mitigating the distortion of the market price which occurs when externally infeasible trades are included in the market schedule, the change in coding practice has also reduced CMSC payments to traders associated with these transactions. The total estimated savings in CMSC payments due to the code change for the period November 2009 to October 2010 is $252,000.[68]

2.5 Loop Flow and the Status of the Phase Angle Regulators (PARs) at the Michigan Interface

A PAR is a special transformer that is used to control the power flowing over a transmission line. There are five PARs on four transmission lines at the Michigan interface, with a capability of controlling about 600 MW of Lake Erie Circulation (LEC). To effectively control LEC, all five PARs need to be in service. With any one of them not activated, the remaining PARs have limited capability to control LEC effectively.

- One PAR (owned by Hydro One) is installed on one transmission line in the Windsor area. It has been properly functioning since market opening, but has had minimal effect in controlling the LEC because PARs at other interties at the Michigan border are not activated.

- Two PARs (owned by Hydro One) are installed on two transmission lines in the Lambton area. Those PARs were out of service in 2003, and returned to service in March 2005. However, due to a technical issue with the PARs, the import/export capability at the Michigan interface was reduced by about 400 MW. As a result, the IESO has bypassed them under normal conditions until an agreement for

[68] It is worth noting that the potential savings could have been much higher because the change in code has eliminated an opportunity for traders to strategically bid or offer. For example, knowing that the IESO would use the TLRi code when curtailing exports/imports, an exporter might bid an extremely high price (the risk of bidding a high price is fully hedged if the exporter has sufficient TRs) and thus increase the constrained-off payment (which is calculated as the difference between the bid price and the HOEP). The change in code has eliminated the CMSC payment and correspondingly removed the potential incentive for traders to bid or offer a high price that does not reflect their actual opportunity costs.

operation between Hydro One and International Transmission Company (ITC) in Michigan can be reached.[69]

- Two new PARs, owned by ITC, have been installed at one transmission line in the Sarnia area to replace one which failed. ITC has indicated that the two PARs will not be put into service until the United States Federal Energy Regulatory Commission (FERC) approves regional sharing of the costs of the PARs.[70]

The Panel has repeatedly commented on this issue and recommended that the bypassed and non-activated PARs be brought into service as soon as possible and practicable, because of the large efficiency gains to Ontario as well as external markets.[71] It appears, however, that activation of the two ITC-owned PARs depends on resolution of U.S. regulatory matters and is outside the control of the IESO and Hydro One.[72]

3. New Matters

3.1 Treatment of Transfer Capability Reductions Outside of Ontario

In other electricity markets, if there is a known lack of transfer capability (either due to outage/derating or other reliability problems) outside the market that prevents intertie transactions from flowing, traders will typically cease offering into or bidding out of the market as they cannot profit from a transaction that cannot flow. Indeed, if they offer or bid and get scheduled, their transaction would fail and they could become subject to potential

[69] See the Panel's December 2005 Monitoring Report, pp 79-82.
[70] FERC Order on Compliance Filing, New York Independent System Operator, Inc., Docket ER08-1281-004, July 15, 2010, paragraph 32.
[71] See the Panel's December 2005 Monitoring Report, pp 79-82; July 2006 Monitoring Report, pp 100-102; January 2008 Monitoring Report, pp 146-151; July 2009 Monitoring Report, pp 164-181; and January 2010 Monitoring Report, pp 69-84.
[72] In December 2010, FERC ordered a settlement proceeding on a request by MISO and ITC that the New York ISO and PJM absorb part of the cost of the ITC-owned PARs. The New York ISO has requested a reconsideration or rehearing of the FERC order. See FERC Order Accepting and Suspending Proposed Tariff Sheets and Establishing Hearing and Settlement Judge Procedures, Midwest Independent Transmission System Operator, Inc., Docket ER11-1844-000, December 30, 2010; and, New York ISO submission on Docket ER11-1844-000, January 21, 2011.

financial penalties and compliance investigations as these failed transactions may be considered not for bona fide reasons. Avoiding offers and bids for infeasible transactions when there are external transfer problems can reduce transaction failures and thereby increase system reliability as well as market price fidelity.

However, this type of reaction by traders to external transfer problems may not occur in the Ontario market because of the two-sequence design and the IESO's coding practice.

- Constrained-off CMSC payments may incent traders to continue offering (or bidding) even though they know there is a transmission problem outside of Ontario that prevents them from importing into (or exporting out of) Ontario.
- Continuing to offer/bid is a risk free strategy because the scheduled imports/exports (in the constrained sequence) will be curtailed by the IESO with an associated code of TLRe as a result of the curtailment being made for external reliability.[73] This exempts the trader from any potential financial penalty (i.e. Intertie Failure Charge) and non-compliance investigation in Ontario.[74] They can avoid sanctions and compliance investigations in the neighbouring market by not arranging the exports (or imports) in the other jurisdictions, given that the transactions are schedule in Ontario earlier than in neighbouring jurisdictions.

July 13-15, 2010

The events of July 13-15, 2010 are an example. A part of the transmission system in Manitoba was derated to 0 MW of transfer capability, which prevented any power from flowing between Ontario and MISO on the Ontario-Manitoba intertie from July 13 HE 10 to July 15 HE 18. However, two market participants still offered or bid at the Manitoba interface. To accommodate the loss of transfer capability in Manitoba, the IESO can either preemptively curtail transactions (prior to final pre-dispatch) or curtail transactions in real-time (if they were scheduled in the constrained sequence). However, where transactions are

[73] For a general discussion of curtailments and other control actions see section 2.2.4 of this chapter.
[74] Because the IESO's pre-dispatch tool runs ahead of external jurisdictions, a failed transaction in Ontario is typically not a failed transaction in the corresponding external jurisdiction and thus there is no financial implication outside Ontario.

scheduled only in the unconstrained sequence but not in the constrained sequence, there is no manual curtailment required and, under the circumstances, this would automatically lead to constrained-off CMSC payments. In the two days (July 14 and 15), Ontario load paid $163,000 in uplift to two traders for constrained-off imports at the Manitoba interface even though the imports could not possibly have flowed.[75] The Panel is currently assessing the behaviour of these market participants.

The Panel recognizes there are challenges in dealing with external transmission problems under the current market design.[76] A locational marginal pricing (LMP) regime could be very useful in addressing such issues because the LMP regime will not provide financial incentives for traders to offer or bid transactions that could not possibly flow. In the absence of such a market design, one option is to reduce the transfer capability when there are transfer capability reductions Ontario prohibit flow over the interface. This would preclude the scheduling of intertie offers or bids in both the constrained and unconstrained sequences. It also would eliminate unnecessary CMSC payments. Alternatively, the IESO could remove all offers and bids for those transactions that are physically incapable of flowing from both the constrained and unconstrained sequence (i.e., using the TLRe code for all offers/bids– not the TLRi code, which removes transactions from the constrained schedule only).[77]

While the Panel maintains its overall views regarding CMSC and the two-sequence market structure, it feels there is a particular urgency regarding the following recommendation. This recommendation should not be interpreted to mean a tolerance for other forms of constrained-off CMSC, or even CMSC in general.

[75] Major transmission outages/deratings or transfer capability reductions are generally made available to market participants in neighbouring US markets based on the open access tariffs or market rules in the markets.
[76] In its January 2010 Monitoring Report, pp. 77-82 and 84-86, the Panel discussed the IESO's action of pre-emptively curtailing exports (or imports) in response to external problems. The Panel concluded that although the action may be blunt to the market, the most practical and efficient way for the IESO to independently assist external ISO to manage their congestion in the short term is to curtail exports (or imports) before the final pre-dispatch run. In the long term, a more efficient way to address the congestion problem might be achieved through improved coordination among market operators. A broader regional resolution, which is under consideration before the FERC, appears to be the right approach**.**
[77] See section 2.2.4 of this chapter.

Recommendation 3-2:

Where there are transfer capability reductions outside Ontario that prohibit power flow out of or into Ontario, the IESO should not make CMSC payments. Possible methods might include but not limited to: removing the related offers/bids, reducing intertie transfer capability to zero, or establishing a mechanism for clawback of the CMSC payments.

3.2 Increased Trading Activity and CMSC Payments in the Northwest Region

3.2.1 *Introduction*

This section reports on the Panel's continuing examination of bottled supply and significant CMSC payments in the Northwest region.

The average zonal price for the Northwest region was - $553/MWh in the summer (May - October) of 2009, -$263/MWh in the winter (November - April) of 2010, and -$157/MWh in the summer of 2010. The significant increase in the zonal price in summer 2010 is likely due to lower water levels over the past summer and a corresponding lower hydroelectric capacity. The negative zonal price reflects how generators in the area are offering into the market. These negative prices would not have been sustainable had the generators actually been exposed to the resulting prices.

The Panel has repeatedly reported on large CMSC payments made to market participants in the Northwest region, even though the area accounts for only a small portion of the total Ontario generation and load (see Table 3-9 below). The CMSC payments are major contributors to zonal prices which do not reflect actual marginal or opportunity costs of production or consumption. As can be seen in Table 3-8, the CMSC payments also represent a major component of total revenues for suppliers in the region, and a major offset to the purchase costs for dispatchable loads in the region. Table 3-8 below indicates the average

realized price for the various types of dispatchable resources in the Northwest region as well as in other regions.[78]

Table 3-8: Revenues, Payments and Average Realized Price by Participant Type
May to October, 2009-2010
(GWh and $/MWh)

Area	Participant Type	Summer 2009					Summer 2010				
		Energy Revenue/ Payments ($M)	CMSC ($M)	Total Revenue/ Payments ($M)	Supply/ Consumption (GWh)	Average Revenue/ Payments ($/MWh)	Energy Revenue/ Payments ($M)	CMSC ($M)	Total Revenue/ Payments ($M)	Supply/ Consumption (GWh)	Average Revenue/ Payments ($/MWh)
Northwest	Generators	59.4	4.2	63.6	2,429	26.18	74.9	5.4	80.3	1,834	43.78
	Importers	4.6	12.5	17.1	176	97.16	10.6	9.6	20.2	388	52.06
	Dispatchable Loads	9.1	(4.7)	4.4	376	11.70	15.1	(15.5)	(0.4)	421	(0.95)
	Exporters	9.3	(7.2)	2.1	392	5.36	4.6	(1.6)	3.0	119	25.21
All Other Areas	Generators	1,644.5	39.1	1,683.6	64,430	26.13	2,834.9	25.4	2,860.3	67,895	42.13
	Importers	80.7	1.4	82.1	2,837	28.94	121.2	0	121.2	2,840	42.68
	Dispatchable Loads	28.8	(1.2)	27.6	1,259	21.92	35.6	(0.5)	35.1	1,099	31.94
	Exporters	186.2	(13.8)	172.4	7,173	24.03	284.2	(2.1)	282.1	7,078	39.86
Ontario	Non-dispatchable loads	1,696.1	84.1	1,780.2	65,517	27.17	2,912.8	60.1	2,972.9	69,500	42.78

There are several important observations arising from these data:

- Although the market has a uniform price design, different market participants in different locations have been paid or charged a different price (after taking into account the CMSC payment). For example, on average, in the Northwest area generators were paid $43.78/MWh in summer 2010 for every MW they produced, importers were paid $52.06/MWh for every MW they imported, dispatchable loads were paid $0.95/MWh for every MW they consumed, and exporters were charged $25.21/MWh for every MW they purchased. In contrast, in all other areas, on average, generators were paid $42.13/MWh, importers were paid $42.68/MWh, dispatchable loads were charged $31.94/MWh, and exporters were charged $39.86/MWh. As the figures above indicate, sources of supply are paid

[78] These calculations exclude Global Adjustment and other, non-CMSC uplift charges as well as contract, regulatory and generator cost guarantee payments.

more than dispatchable sources of consumption (loads and exporters). To hold the market whole, the balance is recovered from non-dispatchable loads, which paid on average $42.78/MWh in summer 2010**.**

- Importers in the Northwest received a much higher price than generators in the Northwest after taking into account CMSC payments. For example, in summer 2009, importers received on average $97.16/MWh for every MWh imported to Ontario, which is 271 percent greater than what Northwest generators received and 272 percent greater than what generators in other areas of Ontario received, on average, over the same period. On average importers in the Northwest are the biggest beneficiaries of the two-sequence market design.

- Conversely, the average actual energy purchase cost by dispatchable loads in Northwest, net of CMSC payments received, was $11.70/MWh in summer 2009 and -$0.95/MWh in summer 2010. This is 47 percent and 103 percent lower, respectively, than the price that other dispatchable loads had paid in the same periods.

- Exporters, especially in the Northwest, have also enjoyed a lower price than non-dispatchable loads. For example, in summer 2009 exporters in the Northwest paid $25.21/MWh, which is 37 percent less than what other Ontario exporters had paid and 41 percent less than what non-dispatchable loads paid.

The price differences among types of market participants indicate that, in reality, the market is not a uniform price market. Furthermore, the generators and importers in a bottled area (like the Northwest) are paid more than other generators and importers in other areas for energy that they have provided to the market. The concept that generators and importers in an area with excess supply are paid more than generators and importers in an area with lower levels of supply (and higher demand) is totally counter-intuitive and has resulted in numerous inefficient and unattended consequences.

In a previous report,[79] the Panel highlighted several issues in the Northwest area and demonstrated that many are a result of the two-sequence market design. In particular, the major findings in that report are:

- The Northwest has accounted for about 1/3 of total CMSC payments in Ontario, although both the intertie capacity and generation capability are small (roughly 10% of Ontario's total intertie capacity and approximately 4 percent of Ontario's total installed generation capability). These CMSC payments provide distorted signals to market participants that undermine market efficiency. The two-sequence design also provides market participants with opportunities to strategically target CMSC payments rather than the delivery or consumption of energy.

- Both the Manitoba and Minnesota interfaces are frequently import congested in the unconstrained sequence without any corresponding physical import of electricity (i.e. imports are constrained off). This has led to congestion rent at this interface being insufficient to cover the TR payouts on these interfaces. Constrained-on payments to exporters and dispatchable loads may at times be inflated due to negative zonal prices in the area, which do not appear to reflect generator production costs or opportunity costs.

This section discusses further developments and issues in the Northwest area, some of which were raised in the Panel's previous report. The focus is on two areas:

- Cost of congestion in the Northwest;
- Trading activity at the Manitoba interface; and
- Subsidization to various market participants and its implications on market efficiency.

[79] See the Panel's January 2010 Monitoring Report, pp. 89-105.

3.2.2 *Cost of Congestion*

There are two major congested locations in the Northwest area: one at the Northwest-to-East interface within Ontario and the other at the interfaces with Manitoba and Minnesota. The former has a transfer capability slightly above 300 MW, but this is frequently reduced due to lightning activity in the area. The latter has a total export capability of about 410 MW (140 MW at the Minnesota interface and 270 MW at the Manitoba interface) and an import capability of about 260 MW (90 MW at the Minnesota interface and 170 MW at the Manitoba interface). With abundant hydro resources in the Northwest (and Manitoba) and declining levels of load, the Northwest area is regularly characterized by supply in excess of demand.

In a well-designed market, abundant low-cost supply should translate into a low market price in the area, providing incentives for generators to reduce their output or scale down capacity, for loads and exporters to increase consumption, and for importers to reduce imports. The market forces would work towards an equilibrium at which all demand willing to pay no less than the market price is satisfied and all supply that has a generation/opportunity cost no greater than the market price is scheduled. However, Ontario continues to operate with the uniform HOEP and associated CMSC payments that were intended to be a temporary structure prior to the development of locational pricing.[80] This design has resulted in a distorted price signal, where none of the above-mentioned functions perform optimally and where market efficiency is not maximized:

- Generators are paid constrained-off payments which undermine the incentive to produce less or scale down their generation capacity in an over-supplied area.
- Loads do not benefit from the abundant supply because they pay the uniform effective price (which includes the HOEP, the Global Adjustment (GA) and uplifts). Notwithstanding the excess of local supply, loads may be incented to reduce their consumption to avoid a high all-in effective price.

[80] For discussion of the original expectation that the market would evolve towards locational pricing, see the Panel's October 2002 Monitoring Report, pp. 140-141.

- Exporters may be incented to bid at a price which does not reflect their actual arbitrage opportunities in order to realize larger constrained-on payments (because the constrained-on payment is calculated as the difference between their bid price and the HOEP).
- Importers may be incented to offer at prices below their supply costs in order to increase constrained-off payments (because the constrained-off payment is equal to the difference between the HOEP and their offer price).

Table 3-9 below reports the total annual CMSC payments for the period from May 2002 to October 2010 (excluding dispatchable loads). The total CMSC payment in Ontario was about $1.1 billion (before clawbacks),[81] of which roughly one-third (or $360 million) was paid to generators and intertie traders in the Northwest area. Of the $360 million in CMSC payments, $161 million (45 percent) was paid for not generating, $146 million (40 percent) was paid for not importing, and $53 million (15 percent) was paid for constrained-on exports /imports / generation.

[81] Approximately 3% of CMSC payments are recovered through clawback processes administered by the IESO. Statistics which net clawback against CMSC payments at the level of the individual interfaces and types of market participants are not readily available. Accordingly, unless otherwise noted, all CMSC data in this report is based on gross payments ignoring clawbacks.

Table 3-9: Annual CMSC Payments
May 2002 to October 2010
($ Millions; Excluding Dispatchable Loads)

Year	Northwest							Ontario		
	Constrained -Off			Constrained-On			Total	Constrained -Off	Constrained-On	Total
	Generators	Manitoba	Minnesota	Generators	Manitoba	Minnesota				
2002*	24	9	2	1	0	0	36	39	107	146
2003	6	9	8	3	0	0	26	68	42	110
2004	20	3	1	0	0	0	24	55	25	80
2005	48	17	6	0	0	6	77	121	81	202
2006	16	9	0	1	0	2	28	62	41	103
2007	14	13	2	2	1	4	35	68	39	107
2008	16	30	3	1	1	16	67	98	53	151
2009	9	17	4	1	4	6	41	73	52	125
2010**	9	10	2	1	2	2	26	43	30	73
Total	161	118	28	9	9	35	360	627	470	1,097
Clawback							14			34
Net CMSC							346			1,063

*From May to December 2002
**from January to October 2010

Eleven market participants have accounted for almost all the $360 million total CMSC payments in the Northwest area since market opening. The three largest recipients account for 90 percent of the total since market opening and 79 percent of the 2010 (January to October) payments. Over the past two years, new traders have become active at the Manitoba interface and are receiving significant CMSC payments. In 2009-2010, four new or smaller traders received about $14 million at the Manitoba and Minnesota interfaces, which accounted for about 20 percent of total CMSC in the Northwest area.

The CMSC payments in 2010 ($26 million) are the lowest in the past six years. This is in part a result of a smaller number of months (January to October in 2010), in part due to a relatively low HOEP[82] (although not as low as in 2009) and in part due to more active trading at the interfaces (especially the Manitoba interface) resulting in lower CMSC payments per constrained MWh.

[82] A lower energy price tends to reduce constrained–off payments, which represent more than 60% of total CMSC payments in the area.

3.2.3 *Trading Activity at the Manitoba Interface*

As noted in section 2.5 above, there has been increased activity in the Northwest area, especially at the Manitoba interface, since the IESO implemented the new transmission service procedure in September 2009 (discussed in Chapter 3 Section 2.3) . The new procedure provides traders sufficient time to obtain transmission service in MISO and Manitoba, and thus facilitates arbitraging transactions between Ontario and MISO. The possible incentives for increased involvement by traders at the interface include opportunities to obtain constrained-off payments for imports and constrained-on payments for exports.

Table 3-10 below reports constrained-off imports[83] and constrained-on exports[84] by traders at the Manitoba interface. It can be seen that in the year since the implementation of the new IESO procedure, market participants other than Participant A have obtained a significant share of constrained-off imports and the majority of constrained-on exports.

[83] A negative value means constrained-on imports.
[84] A negative value means constrained-off exports.

Table 3-10: Constrained-off Imports and Constrained-on Exports at Manitoba Interface
September 2002 to August 2010
(GWh)

Period	Constrained-Off Imports (GWh)			Constrained-On Exports (GWh)		
	Participant A	Others	Total	Participant A	Others	Total
Sep 02 –Aug 03	74	20	94	-6	0	-6
Sep 03 –Aug 04	132	-4	128	-100	0	-100
Sep 04 –Aug 05	249	25	274	0	0	0
Sep 05 –Aug 06	346	10	356	3	0	3
Sep 06 –Aug 07	193	14	207	-16	0	-16
Sep 07 –Aug 08	950	57	1,007	49	0	49
Sep 08 –Aug 09	1,079	59	1,138	99	0	99
Sub -total	***3,022***	***182***	***3,204***	***29***	***0***	***28***
Sep 09 –Aug 10	***951***	***202***	***1,153***	***56***	***144***	***200***
Total	3,973	384	4,357	85	144	228

3.2.4 *Subsidization to Northwest Participants and the Implications on Market Efficiency*

This section examines the impact of CMSC payments on various market participants and on market efficiency. The analysis focuses on the constrained-off payments to importers and generators as well as the constrained-on payments to exporters.[85]

Constrained-off Imports

The Panel has previously observed that payments to constrained-off importers do not provide benefits to the Ontario market and has recommended that they should be eliminated.[86] Since market opening, constrained-off payments to importers in the Northwest region alone have amounted to about $146 million (or an uplift of $0.12/MWh when spread over total Ontario demand plus exports in the past 8 years).

85 Given the regular surplus generation conditions in the Northwest area, constrained-on imports and generation and constrained-off exports are rare and typically are the result of manual actions taken by the IESO for system reliability purposes. CMSC payments to dispatchable loads, most of which are self-induced, were discussed extensively in the Panel's prior report: see the August 2010 Monitoring Report, pp.112-128.

86 See the Panel's CMSC consultation paper "Consultation on CMSC in the IMO-Administered Electricity Market - Issues Related to Constrained-off Payments to Generators and Imports" at : http://www.oeb.gov.on.ca/OEB/Industry/About+the+OEB/Electricity+Market+Surveillance/Consultation+on+CMSC, and various reports (such as the October 2002 Monitoring Report, pp. 142-144 and most recently the July 2006 Monitoring Report, p. 124)

If an importer offers at marginal cost or opportunity cost, the constrained-off payment may effectively represent a subsidy from Ontario loads to the importer without affecting dispatch or allocative efficiency. However, constrained-off payments may induce importers to offer at prices lower than opportunity cost because the magnitude of the constrained-off payment is negatively related to their offer price. This strategy may lead to imports being scheduled inefficiently, ahead of generation which could supply the same energy at a lower marginal cost.

One indicator of socially inefficient transactions at the Manitoba interface can be seen by comparing the locational price in Minnesota (MISO's "ONT_W" interface price) with the shadow price in the Northwest area when there were imports coming from Manitoba into Ontario and there was spare capacity for power to flow from Manitoba to Minnesota at the Manitoba / Minnesota interface.[87] In such a situation, the imports from Manitoba to Ontario would be expected to go to Minnesota (up to the transmission capacity at the Manitoba/Minnesota interface) when the 'ONT_W' interface price in Minnesota is greater than the shadow price in Northwest, as this would be the globally efficient outcome. It can be seen from Table 3-11 that potentially 71% of imports from Manitoba to the Ontario Northwest since January 2009 are inefficient based on this comparison. The Panel believes that the Ontario CMSC regime is the principal driver for these otherwise inefficient transactions.

[87] Only the Manitoba interface is assessed because this is the interface at which most imports are constrained-off and there are only a few market participants trading at this interface.

Table 3-11: Inefficient Imports at the Manitoba Interface
January 2009 to October 2010
(MWh and $1 000)

Month	Total Imports in Unconstrained Schedule (MWh)	Total Imports in Constrained Schedule (MWh)	Inefficient Imports (MWh)	Percentage of Imports Constrained Off (%)	Percentage of Actual Imports which are Inefficient (%)
Jan-09	62,838	14,360	11,494	82	80
Feb-09	96,624	9,401	8,411	91	89
Mar-09	69,774	499	414	99	83
Apr-09	77,336	8,840	6,608	91	75
May-09	130,752	8,180	6,102	95	75
Jun-09	133,949	19,974	18,514	86	93
Jul-09	160,672	36,750	27,425	83	75
Aug-09	169,643	22,970	14,937	91	65
Sep-09	124,785	18,865	15,267	88	81
Oct-09	164,109	33,044	22,568	86	68
Nov-09	142,095	42,015	32,432	77	77
Dec-09	105,055	4,121	2,802	97	68
Jan-10	119,424	3,911	3,370	97	86
Feb-10	69,579	2,822	2,583	96	92
Mar-10	121,988	17,400	16,007	87	92
Apr-10	119,778	61,531	49,989	58	81
May-10	94,177	1,524	1,355	99	89
Jun-10	129,430	44,117	31,022	76	70
Jul-10	156,789	47,279	30,648	80	65
Aug-10	171,934	69,436	46,361	73	67
Sep-10	156,839	82,776	58,392	63	71
Oct-10	145,366	68,558	44,463	69	65
Total	**2,722,936**	**741,535**	**528,798**	81	**71**

Table 3-11 above also reports the imports that have been constrained-off by month for the period January 2009 to October 2010. As can be seen, 81 percent of imports that were offered at the Manitoba interface were constrained off. The enormous percentage of constrained-off imports is another indicator of the incentives traders have to offer at the interface in order to receive the constrained-off payments.

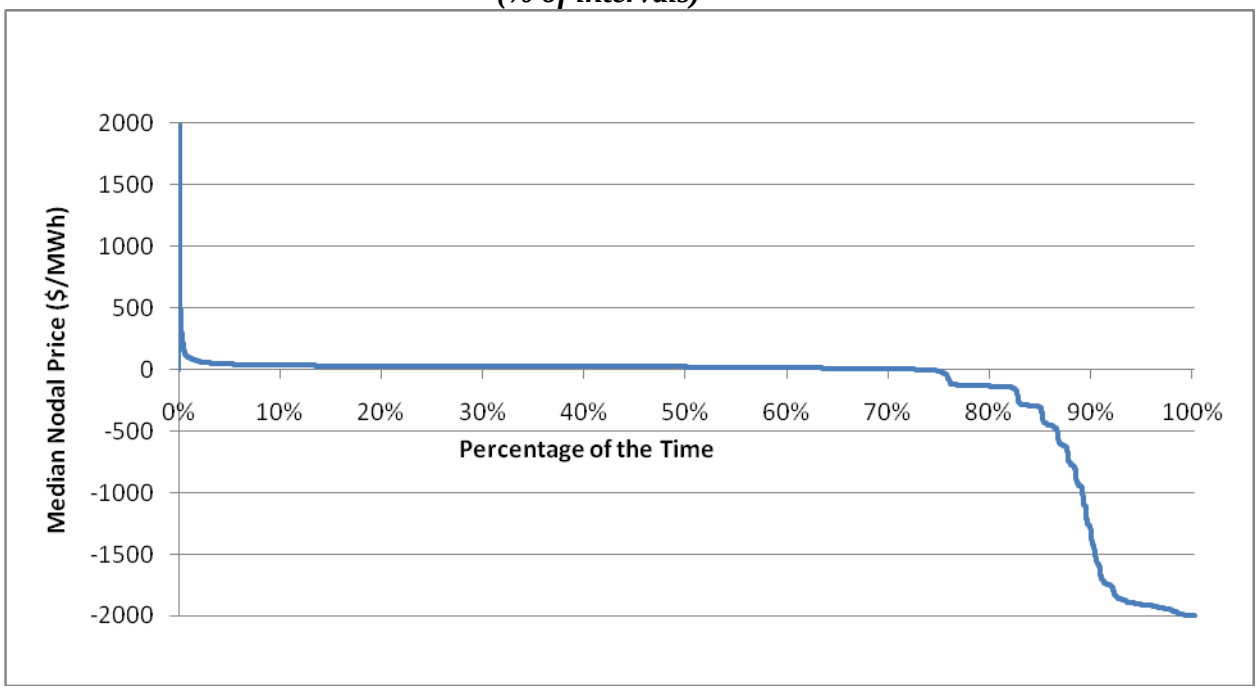
Constrained-off Generation

The Panel has previously recommended that constrained-off payments to generators be eliminated.[88] A report prepared for the IESO in 2003 agreed that constrained-off payments to internal generators may provide some reliability benefit to the market on the basis that generators might otherwise not follow dispatch instructions.[89] The Panel remains puzzled as to why market participants would need to be compensated for following dispatch instructions that the market rules require them to follow.[90] Moreover, the constrained-off payments also incent generators to offer below marginal cost (or opportunity cost), in a similar manner as discussed in the previous section with respect to importers.

Figure 3-6 below depicts the duration curve of the median location nodal price[91] in the Northwest (generators only) for the period from November 2009 to October 2010. The duration curve provides an indication about how generation units had been offered during the period.[92] It can be seen that the median offers were below -$1,500/MWh in 10% of the hours, below -$500/MWh in 13% of the hours, and below $0/MWh in 25% of the hours.

[88] See the Panel's "Consultation on CMSC in the IMO-Administered Electricity Market - Issues Related to Constrained-off Payments to Generators and Imports' at: http://www.oeb.gov.on.ca/OEB/Industry/About+the+OEB/Electricity+Market+Surveillance/Consultation+on+CMSC, and most recently the July 2008 Monitoring Report, pp. 203-205.
[89] "Congestion Management Settlement Credits in Ontario', Charles River Associates, prepared for Ontario Independent Electricity Market Operator, December 24, 2003.
[90] See the Panel's December 2007 Monitoring Report, pp. 151-160.
[91] There is no material change when average locational nodal price is used. A median has been used in order to eliminate the impact of a few very high or very low location nodal prices at specific locations.
[92] It should be noted that half of the generator offers will be below the median.

Figure 3-6: Duration Curve of Median Generator Nodal Price in the Northwest Region November 2009 to October 2010 (% of intervals)



It is understandable that at times fossil-fired generators are willing to offer at a negative price (i.e. willing to pay loads to consume) in order to avoid incremental costs associated with shutting down and restarting a unit (if they need to recover the shutdown cost directly from the market).[93] Similarly, hydroelectric units may offer at a negative price if water levels are high and the facility is unable to store or spill the water (especially during the freshet period in spring). However, it is implausible that generators in the Northwest would have been willing to pay loads to consume approximately 25% of the time for the period November 2009 to October 2010, including paying $1,500/MWh or more 10 percent of the time, as is implied by the negative portion of the nodal price duration curve in Figure 3-6. The high frequency of negative nodal prices strongly suggests that generators regularly offer below marginal or opportunity costs in order to receive constrained-off payments. To the extent that below cost offers result in changes to the merit order in the market schedule, this will also have negative effects on market efficiency.

[93] As noted in section 3.3 below, fossil-fried units often participate in the Generator Cost Guarantee program which reimburses them for operating costs that exceed their revenues.

Constrained-on Exports

A low nodal price may result in exporters being constrained-on even though they bid at a negative price. The constraining-on of exporters leads to those participants being paid to consume and at times the payment could be very large and appear to be unwarranted. The Panel previously recommended that the constrained-on payment should be capped with a replacement bid price such as $0/MWh.[94] The IESO's new rule of capping the CMSC payment, following the Panel's recommendation, will reduce these payments but will not eliminate them.[95]

If constrained-on exports are supplied by internal generators, exporters are subsidized to move power out of Ontario (because generators are effectively paid a higher price to produce the energy).

If constrained-on exports are matched by imports, exporters are effectively subsidized by Ontario loads through CMSC payments to either keep power in external markets or move power from one external jurisdiction to another. The former occurs when the source market of imports is the same as the sink market of the exports, while the latter occurs when they are different. Subsidies have occurred because constrained-on exports are charged a lower price (after netting out the constrained-on payment) while the energy is imported at a higher price. Because importers are incented to offer below cost, exporters may be subsidized to move power from high cost markets to low cost markets. Ontario loads' subsidization of these transactions is not matched by a corresponding benefit to the Ontario market.

Table 3-12 below reports the estimated subsidization by Ontario loads to intertie traders who keep power in external markets or who move power between external markets. The estimates are the constrained-on payments for exports when all the exports were met by imports, which is exactly the difference between what Ontario has paid for the same amount of imports and

[94] See the Panel's January 2010 Monitoring Report, pp. 89-105.
[95] For details, see Market rule Amendment: MR-00370 - Limiting CMSC Payments for Exporters and Dispatchable Loads at: http://ieso.ca/imoweb/amendments/mr_Amendments.asp.

what it has received from the offsetting exports. It is worth noting that the new rule amendment that uses a replacement bid of -$125/MWh will mitigate this subsidy (when exporters strategically bid a large negative price) but will not eliminate it.

Table 3-12: Subsidies to Traders Moving Power In and Out of Ontario or between External Markets At Manitoba and Minnesota Interfaces January 2009 to October 2010 ($000)

Month	Interface		
	Manitoba	Minnesota	Total
Jan-09	1	43	44
Feb-09	2	218	220
Mar-09	0	297	297
Apr-09	0	111	111
May-09	0	293	293
Jun-09	0	89	89
Jul-09	0	11	11
Aug-09	0	28	28
Sep-09	3	250	253
Oct-09	6	19	25
Nov-09	566	8	574
Dec-09	22	25	47
Jan-10	11	42	53
Feb-10	9	2	11
Mar-10	56	4	60
Apr-10	286	12	298
May-10	14	3	17
Jun-10	11	17	28
Jul-10	37	48	85
Aug-10	49	49	98
Sep-10	29	19	48
Oct-10	1	15	16
Total	**1,101**	**1,604**	**2,705**

In summary, during the period January 2009 to October 2010, it is estimated that Ontario loads provided exporters with an approximate $2.7 million subsidy for constrained-on exports that effectively moved power out of, then back into, Minnesota or for moving power from Manitoba to Minnesota through Ontario (most exports at the Manitoba interface are

from Ontario to Minnesota). Ontario loads received no benefit to offset the uplift charge associated with these transactions.[96]

3.2.5 *Assessment*

As demonstrated above, there are significant problems in the Northwest associated with the two-sequence market design. This design has a few fundamental defects:

- The uniform price regime leads to (i) payments for not producing or importing (i.e. generators or importers are constrained off), or (ii) market prices that are not high enough to cover the marginal or opportunity costs (i.e. generators and importers are constrained on), thus requiring constrained-on payments to top up the costs, or (iii) market prices that are too high to loads and exporters compared to the value of consumption or opportunity costs, thus requiring constrained-on payments to offset the charges in order to induce efficient consumption and exports. These side-payments require complex calculations and are difficult to understand.

- Ontario non-dispatchable loads receive little or no benefit for the constrained-off payments that they fund through uplift charges. These constrained-off payments neither help to relieve transmission congestion, nor provide accurate signals or references for decisions relating to the construction of new transmission.

- By providing incentives for market participants to not offer/bid at marginal cost or opportunity cost, CMSC payments potentially lead to efficiency losses. For example, an efficiency loss can result when the change in offer/bid strategy may change the merit order of supply, causing more expensive generation/imports to be scheduled ahead of cheaper generation/imports.

[96] The subsidized amount varies significantly at the Manitoba interface, depending on the volume of exports that traders can move through Manitoba.

The Panel has been previously recommended that a locational pricing design or other similar designs could significantly improve market efficiency and reduce the unnecessary subsidies from Ontario loads to intertie traders as well as to generators and to dispatchable loads, particularly in the Northwest. As a whole, Ontario would benefit from such a market change, both in the short term and in the long term. The Panel understands that the IESO is drafting a "market road map",[97] which will be made available for the industry to review. As part of this process, the Panel suggests the IESO seriously consider the merits of locational pricing, or a variation where dispatchable resources receive/pay location-specific prices with non-dispatchable loads remaining subject to a uniform price.[98]

Recommendation 3-3:
As part of its "market road map" process, the IESO should work with stakeholders to examine the feasibility of replacing the two-sequence design with locational pricing, variable pricing for dispatchable resources or other alternatives.

3.3 Inefficient Stops and Starts Under the IESO's Generation Cost Guarantee Program

3.3.1 Introduction

Previous Findings

In the previous Monitoring Report,[99] the Panel discussed the impact of the December 2009 market rule amendment affecting the IESO's generation cost guarantee (GCG) program.[100] The new rules guarantee eligible fossil-fired generators their start-up costs associated with ramping up to their minimum loading point (MLP).[101] These costs are submitted several

[97] For details, see the IESO's fee submission at:
http://www.ieso.ca/imoweb/pubs/corp2/IESO_SUB_2011%20FEES_20101102.pdf
[98] For further discussion of the alternative of variable pricing for dispatchable resources, see the Panel's January 2010 Monitoring Report, pp. 120-123.
[99] See the Panel's August 2010 Monitoring Report, pp. 128–140.
[100] See MR-00356 - Interim Changes to Real-Time and Day-Ahead Generation Cost Guarantee Programs, available at: http://www.ieso.ca/imoweb/pubs/mr2009/MR-00356-R00-R02-BA.pdf.
[101] The minimum loading point (MLP) is the minimum output of energy, specified by the market participant, that can be produced by a generation facility under stable conditions (i.e. the minimum output level at which the

days after the generator has produced and are not considered as part of the IESO's dispatch decision. In addition, under the new rules generators are guaranteed the incremental cost associated with operating their facility for the duration of their minimum generation block run time (MGBRT). [102] This component of the guarantee is calculated based on the generator's real-time MGBRT offer price.[103]

As part of its assessment of the rule change, the Panel observed that between December 9, 2009 and April 30, 2010, after-the-fact submitted start-up costs under the GCG program accounted for 61.8% of the total costs, while the costs associated with the MGBRT offers accounted for only 38.2% of total costs. Yet under the new rules dispatch decisions are dictated exclusively by the MBGRT offer price. The Panel concluded that the new GCG program, which continued to allow for after-the-fact cost submissions, may have contributed to inefficient dispatch, offers below the average incremental cost of starting and running fossil units, a depressed market clearing price, and an inflated global adjustment. Accordingly, the Panel recommended that, to the extent the IESO believed a reliability program such as the GCG program continued to be warranted, the IESO should base the guarantee payment on the offer submitted by the generator or should implement another solution that would require actual generation costs to be taken into account at the time of scheduling decisions. In addition, the Panel noted that the ability to submit after-the-fact costs raised the possibility of gaming opportunities if the GCG program was not regularly audited.[104]

generator can reliably and persistently operate). A generator also must produce at least at the MLP in order to supply operating reserves.

[102] The minimum generation block run-time is the number of hours, specified by the market participant, that a generation facility must be operating at its minimum loading point or above in accordance with the technical requirements of the facility (i.e. the minimum duration, in hours, that the generation facility, once online, must operate at its MLP or above).

[103] For scheduling purposes, the new GCG rules require that generators offer their MLP at a single price for the duration of their MGBRT. If a generator raises its offer price, it becomes non-compliant with the market rules. (In theory a generator could lower its offer price for certain hours during the MGBRT, but in practice generators would not do so as lowering the offer price would only serve to reduce the guarantee payment available under the GCG program.)

[104] See the Panel's August 2010 Monitoring Report, at pp. 133 and 139–140.

3.3.2 Costs to Loads

During the most recent reporting period the Panel directed the MAU to continue to monitor the impact of the GCG program. The MAU observed that some generation facilities synchronize and operate for their MGBRT, then shut for a short period of time (at times for as little as half an hour), and then re-synchronize for another run. The MAU observed that this behaviour was creating a high cost to Ontario loads because the cost of shutting down a generation facility only to restart that facility several intervals later typically exceeded what it would have cost to keep that same facility online. To illustrate, assume a facility with a 100 MW MLP shuts down only to restart two hours later. Shutting down and restarting this facility may cost consumers $50,000 in exchange for only a small amount of energy produced during the ramp-down and start-up periods. As an alternative to shutting down, the facility could have remained online. The cost to loads associated with the unit remaining online and producing energy may have been as little as $10,000.

During the summer period, the MAU observed 426 instances where GCG eligible generators came offline only to restart again[105] within two hours.[106]

The two main cost components resulting from the shutdown and restart of a GCG generator are an additional payment of constrained-off CMSC during ramp-down and an additional set of start-up costs to ramp back up.[107] Table 3-13 below reports the total submitted start-up costs, as well as CMSC payments during the ramping down period, in the events where generators were offline for two hours or less.

[105] These are situations where the generator pro-actively raised its offer price after completion of the MGBRT period in order to be dispatched off.
[106] For further discussion of the two hour time period used in this analysis, see section 3.3.3 below.
[107] Start-up costs per MWh of output are significantly higher than operating costs per MWh once a unit is at or above its MLP.

Table 3-13: Submitted Start-up Costs and CMSC Payments to Generators For Shutting Down and Restarting within Two Hours Under the Generator Cost Guarantee Program May to October 2010 (Number of Events and $ millions)

Facility	Number of Events	Submitted GCG Start-Up Costs ($ million)	CMSC Payments for Ramp-down ($ million)
A	5	0.02	0
B	2	0.04	0
C	5	0.04	0
D	1	0.04	0
E	1	0.08	0
F	10	0.17	0.07
G	66	1.38	0.27
H	336	21.69	1.19
TOTAL	426	23.46	1.53

It is important to note that the values above are not an estimate of efficiency loss to the market. However, observation of the frequent restarts led the Panel to consider the impact of this behaviour on market efficiency.

3.3.3 Short-Term Shutdowns and Restarts

Fossil-fired generators may need to be shut down for maintenance, technical difficulties, or economic reasons. If a generator is offline for maintenance or technical reasons these shutdowns are not considered inefficient and the start-up costs associated with resynchronization are a necessary aspect of the return to operation. In Ontario, fossil generators are typically economic during mid-peak and peak hours. They are typically not economic during off-peak hours. Absent the GCG program, it would generally be in the financial interest of a fossil generator to shut down during off-peak hours. Shutting down

fossil units during off-peak hours is also efficient to the market because it allows demand to be supplied by other sources at lower marginal cost than fossil-fired generation.

Shutting down fossil-fired generators for a short period of time and then restarting them can lead to an efficiency loss to the market if the overall cost to the market, including the start-up cost and CMSC payments, is higher than the cost at which the system could source energy from the generator without a shutdown. Given the typical MGBRT length of six to eight hours for gas generators, a shutdown and restart typically also results in operation in some off-peak hours. The actual output over a two-day period for one of the generators included in this report is illustrated in Figure 3-7 below.

Figure 3-7: An Example of Multiple Starts at One Generation Unit (MW per interval)

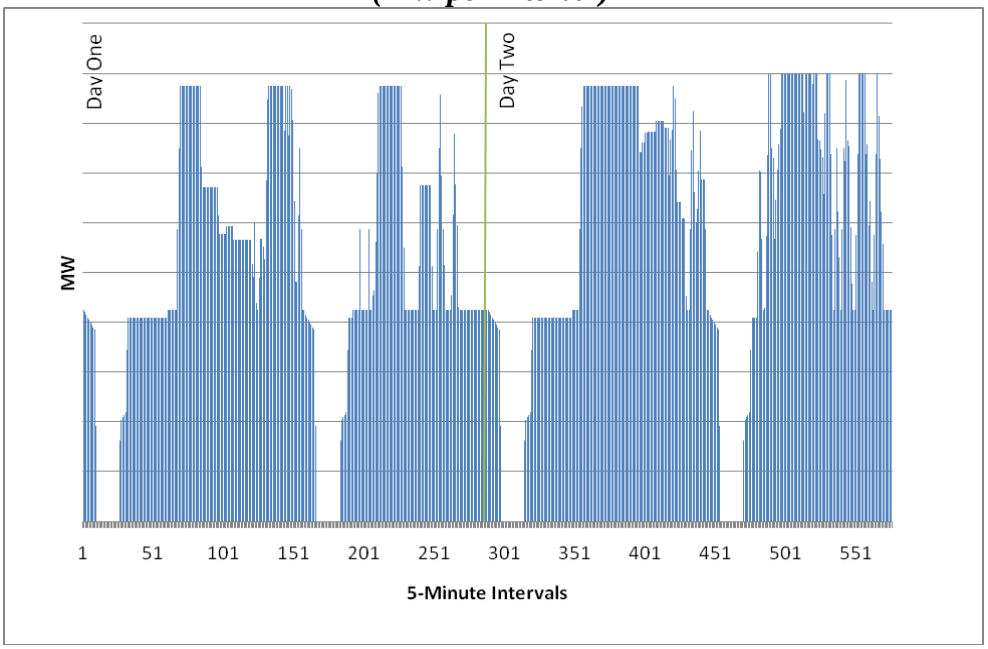
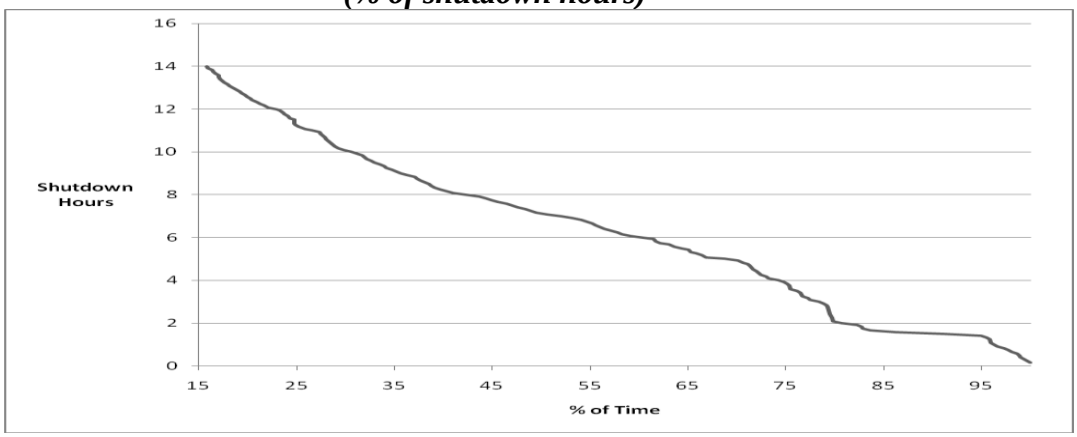


Figure 3-8 shows the duration curve of shut down hours.[108] One can see that following a shutdown, approximately 40% of the time GCG generators were offline for six hours or longer. Such units typically are only starting once per day. However, Figure 3-8 also demonstrates that the duration curve begins to decline more sharply between 5 hours and 2

[108] This does not include ramp-down or resynchronization.

hours offline. For the purpose of this analysis, the Panel has focused on the approximately 20% of events in which a unit was shut down for two or less hours. Accordingly, this analysis understates the efficiency loss whenever a unit remained shut down for a period of more than two hours and it would have been more efficient for that unit to have remained online.

Figure 3-8: Duration Curve of Shutdown Hours at All Generators Under the Generation Cost Guarantee Program May to October 2010 (% of shutdown hours)



3.3.4 Market Efficiency Losses

This section estimates the market efficiency losses associated with short-term (two hour or less) shutdowns for the period May to October, 2010.[109] The method applied to calculate the efficiency loss is described in detail in Appendix 1 to this chapter.

For calculation purposes, the Panel estimated and then compared the benefit to the market for two scenarios: (i) the actual shutdown/restart event which occurred; and (ii) the hypothetical alternative scenario in which the generator is assumed to have stayed online and continued to produce at its MLP rather than shutting down. Where the latter situation leads to a greater benefit to the market, it would be efficiency improving for the generator to stay online.

[109] There was no change to the GCG program rules or settlement methodology during this time period.

In the study period, there were 426 starts that followed a shutdown period of 2 hours or less. This represents approximately 20% of all GCG unit starts during the study period, averaging about 2 starts per day. As demonstrated in Table 3-14 below, the total efficiency loss due to these multiple starts is estimated at approximately $19 million. The Panel also found that 95% of this efficiency loss was associated with the activities of a single market participant. The high efficiency loss associated with this market participant is directly attributable to its submitted start-up costs, which are very large relative to all other market participants participating in the GCG program. The Panel is currently assessing the market participant's behaviour and has asked the MAU to continue monitoring these frequent shut down events.

Table 3-14: Estimated Efficiency Loss due to Generators Shutting Down and Restarting Within Two Hours or Less Under the Generator Cost Guarantee Program
May to October 2010
(Number of Events and $ millions)

Market Participant	Number of Events	Efficiency Loss ($ Million)	Percentage of Total (%)
A	5	-0.03	-0.16
B	2	0.06	0.31
C	5	0.02	0.10
D	1	0.04	0.21
E	1	-0.03	-0.16
F	10	0.14	0.73
G	66	0.65	3.39
H	336	18.31	95.56
TOTAL	426	19.16	100.00

3.3.5 Incentives for Generators to Engage in Short-Term Shutdowns and Restarts

The Panel has identified several incentives for GCG generators to shut-down and restart on a short-term basis.

Opportunities to profit from constrained-on CMSC payments during ramp down

In Ontario's market, generators use offer prices to signal to the IESO's dispatch algorithm their desire to come offline. In order to be dispatched off, the generator must submit an offer price that exceeds the shadow price in the area. Under the current market rules, the existing facility is paid constrained-on CMSC payments based on the offer price during the ramp-down period. The Panel has previously observed that some generators use an offer price that significantly exceeds the local shadow price as a signal to the IESO that the facility wishes to come offline.

In its January 2009 Report, the Panel recommended that the IESO take "action to limit CMSC payments where the CMSC payments are induced by the generator strategically raising its offer price to signal the ramping down of its generation."[110] In its August 2010 Report, the Panel observed that CMSC payments to generators shutting down were contributing approximately $1 million per month to the uplift paid by loads (which based on an annual market demand of approximately 155 TWh translates into a consumer uplift charge of $0.08/MWh) and urged the IESO to expedite the implementation of this rule change. However, the IESO initiative to address this issue was temporarily suspended in late August 2010 to address other priority issues.[111] Between May and October 2010, a further $5.4 million in ramp-down CMSC was paid to generators. Of this, approximately 28 percent relates to the 426 shutdowns and restarts within a period of 2 hours or less.

[110] See the Panel's January 2009 Monitoring Report, pp. 216-217.
[111] The status of the initiative can be monitored on the IESO's web page. See IESO Stakeholder Engagement 84 (SE-84): http://www.ieso.ca/imoweb/consult/consult_se84.asp.

Table 3-XX: Monthly Constrained on CMSC Payments Resulting from Generator Shutdowns May 2009 – October 2010
($1 000)

Month	CMSC for Shutting Down ($1 000)
May-09	1,126
Jun-09	1,494
Jul-09	1,168
Aug-09	1,204
Sep-09	1,111
Oct-09	829
Nov-09	943
Dec-09	700
Jan-10	771
Feb-10	1,234
Mar-10	1,061
Apr-10	1,011
May-10	1,088
Jun-10	898
Jul-10	987
Aug-10	1,104
Sep-10	599
Oct-10	772
Total	18,100

Potential opportunities to profit through GCG start-up submissions

In its previous report the Panel observed a large discrepancy in start-up cost submissions among generators that on their face appeared to be quite similar in nature (i.e. similar facility technology, vintage, MLP, and MGBRT). The Panel noted that the ability to submit after-the-fact costs raised the possibility that allocation methodologies and cost submission rules could potentially allow recovery of amounts in excess of actual incremental start-up costs, especially if the start-up cost submissions were not regularly audited.[112] Accordingly, the Panel encourages the IESO to exercise the authority granted to it under the market rules to audit the cost submissions that generators have made under the GCG program beginning with those which have received the largest payments.

[112] See the Panel's August 2010 Monitoring Report, p. 133

Risk-free participation in the market through the GCG program

In order to qualify for a successive GCG run a generator must shut down. Once the generator has shut down, it can re-qualify for the GCG program provided that its offer price for the restart is economic for at least 50% of its MGBRT based on pre-dispatch prices. Once the facility qualifies for the GCG program, the generation facility is completely insulated from any downside market exposure. That is because, at a minimum, the facility will recover its start-up costs and its MGBRT operating costs (which are assumed to reflect the generator's marginal costs). At the same time the facility has upside exposure to the market to the extent that actual market clearing prices during the GCG run may exceed the MGBRT offer price. Accordingly, generators have an incentive to come offline following one GCG run so as to re-qualify for a successive GCG run.

Hedge of revenue offsets under OPA Clean Energy Supply (CES) contracts

All recently built gas-fired generation in Ontario have OPA CES contracts. Under these contracts, the generators are paid a fixed amount per month for providing the capacity. However, the payments are reduced whenever the facility is deemed to be economic, whether or not it actually operated. By utilizing the GCG program to operate throughout large portions of the day, natural gas generators can minimize their exposure to payment reductions under the CES contracts.[113]

3.3.6 Conclusion

It is understandable that generators need to shut down for maintenance or, technical difficulties, or when they are no longer economic as a result of low demand. However,

[113] In a CES-style contract, a generator's net revenue is calculated based on the HOEP and its heat rate times the daily gas price. As a general rule, if the HOEP in an hour is greater than the heat rate times the daily gas price, the generator is deemed to produce at its deemed capacity, regardless of its actual output. The OPA then deducts the deemed amount from the monthly payment to the generator.

proactively shutting down a unit for a short period of time in order to renew eligibility for the generator cost guarantee program has lead to significant efficiency losses to the market. As demonstrated above, the estimated efficiency loss for these generators shutting down and restarting within two hours was approximately $19 million for the period May to October 2010. Most of these efficiency losses are ultimately borne by loads and exporters. Based on the 71.5 TWh of market demand during this period, this is the equivalent of an avoidable uplift charge of approximately $0.27/MWh for every MWh consumed by these participants.

Recommendation 3-4:

(i) The IESO should resume work on Stakeholder Engagement 84 regarding elimination of self-induced CMSC payments for ramping down generators and should amend the Generation Cost Guarantee program to ensure that all guaranteed costs are considered as part of the dispatch optimization.

(ii) On an interim basis until after-the-fact start-up cost submissions are capped by generator offer prices and CMSC payments to ramping down generators are eliminated, the IESO should amend the Generation Cost Guarantee program to limit generators to one start-up cost guarantee submission per day unless the IESO requests a second start during a day.

(iii) The IESO should re-examine whether the GCG program continues to provide a net benefit to the Ontario market once the Enhanced Day-Ahead Commitment (EDAC) process is implemented or as part of its "Market Roadmap" process.

Chapter 3 Appendix 1: Efficiency Estimation of Multiple Shutdowns

The following section illustrates how the efficiency loss is calculated. There are two scenarios for comparison: 1) the actual scenario with the generator of interest having shut down for two hours or less, and 2) the counterfactual scenario with the generator producing at its MLP for the whole shutdown and ramping up period.

As such, the efficiency calculation has two components:

First, the start-up costs for the restart, less the value of energy provided by the GCG generator during ramp up, are an efficiency loss, which is associated with Scenario 1.

Second, because the GCG generator ramps down, stays offline for up to two hours, and then ramps up to its MLP again, it is necessary for other generators to supply the energy that the GCG generator would have supplied had it continued to operate at its MLP. There is an efficiency loss if the shadow price at that location exceeds the GCG generator's MGBRT offer price. This is associated with Scenario 2.

For simplicity, the shadow price at the generator's location is assumed to represent the replacement cost for the generator, or the marginal value to consumers. The Panel further assumes that the shadow price would have remained unchanged regardless of whether or not the generator of interest had stayed online. Finally, the generator of interest is assumed to produce at its MLP with an incremental cost equal to the offer price for its MGBRT period if it is assumed to have stayed online.

Scenario 1: Actual Situation with Generators Having Shut Down

Let $X1$ be the net benefit: $X1 = BENEFIT1 - COST1$, where…

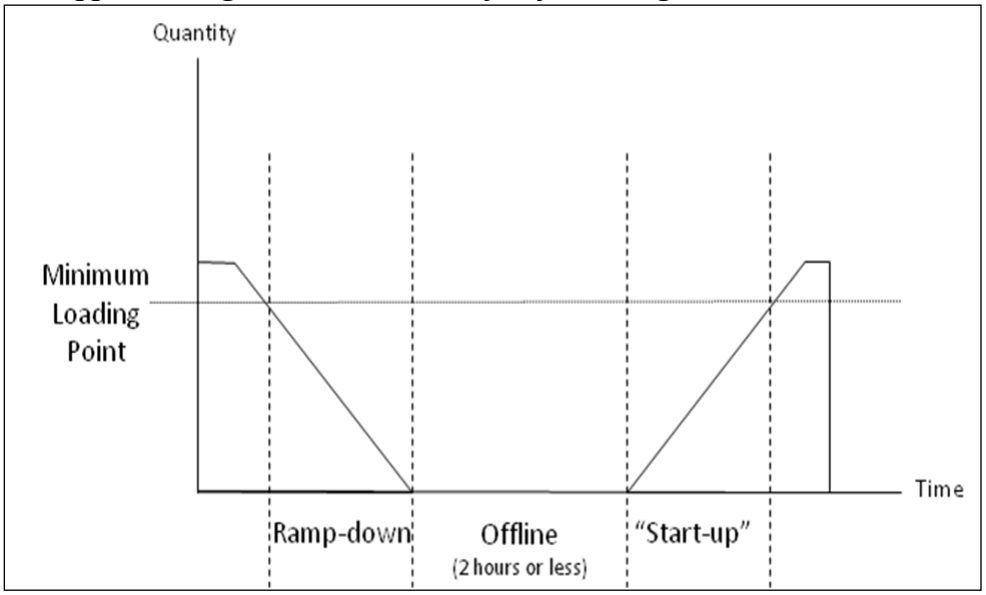
*BENEFIT1 = Shadow Price * Actual Output for ramp up/down*
*COST1=Offer Price * Actual Output for ramping down*[114] *+ Startup Costs*

The net benefit represents the cost savings to the market due to the shutdown of the generator. A positive number indicates that the shutdown is efficient to the market, while a negative number means it is inefficient to the market.

Appendix Figure 3-1 below illustrates how the cost-benefit is calculated when a generator has shut down. The benefit is derived from the energy that it has actually provided to the market and is calculated as the marginal replacement cost multiplied by the supplied energy, up to the generation facility's MLP. The MLP is used because in the counter-factual case, i.e. where the unit stays online, the unit is assumed to stay at the MLP during the period that the facility has ramped down and then ramped up. The cost, conversely, is the production cost for ramping down (Offer Price for MGBRT* MW injected) plus the cost associated with ramping the generation facility back up to its MLP (i.e. the start-up costs submitted under the GCG program) given that the start-up has already included the cost for ramping up.

[114] The cost's ramp-up component is replaced with the participant's after-the-fact submitted costs, i.e. the start-up costs.

Appendix Figure 3-1: Cost-Benefit of Shutting Down a Generator



Scenario 2: Generators Had Stayed Online and Produced at MLP

Let *X2* be the net benefit of staying online: *X2 = BENEFIT2 – COST2*, where…

*BENEFIT2 = Shadow Price * MLP*
*COST2 = Offer Price * MLP for the period from its ramping down from MLP to ramping up to the MLP*

Again, the net benefit represents the cost savings to the market due to the generator having not been shut down. A positive number indicates that keeping the unit online is efficient to the market, while a negative number means it is inefficient to the market.

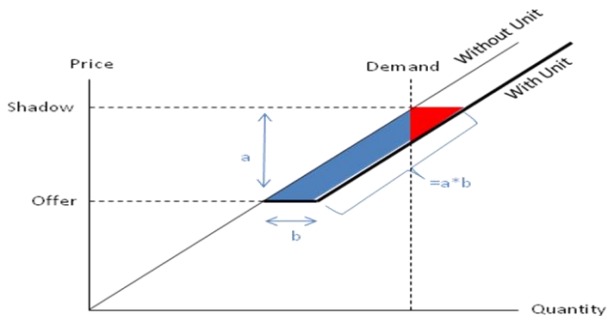
It is worth noting that the net benefit may be overstated because in the counter factual situation the Panel has assumed the shadow price would be unchanged if the facility had remained online. In reality, with more generators online, the locational shadow price tends to decrease, leading to a lower marginal value to the market.[115] However, the

[115] This is demonstrated in the following diagram, which compares two supply curves: a) the actual case, which is the thin line representing the unit dispatched off, and b) the counter-factual case with the thick line, where the unit is imagined to have staid online at MLP. The entire shaded region is the calculated

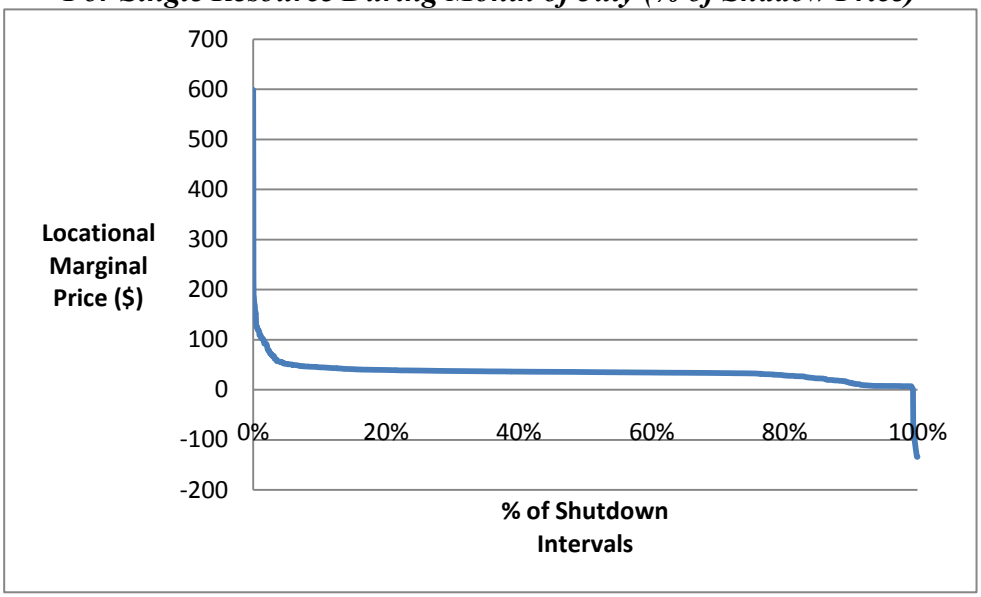
overstatement is expected to be not material because there tends to be low demand relative to available supply at the time when the generators were shutdown. For example, the market participant that contributed to the greatest amount of efficiency loss typically shuts down in the early morning when demand is low and in the early afternoon, prior to the afternoon peak. During these hours shadow prices were generally low and would not have been significantly affected by the online status of the generator of interest.

Appendix Figure 3-2 depicts the distribution curve of shadow prices during the shutdown hours (< 2) for a single resource (participant H). The horizontal flat line indicates that the shadow price is fairly consistent during these hours, which would suggest that the true (locational) shadow price for staying online would not deviate much from the actual value used in the calculation (i.e. the locational shadow price for being offline).

efficiency loss; the red region is an over-stated component as a result of assuming a uniform shadow price, while in actuality efficiency loss is the blue region terminating at demand.



Appendix Figure 3-2: Distribution Curve of Shadow Prices During Shutdown Hours For Single Resource During Month of July (% of Shadow Price)



Efficiency Loss due to shutting down

Efficiency loss due to shutting down is defined as the difference of the net benefit between the actual scenario and the counter-factual scenario. Given that all customers were assumed to have been satisfied, the difference between the net benefit in the two scenarios is the cost savings to meet the same demand. That is, efficiency loss is as follows:

$$\textit{Efficiency Loss} = X2 - X1 = BENEFIT2 - COST2 - BENEFIT1 + COST1$$

A positive number indicates that keeping the generator online would be efficiency improving compared to shutting it down. In contrast, a negative number indicates shutting the generator down is more efficient to the market. Consider the following example: a GCG unit's MGBRT offer and (assumed) incremental cost is $50/MW[116], while its submitted start-up costs are $10,000 (which includes the costs of starting up the unit and ramping to its MLP). The shadow price is $100/MW. Assume the ramping down

[116] To be dispatched offline the participant will have to offer much higher to be placed out of the market. As result, this offer for signalling shut down does not reflect true cost. Instead, the MGBRT offer is used for efficiency calculation.

and ramping up output is 30 MWh each, and the MLP is 300 MW. Further assume the generator stayed offline for half an hour (output 0 MWh) and it required a total of half an hour to ramp down and back up (15 minutes for each). As a result, the total energy that the unit could have provided during the one hour shutdown period was 300 MWh. In this instance, the efficiency loss would have been $20,500 (see below for detailed calculation), meaning that it would have been more efficient for the unit to have stayed online.

Net Benefit for Shutting Down:
*X1 = ($100*60MWh) – ($50*30MWh+ $10,000) = -$5,500*
Net Benefit for Staying online:
*X2 = ($100*300MWh) – ($50*300MWh) = $15,000*

Efficiency Loss = X2 – X1 = 20,500

Chapter 3 Appendix 2: Simulated CMSC Payments during Export/Import Curtailments

One IESO concern related to eliminating the price impact of a curtailed transaction is the impact on CMSC. While CMSC payments may be larger if ADQh-coded curtailments are left in the market schedule, this is not necessarily so. Below are two examples of situations where CMSC payments would have been smaller if ADQh-coded curtailments had been left in the unconstrained, market schedule.

1. January 18, 2010 HE 10 ('HOEP' $69.49/MWh vs. Predispatch MCP $48.73/MWh)

The hour was not an hour with resource shortage. However, with 250 MW CAOR scheduled in HE9 and a 420 MW ramp out in HE10, the IESO felt that there would be insufficient internal resources to meet the first contingency (about 1,500 MW at the time) in a timely manner. The IESO subsequently curtailed 200 MW exports for HE10, using the ADQh code. The 200 MW curtailment resulted in a 250 MW curtailment in the unconstrained sequence because 50 MW were constrained-off.

To see the impact (both on the HOEP and the CMSC payments), the MAU ran a simulation by assuming the 250 MW export curtailment had not been removed from the unconstrained sequence. Appendix Table 3-1 below reports the actual and simulated MCP.[117]

[117] Recognizing that the MAU simulator does not have the exactly same inputs as in the DSO and thus at times may produce a different result, the Panel always compares the simulated "actual" to simulated results in order to isolate the consequences of any change that is of interest. The hour was an hour with an administered price ($70.13/MWh). The simulated "actual" price was $0.64/MWh (1%) lower than the administered HOEP.

Appendix Table 3-1: Actual and Simulated Market Clearing Price and HOEP for Export Curtailment Using ADQh
January 18, 2010 HE 10

Date	Hour	Interval	Export Curtailment (MW)		'Actual' MCP ($/MWh)	Simulated MCP ($/MWh)	Difference (Simulated - Actual) ($/MWh)
			Actual	Used for Simulation			
18-Jan-10	10	1	250	0	70.13	134.13	64.00
18-Jan-10	10	2	250	0	69.36	120.13	50.77
18-Jan-10	10	3	250	0	69.36	117.08	47.72
18-Jan-10	10	4	250	0	69.36	117.08	47.72
18-Jan-10	10	5	250	0	69.36	117.08	47.72
18-Jan-10	10	6	250	0	69.36	117.08	47.72
18-Jan-10	10	7	250	0	69.36	117.08	47.72
18-Jan-10	10	8	250	0	69.36	117.08	47.72
18-Jan-10	10	9	250	0	69.36	117.08	47.72
18-Jan-10	10	10	250	0	69.36	117.08	47.72
18-Jan-10	10	11	250	0	69.36	117.08	47.72
18-Jan-10	10	12	250	0	70.13	117.90	47.77
Average (HOEP)			250	0	69.49	118.82	49.33

Because the 200 MW exports were curtailed with the ADQh code, their corresponding schedules in the unconstrained sequence were also removed. Had the exports not been removed from the unconstrained sequence, the HOEP would have been $118.82/MWh, or $49.33/MWh (71%) higher.

Appendix Table 3-2 below reports the actual and estimated CMSC based on this simulation. With a higher price (i.e. if the curtailed exports had not been removed from the unconstrained sequence), the total CMSC would have been $4,000 lower (which consists of a higher CMSC to generators but a much larger CMSC charged to traders).

Appendix Table 3-2: Actual and Simulated CMSC During an Hour with Export Curtailment
January 18, 2010 HE 10
($)

Type of CMSC Payment	'Actual' CMSC	Simulated CMSC	Difference (Simulated – Actual)
CMSC to ADQh Curtailed Exporters	0	-13,024	-13,024
CMSC to Other Traders	-9,771	-42,332	-32,561
CMSC to Generators	20,709	62,290	41,581
CMSC to Dispatchable Loads	0	0	0
Total	10,938	6,934	-4,004

1. September 5, 2010 HE 1 (HOEP $123.96/MWh vs. PD MCP $17.27 /MWh)

As discussed in Section 2.2, this was an hour with potential surplus baseload generation. The IESO curtailed 347 MW imports, using the ADQh code. The 347 MW curtailment resulted in a 193 MW curtailment in the unconstrained sequence.

To see the impact (both on the HOEP and the CMSC payments), the MAU ran a simulation by assuming the 193 MW is not removed from the unconstrained sequence. Table 3-5 reports the "actual" and simulated MCP. Had the imports not been removed from the unconstrained sequence, the HOEP would have been $54.19/MWh, or $69.76/MWh lower.

Appendix Table 3-3 below reports the actual and estimated CMSC based on the simulation. With a lower price (if the curtailed imports were not removed from the unconstrained sequence), the total CMSC would have been $5,600 lower (which consists of a higher CMSC to importers who were curtailed with ADQh but a much smaller CMSC paid to generators and other traders).

Appendix Table 3-3: Actual and Simulated CMSC During an Hour with Import Curtailment
September 5, 2010 HE 1
($)

Type of CMSC Curtailment	'Actual' CMSC	Simulated CMSC	Difference (Simulated – Actual)
CMSC to ADQh Curtailed Importers	0	6,543	6,543
CMSC to Other Traders	19,041	8,331	-10,710
CMSC to Generators	2,602	1,179	-1,423
CMSC to Dispatchable Loads	0	0	0
Total	21,643	16,053	-5,590

Net exports in the hour were 2,237 MW. With a lower HOEP (if curtailed imports not being removed from the unconstrained sequence), exporters were charged $276,132 less than they have actually paid. This lower charge would have incented exporters to export more to alleviate the SBG condition in the following hours and would have allowed exporters who helped to alleviate the SBG conditions to benefit.

2. Summary

The two examples above indicate that removing the counter-intuitive impacts of the ADQh code may not result in higher CMSC payments and may in fact reduce CMSC payments.

Page Left Blank Intentionally

Chapter 4: The State of the IESO-Administered Markets

1. General Assessment

This is the Panel's 17th semi-annual Monitoring Report of the IESO-administered markets. It covers the summer period, May to October 2010. As in previous reports, the Panel has concluded that the market has operated reasonably well according to the hybrid design established for it, although there were occasions where actions by market participants or the IESO led to inefficient outcomes. In addition, the Panel continues to identify areas for improvement in the market design. In particular, the Panel has observed numerous complications associated with the two-sequence market structure that have undermined efficiency or increased consumer costs with little or no apparent benefit. To this end, the Panel has recommended that the IESO work with stakeholders to examine the feasibility of evolving beyond the two-sequence market structure as part of the IESO's new "market roadmap" process.

2. Unintended Consequences Caused by the Two-Sequence Market Structure in Ontario

In its past two reports, the Panel discussed how Ontario's two-sequence market structure compensates dispatchable resources for costs or implied losses imposed on them by transmission congestion, ramp limitations, and IESO manual actions. The Panel also reiterated that, on many occasions, significant inefficient outcomes have arisen as a result of the two-sequence system. The Panel indicated that exploring a structural change to the existing two-sequence system should be a high priority.[118]

In this report the Panel has commented further on the inefficiencies associated with the two-sequence market structure. Significantly, many of these inefficiencies have

[118] See the Panel's January 2010 Monitoring Report, pp. 120-123 and the Panel's August 2010 Monitoring Report, pp. 268-273.

translated to higher costs for Ontario consumers with little or no commensurate value received in return. For example, at Table 3-9 the Panel reports that since the market opened in May 2002, traders have received $146 million in constrained-off payments in the Northwest region of the province, the vast majority of which were for constrained off imports.[119] Importantly, the Northwest is an area of the province that is marked by an abundance of internal, low-cost supply. This abundance of supply is reflected by the extremely low zonal price in the region (- $157/MWh in summer 2010) as well as the $161 million dollars in constrained-off payments paid to generators located in that area not to produce power since May 2002. During the most recent six month period from May to October 2010, Ontario consumers paid importers $12 million dollars not to deliver power into the Northwest area of the province, while also paying local generators an additional $9 million dollars not to generate power.

A particularly notable example of unnecessary constrained-off payments is discussed in Chapter 3, section 3.1 of this report. Over a two-day period in July, Ontario load paid two traders almost $163,000 in constrained-off payments when it would have been physically impossible for the underlying transactions to flow because of a transmission derate in Manitoba.

In this report, as with previous reports, the Panel has recommended that CMSC payments be reduced or eliminated where they do not contribute to market efficiency. The large majority of issues identified by the Panel since the market was established have dealt with inefficiencies introduced by the two-sequence market structure. None of these individual recommendations, however, address the fundamental and underlying problems of the two-sequence market structure. Moreover, the Panel understands that the two-sequence design inhibits implementation of market changes which would allow for increased efficiency of dispatch with other markets to benefit Ontario consumers, and indeed was the major factor in the decision to develop only an Enhanced Day-Ahead Commitment (EDAC) process rather than a full day-ahead market. The Panel believes

[119] Of the $146 million of constrained off CMSC paid to traders in the Northwest since market opening, approximately $15.0 million was for constrained off exports and $131 for constrained off imports.

that, with the IESO embarking on a "market road map" process, now is the appropriate time to consider replacing the existing two-sequence market structure.

3. Ontario's Long-Term Energy Plan

On November 23, 2010 the Ontario Government released its long term energy plan *Building our Clean Energy Future* (the Energy Plan).[120] The Energy Plan represented the first significant update to the Province's long-term energy policy since the release of the OPA's 2007 Integrated Power System Plan.[121] Under the Energy Plan the government has detailed at a high level its investment plans over the next 20 years. The OPA will prepare an updated IPSP based on the Energy Plan for review by the OEB in 2011 or 2012. Highlights of the Energy Plan include:

- *Demand Forecast:* Demand is expected to recover from recent recessionary levels over the next 10 years. Thereafter demand is expected to remain relatively flat, reflecting conservation efforts and shifts in industrial and commercial energy needs. The bulk power system should be prepared to provide 146 TWh of generation in 2015 and 165 TWh by 2030.
- *Supply*: Coal plants will be shut down by the end of 2014. Significant portions of coal capacity have already been replaced by natural gas plant capacity. Some coal plants have also begun a conversion to biomass or natural gas and more conversions may follow. Nuclear will continue to represent a prominent component of Ontario's supply. Approximately 10,000 MW of nuclear capacity will be refurbished over the next 10 to 15 years and 2,000 MW of new supply will be added. By 2018, wind, solar and biomass is forecast to account for 10,700 MW of installed capacity, up substantially from approximately 1,500 MW today. In addition, the OPA will develop a standard offer program for combined heat and power (CHP) facilities in Ontario with the intention of adding approximately 550 MW of additional CHP capacity.[122]

[120] See: http://www.mei.gov.on.ca/en/pdf/MEI_LTEP_en.pdf
[121] See: http://www.powerauthority.on.ca/integrated-power-system-plan/b-ipsp
[122] Including CHP capacity that has already been contracted the long-term energy is targeting 1,000 MW of CHP capacity.

- *Prices*: Prices for industrial consumers are forecast to rise by 2.7% percent per year, or 70% cumulatively (on a nominal basis) over the next 20 years. Prices for residential consumers, small businesses and farms are expected to double over the next 20 years (a growth rate of 3.5% per year), although almost half of this price increase is expected to be fully realized within the first 5 years (a growth rate of 7.9% per year). Fifty-six percent of the cost increases will be associated with investment in new, renewable energy generation and the balance will be associated with investments in nuclear and gas generation and upgrades to the transmission and distribution system. To reduce the impact of these price increases, the government has introduced a 10% rebate for Ontario residential, small business and farm consumers. Based on projected price growth rates, the rebate program will cost over $7 billion over the five years during which it will be in place.

The Panel expects that new generation built under the Energy Plan will be subject to long-term contracts. The Panel strongly encourages that the contracts include price-responsive measures.[123] In recent years, contracts have left certain generation resources indifferent or partially indifferent to market prices. For example, certain contracts for nuclear, wind and solar power entitle generators to a single fixed price per MWh of energy injected, regardless of prevailing market prices. This has contributed to SBG conditions and market price distortions. The expectation of 10,700 MW of installed renewable (wind, solar and biomass) capacity by 2018, also highlights the need that these resources be dispatchable by the marketplace. A failure to do so could lead to a significant increase in SBG conditions, as is discussed in greater detail in Chapter 3, section 2.2 of this report. The Panel is encouraged that the IESO is well along in a stakeholder process aimed, in part, at making renewable resources dispatchable.[124]

[123] See the Panel's review of various types of contracted generation in Ontario, in the Panel's July 2009 Monitoring Report, pp. 227-235.
[124] See IESO Stakeholder Engagement 91 at http://www.ieso.ca/imoweb/consult/consult_se91.asp

4. Implementation of Panel Recommendations from Previous Report

The Panel's August 2010 report contained six recommendations, all of which were directed at the IESO.

4.1 Recommendations to IESO

The IESO formally reports on the status of actions it has taken in response to the Panel's recommendations. Following each of the Panel's Monitoring Reports the IESO posts this information on its web site and discusses the recommendations and its actions with the Stakeholder Advisory Committee to the IESO Board of Directors (SAC).

In this section we review the status of the recommendations from our last Monitoring Report, released in August 2010. The IESO responses are summarized in Table 4-1 below.

Table 4-1: Summary of IESO Responses to Recommendations in the Panel's August 2010 Monitoring Report

Recommendation Number & Status	Subject	Summary of Action
3-1 **In progress** **IESO to Monitor**	Hourly Uplift Payments	"An urgent market rule amendment to temporarily suspend energy-related CMSC for constrained-off dispatchable loads went into effect on August 28th, 2010. In consultation with the dispatchable load community, the IESO is exploring alternative solutions to expedite the development of market rule amendments to replace the temporary suspension - refer to stakeholder engagement initiative SE-89."
3-2 **In progress** **IESO to Monitor**	Hourly Uplift Payments	"The Technical Panel endorsed a market rule amendment proposal (MR-00370) to limit CMSC payments for exporters and dispatchable loads using replacement bids, as recommended in the January 2010 MSP Monitoring Report. This amendment will be proposed to the IESO Board for approval at their meeting on November 11th, 2011."
3-3 **Pending** **IESO to Monitor**	Price Fidelity	"The IESO agrees that the deadband should be reviewed for a number of reasons, including the impacts of the GEA and the changing composition of market participants. This is already contemplated. However, the issue identified by the MSP will accelerate the review of the sufficiency of the Interpretation Bulletin which sets out the deadband."
3-4 **Pending** **IESO to Monitor**	Dispatch	"In response to a recommendation from the January 2009 MSP report, the IESO initiated a market rule amendment to revise the method of calculating guarantees to improve the effectiveness of day-ahead scheduling decisions. These changes, implemented in December 2009 under MR-00356, linked the guarantee payment to the market participant's offer price and introduced more stringent eligibility requirements for the real-time GCG program. As a result of the changes implemented under MR-00356, approximately 40% of generators' costs are reflected in their offers. This is a significant improvement compared to the initial design where none of the costs were reflected in offers. The IESO continues to believe a reliability program is warranted and some changes to the day-ahead guarantee program are part of the Enhanced Day-Ahead Commitment initiative. The IESO's immediate priorities related to the [Green Energy Act], specifically the integration of renewable energy into the electricity system and market, take precedence over this MSP recommendation."

Recommendation Number & Status	Subject	Summary of Action
3-5 & 3-6 **Pending IESO to Monitor**	Price Fidelity	"The IESO agrees with these recommendations. Efforts to address them have been put on hold to enable to the IESO to address other priorities such as the [Enhanced Day-Ahead Commitment] and changes required to implement the Green Energy and Green Economy Act."

The Panel notes that on December 3, 2010 the IESO implemented rule changes that partially addressed recommendations 3-1 and 3-2 above.[125] The Panel will monitor and report on these changes in its next report.

5. Implementation of Panel Recommendations from Other Reports

In its July 2008 Report the Panel made the following recommendation:

> The MSP restates the recommendation in its December 2007 report that curtailed exports (or imports) for internal resource adequacy ('ADQh') should not be removed from the unconstrained schedule in order to ensure that actual market demand (or supply) is not distorted.[126]

In January 2011, the IESO implemented an interim change that is directionally positive in addressing the Panel's concerns relating to the use of ADQh in circumstances where exports have been curtailed for resource adequacy reasons.[127] The Panel's concerns relating to the use of ADQh code for curtailed imports remains an area of concern for the Panel and is the basis of a recommendation in this report.

Information on other outstanding Panel recommendations can be found on the IESO's website.[128]

[125] See: http://www.ieso.ca/imoweb/pubs/mr2010/MR-00374-R00-BA.pdf and http://www.ieso.ca/imoweb/pubs/mr2010/MR-00370-R00-BA.pdf.
[126] See the Panel's July 2008 Report at p. 180.
[127] See: http://www.ieso.ca/imoweb/pubs/imdc/IESO_IMDC_0160.pdf
[128] See IESO Response to MSP Recommendations at: http://www.ieso.ca/imoweb/marketSurveil/surveil.asp

6. Summary of Recommendations

The Panel groups its recommendation thematically by category: price fidelity, dispatch, transparency and hourly uplift payments. Some recommendations could have impacts in more than one category (e.g. a scheduling change could affect prices as well as uplift). In such cases the recommendation is included in the category of its primary effect. Within each category of price fidelity, dispatch and hourly uplift payments[129], the recommendations in this report have been prioritized based on the Panel's view of their relative importance.

6.1 Price Fidelity

The Panel regards price fidelity as being of fundamental importance to the efficient operation of the market.

Recommendation 3-1 (Chapter 3, section 2.2)

The IESO should not remove imports curtailed to address surplus baseload generation conditions from the unconstrained market schedule. This could be accomplished by changing how the ADQh code operates with respect to the market schedule.

6.2 Dispatch

Efficient dispatch is one of the primary objectives to be achieved from the operation of a wholesale market.

Recommendation 3-4 (Chapter 3, Section 3.3)

(i) The IESO should resume work on Stakeholder Engagement 84 regarding elimination of self-induced CMSC payments for ramping down generators

[129] The Panel does not have any recommendations in this report relating to transparency.

and should amend the Generation Cost Guarantee program ensure that all guaranteed costs are considered as part of the dispatch optimization.

(ii) On an interim basis until after-the-fact start-up costs submissions are capped by generator offer prices and CMSC payments to ramping down generators are eliminated, the IESO should amend the Generation Cost Guarantee program to limit generators to one start-up cost guarantee submission per day unless the IESO requests a second start during a day.

(iii) The IESO should re-examine whether the Generation Cost Guarantee program continues to provide a net benefit to the Ontario market once the Enhanced Day-Ahead Commitment (EDAC) process is implemented or as part of its "Market Roadmap" process.

6.3 Hourly Uplift Payments

The Panel examines hourly uplift payments[130] both in respect of their contribution to the effective price and also their impact on the efficient operation of the market.

Recommendation 3-3 (Chapter 3, Section 3.2)

As part of its "market road map" process, the IESO should work with stakeholders to examine the feasibility of replacing the two-sequence design with locational pricing, variable pricing for dispatchable resources or other alternatives.

Recommendation 3-2 (Chapter 3, Section 3.1)

Where there are transfer capability reductions outside Ontario that prohibit power flow out of or into Ontario, the IESO not make CMSC payments. Possible methods might include but not limited to: removing the related offers/bids, reducing intertie transfer capability to zero, or establishing a mechanism for clawback of the CMSC payments.

[130] Hourly Uplift Settlement Charges are collected from customers in the wholesale market to pay for Operating Reserve, Congestion Management Settlement Credits, Intertie Offer Guarantee payments and other incurred hourly costs such as energy losses on the IESO-controlled grid. The IESO also collects monthly uplift charges to pay for contracted services such as black start capability, voltage support, and regulation Service. There are also a few more monthly uplift charges, which occur occasionally (i.e. Emergency Energy purchase).

TAB 11

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

Ontario

Market Surveillance Panel

Monitoring Report on the IESO-Administered Electricity Markets

for the period from
May 2007- October 2007

PUBLIC

December, 2007

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
26th Floor
Toronto, ON M4P 1E4
Telephone: (416) 481-1967
Facsimile: (416) 440-7665

Commission de l'Énergie de l'Ontario
CP. 2319
2300, rue Yonge
26e étage
Toronto (ON) M4P 1E4
Téléphone: (416) 481-1967
Télécopieur: (416) 440-7665

Ontario

Neil Campbell
Chair, Market Surveillance Panel

Président, Comité de surveillance du marché

December 31, 2007

The Honourable Howard I. Wetston, Q.C.
Chair & Chief Executive Officer
Ontario Energy Board
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Mr. Wetston:

Re: Market Surveillance Panel Report

On behalf of my colleagues on the Market Surveillance Panel, Don McFetridge and Tom Rusnov, I am pleased to provide you with the Panel's 11th semi-annual Monitoring Report of Ontario's wholesale electricity market, the IESO-administered markets.

This report, covering the period May 1, 2007 to October 31, 2007, is submitted pursuant to Article 7.1.1 of Ontario Energy Board By-law #3.

Best Regards,

Neil Campbell
Chair, Market Surveillance Panel

Enclosure

MBOOCS_3782669.3

Table of Contents

Executive Summary ix

Chapter 1: Market Outcomes May 2007 – October 2007 1

1. Highlights of Market Indicators 1

1.1 Pricing 1

1.2 Demand 3

1.3 Supply 3

1.4 Imports and Exports 4

2. Pricing 5

2.1 Ontario Energy Price 5
2.1.1 Load-weighted HOEP 7
2.1.2 Impact of the Global Adjustment and the OPG Rebate on the Effective Price 8

2.2 Operating Reserve Prices 10

2.3 Price Setters 15

2.4 One-Hour and Three-Hour Ahead Pre-dispatch Prices and HOEP 17
2.4.1 Demand Forecast Error 20
2.4.2 Performance of Self-Scheduling and Intermittent Generation 22
2.4.3 Performance of Wind-Power Generation 24
2.4.4 Real-Time Failed Intertie Transactions 28
2.4.5 Imports Setting Pre-dispatch Price 33

2.5 Analyzing Year-Over-Year Changes in the HOEP 34

2.6 Hourly Uplift and Components 37

2.7 Internal Zone Prices and CMSC Payments 38

2.8 A Comparison of High and Low HOEP and Richview Nodal Price 43

3. Demand 45

3.1 Aggregate Consumption 45

3.2 Wholesale and LDC Consumption 46

4. Supply 48

4.1 Supply Conditions and the Supply Cushion 48

4.2 Supply Curves 50

4.3 Outages 52
4.3.1 Planned Outages 52
4.3.2 Forced Outages 53

4.4 Changes in Fuel Prices 55

4.5 Net Revenue Analysis 62

5. Imports and Exports 63

5.1 Overview 63

5.2 Congestion ... 65
5.3 Analysis of the Determinants of Exports from Ontario to New York ... 69
5.4 Wholesale Electricity Prices in Neighbouring Markets ... 71
5.4.1 Price Comparisons ... 71
5.4.2 Exchange Rate Effects and Trade Flows ... 75
5.4.3 Linked Wheel-through Transactions ... 78
Chapter 2: Analysis of Market Outcomes ... 81
1. Introduction ... 81
2. Anomalous HOEP ... 82
2.1 Analysis of High Priced Hours ... 82
2.1.1 June 8, 2007 HE 12 ... 84
2.1.2 June 12, 2007 ... 88
2.1.3 July 17, 2007 HE 10 ... 103
2.1.4 October 24, 2007 HE 18 ... 106
2.1.5 Uplift Greater than HOEP ... 109
2.2 Analysis of Low-priced Hours ... 110
2.2.1 September 18, 2007 HE 1 ... 112
Chapter 3: Matters to Report in the Ontario Electricity Marketplace ... 117
1. Introduction ... 117
2. Material Changes to the Marketplace since the Previous Report ... 118
2.1 Reduction in the Ramp Rate Multiplier in the Unconstrained Sequence ... 118
2.2 A Further 50 MW of Regional Operating Reserve is Introduced to the Ontario Market ... 123
2.3 The Convergence of the Uniform Price and the Richview Shadow Price ... 126
2.4 An Inefficient Demand Response Event ... 142
2.5 The Effect of Phase Shifters on the Michigan Interface ... 146
3. New Matters ... 151
3.1 Dispatch issues ... 151
4. New Items to Report ... 160
4.1 Self-Induced CMSC Payments made for Safety, Legal, Regulatory or Environmental Purposes ... 160
4.2 IOG payments made to Affiliates ... 162
4.3 The Effect of a Delay in a Transmission Upgrade ... 167
4.4 Efficiency Implications of Public Agency Contracts ... 169
4.4.1 OPA Clean Energy Supply and Early Mover's Contracts ... 172
4.4.2 OPA Bruce A Contract ... 174
4.4.3 OPA Renewable Energy Standard Offer Program ... 175
4.4.4 Proposed OPA Clean Energy Standard Offer Program ... 178
4.4.5 Lennox Reliability Must Run Contract ... 180
4.4.6 Summary ... 182
Appendix 3.1: An Econometric Decomposition of the Relative Effects of the Factors Contributing to Convergence of the Richview Price and the HOEP ... 186
Appendix 3.2: Quantifying Efficiency Gains of Moving to 15-minute Dispatch ... 193

Chapter 4: The State of the IESO-Administered Markets 197
1. General Assessment 197
2. Efficiency Implications of Public Agency Contract Arrangements 198
3. IESO Responses to Previous Panel Recommendations 202
4. Summary of Recommendations 205

Page Left Blank Intentionally

List of Tables

Table 1-1: Average HOEP, On-peak and Off-peak, May – October 2006 & 2007 6
Table 1-2: Load-Weighted Average HOEP, May – October 2006 & 2007 8
Table 1-3: Impact of Adjustments on Weighted HOEP, May – October 2006 & 2007 10
Table 1-4: Operating Reserve Prices On-Peak, May – October 2006 & 2007 11
Table 1-5: Operating Reserve Prices Off-Peak, May – October 2006 & 2007 12
Table 1-6: Average Share of Real-time MCP Set by Resource Type, May – October 2006 & 2007 16
Table 1-7: Monthly Share of Real-time MCP set by Resource Type, May – October 2006 & 2007 16
Table 1-8: Monthly Share of Real-Time MCP set by Resource Type, On-Peak, May – October 2006 & 2007 17
Table 1-9: Monthly Share of Real-Time MCP set by Resource Type, Off-Peak, May – October 2006 & 2007 17
Table 1-10: Measures of Differences Between One-Hour Ahead Pre-Dispatch Prices and HOEP, May – October 2006 & 2007 18
Table 1-11: Measures of Differences Between Three-Hour Ahead Pre-Dispatch Prices and HOEP, May – October 2006 & 2007 19
Table 1-12: Forecast Error in Demand May – October 2006 & 2007, ... 20
Table 1-13: Incidents and Average Magnitude of Failed Exports from Ontario, May – October 2006 & 2007 29
Table 1-14: Incidents and Average Magnitude of Failed Imports to Ontario, May – October 2006 & 2007 29
Table 1-15: Average Monthly Export Failures by Intertie and Cause, November 2006 – October 2007 32
Table 1-16: Average Monthly Import Failures by Intertie and Cause, November 2006 – October 2007 32
Table 1-17: Frequency of Imports Setting the Pre-Dispatch Price, May – October 2006 & 2007 ..... (Number of Hours and % of Hours) 33
Table 1-18: Estimation Results of the Updated Econometric Model, January 2003 - October 2007 35
Table 1-19: Price Effects of Setting 2006 On-Peak and Off-Peak Factors at 2007 Levels 36
Table 1-20: Monthly Total Hourly Uplift Charge, May – October 2006 & 2007 37
Table 1-21: Internal Zonal Prices, May 2005 - October 2007 39
Table 1-22: Hours with a Low HOEP or Richview Nodal Price, May – October 2006 & 2007 44
Table 1-23: Hours with a High HOEP or Richview Nodal Price, May – October 2006 & 2007 44
Table 1-24: Monthly Energy Demand, Market Schedule, May – October 2006 & 2007 45
Table 1-25: Pre-Dispatch Domestic Supply Cushion, May – October 2006 & 2007 ..... (% and Number of Hours under Certain Levels) 49
Table 1-26: Real-time Domestic Supply Cushion, May – October 2006 & 2007 ..... (% and Number of Hours under Certain Levels) 49
Table 1-27: Average Hourly Market Schedules by Baseload Generation Type and Ontario Demand, May – October 2006 & 2007 52
Table 1-28: Average Monthly Fuel Prices , May – October 2006 & 2007 56
Table 1-29: Average Monthly Fuel Prices, May – October 2006 & 2007 57
Table 1-30: Yearly Estimated Net Revenue Analysis for Two Generator Types, November 2002 - October 2007 63
Table 1-31: Net Exports from Ontario On-Peak and Off-Peak, May – October 2006 & 2007 64
Table 1-32: Import Congestion in the Market Schedule, May – October 2006 & 2007 66
Table 1-33: Export Congestion in the Market Schedule, May – October 2006 & 2007 67
Table 1-34: Export Model Estimation Results, January 2003 – October 2007 70
Table 1-35: Average HOEP Relative to Neighbouring Market Prices, May 2007 - October 2007 71
Table 1-36: $CDN and $US Henry Hub Spot Market Price Comparison, May – October 2006 & 2007 77
Table 1-37: $CDN and $US NYMEX OTC CAPP Coal Market Price Comparison, May – October 2006 & 2007 77
Table 2-1: Hours with a High HOEP and Uplift greater than HOEP, May - October, 2006 & 2007 84
Table 2-2: Real-Time and One-Hour Ahead Pre-dispatch Prices, Energy and OR, June 8, 2007, HE 11 to HE 13 86

Table 2-3: Interval Summary Information, June 12, 2007, HE 15 96
Table 2-4: Market Schedule and MCP under Different Ramp Rate Multipliers, June 12, 2007, HE 15 98
Table 2-5: Price Impact of Delayed OR Replenishment, June 12, 2007, HE 10 to HE 14....100
Table 2-6: The Price Impact of Export Curtailment, June 12, 2007, HE 13 to HE 17 102
Table 2-7: Pre-dispatch and Real-Time Prices, July 17, 2007, HE 10 and HE 11....104
Table 2-8: Real-Time and One Hour Ahead Pre-dispatch Prices, October 24, 2007, HE 18 and HE 19 .107
Table 2-9: Net Imports and 'Actual' and Simulated Prices, July 17, 2007 HE 18 109
Table 2-10: Number of Hours with HOEP Less $20/MWh, May 2002 – October 2007....111
Table 2-11: Key Data (Monthly Average) for Low Priced Hours, May – October 2007....112
Table 2-12: MCP Prices by Interval, September 18, 2007, HE 1, ...112
Table 3-1: Summary Statistics: Pre-dispatch & Real-time, September 12 – October 31, 2006 and 2007.121
Table 3-2: Estimated Efficiency Gains, 50 MW Regional Reserve Sharing by Month,....
May to October 2007 125
Table 3-3: Effect of Actions on Quality of Price Signals 128
Table 3-4: Prices, Implied Value, and Efficiency Loss, November 7, 2007....145
Table 3-5: Efficiency Gains, Average Daily Demand Ratio, & Real-Time IOG Payment, November 2006 – October 2007....159
Table 3-7: IOG Payments since January 2007, Amounts that Accrued at Times of Affiliate Export & an Estimate of Potential IOG Offset 165
Table 3-8: Constrained Off Payments to Generators in Niagara Area, November 2006 - October 2007...168
Table 3-9: Installed Capacity by Contract Type as of October 2007....171
Table 3-10: Contract Efficiency Comparison....184
Appendix Table 3-1: Contributions to Off-Peak Price Differences, February – October, 2004 vs. 2007 189
Appendix Table 3-2: Contributions to On-Peak Price Differences, February – October, 2004 vs. 2007.191
Table 4-1: Summary of IESO Responses to Recommendations in Previous Market Surveillance Panel Reports 204

List of Figures

Figure 1-1: Frequency Distribution of HOEP, May–October 2006 & 2007 7
Figure 1-2: Monthly Average HOEP Adjusted for OPG Rebate and Global Adjustment, April 2005 – October 2007 9
Figure 1-3: Monthly Operating Reserve Prices by OR Class since Market Opening, May 2002 - October 2007 12
Figure 1-4: Monthly Operating Reserve Activations by Frequency and MW since Market Opening, May 2002 - October 2007 14
Figure 1-5: OR Activations by 100 MWh Categories, May – October 2006 & 2007 15
Figure 1-6: Average Pre-dispatch Price Differences One and Three- hour ahead to Real-time, May – October 2006 & 2007 19
Figure 1-7: Absolute Average One-Hour Ahead Forecast Error, May 2007 - October 2007 21
Figure 1-8: Distribution of Ontario Demand Forecast Error One-Hour Ahead vs. Real-time, ... 22
Figure 1-9: Average Difference between Self-Schedulers' Offered and Delivered Energy, May 2002 - October 2007 23
Figure 1-10: Average and Absolute Average Difference between Wind Generators' Forecasted and Delivered Energy, March 2006 - October 2007 25
Figure 1-11: Normalized Average and Absolute Average Difference between Wind Generators' Forecasted and Delivered Energy, March 2006 - October 2007 26
Figure 1-12: Wind Generation Forecast Error Distribution, One-hour Ahead Pre-dispatch vs. Real-time, May 2007 - October 2007 27
Figure 1-13: Monthly Export Failures as a Percentage of Total Exports by Cause, January 2005 - October 2007 30
Figure 1-14: Monthly Import Failures as a Percentage of Total Imports by Cause, January 2005 - October 2007 31
Figure 1-15: Total Hourly Market Uplift and Average Hourly Market Uplift since Market Opening, May 2002 – October 2007 38
Figure 1-16: Average Internal Zonal Prices, May 2007 – October 2007 41
Figure 1-17: Total CMSC Payments by Internal Zone, May 2007 - October 2007 42
Figure 1-18: Monthly Total Energy Consumption, LDC vs. Wholesale Loads, May 2002 – October 200746
Figure 1-19: Ratio of Wholesale Load to LDC Consumption, May 2002 – October 2007 47
Figure 1-20: Total Monthly Wholesale Load Northwest and the Rest of Ontario, May 2002 – October 2007 48
Figure 1-21: Monthly Real-time Domestic Supply Cushion Statistics, May 2002 – October 2007 50
Figure 1-22: Average Domestic Offer Curve, May – October 2006 & 2007 51
Figure 1-23: Planned Outages Relative to Capacity,* May 2002 - October 2007 53
Figure 1-24: Forced Outages Relative to Capacity,* May 2002 - October 2007 54
Figure 1-25: Forced Outages Relative to Total Capacity by Fuel Type, May 2002 - October 2007 55
Figure 1-26: Henry Hub Natural Gas Spot Price and HOEP, May 2002 - October 2007 58
Figure 1-27: NYMEX OTC Central Appalachian Coal Price and HOEP, May 2002 - October 2007 59
Figure 1-28: Estimated Monthly Average System Heat Rate since Market Opening using HOEP and Shadow Price, January 2003 - October 2007 61
Figure 1-29: Delta Heat Rate (Constrained less Unconstrained Schedules), January 2003 to October 2007 62
Figure 1-30: Net Exports, On-peak and Off-peak, May 2002 - October 2007 65
Figure 1-31: Import Congestion in the Market Schedule by Intertie, May 2007 – October 2007 68
Figure 1-32: Export Congestion in the Market Schedule by Intertie, May 2007 – October 2007 68
Figure 1-33: Average Monthly HOEP Relative to Neighbouring Market Prices, May 2007 – October 2007 72
Figure 1-34: Average Monthly HOEP Relative to Neighbouring Market Prices, On-Peak, May 2007 – October 2007 73
Figure 1-35: Average Monthly HOEP Relative to Neighbouring Market Prices, Off-Peak, May 2007 – October 2007 74

Figure 1-36: Average Richview Shadow Price Relative to Neighbouring Markets, May 2007 – October 2007 75
Figure 1-37: Monthly Average $CDN/US Exchange Rate, January 2004 – October 2007.....76
Figure 1-38: Quantity of Linked and Implied Wheel-through Transactions, April 2005 – August 2007 80
Figure 2-1: Temperature: Day-ahead Forecast vs. Actual for June 12, 2007 90
Figure 2-2: Major Events and the IESO's Actions, June 12, 2007.....91
Figure 3-3: Monthly Average HOEP and Richview Shadow Price, May 2002 – October 2007.....129
Figure 3-4: Monthly Average Difference between the Richview Nodal Price & the HOEP, May 2002-October 2007.....130
Figure 3-5: Number of Hours per Month with Significant Congestion from Various Zones to the Richview Bus, May 2002 - October 2007.....133
Figure 3-6: Demand Forecast Error, February 2004 – October 2007.....134
Figure 3-7: Manually Constrained on Energy Relative to the Ontario Demand, May 2007-October 2007137
Figure 3-8: Monthly Constrained off Net Exports, May 2002 – October 2007.....138
Figure 3-9: Average Monthly Real-Time Domestic Supply Cushion, May 2002 - October 2007 140
Figure 3-10: Monthly Average Import Capability and Number of Hours with Import Congestion on the Michigan Interface, May 2002 - October 2007.....148
Figure 3-11: Average Net Import Change across Intervals, November 2006 - October 2007.....153
Figure 3-12: Average Net Change of Hydroelectric Resources across Intervals, November 2006 - October 2007 154
Figure 3-13: Average Total Net Change in Hydroelectric Resources and Net Imports, November 2006 - October 2007.....155
Figure 3-14: Average MCP and Richview Shadow Price by Interval, ...
November 2006 - October 2007 156
Appendix Figure 1:Estimation of Efficiency Gains of Moving from One Hour to 15 Minute Pre-dispatch194

Executive Summary

Ontario's wholesale electricity spot market once again performed reasonably well according to its design over the six-month period May 2007 to October 2007. Spot market prices generally reflected demand and supply conditions. The Market Surveillance Panel (MSP) found no evidence of gaming, abuse of market power or other inappropriate conduct by market participants or the market and system operator, the Independent Electricity System Operator (IESO). However, as in previous reports, the MSP identified several potential opportunities to improve the efficiency of the market which are reflected in the 13 recommendations summarized below.

Market Prices and Uplift

The average Hourly Ontario Energy Price (HOEP) for the period May 2007 through October 2007 increased by 1 percent compared to the same period in 2006 (although prices were generally lower in the beginning and higher in the final two months of the period). The effective load-weighted HOEP, which provides a more accurate reflection of what Ontario load pays for energy after accounting for the Global Adjustment and OPG Rebate, increased by $1.20/MWh or 2.3 percent in the summer of 2007 compared to 2006. Total hourly uplift payments charged to market participants increased by $16 million or 10 percent during the current period compared to the same period in 2006.

Energy prices were more dispersed relative to last year, with more hours above $70/MWh and more below $20/MWh. There were 4 hours when the HOEP was above $200/MWh, down from 6 a year ago, while the number of hours when the HOEP fell below $20/MWh increased by 122 percent to 331 hours.

Demand and Supply Conditions

Total Market Demand fell by 0.39 TWh or 0.5 percent during May through October 2007 compared to the same period last year. Wholesale load levels continued to decline,

particularly in the Northwest. Although Market Demand fell, total exports increased by over 3 percent.

Net exports (total exports less total imports) declined by 640 GWh or 19 percent relative to last summer. The majority of the decline in net exports occurred in the last three months coinciding with the rapid appreciation of the Canadian/US dollar exchange rate and the increased imports that occurred.

Planned outage rates have been fairly constant since late 2003. However, forced outage rates increased in September and October to rates not seen since 2005. These high rates were primarily a result of outages at two nuclear generating stations during the second half of the summer.

High and Low HOEP

We assessed the four hours during May 2007 though October 2007 period when the HOEP was greater than $200/MWh and the one hour when the HOEP was negative. The highest priced hour occurred on June 12, 2007 in Hour Ending 15 when the HOEP reached $436.53/MWh. We provide a detailed assessment of the conditions contributing to this price. The IESO used almost all available tools to maintain reliability including cutting exports, purchasing emergency energy, curtailing dispatchable loads, activating Operating Reserve, and eventually implementing a 5 percent voltage cut.

Operational Issues & Recommendations

The Panel has made several suggestions for potential changes to the present IESO-administered market based on its analysis of observed market outcomes over the past six months.

Recommendation 1-1 (Chapter 1 Section 2.4.3)

Over the next few years, various new wind projects are scheduled to connect to the IESO's energy grid. Currently, wind generators submit forecasts to the IESO indicating how much energy they will provide on an hourly basis. The discrepancy between forecasted and delivered energy can cause significant differences between pre-dispatch and real-time prices as well as potential reliability issues for the IESO. There has been an increase in the absolute average forecast error since early 2006, coinciding with the introduction of new wind projects in Ontario. Expected new wind generation will increase the magnitude of the overall error and potentially reduce the predictability of real-time prices.

The Panel encourages the IESO to continue to review the forecasting process with wind generators and determine methods to reduce forecast errors. Such generators should have incentives (positive or negative) to encourage accurate forecasting.

Recommendation 2-1 (Chapter 2 Section 2.1.2.3)

After the final pre-dispatch run, the IESO can curtail exports for 'security' or 'adequacy' reasons. The 'security' code is used when an internal or intertie transmission limitation requires the IESO to cut the export. The 'adequacy' code is used to cut an export when there are insufficient internal resources to meet the Market Demand. Adequacy curtailments are removed from both the constrained and unconstrained sequences while security curtailments are only removed from the constrained sequence. Removal from the unconstrained sequence has the effect of lowering demand and suppresses the market price during times of scarcity. This may undermine efficient responses by market participants. For example, the resulting lower HOEP may have the effect of encouraging traders to continue seeking exports from the IESO in the next hours in spite of the potential scarcity situation.

Export curtailment due to 'adequacy' has an effect of suppressing the market price during times of serious scarcity since the curtailed amount is removed from the market schedule, thus distorting the market price signal. The Panel recommends that the IESO not remove the curtailed amount due to 'adequacy' from the market schedule.

Recommendation 3-1 (Chapter 3 Section 2.3)

In the July 2007 MSP Report, the Panel identified that the consumption deviation of dispatchable load can be a source of forecast error. The IESO's forecast model counts the deviation as a portion of forecast demand of non-dispatchable load. The Panel recommended that the IESO should explore possible improvements to the load predictor tool to reduce dispatch inefficiencies from forecast errors arising from changes in dispatchable load consumption

In this report, the Panel identifies another issue that might be resolved by an improvement in the load predictor tool. Given that the constrained sequence uses a ten-minute-ahead demand forecast and the unconstrained sequence uses actual demand,[1] we find that demand has been persistently under-forecasted since early 2005.

Consistent with prior recommendations directed at improving the IESO load predictor, whose algorithm imputes changes in non-dispatchable load that can induce consumption inefficiency and forecast errors, the Panel recommends that the IESO review its load predictor methodology to determine if it is a source of persistent under-forecasting of demand.

Recommendation 3-2 (Chapter 3 Section 2.5)

In our December 2005 Monitoring Report, the Panel discussed an issue involving Phase Angle Regulators (PARs) between Ontario and Michigan. These PARs, first placed in

[1] Plus adjustments when certain control actions such as voltage reductions and manually constraining-off dispatchable load have been taken

service in March 2005, were intended to limit inadvertent parallel loop flow through Ontario between New York and Michigan in order to increase effective import/export capability on the Michigan and also the New York interfaces. However, the Panel noticed an increase in the amount of import congestion and a reduction in import capability (by about 400 MW) at the Michigan intertie, which coincided with and was the result of placing the Lambton PARs in service. Though the PARs were placed in service, they could not be operated until agreements were negotiated among Hydro One, ITC*Transmission* (ITC), the IESO and the Midwest ISO (MISO). To restore interchange capability, the PARs were removed from service in June 2006.

Since June 2006, many of the Panel's concerns have been resolved. The IESO has indicated that it places a high priority on developing Operating Agreements with MISO, Hydro One and ITC and is targeting implementation and reconnection of the PARs by the spring of 2008.

Hydro One has indicated that the units must be operated in a conservative manner for a number of months until sufficient experience had been gained to allow it to determine if the originally anticipated limits can be achieved in order to maximize the Ontario-Michigan intertie capacity. This is expected to require several months. But even in the interim, the PARs will improve import/export capability substantially.

(1) The IESO should expedite completion of the necessary agreements with Hydro One, the Midwest ISO and* ITC*Transmission for operation of the Phase Angle Regulators on the Michigan intertie. The IESO (and Hydro One) should also complete necessary staff training as soon as possible. Any improvement on the spring 2008 target would have positive efficiency (as well as reliability) effects on the Ontario (and Midwest ISO) system and any slippage would have the opposite effects.

(2) Hydro One should work towards developing ratings that will safeguard the Phase Angle Regulators and provide operationally useful Limited Time Ratings as soon as possible.

Recommendation 3-3 (Chapter 3 Section 3.1)

In previous reports, the Panel has discussed the issue of the volatility of dispatch instructions. Although the IESO has undertaken measures to minimize the effect of this volatility on generators, it has not addressed the root causes of either dispatch volatility or interval-to-interval price volatility.

Market Demand (Ontario demand plus exports) and market supply (available generation plus imports) exhibit abrupt hourly changes for two main reasons: the coordinated change in exports and imports made on the hour and the arrival or departure of hydroelectric generation on the hour. The current fixed one hour bid window combined with the present methodology of scheduling interties is creating inefficiencies.

A potential market design change would be to adopt a 15-minute dispatch algorithm for both generation and imports/exports. We understand that the New York ISO already has a 15 minute dispatch algorithm to allow better scheduling of internal resources. Allowing imports, exports and domestic generation to change on the quarter hour reduces the extent to which domestic generation would be obliged to inefficiently ramp up or down to accommodate changes in imports and exports. Rescheduling within the hour could also provide better response to supply problems that may emerge during the hour.

The MSP recommends the IESO begin investigation of a 15 minute dispatch algorithm to enhance the efficiency of the market.

Recommendation 3-4 (Chapter 3 Section 4.1)

On August 12, 2007, a market participant requested that the IESO constrain on various hydroelectric units for regulatory reasons. In this case, river flows had to be maintained in order to respect agreed water levels. The Market Rules allow variances from dispatch instructions for safety, legal, regulatory and environmental reasons. In the months of August and September 2007, the Market Assessment Unit identified approximately

$150,000 of constrained on payments to a market participant that requested various hydroelectric units be constrained on to maintain required water levels. While such 'self-induced' payments may be addressed through discussions leading to voluntary repayments, it would be useful to have rule-based authority to recover such payments.

The IESO should initiate a rule change to allow the recovery of self-induced congestion management settlement credit payments which are made to generators when they are unable to follow dispatch for safety, legal, regulatory or environmental reasons.

Recommendation 3-5 (Chapter 3 Section 4.2)

Import Offer Guarantees (IOG) are intended to assist the reliability of the Ontario market by attracting efficient imports. IOGs are offered to help manage the pricing risk to traders on an hourly basis by paying them based on the higher of their offers and the real-time MCP. Wheel-though transactions, both linked and implied, are not eligible for IOG payments. Such payments are automatically recovered by an IOG offset since there is no net import (i.e., reliability benefit) to Ontario.

Recently, market participants who are business affiliates were identified as importing (and receiving the IOG payment) and exporting in the same hour. This effectively constitutes an implied wheel when the affiliation of the two businesses is considered. If one of these market participants had undertaken both transactions, the IOG payment would have been clawed back through the IOG offset. To date, the amount of money paid to affiliated entities that are importing and exporting power simultaneously has been small. However, it would be appropriate to automatically offset the IOG payments made to a market participant when it is identified as an affiliate in the same manner as for the implied wheel transactions undertaken by a single entity.

The IESO should initiate a rule change to make Intertie Offer Guarantee payments subject to offsets where affiliated market participants are simultaneously importing and exporting.

Recommendation 3-6 (Chapter 3 Section 4.3)

In October of 2004, Hydro One applied and subsequently obtained approval from the Ontario Energy Board for a construction of a new 76-kilometer double circuit 230 kilovolt (kV) transmission line to upgrade the capacity of the Queenston Flow West (QFW) transmission flowgate, as well as upgrades to the Middleport Transformer Station. Increasing the capacity (reducing congestion) of the QFW transmission flowgate will lead to several efficiency gains for the Ontario market including less constrained off generation in the Niagara area, reduced constrained on generation west of QFW, and reduced constrained off/on imports/exports on the New York interties (and the Michigan interties). The projects were expected to increase the rating of the QFW flowgate by 800 MW (44 percent). The projects were to be completed in the summer of 2007, however their completion has been significantly delayed. Hydro One has advised the Panel that although it is not a direct party to the dispute causing the delay, it has been providing input and supporting parties involved in the negotiations. Once the dispute is resolved the Panel anticipates that Hydro One will be ready to complete the project expeditiously.

It is important for the efficiency of the Ontario electricity market that Hydro One attempt to complete the Queenston Flow West transmission expansion as soon as practicable. The ability to fully utilize 'bottled' generation in the Niagara region and maximize economically viable imports with New York (and Michigan) will enhance the efficiency (and reliability) of the Ontario market.

Recommendation 3-7 (Chapter 3 Section 4.4.3)

The Ontario Power Authority (OPA) introduced a Renewable Energy Standard Offer Program (RESOP) in 2006 to help Ontario meet its renewable energy supply targets by

providing small renewable energy generating projects (less than 10 MW) with a standard pricing structure and simplified qualifying guidelines. Because of their small size and their connection within LDCs, there are few requirements for these facilities to provide ongoing production status or forecasts. Also because of the intermittent nature of their production, these generators could add uncertainty for the IESO operation and could in some situations lead to production inefficiencies. The Panel understands that the IESO has just initiated a stakeholder consultation to discuss the integration of these and other embedded generators into the reliable operation of the IESO-controlled grid and encourages the IESO to also consider opportunities to reduce potential inefficiencies.

To the extent possible in its stakeholder consultation on embedded generation, the IESO should consider opportunities to reduce inefficiency through the development of the capability for accurate forecasting of embedded generation production, which may require the provision of real-time production and related information (e.g. outages).

Recommendation 3-8 (Chapter 3 Section 4.4.6)

In light of the growing numbers of OPA contracts with energy suppliers in Ontario, we reviewed these contracts from an efficiency perspective. The Panel's view has always been that efficient contract structure is one that motivates generators to offer into the wholesale market at prices that reflect their incremental cost of production and that this helps to ensure efficient dispatch.

Our assessment found that the Clean Energy Supply (CES) type arrangements are the most efficient of the contract structures used by the OPA. Contracts for new supply would be more efficient if they reflected the same structure as the CES contract; an up-front payment of some kind and incentives for hourly decision-making related to the market price. A similar observation may apply for Ontario Electricity Financial Corporation for any new or renewed NUG (New Utility Generator) contracts it might arrange.

The Panel recommends that the Ontario Power Authority structure future contracts to maintain the energy market price as the driver for production decisions (for example, using a strike price structure similar to the payment provisions in the existing Clean Energy Supply contracts).

Recommendation 4-1 (Chapter 4 Section 2)

Aside from the Ontario Power Generation (OPG) Rebate, there is no publicly available disaggregation of the Global Adjustment into its various component programs: OPG's baseload generation (prescribed assets), the various Ontario Power Authority (OPA) generation procurement programs and demand management programs, Bruce generation and the NUG contracts. Data such as total monthly payments under each program as well as monthly energy delivered would allow for an assessment of the effectiveness and costs (in total and per MWh of supply or conservation) of these various programs. It could also be beneficial for market participants (and even retail customers) who may want to predict the expected future levels of such payments (which represented approximately $370 million or about $5/MWh for the current six month summer period), for example, when making investment or supply contract decisions. For OPA procurement programs, one possible approach is to aggregate information by program, for example, the Renewable Energy program, the Clean Energy Supply program, each of the corresponding Standard Offer Programs, Demand Management programs and Local Distribution Company energy conservation programs.

(1) The Ontario Power Authority should create more transparency regarding the ongoing monthly payments associated with each of its various procurement programs in order to promote a better understanding of the costs and effectiveness of these programs and to help market participants gain a better understanding of the component costs of the Global Adjustment.

(2) Similarly, the IESO should consider providing aggregate monthly payments associated with Ontario Power Generation's regulated baseload assets, as it currently does for the OPG Rebate.

Page Left Blank Intentionally

Chapter 1: Market Outcomes May 2007 – October 2007

1. *Highlights of Market Indicators*

This Chapter provides an overview of the results of the IESO-administered markets over the period May 1 to October 31 in 2007, with comparisons to the same period a year earlier and in many instances a review of trends since market opening. For ease of reference, the May through October period is sometimes referred to as 'the summer period'. There are four substantive sections summarizing the data on prices, demand, supply and trade. Highlights of each of these are summarized in the subsections that follow.

1.1 Pricing

This section reports on various pricing outcomes. The average Hourly Ontario Energy Price (HOEP) was $45.66/MWh, which is $0.45/MWh or one percent higher than the average HOEP in the same period one year ago. Lower demand and higher hydroelectric and nuclear baseload production reduced the HOEP in May while lower nuclear availability and baseload hydro supply resulted in higher prices in September and October. Furthermore, energy prices were more spread out, with more hours above $70/MWh and more below $20/MWh.

The existence of OPA contracts and regulated prices in Ontario's hybrid markets act to protect consumers from being exposed to paying the HOEP. The actual amount paid by most Ontario loads is more accurately measured by the effective load-weighted HOEP, which increased by $1.20/MWh or 2.3 percent in the summer of 2007 compared to 2006.

In section 2.2, we show that average operating reserve prices differed this summer compared to last. During the on-peak hours, there was a large decline in May operating reserve (OR) prices followed by a dramatic increase in June prices because of changing supply conditions associated with freshet. Off-peak operating reserve prices fell by approximately 50 percent for all OR categories. Changes to the OR requirements,

increased OR supply from new entrants, and increased OR activations all contributed to lower OR prices in the off-peak hours this period.

In section 2.3, we show that coal-fired generators continue to set the Market Clearing Price (MCP) most often, although their share fell by 5 percent this summer. Coincidentally, oil/gas generation increased its share by 4 percent.

Section 2.4 reports that there has been little change in the discrepancy between the one-hour ahead and three-hour ahead prices and the HOEP. The section provides an in-depth discussion about the factors that lead to price forecasting errors including forecast error resulting from wind generators. The average absolute difference between offered and delivered MW from wind generation continues to grow as more wind capacity enters the market.

Section 2.5 explores the causes of differences in the HOEP in summer 2007 compared to 2006 by looking at the price effects of different values for key factors like natural gas prices, Ontario load, etc.

Section 2.6 shows hourly uplifts totalled $183 million between May and October 2007, which is 10 percent higher than the previous summer, although the long-term trend continues to suggest both hourly uplift and total uplift are declining.

Average prices and Congestion Management Settlement Credits (CMSC) are reported by zone in section 2.7. Consistent with previous periods, the average zonal price is lowest in the Northwest region at minus $136.65/MWh due to excess hydro supply and low demand forcing generators in the region to bid low (and negative) prices. Constrained off supply/constrained on exports were larger than the same period one year ago by approximately $10 million while constrained on supply/constrained off exports were slightly lower by $0.4 million.

In section 2.8, we compare the frequency of high (>$200/MWh) and low (<$20/MWh) priced hours during the summer months of 2006 and 2007 for both the HOEP and the Richview Shadow Prices. Low priced hours were substantially higher by 182 hours (122 percent) for the HOEP and 108 hours (37 percent) for the Richview Price. There were only 4 hours where the HOEP exceeded $200/MWh and 54 hours for the Richview price at this level.

1.2 Demand

This section presents statistics on Ontario's demand situation for the current summer period. Section 3.1 reports that Ontario and Aggregate (market) Demand declined this summer by 0.65 TWh and 0.39 TWh respectively, although exports increased by over 3 percent. In Section 3.2, we show that wholesale load consumption continued to decline over the last six months. The decline was mainly attributable to declining wholesale load levels in the Northwest.

1.3 Supply

Section 4 reports on the supply conditions in the province by analysing the supply cushion, the average supply curve, outage statistics, and fuel prices during the 2007 summer months. Section 4.1 shows that the average pre-dispatch supply cushion improved to 24.6 percent representing an increase of 2.3 percent compared to last summer while the real-time supply cushion remained the same at 19.7 percent. In section 4.2, we compare the average supply curve this summer compared to last summer and find a small increase in low-priced offers this year, which is mainly due to increased baseload supply.

Energy prices and the supply conditions in the province are sensitive to outages. Section 4.3 presents statistics on planned and forced outages. During the summer of 2007, planned outages showed their typical seasonal variation while forced outage rates were higher during the final three months of the summer, primarily due to frequent outages at two nuclear generating stations.

Section 4.4 discusses changes in fuel prices for the May to October 2006 and 2007 periods. Average monthly natural gas prices (Henry Hub) were higher in the first two months of the summer but lower in the final four months while coal (NYMEX Central Appalachian) prices were lower over all summer months compared to a year ago. We report two additional price series: The Powder River Basin (PWB) coal price and the Union Dawn Hub natural gas price. PWB coal prices were almost 20 percent lower while Dawn gas prices were almost 5 percent higher than last summer.

Finally, section 4.5 presents the results of the net revenue analysis. Similar to previous reports, we find that net revenues earned in the market over the last 12-month period would be insufficient to cover incremental costs.

1.4 Imports and Exports

Section 5 reports on trade outcomes over the current summer period. Section 5.1 shows that total net exports declined by approximately 640 GWh (19 percent) compared to the 2006 summer months. The largest decline occurred during the on-peak hours where net exports fell by 42 percent largely due to increased nuclear outages towards the end of the summer forcing Ontario to become more import dependent. In section 5.2, we observe increasing levels of import and export congestion by 103 hours and 897 hours respectively. Export congested hours to Quebec were 531 hours (431 percent) higher than last summer due to strong competition for energy and a major maintenance procedure that limited the export capabilities of a Quebec intertie.

In the last report, the Panel introduced a revised structural econometric model to analyse the effects of price differences between New York and Ontario on the level of exports to New York. In section 5.3, we update the model by including the summer 2007 months and find that a one percent increase in HOEP will lead to a 4 percent decline in exports while a one percent increase in the New York price will lead to a five percent increase in exports.

In section 5.4, we observe that Ontario remains one the lowest priced areas compared to neighbouring jurisdictions with a six-month average energy price $5/MWh lower than the next lowest priced jurisdiction (MISO). We identify two offsetting effects of the recent appreciation of the Canadian dollar relative to the U.S. dollar: it increases the U.S. cost of buying Ontario energy and; reduces fuel prices for Canadian generators who buy from the U.S. Finally, we report that the level of linked-wheel through transactions increased over the summer 2007 months, especially August 2007 when linked-wheel though transactions totaled 32.9 GWh (approximately 5 percent of imports).

2. *Pricing*

2.1 Ontario Energy Price

Table 1 reports the monthly average Hourly Ontario Energy Price (HOEP) for May to October 2007 compared to the same months in 2006. The average HOEP was $45.66/MWh over the summer months of 2007, which was minimally higher than the same period one year earlier. Over the current six month period, the average HOEP was higher during the on-peak hours but lower during the off-peak hours.

The monthly average HOEP was lower during the first three months relative to a year ago but higher in the last three months, especially September and October where the HOEP increased by 26 percent and 22 percent respectively. The large price differences in September and October from the year before were caused by lower availability of nuclear and baseload hydro supply over the second half of the summer.[2] On the other hand, the price reduction in May was accompanied by somewhat lower demand coupled with higher hydroelectric and nuclear baseload production. The reduction in July corresponded with a large reduction in Ontario demand from a year earlier. Lower coal prices likely put some downward pressure on energy prices over the period, particularly off-peak.

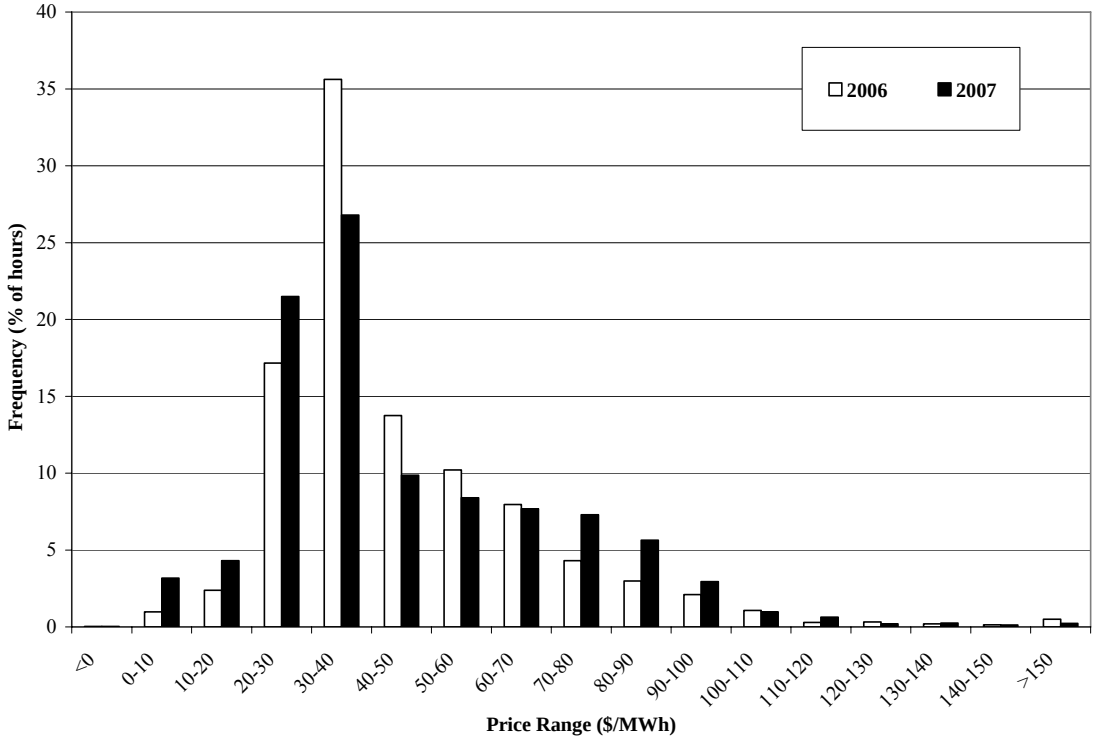
[2] See Tables A-13 and A-14 in the Statistical Appendix

Table 1-1: Average HOEP, On-peak and Off-peak, May – October 2006 & 2007 ($/MWh)

	Average HOEP			Average On-Peak HOEP			Average Off-Peak HOEP		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	46.32	38.50	(16.9)	59.18	53.78	(9.1)	34.77	24.77	(28.8)
June	46.08	44.38	(3.7)	56.04	57.32	2.3	37.36	33.06	(11.5)
July	50.52	43.90	(13.1)	63.25	57.70	(8.8)	41.72	32.54	(22.0)
August	52.72	53.62	1.7	65.05	69.80	7.3	41.64	39.10	(6.1)
September	35.42	44.63	26.0	43.85	58.27	32.9	28.67	34.66	20.9
October	40.20	48.91	21.7	49.64	60.19	21.3	32.44	38.77	19.5
Average	45.21	45.66	1.0	56.17	59.51	5.9	36.10	33.82	(6.3)

Figure 1-1 plots the frequency of price outcomes for the HOEP over the 2006 and 2007 summer months. Generally, prices during the summer period were more evenly spread compared to the same period one year ago. There was a noticeable decline in the number of hours where the HOEP fell between $30/MWh and $60/MWh compared to the same period a year ago. The number of hours the HOEP was less than $30/MWh increased by over 370 hours during the summer of 2007 compared to 2006. The frequency of HOEP in the $70-100/MWh range increased from last summer, while the hours above $150/MWh fell from 22 hours to 10 hours. There were four hours during the summer of 2007 where the HOEP was above $200/MWh and a single occurrence of a negative priced event, all of which are examined in more detail in Chapter 2.

Figure 1-1: Frequency Distribution of HOEP, May–October 2006 & 2007 (% of total hours in $10/MWh price ranges)



2.1.1 Load-weighted HOEP

Compared to the average HOEP, the load-weighted HOEP[3] is a more accurate representation of the amount that loads in Ontario pay and what generators receive for their energy (absent Global Adjustment and OPG Rebate considerations) because it reflects the amount of consumption during a given hour. Table 1-2 shows the HOEP and the load-weighted average price for three different customer categories: all loads, dispatchable loads, and other wholesale loads. The table also reports the amount of Operating Reserve (OR) revenue that participating dispatchable loads earned over the period. Dispatchable loads paid $5.53/MWh of consumption less (11 percent) relative to all loads while other wholesale loads paid 7 percent less. If we account for dispatchable load OR revenue, dispatchable loads paid $6.23/MWh (12 percent) less than all loads as a result of consuming less energy at higher prices and more energy at lower prices.

[3] The load-weighted HOEP over the six month period is simply the HOEP weighted by the amount of consumption over the hour.

Table 1-2: Load-Weighted Average HOEP, May – October 2006 & 2007 ($/MWh)

Year	Unweighted HOEP	Load-weighted HOEP[4]			Dispatchable Load OR Revenue
		All Loads	Dispatchable Load	Other Wholesale Loads	
2006	45.21	48.24	43.52	45.37	0.86
2007	45.66	48.89	43.36	45.57	0.70
Difference	0.45	0.65	(0.16)	0.20	(0.16)
% Change	1.0	1.4	(0.4)	0.4	(18.6)

2.1.2 Impact of the Global Adjustment and the OPG Rebate on the Effective Price

Figure 1-2 plots the monthly HOEP along with the Global Adjustment (GA) and OPG Rebate between April 2005 and October 2007.[5] The figure illustrates that the Global Adjustment and OPG Rebate have moderated HOEP volatility over the period. The monthly average effective HOEP has remained relatively stable within the $49-$55/MWh range and generally above the HOEP since the beginning of 2006 which corresponds to the initiation of the Bruce A contract and other contracts such as early movers and Clean Energy Supply (CES) contracts with the Ontario Power Authority (OPA).

[4] Unadjusted – does not include the impact of the Global Adjustment or the OPG Rebate.

[5] April 2005 represents the beginning of the Ontario Power Generation Non-Prescribed Asset Rebate, which was later renamed the OPG Rebate in May 2006.

Figure 1-2: Monthly Average HOEP Adjusted for OPG Rebate and Global Adjustment, April 2005 – October 2007 ($/MWh)

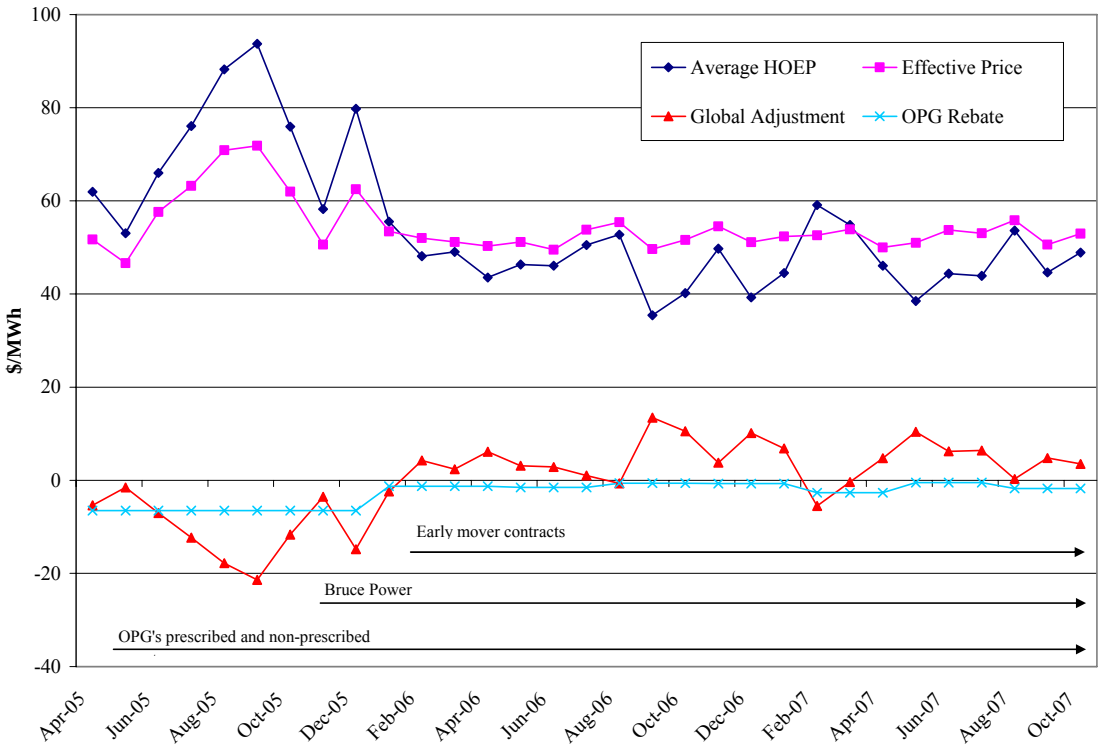


Table 1-3 reports the average six-month HOEP relative to the load-weighted HOEP with and without the Global Adjustment and OPG Rebate over the May to October periods in 2006 and 2007. Although the load-weighted HOEP has increased by only $0.65/MWh, the effective weighted HOEP after being adjusted for Global Adjustment and OPG Rebate has increased by $1.20/MWh, implying the Global Adjustment and OPG Rebate now play a more important role in consumers' final bills.

Table 1-3: Impact of Adjustments on Weighted HOEP, May – October 2006 & 2007 ($/MWh)

Year	Average HOEP	Load-Weighted HOEP	Global Adjustment and OPG Rebate[6]	Effective Load-Weighted HOEP
2006	45.21	48.24	(3.40)	51.64
2007	45.66	48.89	(3.95)	52.84
Difference ($)	0.45	0.65	(0.55)	1.20
% Change	1.0	1.3	(16.1)	2.3

2.2 Operating Reserve Prices

Tables 1-4 and 1-5 compare average monthly on-peak and off-peak Operating Reserve (OR) prices for the May to October 2006 and 2007 periods for the three OR classes: 10-minute spinning reserve (10S), 10-minute non-spinning reserve (10N), and 30-minute reserve (30R).

There was a noticeable decline in on-peak OR prices in May followed by a large increase in June prices compared to one year ago. The observed price differences may be a result of the peaking hydro units coming online later this spring. As reflected in Table A-25 of the Statistical Appendix, there was less hydro supply in May and more hydro supply in June compared to a year ago. Freshet occurred late this year, resulting in more water in June rather than May. Less water in May resulted in more OR supply and therefore substantially lower prices whereas more water in June resulted in less OR supply and higher prices.

Although on-peak OR prices remained relatively constant year-over-year, off-peak OR prices declined dramatically. Average off-peak OR prices dropped by approximately 50 percent for all categories over the current period and declined or remained the same in all months.

[6] A negative value represents a payment from consumers to generators

There were a few notable events between May and October 2007 that placed downward pressure on OR prices. On May 17, 2007, the IESO reduced the ten-minute non-spinning OR requirement by an additional 50 MW (for a total of 100 MW), through reserve sharing when available from neighbouring areas.[7] We discuss the regional reserve sharing program further in Chapter 3. The effect of the reduced requirement is a lowering of reserve prices. Secondly, in June 2007 a self-scheduling generator with a capacity of 105 MW became dispatchable allowing it to participate in the operating reserve market. Since the middle of June, the unit has provided an average of approximately 20 MW of 10S during the on-peak hours and 30 MW in the off-peak hours, which has increased supply and lowered the clearing price for 10S. Finally, the increase in OR activations in the current period compared to one year ago led to a lower OR requirement, thus putting downward pressure on OR prices. When OR is activated, the IESO is not obligated to immediately replenish the reserve requirement. A lower OR requirement reduces the amount of OR demanded during the intervals after a contingency, which leads to a lower OR clearing price until replenishment occurs. The observed increase in OR activations is discussed later in this section.

Table 1-4: Operating Reserve Prices On-Peak,May – October 2006 & 2007 ($/MWh)

	10S			10N			30R		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	6.27	1.96	(68.7)	5.34	1.40	(73.8)	5.34	1.40	(73.8)
June	0.55	4.30	681.8	0.38	2.35	518.4	0.38	2.35	518.4
July	1.78	3.19	79.2	0.44	1.92	336.4	0.44	1.92	336.4
August	3.03	2.82	(6.9)	1.32	0.64	(51.5)	1.32	0.64	(51.5)
September	3.98	2.34	(41.2)	0.21	1.21	476.2	0.21	1.21	476.2
October	2.98	2.05	(31.2)	1.00	1.09	9.0	1.00	1.09	9.0
Average	3.10	2.78	(10.3)	1.45	1.44	(0.7)	1.45	1.44	(0.7)

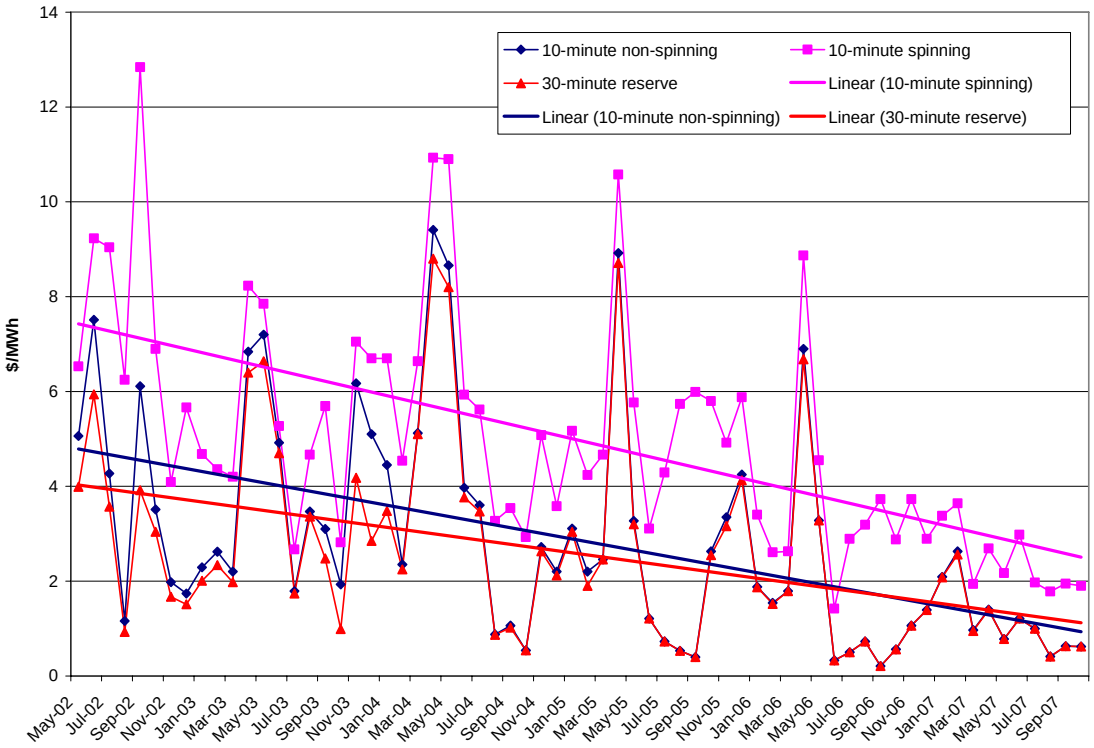
[7] See http://www.ieso.ca/imoweb/news/newsItem.asp?newsItemID=3455 on the IESO website

Table 1-5: Operating Reserve Prices Off-Peak, May – October 2006 & 2007 ($/MWh)

	10S			10N			30R		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	3.00	2.36	(21.3)	1.42	0.22	(84.5)	1.42	0.22	(84.5)
June	2.19	1.83	(16.4)	0.29	0.22	(24.1)	0.29	0.22	(24.1)
July	3.65	0.97	(73.4)	0.55	0.24	(56.4)	0.55	0.24	(56.4)
August	3.33	0.84	(74.8)	0.20	0.20	0.0	0.20	0.20	0.0
September	3.52	1.67	(52.6)	0.21	0.20	(4.8)	0.21	0.20	(4.8)
October	2.80	1.77	(36.8)	0.21	0.20	(4.8)	0.21	0.20	(4.8)
Average	3.08	1.57	(49.0)	0.48	0.21	(56.3)	0.48	0.21	(56.3)

Figure 1-3 depicts the monthly average OR prices since market opening. As identified in previous MSP reports, there is an obvious declining long-term trend in all OR price categories since May 2002.

Figure 1-3: Monthly Operating Reserve Prices by OR Class since Market Opening, May 2002 - October 2007 ($/MWh)



Recently, the Board of Directors of the IESO approved a rule change that grants dispatchable loads the opportunity to provide 10-minute spinning reserve.[8] The additional supply available for OR should reduce the OR prices going forward. Secondly, since the OR market is jointly optimized with the energy market, the HOEP may also decline as a result of this new source of supply.

Coincident to the declining OR price trends identified above, Figure 1-4 indicates that the frequency and magnitude of OR activations in Ontario reached record highs over the summer of 2007.[9] In May and June 2007, there were 38 and 37 OR activations respectively, easily eclipsing the previous record of 29 activations set in July 2002. OR activations in May 2007 totalled 13,351 MWh which is approximately 1,000 MWh greater than July 2002, the previous record high month.

[8] See http://www.ieso.ca/imoweb/news/newsItem.asp?newsItemID=3800

[9] For more information on the IESO's response to contingencies on the system, see the discussion paper presented to the Technical Panel of the IESO titled, "Operating Reserve Activations vs. One-Time Energy Dispatch (OTD)', April 5, 2007 available at http://www.ieso.ca/imoweb/pubs/tp2007/tp199-3c-Paper-ORA-vs-Energy-Dispatch.pdf

Figure 1-4: Monthly Operating Reserve Activations by Frequency and MW since Market Opening,[10] May 2002 - October 2007

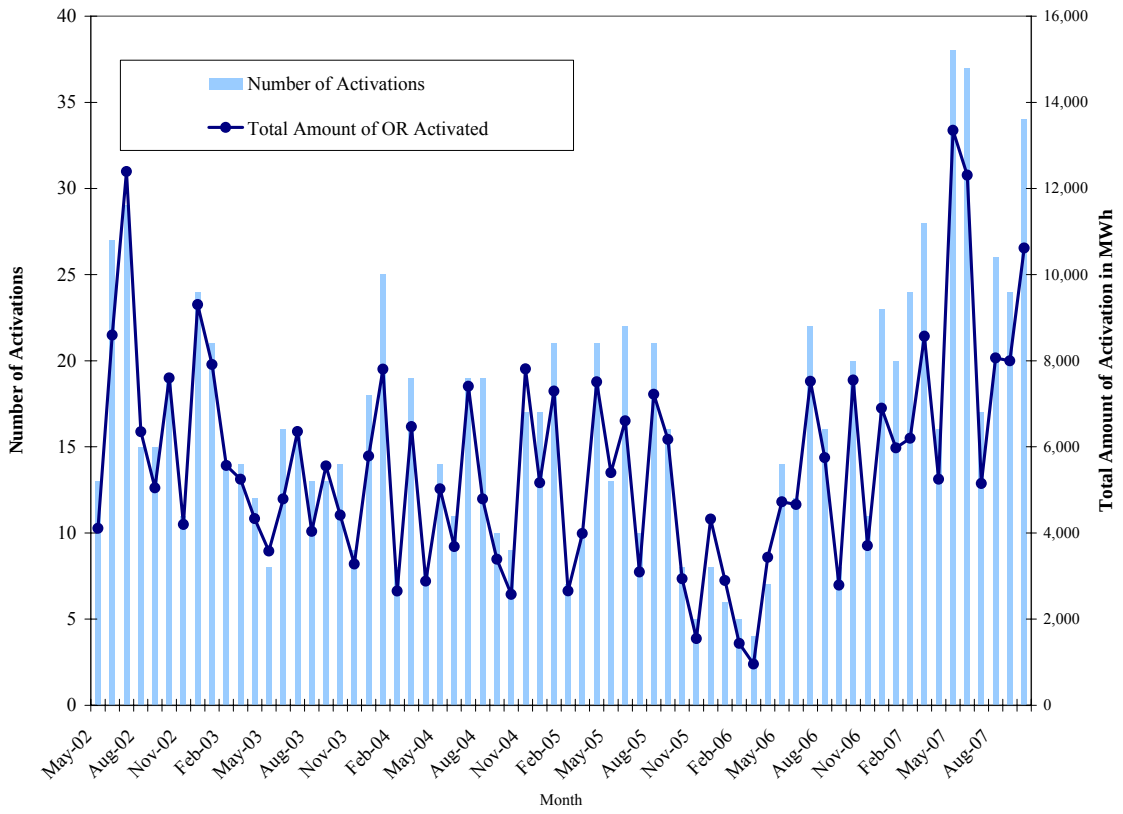
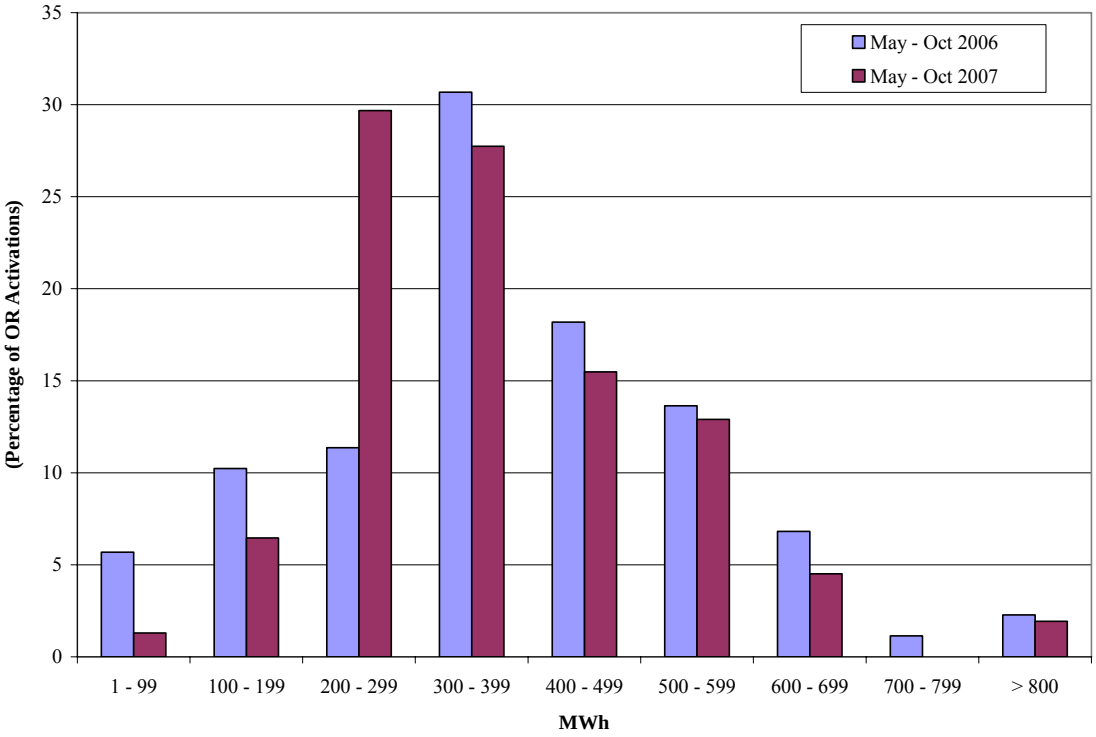


Figure 1-5 plots the percentage of OR activations by 100 MWh increments for the current and previous summer months. The increase in the number of OR activations during the 2007 summer months appears to coincide with a change in the magnitudes of OR activations. Figure 1-5 shows an increase in the percentage of activations within 200 - 299 MWh this summer compared to last summer. On the other hand, the percentage of activations has declined in 2007 for every category above 400 MWh.

[10] MW represents the amount of energy initially activated from the operating reserve and ignores the rate at which the OR is deactivated.

Figure 1-5: OR Activations by 100 MWh Categories, May – October 2006 & 2007 (Percentage of all OR Activations in Period)



The MAU has observed that the increased frequency of OR activations in the two hundred to 299 MW range may be due to generators deviating from their dispatch schedules more frequently than in the past leading to large Area Control Errors (ACE) rather than a significant increase in generators' forced outages.[11] The Panel has requested that the MAU further investigate the issues of increased OR activations.

2.3 Price Setters

Table 1-6 compares the percentage of intervals when each type of generator sets the real-time MCP over the summer months in 2006 and 2007.[12] Coal-fired generators continue to set the MCP most frequently in Ontario, although their share declined by five percent compared to the same period one year ago. Oil/gas-fired generators increased by

[11] Area Control Error means the instantaneous difference between actual and scheduled interchange, taking into account frequency bias (IESO Market Rules, Chapter 11)
[12] Excludes imports because in real-time, imports are unable to set the market clearing price.

4 percent while hydro increased by 1 percent. The shift from coal to oil/gas was largely attributable to higher demand and/or a lower baseload generation supply in August, September, and October 2007. Table 1-9 indicates that coal plants remain the predominant price-setters in off-peak periods, although hydro played an increasingly important role in all months except August and September.

Table 1-6: Average Share of Real-time MCP Set by Resource Type, May – October 2006 & 2007 (% of hours)

	2006	2007	Difference
Coal	59	54	(5)
Nuclear	0	0	0
Oil/Gas	20	24	4
Hydro	21	22	1

Table 1-7 reports the percentage of time each resource type sets the MCP by month over all hours. The frequency that coal set the MCP declined or remained unchanged in every month with the exception of July. The monthly patterns for oil/gas varied considerably.

Table 1-7: Monthly Share of Real-Time MCP set by Resource Type, May – October 2006 & 2007 (% of Hours)

	Coal		Nuclear		Oil/Gas		Hydro	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	63	61	0	0	14	13	23	26
June	61	61	0	0	22	18	17	21
July	52	58	0	0	29	20	20	22
August	57	44	0	0	22	38	22	17
September	56	52	0	0	18	25	26	23
October	62	46	0	0	17	30	21	24
Average	59	54	0	0	20	24	22	22

Tables 1-8 and 1-9 split the hours into on-peak and off-peak periods respectively. Table 1-8 shows that much of oil/gas' share increase seems to have occurred during the on-peak hours where their share rose from 35 percent in 2006 compared to 42 percent for the same months in 2007. The significant increase in oil/gas share is primarily due to the outages at a few nuclear units and a higher Ontario demand in August to October 2007.

Table 1-8: Monthly Share of Real-Time MCP set by Resource Type, On-Peak, May – October 2006 & 2007 (% of Hours)

	Coal		Nuclear		Oil/Gas		Hydro	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	45	49	0	0	26	26	29	25
June	37	47	0	0	39	31	24	22
July	30	38	0	0	48	39	22	23
August	37	15	0	0	34	62	29	23
September	41	32	0	0	32	45	27	23
October	40	26	0	0	32	49	28	26
Average	38	35	0	0	35	42	27	24

Table 1-9: Monthly Share of Real-Time MCP set by Resource Type, Off-Peak, May – October 2006 & 2007 (% of Hours)

	Coal		Nuclear		Oil/Gas		Hydro	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	79	72	0	0	4	1	17	27
June	81	73	0	0	7	6	12	20
July	66	74	0	0	16	5	18	21
August	74	70	0	0	10	18	16	12
September	68	67	0	0	7	11	24	22
October	80	64	0	0	5	13	15	23
Average	75	70	0	0	8	9	17	21

2.4 One-Hour and Three-Hour Ahead Pre-dispatch Prices and HOEP

Accurate pre-dispatch price signals are essential to decisions by market participants regarding production and consumption. Although a perfect price forecast is unrealistic to expect over all hours, any improvements that can be made will help benefit real-time scheduling efficiency. For this reason, the differences between one-hour ahead and three-hour ahead pre-dispatch prices and HOEP are important statistics to monitor. In future reports, we will continue to monitor the discrepancy between pre-dispatch prices and HOEP as well as examine the consistency of the bias between the two prices.

The three-hour ahead pre-dispatch price has become a very important signal as it is tied to the OPA's Demand Response Program (Phase 1). A more accurate three-hour ahead

price certainly improves market efficiency as it can reduce incidents of inefficient curtailment.

Tables 1-10 and 1-11 indicate that the average differences between the one-hour and three-hour ahead pre-dispatch versus real-time prices have remained almost constant relative to the same period one year earlier. However as a percentage of HOEP, the average hourly difference has increased by approximately 4 percent for one-hour ahead and 6 percent for three-hour ahead. This may be due to the increase in the number of low price hours during the summer of 2007. Low-priced hours induce a higher percentage error in an hour for a given absolute forecast difference.

Table 1-10: Measures of Differences Between One-Hour Ahead Pre-Dispatch Prices and HOEP, May – October 2006 & 2007 ($/MWh)

	Average Difference		Maximum Difference		Minimum Difference		Standard Deviation		Average Hourly Difference as a % of the HOEP	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	11.94	8.23	1,739.37	71.78	(297.46)	(77.17)	67.55	14.49	29.88	35.18
June	5.12	6.99	44.18	94.35	(66.34)	(331.10)	11.20	21.84	15.04	25.21
July	6.89	5.26	60.33	62.02	(174.98)	(211.39)	13.61	15.91	18.99	22.34
August	9.73	8.16	262.96	74.60	(67.76)	(60.38)	25.64	13.56	19.93	20.05
September	3.82	5.96	34.86	83.01	(67.49)	(68.97)	8.56	12.46	24.74	22.37
October	6.27	8.17	52.09	66.75	(42.27)	(236.65)	10.44	14.99	21.67	30.09
Average	7.30	7.13	365.63	75.42	(119.38)	(164.28)	22.83	15.54	21.71	25.87

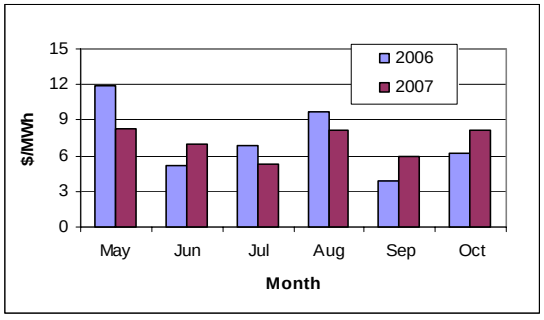
Table 1-11: Measures of Differences Between Three-Hour Ahead Pre-Dispatch Prices and HOEP, May – October 2006 & 2007 ($/MWh)

	Average Difference		Maximum Difference		Minimum Difference		Standard Deviation		Average Hourly Difference as a % of the HOEP	
	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007
May	6.60	7.63	419.55	72.88	(320.42)	(93.58)	30.00	16.11	20.83	30.63
June	4.85	6.83	48.06	99.04	(75.35)	(305.24)	12.76	22.95	14.02	25.54
July	7.51	3.58	114.61	62.49	(126.79)	(215.90)	15.25	16.64	17.92	15.97
August	9.18	7.68	168.10	79.74	(70.41)	(61.26)	27.51	14.90	16.67	19.45
September	2.43	3.91	41.59	60.95	(68.61)	(69.49)	8.99	12.18	17.98	17.71
October	3.86	6.73	62.51	82.25	(42.27)	(234.52)	10.85	15.40	13.59	25.54
Average	5.74	6.06	142.4	76.23	(117.31)	(163.33)	17.56	16.36	16.84	22.47

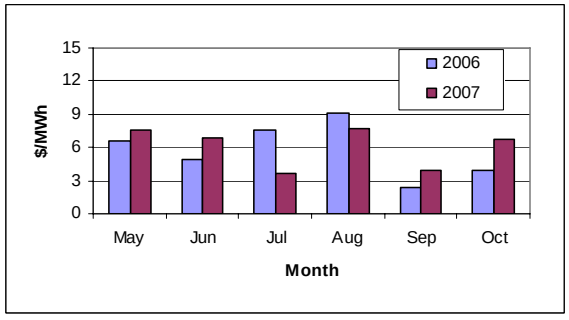
Figure 1-6 graphically represents the average monthly difference between the one and three-hour ahead pre-dispatch versus real-time prices.

Figure 1-6: Average Pre-dispatch Price Differences One and Three-Hour Ahead to Real-Time, May – October 2006 & 2007 ($/MWh)

(One-hour ahead price difference)



(Three-hour ahead price difference)



To date, the Panel has identified four main factors that lead to discrepancies between pre-dispatch and real-time prices including:

- Demand forecast error;
- Performance of self-schedulers and intermittent generators;
- Failure of scheduled imports and exports; and

- Frequency that imports set the pre-dispatch price.

2.4.1 Demand Forecast Error

Table 1-12 reports the one-hour and three-hour ahead mean absolute demand forecast error on a monthly basis over the 2006 and 2007 summer months. On average, the demand forecast error increased by a very small amount in the current period compared to the previous period for both the one-hour and three-hour ahead measurements.

Table 1-12: Forecast Error in Demand
May – October 2006 & 2007
(%)

	Mean absolute forecast difference: pre-dispatch minus average demand divided by the average demand (%)				Mean absolute forecast difference: pre-dispatch minus peak demand divided by the peak demand (%)			
	Three-Hour Ahead		One-Hour Ahead		Three-Hour Ahead		One-Hour Ahead	
	2006	2007	2006	2007	2006	2007	2006	2007
May	2.03	1.82	1.9	1.66	1.19	1.07	0.96	0.89
June	2.19	2.40	1.95	2.05	1.36	1.59	1.03	1.19
July	2.62	2.34	2.26	2.01	1.80	1.56	1.32	1.14
August	2.35	2.53	2.0	2.15	1.64	1.65	1.15	1.22
September	1.86	2.25	1.67	1.96	1.12	1.40	0.89	1.06
October	1.94	2.15	1.78	1.98	1.16	1.18	0.93	0.99
Average	2.17	2.25	1.93	1.97	1.38	1.41	1.05	1.08

Figure 1-7 plots average one-hour demand forecast error since market opening. As mentioned in previous MSP reports, the long-term trend continues to indicate an improvement in the magnitude of demand forecast error. The Panel is satisfied in the long-term improvements observed since market opening and will not publish this figure in future reports unless we observe a significant change in forecast error.

Figure 1-7: Absolute Average One-Hour Ahead Forecast Error, May 2007 - October 2007 (% of Peak Demand)

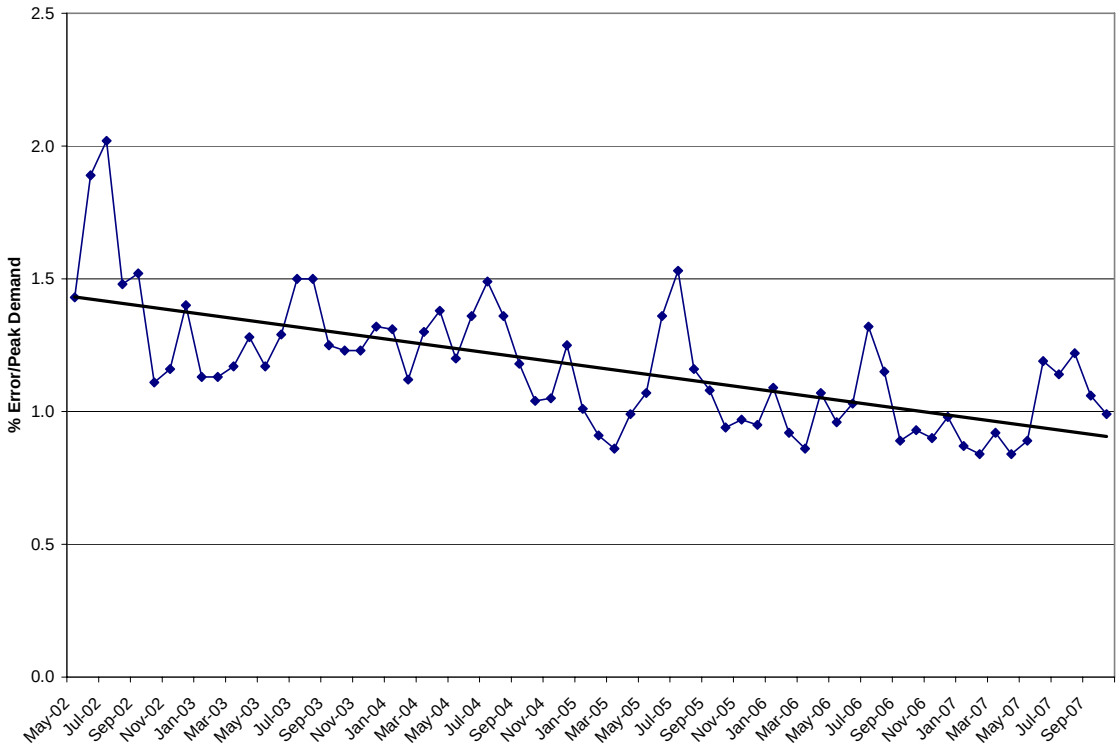
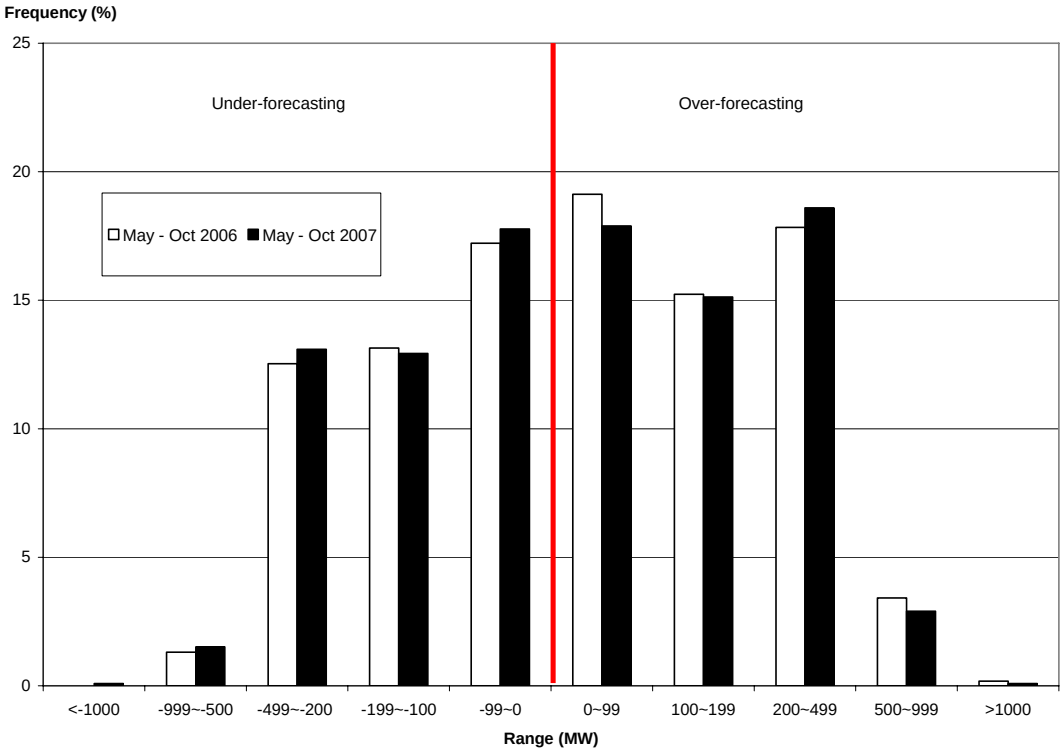


Figure 1-8 divides forecast error events by magnitude and direction. There appears to be a moderate over-forecasting bias during the May to October 2007 months, but slightly less than the bias one year ago.

Figure 1-8: Distribution of Ontario Demand Forecast Error One-Hour Ahead vs. Real-time, May – October 2006 & 2007



2.4.2 Performance of Self-Scheduling and Intermittent Generation

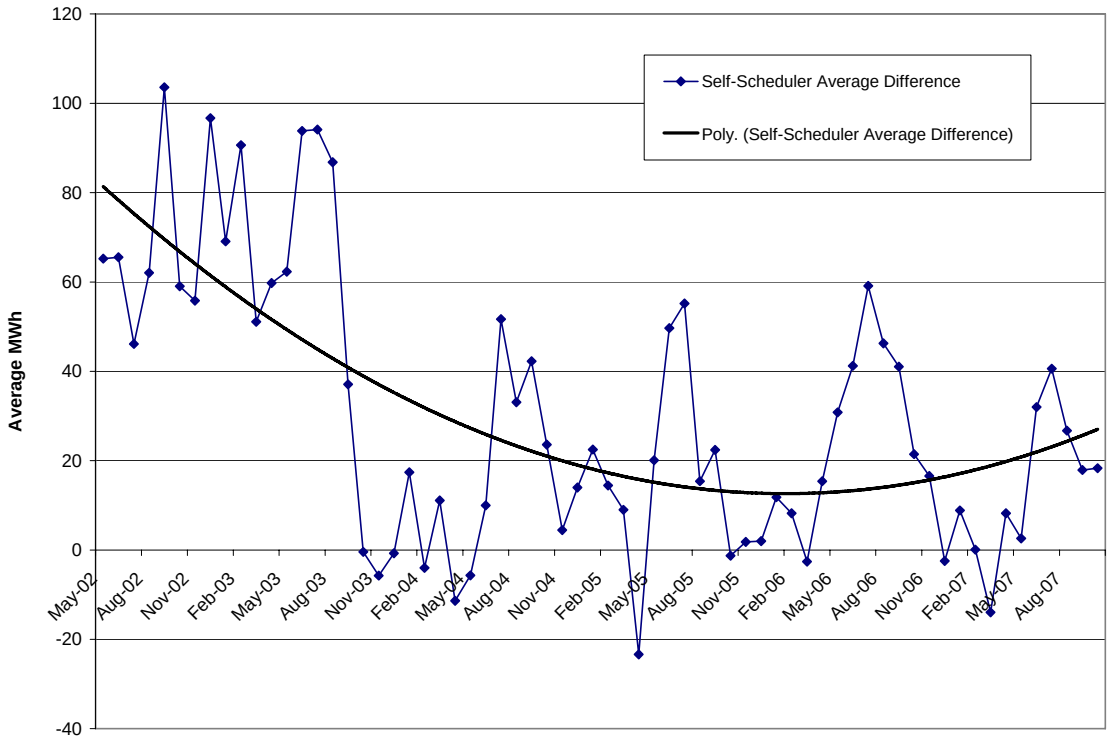
Like the majority of Ontario's generating capacity, self-scheduling and intermittent generators supply energy to the IESO-controlled-grid by submitting forecasts to the IESO indicating the amount of energy they will supply for each hour of the day. However, these units are not held to the strict compliance standards as other generators participating in the IESO-controlled market.[13] The difference between what this group of generators schedules and produces leads to discrepancies between pre-dispatch and real-time prices.

Figure 1-9 plots the monthly average difference between what self-scheduling and intermittent generators offered to produce and what they actually produced since market opening. Since the beginning of 2006, the monthly average differences have been quite

[13] For more details on monitoring standards for intermittent generators, see the slides from the presentation titled "Compliance Assessment of Intermittent Generators" made to the Wind Power Integration Working Group (August 20, 2007) and available at http://www.ieso.ca/imoweb/pubs/consult/se29/se29-20070820-Item6_Compliance_requirements.pdf

volatile. Over the last 12 months, the monthly average difference between delivered and offered energy reached a maximum of 40 MWh in July 2007, which represents the lowest error in July since market opening. Tables A-13 and A-14 in the Statistical Appendix report that hourly self-scheduler supply averaged approximately 700 MW during the off-peak hours and 800 MW during the on-peak hours over the summer of 2007. Therefore, average hourly error made up approximately 5 and 6 percent of average hourly self-scheduler supply for the on-peak and off-peak periods respectively. Comparing the last six months with the year earlier, the differences between offered and delivered have narrowed by over 23 MW (40 percent) on average. This better forecast of supply would tend to lower the pre-dispatch price and narrow the gap between the pre-dispatch price and the HOEP, but the effect of narrowing the difference year-over-year would be small.

Figure 1-9: Average Difference between Self-Schedulers' Offered and Delivered Energy, May 2002 - October 2007 (MWh)



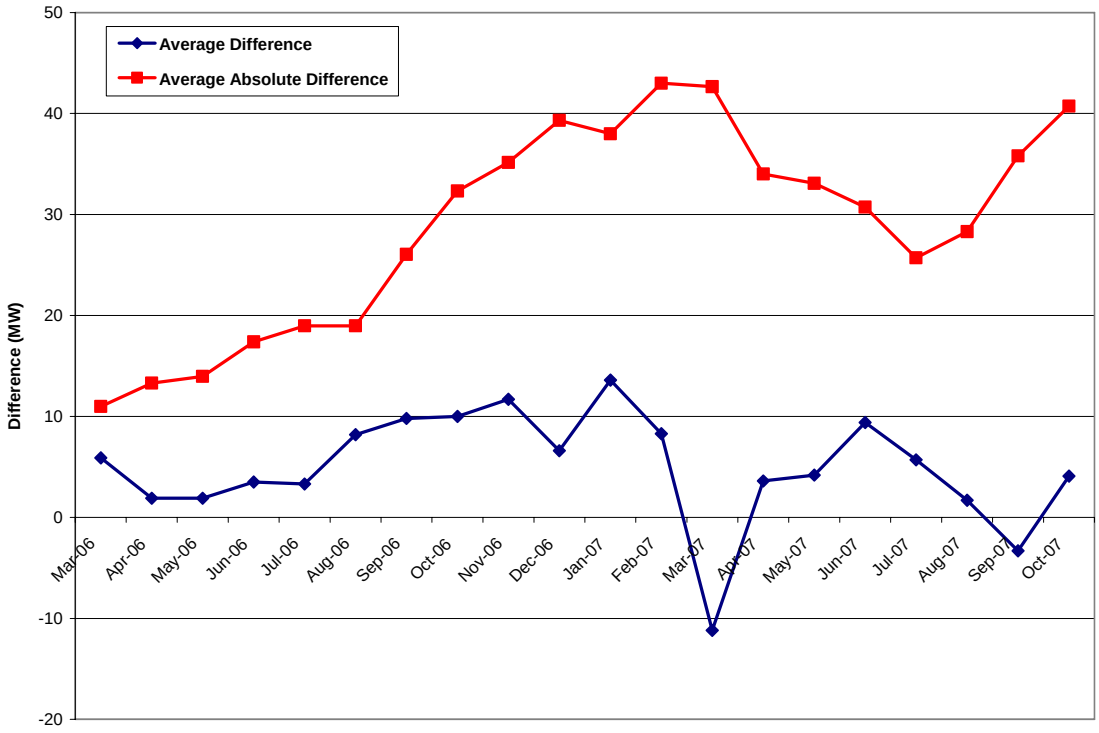
2.4.3 Performance of Wind-Power Generation

Figure 1-10 graphs the average and the absolute average difference[14] between the amounts of energy that wind generators forecast one-hour ahead and what they actually supplied since March 2006.[15] The average difference fell within 5 MW or less in four of the six months during the current period. The average error was positive for all months in the summer 2007 period excluding September, which indicates that on average, wind generators forecasted more energy output one-hour ahead than they delivered to the market.

In this report, we plot the average difference along with the absolute average difference because it eliminates the effect of positive and negative errors cancelling each other out within any given month. Although the average error appears to fluctuate around zero, the average absolute error seems to be rising since early 2006 when the majority of wind generators began producing energy.

[14] The average offsets positive and negative differences, whereas the absolute average does not.
[15] A significant portion of Ontario's wind generation procured by the OPA came online in early 2006.

Figure 1-10: Average and Absolute Average Difference between Wind Generators' Forecasted and Delivered Energy, March 2006 - October 2007 (MWh)



In Figure 1-11, we normalize average error and absolute error by total wind generation capacity to control for the influence of capacity that has entered the market since early 2006. Although absolute error is increasing, the ratio of absolute error to wind capacity seems stable around 10 percent. The implication is that the observed absolute difference between forecasted MWh and delivered MWh from wind generation is becoming larger due to increased wind generation entering the market.

Figure 1-11: Normalized Average and Absolute Average Difference between Wind Generators' Forecasted and Delivered Energy, March 2006 - October 2007 (Difference/Capacity)

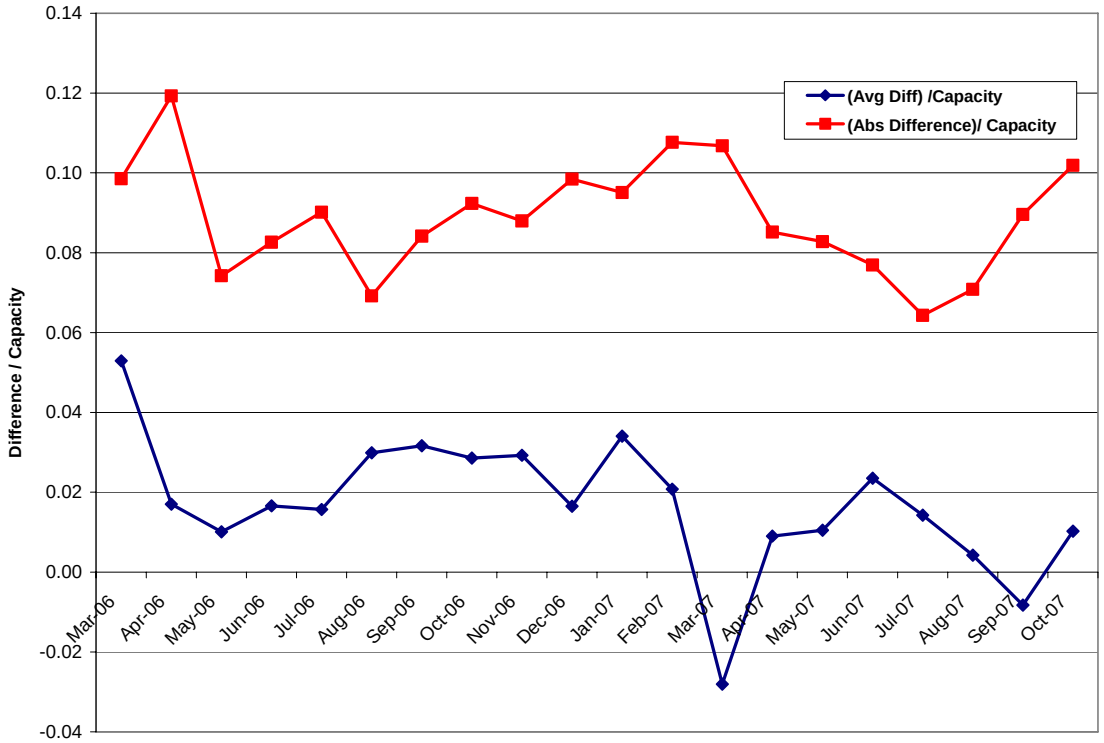
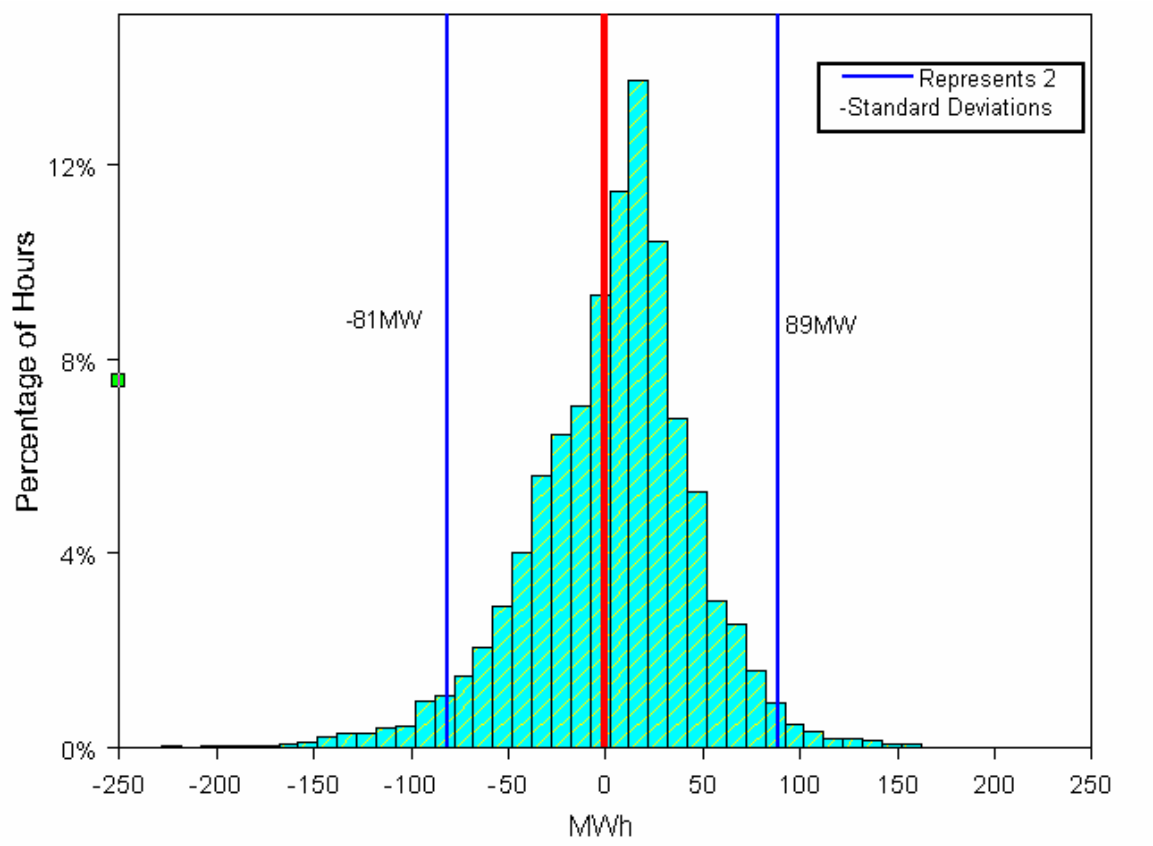


Figure 1-12 below depicts the distribution of forecast error for wind generators during the period May to October 2007. A positive number indicates that these generators over-forecast their output level one-hour ahead, while a negative number indicates that they under-forecast their output level one-hour ahead. On average, these generators slightly over-forecast their offered output although the error range is quite high. The lowest under-forecast amount was 228 MW while the highest over-forecast amount totaled 159 MW. Given that the total wind-power generation capacity is about 400 MW, 228 MW represents over half of Ontario's available wind capacity and constituted an overall forecast error equivalent to 2 percent of scheduled supply during the hour in question. As more and more wind generators enter the market, the magnitude of forecast errors may significantly increase.

Figure 1-12: Wind Generation Forecast Error Distribution
One-hour Ahead Pre-dispatch vs. Real-time,
May 2007 - October 2007
(Percentage of Hours in 10 MWh Ranges)



A large discrepancy between the forecasted and actual output imposes a reliability risk on the system. If these generators significantly overstate their capability, the IESO may dispatch fewer fossil generators or fewer imports in pre-dispatch. In real-time, when wind generators produce less energy than expected and other available resources are not dispatched, system reliability can be at risk. A large discrepancy can also lead to adverse consequences on market prices and efficiency in the market. In pre-dispatch, the IESO dispatches other generators, imports and/or exports based on the forecasts they receive from wind generators. When wind generators supply less energy than offered, the opportunity to dispatch cheaper imports is foregone and the IESO is forced to schedule and dispatch more expensive generation. In contrast, an over-supply by wind generators means that excess energy was scheduled when it was not required. Both of these

situations result in negative market efficiency implications and distort the Market Clearing Price.[16]

In Chapter 2, we illustrate an example where a single wind generator significantly under-forecasted its output and as a result, partially contributed to a negative HOEP of minus $0.40/MWh.[17]

> ***Recommendation 1-1:***
> ***The Panel encourages the IESO to continue to review the forecasting process with wind generators and determine methods to reduce forecast errors. Such generators should have incentives (positive or negative) to encourage accurate forecasting.***

2.4.4 Real-Time Failed Intertie Transactions

Failed import and export transactions are a major source of the differences between pre-dispatch prices and HOEP. In real-time, import failures represent a loss of supply while export failures represent a decline in demand, both of which result in discrepancies between pre-dispatch and real-time prices.

Tables 1-13 and 1-14 compare the number of incidents and rates of import and export failures over the 2006 and 2007 summer months. The frequency of failed exports measured by the number of incidents and the failure rate declined moderately this period. The number of import failures increased 15 percent and the average monthly import failure rate increased 4 percent relative to the same period one year ago, with failure rates higher in three months and lower in the other three months. However, because imports increased by more than 30 percent in this period, the overall import failure rate declined about 5 percent. This is measured as the ratio of total failed imports for the period measured in MWh (rather than averaging monthly values) to total imports.

[16] The IESO has set up a working group to address some of the challenges that wind generators and the IESO will face as more wind projects enter the market including examining wind-power forecasting options. For more information, see the IESO's Wind Power Integration in Ontario (SE-29) webpage available at: http://www.ieso.ca/imoweb/consult/consult_se29.asp

[17] See Chapter 2, section 2.2.1.

Table 1-13: Incidents and Average Magnitude of Failed Exports from Ontario, May – October 2006 & 2007

	Number of Incidents*		Maximum Hourly Failure **(MW)**		**Average Hourly Failure (MW)****		**Failure rate (%)*****	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	564	522	1,136	938	318	202	13.03	8.87
June	324	382	817	733	176	167	5.87	5.76
July	354	350	850	1,079	201	175	6.47	4.51
August	399	373	914	900	187	163	5.8	5.15
September	422	397	788	1,071	192	208	8.88	8.20
October	412	389	874	898	185	195	7.25	7.51
Total	2,475	2,413	N/A	N/A	N/A	N/A	N/A	N/A
Average	413	402	897	937	210	185	7.88	6.67

* The incidents with less than 1 MW are excluded
** Based on those hours in which a failure occurs
*** Total failed MWh divided by total scheduled exports MWh in the unconstrained sequence in a month

Table 1-14: Incidents and Average Magnitude of Failed Imports to Ontario, May – October 2006 & 2007

	Number of Incidents*		**Maximum Hourly Failure (MW)**		**Average Hourly Failure (MW)****		**Failure rate (%)*****	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	121	192	818	453	135	135	3.10	6.25
June	187	148	848	400	153	95	4.58	2.89
July	207	112	1,020	700	123	123	4.25	2.75
August	171	207	405	546	113	118	4.53	3.53
September	54	155	300	525	76	146	1.12	2.54
October	109	172	240	607	69	116	2.08	2.44
Total	849	986	N/A	N/A	N/A	N/A	N/A	N/A
Average	142	164	605	539	112	122	3.28	3.40

* The incidents with less than 1 MW are excluded
** Based on those hours in which a failure occurs
*** Total failed MWh divided by total scheduled imports MWh in the unconstrained sequence in a month

It is difficult to link these changes in the failure rates to the observed changes in the accuracy of the HOEP forecasts. Export failures imply a higher demand in pre-dispatch than in real-time. Reduced failures could imply reduced differences between pre-dispatch and real-time market demand and therefore reduced differences between pre-dispatch prices and HOEP. Increased import failures could also increase demand for domestic generation and thus HOEP, which would tend to reduce the gap between the

pre-dispatch price and the HOEP. This is roughly consistent with the observed decline in the average pre-dispatch to HOEP difference in Table 1-10.

Figure 1-13 plots the percentage of monthly export failures to total exports by the cause of the failure. Failures are separated into those under the market participant's control and those under the neighbouring ISOs' control. The percentage of total export failures not within the market participant's control reached a high of almost 8 percent of total exports in May 2007 and a low of about 2.3 percent in August 2007. The export failure rate under the market participant's control was generally below 3 percent since the implementation of the Intertie Failure Charge in June 2006, but increased to around 5 percent in September and October 2007.

Figure 1-13: Monthly Export Failures as a Percentage ofTotal Exports by Cause, January 2005 - October 2007
(%)

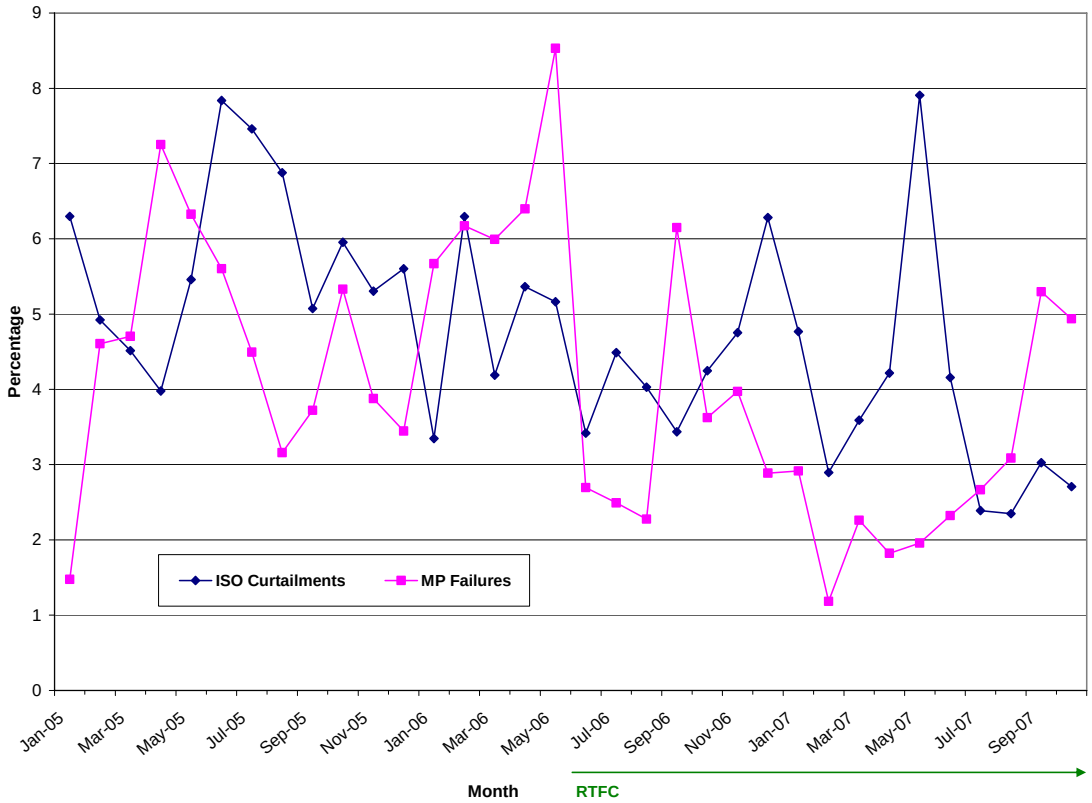


Figure 1-14 plots the percentage of monthly import failures to total imports by cause. Since the introduction of the Intertie Failure Charge in June 2006, the total import failures within the market participant's control as a percentage of total imports has remained at 2 percent or less with the exception of May 2007 where the percentage increased above 4 percent. Failures under the ISOs' control peaked in August 2007 at almost 4.5 percent.

Figure 1-14: Monthly Import Failures as a Percentage of Total Imports by Cause, January 2005 - October 2007
(%)

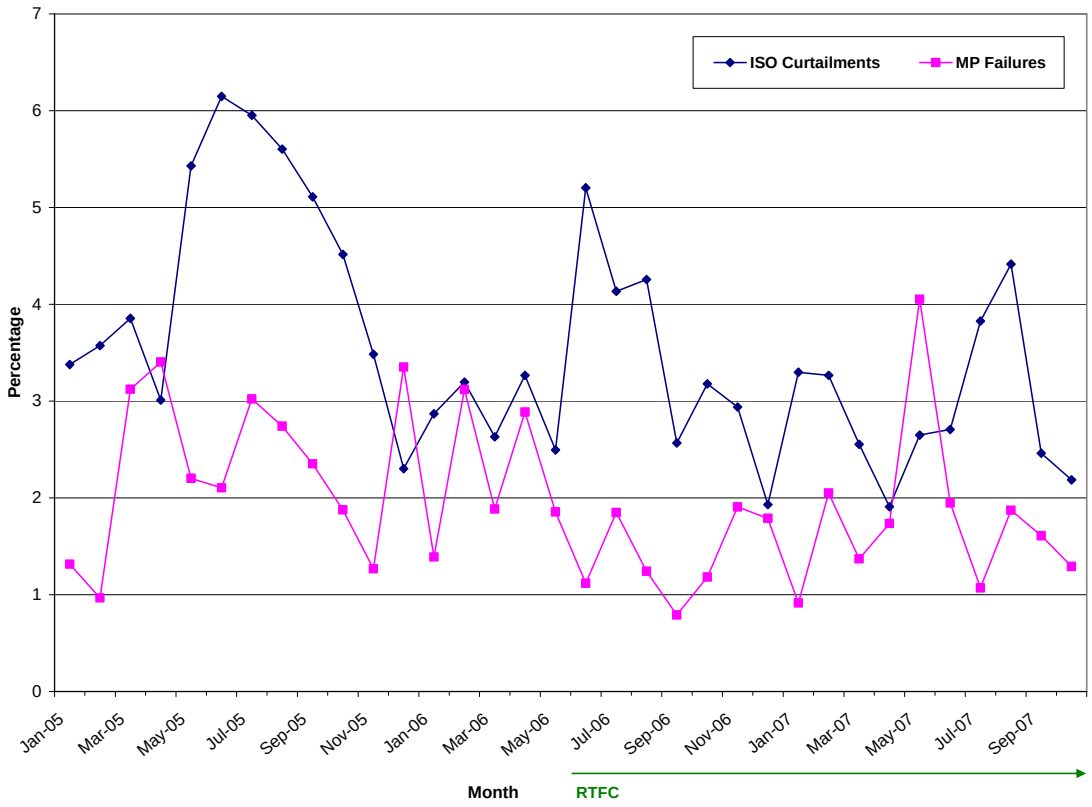


Table 1-15 reports average monthly export failures by intertie and cause for the period November 2006 to October 2007. New York destined export failures make up the majority of total export failures for both causes. For example, approximately 86 percent of export failures under the ISOs' control and over 94 percent of export failures under the participant's control were destined for New York.

Table 1-15: Average Monthly Export Failures by Intertie and Cause, November 2006 – October 2007 (GWh and % Failures)

	Average Monthly Exports (GWh)	Failures (ISO Controlled)		Failures (Participant Controlled)	
		GWh	%	GWh	%
NYISO	715	34.2	86	26.6	94
MISO	173	2.3	6	1.3	4
Manitoba	20	0.7	2	0.3	1
Minnesota	15	0.5	1	0.2	1
Quebec	75	2.1	5	0.1	0
Total	998	39.8	100	28.4	100

Table 1-16 reports average monthly import failures by intertie and cause for the period November 2006 to October 2007. Average monthly MISO imports totalled 317 GWh, or 56 percent of total imports over the last year. Therefore it is not surprising that ISO controlled import failures were the highest in the MISO region and proportional to their imported energy volume at 57 percent of total ISO controlled import failures. However, participant controlled import failures were not proportional to import volumes over the interties. For example, average monthly import failures from New York under the participant's control totalled 6 GWh over the past year representing 60 percent of all participant controlled failures.

Table 1-16: Average Monthly Import Failures by Intertie and Cause, November 2006 – October 2007 (GWh and % Failures)

	Average Monthly Imports (GWh)	Failures (ISO Controlled)		Failures (Participant Controlled)	
		GWh	%	GWh	%
NYISO	75	1.2	7	6.0	60
MISO	317	8.8	57	3.6	37
Manitoba	47	2.0	13	0.1	1
Minnesota	21	0.7	5	0.0	0
Quebec	110	2.8	18	0.2	2
Total	570	15.5	100	10.0	100

2.4.5 Imports Setting Pre-dispatch Price

In the last report, the Panel identified a fourth factor that leads to discrepancies between pre-dispatch and real-time prices; the frequency of imports setting the pre-dispatch market clearing price. In pre-dispatch, imports can set the Market Clearing Price. However in real-time, they cannot be the marginal resource as they are moved to the bottom of the offer stack. Holding everything else constant, the real-time market clearing price may potentially decline compared to the pre-dispatch price during hours when an import is the marginal resource in the pre-dispatch schedule.[18] Therefore, price forecast error measurements would be expected to be higher during months when imports set the pre-dispatch price most frequently.

Table 1-17 shows the frequency of imports setting the pre-dispatch price for the May to October 2006 and 2007 periods by month. During the summer of 2007, imports set the pre-dispatch price 46 hours less frequently than the previous summer, which represents a decrease of approximately one percent relative to the hours in the period. Consistent with the results reported in Table 1-10, the lower incidence of imports setting the pre-dispatch price, the less of a tendency for real-time prices to fall.

Table 1-17: Frequency of Imports Setting the Pre-Dispatch Price, May – October 2006 & 2007 (Number of Hours and % of Hours)

	2006		2007		Difference	
	Hours	%	Hours	%	Hours	% Change
May	250	33.6	272	36.6	22	3.0
June	281	39.0	212	29.4	(69)	(9.6)
July	245	32.9	188	25.3	(57)	(7.6)
August	201	27.0	230	30.9	29	3.9
September	186	25.8	191	26.5	5	0.7
October	216	29.0	240	32.3	24	3.3
Total	1,379	31.2	1,333	30.2	(46)	(1.0)

[18] For more detail about how imports setting the pre-dispatch price can lead to price forecast error, refer to the Section 2.4.5 beginning on page 30 of the August 2007 MSP Report.

2.5 Analyzing Year-Over-Year Changes in the HOEP

In the June 2006 MSP Report, the MAU under the direction of the Panel introduced a simple reduced form econometric model to analyse monthly changes in the HOEP. Originally, the model was estimated using monthly data between January 2004 and April 2006. In the last MSP report, the model specification was changed to alleviate correlation concerns between two explanatory variables; the natural gas price and the New York price. In the revised model, New York integrated load was substituted for the New York price. In this report, we re-estimated the model using monthly data between January 2003 and October 2007 resulting in a total of 58 monthly observations.

Table 1-18 reports the estimation results for the on-peak and off-peak periods. The monthly average HOEP is the dependent variable and the independent variables include nuclear and self-scheduler production, Ontario demand, the natural gas price measured by the average Henry Hub spot market price, New York load, and monthly fixed effects. All explanatory variables in the model are significant and intuitive. The estimated coefficients suggest that holding all else equal, increases in nuclear and self-scheduler supply decreases the HOEP while increases in Ontario and New York demand and the price of natural gas increases the HOEP.

Table 1-18: Estimation Results of the Updated Econometric Model,[19] January 2003 - October 2007

Variable	On-peak Model		Off-peak Model	
	Coefficient	**P-value**	**Coefficient**	**P-value**
Constant	-26.38	0.00	-19.45	0.00
LOG(Nuclear Output)	-0.74	0.00	-0.65	0.00
LOG(Self Scheduler output)	-0.19	0.03	-0.24	0.13
LOG(Ontario Demand)	1.50	0.00	1.67	0.00
LOG(New York Demand)	2.24	0.00	1.37	0.04
LOG(Natural Gas Price)	0.65	0.00	0.55	0.00
Model Diagnostics				
R-squared	0.91		0.82	
Adjusted R-squared	0.88		0.75	
LM test of Serial Correlation	Absent		Absent	
JB test of normality of residuals	Normal		Normal	
Number of observations	58		58	

Table 1-19 shows the results of the decomposition analysis. The analysis attempts to quantify what the monthly average HOEP would have been in 2006 if the explanatory variables observed in 2007 were used in place of the corresponding 2006 values. To isolate the change in HOEP, the replacement procedure is performed one variable at a time. For example, if we replace July 2006 Ontario Demand with the observed July 2007 amount, all else held constant, the 2006 HOEP would have been $5.53/MWh higher. The table also reports the actual average HOEP for each month in the summer of 2006 and the predicted price or 'calibrated HOEP', which is the price that the model 'predicts' for that month using the actual values of the independent variables which were observed for that month last year. A small gap between the actual and calibrated HOEP, as can be seen in the period averages and in many of the individual months for both on-peak and off-peak hours, suggests the model is reasonably accurate and has captured most of the factors influencing price.

[19] The P-Value (probability value) in the table indicates the probability, under the null hypothesis (that the coefficient equals zero) of obtaining a value for the test statistic (in absolute value) that exceeds the value of the statistic that is computed from the sample. A p-value close to zero leads to rejection of the null hypothesis implying that the coefficient is statistically significant in the model.

The estimates from the decomposition analysis suggest that the HOEP is sensitive to changes in the price of natural gas. The results in Table 1-19 show that if 2006 natural gas prices were replaced by the 2007 values, there would have been a large decline in the HOEP in May and June. On the other hand, there would have been $7.64/MWh increase in the HOEP in August, which is consistent with the 17 percent decline in the natural gas price in August 2007 relative to 2006. Another interesting result is if nuclear output in September and October 2006 were replaced by 2007 nuclear output in those months, the HOEP would have declined by $3.12/MWh and $2.66/MWh respectively consistent with higher nuclear forced outage rates in September and October 2007 relative to one year ago as reported in section 4.3.2.

Table 1-19: Price Effects of Setting 2006 On-Peak and Off-Peak Factors at 2007 Levels ($/MWh)

	Month	Nuclear	Natural Gas Price	NY Load	Self	Ontario Load	Actual HOEP	Calibrated HOEP
All Hours	**May**	2.08	-5.62	-2.77	0.58	-1.27	38.50	45.56
	June	-0.18	-3.78	-2.21	-1.33	-1.08	44.38	50.30
	July	-1.53	1.62	4.16	-1.32	5.53	43.90	43.61
	August	-5.37	7.64	-0.87	-1.33	-1.08	53.62	55.56
	September	-3.12	-1.09	-6.13	-1.80	-2.49	44.63	46.69
	October	-2.66	-0.36	-4.54	-1.01	0.59	48.91	45.76
	Average	**-1.80**	**-0.26**	**-2.06**	**-1.03**	**0.03**	**45.66**	**47.91**
Off-peak Hours	**May**	1.12	-2.97	-0.53	0.37	-0.62	24.02	29.24
	June	-0.09	-2.00	0.01	-1.10	-0.22	27.22	32.44
	July	-0.87	0.86	4.20	-1.08	3.38	27.65	28.63
	August	-2.97	3.99	0.87	-0.78	-0.31	35.25	36.08
	September	-1.90	-0.61	-1.94	-1.21	-1.18	29.53	31.94
	October	-1.53	-0.20	-0.90	-0.75	0.25	32.25	31.08
	Average	**-1.04**	**-0.15**	**0.29**	**-0.76**	**0.22**	**29.32**	**31.57**
On-peak Hours	**May**	2.43	-6.59	-1.19	0.74	-1.46	48.84	55.11
	June	-0.23	-4.35	0.61	-1.39	-1.68	56.64	59.90
	July	-1.69	1.82	11.74	-1.40	6.43	55.51	50.56
	August	-6.16	8.76	2.58	-1.71	-1.62	66.75	66.02
	September	-3.43	-1.24	-6.70	-2.21	-3.30	55.42	54.92
	October	-2.98	-0.42	-4.75	-1.21	0.19	60.80	55.57
	Average	**-2.01**	**-0.34**	**0.38**	**-1.20**	**-0.24**	**57.33**	**57.01**

2.6 Hourly Uplift and Components

Table 1-20 reports total hourly uplift charges by component for May to October 2006 and 2007.[20] Uplift payments paid by Ontario consumers and each participant's share vary depending on the energy they consume each month. Total hourly uplift remained relatively constant between summer 2006 and 2007. Hourly uplift increased from $167 million in 2006 to $183 million in 2007 representing an increase of 10 percent. This change is mostly the result of a $10 million increase in Congestion Management Settlement Credit (CMSC) payments along with a $5 million increase in Import Offer Guarantee (IOG) payments. As a percentage of total cost paid by consumers, total uplift represented four percent of total cost paid by consumers of the current six month period.[21]

Table 1-20: Monthly Total Hourly Uplift Charge, May – October 2006 & 2007 ($ million)

	Total Hourly Uplift		IOG*		CMSC		Operating Reserve		Losses	
	2006	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**	**2006**	**2007**
May	36	24	4	3	15	10	3	1	14	11
June	28	39	2	3	13	21	1	1	13	14
July	32	26	2	2	12	9	1	1	17	14
August	37	36	4	3	16	15	1	1	16	18
September	15	30	1	5	5	12	1	1	8	12
October	19	28	2	4	6	10	1	1	10	13
Total	167	183	15	20	67	77	8	6	78	82

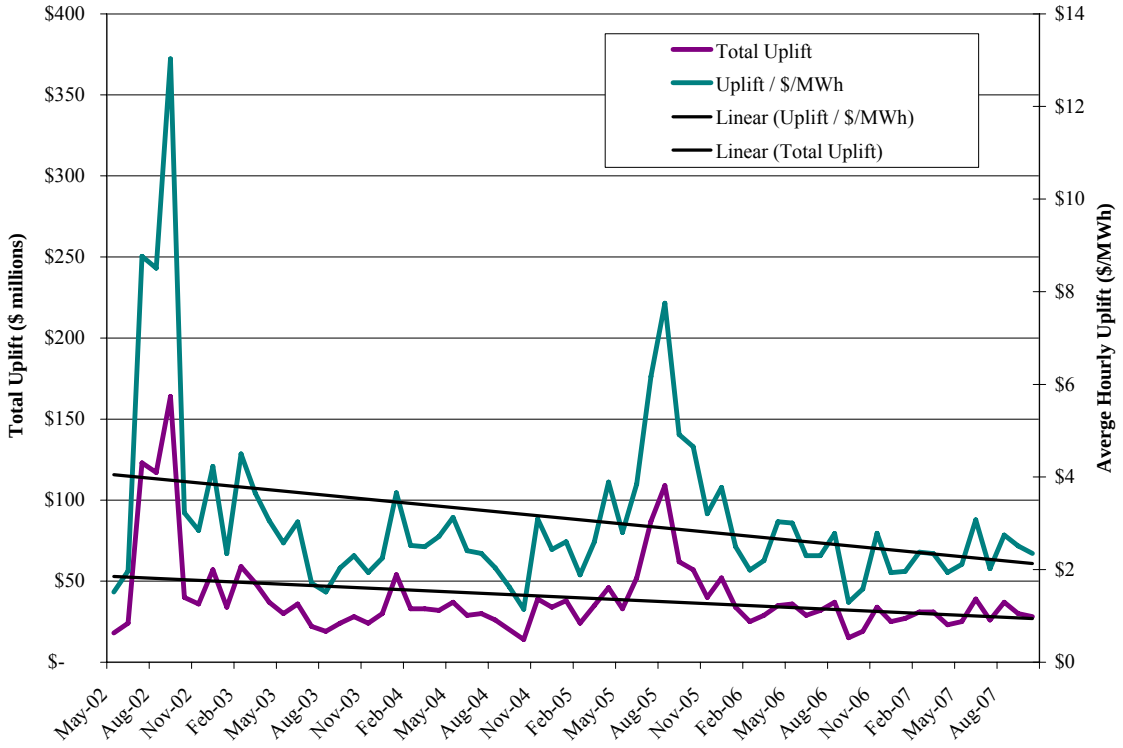
* Includes Day Ahead IOG as of June 2006 and onwards

The long-term trend in hourly uplift charges as illustrated in Figure 1-15 indicates that both total and average hourly uplift payments are declining, although the trend appears to have levelled off since early 2006.

[20] Reported uplift does not include non-market related adjustments described in Section 2.1.2

[21] This was calculated by dividing total uplift by total Market Demand (adjusted using an assumed 3 percent loss factor) over the May to October 2007 months, which resulted in an average uplift of approximately $2.30/MWh. When compared to the average HOEP in the period and accounting for the Global Adjustment, we find that approximately 4 percent of the total cost paid by consumers for energy is in the form of uplift.

Figure 1-15: Total Hourly Market Uplift and Average Hourly Market Uplift since Market Opening
May 2002 – October 2007
($ millions and $/MWh)



2.7 Internal Zone Prices and CMSC Payments

Average nodal prices for the 10 internal zones are shown in Table 1-21 for each six month period for the last 2 ½ years.[22] For most zones other than the Northwest, Northeast, and Niagara, the table shows that current internal zone prices are roughly the same as those over the previous year, being about 5 percent higher than those a year earlier but 2 percent lower than the prices 6 month earlier. These price movements are slightly greater than the change in the average Richview nodal price: the current Richview price was 1 percent below and 1.9 percent above the previous periods respectively. Similar prices across these zones suggest that both congestion and losses are relatively small factors. The small changes in zonal prices relative to changes in the

[22] See the IESO's "Ontario Transmission System" publication for a detailed description of the IESO's ten zone division of Ontario at http://www.ieso.ca/imoweb/pubs/marketreports/OntTxSystem_2005jun.pdf

Richview price indicate only minor shifts in congestion across the last year. For the Northwest, Northeast, and Niagara zones, increased congestion has induced more significant changes in zonal prices.

Table 1-21: Internal Zonal Prices,[23] May 2005 - October 2007 ($/MWh)

Zone	May05-Oct05	Nov05-Apr06	May06-Oct06	Nov06-Apr07	May07-Oct07
Bruce	94.93	66.95	49.67	55.37	53.80
East	100.09	68.01	51.15	55.49	54.42
Essa	96.43	64.51	49.69	52.71	52.16
Northeast	82.22	60.78	44.21	47.67	42.38
Niagara	96.65	70.65	53.24	55.41	52.29
Northwest	33.17	34.43	23.53	36.98	(136.65)
Ottawa	107.22	71.48	53.56	57.01	56.03
Southwest	98.49	68.41	52.36	56.04	54.50
Toronto	106.18	70.08	53.44	57.22	56.36
Western	100.82	69.41	53.59	56.54	55.23
Average	91.62	64.47	48.44	51.02	23.30
Richview	102.00	70.58	55.00	56.63	56.04

For the first time, we are observing Northwest zonal prices which are consistently negative over the period of review, averaging about minus $137/MWh compared with the previous periods in Table 1-21 showing averages between $24/MWh and $37/MWh. Several factors contributed to this dramatic shift in price. First, as reported later, demand in the Northwest has continued to fall. At the same time energy supply, primarily hydroelectric energy, was abundant in the Northwest as well as in Manitoba. This excess supply over demand induced high flows towards the Northeast and from there southward from this part of the province, resulting in congestion at one of several possible locations in the Northwest in roughly half of all hours in the period.[24] Coincident with this congestion, hydroelectric generation in the Northwest was being offered at lower and lower prices over the summer in an attempt to get this energy scheduled so as to minimize the spillage of water. Thus when congestion did occur it led to very low nodal

[23] All nodal and zonal prices have been modified to +$2000 (or -$2000) when the raw value was higher (or lower).

[24] Some of the congestion identified was due to flows westward through the zone or out of the zone (i.e. exports) primarily in May. As the summer progressed flows east increased to the point where there was congestion almost 80 percent of the time in August. This diminished only slightly in September and October.

prices across the Northwest. Over the period the impact of the increasing congestion and the changing energy prices led to the congestion component of the nodal price steadily growing, from near zero in May, to roughly minus $400/MWh in September and October. While generators may offer at negative prices in order to operate, they nevertheless receive the HOEP.

The Northeast zone price averaged $42.38/MWh in the period, somewhat lower than each of the two previous periods. This is indicative of somewhat higher levels of congestion than in previous periods. This is induced partly by the greater level of hydroelectric resources available in the Northeast, partly by flows from the Northwest and outages to the major transmission lines in the Northeast.

Niagara zone prices at $52.29/MWh are also lower than in previous periods. This is also indicative of increased congestion in the Niagara area induced to a large extent by loop flows.

Figure 1-16 shows graphically the average zonal prices for the last six months.

Figure 1-16: Average Internal Zonal Prices, May 2007 – October 2007 ($/MWh)

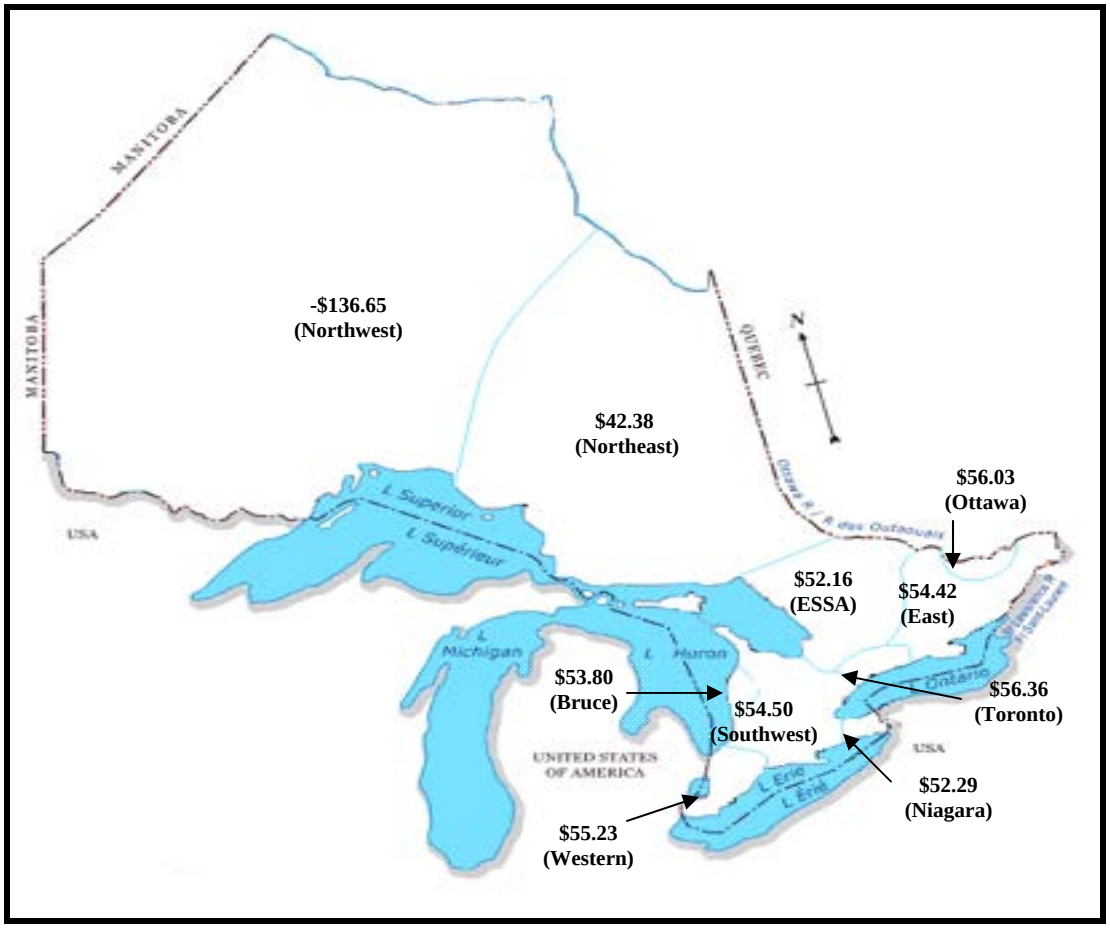
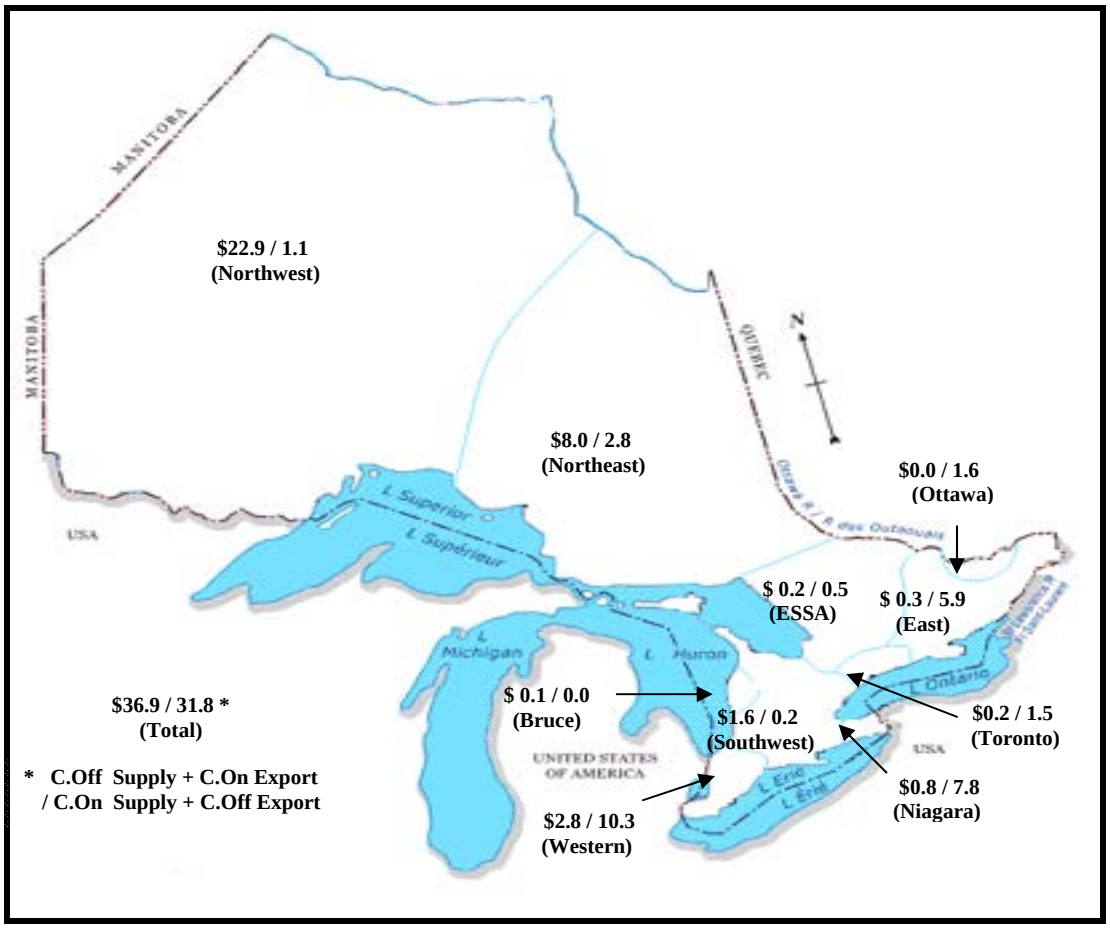


Figure 1-17 shows two sets of CMSC payments for each internal zone for the 6 month period ending October 2007. The first value is the sum of CMSC payments for constrained off generation and imports, plus constrained on exports. The second value is the sum of CMSC payments for constrained on generation and imports, plus constrained off exports. CMSC for imports and exports is attributed only to the zone to which the intertie is connected. The first value is generally indicative of bottling of lower cost supply in an area while the second value corresponds to needing to schedule more costly generation in the constrained schedule in the zone. Dispatchable load CMSC is omitted

since it is primarily self-induced; that is, caused by conditions at the load rather than system conditions.

Figure 1-17: Total CMSC Payments by Internal Zone, May 2007 - October 2007 ($ millions)



In aggregate across all zones, the total of these CMSC payments are larger than for the period 12 months ago. CMSC payments for constrained off supply plus constrained on exports has increased over $10 million or 40 percent, while constrained on supply plus constrained off exports has decreased by about $0.4 million or 1 percent. Comparing the results in Figure 1-17 with those from the period one year ago, the largest increase has been in the Northwest where CMSC paid for constrained off supply has jumped by over $10 million to $22.9 million with a further increase of almost $5 million occurring in the Northeast. Other areas in the province tended to exhibit lower payments amounting to $5 million less in aggregate for constrained off supply. In spite of more constrained off

energy in these Northern areas, there was a small decrease in CMSC paid for constrained on supply and constrained off exports across the province. The largest reductions were in the Northeast and East zones.

The largest changes in CMSC payments have been induced for much the same reasons as the changes in nodal prices, primarily due to increased supply in the North, coupled with transmission limitations preventing the energy flowing south. Much of the CMSC payments in the Niagara and Western zones were induced by loop flows, which caused Queenston Flow West (QFW) limitations for flows into Ontario from New York and flows out of Ontario at Michigan. Another factor which would be expected to affect CMSC payments is the movement from the 12 times to 3 times ramp rate in the unconstrained schedule, which took place on September 12, 2007. Directionally, the transition from 12 times to 3 times ramp should reduce both constrained on and constrained off CMSC payments going forward. However, it is difficult to observe this clearly with six weeks of data.

2.8 A Comparison of High and Low HOEP and Richview Nodal Price

Table 1-22 shows that the number of hours with a low HOEP or Richview nodal price increased dramatically in the summer of 2007 compared to 2006. The number of hours when the HOEP fell below $20/MWh more than doubled from 149 hours in 2006 to 331 in 2007. For both HOEP and Richview price, the frequency of high-priced hours over the period is largely unchanged.

The majority of the low-priced hours occurred in May, June, and July 2007. The most dramatic monthly increase occurred in May where the number of hours the HOEP and Richview prices fell below $20/MWh increased from 17 hours to 115 hours for HOEP and from 37 hours to 135 hours for the Richview price. Increased nuclear and baseload hydroelectric supply (as observed in Statistical Appendix Tables A-13 and A-14) and lower demand were both contributing factors in the observed increase in low-priced hours

in May. The only month with fewer low HOEP hours was September which experienced both notably higher demands and less low-cost energy.

Table 1-22: Hours with a Low HOEP or Richview Nodal Price, May – October 2006 & 2007 (Number of Hours)

	Number of Hours with HOEP <$20/MWh			Number of Hours with Richview Price <$20/MWh		
	2006	2007	% Change	2006	2007	% Change
May	17	115	576.5	37	135	264.9
June	14	67	378.6	25	69	176.0
July	30	57	90.0	40	73	82.5
August	4	11	175.0	35	22	(37.1)
September	63	45	(28.6)	101	70	(30.7)
October	21	36	71.4	53	30	(43.4)
Total	149	331	122.1	291	399	37.1

The frequency of hours when the HOEP and Richview nodal prices were above $200/MWh remained relatively stable this period compared to the same period last year as shown in Table 1-23. High-priced HOEP hours declined from six hours to four hours while the Richview price eclipsed $200/MWh in 54 hours this summer compared to 51 hours last summer. The frequency of high Richview price hours continues to be notably higher than the frequency of high HOEP hours for reasons which are discussed in Chapter 3.

Table 1-23: Hours with a High HOEP or Richview Nodal Price, May – October 2006 & 2007 (Number of Hours)

	Number of Hours with HOEP >$200/MWh			Number of Hours with Richview Price >$200/MWh		
	2006	2007	% Change	2006	2007	% Change
May	3	0	(100.0)	19	0	(100.0)
June	0	2	N/A	5	25	400.0
July	1	1	0.0	8	3	(62.5)
August	2	0	(100.0)	18	13	(27.8)
September	0	0	N/A	0	6	N/A
October	0	1	N/A	1	7	600.0
Total	6	4	(33.3)	51	54	5.9

3. *Demand*

3.1 Aggregate Consumption

As illustrated in Table 1-24, total Ontario and total Market (Ontario plus exports) Demand declined this summer compared to last summer by 0.65 TWh and 0.39 TWh respectively, although exports increased by 0.23 TWh.

There was a noticeable decline in demand in July 2007 compared to July 2006. In July, Ontario Demand declined by over 1.04 TWh, or 7.5 percent and Market Demand fell by 0.77 TWh, representing a decline of greater than 5 percent. An important factor that contributed to July's decline in demand was cooler weather. Tables A-2 and A-3 of the Statistical Appendix show that weather conditions in July were on average 2°C cooler than the year before and the number of days when the temperature rose above 30°C declined from nine days to four days. Contrasting the trend to lower demand, September saw higher demands, both domestic and export, primarily as the result of 2.5°C higher temperatures and four more days with temperatures above 30°C.

Table 1-24: Monthly Energy Demand, Market Schedule, May – October 2006 & 2007 (TWh)

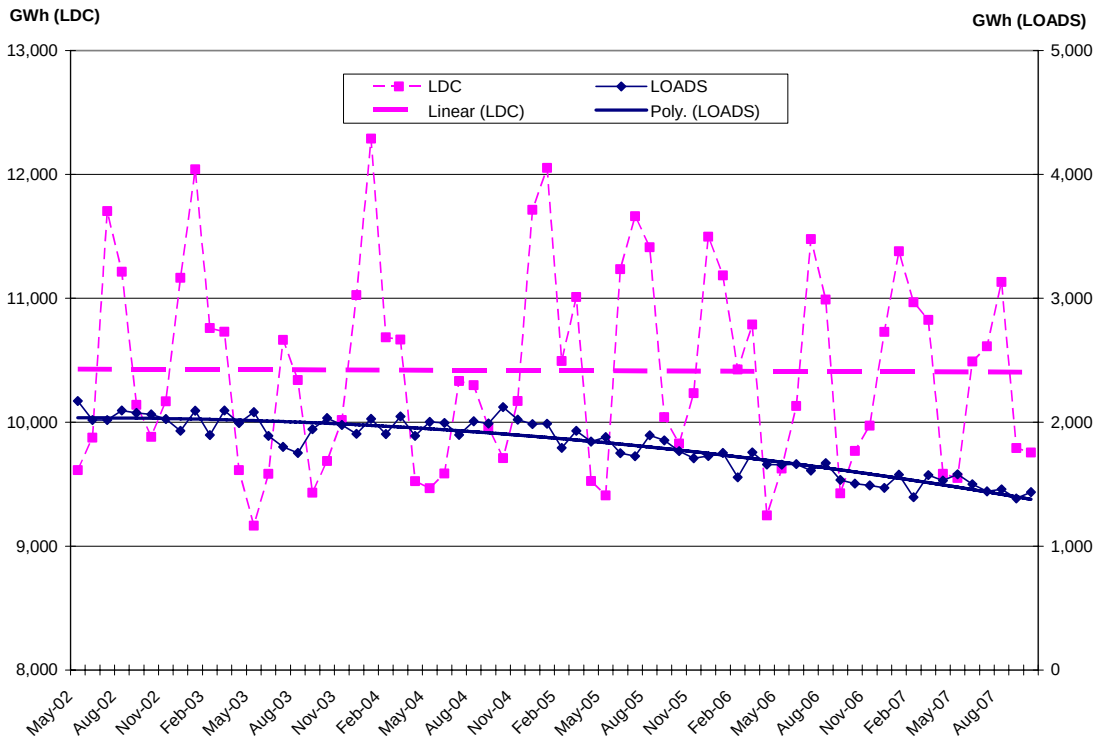
	Ontario Demand*			Exports			Total Market Demand		
	2006	**2007**	**% Change**	**2006**	**2007**	**% Change**	**2006**	**2007**	**% Change**
May	11.99	11.83	(1.3)	1.20	1.08	(10.0)	13.19	12.91	(2.1)
June	12.59	12.69	0.8	0.91	1.04	14.3	13.50	13.74	1.8
July	13.89	12.85	(7.5)	1.03	1.30	26.2	14.92	14.15	(5.2)
August	13.32	13.47	1.1	1.21	1.12	(7.4)	14.53	14.60	0.5
September	11.58	11.95	3.2	0.83	0.92	10.8	12.41	12.88	3.8
October	11.99	11.92	(0.6)	0.98	0.93	(5.1)	12.97	12.85	(0.9)
Total	75.36	74.71	(0.9)	6.16	6.39	3.7	81.52	81.13	(0.5)
Average	12.57	12.45	(0.9)	1.03	1.07	3.4	13.59	13.52	(0.5)

* Non-dispatchable loads plus dispatchable loads

3.2 Wholesale and LDC Consumption

Figure 1-18 separates energy consumption by Local Distribution Companies (LDCs) and other wholesale loads since the market opened in May 2002. Wholesale load consumption has significantly declined since market opening. On average since January 2005, wholesale load has declined by approximately 600 GWh (30 percent). LDC consumption has remained relatively consistent, and Figure 1-18 suggests that month-to-month volatility has declined. That is, seasonal swings in consumption have not been as dramatic as observed during the early years of the market. As might be expected, this pattern appears to be closely tied to monthly temperatures, with the winter peak monthly consumption driven by January or December temperatures and summer peak consumption driven by July or August average temperatures.[25]

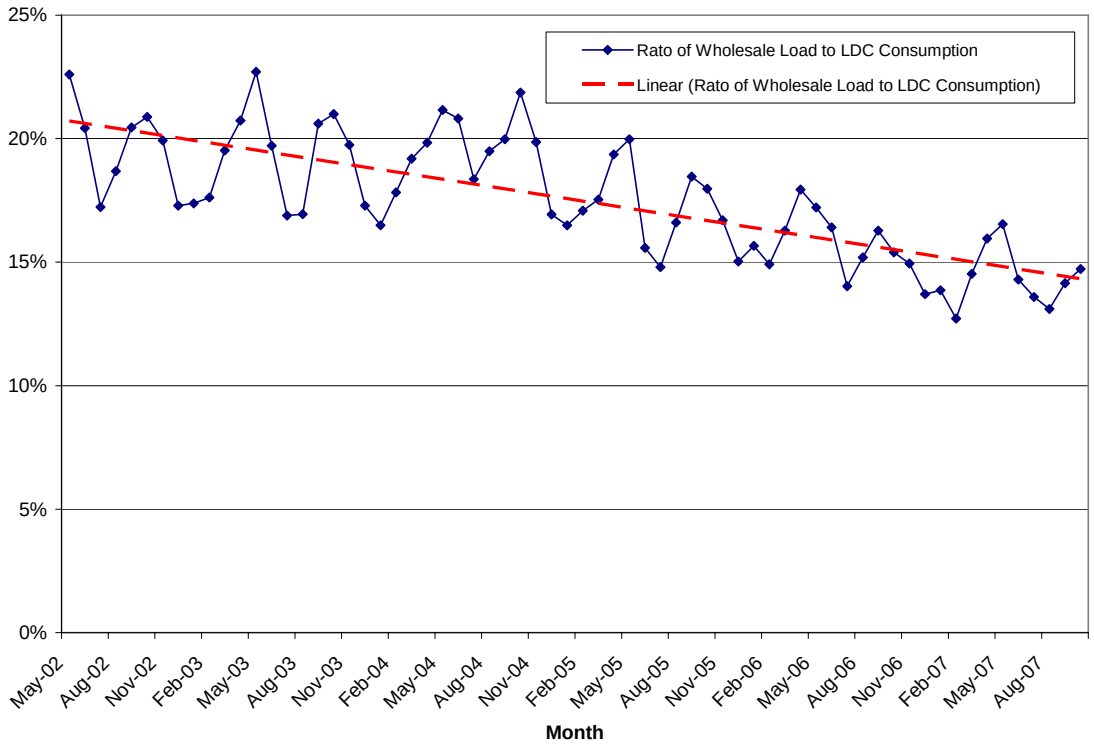
Figure 1-18: Monthly Total Energy Consumption, LDC vs. Wholesale Loads, May 2002 – October 2007 (GWh)



[25] See Statistical Appendix, Table A-2.

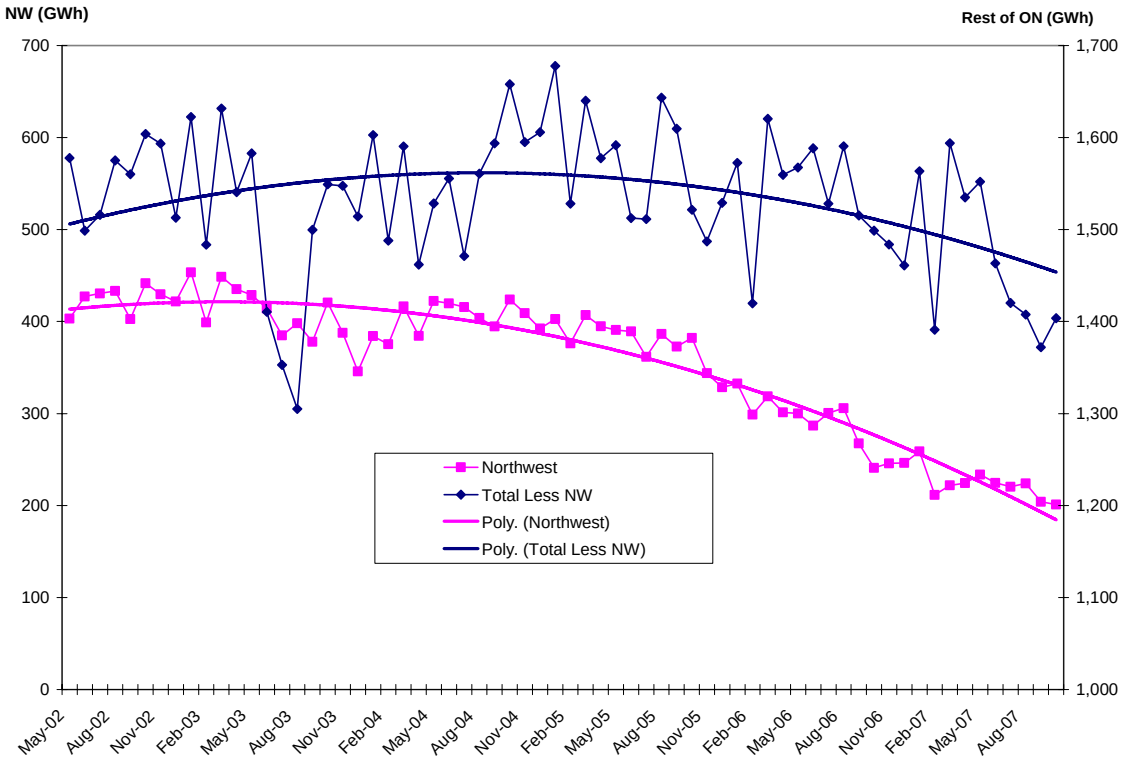
Figure 1-19 reports the ratio of wholesale load to LDC consumption on a monthly basis since market opening. Consistent with the decline in wholesale load, there is a long-term declining trend in the ratio between wholesale load to LDC consumption.

Figure 1-19: Ratio of Wholesale Load to LDC Consumption, May 2002 – October 2007 (%)



In Figure 1-20, monthly wholesale load in the Northwest is isolated from the rest of Ontario and polynomial trend lines are included to help identify long term trends. The previous MSP report identified a large decline in wholesale load in the Northwest beginning in early 2005. This trend continued through the summer months of 2007. There also appears to be a slight decline in wholesale load in the rest of the province. In September 2007, monthly wholesale load in Ontario excluding the Northwest totalled 1,372 GWh, representing the lowest monthly total since the summer months of 2003.

Figure 1-20: Total Monthly Wholesale Load
Northwest and the Rest of Ontario,
May 2002 – October 2007[26]
(GWh)



4. *Supply*

4.1 Supply Conditions and the Supply Cushion

The supply cushion is an important market and reliability measure that represents the amount of excess supply available for dispatch in a given hour. Tables 1-25 and 1-26 report the pre-dispatch and real-time domestic supply cushion statistics for all months between May and October 2006 and 2007.

In pre-dispatch, the average supply cushion increased by 2.3 percent and grew in all months in 2007 relative to the same months in 2006 with the exception of October. For most months, both the number of hours with a negative pre-dispatch supply cushion and

[26] The low value for total load in August 2003 is due to the blackout that month.

supply cushion less than 10 percent declined relative to last summer. This implies that there was almost always sufficient generation to meet the Ontario demand. One major factor which led to an improved pre-dispatch supply cushion was moderate weather conditions this summer causing reduced demand.

Table 1-25: Pre-Dispatch Domestic Supply Cushion, May – October 2006 & 2007 (% and Number of Hours under Certain Levels)

	Average Supply Cushion (%)		Negative Supply Cushion (# of Hours, %)				Supply Cushion Less Than 10% (# of Hours, %)			
	2006	2007	2006	%	2007	%	2006	%	2007	%
May	20.0	25.4	34	4.6	0	0.0	161	21.6	34	4.6
June	22.4	23.1	2	0.3	2	0.3	146	20.3	126	17.5
July	22.8	25.7	1	0.1	0	0.0	147	19.8	68	9.1
August	24.3	27.6	10	1.3	4	0.5	80	10.8	56	7.5
September	23.9	25.6	0	0.0	8	1.1	71	9.9	47	6.5
October	20.4	19.9	3	0.4	0	0.0	106	14.2	147	19.8
Total	22.3	24.6	50	1.1	14	0.3	711	16.1	478	10.8

Table 1-26 shows that on average, the real-time domestic supply cushion remained the same at 19.7 percent when comparing the summer months of 2006 and 2007. The number of hours with a negative supply cushion declined moderately, however the number of hours less than 10 percent increased by 131 hours.

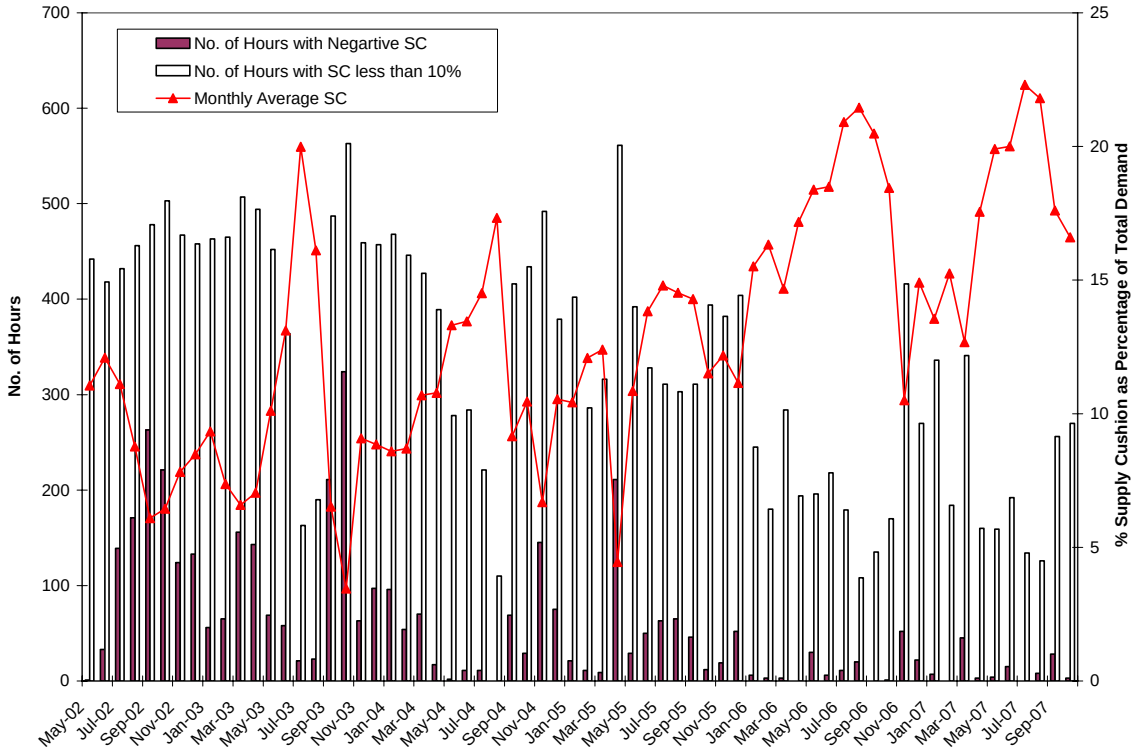
Table 1-26: Real-time Domestic Supply Cushion, May – October 2006 & 2007 (% and Number of Hours under Certain Levels)

	Average Supply Cushion (%)		Negative Supply Cushion (# of Hours, %)				Supply Cushion Less Than 10% (# of Hours, %)			
	2006	2007	2006	%	2007	%	2006	%	2007	%
May	18.4	19.9	30	4.0	4	0.5	196	26.3	159	21.4
June	18.5	20.0	6	0.8	15	2.1	218	30.3	192	26.7
July	20.9	22.3	11	1.5	0	0.0	179	24.1	134	18.0
August	21.5	21.8	20	2.7	8	1.1	108	14.5	126	16.9
September	20.5	17.6	0	0.0	28	3.9	135	18.8	256	35.6
October	18.4	16.6	1	0.1	3	0.4	170	22.9	270	36.3
Total	19.7	19.7	68	1.5	58	1.3	1,006	22.8	1,137	25.7

Figure 1-21 plots the average monthly real-time domestic supply cushion statistics since market opening. The monthly average supply cushion reached its highest level during the

summer of 2007 when it reached an all-time high of 22.3 percent in July. Furthermore, instances of a negative supply cushion are much less frequent compared to the beginning of market opening, suggesting that the reliability conditions in the province are gradually improving.

Figure 1-21: Monthly Real-time Domestic Supply Cushion Statistics, May 2002 – October 2007 (% and Number of Hours under Certain Levels)



4.2 Supply Curves

Figure 1-22 plots the average domestic offer curve for the summer months this year compared to last year. There was little increase in Ontario's total generating capacity this summer relative to last, which is reflected in the small change in total offered MW. The section of the offer curves below $0/MWh suggests that more baseload generators are offering minus $2,000/MWh (approximately 300 MW) rather than between minus $500/MWh and $0/MWh.

Figure 1-22: Average Domestic Offer Curve, May – October 2006 & 2007 ($/MWh)

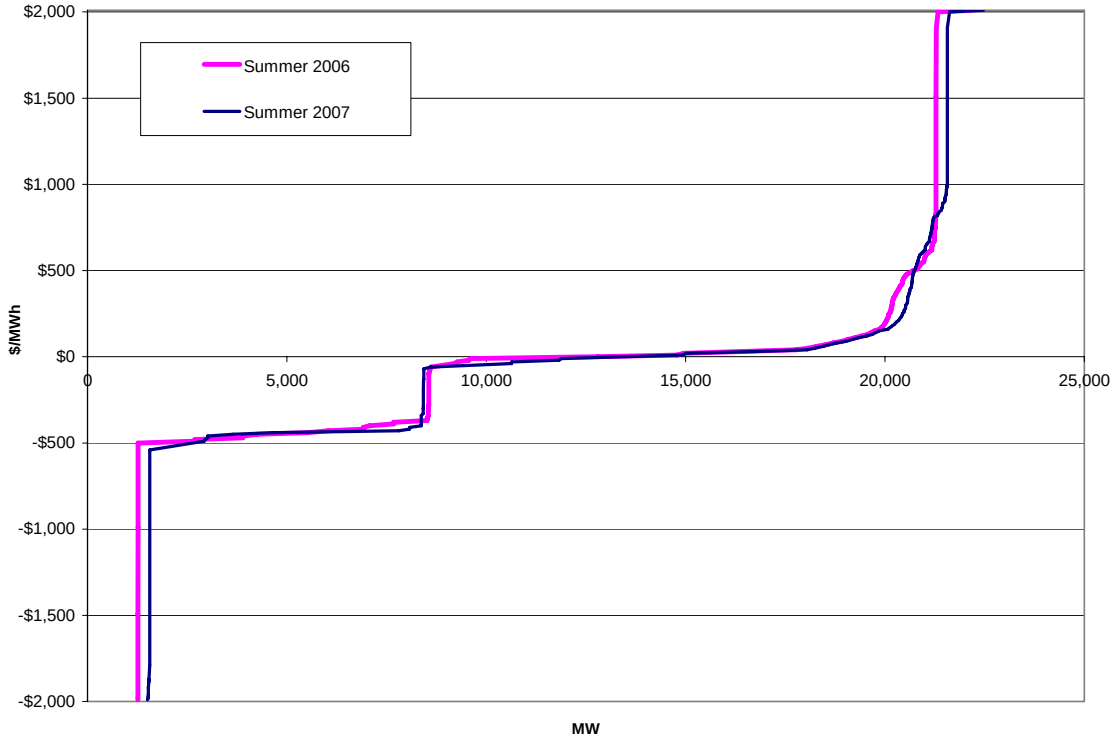


Table 1-27 reports the average hourly market schedule and Ontario demand for the period May to October 2006 and 2007 by baseload generation type. Over the six month period, hourly baseload production in the market schedule marginally declined from 16.5 GW to 16.4 GW. Scheduled nuclear supply declined by on average 0.4 GW per month compared to the summer of 2006 mainly due to an increase in nuclear outages from July onwards.

Table 1-27: Average Hourly Market Schedules by Baseload Generation Type and Ontario Demand,
May – October 2006 & 2007
(GW)

	Nuclear		Baseload Hydro		Self-Scheduling Supply		Ontario Demand (Non-Dispatchable Load)	
	2006	2007	2006	2007	2006	2007	2006	2007
May	8.8	9.4	2.0	2.2	0.8	0.8	15.5	15.4
June	9.4	9.4	1.9	2.0	0.9	0.8	16.9	17.1
July	10.2	9.7	2.1	1.9	0.8	0.7	18.1	16.8
August	10.8	9.5	2.0	1.8	0.8	0.7	17.4	17.6
September	9.6	8.7	2.0	1.8	0.9	0.7	15.6	16.1
October	8.9	8.2	2.1	2.0	0.9	0.9	15.6	15.5
Average	9.6	9.2	2.0	2.0	0.9	0.8	16.5	16.4

4.3 Outages

Managing planned outages and minimizing forced outages allows generators to maximize their output, increase revenues, and improves the supply situation in the province. Market Clearing Prices are sensitive to both planned and forced outages since supply is removed from the market. Planned outages are usually taken during the low demand periods in spring and fall. Forced outages are unexpected and therefore a challenge for a system operator to accommodate and the generator owners to manage. In this section, we report nuclear and coal outage rates, since outages to these inframarginal resources tend to have a significant effect on price. Given that a significant amount of gas-fired generation will enter the market over the next few years, we will consider reporting outage rates for this group in future reports.[27]

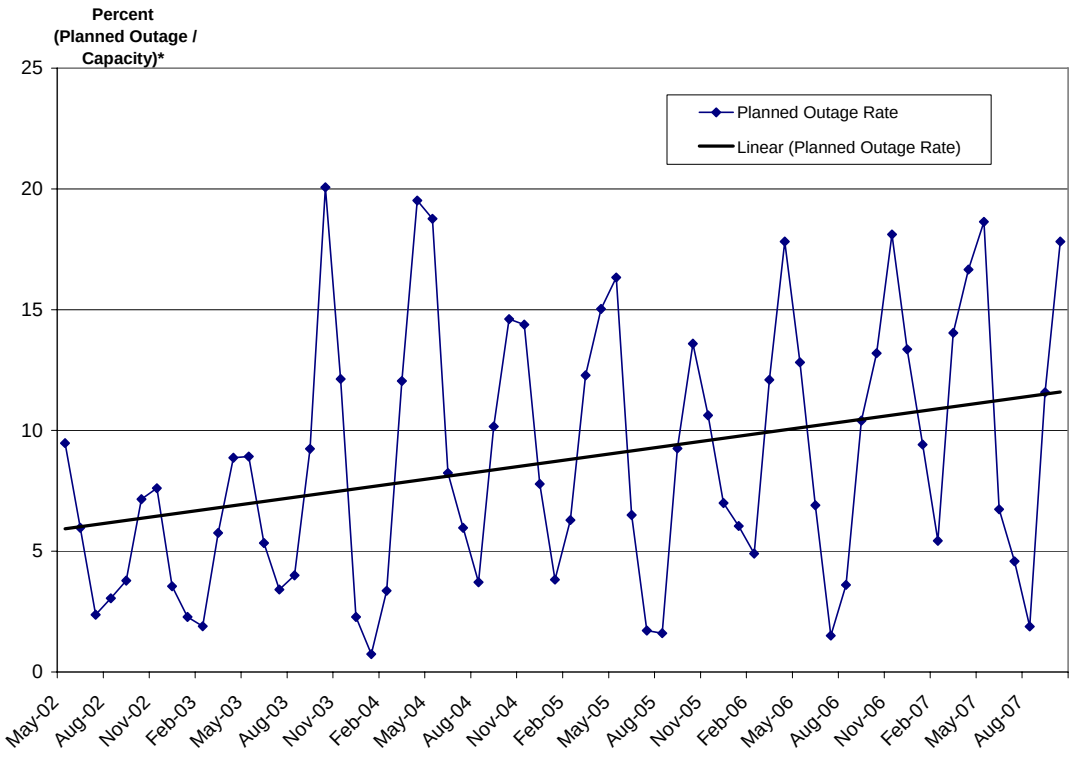
4.3.1 Planned Outages

Figures 1-23 plots the monthly planned outages as a percentage of capacity. Planned outages show a great deal of seasonal variation since they are most often taken during the spring and fall, which represent the low demand periods of the year. Since market opening, the long term trend line appears to be moving upward but this seems to be

[27] See http://www.powerauthority.on.ca/Page.asp?PageID=924&SiteNodeID=236 for a list of operating and new natural gas-fired generation projects under contract with the OPA along with projected start dates.

influenced by lower planned outage levels during the first year of the market. Since late 2003, the long-term trend appears relatively flat with typical seasonal variations.

Figure 1-23: Planned Outages Relative to Capacity,*
May 2002 - October 2007
(% of Capacity)

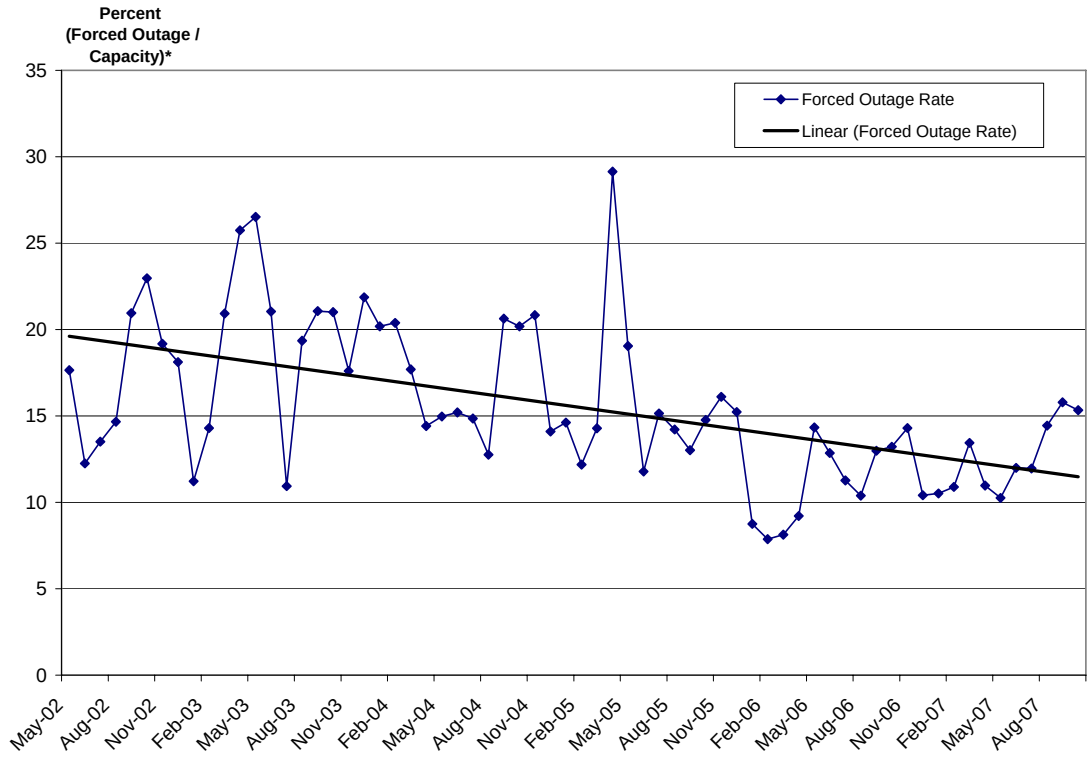


** Nuclear and Coal-fired units only*

4.3.2 Forced Outages

Figure 1-24 plots forced outages as a percentage of capacity between May 2002 and October 2007. The long-term trend in forced outages appears to be declining relative to capacity and is approaching 10 percent. However, forced outage rates rose above the 15 percent level in September and October (a level not seen since 2005). Future observations will confirm if the increase is sustainable.

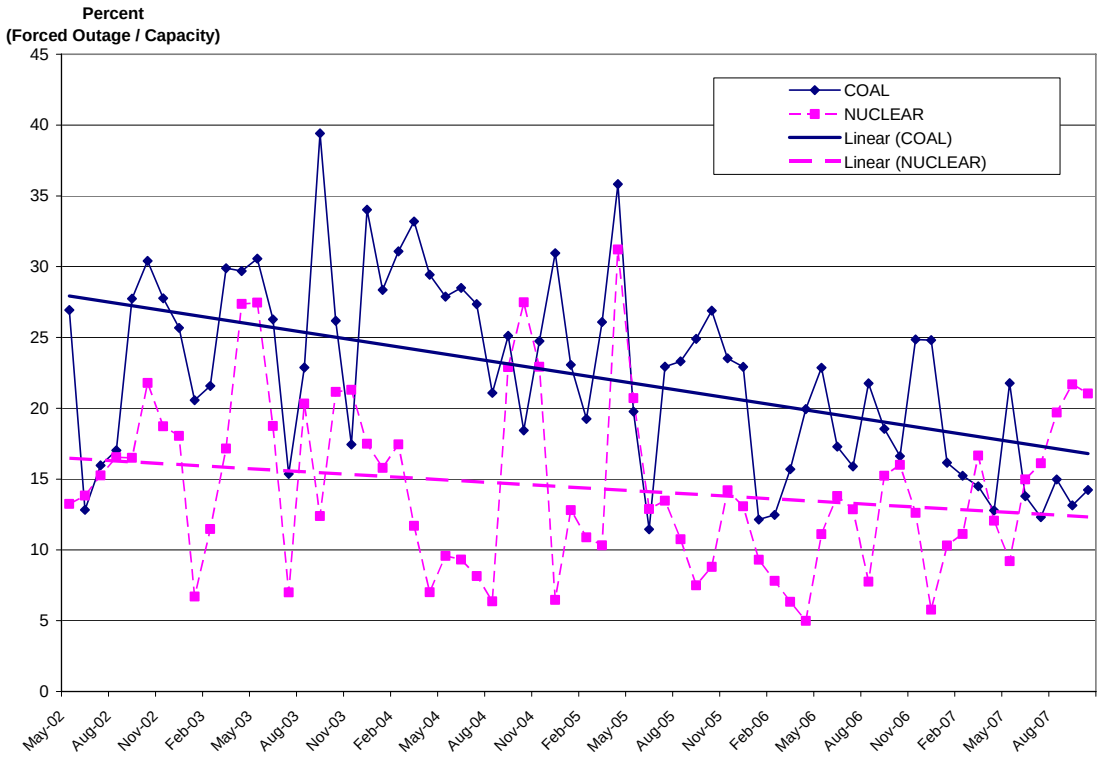
Figure 1-24: Forced Outages Relative to Capacity,*
May 2002 - October 2007
(% of Capacity)



** Nuclear and Coal-fired units only*

Figure 1-25 separates forced outage rates by fuel type since market opening and includes linear trend lines to help isolate long term trends. Although coal-fired generator outages were relatively low compared to previous years, nuclear outages increased to 20 percent or higher in August, September, and October 2007. Nuclear outage rates have not been above 20 percent since the spring of 2005. These high rates resulted from frequent outages at two nuclear generating stations from July onwards.

Figure 1-25: Forced Outages Relative to Total Capacity by Fuel Type, May 2002 - October 2007 (% of Capacity)



4.4 Changes in Fuel Prices

Table 1-28 shows the monthly average spot market prices this summer relative to summer 2006 for both natural gas and coal. The average natural gas price is measured by the Henry Hub spot price and then converted to Canadian dollars.[28] [29] The coal price is evaluated using the NYMEX over-the-counter price for Central Appalachian region coal converted to Canadian dollars.

In May and June 2007, natural gas prices were approximately 21 percent and 13 percent higher than the same months in 2006. Although natural gas prices began the summer much higher in 2007 compared to 2006, gas prices fell in the final four months. The

[28] The Henry Hub is located in Southern Louisiana and is routinely used as the reference price for most of the domestic gas destined for the East.

[29] The Bank of Canada nominal noon exchange rate was used to convert commodity prices into Canadian dollars. Between May 2007 and October 2007, the Canadian dollar appreciated by approximately 13 percent to an average monthly rate of $1 CAD =$ 1.02 USD in October.

largest monthly decline occurred in August when the average gas price fell over 17 percent this year compared to last. NYMEX OTC Central Appalachian coal prices were on average, $0.25/MMBtu or approximately 12 percent lower in the last six months compared to one year ago. Much of the observed decline in both coal and natural gas prices is due to the strengthening Canadian dollar relative to the U.S dollar. The impact of exchange rates is discussed in more detail in section 5.4.2.

Table 1-28: Average Monthly Fuel Prices , May – October 2006 & 2007 ($CDN/MMBtu)

	Coal Price (NYMEX OTC Central Appalachian)			Natural Gas Price (Henry Hub Spot)		
	2006	**2007**	**% increase**	**2006**	**2007**	**% increase**
May	2.36	2.00	(15.3)	6.92	8.39	21.2
June	2.32	2.07	(10.8)	6.94	7.82	12.7
July	2.18	1.93	(11.5)	6.91	6.54	(5.4)
August	2.22	1.90	(14.4)	8.03	6.64	(17.3)
September	2.12	1.88	(11.3)	5.62	5.61	(0.2)
October	2.02	1.89	(6.4)	6.66	6.56	(1.5)
Average	2.20	1.95	(11.7)	6.85	6.93	1.2

In the past, the Panel has used the Central Appalachian coal price and the Henry Hub natural gas price exclusively to measure average monthly fuel prices. Table 1-29 reports two additional fuel price series for the May to October 2006 and 2007 months which can help identify trends in fuel prices and may represent an improvement when measuring fuel prices: the Powder River Basin coal price and the Union Dawn Hub natural gas price. The Powder River Basin, which is located in southeast Manitoba and northeast Wyoming, represents a relatively cheap source of coal used by a large portion of Ontario's fossil generating fleet. The Union Dawn Hub is Canada's largest underground natural gas storage facility located in near Sarnia, Ontario. Although the Henry Hub and Union Dawn Hub gas prices are similar in many hours, differences that reflect transportation constraints do occur. Dawn prices may be more applicable to generators in Ontario, but somewhat less so for those in the U.S. For future analysis (including the various

econometric models available), we will consider how the additional fuel price data should be used.

Table 1-29: Average Monthly Fuel Prices, May – October 2006 & 2007 ($CDN/MMBtu)

	Coal Price (Powder River Basin)			Natural Gas Price (Union Dawn Hub)		
	2006	2007	% Change	2006	2007	% Change
May	0.84	0.55	(34.8)	7.14	8.76	22.7
June	0.79	0.56	(29.5)	7.02	8.07	15.0
July	0.76	0.57	(25.2)	6.85	6.77	(1.1)
August	0.71	0.63	(11.7)	7.84	6.54	(16.6)
September	0.63	0.62	(1.7)	5.71	6.31	10.6
October	0.65	0.60	(8.5)	6.78	6.82	0.5
Average	0.73	0.59	(19.7)	6.89	7.21	4.7

Figures 1-26 and 1-27 plot the monthly average natural gas and coal prices with the on-peak and off-peak HOEP prices. Over the summer months in 2007, movements in the HOEP appear to coincide with movements in the price of natural gas, which is consistent with the long-term relationship between the two variables. Coal prices do not show the same long-term relationship with the HOEP. Nevertheless, the observed 12 to 20 percent drop in coal price in Canadian dollars is likely one of the factors influencing Ontario prices. Off peak energy prices dropped on average just over 6 percent relative to the previous year, which was likely influenced by lower coal prices which were on the margin 70 percent of the time off peak. On peak coal was on the margin half that much. The downward pressure from coal price on market price was offset by poorer baseload generation performance.

Figure 1-26: Henry Hub Natural Gas Spot Price and HOEP, May 2002 - October 2007 ($/MWh and $/MMBtu)

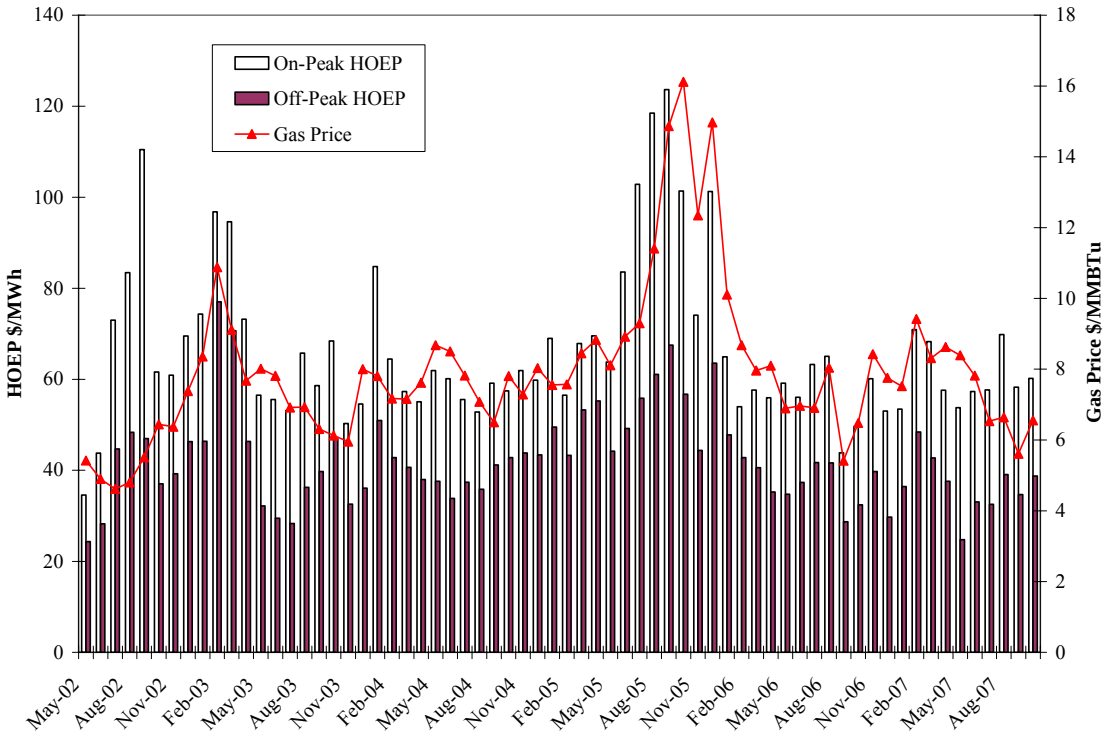


Figure 1-27: NYMEX OTC Central Appalachian Coal Price and HOEP, May 2002 - October 2007 ($/MWh and $/MMBtu)

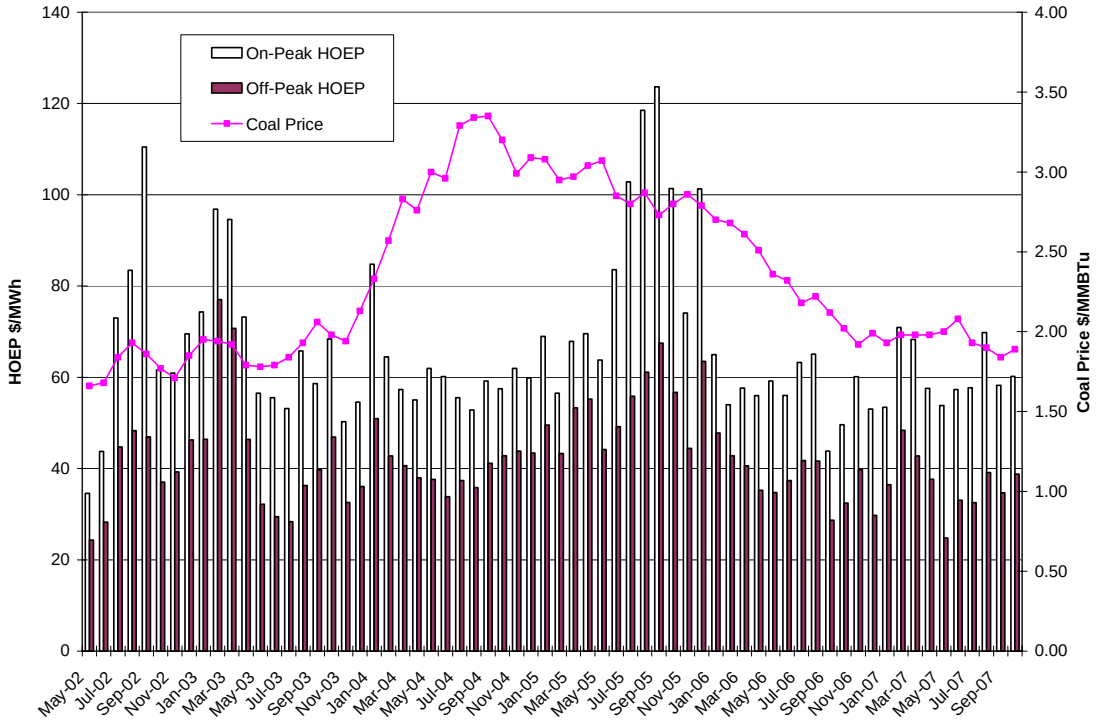
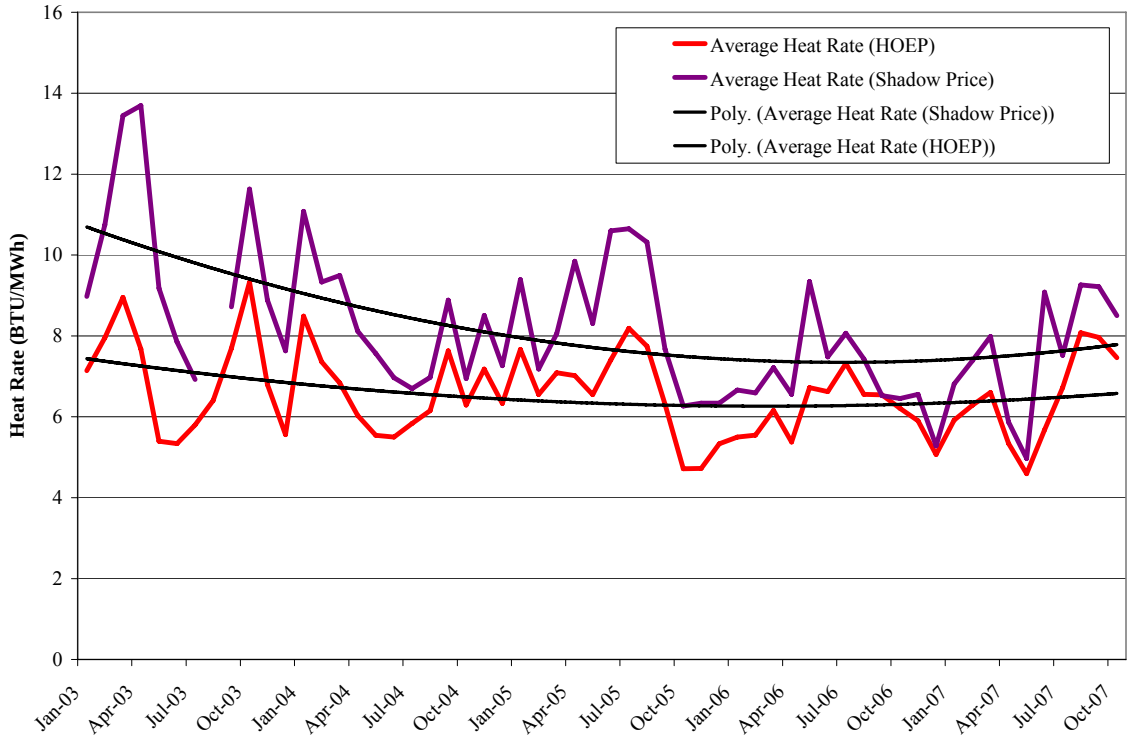


Figure 1-28 plots the estimated system heat rate since January 2003. The system heat rate is derived by dividing the observed monthly average price by the average Canadian dollar equivalent of the Henry Hub gas price (i.e. implicitly assuming gas is always the marginal fuel source). This estimated heat rate is useful for two reasons. First, gas-fired generators are typically marginal or near marginal. The system heat rate provides information on what efficiency level a gas-fired generator needs to be to recover its incremental costs through market revenue. Secondly, since new generation capacity in the province will most likely be gas-fired, the system heat rate provides investors information on what type of gas-fired generator can be potentially scheduled in the market and thus able to recover their incremental costs. A high system heat rate indicates that less efficient generators are being scheduled by the system and these units have an opportunity to recover incremental costs. A low system heat rate indicates that more efficient generators are needed and only these generators have an opportunity to recover incremental costs.

Figure 1-28 shows that in the early years of the market, a relatively less efficient generator could cover incremental costs since market prices were relatively favourable to generators. However in later years, only the most efficient generators were able to cover incremental costs. For example before mid 2005, a gas-fired generator with a heat rate of 7,000 MMBtu could make sufficient revenue to recover its incremental costs while after mid 2005, only generators with a heat rate of 6,000 MMBtu could recover their incremental costs. Taking into account CMSC payments by using the Richview shadow price in the heat rate calculation, a generator with a heat rate above 8,000 MMBtu could recover its incremental costs before mid 2005, while only generators with a heat rate of about 7,000 MMBtu could break even after mid 2005.

The system heat rate data is consistent with our net revenue analysis in this report and in previous reports. Apart from the first year the market opened, the HOEP levels have been low enough not to allow a typical gas-fired generator with a standard heat rate of 7,000 MMBtu to recover its costs without a contract.

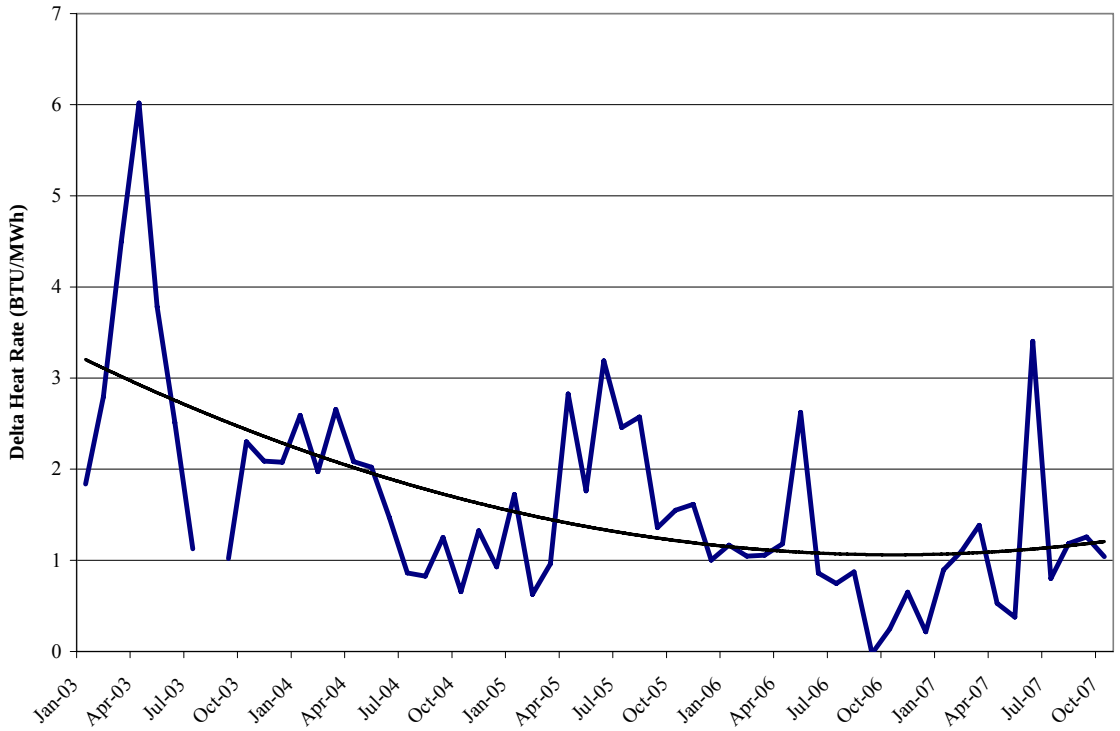
Figure 1-28: Estimated Monthly Average System Heat Rate since Market Opening using HOEP and Shadow Price, January 2003 - October 2007 (Btu/MWh)



The gap (or delta) between the unconstrained (measured using the HOEP) and constrained (measured using the Richview Shadow Price) heat rates is shown in Figure 1-29. The gap between the two has been declining since early 2003, although there was a large increase in the delta during June 2007.[30] The narrowing gap implies a lower CMSC to generators and the HOEP has been becoming a more and more important signal to market participants and potential investment. The narrowing delta mirrors an apparent convergence between the HOEP and the Richview shadow price, as will be discussed in Chapter 3.

[30] The large gap in June 2007 was due to higher Richview Shadow prices caused by a few factors: 1) an outage in a major transmission line (D501P) that limited hydro power in north to flow south in the early part of the month, 2) a derating of the QFW transmission line on June 11th that limited power production at the Beck generating station, and 3) events on June 12th, which are discussed in more detail in Chapter 2.

Figure 1-29: Delta Heat Rate (Constrained less Unconstrained Schedules), January 2003 to October 2007 (Btu/MWh)



4.5 Net Revenue Analysis

Similar to previous MSP reports, we use a standardized model developed by the Federal Energy Regulatory Commission of the United States (FERC) to help assess whether there are sufficient revenues for a new gas-fired generator in Ontario to make an adequate rate of return on an investment with typical characteristics.[31]

Table 1-30 reports estimated net revenues for two types of generators; an efficient combined cycle plant with a heat rate of 7,000 Btu/KWh and a less efficient combustion turbine plant with a heat rate of 10,500 Btu/KWh. The assumed variable operating and maintenance (O&M) costs are $1.1/MWh for the combined cycle and $3.3/MWh for the

[31] For details, see FERC 2004 State of the Markets Report, Docket MO05-4-000.

combustion turbine unit along with an assumed 5 percent outage rate for both.[32] Revenues are examined on an annual basis using the November to October period.

The amount of net revenue available to new generation during May – October 2007 continues to be insufficient to induce new investment in Ontario in the absence of guarantees and subsidies.[33] Estimated net revenues over the November 2006 to October 2007 period were $61,257 for the combined-cycle unit and $15,151 for the combustion. These net revenues are well below the estimated FERC requirement of US$80,000-90,000/MW-year for a combined cycle unit and US$60,000-70,000/MW-year for a combustion-turbine unit to meet all debt and equity requirements.[34]

Table 1-30: Yearly Estimated Net Revenue Analysis for Two Generator Types, November 2002 - October 2007 ($/MWh)

Generator Type	7,000 Btu/KWh of Combined-cycle with variable O&M cost of $1.10/MWh	10,500 Btu/KWh of Combustion turbine with variable O&M cost of $3.30/MWh
Nov 2002 – Oct 2003	$111,467	$31,695
Nov 2003 - Oct 2004	$52,987	$11,128
Nov 2004 – Oct 2005	$95,181	$28,064
Nov 2005 - Oct 2006	$45,093	$10,181
Nov 2006 – Oct 2007	$61,257	$15,151
Average	$73,197	$19,244

5. *Imports and Exports*

5.1 Overview

Table 1-31 reports monthly net exports for on-peak, off-peak, and all hours over the last two summer periods. Total net exports declined by approximately 640 GWh in the

[32] FERC assumes US$1/MWh for the more efficient combined cycle unit and US$3/MWh for the less efficient combustion turbine. To translate the numbers to Canadian dollars, we presume an exchange rate of US$1=CND$1.1, which is close to the average over the last twelve months (although there has been a dramatic appreciation in the $CDN relative to the $US since September 2007) and consistent with the calculations performed in previous MSP reports.

[33] Net revenue is earned on the portion of revenue above the generator's assumed strike price. The generator is assumed to be online in all hours when the HOEP is larger than the strike price.

[34] The FERC numbers reported represent the best estimates of what is required to cover all costs associated with constructing and operating a new gas-fired generation unit by efficiency type.

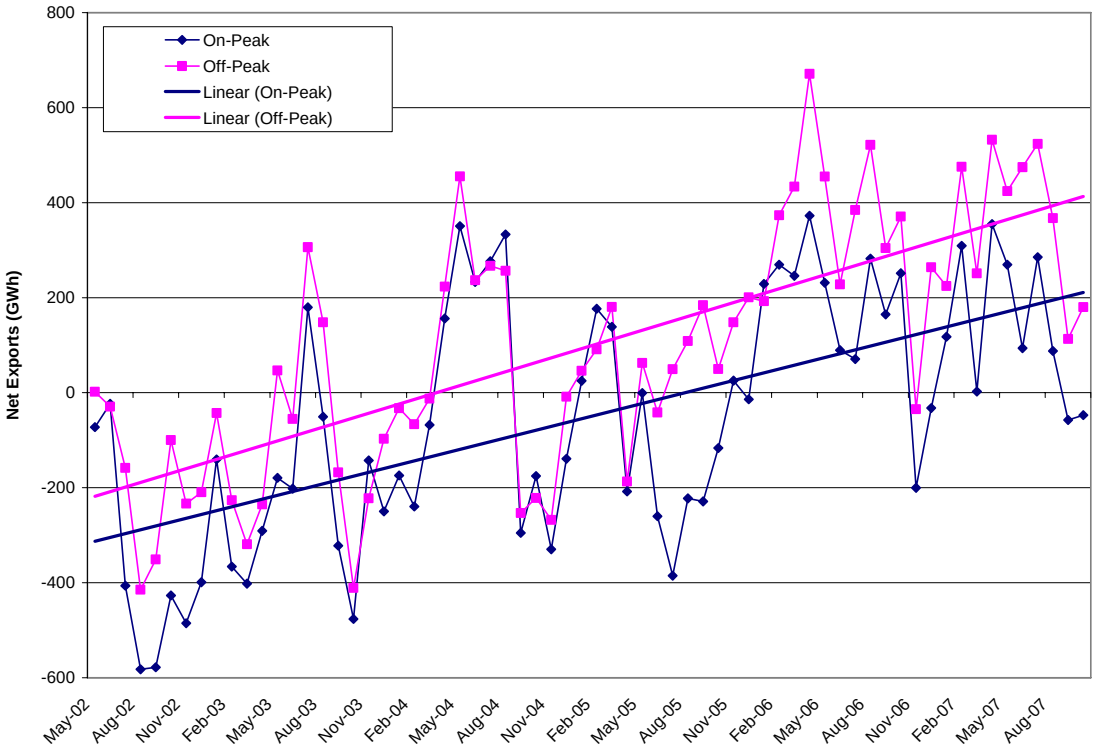
summer of 2007 compared to 2006. The majority of the decline occurred during the on-peak hours and were due to increased imports. Net exports increased during the first three summer months compared to 2006 and declined in the later three months coinciding with the rapid appreciation of the Canadian dollar relative to its US counterpart (as described more fully in section 5.4.2 below).

Table 1-31: Net Exports from Ontario On-Peak and Off-Peak, May – October 2006 & 2007 (GWh)

	Off-Peak			On-Peak			Total		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	455	424	(6.8)	231	270	16.9	686	694	1.2
June	227	475	109.3	90	94	4.4	318	568	78.6
July	384	524	36.5	71	285	301.4	455	809	77.8
August	522	367	(29.7)	282	88	(68.8)	804	455	(43.4)
September	305	113	(63.0)	165	(58)	(135.2)	469	55	(88.3)
October	371	180	(51.5)	252	(47)	(118.7)	623	133	(78.7)
Total	2,264	2,083	(8.0)	1,091	632	(42.1)	3,355	2,714	(19.1)
Average	377	347	(8.0)	182	105	(42.3)	559	452	(19.1)

Figure 1-30 plots the long-term trends in on-peak and off-peak net exports. Although Ontario was typically a net importer when the market first opened due to the tight supply conditions, net exports have been gradually increasing, although on-peak net exports fell below zero (i.e. represented net imports) over the last two months of the current summer period. This was mainly due to increased nuclear outages at the end of the summer forcing Ontario to be more dependent on imports.

Figure 1-30: Net Exports, On-peak and Off-peak, May 2002 - October 2007 (GWh)



5.2 Congestion

Tables 1-32 and 1-33 report the number of occurrences of import and export congestion by month for the May to October 2006 and 2007 periods. Total import congestion increased this summer from 676 hours in 2006 to 769 hours in 2007 representing an increase of 14 percent. Export congestion hours increased dramatically from 753 hours in 2006 to 1,650 in 2007.

Examining the monthly import and export congestion values indicates that, as would be expected, the frequency of congested hours and the direction of flows appear to correspond to the substantial appreciation of the Canadian/US dollar exchange rate towards the end of the current period.

Import congestion in total started the period quite low, being much lower than the previous year's frequency in May and June. As the period progressed and the Canadian dollar appreciated against the US dollar, congestion frequency grew, exceeding the previous year's values with the frequency for October 2007 nine times larger than in October 2006. The most significant changes in import congestion occurred at the Michigan and Minnesota interties. Import congestion decreased during the first 3 or 4 months of the period and dramatically increased during the last three months, coinciding with the appreciating dollar.

Similarly, as shown in Table 1-33, the current six-month period saw export congested hours increase relative to last year. This was due almost entirely to increases in exports to the US in the first three months across all interfaces.[35] However consistent with the appreciating Canadian dollar, export congestion declined relative to these first few months on all interties and fell below last year's values during September and October.

Table 1-32: Import Congestion in the Market Schedule, May – October 2006 & 2007 (Number of Hours)

	NY to ON		MI to ON		MB to ON		MN to ON		QC to ON		Total	
	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007
May	8	4	19	0	0	2	112	1	8	2	147	9
June	0	0	33	1	9	11	243	8	0	16	285	36
July	0	0	0	3	2	2	4	29	43	26	49	60
August	1	11	0	5	4	8	46	123	4	6	55	153
September	0	0	0	122	3	7	95	14	2	0	100	143
October	0	0	8	64	0	6	26	297	6	1	40	368
Total	9	15	60	195	18	36	526	472	63	51	676	769

[35] It is important to note that many exports we report as heading to Quebec are in fact wheel-though transactions to the U.S.

Table 1-33: Export Congestion in the Market Schedule, May – October 2006 & 2007 (Number of Hours)

	ON to NY		ON to MI		ON to MB		ON to MN		ON to QC		Total	
	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007	2006	2007
May	66	32	2	39	0	1	2	26	16	321	86	419
June	10	149	0	11	0	0	2	4	10	92	22	256
July	37	247	0	5	0	0	10	108	2	159	49	519
August	194	146	5	14	0	0	15	35	0	34	214	229
September	163	83	0	3	0	0	16	0	45	41	224	127
October	105	91	0	1	0	0	3	1	50	7	158	100
Total	575	748	7	73	0	1	48	174	123	654	753	1,650

Figures 1-31 and 1-32 presents import and export congested hours respectively as a percentage of total congested hours by intertie over the 2007 summer months. Figure 1-31 shows that majority of import congestion (61 percent) occurred over the Minnesota intertie. In many hours, imports from Manitoba are unable to enter the province due to excess supply in the Northwest. Transmission constraints limit the amount of energy that can be moved from the Northwest to the rest of the province, which is reflected in the negative shadow price observed in Table 1-21. On the other hand, the majority of the export-congested hours during the summer were destined to New York and Quebec (85 percent combined). Export-congested hours to Quebec were abnormally high during the first half of the summer for two reasons. First, with attractive off-peak prices in Ontario (especially May), there was strong competition for energy leading to the tie being congested. Secondly, there was a transformer refurbishment procedure performed on H4Z forcing the line to be export limited to 40 MW (down from 85 MW) and therefore vulnerable to congestion.

Figure 1-31: Import Congestion in the Market Schedule by Intertie, May 2007 – October 2007 (Percentage of Congested Hours)

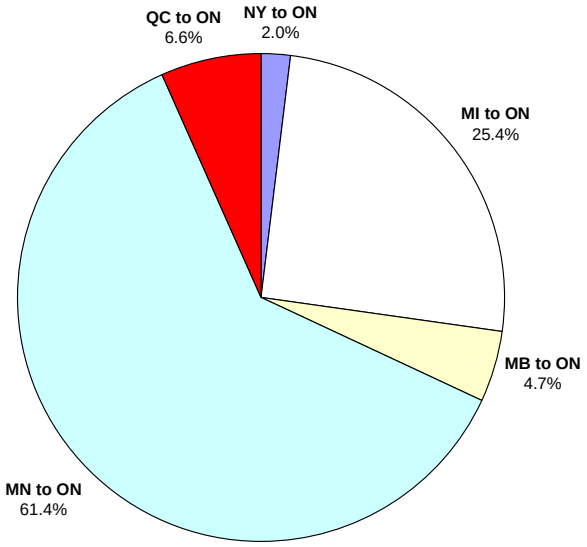
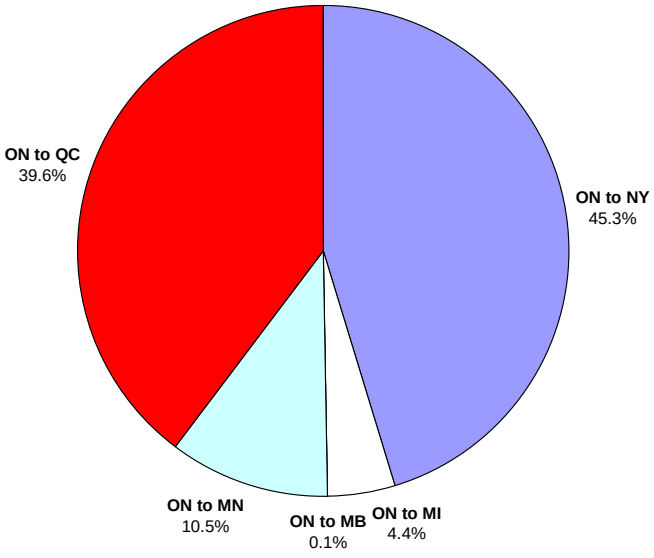


Figure 1-32: Export Congestion in the Market Schedule by Intertie, May 2007 – October 2007 (Percentage of Congested Hours)



5.3 Analysis of the Determinants of Exports from Ontario to New York

In the last report, the Panel introduced a revised econometric model to analyse the determinants of the volume of export flows between Ontario and New York, which continues to be our largest export destination.[36] Developed by the IESO, the reduced form structural model tests the hypothesis that exports from Ontario to New York are an increasing function of the differential between the New York and Ontario energy prices, after controlling for seasonal and other factors that vary from month to month and over time.[37]

We re-estimate the model using monthly data covering the period January 2003 to October 2007 (58 observations) and provide separate estimates for the on-peak and off-peak hours. Coefficient estimates are reported in Table 1-34. The results indicate that the differential between the Ontario and New York prices is influential on the level of exports from Ontario to New York. Both the HOEP and New York prices have the expected coefficient signs; a negative sign for the coefficient associated with the HOEP and a positive sign for the New York price coefficient.

[36] Between May and October 2007, over 70 percent of exports were destined for New York.

[37] The model is estimated using the two-stage least squares method. First stage instruments include Ontario non-dispatchable demand, nuclear output, self-scheduler output, New York load and the price of natural gas.

Table 1-34: Export Model Estimation Results, January 2003 – October 2007

Variable	All Hours		On-peak		Off-peak	
	Coef.	S.E.	Coef.	S.E.	Coef.	S.E.
Constant	3.94	0.00	2.21	0.05	5.12	0.00
Log(HOEP)	-4.27	0.00	-6.58	0.00	-2.18	0.06
Log(New York Price)	4.74	0.00	7.43	0.00	2.46	0.02
January	0.22	0.18	0.27	0.24	-0.02	0.86
February	0.19	0.32	0.02	0.95	0.12	0.32
March	0.13	0.38	-0.01	0.96	0.04	0.80
April	-0.01	0.97	-0.04	0.89	-0.19	0.20
May	0.22	0.28	0.13	0.65	0.07	0.73
June	0.35	0.07	0.54	0.03	-0.02	0.91
July	0.10	0.51	0.29	0.29	-0.22	0.40
August	-0.11	0.64	-0.18	0.56	-0.27	0.36
September	0.04	0.74	-0.11	0.73	-0.23	0.11
October	-0.34	0.19	-0.22	0.45	-0.58	0.05
November	-0.01	0.96	-0.05	0.76	-0.15	0.33
Time Trend	0.01	0.15	0.01	0.34	0.01	0.03
Model Diagnostics						
Correlation between actual and fitted values	0.79		0.78		0.73	
Number of observations	58		58		58	

The model is estimated in logarithmic form so the coefficient estimates can be interpreted as elasticities. The elasticity of exports with respect to the HOEP over all hours is estimated as minus 4.27, implying a one percent increase in the HOEP leads to a 4.27 percent decline in exports to New York (and vice versa), all other things held constant. Alternatively, the coefficient estimate for the New York price over all hours is 4.74, meaning a one percent increase in the New York price will lead to a 4.74 percent increase in exports destined for New York. Coefficient estimates for the on-peak and off-peak hours show that exports are more responsive to changes during the on-peak hours given the larger magnitude of the estimates.

5.4 Wholesale Electricity Prices in Neighbouring Markets

5.4.1 Price Comparisons

In the last Panel report we observed that for the first time prices in Ontario dropped below those of all neighbouring markets, although marginal costs (as represented by the Richview shadow price) suggested that Ontario production costs were not the lowest.

In Table 1-35 we observe once again that the six-month average HOEP prices for Ontario are lower than market prices in the 4 main nearby markets, in both off-peak and on-peak periods and in aggregate. Up to about one year ago MISO exhibited the lowest prices relative to all surrounding jurisdictions. However in the current period, MISO prices are about 10 percent higher than in Ontario. PJM's prices were the highest, about 50 percent above Ontario prices on average.

Table 1-35: Average HOEP Relative to Neighbouring Market Prices, May 2007 - October 2007 ($CDN/MWh)

	Off-Peak	On-peak	Total
Ontario	33.82	59.51	45.66
MISO	36.27	68.64	50.95
New England	57.26	75.90	65.72
New York	40.86	67.81	53.12
PJM	51.13	84.61	66.02
Average	43.87	71.29	56.29

Figures 1-33 to 1-35 compare the Ontario HOEP with the appropriate zonal prices in neighbouring jurisdictions on a monthly basis between May and October 2007 for all hours, on-peak hours, and off-peak hours respectively. Ontario tends to be the lowest price market in almost all months. However, MISO had lower prices on-peak in September and October, and off-peak in June, July, and September. New York prices were lower only in the May off-peak period.

Figure 1-33: Average Monthly HOEP Relative to Neighbouring Market Prices, May 2007 – October 2007 ($CDN/MWh)

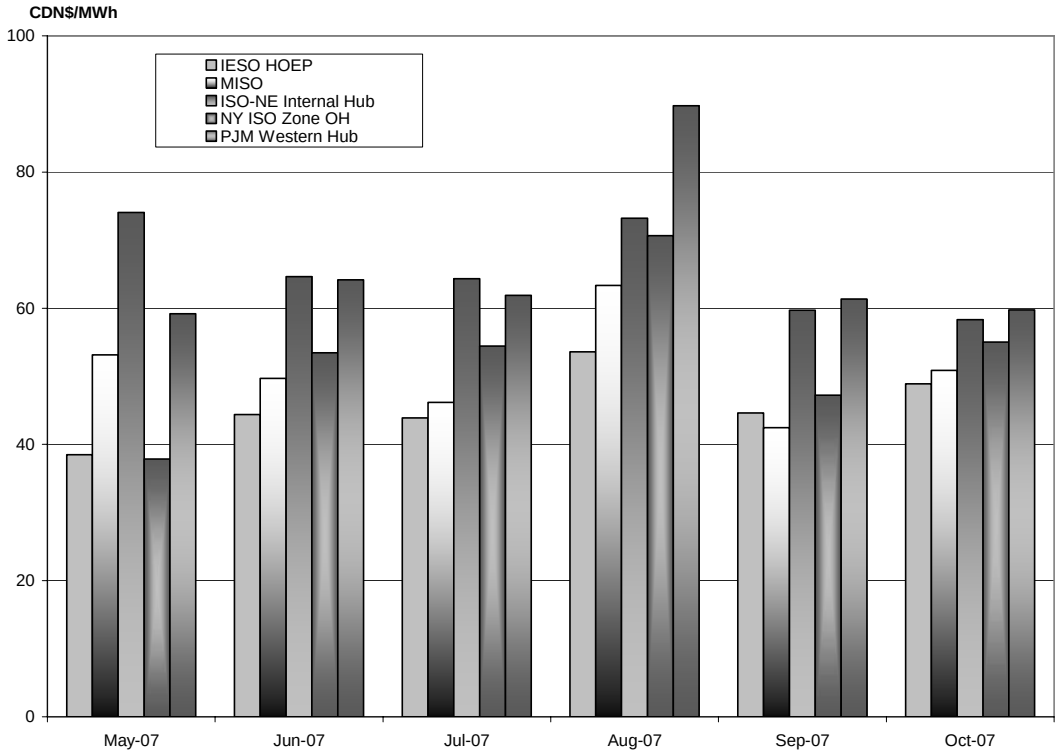


Figure 1-34: Average Monthly HOEP Relative to Neighbouring Market Prices, On-Peak,
May 2007 – October 2007
($CDN/MWh)

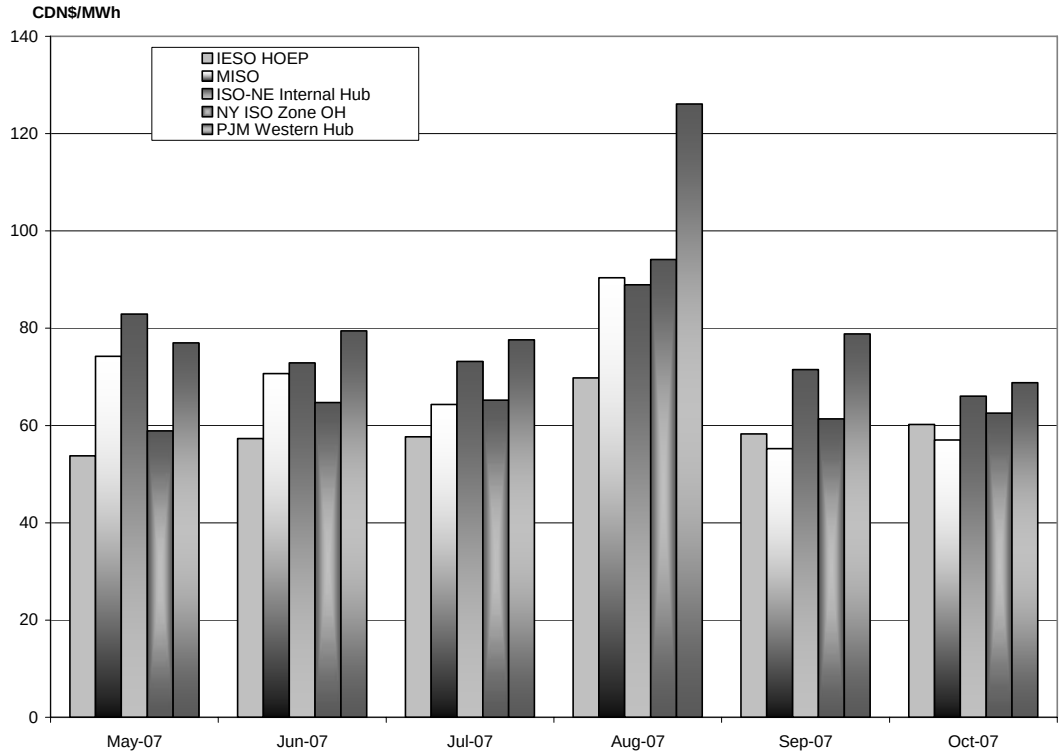


Figure 1-35: Average Monthly HOEP Relative to Neighbouring Market Prices, Off-Peak,
May 2007 – October 2007
($CDN/MWh)

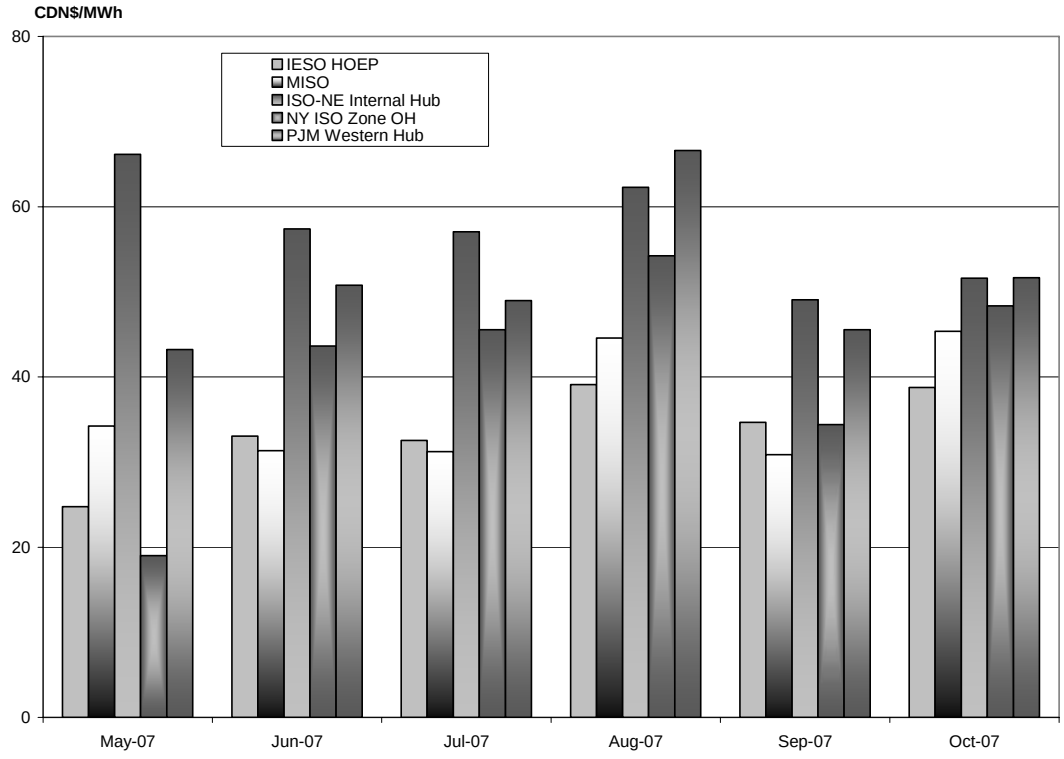
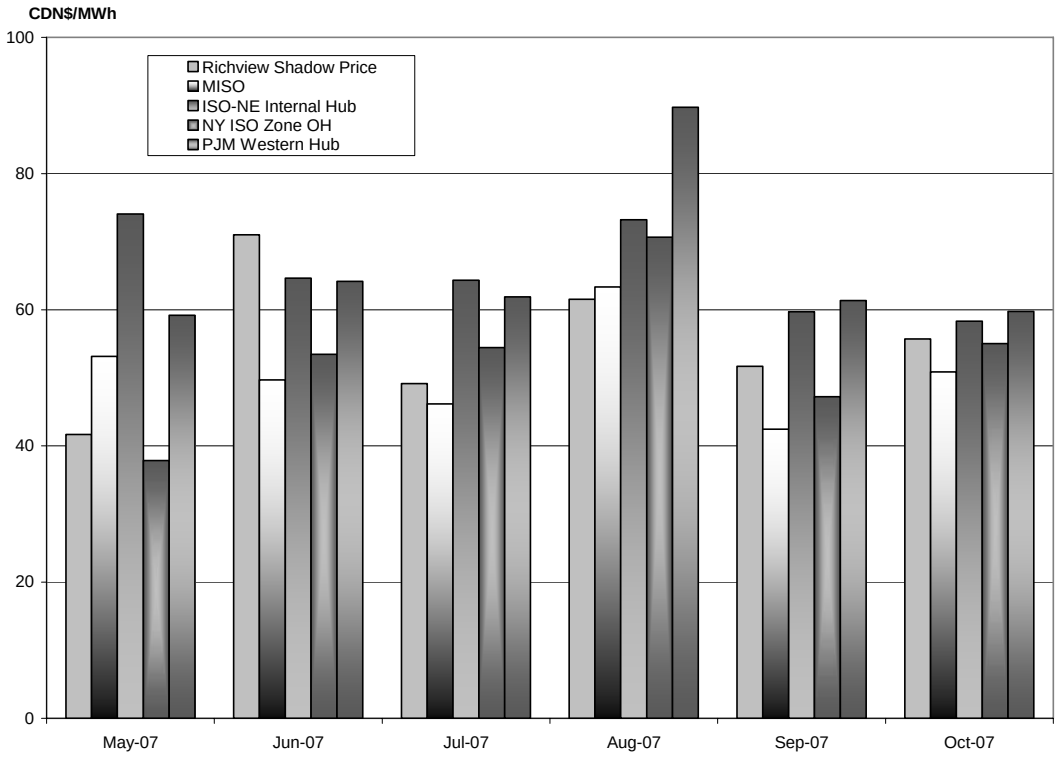


Figure 1-36 compares Richview shadow prices to neighbouring market prices, similar to Figure 1-33. However, because of the higher shadow prices, Ontario's marginal production costs appear to be more expensive than MISO for four months (June, July, September, and October) and more expensive than New York for four months (May, June September, and October). By this measure Ontario is one of the lower production cost markets, but not the lowest in any month of the period.

Figure 1-36: Average Richview Shadow Price Relative to Neighbouring Markets, May 2007 – October 2007 ($CDN/MWh)

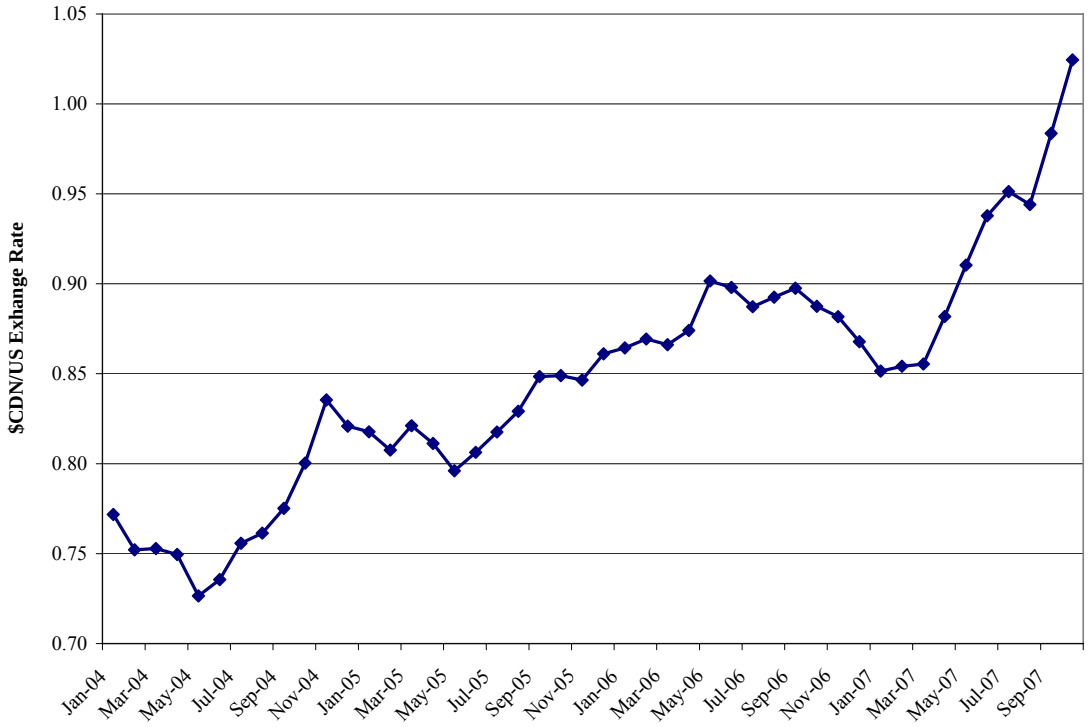


5.4.2 Exchange Rate Effects and Trade Flows

As discussed earlier in the Chapter, there has been a substantial appreciation in the Canadian dollar relative to the US dollar over the past summer and especially in September and October. Figure 1-37 illustrates the increase in the monthly average Canadian/US dollar exchange rate since January 2004.[38] The figure shows a gradual appreciation of the Canadian dollar since early 2004. More recently, between January and October 2007 the average monthly Canadian /US dollar exchange rate increased from approximately $0.85 to $1.02 or 20 percent. Similarly, the exchange rate has increased by approximately 13 percent since May 2007, which represents the first month of the current summer period. The average exchange rate for the six-month summer period has increased from $0.89 to $0.96, or 8 percent.

[38] The monthly exchange rate is calculated by averaging the Bank of Canada's daily noon spot rate available at http://www.bank-banque-canada.ca/en/rates/exchange.html.

Figure 1-37: Monthly Average $CDN/US Exchange Rate, January 2004 – October 2007



In addressing the question of whether this change in the exchange rate has affected imports and exports, the Panel has noted there are two factors to consider: the direct impact on traders transacting between two jurisdictions with different currencies; and the indirect impact of fuel prices in Ontario relative to the US energy markets.

Consider first what traders would experience from an increase in the exchange rate assuming the market energy prices in the local currencies had not changed last year to this year. Taking an on-peak example, if the US energy price were US$62.30/MWh and the Ontario price were CDN$70/MWh in both years, at a $0.89 exchange rate, the Ontario price would be equivalent to the US price. There would be little motivation for any trade. As the exchange rate increased to $0.96, the Ontario price would now be US$67.20/MWh, which is significantly higher that the US energy price (given both are assumed unchanged). At these average prices, there is more opportunity for trade,

primarily imports to Ontario. Therefore, a change in the exchange rate creates arbitrage opportunities for export and import transactions.

However, the exchange rate should also affect energy prices in the two countries. Generators that rely on natural gas to produce energy are very sensitive to large changes in the price of natural gas. Table 1-36 reports the monthly average Henry Hub spot market price for the May to October 2006 and 2007 periods in both US and Canadian dollars. Table 1-37 reports similar Canadian and US dollar prices for Central Appalachian coal.

Table 1-36: $CDN and $US Henry Hub Spot Market Price Comparison, May – October 2006 & 2007 ($/MMBtu)

	$CND			$USD			Exchange Rate		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	6.92	8.39	21.2	6.21	7.64	23.0	0.90	0.91	1.0
June	6.94	7.82	12.7	6.26	7.34	17.3	0.90	0.94	4.4
July	6.91	6.54	(5.4)	6.12	6.22	1.6	0.89	0.95	7.2
August	8.03	6.64	(17.3)	7.17	6.27	(12.6)	0.89	0.94	5.8
September	5.62	5.61	(0.2)	4.86	5.44	11.9	0.90	0.98	9.6
October	6.66	6.56	(1.5)	5.75	6.72	16.9	0.89	1.02	15.4
Average	6.85	6.93	1.2	6.06	6.61	9.0	0.89	0.96	7.2

Table 1-37: $CDN and $US NYMEX OTC CAPP Coal Market Price Comparison, May – October 2006 & 2007 ($/MMBtu)

	in $CND			in $USD			Exchange Rate		
	2006	2007	% Change	2006	2007	% Change	2006	2007	% Change
May	2.36	2.00	(15.3)	2.13	1.82	(14.6)	0.90	0.91	1.0
June	2.32	2.07	(10.8)	2.08	1.94	(6.7)	0.90	0.94	4.4
July	2.18	1.93	(11.5)	1.94	1.84	(5.2)	0.89	0.95	7.2
August	2.22	1.90	(14.4)	1.98	1.79	(9.6)	0.89	0.94	5.8
September	2.12	1.88	(11.3)	1.9	1.81	(4.7)	0.90	0.98	9.6
October	2.02	1.89	(6.4)	1.79	1.94	8.4	0.89	1.02	15.4
Average	2.20	1.95	(11.7)	1.97	1.86	(5.8)	0.89	0.96	7.2

These data demonstrate gas prices barely increased on average in Ontario while they increased 9 percent in US dollars. Similarly US coal price dropped almost 6 percent but the price in Ontario went down 12 percent. This means that Ontario generators have seen lower or stable input costs, while US generators have seen price increases for natural gas and smaller price reductions for coal. In other words, when the Canadian dollar is strong it takes 'less Canadian dollars' to get to the same fuel as the weaker US dollar.

If fuel price were the only factor affecting market price, then US market prices would have risen somewhat in US dollars to reflect increasing fuel prices (with possibly some off-peak moderation in price based on coal prices) while Ontario prices should have remained stable or fallen in Canadian dollars.

Exchange rate has two offsetting effects. It increases the US cost of purchasing Ontario energy (or increases the value of selling into Ontario), but it would also tend to reduce the Ontario market prices relative to the US markets because the fuel costs are lower, theoretically by the same amount, all else held constant.

Market prices are driven by other factors as well, and we would not expect spot fuel price changes or exchange rate fluctuations to change offer prices on a direct pro-rata basis either immediately or over time. But the tendency for the exchange rate alone as a driver to increase imports and reduce exports would seem to be muted by the compensating impact on fuel price and in turn market price.

5.4.3 Linked Wheel-through Transactions

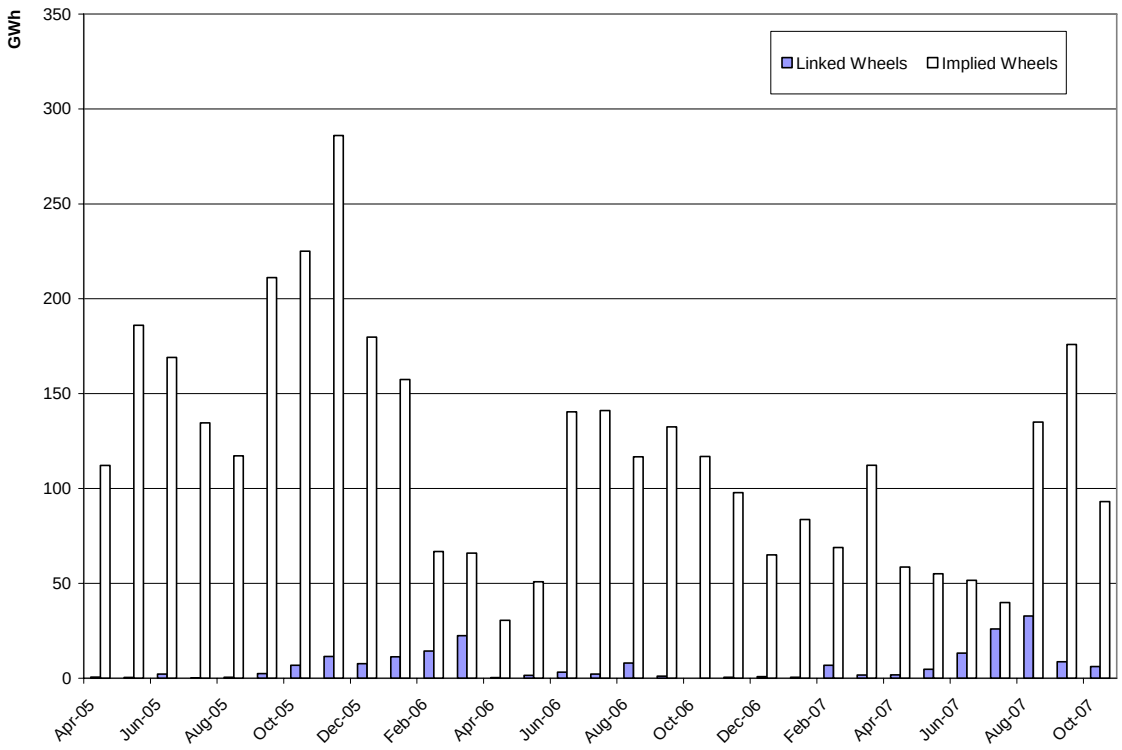
A wheel-through transaction occurs when a market participant moves energy from one jurisdiction to another through the IESO-controlled transmission grid. These can be implied wheels, with no identified relationship between an import and export, or a market participant can specifically identify the transaction as a "linked wheel" through the NERC eTag. If either leg of the linked wheel is prevented from flowing, the other leg must also be cut. Ontario receives a fixed $/MWh payment on the export side of a

linked-wheel transaction in order to compensate for using the province's transmission infrastructure.

Figure 1-38 below shows the total monthly volume of linked wheel-through transactions and implied-wheel through transactions since April 2005.[39] The total monthly quantity of linked wheel-through transactions through Ontario has historically been below 15 GWh prior to the summer of 2007 and in many months below 5 GWh. Between June and August 2007, linked wheeled-transaction quantities dramatically increased and reached a peak monthly total of 32.9 GWh in August. Traders appear to have identified arbitrage opportunities between other jurisdictions that require them to move energy through Ontario to fulfill their delivery obligations.

[39] This start date was chosen because on April 1, 2005, the Midwest ISO launched its Midwest Energy Markets and began centrally dispatching wholesale electricity and transmission service throughout the jurisdiction.

Figure 1-38: Quantity of Linked and Implied Wheel-through Transactions,April 2005 – August 2007
(GWh)



Although the quantity of linked wheel-through transactions has increased over the past few months, they make up a small proportion of total Ontario imports and exports. For example, during the peak month of August 2007, linked wheel-through transactions accounted for 5.4 percent of total imports and 3.1 percent of total exports.

Chapter 2: Analysis of Market Outcomes

1. *Introduction*

The Market Assessment Unit (MAU), under the direction of the Market Surveillance Panel, monitors the market for anomalous events and behaviour. Anomalous behaviours are actions by market participants (or the IESO) that may lead to market outcomes that fall outside of predicted patterns or norms.

The MAU monitors high and low priced hours and any other events that appear to be anomalous, even though they may not meet bright-line price tests, and reports its findings to the Panel. The Panel believes the explanation of these types of events provides transparency on why certain outcomes occur in the market and leads to learning by all market participants.

On a daily basis, the MAU reviews the previous day, not only to discern anomalous events but also to review:

- apparent changes in bid strategies;
- the impact of forced outages and extended planned outages;
- import/export arbitrage opportunities;
- the appropriateness of uplift payments; and
- the application of IESO procedures.

In addition to identifying anomalous events, such reviews may lead to identification of inappropriate market incentives that lead to inefficiencies.

The MAU reviews all high priced hours to identify the critical factors leading to the high prices and reports its findings to the Panel. For the purpose of this report, high priced hours are defined as all hours in which the HOEP was greater than $200/MWh or in which the hourly uplift exceeded the HOEP. In addition, the MAU reviews all low

priced hours and reports its findings to the Panel. For the purpose of this review, a low priced hour is defined as any hour in which the HOEP was less than $20/MWh.[40]

With respect to high priced hours, there were four hours during the review period May 2007 through October 2007 in which the HOEP was greater than $200/MWh. Section 2.1 of this Chapter examines the factors contributing to the relatively high HOEP in each instance. There were also three hours during the review period in which the hourly uplift exceeded the HOEP. The Panel has observed that the increasing frequency with which uplift exceeds the HOEP is not because the uplift is unusually high but because the HOEP is very low. This raises the question of whether the observation that the uplift exceeds the HOEP remains a useful indicator of uplift anomalies. The Panel has asked the MAU to explore the possibility of developing a more useful indicator of anomalous uplifts.

In this review period there were 331 hours in which the HOEP was less than $20/MWh including one hour in which the HOEP was negative. A negative price implies generators are paying loads and export customers to consume energy. Section 2.2 of this Chapter reviews the factors typically driving prices to low levels in these hours.

In its review and analysis of high-priced and low-priced hours and other anomalous events, the MAU did not find any event which suggested that there was gaming or abuse of market power by any market participant Nevertheless, we do have recommendations for the IESO and Hydro One which are intended to improve market efficiency.

2. *Anomalous HOEP*

2.1 Analysis of High Priced Hours

The MAU regularly reviews all hours where the HOEP exceeds $200/MWh and where the hourly uplift exceeds the HOEP. The objective of this review is to understand the underlying causes that led to these prices and determine whether any further analysis of

[40] $200/MWh is typically an upper bound for the cost of a fossil generation unit. $20/MWh is a lower bound for the cost of a fossil unit.

the design or operation of the market or any further investigation of the conduct of market participants is warranted.

Table 2-1 depicts the total number of hours with a HOEP greater than $200/MWh and the total number of hours with an uplift greater than the HOEP from May to October 2007, with comparative data for the same period in 2006. The number of hours with HOEP greater than $200/MWh was smaller in 2007 than in 2006, while the number of hours with an uplift exceeding the HOEP remained the same. In both periods, the total number of high-priced hours is quite low, representing close to 0.1 percent of total hours of operation. This frequency of high-priced hours is a marked decrease from the period just after market opening, when high-priced hours represented almost 1.3 percent of total hours in first six months.

Hours when uplift exceeds HOEP are of potential concern because uplift is calculated after the fact and is thus less transparent to the market. That is, potentially price-responsive loads do not see the uplift and, because it can be volatile at times, cannot take it into account when making their consumption decisions. The greater uplift is relative to the HOEP, the less accurate is the HOEP as a signal of the incremental cost of supply or the incremental value of consumption. Hours in which the uplift is well in excess of its usual magnitude may also imply problems in market design or operation and thus merit further examination.

Table 2-1: Hours with a High HOEP and Uplift greater than HOEP, May - October, 2006 & 2007 (Number of Hours)

	Number of Hours with HOEP >$200 /MWh		Number of Hours with Uplift > HOEP	
	2006	**2007**	**2006**	**2007**
May	3	0	0	1
June	0	2	0	0
July	1	1	0	0
August	2	0	0	0
September	0	0	3	2
October	0	1	0	0
Total	6	4	3	3

In our previous reports, we noted that a HOEP greater than $200/MWh typically occurs in hours when one or more of the following occurs:

- real-time demand is much higher than the pre-dispatch forecasts of demand;
- one or more imports fail real-time delivery; and/or
- one or more generating units that appear to be available in pre-dispatch become unavailable in real-time as a result of a forced outage or derating.

Each of these factors has the effect of tightening the real-time supply cushion relative to the pre-dispatch supply cushion. Spikes of the HOEP above $200/MWh are most likely to occur when one or more of the factors listed above cause the real-time supply cushion to fall below 10 percent.

2.1.1 June 8, 2007 HE 12

Prices

The HOEP in this hour reached $204.72/MWh. Table 2-2 shows the real-time energy and OR prices and the one-hour ahead pre-dispatch prices for HE 11 – 13. While pre-dispatch prices were moderate, the real-time MCP began to increase late in HE 11 and near the end of HE 12 was as high as $350/MWh.[41] At the same time, the real-time OR

[41] The Richview nodal price reached $1,299.90 when the MCP peaked.

prices jumped and stayed at or above $30/MWh. The 10 minute spinning reserve price peaked at $104.51/MWh just before the end of HE 12 when the MCP was at its highest. The interval prices and HOEP fell to about $135/MWh in HE 13, which was still roughly $54/MWh higher than the pre-dispatch run had projected.

Table 2-2: Real-Time and One-Hour Ahead Pre-dispatch Prices, Energy and OR, June 8, 2007, HE 11 to HE 13

($/MWh)

Delivery Hour	Interval	Pre-dispatch				Real-Time				Difference in MCP
		10N	10S	30R	MCP	10N	10S	30R	MCP	
11	**1**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	70.36	-2.06
11	**2**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	72.42	0.00
11	**3**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	72.42	0.00
11	**4**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	72.42	0.00
11	**5**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	76.12	3.70
11	**6**	0.43	0.43	0.43	72.42	0.43	0.43	0.43	76.12	3.70
11	**7**	0.43	0.43	0.43	72.42	0.44	0.44	0.44	76.24	3.82
11	**8**	0.43	0.43	0.43	72.42	0.44	0.44	0.44	76.24	3.82
11	**9**	0.43	0.43	0.43	72.42	2.00	2.00	2.00	86.68	14.26
11	**10**	0.43	0.43	0.43	72.42	22.53	22.53	22.53	107.33	34.91
11	**11**	0.43	0.43	0.43	72.42	29.95	29.95	29.95	120.26	47.84
11	**12**	0.43	0.43	0.43	72.42	22.53	22.53	22.53	107.33	34.91
12	**1**	0.43	4.88	0.43	73.00	30.00	45.01	30.00	127.13	54.13
12	**2**	0.43	4.88	0.43	73.00	30.00	45.01	30.00	154.66	81.66
12	**3**	0.43	4.88	0.43	73.00	30.00	45.01	30.00	140.00	67.00
12	**4**	0.43	4.88	0.43	73.00	30.10	45.11	30.00	154.78	81.78
12	**5**	0.43	4.88	0.43	73.00	30.00	45.01	30.00	154.66	81.66
12	**6**	0.43	4.88	0.43	73.00	30.01	45.01	30.00	154.67	81.67
12	**7**	0.43	4.88	0.43	73.00	30.10	45.11	30.00	154.78	81.78
12	**8**	0.43	4.88	0.43	73.00	75.00	91.83	74.90	241.95	168.95
12	**9**	0.43	4.88	0.43	73.00	75.00	91.83	74.90	241.95	168.95
12	**10**	0.43	4.88	0.43	73.00	75.00	104.51	74.90	350.12	277.12
12	**11**	0.43	4.88	0.43	73.00	75.00	104.51	74.90	350.12	277.12
12	**12**	0.43	4.88	0.43	73.00	75.00	91.83	74.90	231.83	158.83
13	**1**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.68	53.68
13	**2**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**3**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.68	53.68
13	**4**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.68	53.68
13	**5**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**6**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**7**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	124.80	43.80
13	**8**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**9**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**10**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	145.12	64.12
13	**11**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80
13	**12**	0.43	12.88	0.43	81.00	30.00	45.01	30.00	134.80	53.80

Day-ahead Conditions

June 8 was expected to be a normal day with a peak demand of about 21,000 MW in HE 15. For HE 12, the forecast demand was about 20,600 MW. The Day-Ahead Commitment Process (DACP) scheduled most of the available fossil units to meet the anticipated peak demand. No imports were scheduled in DACP since the domestic supply was economic and sufficient to satisfy the forecast Ontario demand.

Baseload supply was significantly affected by long-term planned and forced outages of several nuclear and fossil units. In total, the unavailable baseload capacity amounted to as much as 3,900 MW. These outages were all known day-ahead and were expected to continue on June 8th.

Final Pre-dispatch Conditions

In the final pre-dispatch run, the one-hour ahead Ontario demand for HE 12 was forecast at 21,300 MW, with a projected price of $73/MWh. The one-hour ahead forecast was about 700 MW heavier than forecast day-ahead. There were 1,120 MW of exports and 801 MW of imports scheduled in the unconstrained schedule. The pre-dispatch schedule had 936 MW being offered between $73/MWh and $350/MWh. The majority of these offers were from peaking hydro units, which were also supplying operating reserve. The pre-dispatch supply cushion was 3.4 percent.

With the absence of 3,900 MW of inframarginal supply in pre-dispatch, the pre-dispatch price reflected the cost of gas-fired generation which set the price. The small supply cushion and the moderate pre-dispatch price imply that the offer curve was very steep on the right side of the demand curve. Under these conditions, a small forced outage (including an import failure) or a slight under-forecast of demand could lead to a spike in the real-time price.

Real-time conditions

After the final pre-dispatch run, 126 MW of imports from Michigan failed due to security problems in MISO. As well, at 10:38 (HE 11 Interval 8), a baseload fossil-fired generator was derated by 85 MW. The total loss of supply amounted to 211 MW.

In real-time, demand came in heavier than expected. Average demand in HE 12 was 21,655 MW while peak demand in the hour occurred in interval 11 and totalled 21,833 MW, or 533 MW (2.5 percent) greater than forecast one hour earlier (which was about 1,200 MW (5.8 percent) greater than forecast day-ahead).

In total, the excess of actual over expected demand plus the lost supply (including failed imports) amounted to 744 MW in the hour, implying the DSO needed to dispatch more peaking generation to meet the demand. The real-time supply cushion dropped to -0.9 percent, implying that CAOR was being used to provide operating reserve.[42] In fact, CAOR was scheduled in all intervals to supply between 200 MW and 500 MW of ten minute non-spinning and 30 minute reserve and CAOR set the operating reserve prices.

The effect of demand coming in heavy and supply being lost was to push the HOEP to $204.72/MWh for the hour. There is no indication that the import failure and the loss in domestic supply involved inappropriate behaviour.

2.1.2 June 12, 2007

On this day, HOEP peaked at $436.53/MWh in HE 15. Besides the high price in the hour, the day of June 12 is itself of interest because the IESO used almost all the available tools to maintain reliability including:

- cutting exports;
- purchasing emergency energy;
- curtailing dispatchable loads;

[42] The real-time supply cushion does not include CAOR as a resource as it is not a real generation resource and does not help system reliability. Including CAOR as supply would gradually increase the supply cushion as more CAOR is introduced which would distort the true supply/demand situation in the marketplace. Therefore, a negative real-time supply cushion means there are fewer resources than the Ontario demand plus operating reserve, indicating the CAOR is used to provide OR.

- activating OR; and
- making a 5 percent voltage cut.

The CMSC for the day amounted to $3 million, in contrast with $0.2 million - $0.5 million in a normal weekday.

2.1.2.1 June 12, 2007: Events of the day

Day-Ahead Conditions

Going into June 12th, there were 4,400 MW of inframarginal nuclear and fossil generation on planned or forced outages.

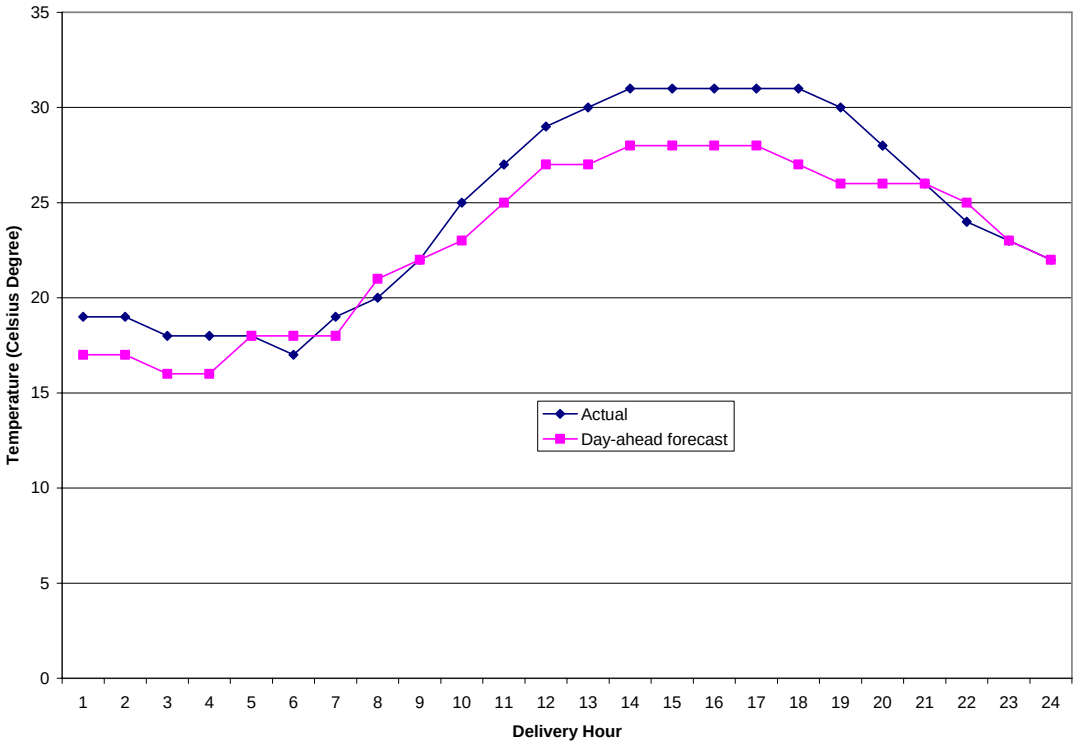
The Ontario demand forecast for the day at the time of the DACP run (June 11, 2007 HE 15 for June 12, 2007) was moderate with a daily peak demand of 21,796 MW expected in HE 16. The forecast (peak) demand for HE 15 was 21,569 MW, with a price projected at about $120/MWh. The IESO scheduled 3,540 MWh of imports, from a total of 10,000 MWh offered, as well as 5,500 MWh from 22 dispatchable coal and gas-fired generators for the peak hour by providing DA-IOG or DA-GCG guarantees through the DACP. All generators and imports that had been scheduled in the DACP showed up on time, unless otherwise approved by the IESO to withdraw from the DACP.

Real-Time Conditions

While the DACP predicted a 'normal' day with sufficient supply, the real-time demand in peak hours turned out to be 1,000 to 1,500 MW higher than expected day-ahead. The peak Ontario demand of 23,273 MW in HE 16 was about 1,500 MW (or 6.78 percent) higher than forecast day-ahead. It appears that the reason for this is that the temperature on the day was significantly under-forecast day ahead and revisions were too little and too late. Beginning in HE 8, the demand grew much faster than expected as the temperature continued to increase. Figure 2-1 shows the comparison of hourly actual and forecast day-ahead temperature. For the afternoon peak hours, the temperature was 3ºC to

4ºC under-forecast, which is equivalent to a demand under-forecast of about 1,200 MW to 1,600 MW.

Figure 2-1: Temperature: Day-ahead Forecast vs. Actual for June 12, 2007 (Degrees Celsius)

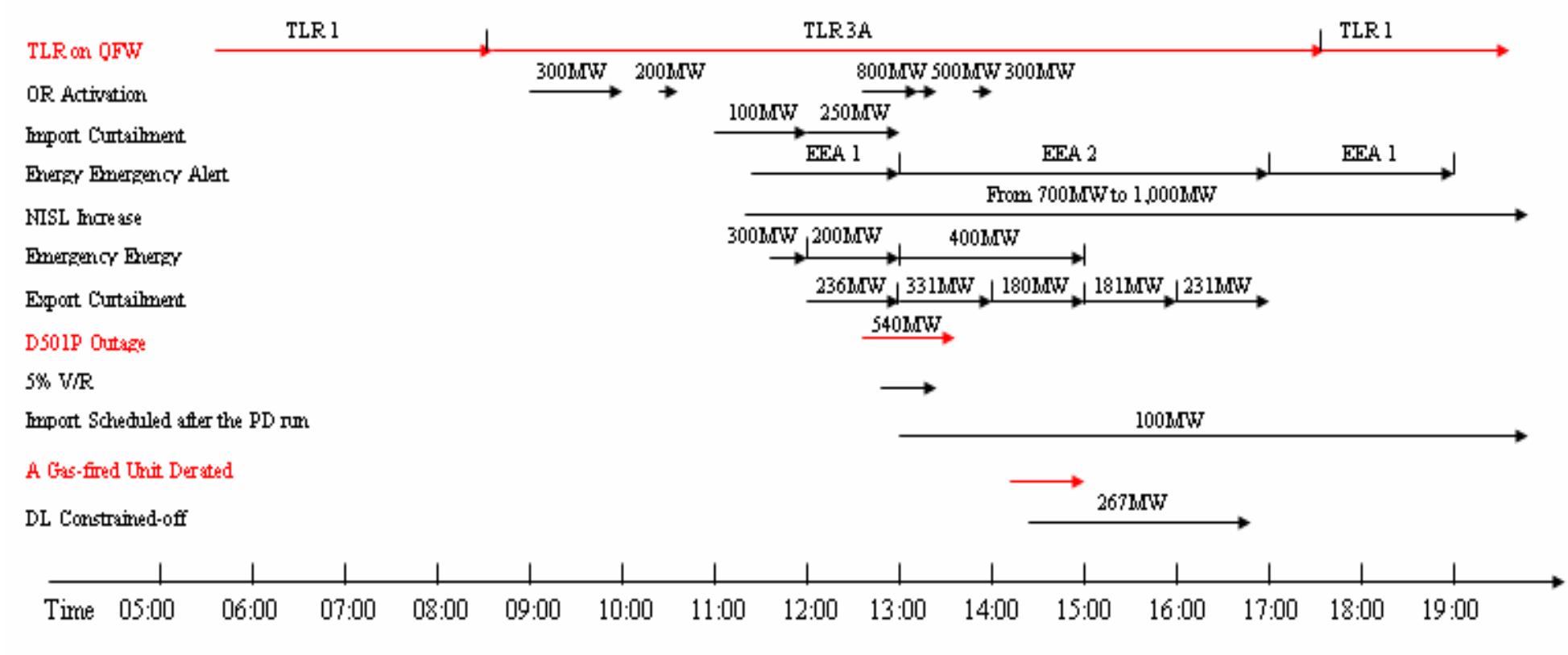


Supply Changes and IESO Responses

On the supply side, the B31L line (one of the main interfaces with Quebec) was de-rated from 390 MW to 200 MW for HE 11 to HE 13 due to transmission limitations in Quebec. This reduced the availability of imports and emergency energy from Quebec. In addition, 50 MW of imports on the P33C line that were scheduled in the DACP were curtailed in HE 15 by HQ for its own security.

The IESO took a series of control actions to deal with the unexpectedly high-demand. These actions are explained below and also summarized in Figure 2-2.

Figure 2-2: Major Events and the IESO's Actions, June 12, 2007



Beginning in the early morning (at 05:35), a TLR 1[43] (Transmission Loading Relief) was issued by the IESO on the Queenston Flow West (QFW) flowgate.[44] QFW normally carries the power produced by Ontario's Niagara area generation, imports and inadvertent loop flows, the latter often referred to as Lake Erie Circulation (LEC). LEC can be clockwise or counter-clockwise, although in recent years it has most often been counter-clockwise. On June 12 a large counter-clockwise loop-flow, which ranged from 600 to 800 MW in peak hours, consumed a large proportion of QFW capability leading to it becoming overloaded and the IESO declaring a TLR 3A from 08:32 until 17:26 in the evening.[45] As a result of the high LEC, the power flow from the Beck and Nanticoke generation toward Hamilton and Toronto was constrained down by up to 400 MW for the TLR 3A period. Also, 100-250 MW of imports from Michigan were cut (in HE 12 and HE 13) because the additional imports would have further increased the counter-clockwise LEC. In general, about 30 percent of these imports flow to Ontario through the Niagara ties.

Due to the congestion on the QFW flowgate, the 100 MW of RRS (Regional Reserve Sharing) with New York, PJM and New England was also unavailable. The IESO subsequently increased its OR requirement from 1,318 MW to 1,418 MW for the period HE 14 to HE 24.

At 10:18 (HE 11 interval 4), the IESO requested a market participant to start a gas-fired generator as soon as possible for reliability, even though withdrawal of the unit from its DACP schedule had been approved earlier in the day. The unit was in service and synchronized three hours later.

[43] A TLR 1 is a notice to neighbouring ISOs and market participants that there is a potential that the designated interface may, at some point in the future, be above its operating limit.

[44] The QFW transmission Flowgate (often called an Interface) consists of a set of five 230kV transmission circuits (Q23BM, Q24BM, Q25BM, Q29BM and Q30M) from the Queenston area on the Niagara River to major transmission stations at Middleport and Hamilton. QFW, with a normal rating of about 1,800 MW, was de-rated by 400 MW from HE 7 on June 11, 2007 for a planned outage of Q29BM. At 12:01 (HE 13 interval 1) on June 12, the IESO recalled the Q29BM outage for adequacy concerns, and the line was restored to service at 16:53 (HE 17 interval 11).

[45] A TLR 3 is a notice to the other ISOs and the market that QFW flowgate is over its operating limit and transmission services will be re-allocated to continue to allow transactions with higher transmission priority to continue to flow. For details on how the TLR levels are determined, see the NERC procedures:
ftp://www.nerc.com/pub/sys/all_updl/docs/ferc/TLRFiling-2-05.pdf.

At 10:41 (HE 11 interval 9), the Multi Interval Optimizer (MIO is the constrained version of the DSO) indicated both a 10S and a total OR deficiency as internal generation normally providing OR was being dispatched for energy. After having assessed the power flow on the QFW interface, the IESO determined that there was still room for a slight increase in power flow up to its stability limit and subsequently requested emergency energy from MISO to allow it to eliminate the OR shortfall for HE 12. Hence, 300 MW of emergency energy flowed from Michigan to Ontario from 11:40 to 12:00.

At 11:26 (HE 12 interval 6), the IESO declared EEA 1 (Energy Emergency Alert – Level 1) as demand continued to run heavier than forecast and it was waiting for available generation to come online.[46] As a result of the declaration of EEA 1, the IESO, following its standard operating procedures, increased the Net Interchange Scheduling Limit (NISL) from the standard 700 MW level to 1000 MW to allow more imports to flow in. The IESO also started to curtail 236 MW of exports and scheduled an additional 100 MW of imports from Quebec for local requirements in the Ottawa area after the pre-dispatch run.

At 11:45 (HE 12 interval 9), an additional 200 MW of emergency energy was bought from MISO for HE 13, based on the adequacy assessment for that hour.

At 12:42 (HE 13 interval 9), a 500 kV transmission line (D501P) that links the hydroelectric generation in the northeast to the south tripped. This caused a loss of about 800 MW of supply. In response to this event, the IESO immediately activated 800 MW of OR, curtailed 331 MW of exports and purchased 400 MW of emergency energy for the coming hour, HE 14. Because OR was activated, the IESO reduced the OR requirement by 800 MW. The OR requirement was restored to 1318 MW at 13:16 (HE 14 interval 4).

[46] Following the NERC Reliability Standard (EOP-002 Attachment 1), the IESO will issue EEA 1 when the IESO control area has or expects to have all available resources in use, and EEA 2 when it has or is about to initiate load management procedures such as voltage reduction and/or load curtailment (see IESO Market Manual 7 Appendix E.1)

Although the IESO's actions followed the NPCC standard, which allows up to 105 minutes for replenishment of OR after a contingency,[47] the reduction in the OR requirement for 34 minutes during this shortage condition had the effect of depressing both the HOEP and OR prices during this period.[48] As Table 2-5 in the later part of this section shows, the HOEP would have been $0.02/MWh higher in HE 13 and $1.93/MWh higher in HE 14.

The loss of the 500 kV transmission line highlights the inconsistent treatment of generation outages and transmission outages. As was discussed in our December 2006 report, when a transmission outage affects system reliability, the lost supply remains in the unconstrained schedule and thus has no impact on the market price. In contrast, when a generator has an outage, the lost supply is removed from the unconstrained schedule and thus may increase the market price in a manner which reflects the scarcity of the available resources. In the current case, the loss of D501P represented an inability to access 800 MW of hydro generation in the north, but had no impact on the market price. Although it might be logical to treat a transmission outage that causes loss of resources in the same way as a generation outage, transmission limitations are regularly only reflected in the IESO's constrained schedule. However, in this situation there has been an OR reduction of 800 MW in both constrained and unconstrained schedules, corresponding to the loss of generation, even though the generation is still available in the unconstrained schedule. This type of double counting means, all else equal, that not only would the market price not increase to reflect the loss but it would actually drop because of the reduced OR demand.

At 12:43 (HE 13 interval 9), the IESO implemented a 5 percent province-wide voltage reduction, except in the Niagara area which was congested. A reduction of load in this area would have increased the QFW congestion. The 5 percent voltage reduction lowered

[47] The NPCC A-6 Criteria allows restoration of 10 minute OR within 90 minutes of a shortfall without a contingency and 105 minutes with a reportable contingency from the start of the shortfall.
[48] In our previous monitoring report, July 2007, we recommended replenishing OR as quickly as possible. The IESO is planning to stakeholder the discussion of this issue.

Ontario demand by about 540 MW. As previously recommended by the Panel, this reduction was added back into the unconstrained schedule to avoid an artificial depression of prices during this period of scarcity.[49]

At 13:02 (HE 14 interval 1), the IESO declared an EEA 2.[50]

The voltage reduction was terminated at 13:24 (HE 14 interval 5) as D501P came back into service. However, as supply was still tight, export curtailment and emergency purchases continued.

As demand continued to run heavier than expected, at 14:20 (HE 15 interval 4) the IESO determined there would be adequacy problems in the afternoon peak hours. It therefore manually constrained off 60 percent of the dispatchable load (267 MW) for HE 15 to HE 17. These MW still appeared in the unconstrained sequence which again avoided an artificial depression of prices during a period of scarcity. In total, the IESO paid $766,000 in constrained-off payments to these dispatchable loads.

As an indication of how 'tight' the constrained system was, from HE 10 interval 11 on and off through to HE 14 interval 5, CAOR was being used by the constrained schedule for energy, implying a potential need for export curtailment or voltage cuts. Beginning in HE 13 interval 9 through to HE 14 interval 5, and with D501P forced out of service, 545 MW of CAOR was being dispatched in the constrained schedule.

At 17:01 (HE 18 interval 1) the EEA was reduced to level 1 from level 2. It was withdrawn at 18:59 (HE 19 interval 12).

[49] See our June 2004 Report (pp 47-51) and June 2005 Report (pp 60-66). The IESO implemented the new procedures for the treatment of voltage reduction on August 11, 2005.
[50] NERC Reliability Standard (EOP-002 Attachment 1).

2.1.2.2 June 12, 2007 HE 15

Summary Information

In this hour the HOEP spiked to $436.53/MWh, the highest HOEP to date in 2007. Table 2-3 below provides summary information for the hour. The sudden increase in MCP coincided with the forced derating of a fossil unit.

Table 2-3: Interval Summary Information, June 12, 2007, HE 15 (MWh and $/MWh)

Hour	Interval	DA Peak Demand (MWh)	PD Peak Demand (MWh)	RT Actual Demand (MWh)	MCP ($/MWh)	Failed Imports (MWh)	Curtailed Exports (MWh)	A Gas-Fired Unit Market Schedule (MWh)
15	**1**	21,569	22,086	22,534	154.22	156	175	217
15	**2**	21,569	22,086	22,636	135.35	156	175	510
15	**3**	21,569	22,086	22,673	135.35	156	175	525
15	**4**	21,569	22,086	22,743	135.35	156	175	525
15	**5**	21,569	22,086	22,676	135.23	156	175	525
15	**6**	21,569	22,086	22,689	544.37	156	175	18
15	**7**	21,569	22,086	22,771	599.99	156	175	18
15	**8**	21,569	22,086	22,751	574.62	156	175	18
15	**9**	21,569	22,086	22,873	622.06	156	175	18
15	**10**	21,569	22,086	22,951	779.78	156	175	18
15	**11**	21,569	22,086	22,873	622.06	156	175	18
15	**12**	21,569	22,086	22,955	799.99	156	175	18
Average		21,569	22,086	22,760	436.53	156	175	202

Final Pre-dispatch Conditions

The pre-dispatch peak demand for HE 15 was forecast at 22,086 MW with a projected price at $105.43/MWh. Net imports of 332 MW were scheduled in the unconstrained sequence. The pre-dispatch supply cushion was 3.1 percent, implying very tight supply.

Real-time Conditions

In real-time, the average demand in HE 15 came in at 22,760 MW, with a peak demand of 22,955 MW. The peak demand was 869 MW or 4 percent more than expected one-hour ahead while 156 MW of imports failed due to external security issues in Quebec.

To respond to the tight supply conditions, the IESO curtailed 175 MW of exports to Michigan before real-time for 'adequacy'. The real-time supply cushion dropped to -2.4 percent. As an illustration of how much tighter conditions were in the constrained schedule, the IESO constrained off a large portion of the dispatchable load (from HE 15 interval 4 to HE 17 interval 10).

As noted above, at 10:18 the IESO requested a gas-fired unit to start up as soon as possible. When this unit is started from the cold state, it takes four hours to warm up and another period of operation at a low output level. The usual practice is for the operator to send an outage slip to the IESO, indicating the time and the output level that the unit must stay at when it starts up. Due to the 12 times ramp rate effect, as soon as the unit is synchronized into the system, it is deemed to have ramped up almost immediately to its maximum capacity in the market schedule.

As Table 2-4 below shows, as soon as the unit was synchronized in interval 1, its unconstrained schedule appeared as 217 MW (12 times ramp effect) although it was scheduled for 0 MW in the constrained sequence. Conversely, when it is derated, it is deemed in the market schedule to have ramped down immediately to the derated level, in this case from 525 MW to 18 MW. In the current case, when the derating was implemented, the MCP simultaneously jumped to above $500/MWh as a result of loss of 507 MW of inframarginal supply in the unconstrained sequence.

The effect of using 12 times ramp rate multiplier can be compared to other alternatives such as three and one times ramp rate multiplier. As Table 2-4 shows, had a three times ramp rate been used, the unit could have been ramped up to 292 MW in five intervals (implying a 200~400 MW reduction in phantom supply, that is, supply in the market schedule that physically cannot be accessed) and the MCP would have been $20~$80/MWh higher when the 200~400 MW of phantom supply were unavailable. Had one times ramp rate been used, the market schedule for the unit would have been up to only 75 MW in five intervals (implying a 450 MW reduction in phantom supply), and the MCP would have been $60~$200/MWh higher. The reduction of the ramp multiplier

from twelve to three on September 12, 2007 should reduce the incidence of large swings in phantom capacity in the future.

Table 2-4: Market Schedule and MCP under Different Ramp Rate Multipliers, June 12, 2007, HE 15 (MWh and $/MWh)

			12-times Ramp Rate		3-times Ramp Rate		1-times Ramp Rate	
Hour	**Interval**	**Constrained schedule**	**MCP ($/MWh)**	**Market Schedule (MW)**	**MCP ($/MWh)**	**Market Schedule (MW)**	**MCP ($/MWh)**	**Market Schedule (MW)**
15	**1**	0	155.00	217	211.13	45	220.33	15
15	**2**	28	145.22	510	226.99	90	350.12	30
15	**3**	43	135.35	525	211.13	142	350.12	45
15	**4**	58	135.35	525	155.45	217	350.12	60
15	**5**	68	135.23	525	154.22	292	220.33	75
15	**6**	18	375.12	18	375.12	18	375.12	18
15	**7**	18	599.99	18	599.99	18	599.99	18
15	**8**	18	562.50	18	562.50	18	562.50	18
15	**9**	18	622.06	18	622.06	18	622.06	18
15	**10**	18	779.78	18	779.78	18	779.78	18
15	**11**	18	622.06	18	622.06	18	622.06	18
15	**12**	18	799.99	18	799.99	18	799.99	18
Average		27	422.30	202	443	76	487.71	29

Of interest is that the simulated MCP is exactly the same under different ramp rate multipliers after the unit is derated. The reason for this is that almost all fossil resources were fully utilized and a change in the multiplier has no impact on their schedules. Hydro units have a very large ramp rate and the change in the ramp rate multiplier has no effect on their market schedules. As a result, the change in the multiplier has no impact on the MCP for those intervals after the unit was derated.

2.1.2.3 Assessment of June 12, 2007

The under-forecast of the temperature and thus of demand was the primary cause for the need for control actions by the IESO on June 12th but failed imports, the outage at D501P and a derated generator aggravated a tight supply condition. To respond to the unexpectedly large demand in real-time that was compounded by supply issues, the IESO

took almost all available control actions to maintain system reliability. These actions, and their market impacts, included:

- purchasing emergency energy (which was included as part of the demand in the market[51] and had no effect of suppressing the market price);
- reducing the system voltage by 5 percent (an estimated reduction in demand from the voltage reduction was added back into the market schedules and thus provided correct price signals);
- manually constraining-off a dispatchable load (which was not removed from the market schedules and had no effect of suppressing the market price);
- activating operating reserve and reducing OR requirements (which lowered the total demand and thus had an effect of suppressing the market price); and
- recalling exports in real-time for 'adequacy' (which were taken out of the market demand and suppressed the market price[52])

While these actions collectively helped to keep the lights on, the last two actions likely had an adverse impact on efficiency and future hour system reliability as they artificially suppressed the HOEP signal in several hours and thus perhaps discouraged potentially economic imports and domestic supply, and encouraged potentially uneconomic exports.

The Impact of OR Requirement Reduction

To see how the delayed OR replenishment affected the HOEP, the MAU ran a simulation with immediate OR replenishment for those hours in which OR was activated and the OR requirement was reduced. In order to control modelling error this simulation was compared to simulated actual conditions. The simulation results are summarized in Table 2-5 below. Our observations are:

- the OR reduction had a very limited impact on the prices in HE 10 and HE 11 because the OR amount involved was small,

[51] Market Rule Amendment MR – 000296 allows the IESO to increase or decrease the market demand to offset the impact of control actions such as emergency energy purchase, dispatchable load curtailment, and voltage reduction.

[52] A recalled export is taken away from the market demand in the unconstrained sequence only if it is for 'adequacy'. A recalled export for 'security' (e.g. TLRi) has no effect on the market price. The curtailment of exports has the unintended consequence of hedging the risk to exporters by cutting them when prices are rising so that exporters can avoid a potentially high price.

- the price impact in HE 13 was still small although 266 MW of OR was activated. The reason for this is that the energy demand was moderate in HE 13 hour and there were still a lot of peak hydro supplying OR.
- the OR reduction had a noticeable impact in HE 14, where both the HOEP and the OR prices would have been almost $2/MWh higher had the OR requirement not been reduced. The reason for such a larger impact is that the demand was 400 MW greater than in HE 13, and some peaking hydro units were dispatched for energy and thus could not provide cheap OR.

Table 2-5: Price Impact of Delayed OR Replenishment, June 12, 2007, HE 10 to HE 14 (MW and $/MWh)

	'Simulated' Actual				If OR had not been Reduced				Integrated OR Activation (MW)	HOEP Difference
Hour	**10N**	**10S**	**30R**	**HOEP**	**10N**	**10S**	**30R**	**HOEP**		
10	0.28	2.34	0.28	90.01	0.31	2.34	0.31	90.01	75	0.00
11	0.41	3.37	0.41	96.30	0.42	3.37	0.42	96.30	17	0.00
13	0.22	0.22	0.22	101.31	0.32	0.32	0.32	101.34	266	0.02
14	12.80	12.96	12.80	127.67	14.78	14.94	14.78	129.60	185	1.93

The Impact of Export Curtailment for Adequacy

The IESO may curtail an export for 'security' or 'adequacy' after the final pre-dispatch run. 'Security' is designated if the curtailment of the export is directly due to an internal transmission limitation or transmission limitation on an intertie. 'Adequacy' is used when Ontario faces a resource shortfall which is not recognized by the hour-ahead pre-dispatch sequence. A 'security' designation is used rather than 'adequacy' if the resource shortfall is expected to last beyond the next hour so that the pre-dispatch sequence can recognize it.

When exports are curtailed for 'adequacy', the IESO removes them from both the constrained and unconstrained sequence.[53] This manual action has the effect of a sudden loss of demand in both sequences. As a result, the market price is suppressed by the

[53] See the IESO Market Manual 4 Appendix C

operator's control action, at a time when the market is unable to fully meet demand. Market participants are not compensated for the curtailment in this situation.[54]

In contrast, an export recalled for 'security' is not removed from demand in the unconstrained sequence and hence does not artificially suppress the market price. Market participants are compensated or charged for being constrained off through the CMSC mechanism.

Exporters understand that in periods where demand outstrips supply and IESO control actions must be taken (periods of concern for 'adequacy'), the IESO will curtail the export and remove it from both schedules. In other words in periods where the HOEP may be extremely high the price risk to the exporter is hedged by the IESO's control actions. Curtailing the export for 'security' removes it from the constrained schedule only, which continues to keep the price risk where it is supposed to be, in the hands of the exporter. Removing exports from the market schedule with the resulting lower HOEP may also have the effect of sending a signal to continue seeking exports from the IESO in the next hours in spite of the potential scarcity situation.

To see how the export curtailment affected the HOEP on the day, the MAU ran a simulation in which the unconstrained sequence retained the exports. Had the exports that were curtailed for 'adequacy' in HE 13 to 17 been included in the market demand, the simulated HOEP would have indicated a more severe shortage condition. The estimated energy price was $335/MWh, the 10N and 30R OR prices at $127/MWh and the 10S at $190/MWh, which were much higher than the actual price, as can be seen in Table 2-6 below.

[54] If they were constrained off for 'security', instead, they might face a negative CMSC, i.e. they would have to pay for the difference between the HOEP and their offer price times their market schedule although they have actually exported nothing.

Table 2-6: The Price Impact of Export Curtailment, June 12, 2007, HE 13 to HE 17 ($/MWh)

Delivery Hour	Simulated Actual[55]				Had Export Curtailment Had No Impact on Market demand				HOEP Difference
	10N	10S	30R	HOEP	10N	10S	30R	HOEP	
13	0.22	0.22	0.22	101.31	0.23	0.23	0.23	104.81	3.50
14	12.80	12.96	12.80	127.67	40.65	50.32	40.60	232.88	105.21
15	70.85	205.58	70.78	422.30	509.34	733.02	509.26	907.48	485.18
16	47.35	49.34	47.29	185.88	64.59	146.60	64.53	308.26	122.38
17	4.79	4.79	4.79	104.10	18.98	18.98	18.98	123.31	19.20
Average	27.20	54.58	27.17	188.25	126.76	189.83	126.72	335.35	147.09

As Table 2-6 indicates, the HOEP would have been substantially higher in HE 14 through HE 16 if those curtailed exports had not been subtracted from market demand in the market schedule. In other words, the IESO's control actions had an effect of suppressing the market price to a level that failed to correctly reflect the true tight supply condition. Higher prices would have provided market participants with appropriate signals and incentives to respond in a timely manner to the scarcity situation. For most participants, although they are unable to respond to the real-time price within the two hour offer/bid window, they can do so in future hours if they expect a high real-time price to continue.

One solution to this situation is to leave exports in the market schedule which would lead to a higher price and a signal for the market to respond when there are adequacy problems. But it should be noted that part of the problem with the treatment of these exports is the inability to reschedule imports or exports during the hour. In Chapter 3 the Panel assesses some of the benefits of 15 minute scheduling. If schedules were determined every 15 minutes, imports and exports could be re-scheduled shortly after an adequacy (or security) situation emerged, to help respond to the scarcity.

[55] The 'actual' MCP or HOEP is simulated and slightly different from the actual outcome from the DSO in this case because the simulation tool has a different converging algorithm and some input information is slightly different from that actually used by the DSO. In the majority of cases, the simulation tool generates almost identical results as the DSO.

Recommendation 2-1

Export curtailment due to 'adequacy' has an effect of suppressing the market price during times of serious scarcity since the curtailed amount is removed from the market schedule, thus distorting the market price signal. The Panel recommends that the IESO not remove the curtailed amount due to 'adequacy' from the market schedule.

2.1.3 July 17, 2007 HE 10

Prices

On July 17 the HOEP reached $271.40/MWh in HE 10, with a maximum MCP of $652/MWh in interval 12. Table 2-7 below lists the interval MCP and the pre-dispatch price during both HE 10 and 11 on July 17, 2007. Between the second and third intervals in HE 10, the real-time MCP suddenly jumped from $57.44/MWh to $192.58/MWh and then continued to move up to $652.33/MWh in interval 12. The MCP was back to $67/MWh by interval 1 of HE 11.

Table 2-7: Pre-dispatch and Real-Time Prices, July 17, 2007, HE 10 and HE 11 ($/MWh)

Delivery Hour	Interval	PD MCP	RT MCP	Difference
10	**1**	60.01	57.25	-2.76
10	**2**	60.01	57.44	-2.57
10	**3**	60.01	192.58	132.57
10	**4**	60.01	226.2	166.19
10	**5**	60.01	226.43	166.42
10	**6**	60.01	226.43	166.42
10	**7**	60.01	226.44	166.43
10	**8**	60.01	226.43	166.42
10	**9**	60.01	245.22	185.21
10	**10**	60.01	350.12	290.11
10	**11**	60.01	569.95	509.94
10	**12**	60.01	652.33	592.32
Average		**60.01**	**271.40**	**211.39**
11	**1**	61.00	66.79	5.79
11	**2**	61.00	72.15	11.15
11	**3**	61.00	72.15	11.15
11	**4**	61.00	72.15	11.15
11	**5**	61.00	74.25	13.25
11	**6**	61.00	72.15	11.15
11	**7**	61.00	72.15	11.15
11	**8**	61.00	94.05	33.05
11	**9**	61.00	94.05	33.05
11	**10**	61.00	94.05	33.05
11	**11**	61.00	94.05	33.05
11	**12**	61.00	94.05	33.05
Average		**61.00**	**81.00**	**20.00**

Day-ahead Conditions

Demand was expected to be normal day-ahead with a peak demand of 20,255 MW in HE 17. The peak demand for HE 10 was forecast at 18,964 MW. The DACP scheduled 15 fossil units (with a total capacity of 5,460 MW) online for peak hours. There were no imports scheduled as Ontario generation was sufficient and more economic.

Final Pre-dispatch Conditions

In the final pre-dispatch run, the forecast hour-ahead demand for HE 10 was 19,024 MW, with a projected price of $60.01/MWh. There were 2,404 MW of exports and 295 MW of imports scheduled. The pre-dispatch schedule indicated that approximately 1,700 MW

was being offered between $61/MWh and $652/MWh. The majority of these offers were from peaking hydro units which were scheduled to supply 960 MW of OR, implying the remaining 840 MW of offers was available for energy. The pre-dispatch supply cushion was 6.6 percent.

Real-time Conditions

Real-time demand came in heavier than expected. The average demand in HE 10 was 19,185 MW and the peak demand in the hour which occurred in interval 12 was 19,464 MW, or 440 MW (2.3 percent) greater than had been expected one hour earlier.

Starting in interval 3, three fossil-fired generators were de-rated due either to technical problems or to environmental concerns. This resulted in a loss of up to 360 MW of inframarginal supply.

Another unit that had been scheduled for 88 MW in pre-dispatch failed to show up in real-time. The reason this occurred is that this unit was unintentionally offered at a low price two hours ahead and it was picked up by the pre-dispatch sequence although it was not ready for synchronization. The unit owner subsequently took all necessary actions to communicate with the IESO, and there was no breach of Market Rules.

As well, 50 MW of exports failed on the Michigan interface due to a missing E-tag, which partially offset the effect of lost supply and increased demand.

The effect of these losses in supply was to reduce the real-time supply cushion to -0.5 percent.

Assessment

The price spike was due to an under-forecast of demand (440 MW) combined with a series of deratings of typically inframarginal generators (360 MW). The real-time market thus required up to 890 MW from peaking units to fill the gap. There were no control actions that distorted the market price.

The MCP in HE 11 interval 1 dropped to $66.79/MWh, which is in a sharp contrast to the $652.33/MWh MCP in the previous interval. The collapse of the MCP was primarily due to the synchronization of the fossil-fired generator which had failed to show up earlier. The effect of the 12 times ramp rate assumption was to treat this unit as if it had ramped up almost to full capacity in the unconstrained sequence as soon as it was synchronized. This sudden, large and artificial increase in inframarginal supply instantaneously suppressed the MCP.

In addition to the synchronization of the coal-fired generator, the IESO activated 400 MW of OR for intervals 1 and 2 of HE 11 as the Area Control Error (ACE) was near -400 MW.[56] The activation of OR led to a reduction of 400 MW in the OR requirement, which further added a downward pressure on the MCP.

2.1.4 October 24, 2007 HE 18

The HOEP reached $297.52/MWh in HE 18, with a maximum MCP of $622.79/MWh. The projected one-hour ahead price was only $60.87/MWh.

Table 2-8 below lists the interval MCPs and the pre-dispatch prices in HE 18. In the first three intervals, the MCP was quickly decreasing from $104.72/MWh to $69.98/MWh, which is a typical pricing pattern for this hour since the implementation of 3 times ramp rate. The MCP stayed at $100-$200/MWh for four intervals in the middle of the hour, and then suddenly jumped above $430/MWh from interval 8 onwards.

[56] ACE is the instantaneous difference between actual and scheduled interchange, taking into account the effect of frequency bias. The IESO typically re-dispatches generators to restore the ACE. If the IESO feels that the re-dispatching cannot solve the issue (usually when a negative ACE is greater than 200 MW), it may activate operating reserve.

Table 2-8: Real-Time and One Hour Ahead Pre-dispatch Prices, October 24, 2007, HE 18 and HE 19 ($/MWh)

Delivery Hour	Interval	Real-time MCP	One-Hour Ahead Pre-dispatch Price	Difference
18	**1**	104.72	60.87	43.85
18	**2**	94.72	60.87	33.85
18	**3**	69.98	60.87	9.11
18	**4**	110.36	60.87	49.49
18	**5**	126.90	60.87	66.03
18	**6**	142.66	60.87	81.79
18	**7**	190.30	60.87	129.43
18	**8**	430.00	60.87	369.13
18	**9**	530.00	60.87	469.13
18	**10**	622.79	60.87	561.92
18	**11**	525.05	60.87	464.18
18	**12**	622.79	60.87	561.92
19	**1**	115.48	99.00	16.48
19	**2**	68.66	99.00	-30.34
19	**3**	61.12	99.00	-37.88
19	**4**	61.12	99.00	-37.88
19	**5**	61.12	99.00	-37.88
19	**6**	61.12	99.00	-37.88
19	**7**	65.86	99.00	-33.14
19	**8**	68.66	99.00	-30.34
19	**9**	68.66	99.00	-30.34
19	**10**	59.54	99.00	-39.46
19	**11**	61.12	99.00	-37.88
19	**12**	59.54	99.00	-39.46

The real-time MCP in HE 19 fell to about $60/MWh after the first interval and the HOEP was only $67.67/MWh.

Pre-dispatch Conditions

In pre-dispatch, the forecast one hour ahead peak demand was 18,456 MW, with a projected price of $60.87/MWh. There were 1,777 MW of exports and 1,800 MW of imports scheduled, implying the Ontario market was very liquid for the hour. The pre-dispatch supply indicated that approximately 900 MW were being offered between $61/MWh and $622/MWh by domestic generators. The majority of these offers were from peaking hydro units. They were scheduled to supply about 300 MW of OR,

implying that the remaining 600 MW was available for energy. The pre-dispatch supply cushion was 5.5 percent.

Real-time Conditions

Real-time demand came in almost the same as expected. The average demand in HE 18 was 18,229 MW and the peak demand in the hour occurred in interval 10 was 18,520 MW, or only 60 MW (0.3 percent) greater than expected one hour earlier. The real-time supply cushion was only -2.2 percent, however, implying CAOR was used to provide operating reserve. CAOR set the OR prices for most intervals in the hour.

Assessment

The price spike was driven almost entirely by an error in the offers of a gas-fired generator. The generator was shut down in the middle of HE 16 as scheduled. At the time it was shut down its operator intended to remove the offers that had been made for HE 17 and 18 in the offer/bid window. These offers were not, in fact, removed and the DSO picked them up in the final pre-dispatch run and dispatched the generator in both the constrained and unconstrained sequences and in both hours.

In real-time, however, the generator involved could not be dispatched as its breakers were open. The DSO thus had to turn to more other expensive internal generators along the offer stack. At the same time, the few coal-fired generators online were in the middle of ramping down and could not ramp back up fast enough to offset the absence of the gas-fired generator.

To add to an already tight situation, 100 MW of imports from MISO failed due to ramp rate limitations in Michigan. The real-time supply cushion was reduced to -2.2 percent as a result of the unavailability of the gas-fired generator, the ramping down of several coal-fired units and the 100 MW import failure. As a consequence, the real-time HOEP spiked to $297.25/MWh.

The MAU ran a simulation of assuming the offers of the gas-fired generator had been properly dealt with. The comparison of the simulation results is listed in Table 2-9. Had the offers been correctly removed, the DSO would have scheduled 2,033 MW of imports and 1,633 MW of exports in the pre-dispatch sequence for HE 18, with a pre-dispatch price at $85/MWh. The additional imports (233 MW) would have come from Quebec, and the reduced exports (144 MW) would have been on the New York interface. That is, the pre-dispatch sequence would have scheduled 377 MW more in net imports. If all those additional net imports were available in real-time, the HOEP would have been $82.22/MWh, or $211.86/MWh lower than the 'actual' HOEP.

We understand that the error in the offers for HE 17 and HE 18 is under investigation by the IESO's Compliance Unit for a possible breach of the Market Rules.

Table 2-9: Net Imports and 'Actual' and Simulated Prices, July 17, 2007 HE 18 (MWh and $/MWh)

Delivery Hour	Interval	Simulated 'Actual'			Simulated			MCP Difference (Simulated-Actual)
		RT MCP ($/MWh)	PD Price ($/MWh)	Net Import (MWh)	RT MCP ($/MWh)	PD Price ($/MWh)	Net Import (MWh)	
18	**1**	104.72	60.87	23	33.45	85.00	400	-71.27
18	**2**	94.72	60.87	23	33.77	85.00	400	-60.95
18	**3**	69.98	60.87	23	33.77	85.00	400	-36.21
18	**4**	110.36	60.87	23	34.70	85.00	400	-75.66
18	**5**	120.48	60.87	23	35.64	85.00	400	-84.84
18	**6**	142.66	60.87	23	65.85	85.00	400	-76.81
18	**7**	190.30	60.87	23	65.85	85.00	400	-124.45
18	**8**	400.00	60.87	23	131.90	85.00	400	-268.10
18	**9**	525.05	60.87	23	134.44	85.00	400	-390.61
18	**10**	622.79	60.87	23	142.66	85.00	400	-480.13
18	**11**	525.05	60.87	23	131.90	85.00	400	-393.15
18	**12**	622.79	60.87	23	142.66	85.00	400	-480.13
Average		**294.07**	**60.87**	**23**	**82.22**	**85.00**	**400**	**-211.86**

2.1.5 Uplift Greater than HOEP

There were three hours in 2007 in which the uplift was greater than the HOEP: May 12 HE 3, September 16 HE 3, and September 18 HE 1. These events all took place during

the overnight hours where HOEP tends to be lower. For two of the events uplift was not large, rather HOEP was quite low.

On May 12 HE 3, the relatively high uplift ($6.36/MWh) was due to a large constrained-off payment to a dispatchable load, which was subsequently reversed by the IESO as the constrained-off was induced by the load itself. The IESO practice is to calculate the CMSC hourly based on real-time unconstrained and constrained schedules. But at the end of each month, the IESO may recover those payments to dispatchable loads if they are induced by participants themselves. The HOEP was $5.72/MWh, because the Ontario demand was only 12,393 MW and there was a lot of baseload supply.

On September 16 HE 3, the uplift charge of $1.08/MWh was in the normal range, but the HOEP was only $0.39/MWh because the Ontario demand was as low as 12,000 MW and failed exports to New York were 1,071 MW.

On September 18 HE 1, the HOEP was negative with an uplift charge $2.12/MWh. We will discuss the negative priced hour in the next section.

None of these hours raise any concerns regarding the operation of the market.

2.2 Analysis of Low-priced Hours

A 'low-priced hour' is arbitrarily defined for monitoring purposes as any hour in which the HOEP was less than $20/MWh. As Table 2-10 below indicates, there were 331 hours during the period May - October 2007 for which the HOEP was less than $20/MWh. During the same months a year earlier, there were 149 low priced hours. The lowest HOEP in the review period, -$0.40/MWh, occurred on September 18, 2007 in HE 1 and was the only negative HOEP in the period. Section 2.2.1 reviews this hour.

Table 2-10: Number of Hours with HOEP Less $20/MWh, May 2002 – October 2007 (Number of Hours and Percentage of Total Hours)

Time Period	HOEP < $20/MWh		HOEP < $0/MWh
	Number of Hours	% of Total Hours	Number of Hours
May 2002 to October 2002	162	3.7	0
May 2003 to October 2003	78	1.8	0
May 2004 to October 2004	314	7.1	0
May 2005 to October 2005	52	1.2	0
May 2006 to October 2006	149	3.4	1
May 2007 to October 2007	331	7.5	1

The MAU has found that, in general, a HOEP below $20/MWh occurs in hours when one or both of the following occurs:

- Ontario demand is less than 15,000 MW. This typically occurs in the overnight hours, on holidays or during the spring/fall seasons.

- Normal baseload supply is augmented by the supply from a number of hydroelectric facilities that are usually 'run-of-river' facilities, which have an abundance of water. This occurs most frequently during the freshet period such as in April, May and June but it can occur at other times.

While these are the primary factors that contribute to a HOEP being less than $20/MWh, demand forecast errors and failed export transactions can also place significant downward pressure on the HOEP, resulting in HOEP being much lower than pre-dispatch.

Occurrences of Low Priced Hours May – October 2007

The MAU's review of these low priced hours between May – October 2007 indicates that they were mainly a result of low Ontario demand in combination with failed exports and over-forecasts of demand. When real-time demand is as low as 13,000 MW, baseload generation may be sufficient to meet it, leading to very low prices.

Table 2-11 summarises the average key data on low-price hours by month and Table A-51 in the Statistical Appendix has detailed hourly statistics on these hours.

Table 2-11: Key Data (Monthly Average) for Low Priced Hours, May – October 2007 (MW and $/MWh)

Delivery Month	Failed Net Exports (MW)	Real-time Demand (MW)	Pre-dispatch Demand (MW)	Demand Over-forecast (MW)	HOEP $/MWh	Pre-dispatch Price $/MWh	Difference (RT-Pre-dispatch) $/MWh
May	199	13,151	13,323	172	11.80	19.23	-7.43
June	124	13,596	13,903	307	13.06	19.29	-6.23
July	107	13,236	13,519	283	12.57	20.19	-7.62
August	158	13,196	13,524	328	10.14	21.10	-10.96
September	256	12,822	12,952	130	9.95	22.41	-12.46
October	261	12,818	13,111	293	9.96	24.77	-14.81
Average	181	13,176	13,407	231	11.68	20.50	-8.82

2.2.1 September 18, 2007 HE 1

The HOEP in this hour was -$0.40/MWh. Table 2-12 below lists the real-time MCPs and the pre-dispatch prices for the hour. The MCP reached a low of - $ 4.06/MWh in interval 12.

Table 2-12: MCP Prices by Interval, September 18, 2007, HE 1, ($/MWh)

Delivery Hour	Interval	RT MCP	PD Price	Difference (RT-PD)
1	**1**	-0.1	25.35	-25.45
1	**2**	-0.1	25.35	-25.45
1	**3**	1.0	25.35	-24.35
1	**4**	0.0	25.35	-25.35
1	**5**	-0.1	25.35	-25.45
1	**6**	-0.1	25.35	-25.45
1	**7**	-0.1	25.35	-25.45
1	**8**	-0.2	25.35	-25.55
1	**9**	-0.2	25.35	-25.55
1	**10**	-0.4	25.35	-25.75
1	**11**	-0.4	25.35	-25.75
1	**12**	-4.06	25.35	-29.41
Average		-0.40	25.35	-25.75

Pre-dispatch Market Conditions

The pre-dispatch peak demand for HE 1 was forecast at 13,812 MW with a projected price at $25.35/MWh. There were 1,637 MW of offers at prices between -$0.40/MWh and $25.35/MWh, of which about 1,200 MW were offered by baseload hydro generators who were also providing a significant amount of OR. The pre-dispatch total supply cushion was 44.3 percent.

Real-time Market Conditions

The real-time demand for the hour averaged 13,420 MW, with a peak demand of 13,564 MW which is 248 MW (or 1.8 percent) less than forecast hour-ahead. Failed exports amounted to 731 MW, all of which were under the control of the market participants involved and thus subject to an automatic settlement charge.[57] Self-scheduling and intermittent generators also produced 140 MW more than was projected, which put further downward pressure on the real-time price. These three factors caused the HOEP to drop to -$0.40/MWh. The real-time total supply cushion slipped slightly to 40.4 percent, as a few fossil-fired units were either shutting or ramping down to their minimum loading point, which tended to reduce the real-time supply cushion.

Assessment

The MCPs were set by a run-of-the-river hydro unit which received a fixed contract price of $33/MWh for its output. For this generator, offering a negative price minimizes the possibility of spilling water and ensures that the unit is likely to be scheduled and receive its contract price.

The Global Adjustment for the hour was $3.52/MWh, and the OPG Rebate $1.76/MWh. The net result is that consumers paid or will pay $1.36/MWh, although the wholesale price was -$0.40/MWh. Exporters were actually paid $0.40/MWh for the 815 MW which was exported.

[57] Exporters paid a real-time failure charge of about $16,909 (about $32/MWh) for these failed exports.

The negative HOEP was the result of 1119 MW of net change from pre-dispatch arising from the following sources:

- 731 MW of failed exports
- 248 MW lower than expected Ontario demand
- 140 MW of self-scheduler production in excess of forecast

The over-forecast of demand led to an additional 217 MW of imports being purchased from Michigan. These imports were offered at $25/MWh, slightly below the pre-dispatch price of $25.35/MWh, and were guaranteed a RT-IOG payment of $5,512. These imports were not required in real-time, but because imports accepted in pre-dispatch are put at the bottom of the supply stack in real-time, this had the effect of suppressing the HOEP. As we suggested in our previous report, it would be useful for the IESO to review the costs and benefits of the IOGs in off-peak hours.[58]

The large amount of failed exports on the Michigan interface had a run-on effect of suppressing the HOEP in the following hour as well. The Net Interchange Scheduling Limit ('NISL', which is preset at 700 MW) was binding for HE 2 as a result of the export failure in HE 1, which limited the maximum amount of net exports in HE 2. Had the NISL not been binding, a greater market demand in HE 2 and thus a higher real-time price would have resulted.

Although the binding NISL was a direct consequence of the export failure in the previous hour, the limitation of exports could have been relaxed if a high NISL were applied. As we indicated in our previous report, it would be useful for the IESO to review whether the default NISL setting of 700 MW could be raised.[59]

The majority of the energy in HE 1 was provided by baseload, self-scheduling and intermittent generators. Apparently some self-scheduling and intermittent generators were induced online by their fixed-price NUG contracts. Because most of these

[58] See our July 2007 Report, pp. 124-127, Recommendation 3-4.
[59] See our July 2007 Report, pp.97-100, Recommendation 2-2.

generators are paid a fixed price based on their actual output, they may generate power when the HOEP is lower than their incremental cost and thus displace more economic resources.

Fossil generators being online overnight were mainly driven by economics as they can avoid a restart-up during the load pick-up period in later hours by staying at their minimum level; some fossil units were in the middle of ramping down to their minimum.

The low price was further depressed by the over-generation of self scheduling and intermittent generators. The vast majority of the over-generation was from a wind generator that was projected to produce only 60 MW, but actually generated 178 MW. As more and more wind-power generators come online in future, the forecast error from these generators will have a significant impact on both market efficiency (and system reliability). The Panel will continue to monitor these new resources for their impact on efficiency.

Page Left Blank Intentionally

Chapter 3: Matters to Report in the Ontario Electricity Marketplace

1. *Introduction*

This Chapter summarises changes in the marketplace since our last report. It also updates the status and analyses of issues raised in previous reports as well as discussing new issues that have arisen during the review period.

Section 2 identifies material changes that have occurred in the market since our last report as well as providing additional analysis of matters raised in earlier reports:

- the replacement of the twelve times ramp rate assumption with a three times ramp rate assumption in the unconstrained pricing sequence;
- the implementation of a further 50 MW tranche of regionally shared Operating Reserve;
- the causes of the observed convergence of the Richview (nodal) price with the HOEP;
- an event that illustrates an inefficiency of the OPA's demand response program Phase I;
- the Lambton phase shifter (PARs) issue that was identified in our December 2005 report.

Previous Panel reports have identified market participants' concerns with regard to dispatch issues and described some of the measures the IESO has undertaken to address these issues. In the past, there has been discussion of the possibility of moving from hourly to 15 minute dispatch as a further remedial measure. In section 3 the Panel discusses some of the possible efficiency gains that may be obtained from 15 minute dispatch.

In section 4, we comment on some new issues. First, there are some CMSC payments made for legal, regulatory and environmental reasons that are probably unwarranted. Second, there are instances of Intertie Offer Guarantee (IOG)

payments that would not be made if the IOG excluded implied wheeling by affiliated entities just as excludes implied wheeling by a single market participant. Finally, the Panel examines the efficiency implications of the various public agency contracts that have been struck with the advent of the hybrid market and provides guidance on contract structures that could promote efficiency.

2. *Material Changes to the Marketplace since the Previous Report*

2.1 Reduction in the Ramp Rate Multiplier in the Unconstrained Sequence

In previous reports, we have described how the unconstrained sequence (i.e. the market schedule) derives dispatch schedules and the corresponding energy prices based on the assumptions that generation can ramp at twelve times its actual capability as specified in its offer and that potential transmission limits are not binding.[60] The Panel has noted how this has led to market prices that are inconsistent with actual generator capabilities and dispatches leading to inefficiencies in the marketplace. The Panel has previously recommended using the actual (one times) ramp in the market schedule.[61]

In January 2007 the IESO approved a Market Rule change to be implemented in February 2007 which specified that the ramp multiplier should be reduced from twelve to three times.[62] Challenge to this rule change by the Association of Major Power Consumers of Ontario (AMPCO) at the OEB was unsuccessful[63] and a subsequent appeal to the Divisional Court was abandoned. As a result, the IESO implemented the three times ramp multiplier in the market (real-time) schedule on September 12, 2007. With only 49 days of market data available during this reporting period, it is difficult to attribute any changes in market prices or in market participants' behaviour to the change in the ramp rate multiplier. We have asked the

[60] For details, see our December 2003 monitoring report (page 112) and December 2004 report (page 63).
[61] See our December 2003 report, page 112.
[62] Market Rule Amendment MR – 00331, see: www.ieso.ca
[63] See OEB order EB-2007-0040 dated April 10, 2007.

MAU to continue monitoring the matter and report to us when more data are available.

In this section, we provide some initial observations. Figure 3-1 below depicts the normalized MCP – the ratio of the interval MCP to the HOEP for the hour -- for the period September 12 to October 31, 2007 and for the same period in 2006. This index shows how the MCP can deviate from its associated HOEP: the further away the index is from unity, the more divergent is the MCP from the associated HOEP. We chose 2006 as the representative benchmark period as it is similar in structure to earlier years.[64] It appears that the divergence between the MCP and the associated HOEP has increased since the implementation of the three times ramp rate multiplier and that this divergence is more prominent in the evening hours. For example, from HE 21 to 24, the MCP in the first interval is much higher relative to the HOEP while in subsequent intervals it is lower.[65]

[64] We also looked at the same period in 2003 to 2005. Except in 2005, the index shows essentially the same pattern and magnitude as in 2006. The highly volatile MCP in 2005 was likely induced by the dry weather which significantly reduced the availability of water and thus the system had relied more on fossil units that have a much slower ramp rate than hydro units.

[65] Although it is difficult to see because of the scale used in Figure 3-1, the high points for each of HE 21-24 are in the first intervals. Figure 3-2 also shows the dramatic price changes between interval 12 and interval 1 for these same hours.

Figure 3-1: Average Interval MCP Relative to Average HOEP by Hour, September 12 - October 31, 2006 and 2007

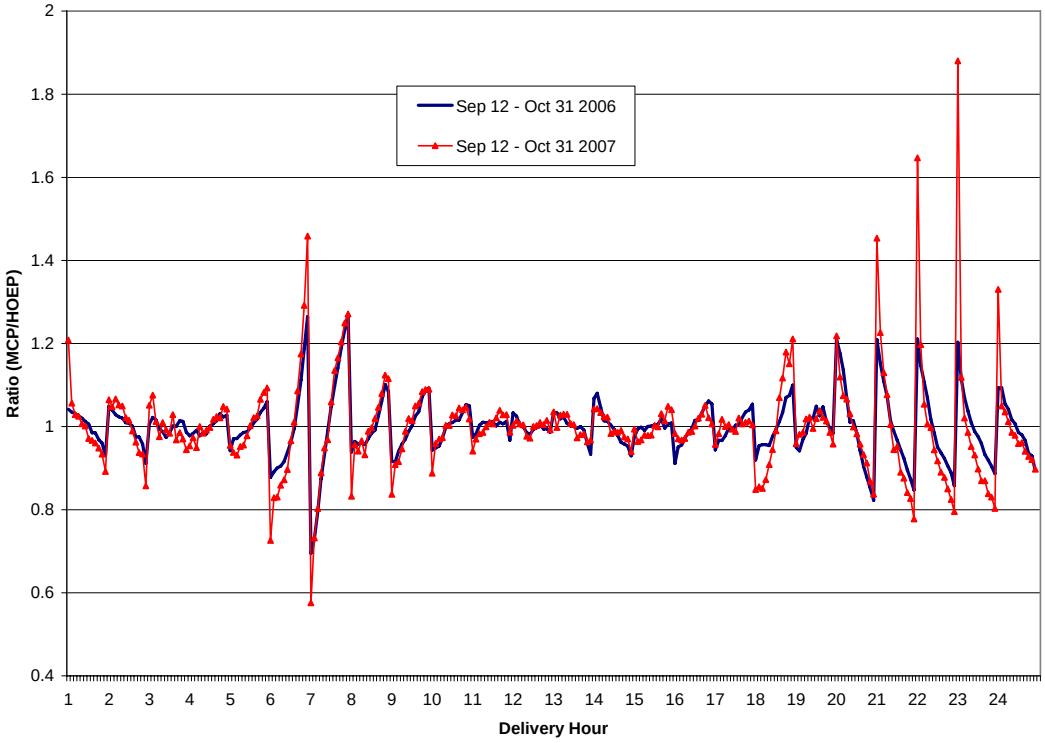


Table 3-1 below lists summary statistics for the pre-dispatch and real-time MCPs for the periods we are comparing. Presumably, the pre-dispatch MCP (which is an hourly price) is not directly affected by the change in the assumed ramp rate for real-time. Real-time MCP (rather than HOEP) is used as it is most likely affected by the change in ramp rate multiplier. A comparison of the two prices should provide important information on how the change in the ramp rate multiplier has affected the real-time price. To measure the volatility of these prices we use the coefficient of variation (COV), which is the standard deviation divided by the average for a set of observations. To check for changes in volatility, we do before-and-after comparisons of the respective COVs of the pre-dispatch and real-time MCPs and before-and-after comparisons of the respective COVs of the absolute hour-to-hour changes in the pre-dispatch and real-time MCPs. It appears that both the MCP and the change in MCP have been somewhat more volatile since the implementation of

the three times ramp rate multiplier. For example, the coefficient of variation of the real-time MCP for 2007 was 0.54, in contrast to 0.41 for 2006 (or a 32 percent increase). The average absolute interval-to-interval change in the real-time MCP was $3.67/MWh for 2007 versus $1.86/MWh for the same 49 days in 2006 (or a 5 percent increase). In contrast to the increase in the real-time price volatility, the COV of the pre-dispatch price has increased only by 14 percent and the volatility of absolute change in the pre-dispatch price by 4 percent.

Table 3-1: Summary Statistics: Pre-dispatch & Real-time, September 12 – October 31, 2006 and 2007

	PD MCP		Absolute Change in PD MCP		RT MCP		Absolute Change in RT MCP	
	2006	2007	2006	2007	2006	2007	2006	2007
Average $/MWh	44.32	53.98	4.96	6.46	39.09	46.83	1.86	3.67
Standard Deviation $/MWh	15.31	21.55	5.65	7.63	15.99	25.19	4.67	9.67
Coefficient of Variation (COV)	0.35	0.40	1.14	1.18	0.41	0.54	2.51	2.63
Percentage Changes in COV %		14		4		32		5

Along with a more volatile real-time price in 2007, the average real-time MCP (equivalent to an average HOEP) also increased from $39.09/MWh to $46.83/MWh, or by $7.74/MWh. The Panel believes that this price difference was driven largely by fundamentals of supply and demand in the marketplace. In fact, the pre-dispatch price also increased from $44.32/MWh to $53.98/MWh, or by $9.66/MWh, more than the increase in the real-time price. One can also see from Chapter 1 that the Ontario price was closely following the trend of the prices in external markets.

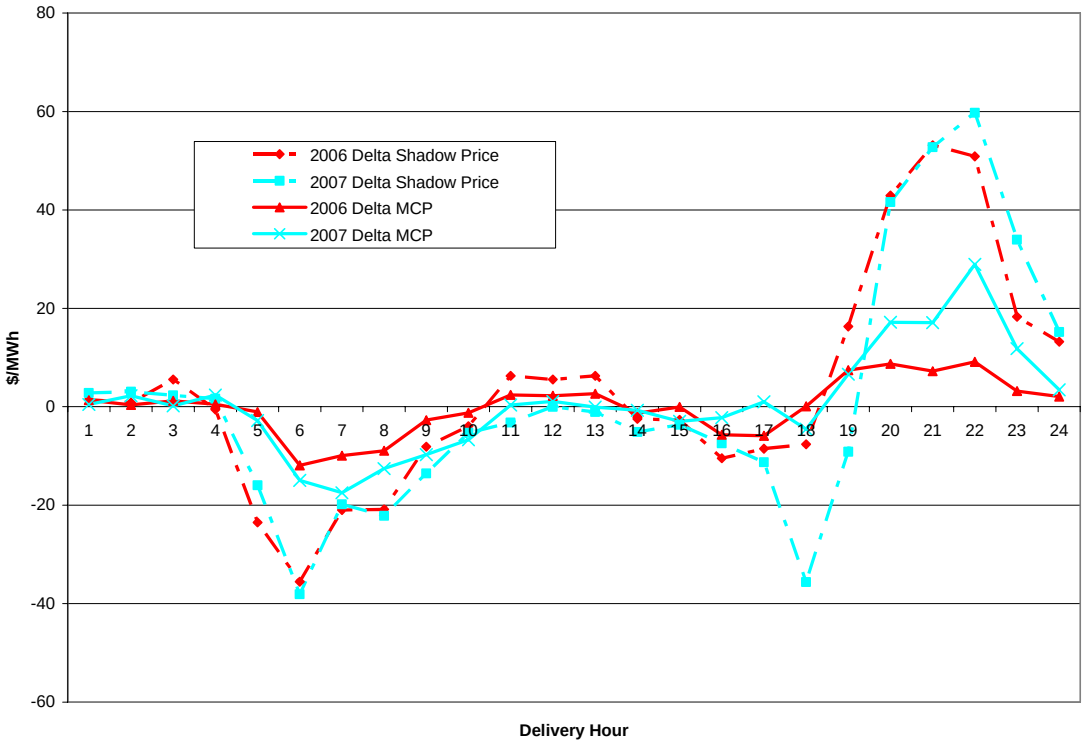
As shown in Figure 3-1 above, the most obvious change in interval to interval prices appears to be occurring between interval 1 of a given hour and interval 12 of the preceding hour. Between these two intervals (in other words, between the two adjacent hours), market supply and demand conditions can differ sharply as peaking hydroelectric generators and importers and exporters enter or exit the market on the

hour as load grows in the morning and as it declines in the evening.[66] The sudden change in the supply/demand balance on the hour requires fossil generators to ramp down quickly at the beginning of each hour in the morning to accommodate the sudden arrival of imports and peaking hydro and/or the sudden departure of exports, and to ramp up quickly at the beginning of each hour in the evening. As a result, the interval MCP at the beginning of the hour can be noticeably less than the MCP at the end of the previous hour in the morning with the reverse being true of the evening. The use of three times ramp rate multiplier rather than twelve times ramp rate multiplier in the market schedule further amplifies the effect on the MCP of the sudden change in the supply/demand balance on the hour. This comes closer to accurate price signals, although there is still a fictitious assumption that such changes occur three times faster than the actual capability.

Figure 3-2 below provides a comparison of the price change from interval 12 to interval 1 for both the unconstrained and constrained sequences. The price for the constrained sequence is the Richview shadow price. What is apparent is that the reduction of the assumed ramp rate multiplier from twelve to three in the unconstrained sequence has tended to bring the interval price pattern in the unconstrained sequence more into line with the constrained sequence which uses the actual ramp rate.

[66] This is explained in greater detail in section 3.1, our review of dispatch volatility.

Figure 3-2: Average Changes in Prices between Intervals 12 and 1, Unconstrained and Constrained (Richview) Sequences, September 12 - October 31, 2006/2007



2.2 A Further 50 MW of Regional Operating Reserve is Introduced to the Ontario Market

On January 4, 2006 the Northeast Power Coordinating Council (NPCC)[67] authorised a Regional Reserve Sharing Program (RRS) for up to 50 MW of reserve energy for up to 60 minutes. The IESO implemented the RRS program on January 4, 2006 and

[67] NPCC, following the rules and standard of the NERC, develops regionally-specific reliability criteria and standards. NPCC includes New York State, the six New England States, and the Ontario, Québec, and the Maritime Provinces.

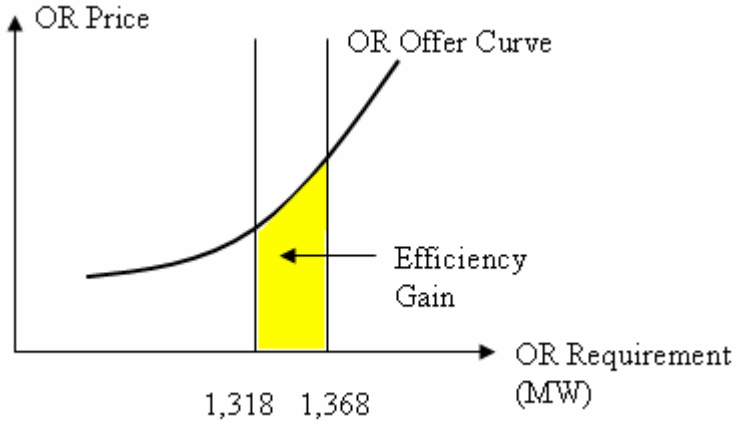
correspondingly lowered its reserve requirements from a normal level of 1418 MW to 1368 MW.[68] We commented on this development in our May 2006 report.

On April 27, 2007, the NPCC approved a further 50 MW of regional reserve sharing. On May 17, 2007, the IESO implemented this second tranche of 50 MW of RRS, lowering its normal reserve requirements further down to 1318 MW. The Panel welcomes developments, such as the reserve sharing program, that allow the IESO to maintain the same system reliability standard at a lower cost. The reduction in the value of the resources required to maintain reliability represents an efficiency gain. An estimate of the magnitude of this efficiency gain is reported below.

To estimate the efficiency gain resulting from the reduction in the OR requirement from 1,368 MW to 1,318 MW, the MAU ran a simulation for the period since the reduction, assuming the 50 MW OR reduction had not occurred.[69] Table 3-2 below shows the estimated efficiency gains and price effect by month. Everything being equal, the energy price would have been $0.07/MWh higher than the current price and the OR prices $0.14/MWh to $0.17/MWh higher. The efficiency gain is equal to the cost of the additional OR that would have been required if the OR

[68] Market Rule Amendment MR 00299, see www.ieso.ca

[69] The simulation mimics the unconstrained sequence and ignores all constraints that exist in the constrained sequence. As a result, the estimated efficiency gains may understate the true efficiency gains in the constrained sequence. The estimated efficiency gain is essentially the avoided cost of providing the 50 MW of OR, which is the shaded (yellow) area in the



following graph.

Note, due to the joint optimization of the DSO, there may be efficiency gains on the energy side as well even though there is no change in energy demand, although the gains may be very small. The efficiency gains reported in Table 3-2 are the total cost savings in both the energy and OR markets, as derived from the reported total costs in the simulations.

requirement had not been reduced. The total efficiency gain amounted to $119,000 for less than six months, with a relatively large gain in the freshet period (usually from May to July) when hydro units are typically supplying energy and hence are unavailable to provide Operating Reserve. In this period, the OR price tends to be higher. In other words, the efficiency gain is highly related to the OR prices, especially the 10 minute non-spinning reserve price, as one might have expected.

Table 3-2: Estimated Efficiency Gains 50 MW Regional Reserve Sharing by Month, May to October 2007

	Price Change Had the OR Requirement not Been Reduced ($/MWh)				Efficiency Gains $ (000)
	Energy	10S	10N	30R	
May-07*	0.05	-0.04	0.05	0.09	7
07-Jun	0.06	0.09	0.15	0.15	24
07-Jul	0.13	0.39	0.39	0.38	42
07-Aug	0.05	0.1	0.1	0.09	15
07-Sep	0.03	0.09	0.1	0.09	14
07-Oct	0.03	0.13	0.14	0.13	17
Total					119
Average	0.07	0.14	0.16	0.17	

*from May 17 to 31

During this period, the total 100 MW RRS has been used to offset total 10 minute and total OR requirements (reducing the need for non-spin OR resources). The Panel is aware that the IESO had been considering shifting the OR reduction discussed above to offset 10 minute spinning reserve as well. To support that discussion the IESO undertook a study based on the same methodology as we have used here which concluded that the cost saving to the market could amount to $20,000 per year.[70] We support this further initiative. It is to be implemented early in 2008.[71]

[70] See "Drafted Cost-Benefit Analysis" for Market Rule Amendment MR-00332, presented to the Technical Panel on July 24, 2007. available at: http://www.ieso.ca/imoweb/amendments/tp_meetings.asp

[71] The IESO Board of Directors approved the rule amendment on September 7, 2007, and the new rule came into effect on December 12, 2007 (IESO's "Participant News" dated September 13, 2007). The new OR requirement will take effect in early 2008 when the IESO completes all necessary tool changes.

2.3 The Convergence of the Uniform Price and the Richview Shadow Price

Factors Affecting Convergence

As the Panel has observed on numerous occasions, the uniform price regime in the Ontario market results in some inefficiencies.[72] A manifestation of this is the gap between the HOEP, which is the base price (prior to uplifts) that loads pay and generators receive in the spot market, and the incremental cost of providing energy to meet the last MW of demand which the Panel has traditionally viewed as being represented by the Richview nodal price (also referred to as the 'Richview shadow price' or 'Richview price').[73]

A convergence between the HOEP and the Richview price could be taken to imply that there has been a reduction in the inefficiencies associated with the uniform pricing regime. This depends on the reason for the convergence. One possibility is that the sources of bias or inefficiency in the HOEP have been reduced and this has brought it closer to the Richview price. Another possibility is that there may be biases in the Richview price that have brought it closer to the HOEP. In the latter case, convergence would not imply an efficiency improvement. In this section we attempt to address this question with an analysis of the causes of the observed convergence of the HOEP and the Richview price.

Over the years since market opening, the Panel has made various recommendations and the IESO has taken numerous steps to remove sources of bias in both the HOEP and in nodal prices including the Richview price. The reforms that have been introduced include:

1. Adding up to 800MW of CAOR for Operating Reserve and thus eliminating the IESO's control actions of reducing reserve requirements and suppressing the HOEP during shortage conditions;

[72] See especially our December 2006 and July 2007 monitoring reports.
[73] Richview is generally representative of the incremental cost, although there would be regional variations based on local supply and demand conditions relative to grid constraints. Richview is close to the major load centre in Ontario, and from Table 1-21 in Chapter 1 it can be seen that this price is close to zonal prices in much of Southern Ontario, especially the Toronto zonal price. For a further explanation, see also the Panel's monitoring report, Dec 2006, p. 91.

2. Reducing demand forecast errors;
3. Reducing transaction failures by imposing the Intertie Failure Charges;
4. Working with self-scheduling and intermittent generators to reduce their forecast errors;
5. Not subtracting emergency energy purchases from the market demand and adding an equivalent amount of demand reduction from voltage reduction to the market demand, thus reducing counter-intuitive price impacts during scarcity conditions;
6. Introducing the MIO (Multi-Interval Optimization) in the constrained sequence and thus removing some inefficiently high shadow prices; and
7. Lowering the ramp rate multiplier in the unconstrained sequence from 12 to 3.

Table 3-3 below summarizes our assessment of the effect of the above actions on either the Richview shadow price or the HOEP, or both. In brief, the changes in procedures regarding emergency energy purchases and voltage reductions have improved the fidelity of the HOEP, the implementation of MIO has led to a more efficient Richview shadow price, and other changes have improved both price signals.

Table 3-3: Effect of Actions on Quality of Price Signals

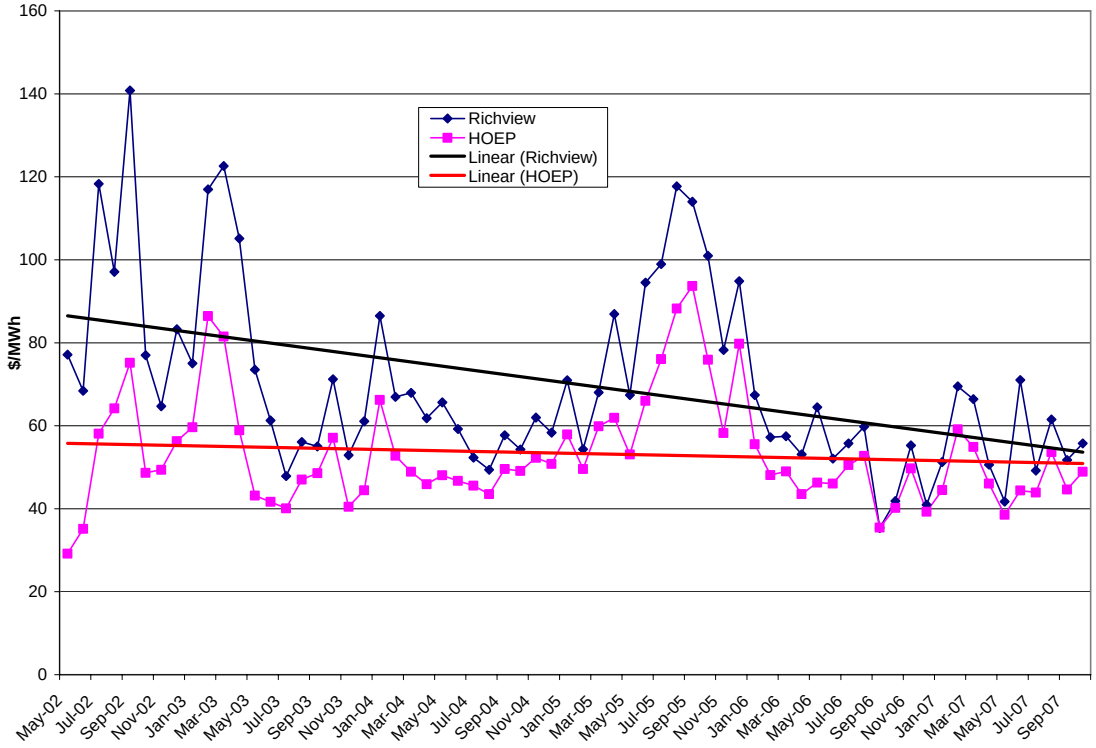
Action	Date Introduced	Richview Price	HOEP
CAOR	Aug. 2003 (400 MW), Aug. 2005 (+400 MW)	Improved	Improved
Reduced Forecast Error	On-going	Improved	Improved
Intertie Failure Charge	June 2006	Improved	Improved
Self-Scheduling Error Reduced	On-going	Improved	Improved
Emergency Energy & Voltage Reduction Added to Market Demand	Aug. 2005	None	Improved
MIO	June 2004	Improved	None
3 Times Ramp Rate	Sept. 2007	None	Improved

As well, the market has experienced improved supply conditions as shown by the increase in the supply cushion since market opening (see the data in Chapter 1). An implication of the increase in the supply cushion is that the market is operating on the flatter portion of the offer curve in both the constrained and unconstrained schedules and this should have the effect of reducing the gap between the Richview (constrained) price and the (unconstrained) HOEP.

Convergence Trend

Possibly as a result of the reforms introduced by the IESO and the increase in the supply cushion, the Richview nodal price and the HOEP have been converging. This is illustrated in Figure 3-3 below.

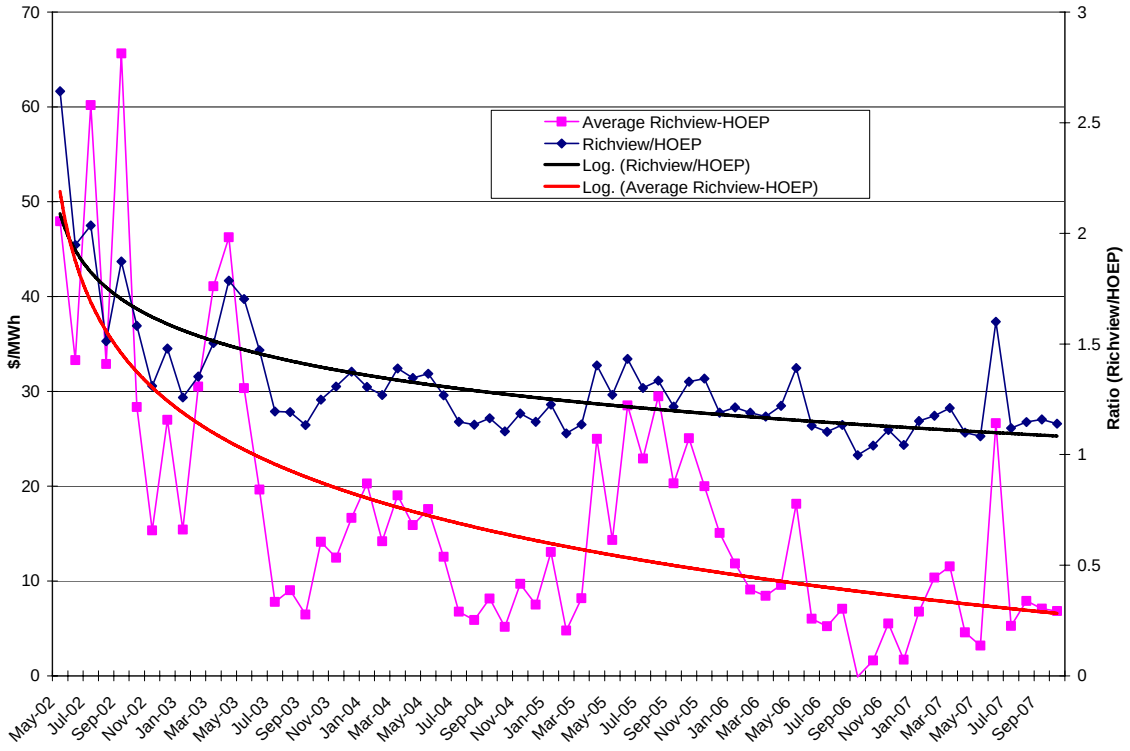
Figure 3-3: Monthly Average HOEP and Richview Shadow Price, May 2002 – October 2007



Convergence is also apparent in Figure 3-4 below which depicts both the monthly average difference between the Richview price and the HOEP, and the ratio of the Richview price to the HOEP.[74] Both the price gap and the ratio have decreased over time. The conclusion that the Richview price and the HOEP have converged is also supported by statistical analysis.[75]

[74] Like the HOEP, the Richview price is capped between $2,000 and -$2,000. Blackout period (from August 14 to 21) was excluded.
[75] Statistical (unit root) tests support this conclusion. The test model is the Augmented Dickey-Fuller test, which is detailed in our December 2004 report (page 68-69). This test is updated in this report.

Figure 3-4: Monthly Average Difference between the Richview Nodal Price & the HOEP, May 2002-October 2007



One interpretation of the convergence of the HOEP and the Richview price is that the artificial gap between the HOEP and the cost of producing power is smaller, thus reducing the inefficiencies resulting from the use of the HOEP as the market price. Another interpretation is that if the Richview price has been pushed down toward the HOEP by system operator control actions, the narrowing of the gap may not indicate any efficiency improvement in the market. In essence, convergence may be due to the HOEP becoming a more efficient price or Richview becoming a less efficient price or both. The purpose of the analysis reported below is to determine the major causes of the convergence of the HOEP with the Richview price.

In our December 2006 report, we identified some factors that could lead to the Richview price being lower than the HOEP. The factors identified in that report

included demand forecast error, constrained off (net) exports, and the high minimum loading point of manually constrained on generation.

In this report we include two of these with other potentially important factors and undertake an econometric analysis to estimate their respective effects. The factors considered are:

- Transmission congestion from the northwest;
- Demand forecast error;
- Manually constrained on generation;
- Constrained off (net) exports; and
- Changes in the real-time supply cushion.

Transmission Congestion from the Northwest

The constrained sequence takes account of all transmission limits internal to Ontario and at the interties with other systems. In contrast, internal transmission limits are ignored in the unconstrained sequence. The most important source of transmission congestion is from the northwest area of Ontario to southern Ontario. Northwestern Ontario normally tends to have excess capacity that is bottled in the area due to transmission limitations. This bottled capacity is treated as being available to the market in the unconstrained schedule thereby imparting a downward bias to the HOEP. Any easing of transmission congestion or reduction in supply in the northwest would reduce this downward bias.

Figure 3-5 plots the total number of hours with significant transmission congestion between the northwest, northeast and all other zones and the Richview bus. A few large generators in each zone are chosen for purposes of this calculation, and the transmission is considered to be congested if the Richview price is at least 20 percent higher than the loss-adjusted average nodal price.[76] It can be seen that most

[76] The difference between the Richview price and a reference price at a node can be decomposed into two components – a loss and a congestion component. A detailed decomposition technique is demonstrated in the Panel's December 2006 report. The 20 percent price difference threshold is intended to distinguish incidents of significant congestion.

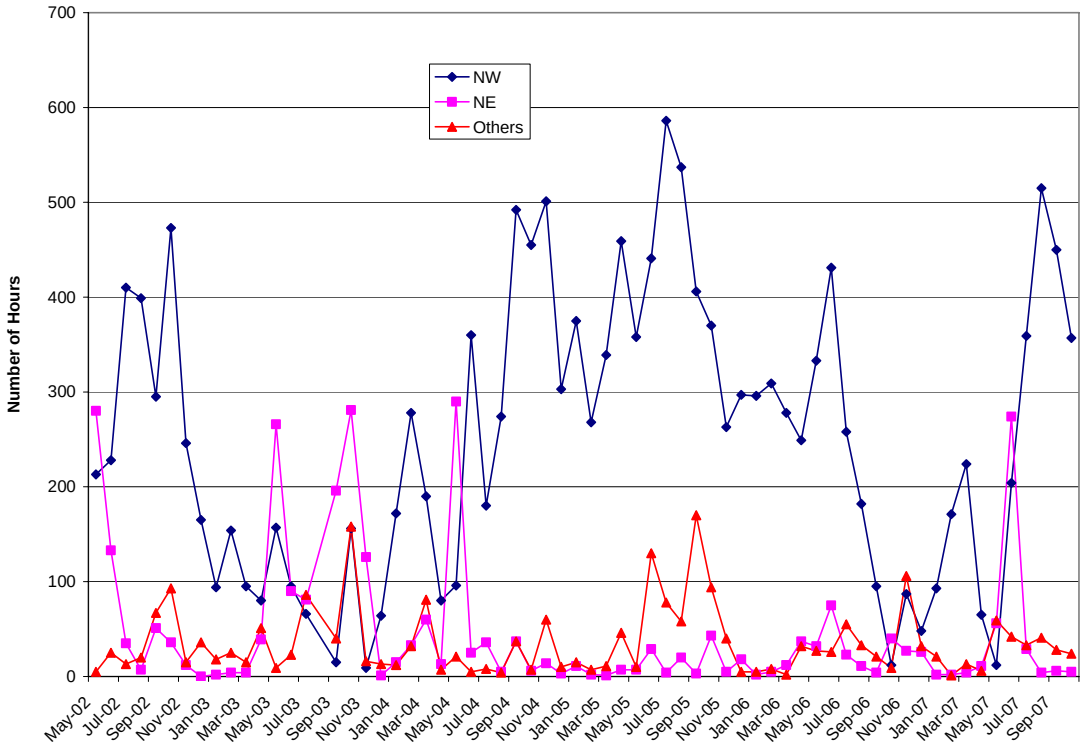
congestion occurs on the tie from the northwest area to the south. Although such congestion has been decreasing since the summer of 2005, it increased again in July to October 2007. The main reasons for the decrease in congestion before July 2007 are:

- fossil-fuelled generation in the northwest was staying off-line much more frequently; and
- there was less rainfall and thus less water available for hydro stations in the northwest to produce energy.

The increase in congestion in July to October 2007 was coincident with the increased availability of water in northwest.

In essence, between the summer of 2005 and June 2007, there was a reduction in the amount of bottled generation in the northwest, implying less phantom generation in the unconstrained schedule and therefore a reduction in the downward bias of the HOEP.

Figure 3-5: Number of Hours per Month with Significant Congestion from Various Zones to the Richview Bus, May 2002 - October 2007



Demand Forecast Error

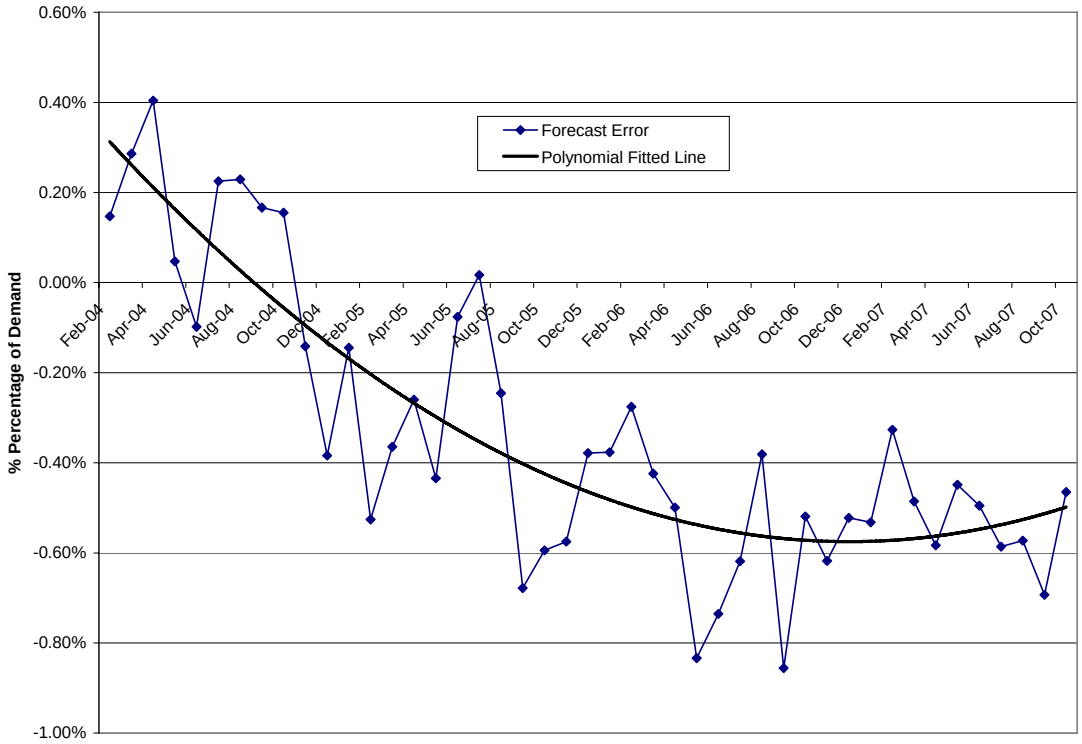
The constrained sequence uses a ten-minute-ahead demand forecast, while the unconstrained sequence uses actual demand (plus adjustments when certain control actions such as voltage reductions have been taken).

Figure 3-6 plots the monthly deviation between the forecast demand used for calculating the Richview shadow price and the adjusted actual demand used for calculating the MCP and the HOEP.[77] The data are available from February 2004 onward. It is apparent that demand was increasingly under-forecast from late 2004 through late 2006 but the discrepancy between forecast and actual demand has been

[77] The demand forecast for calculating the shadow price is an average demand while the demand for calculating the MCP is a snap shot demand at the time when the unconstrained sequence runs. The demand used for the MCP calculation may be adjusted if there is a voltage reduction.

roughly stable since late 2006. The under-forecast of demand in the constrained sequence biases the Richview price (and all other nodal prices) downward.

Figure 3-6: Demand Forecast Error, February 2004 – October 2007



It appears that the demand was persistently under-forecast since early 2005. In our July 2007 report, the Panel noticed that the consumption deviation of dispatchable load can be a source of forecast error because the IESO's forecast model counts the deviation as a portion of forecast demand of non-dispatchable load.[78, 79] We have asked the MAU to continue monitoring the forecast error.

Recommendation 3-1:

Consistent with prior recommendations directed at improving the IESO load predictor, whose algorithm imputes changes in non-dispatchable load that can induce consumption inefficiency and

[78] MSP monitoring report, July 2007, pp. 100-106
[79] To a minor degree historically but more so in future, there are other causes of forecast errors including RESOP projects that are located behind the LDC meters and proposed CESOP projects, as will be discussed in section 4.4 of this Chapter.

forecast errors, the Panel recommends that the IESO review its load predictor methodology to determine if it is a source of persistent under-forecasting of demand.

Manually Constrained On Generation

Generation is said to be manually constrained on when it is constrained on by the IESO control room rather than by the dispatch algorithm. When generation is constrained on manually, the additional supply involved is added to the bottom of the constrained offer stack, shifting it to the right. This lowers the nodal prices, including the Richview price. Manually constrained on generation is not included in the market (unconstrained) schedule and it does not affect the HOEP.

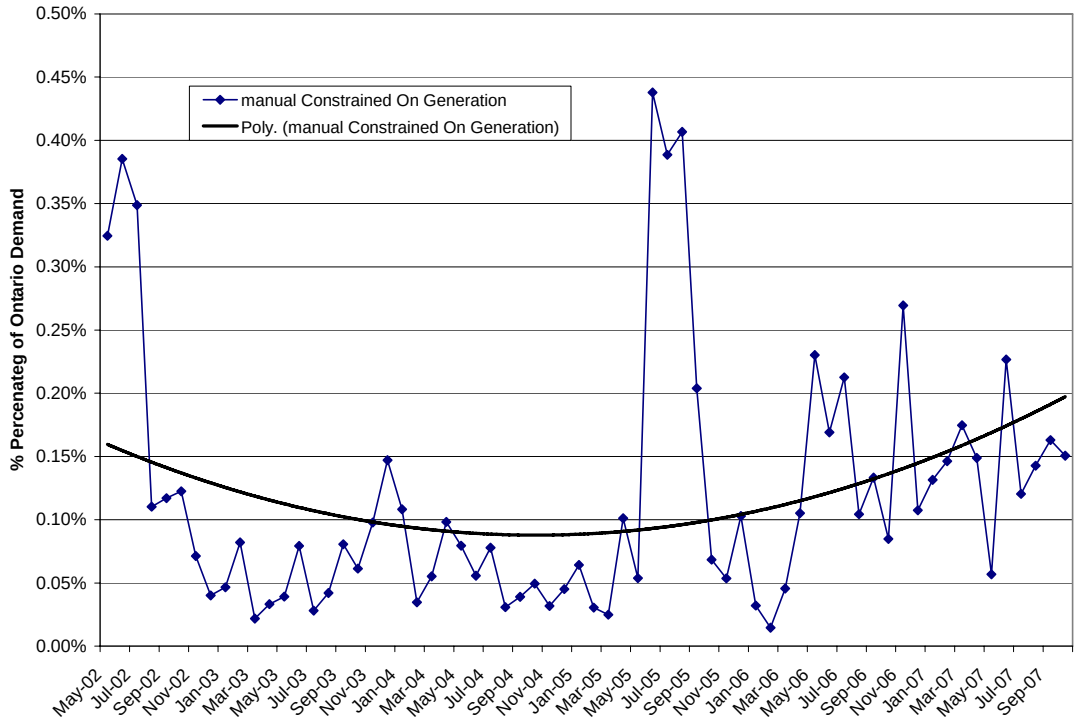
Fossil generation is constrained on manually for a variety of reasons. First, fossil units have a minimum run-time (MRT). At times, in order to keep a unit online for the required period, the IESO must manually constrain it on during hours when it is not otherwise selected based on its offer prices. A second reason is that a fossil generator usually has a minimum loading point (MLP). The unit cannot operate stably at output levels below the MLP without shutting-down. At times, in order to keep the unit on-line the IESO must constrain it on to the MLP during hours where it is not selected based on its offers. A third reason is fossil generators have a long lead time in order to start. If the IESO expects the market will not solve its reliability concerns in future hours, it may constrain a generator on even if the unit is offering above the relevant nodal price.

The IESO use of manually constrained on generation has increased over the last couple of years with the addition of new gas-fired generation facilities. This type of generation has a long MRT and a high MLP. For example, for a 500 MW coal-fired generator the MLP is in the order of 20 percent of its capacity (100 MW) while for a similar sized gas-fired generator the MLP is 75 percent of its capacity (375 MW). If the IESO constrains on a gas-fired generator, this generator is forced to produce at a fixed level or a minimum level regardless of its offer price. In other words, the

DSO puts this constrained energy at the bottom of the supply stack when it calculates the nodal price, which is equivalent to a rightward shift in the offer curve. An observation is that due to the physical characteristics of this gas-fired generation this high variable cost generation is being treated as if it were low variable cost generation. This lowers the Richview price when measured against the HOEP. This downward trend may have increased over time because of the increase in the MLP and MRT of the generation fleet and also because the introduction of programs such as SGOL and DACP increases the frequency with which generation is manually constrained on.

Figure 3-7 plots monthly total constrained on energy due to manual actions relative to the total Ontario demand. One can see that the IESO has been increasing its use of manual actions, which tends to lower the Richview price in relation to the HOEP. The marked increase in manually constrained on generation in 2006 coincides with the inception of the DACP.

Figure 3-7: Manually Constrained on Energy Relative to the Ontario Demand, May 2002 – October 2007

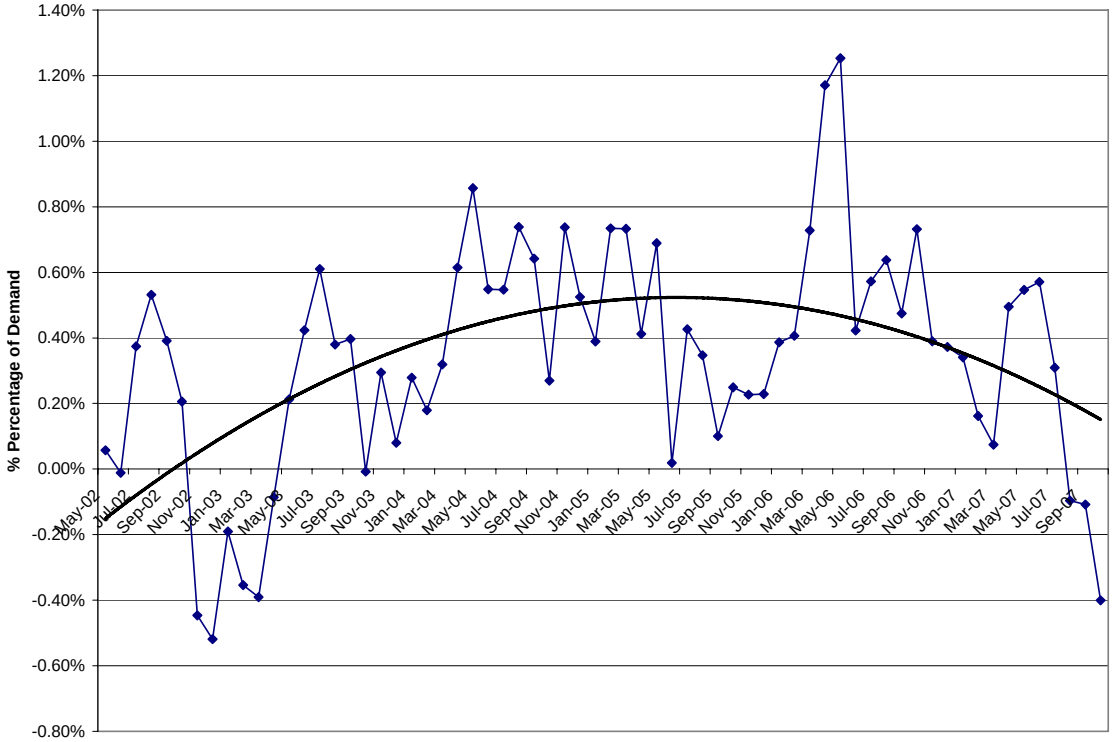


Constrained off Net Exports

With the improved domestic supply/demand balance, Ontario has become a net exporter (as can be seen from the data in Chapter 1). The major export markets are New York and Michigan. The export capability of the interfaces with these markets is partially a function of what is called Lake Erie Circulation (LEC or loop flow). Loop flow has the effect of reducing transmission capacity on the interties, but can also reduce the availability of transmission within Ontario even more, with the result that some exports that cannot be supported by internal transmission are still scheduled in the unconstrained sequence. These exports in the unconstrained schedule but not in the constrained sequence are constrained off exports. Constrained off exports appear in the unconstrained (market) schedule with the result that this demand is overstated and the HOEP is biased upwards.

Figure 3-8 below plots monthly total constrained off (net) exports. A positive number indicates that there are more (net) exports in the unconstrained sequence than in the constrained sequence, implying a higher demand in the unconstrained sequence and thus a higher HOEP. Constrained off exports increased relative to total demand until mid-2006 after which they have been decreasing. With more constrained off exports HOEP is thus higher relative to the Richview shadow price, while fewer constrained-off exports reduce HOEP relative to the Richview shadow price. The generally increasing level of constrained-off net exports should have had an effect of narrowing the gap between the Richview price and the HOEP, since HOEP was lower to start with and it moves upward relative to the shadow prices, because of the higher relative demand. The more recent reduction in the level of constrained-off exports tends to remove some phantom demand in the unconstrained sequence and thus bring down the HOEP relative to shadow prices, widening the gap between the Richview and the HOEP.

Figure 3-8: Monthly Constrained off Net Exports, May 2002 – October 2007



Real-Time Domestic Supply Cushion

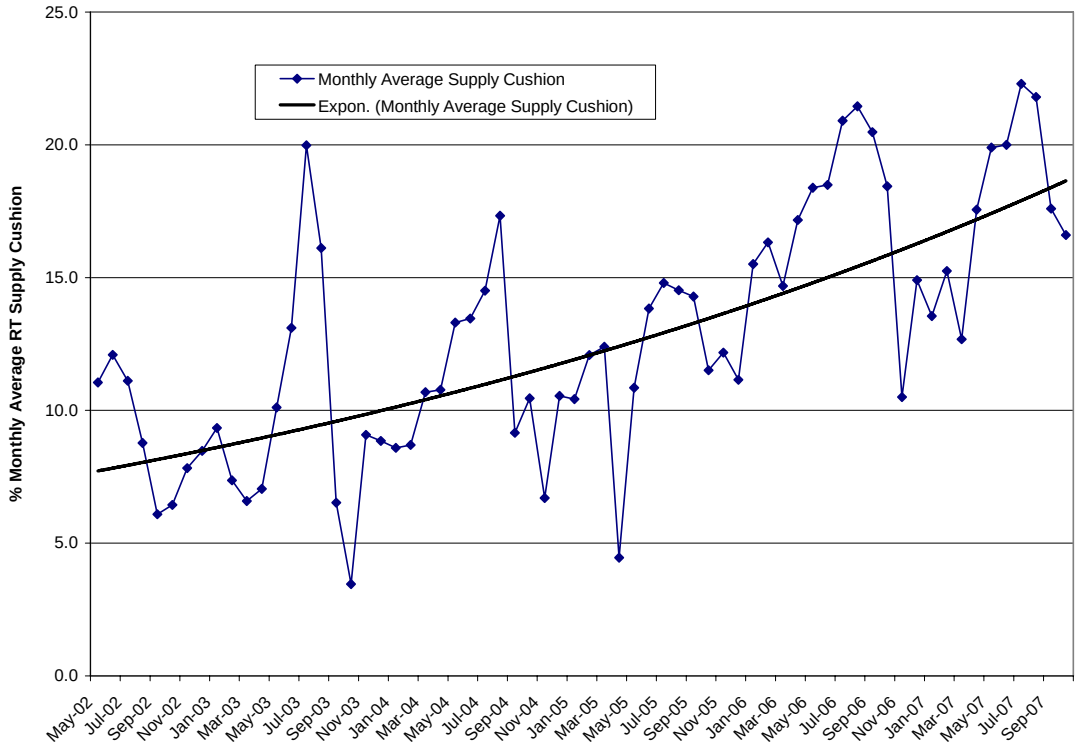
The real-time domestic supply cushion is an indicator of the demand and supply balance in real-time.[80] As noted in Chapter 1, the supply cushion measures the excess of available generating capacity over total demand (energy plus the OR requirement).[81] A bigger supply cushion implies a greater ability to respond to demand or supply disturbances in both the constrained and unconstrained sequences. This tends to not only smooth price spikes in both sequences, but also to narrow the gap between the Richview price and the HOEP because a spike in the HOEP is often associated with a proportionately greater spike in the Richview price due to transmission constraints.

Figure 3-9 below charts the monthly average domestic supply cushion from May 2002 to October 2007. It is apparent that the supply cushion has been increasing over time, implying an improved supply/demand balance. This would have helped to reduce the gap between the Richview shadow price and the HOEP.

[80] To see how the Panel constructs the supply cushion, refer to our April 2007 report, page 79-82.

[81] Note the supply cushion does not include the offers from a fossil generator that is offline. Therefore an increased supply cushion can be a result of either improved fundamentals of supply/demand condition, or simply fossil generators that stay online more frequently and/or for a longer period of time. As the Panel noted in its April 2007 report, the SGOL and DACP programs may have induced some gas-fired generators to stay online longer or come online more frequently than required and thus improved the supply cushion.

Figure 3-9: Average Monthly Real-Time Domestic Supply Cushion, May 2002 - October 2007



Relative Effects of the Factors Contributing to Convergence: An Econometric Decomposition

The Panel have been working with the MAU (supported by the IESO) on an econometric model of the difference between the Richview nodal price and HOEP to help explain the price convergence we have noted over the past few years. The technique used is an Oaxaca decomposition, which can provide insights on how much the price gap has changed as result of changes in the explanatory variables, as well as the sensitivity of the price gap to these variables from one year to the next. Appendix 3.1 at the end of this Chapter provides the details on this decomposition technique and its results.

The decomposition allows year-to-year comparisons. For illustration simplicity, we only report and compare 2004 with 2007 results, for off-peak and on-peak. 2004 was chosen as the earliest date with sufficiently full and accurate data. The

decomposition employed the five explanatory variables discussed earlier in this section.

In the off-peak period, the gap between the Richview price and the HOEP narrowed by $2.66/MWh (from $7.70/MWh in 2004 to $5.04/MWh in 2007). The decomposition analysis shows that, to the extent that variation in the price gap can be explained by the selected variables, the narrowing of the Richview nodal price and HOEP gap between 2004 and 2007 is largely attributable to the supply cushion variable and, to a lesser degree, the demand forecast error variable. The increase in the supply cushion reduced the amount by which HOEP was lower than the Richview price, while increasing the under-forecast of demand in the constrained schedule suppressed the Richview price. The improved supply cushion implies a reduction in the price difference of between $3.48/MWh and $7.39/MWh, and the increased demand under-forecast by between $0.49/MWh and $4.18/MWh.

In the on-peak period, the price gap narrowed by $2.3/MWh, from $16.34/MWh in 2004 to $14.00/MWh in 2007. The improved supply cushion and increasing demand under-forecast were the most important explanatory variables leading to the change although the importance of each is less certain than for the off-peak analysis because of the smaller identified effects in 2004. The supply cushion reduced the gap by between $2.60/MWh and 4.63/MWh, and the demand under-forecast by between $0 and $15.14/MWh.

However, the on-peak model also shows a very large change, $15.49/MWh, in the constant terms between the two years. This implies that some other important factors were not captured by the model, which appears to have had an effect of increasing the difference in the two prices. The change may also indicate that a linear structural model is not adequate for representing the underlying process.

The possibility that other important factors have been omitted or that the structure of the model is not sufficiently accurate is also demonstrated (in the Appendix) by

large changes in the coefficients of many of the variables between 2004 and 2007. Changes in these coefficients combined with the changes in the constant term imply almost as large changes in the Richview nodal price and HOEP difference as the explanatory variables themselves.

In both the off-peak and on-peak analyses, the other variables (congestion between the northwest and the south, manually constrained on generation, and constrained-off net exports) had limited effect on the gap between the two prices in the two comparable years.

The optimization processes which determine the Richview nodal price and HOEP are complex and non-linear, and thus the effects of the factors studied above on the price convergence should be complex and non-linear. The large difference in the marginal effects due to coefficient changes from year-to-year suggests that either the linear approximation is not a good approach for modeling this non-linear process, or parameters not modeled have significantly changed and affected the prices and price differences.

This econometric decomposition, although not perfect, does provide some insights, for example that of the factors considered, the improved supply cushion and demand under-forecast had the largest impact on the convergence of the two prices. However, our analysis shows that the determinants of the gap between the Richview price and the HOEP vary significantly over time.

2.4 An Inefficient Demand Response Event

In its December 2006 report, the Panel discussed the issue of demand response programs in the Ontario market. In the Panel's view, conservation should not mean simply using less electrical energy. Conservation is properly defined as efficient use and stewardship of resources in general.

The MAU observed an event in early November of 2007 that highlighted an inefficiency in one of the current demand response programs. The Panel felt it would be worthwhile including this event in this report rather than its normal reporting cycle of November 2007 to April 2008 which would be six months hence.

The Ontario Power Authority (OPA) implemented a Demand Response Program Phase I (DR1) on June 23, 2006, having about 270 MW registered capacity as of December 2006.[82] The maximum curtailment in a single hour to the end of 2006 was estimated as 140 MW.

The key components of DR1 are as follows:

1. The program requires eligible participants to have a demand response capability between 0.5 MW and 100 MW.
2. Each month, participants submit a strike price at which they are willing to curtail consumption. The strike price must be equal to or exceed the floor price provided by the OPA for the contract period. The floor price was $80/MWh for November 2007.[83]
3. If the IESO three-hour ahead price hits the strike price, a program participant may indicate to the OPA that it will reduce its consumption for that hour and up to two hours after the event.
4. The OPA will pay the participant an amount equal to the verified demand reduction times the strike price for each eligible hour. The verified demand reduction for an hour is measured against a baseline demand. The baseline demand is measured on an hourly basis as the average of the ten highest consumption levels for the given delivery hour in the past eleven days or through an alternative approach proposed by market participants and approved by the OPA.

[82] See "Review of Phase One of the Demand Response Program" by Price Watch House Cooper dated at March 30, 2007. www.powerauthority.on.ca/
[83] The OPA updates the floor price monthly on its website: www.powerauthority.on.ca

On November 7, 2007 a major north-south transmission line in the Northeast part of the province was out of service for planned maintenance, resulting in over 700 MW of hydroelectric generation being bottled in the zone. A DR1 load located in the Northeast (the congested zone), was activated by the load under OPA's Demand Response program in HE 18 to 23 of November 7, curtailing 50 MW of consumption.[84] In response to the reduction in the DR1 load in this congested area, the IESO had to constrain down an additional 50 MW of hydroelectric generation.

For HE 18, the three-hour ahead price, at $85.76/MWh, was above the OPA's published floor price of $80/MWh. That the DR1 load chose to activate the program implies that its contract price must be somewhere between $80/MWh and $85.76/MWh. The load notified the IESO at 16:45 (HE 17 Interval 9) after the final pre-dispatch schedule for HE 18. The load reduction lasted from hours 18 through 23, implying the DR activation was in effect in those hours. (Note that the three hour ahead prices for the six hours were all above $80/MWh, the OPA's floor price).[85]

Table 3-4 below lists the unconstrained prices, estimated shadow prices, as well as estimated efficiency losses and constrained off payments due to the activation of the DR1 load. Although the three-hour ahead pre-dispatch price in all six hours was above $80/MWh, the HOEP was well below $80/MWh except in HE 19. The shadow prices in the Northeast (Marginal Cost Column) are estimated as the IESO manually constrained down the units in the area due to the transmission outage and thus the shadow prices produced by the DSO are not an accurate indicator of the actual marginal production cost. Based on actual schedules and offer prices at the time, we estimated that the true shadow prices should be close to $3/MWh, which is well below the OPA's floor price. Given that the implied consumption value to the

[84] Market Manual 7.1 section 3.3.4 requires a wholesale load to notify the IESO if it is going to deviate from its routine consumption by more than 50 MW in north (north of ESSA in Barrie) or by more than 100 MW in the south (south of ESSA). A load, however, is not required to report the reasons for the deviation. The current case caught the Panel's attention as the consumers happened to notify the IESO that the load curtailment was due to the OPA's DR1.

[85] In general, the Panel has no information on whether or not a load curtailment is due to the OPA's DR program or the load's own consumption interruption. This information is strictly confidential between the OPA and the market participant. Based on the three-hour ahead prices and the load's consumption, we believe it reasonable to assume the consumption reduction in all these hours was due to DR1.

DR1 load is $160/MWh,[86] total efficiency loss (i.e. reduced consumption times the difference between the marginal value and marginal cost, $160/MWh and $3/MWh respectively) in these hours amounted to $48,000.

Table 3-4: Prices, Implied Value, and Efficiency Loss, November 7, 2007

	3 hr ahead price $/MWh	HOEP $/MWh	Marginal Cost in North $/MWh	Contract Price $/MWh	Implied Value to Consumer $/MWh	Efficiency Loss to Market $(000)	Constrained off to Hydro Unit $(000)
18	87.56	54.71	3	80	160	8	3
19	99.29	96.11	3	80	160	8	5
20	83.99	62.96	3	80	160	8	3
21	87.56	48.83	3	80	160	8	2
22	87.56	41.97	3	80	160	8	2
23	83.41	35.66	3	80	160	8	2
Total						48	17

In the six hours (from HE 18 to 23), we assume the DR1 load was paid $24,000 (50MW*$80/MWh*6hrs) for reducing consumption and the hydroelectric generator was paid a constrained off payment of about $17,000 for reducing production. These payments, totalling $41,000, are paid by other consumers.

Although the DR1 is structured to invite efficient bids (i.e. the strike price is intended to reflect the preferences of individual loads), inefficiency remains because the value of consumption foregone by loads is roughly twice the avoided cost of generation.

Given the implied value of consumption to a load, activation of a DR program is very likely inefficient. In the case of November 07, 2007, the activation led to an efficiency loss as high as $48,000, which is almost exactly equal to the lost value of

[86] The implied consumption value is equal to the HOEP the load avoided (projected to be $80/MWh) and the price it was paid (we assume $80/MWh). For the load to be willing to forego consumption, its profit when consuming (approximately Value – HOEP) must be no more than its profit not consuming (the payment it receives from OPA = Strike Price), or Value – HOEP = Strike Price. If a load has a higher strike price, its implied consumption value is higher, which is equal to twice its strike price, since the projected HOEP is approximately equal to its strike price..

consumption (because of the low incremental cost) and twice the payment to the load for its reduced consumption.

The case is a concrete illustration for market participants of our earlier comments in the December 2006 report:

> "If demand response programs are deemed to be required they should be designed so as to enable customers to: (i) curtail their consumption of a service (or have it curtailed on their behalf) when the value customers derive from the service is less than the incremental cost of providing it and; (ii) consume when the value they derive from the service exceeds the incremental cost of providing it. Incentive programmes that induce customers to curtail consumption at times when the value they derive from the service is greater than the incremental cost of providing do not conserve resources in the true sense of the word."[87]

In our analyses and comments the Panel focuses on the efficiency implications for the market, although in a broader context there may be other public policy goals relevant to the discussion of these programs.

2.5 The Effect of Phase Shifters on the Michigan Interface

In our December 2005 monitoring report, the Panel discussed an issue involving Phase Angle Regulators (PARs) between Ontario and Michigan: two at Ontario's Lambton Generating Station and one at ITC*Transmission*'s (ITC) Bunce Creek station in Michigan. PARs (commonly referred to as Phase Shifters), are specialized transformers which are designed to allow operators to control the amount of power flowing on an interface within certain limits. In this case the PARs, designed to allow control of up to 500 MW in either direction,[88] were intended to limit the inadvertent parallel flow (Loop Flow)[89] of power through Ontario between New York and Michigan (commonly referred to as 'Lake Erie Circulation' (LEC))

[87] See our December 2006 report at page 140.
[88] For example, if LEC was measured to be 700 MW, the PARs could reduce this parallel flow to 200 MW, thus enabling increased import or export transactions by allowing transmission capacity to be more usefully employed.
[89] Loop flows are discussed in more detail in our December 2006 monitoring report, pp 113 – 117.

and thus increase effective import/export capability on the Michigan and also the New York interfaces. High LEC can cause congestion on Ontario's transmission system which may affect market efficiency and also reliability.

During the Panel's 2005 monitoring activities, the MAU brought to our attention that there had been an upward trend in the number of hours in which import congestion occurred and a reduction in the average import capacity of about 400 MW at the Michigan interface. This coincided with and was the result of placing the Lambton PARs in service.

Several of the issues identified in our December 2005 Report have been resolved:

1. Hydro One has restored circuit B3N to service following successful re-negotiation of a right-of-way easement with the local First Nations band.

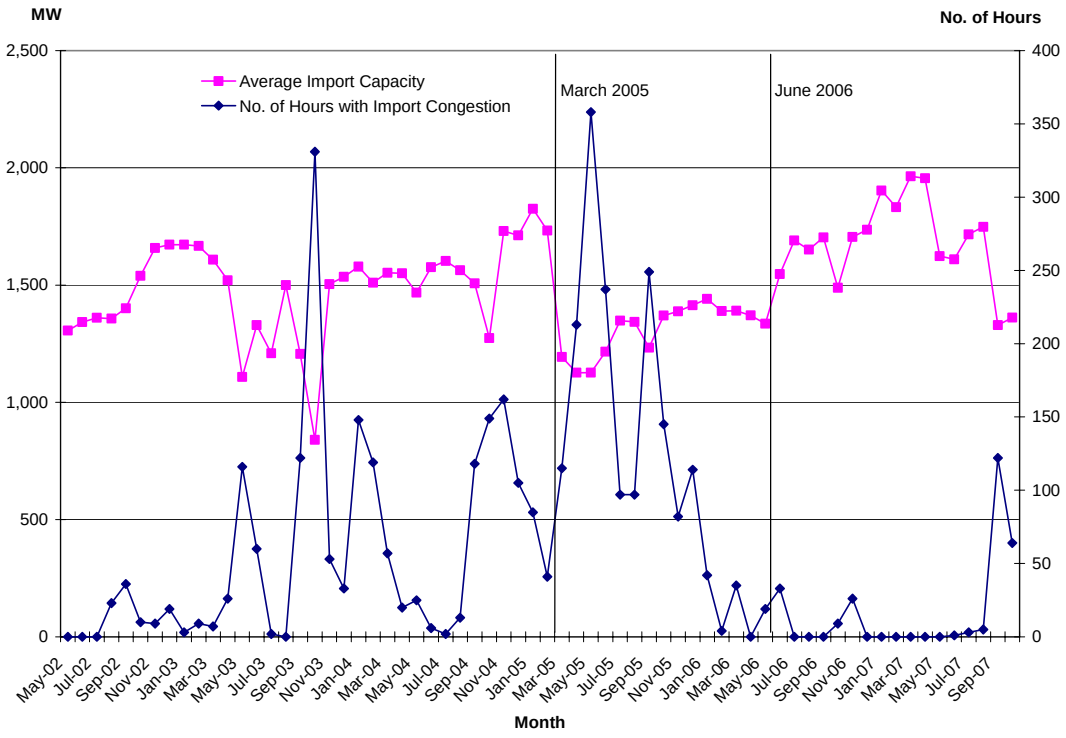
2. Once the above B3N issue was resolved, ITC ordered new PARs for this circuit and these are expected to be in-service in mid-2009.

3. Because the PARs limited import capability, the IESO and Hydro One worked together to bypass them in early June 2006 following Hydro One's confirmation that this was technically feasible and an operational procedure was developed to enable the PARs to be returned to service within 30 minutes in an emergency. The bypass restored interchange capacity to previous levels as shown in Figure 3.10.

   The lower import capability in September and October 2007 was due to a planned outage of transmission line L4D to facilitate system enhancements and expansion in Lambton area, particularly the connection of the new Sarnia Greenfield and St. Clair generators. This outage reduced the import capability by about 400 MW until the line was returned to service in mid November 2007.

4. Hydro One has signed an Interconnection Facilities Agreement (IFA) with ITC and the companies are developing a Standard Operating Procedure (SOP) which we understand is expected to be completed by year-end 2007. Hydro One advised the Panel that the SOP is expected to cover Limited Time Ratings (LTR) for all PARs at Lambton and Bunce Creek and to allow these PARs to be operated to control power flows as designed.

Figure 3-10: Monthly Average Import Capability and Number of Hours with Import Congestion on the Michigan Interface, May 2002 - October 2007



As noted in our earlier monitoring reports, the manufacturer of the PARs has provided Hydro One with Continuous Ratings and 15 minute Limited Time Ratings. This 15 minute LTR has little utility from an operations perspective due to MISO's inability to re-position their system to limit power flows within 15 minutes. NERC standards require the ISOs to be able to do so as soon as possible following a contingency, but within 30 minutes at the most. The 15 minute rating thus only indicates (from the manufacturers perspective) that a

higher than 'continuous' rating is feasible for the PARs for short periods in contingency situations.

Hydro One advised that it recognizes the importance of the PARs to enable efficient market operation and their contribution to reliability in both Ontario and Michigan. However, they are concerned about the risk to the equipment of extending operating ranges, particularly given the failures of all the original phase shifters as they were being commissioned into service. This concern has led to a conservative operating philosophy which is reflected in Hydro One's IFA with ITC. The IFA calls for a relatively wide 300 MW 'dead band' within which the tap changers[90] will be not be operated. This dead band will only be reduced based on operating experience.

Consistent with this concern, Hydro One has expressed its reluctance to modify any operating parameters until sufficient experience has been gained to verify the PARs' condition and performance under normal operating conditions. This will entail operating the PARs over both a reasonable period of time (likely a number of months) as well as under a variety of conditions including relatively heavy loading and substantial tap changer operations

Once this operating experience has been obtained, Hydro One is willing to undertake the necessary studies related to moving to a 30 minute LTR. Hydro One also indicated that it is waiting for IESO to complete its necessary agreements with the Michigan parties and indicate its readiness to terminate the previous interconnection agreement, and that all parties have trained staff in place to operate the PARs. The sooner these agreements are in place, the sooner this operating experience can be gained.

[90] Tap changers are the electro-mechanical devices that regulate the degree to which the PARs control power flows over the inter-connections.

The IESO has advised the Panel that it and Hydro One have agreed that a clear and unambiguous understanding of the terms of the IFA and SOP is required in their Operating Agreement. Therefore, IESO has placed a high priority on resolving outstanding issues and completing its agreements with Hydro One, ITC and MISO. These involve modifying an Operating Instruction with MISO, ensuring that the operating staffs of all four parties are trained in the intricacies of the revised interconnection and finally, terminating an old interconnection agreement with MISO's predecessors. The IESO expects that completion of these items will allow normal operation of the existing PARS by the end of the first quarter of 2008, i.e. ahead of next summer's peak period. When the B3N PAR is placed in service by ITC in mid-2009, control of Lake Erie Circulation will be fully operational and full import capability of about 2,500 MW realized over the Michigan ties. Also, even before the B3N Pars are in service, import capability will be enhanced with the Lambton PARs operational.

While we understand and respect Hydro One's concerns for the safety of the PARs, we continue to urge Hydro One to develop appropriate LTRs for these units as soon as possible. Hydro One has noted that the sooner that the IESO completes its necessary agreements with the Michigan parties and indicates its readiness to terminate the previous interconnection agreement, and that all parties have trained staff in place to actually operate the PARs, the sooner operating experience can be gained to allow determination of the feasibility of establishing a 30 minute LTR. Because the increased LEC has become a large issue to the system reliability and market efficiency, full functioning of these PARs will significantly reduce the loop-flow and bring a significant benefit to the Ontario and US markets.

Recommendation 3-2

(1) The IESO should expedite completion of the necessary agreements with Hydro One, the Midwest ISO and ITCTransmission for operation of the Phase Angle Regulators on the Michigan intertie. The IESO

(and Hydro One) should also complete necessary staff training as soon as possible. Any improvement on the spring 2008 target date would have positive efficiency (as well as reliability) effects on the Ontario (and Midwest ISO) system and any slippage would have the opposite effects.

(2) Hydro One should work towards developing ratings that will safeguard the Phase Angle Regulators and provide operationally useful Limited Time Ratings as soon as possible.

3. *New Matters*

3.1 Dispatch issues

Several previous Panel reports have discussed the issue of the volatility of dispatch instructions and over the past several years the IESO has undertaken measures to minimize the effect of this volatility on generators.

These IESO measures include:

1. an increase in the generator compliance dead band to 15 MW from 10 MW on May 8, 2006;
2. compliance aggregation for hydroelectric generators which allows substitution of production by a facility with a similar grid effect, June 7 2006;
3. replacement offers, August 19, 2006;
4. fossil units with symmetrical ramp rates,[91] Fall 2006; and
5. fossil units with non-symmetrical ramp rates, December 2007.

Many of these measures were discussed in the Panel's report of December 2006.[92] These measures are designed to reduce the inefficiencies associated with volatile

[91] Specified fossil units can substitute energy for each other, with certain restrictions, including the requirement that their ramping-up and ramping-down capabilities are the same (i.e. symmetrical) in corresponding production ranges.
[92] More detailed explanations can also be found on the IESO website at Stakeholder Engagement Plan 9 www.ieso.ca

dispatch both in the short-term (inefficient fuel conversion) as well as the longer term where volatility increases maintenance costs and outages.

These measures do not address the root causes of either dispatch volatility or interval to interval price volatility. Dispatch volatility arises as a result of:

.

1. interval to interval changes in the Ontario demand;
2. deviations by generators and dispatchable loads from their dispatch instructions (whether or not this constitutes non-compliance);
3. deratings and forced outages of generators;
4. deratings and forced outages of transmission facilities, changes in flow limits or externally-induced loop flows;
5. cross-hour changes in generator offers (especially by peaking hydro generators); and
6. cross-hour changes in import and export offers.

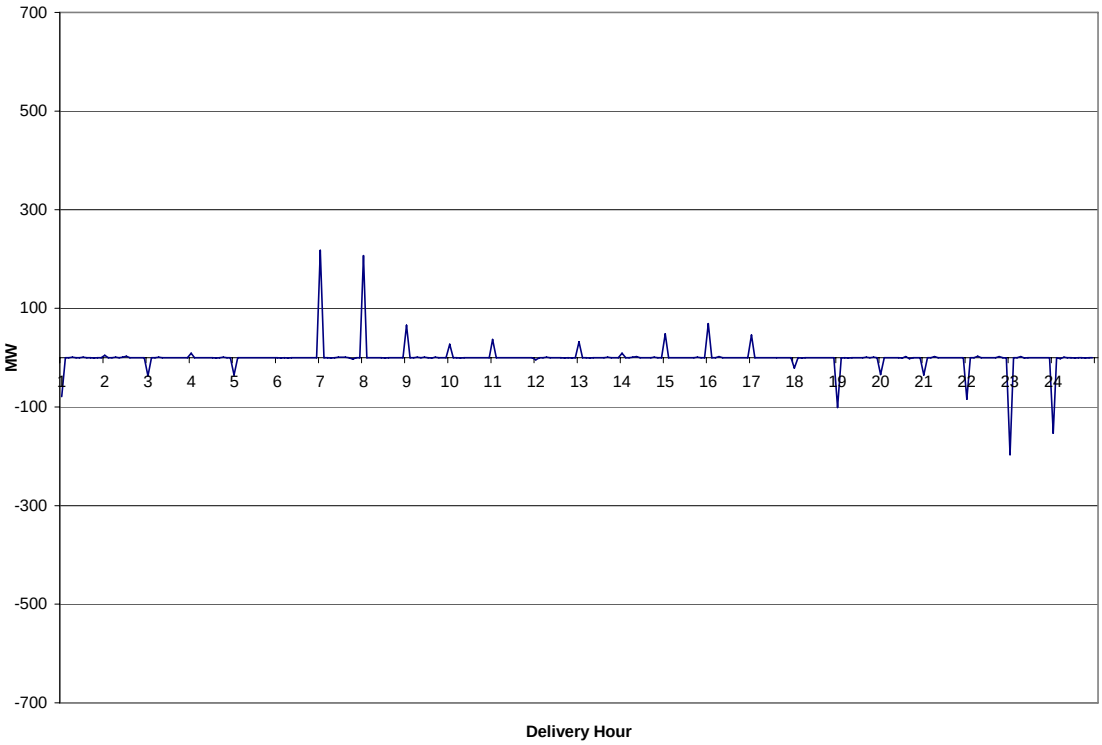
Normally, Ontario demand is characterized by fairly smooth interval-by-interval increase and decrease of load across the day. In contrast, market demand, which is a combination of Ontario demand and the hourly change in demand and supply on the inter-ties, exhibits abrupt hourly changes. The hourly change in intertie demand/supply is not a reflection of changes in demand in other markets. Rather, it is a consequence of the design of the institutions linking Ontario with other markets. The limitations of these linking institutions are commonly referred to as 'seams issues'. One of these limitations is that decisions regarding imports and exports must be made far enough ahead of the hour to allow the various ISOs to co-ordinate intertie flows. These decisions are made hour-ahead and, once chosen, become non-dispatchable.

The coordinated change in net imports is made on the hour. In response to changes in net imports, marginal domestic generators must either increase or decrease their output rapidly over a ten minute time period. In recognition of the limited capability

of internal generation to be ramped to accommodate changes in net imports, the IESO maintains a Net Interchange Scheduling Limit (NISL) of 700 MW. The purpose of the NISL is to limit intertie schedule changes to a maximum of 700 MW between hours.

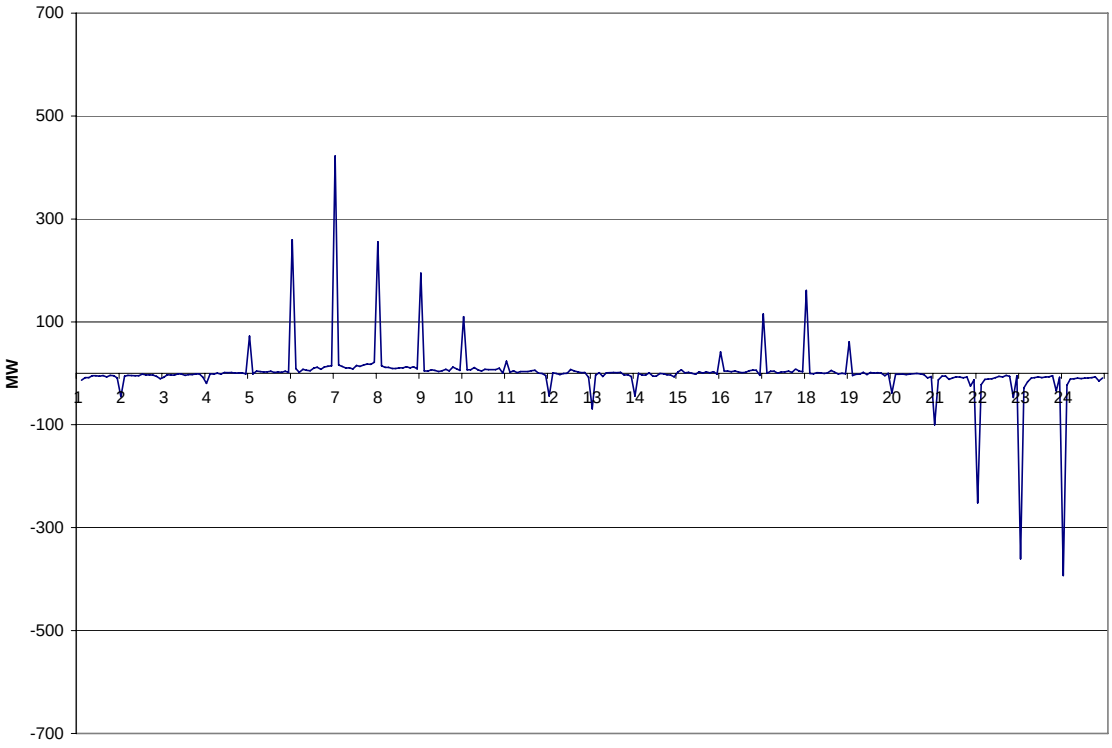
Figure 3-11 below shows the average interval to interval change in net imports from October 1, 2006 through September 30, 2007. Typically, these changes happen on the hour. It is apparent that there are abrupt changes in net imports in the morning ramp hours of HE 7 and HE 8 when exports decline and imports increase as prices rise across the day, leading to a net import increase of 200 MW on average. Again, in the evening hours as exports typically increase and imports decrease, we see a net export increase of roughly 150 MW hourly.

Figure 3-11: Average Net Import Change across Intervals, November 2006 - October 2007



A further source of volatility comes from the abrupt arrival or departure of hydroelectric generators on the hour. Hydroelectric generators wishing to be assured of either running or not running during a particular hour tend to offer either well into the money or well out of it. This implies that there will be a large swing on the hour as hydroelectric generators enter the market in the morning, leave it in the afternoon, return for the evening peak and leave again in the late evening. This is in fact what is observed in Figure 3-12 below.

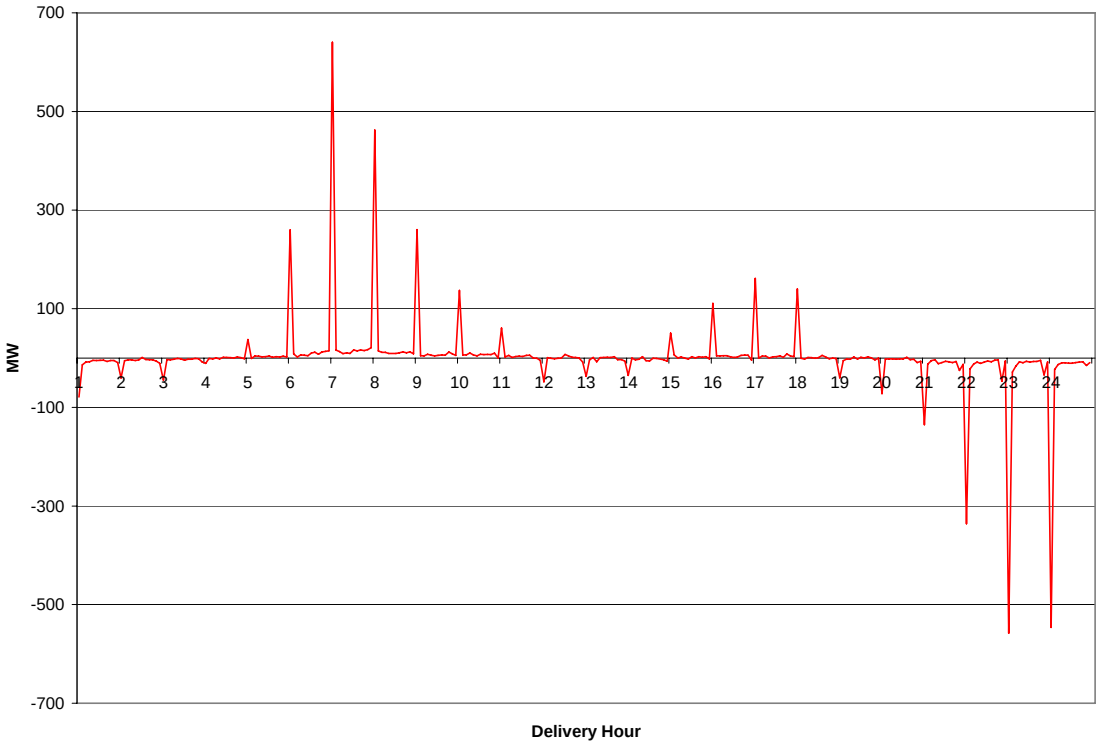
Figure 3-12: Average Net Change of Hydroelectric Resources across Intervals, November 2006 - October 2007



The combined effect of the change in net imports with the change in inframarginal hydroelectric output on the hour is illustrated in Figure 3-13. In the morning, the decrease in net exports and increase in inframarginal hydroelectric supply on the hour forces marginal generators to ramp down suddenly during the first two intervals of each hour to accommodate these changes and then ramp back up as demand builds across the hour. For example, on average over the past year,

marginal generators were required to ramp down by close to 700 MW in total within the first and second intervals of the start of Hour 7 to accommodate the increase in net imports and inframarginal hydroelectric supply that occurred at the beginning of the hour. At night, marginal generators must ramp up for a few intervals each hour in order to accommodate the decrease in net imports and hydroelectric supply on the hour and then quickly return to reducing output to match the declining load.

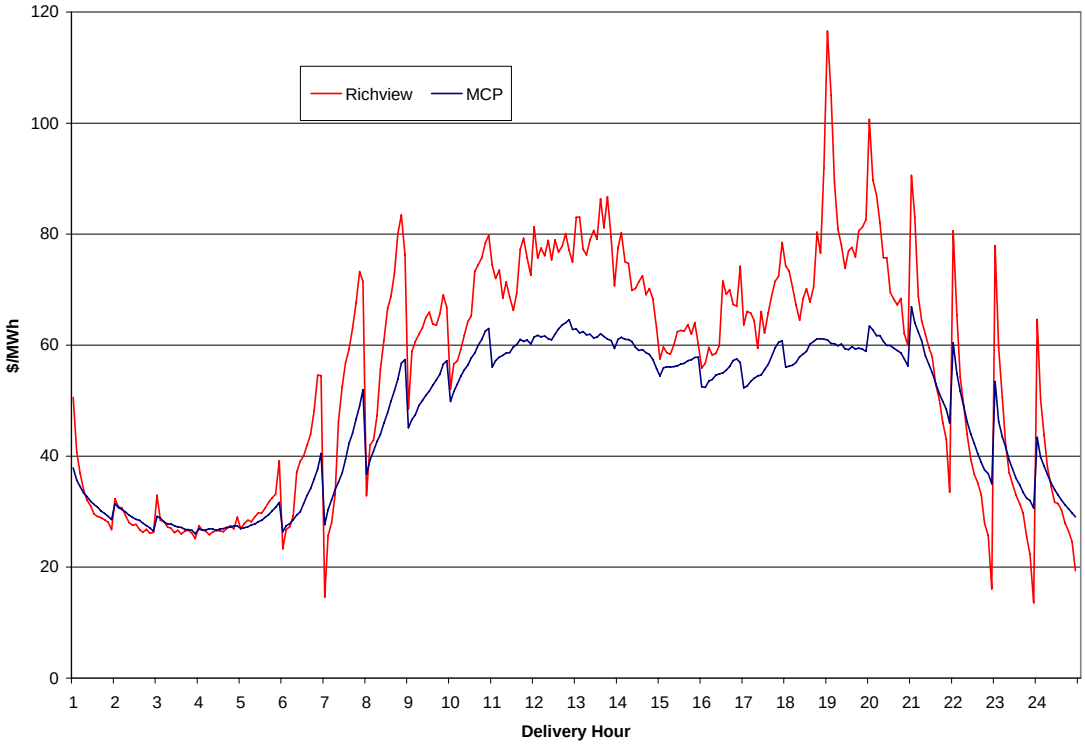
Figure 3-13: Average Total Net Change in Hydroelectric Resources and Net Imports, November 2006 - October 2007



The price effects of abrupt changes in the supply/demand balance on the hour are illustrated in Figure 3-14. The figure shows that there are relatively large changes in the Richview nodal price on the hour, which is due to the fact that there is a steeper offer curve in the constrained sequence mainly as a result of transmission constraints and ramp capability. In the morning the interval price plummets on the

hour as net imports and hydroelectric generation abruptly increase.[93] The interval price then recovers over the hour only to plummet again at the beginning of the next hour. The reverse is true at night.

Figure 3-14: Average MCP and Richview Shadow Price by Interval, November 2006 - October 2007



Looking at the change in price from interval to interval averaged across the year it is quite clear that the present fixed one hour bid window in combination with the present methodology of scheduling transactions over the interties is creating inefficiencies at times. Changes in institutional design that could smooth the transitions that are presently massed on the hour could reduce these inefficiencies. There would be less need to quickly ramp down relatively inexpensive generation in the morning and then within a few minutes begin to reload it. Similarly, there would be less need to ramp up more expensive generation for short periods of time

[93] Because of their quick ramping capability hydroelectric units can ramp to their full output in the first interval of the hour. This contrasts with much slower ramping fossil units which could take many intervals or even hours to reach their full economic production.

in the evening to accommodate on-the-hour departures of peaking hydro and imports.

A possible change in market design would be to move towards a 15-minute dispatch for generators and imports / exports. One option for this new algorithm would be to allow participants to offer or bid in 15 minute increments and be pre-dispatched every 15 minutes, instead of hourly. This is the approach currently used by New York for its internal generation. In the case of MISO and PJM, generators must offer hourly while imports and exports are scheduled for an hour but can transit between markets on the quarter hour, depending on ramp availability. Allowing imports and exports to change on the quarter hour reduces the extent to which domestic generation is obliged to ramp up or down to accommodate changes in exports and imports.

Preliminary discussions with hydroelectric generators also indicate that being allowed to bid at intervals that are more frequent than an hour would allow them to refine their offers so that they are potentially marginal for parts of an hour rather than bidding deep into the money for the entire hour. This would enable them to avoid the low price intervals in an hour.

One source of efficiency gains from 15 minute dispatch is from avoiding imports for the low demand intervals in an hour. The MAU has estimated the potential efficiency gains from this source for the period November 2006 to October 2007. It is equal to the amount of avoided imports times the difference between the import offer price and the adjusted Richview shadow price. This calculation is described in detail in Appendix 3.2 to this Chapter.

Table 3-5 below summarizes the monthly efficiency gains, average daily demand ratio, and real-time IOG payment. The average daily demand ratio is the average of the daily highest Ontario demand relative to the daily lowest demand. In total, the

efficiency gains from re-dispatching imports can amount up to $8.32 million yearly, which is about one-third of the real-time IOG payment.

Table 3-5: Efficiency Gains, Average Daily Demand Ratio, & Real-Time IOG Payment, November 2006 – October 2007

Month	Efficiency Loss ($ Millions)	Average Daily Demand Ratio	RT IOG* ($ Millions)
Nov-06	0.57	1.42	3.69
Dec-06	0.72	1.42	2.64
Jan-07	0.47	1.37	2.57
Feb-07	0.80	1.30	4.30
Mar-07	0.85	1.30	4.70
Apr-07	1.00	1.32	2.44
May-07	0.96	1.38	2.49
Jun-07**	1.00	1.48	2.35
Jul-07	0.65	1.47	1.58
Aug-07	0.95	1.46	2.42
Sep-07	1.04	1.43	1.85
Oct-07	0.60	1.41	2.71
Total	8.32	1.39	27.41

* IOG reversals are not adjusted

** June 12, 2007 is excluded as the Richview shadow price was significantly distorted by the IESO's control actions.

One might expect that even greater efficiency gains could be realized, the larger are the demand changes in an hour as more expensive imports are not needed to meet the demand in the low demand intervals. This is generally not true as shown in Table 3-5 above. For example, the average daily ratio for March 2007 was 1.30, the lowest in all months, but the estimated efficiency gains reached $0.85 million, the sixth highest. The reason for this is that the efficiency gains also depend on the amount of marginal imports and their offer structures. If marginal imports are small in a month, the estimated efficiency gains will be small.

Although these estimates may overstate the efficiency gains arising from the re-dispatch of imports,[94] moving to 15 minute dispatch is also likely to yield efficiency

[94] The overstatement of efficiency gains come from the fact that the prices for low demand intervals should be lower compared to an average price for the hour and thus more exports are expected. The increase in exports will drive up the

gains from more efficiently dispatching both fossil and peaking hydro generators. For example, peaking hydro may be scheduled for the peak demand intervals in an hour only thus conserving valuable energy for later high-demand hours.

Recommendation 3-3

The MSP recommends the IESO begin investigation of a 15 minute dispatch algorithm to enhance the efficiency of the market.

4. *New Items to Report*

4.1 Self-Induced CMSC Payments made for Safety, Legal, Regulatory or Environmental Purposes

At 00:08 on August 12, 2007, a market participant requested that the IESO constrain on various hydroelectric units due to regulatory reasons, when river flows had to be maintained in order to respect agreed water levels. At the time, the units were offered at over $500/MWh. The IESO constrained on these generators at 51 MW beginning in HE 1 Interval 5. As a result of this action, the market participant received approximately $16,000 in constrained on payments for the hour as part of the normal settlement process.

The present policy of the IESO control room is to accept generators not following dispatch for safety, legal, regulatory and environmental reasons.[95] In order for the IESO to achieve subsequent accurate dispatch schedules (for all units), the control room must constrain the generator to the output that it requires. Effectively, the resulting constraint payments (on or off) are self-induced (i.e. caused by conditions at the plant, not conditions on the grid).

estimated new Richview shadow price and thus narrow the gap between the import offer price and new Richview shadow price. In other words, the estimated efficiency gains based on the gap should be smaller.

[95] Chapter 7 section 7.5.3 of the Market Rules does not require a market participant to comply with a dispatch instruction that would "endanger the safety of any person, damage equipment, or violate any applicable law". This is interpreted to include regulatory or environmental concerns. In this report we refer to these collectively as "safety, legal, regulatory or environmental" reasons.

In the months of August and September 2007, the MAU has identified approximately $150,000 of these types of constrained on payments to this market participant under similar conditions.[96] While there is no formal rule or process available for the recovery of these funds, discussions are under way between the IESO and the market participant for a voluntary repayment of these funds. It is understood this voluntary re-payment will occur.

In an early Market Surveillance Panel Report, on the subject of "Constrained Off Payments and Other Issues in the Management of Congestion" it was recommended that:

> the [IESO] initiate a rule change which does not require the [IESO] to make such payments in the first place or authorizes the [IESO] to completely recover self-induced constrained off CMSC payments to generation or dispatchable load.[97]

As a result, Market Rule changes were put into place to enable the recovery of self-induced dispatchable load CMSC payments.[98] At that time, discussions had taken place with market participants regarding similar self-induced payments for generators, but the IESO concluded that a general solution was too difficult to implement. With a narrower focus on generator self-induced payments for safety, legal, environmental and regulatory requirements, a rule change should now be easier to undertake.

[96] Only a sample of the events from May to October 2007 is included in this estimate since these were more readily available. To develop complete figures for the period it would be necessary to review the control room's logs for each day, identify the likely cases and determine how much CMSC was paid for each.
[97] Market Surveillance Panel Report, July 3, 2003; p. 6.
[98] See Section 3.5.1A in Chapter 9 of the Market Rules.

Recommendation 3-4

The IESO should initiate a rule change to allow the recovery of self-induced congestion management settlement credit payments which are made to generators when they are unable to follow dispatch for safety, legal, regulatory or environmental reasons.

4.2 IOG payments made to Affiliates

An Intertie Offer Guarantee (IOG) is a payment made by loads to improve the incentives for traders to enter the IESO-administered market as importers of energy from neighbouring markets. This is intended to assist the reliability of the Ontario market. However, IOG payments create the potential for gaming opportunities in the market that provide no net reliability improvements, as explained below. Rule changes were made in August 2002 to limit some of the perverse effects of the IOG payments.[99]

In June 2007, it was observed that two affiliate organizations were in a position to benefit in a manner consistent with an implied wheel. A second example of a group of such transactions taking place over several months in 2007 by two other affiliated entities, was also identified. Had these simultaneous import and export transactions been undertaken by the parent company, the IOG payment would have been offset.[100]

Introduction

Imports are important for the reliable operation of the Ontario market. It is recognized that trading between distinct energy markets with volatile pricing on both sides requires traders to manage significant risks. Such risks may discourage potential beneficial transactions. To help traders manage that risk, and hence

[99] See Market Rule Amendment Proposal MR-00204-R00 for the rationale for the rule changes http://www.ieso.ca/imoweb/pubs/mr/ua/mr_00204_r0i.pdf.
[100] According to section 3.8A.3.1 of Chapter 9 of the Market Rules.

increase their incentives to participate in the market, IOG payments were offered. These payments guarantee that, in the event that an import is scheduled, and the market price falls below the importer's offer price, they will be paid based on their offer and not on the real-time MCP. The guarantee also reduces the likelihood of imports failing in real-time as a result of changing market conditions, improving certainty of supply for the IESO.

Some transactions were excluded from IOG payments shortly after the market was opened, as they were deemed to not provide a reliability improvement. These transactions are referred to as implied wheel transactions. Implied wheel transactions occur between two markets that require power to flow through Ontario from the source market to the destination market. As Ontario is not the final destination of the energy, no increase in system reliability is gained by the simultaneous importing and exporting of energy. The subsequent payment of the IOGs for such transactions would be an unwarranted burden on loads in Ontario. Implied wheel transactions are not prohibited by the rules; rather the implementation of the IOG offset rules for an implied wheel transaction prevents the trader from benefiting from the IOG.

Without the IOG offset, traders could make use of 'implied wheels' and game the IOG payment, increasing profit without providing any benefit to the market. By transferring energy through the market with two distinct transactions at the same time, the IOG payment on the import allowed for the potential to arbitrage between real-time and pre-dispatch prices. Substantial profits were possible whilst there may have been no real net flow of energy between markets at all. The Market Rules were urgently amended in July 2002 to prevent the payment of IOGs in such situations.[101]

The amendment to the rules also included removing the eligibility of a market participant to receive IOG payments when the MAU determines that the recipient has an agreement or arrangement to share the IOG payment with another

[101] MR-00204-R00, op. cit.

participant.[102] The evidentiary burden upon the MAU to demonstrate that an agreement to share IOG payments exists is significant. If demonstrated, however, the IESO can recover those payments which were subject to that agreement through an IOG offset.

In July 2002 there were only hour-ahead transactions, but when the day-ahead commitment process was introduced in June 2006 the IOG offset was not extended to day-ahead import offer guarantees (DA-IOG) for imports where the importer took verifiable day-ahead actions to firm up the transaction.

First Example

Recently two affiliated market participants were identified as importing (and receiving the IOG payment) and exporting respectively in the same hour. These transactions effectively constitute an implied wheel when the affiliation of the two businesses is considered. Because there is no net import to the IESO, a reliability benefit commensurate with the IOG Payment was not delivered by the overall economic enterprise, the eventual beneficiary of the payment. Had either one of these legal entities undertaken both transactions itself, the IOG payments would have been offset automatically in the settlement process.

The size of the IOG payments related to such transactions are small even when investigated over the time during which the two affiliates have both been operating in Ontario. Table 3-6 below highlights the IOG payments made to the importing affiliate since its registration, the amounts that occurred at times when the other affiliate was exporting, and an estimate of the total potential IOG offset if the simultaneous transactions has been treated as implied wheels.

[102] According to section 3.8A.3.2 of Chapter 9 of the Market Rules. There has been no application of this rule to date.

Table 3-6: IOG Payments since Registration, Amounts that Accrued at Times of Affiliate Export & an Estimate of Potential IOG Offset

Total IOG Payments	IOG Payments when affiliate exporting	Estimate of Potential Offset[103]
$334,492	$41,771	$20,692
	12%	6%

Second Example

Further investigation of other known affiliate relationships revealed that two other affiliated entities are also periodically importing and exporting at the same time.

When investigated from January 1, 2007, the size of the potential offset is also small. Table 3-7 below highlights the IOG payments made to the importing affiliate, the amounts that occurred at times when the other affiliate was exporting, and an estimate of the total potential IOG offset.

Table 3-7: IOG Payments since January 2007, Amounts that Accrued at Times of Affiliate Export & an Estimate of Potential IOG Offset

Total IOG Payments	IOG Payments when Exporting	Estimate of Potential Offset
$300,678	$65,664	$60,912
	22%	20%

These events again identify some shortcomings of the IOG payments.

[103] In hours where there are simultaneous imports and exports, the export can be smaller. This leads to a partial recovery of the IOG in a given hour.

In the absence of the removal of IOG payments, it is clear that parent companies have benefited from IOG payments at times when they were wheeling energy across their portfolio, without providing a reliability benefit (or taking on the market price risks usually associated with import transactions).

We noted earlier an existing Market Rule that allows IOG offsets if the MAU finds there is an agreement or arrangement between two entities to share the IOG. However, the IESO does not consider affiliation alone as a sufficient basis for application of this rule. Moreover, based on the small size of the payments and the somewhat random nature of simultaneous imports and exports, it does ***not*** appear that this was a coordinated, intentional attempt to game the IOG payment through an agreement or arrangement in either of the above examples.

To prevent further accumulation of IOG payments that do not provide the intended reliability benefits, and to close what appears to be an unintended loop hole that would allow the gaming of IOG payments by affiliates, it would be appropriate to automatically offset the IOG payments made to a participant when it is identified that an affiliate business is exporting energy at the same time. In formulating such a rule change it will be important to confirm whether affiliation as currently defined in the rules[104] is a sufficient threshold to restrict potential gaming of the offsets.

Recommendation 3-5

The IESO should initiate a rule change to make Intertie Offer Guarantee payments subject to offsets where affiliated market participants are simultaneously importing and exporting.

[104] The Market Rules Chapter 11 defines
"affiliate, with respect to a corporation, has the meaning ascribed thereto in the Business Corporations Act (Ontario)"

4.3 The Effect of a Delay in a Transmission Upgrade

On October 29, 2004, Hydro One submitted an application to, and subsequently obtained approval from, the Ontario Energy Board for a construction of a new 76-kilometer double circuit 230 kilovolt (kV) transmission line to upgrade the capacity of the Queenston Flow West (QFW) transmission flowgate, as well as upgrades to Middleport Transformer Station. The projects were expected to increase the rating of the QFW flowgate by roughly 800 MW from its current level of 1800 MW to 2600 MW (or a 44 percent increase). These upgrades were expected to be finished in the summer of 2007. The Panel understands that completion of these projects has been significantly delayed.

When this new line is in placed in service, it is expected that, based on historical loading patterns, the QFW flowgate will almost never be congested. The elimination of congestion on the QFW flowgate would lead to significant efficiency gains to the Ontario market. These efficiency gains include reduced constrained off generation in Niagara area, reduced constrained on generation west of the QFW flowgate, and reduced constrained off/on imports/export on either the New York interface or the Michigan interface. The MAU estimated that from the constrained off generation in the Niagara area alone the efficiency gain can be almost $3 million per year, as shown in Table 3-8.[105]

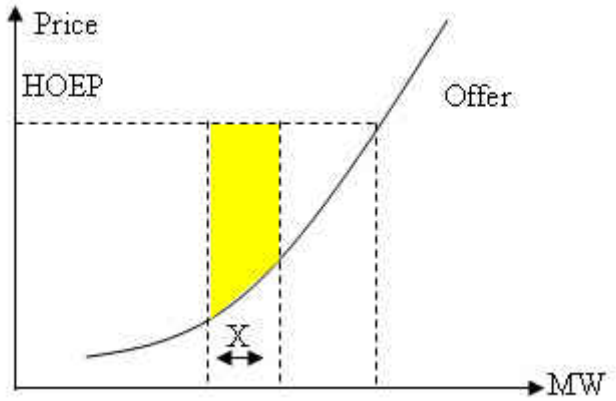
[105] The efficiency gain of reducing constrained off generation is equivalent to the constrained off payment to the generators, which is illustrated in following graph. If there were no congestion on the QFW interface, the offered X MW could have been utilized and the yellow area is the lost producer surplus (note consumer surplus is irrelevant in this case as all consumption is met by constraining on other generators).

Table 3-8: Constrained Off Payments to Generators in Niagara Area, November 2006 - October 2007

	Constrained off Payment ($ thousand)
Nov-06	572
Dec-06	330
Jan-07	229
Feb-07	133
Mar-07	211
Apr-07	211
May-07	359
Jun-07	226
Jul-07	101
Aug-07	134
Sep-07	193
Oct-07	268
Total	2,969

With the upgrades completed, IESO staff estimate that the import capability on the New York interface may increase by as much as 350 MW. The number is an estimate based on the transmission capability within the New York state.

The improved import capability on the Michigan interface can be as high as 800 MW. The 800 MW is estimated based the LEC pattern: typically, every 100 MW import from Michigan tends to result in 30 MW flow through New York with the remaining 70 MW flowing directly over the Michigan ties. Thus when a



transmission line within New York is congested, this also limits import capability from Michigan. The improved import/export capability should significantly relieve system strain on days such as June 12, 2007 and improve market efficiency.

Prior to the work stoppage Hydro One had carried out an extensive consultation process with the stakeholders and was well on its way to completing the transmission project. Since the work stoppage is the result of a dispute between parties other than Hydro One, the Panel understands that Hydro One is not a direct party to the dispute and is precluded from participating directly in the negotiations aimed at resolving the dispute. Nevertheless, Hydro One can continue providing input and support to the parties involved in the negotiations. Once the dispute is resolved, the Panel anticipates that Hydro One will be ready to complete the project expeditiously.[106]

Recommendation 3-6

It is important for the efficiency of the Ontario electricity market that Hydro One attempt to complete the Queenston Flow West transmission expansion as soon as practicable. The ability to fully utilize 'bottled' generation in the Niagara region and maximize economically viable imports with New York (and Michigan) will enhance the efficiency (and reliability) of the Ontario market.

4.4 Efficiency Implications of Public Agency Contracts

In late 2004, the Ontario Power Authority (OPA) was created by the Government of Ontario for the stated purpose of developing a reliable and sustainable electricity system for the future. Since then, the OPA has announced a number of supply procurement programs through a Request for Proposals (RFP) process, along with

[106] Hydro One has explained to the Panel that only 5 weeks of further installation work is needed.

new contractual arrangements with existing generators. It appears that new generation in Ontario will continue to develop through the provincial government procurement process for the foreseeable future. These initiatives have important implications for the role the competitive spot market plays in Ontario.

The Panel's view is that an efficient contract structure is one that motivates generators to offer supply into the wholesale market at prices that reflect their incremental cost of production and that this helps to ensure efficient dispatch. In this section, we review and summarizes various OPA supply procurement programs including CES Contracts/Early Movers, the Bruce A contract, and the Renewable Energy and Clean Energy Standard Offer Programs, as well as the IESO's Lennox Reliability Must Run contract.[107]

Table 3-9 summarizes the amount of installed capacity by contract type as of September 2007. In aggregate, these contract arrangements currently make up approximately 18 percent of Ontario's total production capacity.

[107] Although the Lennox RMR contract is currently an agreement between the IESO and OPG, the intention is that the OPA will eventually replace the IESO in these contracts. The latest one-year contract, dated October 1, 2007, is awaiting OEB approval, According to the Integrated Power System Plan (IPSP) released August 29, 2007, the IESO is unlikely to require Lennox for local area supply in the future and will therefore be unable to secure its capacity under the existing RMR contract terms. At that time, a contractual arrangement with the OPA would be required to avoid the units shutting down. See Exhibit D, Tab 9, Schedule 1, Attachment 1 of the IPSP for details at: http://www.powerauthority.on.ca/Storage/50/4562_D-8-1_Att_1.pdf

Table 3-9: Installed Capacity by Contract Type as of October 2007

Contract Type	Total Installed Capacity (MW)	Percentage of Ontario Capacity[108]
OPA Clean Energy Supply/Early Movers Contracts	1,264	4.1
OPA Bruce A Contract (Units 1 and 2)	1,500	4.8
OPA Clean Energy Standard Offer Program[109]	N/A	N/A
OPA Renewable Energy Standard Offer Program	628[110]	2.0
Lennox Reliability Must Run Contract	2,140	6.9
Total	5,532	17.8

In the Panel's opinion, the CES Contracts and Early Movers Contracts entered into by the OPA are designed in a way that maintains dispatch efficiency. The other contracts can be categorized as true fixed-price contracts or variations thereon. Contracts that pay fixed prices can lead to externalities where a generator has a financial incentive to run even if the market price is lower than its incremental cost. This could lead to an efficiency loss because a lower cost supplier may be displaced and the market price may be less than the incremental cost of generation. The Panel continues to urge the OPA to utilize the real-time Market Clearing Price as a signal for supply in order to promote dispatch efficiency.

We also note that there may be a number of 'non-utility generation' (NUG) contracts arranged 15 to 20 years ago and currently administered by Ontario

[108] There is approximately 31,000 MW of installed generation in Ontario's electricity market as stated on IESO website at http://www.ieso.ca/imoweb/media/md_supply.asp

[109] The Clean Energy Standard Offer Program has not been finalized and launched. For details on the anticipated program design, see the OPA's final recommendations at http://www.powerauthority.on.ca/Storage/44/3973_CESOP_Final_Recommendations.pdf

[110] Installed capacity up to and including September 2007. See the September 2007 Progress Report on the OPA's Standard Offer Program website at: http://www.powerauthority.on.ca/SOP/Storage/52/4814_RESOP_Sept._2007_report.pdf

Electricity Financial Corporation, that may be coming to the end of the contract life. We do not know details of these contracts, but would suggest that conclusions below regarding efficient contract structures for OPA might also apply to any new or renewed OEFC contracts.

4.4.1 OPA Clean Energy Supply and Early Mover's Contracts[111]

In early 2004, a Request for Proposals (RFP) was issued by the government of Ontario for 2,500 MW of clean energy and demand-side projects. The successful Clean Energy Supply (CES) projects were announced in the spring of 2005 and led to 1,945 MW of new generation in the province. On June 15, 2005, the Ontario Power Authority (OPA) was directed by the Ontario Minister of Energy to develop contracts for certain power generation projects that would not otherwise have qualified for the CES RFP and they were named the 'Early Movers'. There have been five Early Movers contracts executed since the beginning of 2006. These contracts are quite similar to the standard CES contract.

Generators under the CES/Early Movers contracts are motivated to offer at their incremental cost. When the Market Clearing Price is higher than the calculated unit strike price, the unit is deemed to produce energy, otherwise they are penalized an amount based on the foregone output which is ultimately removed from their monthly revenue requirement.[112] This promotes efficient dispatch.[113]

Efficient contract structures should motivate generators to reduce both their fixed and variable operating costs. The CES/Early Movers contracts do motivate generators to reduce both fixed and variable costs since the generator receives a

[111] The CES pro-forma contract is available on the Ontario Electricity RFP Website at http://www.ontarioelectricityrfp.ca/Docs/ConsolidatedCESContract.pdf

[112] Actual rules for deeming units are more complicated, and there is an allowance for start-up costs.

[113] Due to the SGOL and day-ahead cost guarantees available to generators participating in the IESO-administered market, such a generator may be motivated to offer its minimum production amount below cost, while offering incremental energy above that at cost. This is a no-cost strategy for the generator to reduce its risk of not being online when it may be deemed to be generating. This is a general function of the design of the DA-GCG and SGOL programs, not a peculiarity of the CES or Early Movers contracts. In our July 2007 report, we recommended that the IESO review its DA-GCG and SGOL guarantee programs due to inefficiencies created. For more information, see Recommendation 3-3 on page 123 of the July 2007 MSP Report.

fixed pre-determined payment to cover all operating and maintenance (O&M) costs. Every dollar saved by reducing costs is realized by the generator and in turn increases its profits.

Most generating facilities in Ontario are required to take periodic planned outages for maintenance, upgrade, or safety reasons. The frequency of these outages depends on generation technology and the age of the equipment, as well as the owner's maintenance strategy. An efficient contract structure should motivate a generator to take planned outages during the low demand hours and days of the year. In the CES/Early Movers contracts, there is no reference of the way planned outages are accounted for in the calculation of the monthly Contingent Support Payment (CSP) and the Revenue Sharing Payment (RSP). This may motivate the generator to minimize planned outages in order to reduce the risk of not being on line when required.

Forced outages (or deratings) are unanticipated in nature. Within the CES/Early Movers contracts, all forced outages (or forced deratings) fall under the definition of "Force Majeure" meaning the generators are excused of any obligations to produce.[114] This creates an incentive for these facilities to employ a maintenance strategy that reduces (or eliminates) preventive maintenance through planned outages and simply deals with maintenance issues when they bring about forced outages.[115]

Generators under the CES/Early Movers contracts are deemed to produce when the Market Clearing Price is higher than their strike price (estimated cost of production) and are penalized if they are not online during those hours.[116] The benefit of this structure is that it acts as a motivator for the generator to operate when prices are

[114] The hours are ignored for the purposes of the CSP and RSP calculations set out in Exhibit J of the contract.
[115] Generators must examine all risk and revenue factors when considering a maintenance strategy.
[116] Actual deeming rules are more complicated, accounting for pre-dispatch and HOEP prices. In addition there is an adjustment for start-up costs.

higher than their cost, which is generally efficient. Therefore, much of the financial risk is in the hands of the generators, and thus will also tend to promote efficiency.

Since the derivation of the strike price accounts for fuel prices, this basically removes the risk of fuel price fluctuations to the generators. The implication of this structure is that the CES generators do not have an incentive to minimize fuel costs.

4.4.2 OPA Bruce A Contract[117]

On October 17, 2005, the Ontario government announced that it had reached an agreement with Bruce Power for the refurbishment of Bruce A Units 1 and 2 at the Bruce Nuclear facility representing 1,500 MW of new baseload capacity through 2036.[118] The agreement also stated that Bruce Unit 3 would be refurbished once it reached the end of its operational life and only Unit 4's steam generators would be replaced.

On August 29, 2007, the Ontario Power Authority confirmed the expansion of the agreement to include the full refurbishment of Unit 4, rather than only replacing the steam generators. The replacement of the fuel channels will lengthen the operational life of Unit 4 to 2036 and add 750 MW of refurbished nuclear power, increasing the total refurbished nuclear capacity under contract to 3,000 MW.

The Bruce A contract with the OPA is designed to maximize the output of the units. Bruce A units are paid a fixed rate for each MWh of production. For this reason, the units are not motivated to offer at incremental cost. In order to maximize revenues, the units are motivated to offer at a level that guarantees they are dispatched. Since the Bruce A generating units are inframarginal, the efficiency implications of their bidding strategy should be quite small.

[117] The Bruce Power Refurbishment Implementation Agreement is publicly available on the Ministry of Energy's website at http://www.energy.gov.on.ca/english/pdf/electricity/bruce_power_refurbishment_implementation_agreement.pdf
[118] See the News Release from October 17, 2005 on the Ministry of Energy's website for more details: http://www.energy.gov.on.ca/index.cfm?fuseaction=english.news&body=yes&news_id=110

An efficiency benefit from this type of arrangement is that these units are motivated to minimize the amount of time they spend on outage as well as reduce costs, since all of the cost savings will benefit the generator through higher profits.[119]

4.4.3 OPA Renewable Energy Standard Offer Program[120]

Implemented in November 2006, the Renewable Energy Standard Offer Program (RESOP) was designed to help Ontario meet its renewable energy supply targets by providing small renewable energy generating projects (less than 10 MW) with a standard pricing structure and simplified qualifying guidelines. Eligible renewable energy sources include wind, hydroelectric, solar and biomass.[121]

A potentially inefficient component of the RESOP contract structure is that participating generating projects receive a fixed-price for their electricity production. Generators receive $110/MWh for electricity with 20 percent of the base rate indexed annually for inflation.[122] The RESOP contract structure motivates the participating generators to maximize production regardless of the time of day or period of the year. As a result, RESOP generating units may potentially displace cheaper sources of electricity.

For renewable energy with very low incremental production costs (which applies to all except possibly some sources of biomass), it would be efficient to run these under most circumstances. The main exception occurs when they induce significant costs to other generation that must change their output due to transmission limitations. As a result, in practice there are likely no significant negative

[119] We are advised by Bruce Power that Ontario consumers also benefit from any cost savings as a result of a cost sharing arrangement incorporated in the contract. We have not had an opportunity to review this provision.
[120] The OPA Renewable Energy Standard Offer Program contract is publicly available on the OPA's website at http://www.powerauthority.on.ca/Storage/32/2793_RESOP_Contract_Version_2.0.pdf
[121] For eligibility and contract details, see http://www.powerauthority.on.ca/sop/Storage/44/3985_SOPInformationBrochure.pdf
[122] Excludes Solar PV generators who receive $420/MWh over the life of the contract

efficiency implications except for some types of biomass or for wind in transmission congested areas such as near the Bruce generating facility.

RESOP generating units have little incentive to store energy in order to produce during the on-peak hours of the day. Generally, the electricity is provided as the fuel becomes available.

Participating generators have appropriate incentives to minimize production costs under the RESOP contracts. All cost savings will benefit the generator through increased profits.

There are some cost risks to both the RESOP generators and the consumers of Ontario. RESOP generators are at risk of not covering their investment costs if they are unable to produce enough electricity due to prolonged outages or insufficient fuel (wind). In such cases, risk is assigned to the party that can best deal with it, the generator owner. For consumers, the main implication is that the fixed-price of $110/MWh is likely to be higher than the average HOEP, with the resulting difference being factored into and increasing the Global Adjustment.

It is expected that most of the RESOP generators will be embedded within LDCs and may place an externality on other market participants. The present calculation of transmission charges for LDCs is based on their net withdrawal from the Grid. The RESOPs are generating behind the LDC meter and as a result the LDC avoids uplift charges in respect of the RESOP volumes. As such volumes increase, total market uplift will be paid by a smaller load base.

There are some further implications from RESOP projects due to their size, the intermittent nature of their operation, and the number of projects across the province. Since RESOP facilities are not dispatchable and likely connected to an LDC rather than directly to the IESO grid, there are few requirements for these facilities to provide ongoing production status or forecasts. This adds uncertainty

for the IESO operators because the only indication they may have that RESOP generators are changing output is through changes in observed demand. We understand that it was originally anticipated that this would not be a significant concern because these are small projects which are spread over the province, making abrupt changes in aggregate output less of a risk.

In addition, we note from OPA reports,[123] that there are several groupings of 10 MW projects which appear to be part of a much larger overall Wind Farm or Solar Group, which if treated as a single project would be subject to a system impact assessment by the IESO. It is our understanding that over 2,000 MW of RESOP generation has applied for contracts.[124] Changes in production for this generation will appear as changes in demand from LDCs, and would contribute to an additional component of demand forecast error. Significant and abrupt changes in demand could lead to the IESO having to constrain on slow starting dispatchable generation (fossil units) at minimum load levels in order to meet load variation due to uncertain RESOP generation volumes. In congested areas, the IESO may have to reserve some transmission capability because of the large uncertainty in the magnitude of power flows caused by this intermittent generation. There may be other operational responses but constraining on generation and/or limiting transmission capability generally would not be efficient.

The Panel understands that the IESO has just initiated a stakeholder consultation to discuss the integration of these and other embedded generators into the reliable operation of the IESO-controlled grid.[125] Due to the scale of the projects and the intermittent nature of the output (as illustrated in Chapter 1 section 2.4.3 on the performance of wind generation) and their possible effect on efficiency, to the extent possible in its consultation, the IESO should consider opportunities to reduce potential inefficiencies. This may include ways by which these generators could

[123] http://www.powerauthority.on.ca/sop/Storage/56/5161_RESOP_Nov._2007_report.pdf
[124] This does not necessarily mean all 2000 MW will be contracted or eventually built. As of November 2007, there were some 842 MW of executed contracts under the RESOP.
[125] See IESO consultation on Embedded Generation: http://www.ieso.ca/imoweb/consult/consult_se57.asp

provide the IESO with better information on actual and forecast production including outage plans.[126]

Recommendation 3-7

To the extent possible in its stakeholder consultation on embedded generation, the IESO should consider opportunities to reduce inefficiency through the development of the capability for accurate forecasting of embedded generation production, which may require the provision of real-time production and related information (e.g. outages).

4.4.4 Proposed OPA Clean Energy Standard Offer Program[127]

The proposed Clean Energy Standard Offer Program (CESOP) is intended to support the introduction of small (less than 10 MW) generation including combined heat and power and electricity generated as by-product fuels that would otherwise be under-utilized. The program is now expected to launch in the spring of 2008 after further review.

Under the presently proposed design, generators that participate in the CESOP would be encouraged to run during the prime-peak periods and mid-peak periods as specified by a CESOP rate schedule. The proposed agreement states that during the high peak hours, generators would receive HOEP plus $81/MWh for energy and during the mid peak hours, generators would receive HOEP plus $43.20/MWh. For the remaining hours, the generator will be motivated to produce when the HOEP is greater than their incremental cost of production since they only receive the HOEP for energy generated. The rates are intended to reflect the flexibility and reliability of distributed generation to the integrated power system and promote energy production during the high-demand hours during the year.

[126] Martin Merritt, the Market Surveillance Administrator for Alberta has discussed similar concerns with the proposed scale of wind projects in Alberta. See " Power Luncheon: Alberta's Power Market 12 Years After Inception", September 2007 available at http://www.albertamsa.ca/files/BMO_Nesbitt_Sept_2007(w_notes).pdf

[127] The OPA's final recommendations on the Clean Energy Standard Offer Program can be found at http://www.powerauthority.on.ca/Storage/44/3973_CESOP_Final_Recommendations.pdf

Under the proposed design, generators participating in the CESOP would be efficiently motivated by the fixed rate schedule to reduce their operating costs and maximize their availability during on-peak hours due to the nature of the fixed rate schedule. However, at lower load levels or periods with more than enough low cost generation, the fixed rate schedule would be expected to lead to inefficiencies. The primary inefficiency of this contract structure is that generators may choose to operate when market prices are lower than their incremental costs in order to receive the fixed rate schedule.

The proposed CESOP contract design would also place an externality on other market participants. The OPA has projected that most potential applicants will be loads including greenhouses, hospitals, universities, industrial facilities, and natural gas pressure regulating stations. If this projection holds true and most CESOP generators have an embedded load attached, they have the ability to generate 'behind the meter'. Thus the attached load avoids uplift charges. When these generators produce behind the meter, it places an increased uplift burden on all other consumers, as the existing total uplift amounts will be shared by the lower volumes of the fewer remaining loads.

This uplift issue should be seen in context. First, other generation (existing and projected) that is embedded behind a load (e.g., CTU or combined cycle generators on-site at an industrial plant), also avoids uplift. Even generation not associated with a specific load will also have this effect (including RESOP generation), since it reduces the LDCs net demand and therefore uplift charges decline for consumers that fall within the LDC. In such cases, the reduced uplifts are experienced by all the load in the LDC, not just the load with a generator.

Not all uplifts are avoidable. LDCs will continue to be responsible for identifying embedded generation for the purpose of the Debt Retirement Charge (DRC). DRC applies to the gross demand, not demand net of generation. So even for CESOP

(and RESOP) projects, the generation will be tracked and accounted for under the DRC.

Even though other embedded generation is netted against load, there is a potential for a much larger portfolio of such generation to be built in the future under CESOP as well as RESOP and potentially other programs, with an increasingly significant effect on the uplift paid by the remaining loads.

As mentioned, it is our understanding that OPA is further reviewing the proposed structure of the CESOP contract.

4.4.5 Lennox Reliability Must Run Contract[128]

Although the Reliability Must Run (RMR) contract is an agreement between the IESO and OPG, we review its efficiency implications partly for completeness of a review of different contract structures in Ontario.

The Panel had briefly reviewed some aspects of the contract in an earlier report[129] and we expand somewhat on that analysis here. The Panel notes that versions of this contract have been reviewed and approved by both the IESO Board and the OEB.[130] However, as explained below, our overall view is that the contract does not always rely on financial drivers to achieve efficient outcomes, although it has built in a variety of contractual terms that may encourage some efficient behaviours.

Lennox is a 2,140 MW dual-fuelled (oil and natural gas) generating station located near Kingston, Ontario. Lennox is owned by Ontario Power Generation (OPG) and is operated as a peaking resource. After the IESO identified reliability concerns

[128] For a copy of the latest Lennox contract, see http://www.opg.com/about/reg/filings/files/Regulatory%20Documents/Lennox%20RMR%20Appendix%201.pdf

[129] MSP Monitoring Report, June 2006, p.116 and pp.120-121. The Report addresses the possible incentives for inefficient bidding and offsetting lower incremental cost plant, but notes "the contract seeks to limit the potential for these excursions to special circumstances".

[130] The OEB Decision (EB-2005-0490) March 13, 2006 deals with some of the issues the Panel identifies here and concludes "that the financial provisions of the RMR Contract are reasonable and that the RMR Contract does not contain incentives for OPG to alter its offer behaviour". With regard to recovery of 100 percent of the fixed and variable costs, the OEB stated "the cost-based financial structure of the contract is appropriate for reliability must-run contracts".

with the proposed closure of Lennox, the IESO and OPG entered into a one year RMR contract beginning October 1, 2005. The agreement has been renewed each year with the latest contract beginning October 1, 2007. It is the only RMR contract in Ontario.[131]

The contract specifies that the generation units must run when the IESO requires them for reliability purposes. The generator may also run the units at other times if it makes offers that are selected. Under the contract, the generator receives a monthly payment to cover all fixed and variable costs associated with running the plant,[132] not just during those periods when specifically required by the IESO. As a RMR contract, this degree of cost recovery may be justified but we observe that it provides little incentive to the generator to reduce costs. OPG has expressed to the Panel that the contract does motivate them to reduce costs, by virtue of the various audit and review provisions granted to the IESO under the terms of the contract. Although OPG may be separately motivated to reduce its costs, the Panel does not regard the audit and review provisions of the contract alone as a significant incentive for OPG to actively seek efficient cost reductions.

Under this RMR contract the generator does not have a significant financial driver to offer production at incremental cost. There are non-financial terms which guide the generators behaviour, although these are subject to some interpretation.[133] When required by the IESO, the generator is to provide offers that allow the units to be selected in the dispatch schedule. As an additional financial incentive, the generator receives 5 percent of all revenues earned from the units' energy production. This premium provides a small incentive to be on-line during the high priced hours of the day. This could also constitute an inefficient incentive for the generator to stay online overnight - when it would not be efficient for the market -

[131] In the June 2006 Monitoring Report p.121, the Panel identified the potential inefficient driver in the Lennox RMR contract associated with payments based on incremental cost plus a portion of the MCP.
[132] A small portion of fixed costs, about 5 percent, are not specifically identified in the contract, and payment for these was set at the initial estimated value, about $1.5 million.
[133] These are: "consistent with good utility practice", to act in a "commercially reasonable manner", and other than in exceptional circumstances "offer a unit economically over a sustained period of time based on its costs". OPG has advised that it considers these provisions to mean offering at incremental costs, although, the Panel notes that the contract does not specifically require this.

in order to minimize start up risk the next day, and receive 5 percent of the smaller off-peak prices. However, the Panel has not observed such behaviour.

There are performance standards in the RMR contract which provide a small financial incentive for the generator to maximize the availability of the units, based on seasonal target rates of forced unavailability. This encourages the units to be available most of the time, when needed for reliability, but is not directly linked to actual market conditions or prices.

4.4.6 Summary

Efficient contract structures are critical in setting proper incentives for generators to respond in efficient ways. The CES type arrangements are the most efficient of the contract structures used by the OPA. These contracts recognize the marginal cost of a unit and place the focus on the MCP as the driver for offer decisions. Contracts for other types of supply would be more beneficial to market efficiency if they reflected a similar structure as the CES contract; an up-front payment of some kind and incentives for hourly decision-making related to the MCP. Standard Offer Programs for energy sources that have minimal incremental costs are unlikely in practice to cause much inefficiencies when they produce (unless they force hydro to spill or nuclear to reduce production for a few hours or days). However, the generators operating under such contracts have only limited drivers to take outages when the energy is least valuable and therefore could benefit from a market-price based signal.

Similar to the CES contracts, a possible structure for CESOP (or future RESOP) contracts would be to provide an up-front payment, ideally linked to some annual or perhaps quarterly performance requirements, with actual production paid based on HOEP. There are variations on this to remove some of the risks to the producers or loads who are paying for these.

This type of structure is quite flexible and applicable over many generator types. Generators in the SOP are self-scheduled or intermittent. The above structure allows them to continue to make production or outage decisions in reference to expected market prices. Contracts for units which in practice run flat (e.g. nuclear) may use performance-related fixed payments, with HOEP-related hourly payments. This maintains an incentive to maximize production and take outages when prices are lowest. Finally, there appears to be no reason why a contract for Lennox, if desired by both OPA and OPG once it is no longer needed as a RMR supply, should have a structure different from the CES contract.

Recommendation 3-8

The Panel recommends that the Ontario Power Authority structure future contracts to maintain the energy market price as the driver for production decisions (for example, using a strike price structure similar to the payment provisions in the existing Clean Energy Supply contracts).

Table 3-10: Contract Efficiency Comparison

	Early Movers / CES	Bruce A	Lennox RMR	Renewable Energy Standard Offer Program	Proposed Clean Energy Standard Offer Program
Is the generator motivated to offer at its incremental cost?	Yes, when the MCP > Strike Price, the unit is deemed to produce (and if it does not, they are penalized).	No. Bruce A generating units are motivated to offer to guarantee they are selected in the dispatch schedule.	There are no financial drivers, but, contracts terms indicate such behaviour.	Offers are not submitted by these generators.	Offers are not submitted by these generators.
Is the generator motivated to reduce its costs both fixed and variable?	Yes, the generator receives a fixed pre-determined payment to cover all O&M costs for the life of the contract so money saved is profit for the generator.	Yes, Bruce keeps all realized cost savings (see footnote in the text).	Not directly, since costs are covered monthly. There may be some weak drivers, more related to IESO audit and review, which would ensure reasonable costs.	Yes, since they are paid a fixed amount for each MWh produced. All cost savings are kept by the RESOP generator.	Yes, since they are paid based on a fixed rate schedule for each MWh produced. All cost savings are kept by the CESOP generator.
Is the generator motivated to maximize its availability (minimize its outages and deratings)?	Yes and no. A facility has an incentive to plan outages at times it is not needed by the system. However, there may be an incentive to go on "forced outage" rather than "planned outage" due to the favourable treatment of forced outages.	Yes, Bruce A is paid for each MWh produced.	On a plant basis, there are some drivers to minimize forced outages.	Yes. The rate schedule motivates them to maximize their availability.	Yes. The rate schedule motivates them to maximize their availability.
Is the generator motivated to schedule / plan its outages in the most efficient time period?	Yes, They would want to avoid most risky time periods, i.e. if contract expects them to run, which is consistent with finding most efficient period for outages.	No, although there is an incentive to minimize outages, as noted above.	The IESO may require them for reliability at other times. There is no direct financial incentive, but there are various contract requirements to act in a "commercially reasonable manner", and "consistent with good utility practice".	No, payment to the generator is strictly based on output regardless of when that output is produced.	Yes. The rate schedule motivates them to schedule outages during the low demand hours and days when contract payments do not apply
Is the generator motivated to provide OR and other ancillary services?	Yes, Ancillary Payments are kept by the generator.	Yes, Ancillary Payments are kept by the Generator	Yes, "consistent with good utility practice". However, compensation could be marginally less since the generator maintains 5 percent of market revenue, which may be less for OR.	No. The generator assigns to the OPA all rights to the Related Products (includes all ancillary services).	This level of detail not yet available.
Is the generator motivated to provide ramp and dispatch capability?	Yes, rising prices will motivate these generators to be online.	No, the generator is only motivated to maximize output.	This should be "consistent with good utility practice" and the 5 percent MCP premium acts as a small financial incentive to do so. They can also be required to provide ramp and dispatch capability when needed by the IESO.	No	No, they only have an incentive to produce according to the payment schedule set out in the CESOP contract.

	Early Movers / CES	Bruce A	Lennox RMR	Renewable Energy Standard Offer Program	Proposed Clean Energy Standard Offer Program
Is the generator motivated to provide energy during the peak hours of the day?	Yes. The generator is penalized if they are not online during hours when Market Clearing Prices are above their strike price	Yes, the units are motivated to maximize output over all hours of the day given they receive a fixed amount per MWh generated.	Yes, this would be "consistent with good utility practice". They must do so if requested by the IESO for reliability reasons, and are financially motivated in order to receive 5 percent of revenues earned from the energy market (small incentive to be online during high-priced hours).	Due to the inherent characteristics of the RESOP generators, time-shifting production could be prohibitively costly and inefficient.	Yes, but only during peak demand months specified in the rate schedule.
Are the contracts tailored to promote generators to participate in the market?	Yes, fixed costs are essentially covered and the generators are required to run when prices are higher than the generator's strike price.	Yes, the Bruce A contract promotes participation by rewarding the generator for producing as much as possible.	This is required "consistent with good utility practice". The 5 percent MCP premium acts as a very small incentive to participate.	Yes, these generators want to produce as much as possible in order to recover costs.	The program promotes generation during the high and mid peak hours and days of the year.
Do the contracts establish externalities on others?	No. If these generators operate in periods where they do not cover their costs there is no compensation from the Contract.	Yes, there is no incentive to shutdown when energy prices fall below their costs. They may displace cheaper-priced generation.	Yes, generator can operate and recover its costs plus 5 percent of revenues no matter what the energy price. However, consumers recover 95 percent of market revenues.	Yes, if they have an embedded load attached, they may be motivated to generate behind the meter to avoid uplift charges, resulting in total uplift being shared by all other participants.	Yes, if they have an embedded load attached, they may be motivated to generate behind the meter to avoid uplift charges, resulting in total uplift being shared by all other participants.
Are risks assigned to those who can best deal with them?	Yes, if the generators don't produce when MCP > Strike Price, implied deemed payments will be clawed back. The calculation of the strike price accounts for fuel prices so the consumers hold fuel price risk.	Yes and No. Volume risk sits with the Generator. Fuel price risk sits with the Load.	No. The generator bears no volume or fuel price risk.	No. The generator must produce enough to cover costs. The price risk is on the consumers.	No. the generator must produce enough to cover costs. The price risk is on the consumers. Fuel risk is shared by generator and consumers though the fixed spark spread.
Are the contracts transferable to a DAM type construct and LMP?	Yes. The contracts reference the possibility of evolution to both DAM and similarly LMP, and the conversion of the contract pricing from HOEP to DAM or LMP pricing.	Yes, the contract addresses the potential introduction of both LMP and day-ahead prices.	There are no financial drivers, but, contracts terms indicate such behaviour.	No mention in Contract.	No mention in preliminary documentation.

Chapter 3 Appendix

Appendix 3.1: An Econometric Decomposition of the Relative Effects of the Factors Contributing to Convergence of the Richview Price and the HOEP

The decomposition technique we use is an Oaxaca decomposition.[134] The same regression equation is estimated for each year or period we wish to compare:

$$Diff_i = \alpha_i + \beta_i X_i + U_i , \qquad (1)$$

where $Diff$ is the average hourly difference between the Richview nodal price and the HOEP, i is a year or period indicator, α and β are parameters, X is a vector of independent variables, and U is the residual term.

The mean variation in the price difference over n years can then be rewritten as:

$$\overline{Diff_i} - \overline{Diff_{i-n}} = \beta_i[\overline{X}_i - \overline{X}_{i-n}] + [\alpha_i - \alpha_{i-n}] + [\beta_i - \beta_{i-n}]\overline{X}_{i-n} \quad (2)$$

Or

$$\overline{Diff_i} - \overline{Diff_{i-n}} = \beta_{i-n}[\overline{X}_i - \overline{X}_{i-n}] + [\alpha_i - \alpha_{i-n}] + [\beta_i - \beta_{i-n}]\overline{X}_i \quad (3)$$

The variation in the price difference between period *i* and period *i-n* has two components in both equations: explained variation (the first term) and unexplained variation (the last two terms). The explained variation comes from the change in the explanatory variables in the regression model between period *i* and period *i-n*; the unexplained variation comes from the changes in the estimates of the regression coefficients (α and β) between periods.

The analysis reported here is of the determinants of the change in the average hourly on-peak and off-peak Richview-HOEP price differentials between the period February to October, 2004 and the same period in 2007. February to October, 2004 is chosen as the base period as this is the earliest period for which we have accurate forecast data. All variables are hourly averages for on-peak and off-peak hours respectively.

[134] The Oaxaca decomposition is widely used in labour economics, to identify the degree of wage discrimination between different groups of employees.

Appendix Table 3-1 and 3-2 below report the regression results and the decomposition. The independent variables (i.e. regressors) include hourly averages of those factors discussed in Section 2.3:

- a binary indicator of congestion between the northwest and the south (1 for congestion and 0 for non-congestion),
- the average hourly 10-minute demand forecast error,
- the average hourly amount of manually constrained on generation,
- the average hourly amount of constrained off net exports, and
- the average hourly real-time supply cushion.

On the top of each table are the yearly average Richview nodal price and HOEP, their difference, and the change in the difference. In the middle of each table are the average magnitudes of each explanatory variable and the explained variation based on either 2007 or 2004 coefficients. Both sets of coefficients are used for comparison as the coefficients for each year might be very different and thus the explained variation could be very different. At the bottom of each table are the estimated coefficients and the unexplained variation. Our primary interest is in the contributions of the explanatory variables to variation in the price differences.

For example, from Appendix Table 3-1, the actual off-peak price difference in 2004/2007 narrowed by $2.66/MWh (from $7.70/MWh in 2004 to $5.04/MWh in 2007). Changes in the explanatory variables contributed to these 2004 to 2007 differences as follows:

- Over the period 2004-2007, congestion from the northwest to the south increased slightly and this widened the gap between the Richview price and the HOEP by $0.07/MWh because of the downward effect of the phantom supply in northwest on the HOEP. The effect of using the 2004 or 2007 coefficient is the same.
- The extent to which demand was under-forecast in the constrained schedule increased over the period 2004 – 2007. This suppressed the Richview price and narrowed the gap with the HOEP by $4.18/MWh if the 2007 coefficient is used, or $0.49/MWh if the 2004 coefficient is used.

- The increase in manually constrained on generation and the decrease in constrained off net exports each had a relatively little effect, whether the 2004 or 2007 coefficients are applied.
- The increase in the real-time supply cushion over the period 2004 – 2007 reduced the relative severity of price spikes in the constrained schedule thereby reducing the amount by which HOEP was lower than Richview. This decreased the gap by $3.48/MWh if the 2007 coefficient is applied, or $7.39/MWh if the 2004 coefficient is applied. The effect of the supply cushion is prominent among all variables of study, whether the 2004 or 2007 coefficient is applied.

The implication of the decomposition analysis for off-peak periods is that, to the extent that variation in the gap between the Richview nodal price and the HOEP can be explained by the five variables identified, the reduction of this gap between 2004 and 2007 is largely attributable to an increase in the supply cushion (which reduced the amount by which HOEP was lower than the Richview price) and likely to under-forecasting demand in the constrained schedule (which suppressed the Richview price).

Appendix Table 3-1: Contributions to Off-Peak Price Differences, February – October, 2004 vs. 2007

	2004	2007		2007 - 2004 ($/MWh)	
Richview ($/MWh)	46.6	41.64		4.96	
HOEP ($/MWh)	38.9	36.6		2.30	
Difference ($/MWh)	7.7	5.04		**-2.66**	
Average values				Using 2007 Coefficient	Using 2004 Coefficient
Northwest-South Congestion	0.267	0.278	**Regressors**	0.07	0.07
Demand Forecast Error (MWh)	22	-101		-4.18	-0.49
Manual Constrained on generation (MWh)	9	16		-0.02	0.23
Constrained on net export (MWh)	94	78		0.13	0.32
Supply Cushion (%)	15.587	25.144		-3.48	-7.39
Subtotal				**-7.48**	**-7.25**
Estimated Coefficients					
Constant	19.438	16.476	**Coefficients**	-2.96	-2.96
Northwest-South Congestion	6.781	6.402		-0.10	-0.11
Demand Forecast Error	0.004	0.034		0.66	-3.03
Manual Constrained on generation	0.033	-0.003		-0.32	-0.58
Constrained off net export	-0.020	-0.008		1.13	0.94
Supply Cushion	-0.773	-0.364		6.38	10.28
Subtotal				**4.78**	**4.55**
Total ($/MWh)	**-2.71**				**-2.71**

Regarding the implications of the different coefficients in the two years, the changed coefficient for the supply cushion variable dominates the unexplained portion of the difference between the Richview prices and HOEP. For example, the change to the supply cushion coefficient accounts for an increased price gap of $6.38/MWh using the 2004 supply cushion value or $10.28/MWh using the 2007 supply cushion. The former value is based on the 2004 average value of the supply cushion multiplied by the difference in the coefficients between the two years. The latter value uses the 2007 average supply cushion multiplied by the change in the coefficients.

According to Appendix Table 3-2 for the on-peak decomposition, the on-peak price gap decreased by $2.3/MWh, from $16.34/MWh in 2004 to $14.00/MWh. Changes in the explanatory variables contributed to these 2004 to 2007 differences as follows:

- The demand forecast error contributed a $15.14/MWh reduction (using the 2007 coefficient) or $0/MWh (using the 2004 coefficient) to the Richview-HOEP gap. Based on the 2007 coefficients, this variable affected the price difference most, while using the 2004 coefficients, this variable had a negligible effect on the price difference.
- The supply cushion variable change reduced the gap by $4.63/MWh (using the 2007 coefficient) or $2.60/MWh (using the 2004 coefficient).
- Effects of all other explanatory variables were minimal.[135]

[135] The manual constrained on generation increased by 25 MW from 11 MW in 2004 to 36 MW in 2007, but has counterintuitive effect of increasing the gap by $0.23/MWh or $0.31/MWh. The counterintuitive effect was induced by a few outliers in which there was large constrained on generation associated with a large Richview price.

Appendix Table 3-2: Contributions to On-Peak Price Differences, February – October, 2004 vs. 2007

	2004	2007		2007 - 2004 ($/MWh)	
Richview ($/MWh)	74.43	75.57		1.14	
HOEP ($/MWh)	58.09	61.57		3.48	
Difference ($/MWh)	16.34	14.00		**-2.34**	
Average values				2007 Coefficient	2004 Coefficient
Northwest-South Congestion	0.49	0.46	Regressors	-0.44	-0.13
Demand Forecast Error (MWh)	49	-74		-15.14	0.00
Manual Constrained on generation (MWh)	11	36		0.23	0.31
Constrained off net export (MWh)	140	142		-0.04	0.00
Supply Cushion (%)	7.966	10.182		-4.63	-2.60
Subtotal ($/MWh)				**-20.03**	**-2.43**
Estimated Coefficients					
Constant	23.057	38.546	Coefficients	15.49	15.49
Northwest-South Congestion	5.464	18.519		6.33	6.02
Demand Forecast Error	0.000	0.123		6.04	-9.10
Manual Constrained on generation	0.012	0.009		-0.03	-0.11
Constrained off net export	0.000	-0.021		-2.94	-2.98
Supply Cushion	-1.175	-2.089		-7.28	-9.31
Subtotal ($/MWh)				**17.61**	**-0.01**
Total ($/MWh)	**-2.42**				**-2.42**

There are also large changes in the coefficients of the variables (except manual constrained on generation) which, together with the $15.49/MWh change in the constant term, imply an effect on the price gap almost as large as the changes in the variables themselves. The shifted coefficient of the Northwest-south congestion variable increased the gap by about $6/MWh. The change in the coefficient for the demand forecast error using the 2004 average value of the variable (representing an over-forecast) had an apparent similar effect on the price gap , while the 2007 value of the variable (representing an under-forecast) appears to have reduced the gap by $9.10/MWh. The changed coefficients for the constrained off net export and supply cushion variables appear to have reduced the price gap by about $3/MWh to $9/MWh.

As noted above, there is a large change in the constant term, but both the 2004 and 2007 constant terms are quite large in themselves, $23/MWh and $39/MWh respectively. This implies that there may be important explanatory variables that the model has not captured. These large values may also be indicating that the linear model assumed for the decomposition is not sufficiently representative of what may be a non-linear relationship in the variables. The large size of the constant terms for the off-peak results leads to a similar conclusion.

Summary

In general, our analysis shows that the determinants of the gap between the Richview price and the HOEP vary in importance over time. As a consequence, the explanation for the convergence or divergence of the Richview price and the HOEP over a particular time period depends on the time period chosen. As far as the reduction in the gap between the Richview price and the HOEP between 2004 and 2007 is concerned, this appears to be most sensitive to the increase in the supply cushion and the increased under-forecast of demand in the constrained schedule. Changes in congestion between the northwest and the south, in manually constrained on generation, and in constrained off net exports respectively had a limited effect on the gap between the two prices.

However, the decomposition also demonstrates that coefficients of the variables can change significantly between years, and combined with the constant term, suggest that the unexplained variations of the price gap in the model may be almost as large as the explained variations. This indicates that there may be important variables the decomposition has not modeled. Alternately, the decomposition may be using a linear model to represent a non-linear process.

Appendix 3.2: Quantifying Efficiency Gains of Moving to 15-minute Dispatch

We use a static approach to estimate the efficiency gains of moving from one hour to 15 minute pre-dispatch. In other words, we assume offers and bids from all resources to be the same as they were and proxy the potential efficiency gains had the 15 minute pre-dispatch been used.

We assume the offers are still hourly offers. That is, an offer is valid for the whole hour. 15 minute dispatch divides an hour of 12 intervals into four blocks: interval 1-3, 4-6, 7-9 and 10-12. When demand is ramping up within an hour, interval 10-12 has the peak demand, while when demand is ramping down, interval 1-3 has the peak demand.

The efficiency implication of the 15 minute pre-dispatch is highlighted in Appendix Figure 1. Assume this is an hour with demand ramping up.[136] Thus the demand in interval 10-12 is the peak demand for the hour, which is greater than the demand in interval 7-9 as well as in interval 1-3 and 4-6. PD Offer Stack represents the actual offers from all resources: solid black lines represent domestic generator offers and the red line is an import. The import is scheduled based on the peak demand for the hour.

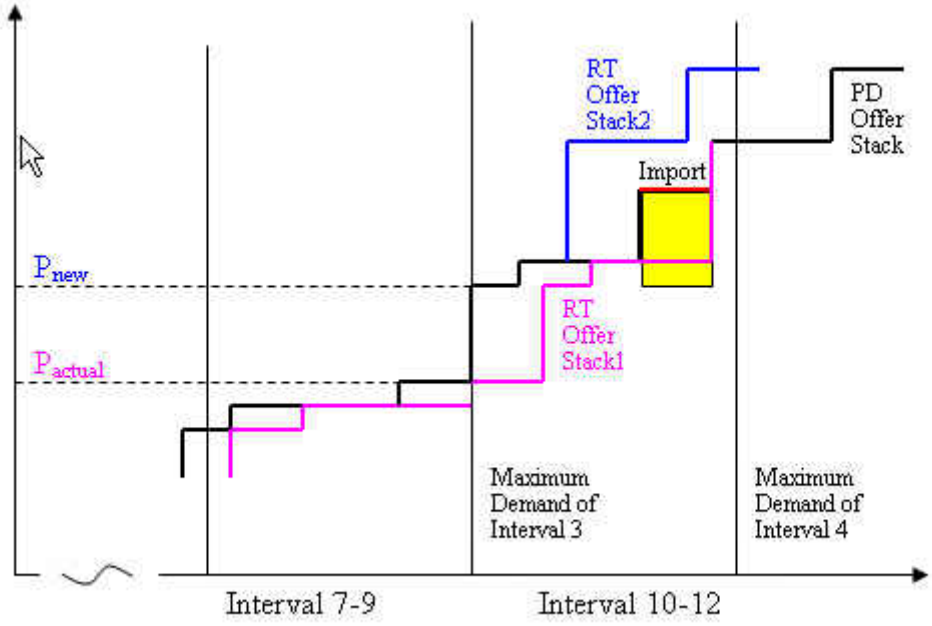
Imports cannot set the real-time price. Their offers are re-stacked at the bottom of the supply stack in real-time. The pink line represents the real-time offer curve, and the real-time price is set at P_{actual}.

Apparently the scheduled import is efficient for interval 10-12 in which the demand is the highest, but inefficient for interval 7-9 as well as for interval 1-3 and 4-6 because cheaper domestic generation can be sufficient to meet the demand. Had the import not been scheduled for interval 7-9, the supply stack would have been the same as the PD Offer Stack in the first part but steep in the second part, as shown in the blue lines. The new real-time price would be P_{new}.

[136] The analysis for situations with demand ramping down is analogous.

The efficiency gains of having the import not dispatched for interval 7-9 is the imported MW times the difference between its offer and the new price, which is represented by the yellow rectangle.

Appendix Figure 1: Estimation of Efficiency Gains of Moving from One Hour to 15 Minute Pre-dispatch



Because actual dispatch efficiency depends on the outcomes from the constrained sequence, we estimate the efficiency gains based the constrained sequence. Our estimation approach is as follows.

1. Based on the one-hour ahead pre-dispatch demand, we identify the interval with the highest demand within each interval block (i.e. every 15 minute period). The pre-dispatch demand is used since the 15 minute pre-dispatch is also based on the forecast demand.

2. We restack the offer curve for each interval with the highest demand within a 15 minute block except the interval with the highest demand within the hour. The

peak interval with the hour is excluded as there is presumably no efficiency gain for this 15 minute block.

a. If a unit is dispatched for operating reserve, an equivalent portion is reduced from the highest to lowest offer price. This eliminates potential double counting effect on energy supply.
b. All dispatched energy at generation units is removed from the supply curve as they are irrelevant to the calculation.[137] This can also eliminate the effect of out-of-merit dispatch as a result of manual actions by the operator.
c. If an import is manually constrained on, the import is not counted into the offer stack as manual actions are typically taken when there is security of adequacy problems.

3. We match the Richview nodal price with the rebuilt offer stack and identify the marginal unit. Then we sequentially remove the scheduled imports from the highest offer to the lowest offer and approximate a new Richview nodal price. The removal process goes on until the last removed import will lead to a new price greater than its offer price. The final estimated price should be below the offer price of all removed imports, i.e. all avoidable imports.

4. We then calculate the potential efficiency gains of having not scheduled those avoidable imports.

There are a few caveats in this analysis. First, we assume no behavioural change and thus may overstate the efficiency gains. For example, had few imports scheduled for low-demand intervals, the price should be higher for those intervals. In response to the expected higher price, some exports may not have offered and thus been selected. This will push the price up. The static approach of assuming no response overstates the likely price effect and thus the efficiency gains from the change in dispatch interval. Second, our estimation of focusing on imports only tends to understate the efficiency gains from

[137] Removing imports from the schedule can only lead to more generation rather than less.

smoothing the dispatch of fossil units and hydro units. It is expected that the import/export change between every 15 minute interval is smaller than the change from hour to hour, which can reduce the cycling of fossil generators and lower wear and tear costs.[138] The smoothing in demand growth can also reduce the need for hydro generators to provide ramp capability and thus preserve energy for high valued hours.

[138] The Independent Market Advisor to the New York ISO observed that since the 15 minute dispatch was implemented, the hour-ahead and real-time price has been convergent. The improved convergence improved the scheduling of non-dispatchable resources and imports and the commitment pf peaking units. For details, see '2004 State of the Market Report, New York ISO' by Potomac Economics, Ltd., July 2005.

Chapter 4: The State of the IESO-Administered Markets

1. *General Assessment*

This is our 11th semi-annual monitoring report on the IESO-administered markets covering the summer period May to October 2007. As in our previous reports we conclude that the market has operated well according to the parameters set for it.

The average monthly HOEP, May to October 2007, was slightly higher (by 1 percent), than the HOEP corresponding to the period a year ago, and represents a levelling out of the trend towards lower prices we have seen since the market began operating. Market-related uplift payments for congestion, supply guarantees and other matters were also marginally higher than the corresponding period a year ago, primarily as the result of more congestion particularly in the northwest.

Lower prices have been the natural outcome of the increased energy supplies seen in Ontario since market opening. However, with little new generation being added over the last year and slightly lower production from nuclear generation, there was less downward pressure on market prices in the period relative to last year. In fact, less available low cost energy pushed up prices in the latter months of the period, particularly on-peak. Export demand was up but overall market demand was lower, primarily due to the continued decrease in wholesale load.

Higher exchange rates for Canadian currency over the period tended to offset higher U.S. gas prices. The exchange rates, combined with already lower US coal prices produced significantly lower Ontario prices for coal.

Generally, on-peak prices were higher and off-peak prices lower compared to the same period last year, and consistent with this, energy prices were more spread out, with more hours above $70/MWh and more below $20/MWh. Lower coal prices likely contributed

to some of the reduction in the off-peak prices since coal-fired generators were usually the marginal units in these hours.

There were only 4 hours with HOEP over $200/MWh, compared with six last year. Even though there was a higher frequency of prices below $20/MWh, there was only one hour with negative HOEP, the same as last year. Our review of these and other anomalous hours led us to conclude that the price movements in these hours were consistent with the supply/demand conditions prevailing at the time. As is customary, the MAU communicated with market participants from time to time to review and understand market behaviour. We found no evidence of gaming or abuse of market power during the review period.[139]

The rest of the Chapter is organized as follows: section 2 summarizes findings from Chapter 3 of our review of generation contracts and a demand response event in the period. Section 3 provides a status report of actions by the IESO in response to previous Panel recommendations. Finally, section 4 excerpts and lists the various recommendations made in the body of our report.

2. *Efficiency Implications of Public Agency Contract Arrangements*

In Chapter 3 we reviewed the implications for dispatch efficiency in the IESO-administered market of existing public agency generation contracts and an event involving a load participating in the Ontario Power Authority's (OPA) Demand Response Program DR1.

The generation contracts reviewed included the Reliability Must Run contract struck by the IESO, and several of OPA's generation procurement programs, such as the Bruce A energy contract, two forms of Standard Offer Programs (SOPs), and the Clean Energy Supply (CES) program (whose contract structure acted as a reference for the Early Movers contracts).

[139] In spite of this general conclusion, the Panel observes that as usual there have been many instances of CMSC adjustment through the administrative activity performed by the MAU under the Local Market Power mitigation rules.

From that review we observed that the CES contract arrangements were 'efficiency friendly' by many measures, whereas the other contracts (noted above) did not provide as clear efficiency drivers to the generators. This is primarily due to the CES contract using a strike price based on the generator's marginal cost and (in simple terms) deeming the generation to be producing when market prices reach the strike price.

In the case of low cost energy (Renewable Energy SOP and Bruce A contract), though efficiency drivers are weak, the contracts can still lead to efficient outcomes, except on occasions when there may be a surplus of low-cost energy, or in the event that outages may be planned without reference to daily or seasonal market prices as a driver. We also noted that the limited information the IESO may have about actual and projected production for RESOP facilities is likely to increase operational uncertainty, by increasing demand forecast error since most SOP projects would be connected within an LDC. This may not have a large impact over the province as a whole, given the small total volumes currently generated under such contracts and diversity of production across the province. However, it will be larger in future and could become quite significant locally where transmission may be limiting. This has the potential to lead at times to inefficient utilization of local transmission because of the uncertainty of RESOP production.[140] For example in a transmission congested area such as the Northwest abrupt upward changes in RESOP production could overload local transmission therefore at times it may be necessary for the IESO to increase the transmission buffer. There may be operational alternatives for dealing with this issue and the Panel understands that the IESO has just initiated a stakeholder consultation to discuss the integration of RESOP and other embedded generators into the reliable operation of the IESO-controlled grid.[141] We are recommending the IESO consider opportunities arising from this consultation for minimizing inefficiencies that may be associated with embedded generation projects. (See Recommendation 3-7 in section 4.)

[140] OPA has the ability to limit projects in certain areas of the province where transmission may be restrictive.
[141] http://www.ieso.ca/imoweb/consult/consult_se57.asp

While the proposed Clean Energy SOP is under review by OPA the Panel would like to point out issues with the initial draft of the CESOP that should be reviewed. The large hourly payments associated with the proposed CESOP may lead to these suppliers replacing lower cost Ontario generation or imports in the market. The potential magnitude of total CESOP projects underscores a further issue. Because this generation is typically expected to be coupled with a load, by netting this generation against load, uplifts payments by this load are reduced (with the exception of the Debt Retirement Charges which are based on gross demand). The consequence of this is that the fixed costs of uplift are spread over a smaller load base, thus increasing the separation between HOEP and the total cost of consumption for most loads. This impact on uplift is not unique to CESOP generation, but it could increase significantly as more embedded generation facilities come online.

Finally, as we have reported before, we found the IESO's Reliability Must Run contract for OPG's Lennox facility does not always rely on financial incentives to achieve efficient outcomes, rather it has a variety of contractual terms that may encourage efficient behaviour subject to the appropriate interpretation.

We also reported an event in which a load in OPA's Demand Response Program DR1 was induced by projected market prices above $80/MWh to reduce consumption, although doing so led to the IESO having to reduce lower cost hydroelectric generation. The value of the reduced consumption was estimated at about $160/MWh while the cost of the marginal supply was estimated at $3/MWh. Not consuming in this situation was obviously inefficient and led to other loads paying total uplifts to the DR1 load and the generator roughly equivalent to the efficiency loss. It is not clear how often such events occur, partly because of a lack of information about use of the program. However, any scheme that pays a load to reduce consumption can be expected to induce a significant proportion of inefficient outcomes, even when there are no transmission limits.[142]

[142] Excluding consideration of any benefits associated with other public policy goals, efficiency loss is the value of consumption less the incremental cost of generation. With value roughly two times HOEP and incremental cost roughly equal to HOEP (absent transmission limits and large transmission losses), the efficiency loss is often close to HOEP. For the event above, the efficiency loss was much greater because congestion induced a much lower incremental cost for generation.

There is a common shortcoming of several of the generation contract arrangements and the DR1 scheme, namely that the MCP signal to these facilities is being distorted. Some generators do not see this signal at all, or receive a premium well above MCP. Under DR1, the signal to the load is roughly two times MCP. For future programs, or to the extent that payments under existing programs can be modified, there would be greater efficiency gains to the market if these programs focused on an undiluted MCP as the driver.[143]

In Chapter 3 and in our previous report we recommended that OPA employ a contract structure which uses the energy market price as the hourly payment or driver, such as the CES contract.[144] With regard to Demand Response programs, we have previously recommended such programs be designed to motivate consumers not to consume only when their value is less than the cost of supply.[145]

As we noted in Chapter 1, load-weighted HOEP has increased by $0.65/MWh, but the effective weighted HOEP after being adjusted for the Global Adjustment (GA) and OPG Rebate has increased by $1.20/MWh. This implies that additional costs have been added to the GA.[146] This data indicates a trend toward increasing payments by consumers as the result of the changing Global Adjustment. As OPA procures more resources, both generation and demand response, the size of this uplift charge is expected to grow. About 3200 MW of generation contracted by OPA is expected to be installed in 2008 with another 3400 MW (approximately) expected in the following two years, much more than the roughly 1700 MW of generation currently contracted by OPA. This does not include Standard Offer Program generation.[147]

[143] The most accurate driver and signal for efficiency would be the shadow price at each location. MCP or HOEP diverge from shadow prices, but less so most of the time than the price drivers in many of the existing contracts.
[144] "To realize all of the benefits of the wholesale market, however, future supply contracts should include terms and conditions that induce new generation to offer into the wholesale market at prices that reflect their incremental cost of production. This will help to ensure efficient dispatch." - December 2006 Monitoring Report, p.150.
[145] Ibid. p.140
[146] The Global Adjustment is affected by HOEP, the capacity contracted and any strike prices in the contracts. Normally when average HOEP increases, GA should decrease. So the increase in GA this year in spite of slightly increasing HOEP is indicative of marginally more contracted capacity. We also note that new OPA resources being contracted tend to be at prices above current HOEP, so would tend to increase the GA.
[147] See http://www.powerauthority.on.ca/Page.asp?PageID=1212&SiteNodeID=123; These figures include the planned 1500 MW of refurbishment at Bruce, but not Bruce 1 or Bruce 2 capacity. See also OPA; "A Progress Report on Renewable Energy Standard Offer

Aside from the OPG Rebate figure, there is no publicly available disaggregation of the Global Adjustment into its various components: OPG's baseload generation (prescribed assets), the various OPA generation procurement and demand management programs, Bruce generation or the NUG contracts. Data such as total monthly payments under each program as well as monthly energy delivered would be useful for an assessment of the effectiveness or cost of these various programs. Disaggregation could also be helpful for market participants or even retail customers who may try to forecast how these payments may increase in the future and could be useful for making investment or supply contract decisions. The Global Adjustment alone for the recent summer period represented an aggregate charge to Ontario consumers of approximately $370 million or about $5/MWh of Ontario consumption in the period.

Recommendation 4-1

(1)The Ontario Power Authority should create more transparency regarding the ongoing monthly payments and energy delivered for each of its various procurement programs in order to promote a better understanding of the costs and effectiveness of these programs and to help market participants gain a better understanding of the component costs of the Global Adjustment.

(2) Similarly, the IESO should consider providing aggregate monthly payments associated with Ontario Power Generation's regulated baseload assets, as it currently does for the OPG Rebate.

3. *IESO Responses to Previous Panel Recommendations*

Many of the recommendations in Panel's reports are directed toward the IESO. In November 2006 the IESO began to formally report on the status of actions it has taken in

Program November 2007" .There are some 842 MW of energy under 228 executed RESOP Contracts, with another 78 applications in process. Based on information from OPA, this represents about 100 MW in 2007, another 300 MW in 2008 and some 400 MW in 2009 and 2010 combined.

response to these recommendations. The IESO posts this information on its Web site, as well as discussing the recommendations and actions with its Stakeholder Advisory Committee (SAC).[148]

The current version of the status document covers recommendations going back several years. In this section we review the status of the recommendations from our last monitoring report, released in August 2007. The IESO responses to these are summarized in Table 4-1 below.

[148] See "IESO Response to MSP Recommendations" at http://www.ieso.ca/imoweb/marketSurveil/surveil.asp

Table 4-1: Summary of IESO Responses to Recommendations in Previous Market Surveillance Panel Reports

Recommendation Number & IESO Status	Subject	Summary of Action
1-1 (1)[149] **Closed**	Intertie Failures	"… a proposal has been made to the Inter-Jurisdictional Trading Sub-committee that would result in a majority of these failures being classified as within the market participant's control and subject to the various failure charges."
2-1 (2) **In Progress** Target: 2008/03/31	Time Lags for Replenishing OR	"… the IESO has begun a review of the operating reserve adjustment policy. As part of this review the IESO will respond to the MSP's question regarding the appropriateness of any OR reductions."
2-2 (3) **In Progress** Target: 2008/06/30	Increasing Net Interchange Scheduling Limit	"… IESO … will undertake to review the frequency and impact of a binding 700 MW limit. The IESO's review will consider the appropriate balance between too low a NISL that … may affect efficient trade and too high a NISL limit that … can have negative effects on the operation of the grid and can also interfere with issues of price fidelity and market efficiency."
2-3 (4) **In Progress**	Load Predictor Tool	"The IESO accepts this recommendation and will initiate a review of the dispatchable load treatment and determine based on frequency, impact, priority and cost what future actions should be taken."
3-1 (5) **Closed**	Efficient use of Dispatchable Loads' OR Capability	"…as of August the OPA contract provisions now allow for the continued offering of OR by dispatchable loads that have not been dispatched by an OPA program."
3-2 (6) **In Progress** Target: 2008/05/31	DACP and Generator Cost Guarantees	"The IESO is in the midst of an assessment of possible improvements to day-ahead mechanisms. This review will include possibilities ranging from DACP enhancements that could include three-part bidding and 24-hour optimization, to a more complete day-ahead market design."
3-3 (7) **Closed**	SGOL and DA-GCG Interface	"This recommendation will be tracked under Recommendation 6 above."
3-4 (8) **In Progress**	RT-IOG and DA-IOG in Off-Peak Hours	"This issue was identified by the Market Pricing WG in 2004 and reviewed in 2005. … This remains an issue on the list of pricing issues to be addressed by the Market Pricing WG."
3-5 (9) **In Progress**	Energy Exports through Segregated Mode of Operation	"This work was initiated sometime ago and we have met with OPG and are working through the concept."
3-6 (10) **Closed**	Locational Pricing Analysis	"Following a review of locational pricing undertaken by the Market Pricing WG in late 2006, the Stakeholder Advisory Committee (SAC) recommended to the IESO Board, which was accepted by the Board, that the IESO continue to learn about Locational Pricing, but at a measured pace. The 2006 analysis identified several factors that make a direct comparison of historic constrained shadow prices and HOEP problematic. IT changes are in progress that will improve the accuracy of the existing shadow prices[150] and the IESO continues to develop its capability to analyze behavioural responses to market changes."

[149] Recommendations are labelled according to the numbering in our monitoring report, e.g. "1-1", as well as according to the chronological numbering used in the IESO Report e.g. "(1)".
[150] Information technology changes completed or underway include new loss factors, publishing intertie shadow prices and identifying when NISL is limiting.

Given the few months since our recommendations were made public, the IESO has made valuable progress in several areas. There are specific targets dates on some of the actions described, although a few actions "In Progress" are open-ended with no indication when the issues might be considered. Four items are shown as "closed": the resolution for number 1-1 (1) is imminent; number 3-1 (5) has been successfully dealt with; number 3-3 (7) has been combined with another "In Progress" item; and 3-6 (10) appears to be closed only in the sense that some initial exploratory activities have been identified and are underway. We will continue to monitor market developments in relation to unimplemented panel recommendations to the IESO.

4. *Summary of Recommendations*

The following recommendations arise from the analysis in this report. They focus on issues of price fidelity and market efficiency, although we expect that several may also enhance reliability.

Recommendation 1-1 (Chapter 1 Section 2.4.3)

The Panel encourages the IESO to continue to review the forecasting process with wind generators and determine methods to reduce forecast errors. Such generators should have incentives (positive or negative) to encourage accurate forecasting.

Recommendation 2-1 (Chapter 2 Section 2.1.2.3)

Export curtailment due to 'adequacy' has an effect of suppressing the market price during times of serious scarcity since the curtailed amount is removed from the market schedule, thus distorting the market price signal. The Panel recommends that the IESO not remove the curtailed amount due to 'adequacy' from the market schedule.

Recommendation 3-1 (Chapter 3 Section 2.3)

Consistent with prior recommendations directed at improving the IESO load predictor, whose algorithm imputes changes in non-dispatchable load that can induce consumption inefficiency and forecast errors, the Panel recommends that the IESO review its load predictor methodology to determine if it is a source of persistent under-forecasting of demand.

Recommendation 3-2 (Chapter 3 Section 2.5)

(1) The IESO should expedite completion of the necessary agreements with Hydro One, the Midwest ISO and ITC*Transmission for operation of the Phase Angle Regulators on the Michigan intertie. The IESO (and Hydro One) should also complete necessary staff training as soon as possible. Any improvement on the spring 2008 implementation target would have positive efficiency (as well as reliability) effects on the Ontario (and Midwest ISO) system and any slippage would have the opposite effects.*

(2) Hydro One should work towards developing ratings that will safeguard the Phase Angle Regulators and provide operationally useful Limited Time Ratings as soon as possible.

Recommendation 3-3 (Chapter 3 Section 3.1)

The MSP recommends the IESO begin investigation of a 15 minute dispatch algorithm to enhance the efficiency of the market.

Recommendation 3-4 (Chapter 3 Section 4.1)

The IESO should initiate a rule change to allow the recovery of self-induced congestion management settlement credit payments which are made to generators when they are unable to follow dispatch for safety, legal, regulatory or environmental reasons.

Recommendation 3-5 (Chapter 3 Section 4.2)

The IESO should initiate a rule change to make Intertie Offer Guarantee payments subject to offsets where affiliated market participants are simultaneously importing and exporting.

Recommendation 3-6 (Chapter 3 Section 4.3)

It is important for the efficiency of the Ontario electricity market that Hydro One attempt to complete the Queenston Flow West transmission expansion as soon as practicable. The ability to fully utilize 'bottled' generation in the Niagara region and maximize economically viable imports with New York (and Michigan) will enhance the efficiency (and reliability) of the Ontario market.

Recommendation 3-7 (Chapter 3 Section 4.4.3)

To the extent possible in its stakeholder consultation on embedded generation, the IESO should consider opportunities to reduce inefficiency through the development of the capability for accurate forecasting of embedded generation production, which may require the provision of real-time production and related information (e.g. outages).

Recommendation 3-8 (Chapter 3 Section 4.4.6)

The Panel recommends that the Ontario Power Authority structure future contracts to maintain the energy market price as the driver for production decisions (for example, using a strike price structure similar to the payment provisions in the existing Clean Energy Supply contracts).

Recommendation 4-1 (Chapter 4 Section 2)

(1) The Ontario Power Authority should create more transparency regarding the ongoing monthly payments and energy delivered for each of its various procurement programs in order to promote a better understanding of the costs and effectiveness of these programs and to help market participants gain a better understanding of the component costs of the Global Adjustment.

(2) Similarly, the IESO should consider providing aggregate monthly payments associated with Ontario Power Generation's regulated baseload assets, as it currently does for the OPG Rebate.

Ontario

Market Surveillance Panel

Statistical Appendix

Monitoring Report on the IESO-Administered Electricity Markets

for the period from
May 2007 – October 2007

In some instances, the data reported in this Report has been updated or recalculated and therefore may differ from values previously quoted in our earlier reports.

List of Tables

Table A-1: Monthly Energy Demand, May 2006 – October 2007
Table A-2: Average Monthly Temperature*, March 2002 - October 2007*
Table A-3: Number of Days Temperature Exceeded 30°C, March 2002 - October 2007*
Table A-4: Outages, May 2006 - October 2007*
Table A-5: Average HOEP, On and Off-Peak, May 2006 - October 2007
Table A-6: Average Richview Slack Bus Price, On and Off-Peak, May 2006 - October 2007
Table A-7: Ontario Consumption by Market Segmentation, May 2006 - October 2007
Table A-8: Frequency Distribution of HOEP, May 2006 - October 2007
Table A-9: Frequency Distribution of HOEP plus Hourly Uplift, May 2006 - October 2007
Table A-10: Total Hourly Uplift Charge as a Percentage of HOEP, On and Off-Peak, May 2006 - October 2007
Table A-11: Total Hourly Uplift Charge by Component, May 2006 - October 2007
Table A-12: Operating Reserve Prices, May 2006 - October 2007
Table A-13: Exogenous Factors Affecting HOEP, Off-Peak, May 2006 - October 2007*
Table A-14: Exogenous Factors Affecting HOEP, On-Peak, May 2006 - October 2007*
Table A-15: RT IOG Payments, Top 10 Days, May 2007 – October 2007*
Table A-16: IOG Offsets due to Implied Wheeling, May 2006 - October 2007
Table A-17: CMSC Payments, Energy and Operating Reserve, May 2006 - October 2007
Table A-18: Share of Constrained On Payments by Type of Supplier, May 2006 - October 2007
Table A-19: Share of CMSC Payments Received by Top Facilities, May 2006 - October 2007
Table A-20: Domestic Supply Cushion Statistics, May 2006 – October 2007*
Table A-21: Share of Real-time MCP Set by Resource, May 2006 – October 2007
Table A-22: Share of Real-time MCP Set by Resource, Off-Peak, May 2006 – October 2007
Table A-23: Share of Real-time MCP Set by Resource, On-Peak, May 2006 – October 2007
Table A-24: Resources Selected in Real-time Market Schedule, May 2006 – October 2007
Table A-25: Resources Selected in the Real-time Market Schedule, May 2006 – October 2007
Table A-26: Offtakes by Intertie Zone, On-peak and Off-peak, May 2006 – October 2007*
Table A-27: Injections by Intertie Zone, On-peak and Off-peak, May 2006 - October 2007*
Table A-28: Net Exports, May 2006 – October 2007
Table A-29: Measures of Difference between 3-Hour Ahead Pre-dispatch Prices and HOEP, May 2006 - October 2007
Table A-30: Measures of Difference between 1-Hour Ahead Pre-dispatch Prices and HOEP, May 2006 - October 2007
Table A-31: Measures of Difference between Pre-dispatch Prices and Hourly Peak MCP, May 2006 – October 2007
Table A-32: Average Monthly HOEP Compared to Average Monthly Peak Hourly MCP, May 2006 – October 2007
Table A-33: Frequency Distribution of Difference Between 1-Hour Pre-dispatch and HOEP, May 2006 - October 2007*
Table A-34: Difference between 1-Hour Pre-dispatch Price and HOEP within Defined Ranges, May 2006 - October 2007
Table A-35: Difference between 1-Hour Pre-dispatch Price and Hourly Peak MCP within Defined Ranges, May 2006 - October 2007
Table A-36: Demand Forecast Error; Pre-Dispatch versus Average and Peak Hourly Demand, May 2006 - October 2007
Table A-37: Percentage of Time that Mean Forecast Error (Forecast to Hourly Peak) within Defined MW Ranges, May 2006 – October 2007*
Table A-38: Discrepancy between Self-Scheduled Generators' Offered and Delivered Quantities, May 2006 – October 2007*
Table A-39: Discrepancy between Wind Generators' Offered and Delivered Quantities*, May 2006 – October 2007
Table A-40: Failed Imports into Ontario, May 2006 – October 2007*

Table A-41: Failed Imports into Ontario, On-Peak, May 2006 - October 2007*
Table A-42: Failed Imports into Ontario, Off-Peak, May 2006 - October 2007*
Table A-43: Failed Exports from Ontario, May 2006 - October 2007*
Table A-44: Failed Exports from Ontario, On-Peak, May 2006 - October 2007*
Table A-45: Failed Exports from Ontario, Off-Peak, May 2006 - October 2007*
Table A-46: Sources of Total Operating Reserve Requirements, On-Peak Periods, May 2006 – October 2007
Table A-47: Sources of Total Operating Reserve Requirements, Off-Peak Periods, May 2006 – October 2007
Table A-48: Day Ahead Forecast Error, May 2006 – October 2007
Table A-49: Average One Hour Ahead Forecast Error, May 2006 – October 2007
Table A-50: Monthly Payment for Reliability Programs, May 2006 – October 2007
Table A-51: Low Price Hours, May 2007 - October 2007*

Table A-1: Monthly Energy Demand, May 2006 – October 2007 (TWh)*

	Ontario Demand		Exports		Total Market Demand	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	11.99	11.83	1.20	1.08	13.18	12.91
Jun	12.59	12.69	0.91	1.04	13.51	13.74
Jul	13.89	12.85	1.03	1.30	14.92	14.15
Aug	13.32	13.47	1.21	1.12	14.53	14.60
Sep	11.58	11.95	0.83	0.92	12.41	12.88
Oct	11.99	11.92	0.98	0.93	12.97	12.85
Nov	12.22	N/A	0.53	N/A	12.75	N/A
Dec	12.92	N/A	0.67	N/A	13.58	N/A
Jan	13.79	N/A	0.78	N/A	14.57	N/A
Feb	13.04	N/A	1.19	N/A	14.24	N/A
Mar	13.21	N/A	0.91	N/A	14.12	N/A
Apr	11.86	N/A	1.16	N/A	13.02	N/A
May – Oct	75.36	74.71	6.16	6.39	81.52	81.13
Nov - Apr	77.04	N/A	5.24	N/A	82.28	N/A
May - Apr	152.40	N/A	11.40	N/A	163.80	N/A

* Data includes dispatchable loads

Table A-2: Average Monthly Temperature*, March 2002 - October 2007*
(°Celsius)

	2002	2003	2004	2005	2006	2007
Jan	N/A	(7.68)	(9.13)	(6.78)	0.30	(2.65)
Feb	N/A	(7.02)	(3.29)	(3.60)	(3.56)	(7.99)
Mar	0.39	(0.57)	2.26	(1.29)	1.21	0.59
Apr	7.27	5.53	6.88	8.18	8.36	6.29
May	11.21	12.23	13.31	12.14	14.59	14.77
Jun	19.18	18.53	17.78	22.54	19.76	20.84
Jul	24.14	21.71	20.65	24.09	23.50	21.42
Aug	22.63	21.85	19.57	22.53	21.22	22.27
Sep	20.09	17.12	18.40	18.33	15.79	18.34
Oct	9.16	9.04	10.85	11.01	9.07	14.11
Nov	3.18	4.91	5.29	5.06	5.25	N/A
Dec	(1.82)	(0.03)	(2.54)	(3.13)	1.94	N/A

* Temperature is calculated at Toronto Pearson International Airport

Table A-3: Number of Days Temperature Exceeded 30°C, March 2002 - October 2007*

	2002	2003	2004	2005	2006	2007
Jan	N/A	0	0	0	0	0
Feb	N/A	0	0	0	0	0
Mar	0	0	0	0	0	0
Apr	0	0	0	0	0	0
May	0	0	0	0	2	1
Jun	5	4	2	9	3	6
Jul	16	4	1	11	9	4
Aug	8	4	0	7	3	8
Sep	4	0	0	2	0	4
Oct	0	0	0	0	0	1
Nov	0	0	0	0	0	N/A
Dec	0	0	0	0	0	N/A

* Temperature is calculated at Toronto Pearson International Airport

Table A-4: Outages, May 2006 - October 2007*
(TWh)

	Total Outage		Planned Outage		Forced Outage	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	5.06	5.49	2.63	3.63	2.43	1.86
Jun	3.89	3.58	1.51	1.35	2.37	2.23
Jul	2.82	3.34	0.40	0.94	2.42	2.40
Aug	3.22	3.61	0.96	0.46	2.26	3.15
Sep	4.82	5.48	2.46	2.42	2.36	3.06
Oct	5.34	6.53	2.93	3.77	2.41	2.76
Nov	5.75	N/A	3.34	N/A	2.41	N/A
Dec	4.37	N/A	2.47	N/A	1.90	N/A
Jan	3.74	N/A	1.83	N/A	1.90	N/A
Feb	3.03	N/A	1.13	N/A	1.89	N/A
Mar	5.17	N/A	2.86	N/A	2.32	N/A
Apr	4.99	N/A	3.11	N/A	1.88	N/A
May – Oct	25.15	28.03	10.89	12.57	14.25	15.46
Nov - Apr	27.05	N/A	14.74	N/A	12.30	N/A
May - Apr	52.20	N/A	25.63	N/A	26.55	N/A

* There are two sets of data that reflect outages information. Past reports have relied on information from the IESO's outage database. This table reflects the outage information that is actually input to the DSO to determine price. The MAU has reconciled the difference between the two sets of data by applying outage types from the IESO's outage database to the DSO outage information.

Table A-5: Average HOEP, On and Off-Peak, May 2006 - October 2007
($/MWh)

	Average HOEP		Average On-Peak HOEP		Average Off-Peak HOEP	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	46.32	38.50	59.18	53.78	34.77	24.77
Jun	46.08	44.38	56.04	57.32	37.36	33.06
Jul	50.52	43.90	63.25	57.70	41.72	32.54
Aug	52.72	53.62	65.05	69.80	41.64	39.10
Sep	35.42	44.63	43.85	58.27	28.67	34.66
Oct	40.20	48.91	49.64	60.19	32.44	38.77
Nov	49.71	N/A	60.13	N/A	39.75	N/A
Dec	39.25	N/A	53.06	N/A	29.71	N/A
Jan	44.48	N/A	53.44	N/A	36.43	N/A
Feb	59.12	N/A	70.93	N/A	48.39	N/A
Mar	54.85	N/A	68.31	N/A	42.76	N/A
Apr	46.05	N/A	57.58	N/A	37.63	N/A
May – Oct	45.21	45.66	56.17	59.51	36.10	33.82
Nov - Apr	48.91	N/A	60.58	N/A	39.10	N/A
May - Apr	47.06	N/A	58.37	N/A	37.60	N/A

Table A-6: Average Richview Slack Bus Price, On and Off-Peak, May 2006 - October 2007 ($/MWh)

	Average Richview Slack Bus Price		Average On-Peak Richview Slack Bus Price		Average Off-Peak Richview Slack Bus Price	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	64.45	41.69	96.58	57.84	35.60	27.18
Jun	52.09	71.03	61.00	103.80	44.29	42.38
Jul	55.71	49.16	68.17	66.92	47.11	34.54
Aug	59.78	61.53	73.72	82.04	47.26	43.10
Sep	35.32	51.71	44.01	71.36	28.38	37.35
Oct	41.83	55.73	50.96	68.24	34.32	44.49
Nov	55.24	N/A	68.11	N/A	42.93	N/A
Dec	40.97	N/A	56.03	N/A	30.57	N/A
Jan	51.24	N/A	61.90	N/A	41.67	N/A
Feb	69.49	N/A	83.83	N/A	56.45	N/A
Mar	66.40	N/A	86.19	N/A	48.64	N/A
Apr	50.63	N/A	60.15	N/A	43.67	N/A
May – Oct	51.53	55.14	65.74	75.03	39.49	38.17
Nov - Apr	55.66	N/A	69.37	N/A	43.99	N/A
May - Apr	53.60	N/A	67.55	N/A	41.74	N/A

Table A-7: Ontario Consumption by Market Segmentation, May 2006 - October 2007 (TWh)

	LDC's		Wholesale Loads		Generation		Metered Energy Consumption		Transmission Losses		Total Energy Consumption	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	9.63	9.55	1.66	1.58	0.18	0.20	11.46	11.33	0.47	0.49	11.93	11.82
Jun	10.13	10.49	1.66	1.50	0.19	0.19	11.99	12.18	0.56	0.51	12.54	12.69
Jul	11.48	10.61	1.61	1.44	0.19	0.19	13.27	12.24	0.58	0.60	13.85	12.84
Aug	10.99	11.13	1.67	1.46	0.16	0.20	12.82	12.79	0.49	0.66	13.31	13.45
Sep	9.43	9.79	1.53	1.38	0.16	0.18	11.12	11.36	0.40	0.56	11.52	11.92
Oct	9.77	9.75	1.50	1.44	0.15	0.15	11.42	11.33	0.54	0.58	11.96	11.91
Nov	9.97	N/A	1.49	N/A	0.16	N/A	11.63	N/A	0.55	N/A	12.18	N/A
Dec	10.73	N/A	1.47	N/A	0.16	N/A	12.36	N/A	0.52	N/A	12.88	N/A
Jan	11.38	N/A	1.58	N/A	0.16	N/A	13.12	N/A	0.64	N/A	13.76	N/A
Feb	10.97	N/A	1.40	N/A	0.14	N/A	12.51	N/A	0.53	N/A	13.04	N/A
Mar	10.83	N/A	1.57	N/A	0.18	N/A	12.58	N/A	0.62	N/A	13.19	N/A
Apr	9.60	N/A	1.53	N/A	0.17	N/A	11.30	N/A	0.53	N/A	11.83	N/A
May – Oct	61.43	61.32	9.63	8.80	1.03	1.11	72.08	71.23	3.04	3.40	75.11	74.63
Nov - Apr	63.48	N/A	9.04	N/A	0.97	N/A	73.50	N/A	3.39	N/A	76.88	N/A
May - Apr	124.91	N/A	18.67	N/A	2.00	N/A	145.58	N/A	6.43	N/A	151.99	N/A

Table A-8: Frequency Distribution of HOEP, May 2006 - October 2007
(Percentage of Hours within Defined Range)

	HOEP Price Range ($/MWh)																			
	< 10.00		10.01 - 20.00		20.01 - 30.00		30.01 - 40.00		40.01 - 50.00		50.01 - 60.00		60.01 - 70.00		70.01 - 100.00		100.01 - 200.00		> 200.01	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	0.67	6.59	1.61	9.01	12.77	26.61	**40.73**	**27.55**	16.26	6.72	10.48	5.65	7.26	5.11	7.39	10.75	2.42	2.02	0.40	0.00
Jun	0.42	3.19	1.53	6.11	9.44	26.11	**39.03**	**27.36**	13.61	7.08	14.44	6.39	10.69	9.17	10.28	10.00	0.56	4.31	0.00	0.28
Jul	0.54	2.82	3.49	4.84	10.89	24.19	**33.87**	**27.96**	12.37	9.01	8.74	8.74	7.93	6.59	18.95	13.98	3.09	1.75	0.13	0.13
Aug	0.13	0.81	0.40	0.67	19.22	14.52	**30.38**	27.55	8.47	10.35	9.01	7.93	12.37	6.99	12.10	**28.09**	7.66	3.09	0.27	0.00
Sep	3.33	3.06	5.42	3.19	28.61	20.42	**31.67**	**26.94**	16.81	13.61	9.58	11.25	2.64	6.53	1.67	13.33	0.28	1.67	0.00	0.00
Oct	0.94	2.69	1.88	2.15	22.72	17.61	**37.77**	**22.98**	14.78	12.37	9.14	10.62	7.12	11.69	5.51	18.82	0.13	0.94	0.00	0.13
Nov	0.97	N/A	2.50	N/A	11.25	N/A	**33.33**	N/A	11.81	N/A	8.89	N/A	9.17	N/A	19.72	N/A	19.72	N/A	0.00	N/A
Dec	6.32	N/A	7.53	N/A	18.01	N/A	**36.69**	N/A	9.81	N/A	5.65	N/A	5.11	N/A	8.33	N/A	8.33	N/A	0.00	N/A
Jan	1.08	N/A	1.34	N/A	9.68	N/A	**43.15**	N/A	15.32	N/A	10.08	N/A	7.26	N/A	11.29	N/A	11.29	N/A	0.00	N/A
Feb	0.00	N/A	0.00	N/A	0.15	N/A	**31.99**	N/A	13.54	N/A	11.01	N/A	12.50	N/A	26.04	N/A	26.04	N/A	0.00	N/A
Mar	0.00	N/A	0.00	N/A	5.78	N/A	**37.10**	N/A	9.68	N/A	10.62	N/A	8.06	N/A	22.18	N/A	6.59	N/A	0.00	N/A
Apr	2.36	N/A	3.61	N/A	15.14	N/A	**32.22**	N/A	11.94	N/A	7.36	N/A	13.89	N/A	10.28	N/A	3.06	N/A	0.14	N/A
May –Oct	1.01	3.19	2.39	4.33	17.28	21.58	**35.58**	**26.72**	13.72	9.86	10.23	8.43	8.00	7.68	9.32	15.83	2.36	2.30	0.13	0.09
Nov - Apr	1.79	N/A	2.50	N/A	10.00	N/A	**35.75**	N/A	12.02	N/A	8.94	N/A	9.33	N/A	16.31	N/A	12.51	N/A	0.02	N/A
May -Apr	1.40	N/A	2.44	N/A	13.64	N/A	**35.66**	N/A	12.87	N/A	9.58	N/A	8.67	N/A	12.81	N/A	7.43	N/A	0.08	N/A

* Bolded values show highest percentage within month.

Table A-9: Frequency Distribution of HOEP plus Hourly Uplift, May 2006 - October 2007
(Percentage of Hours within Defined Range)

	HOEP plus Hourly Uplift Price Range ($/MWh)																			
	<10.00		10.01 - 20.00		20.01 - 30.00		30.01 - 40.00		40.01 - 50.00		50.01 - 60.00		60.01 - 70.00		70.01 - 100.00		100.01 - 200.00		> 200.01	
	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008
May	0.67	6.59	1.34	8.06	9.27	22.04	**36.96**	**30.65**	20.03	7.93	11.16	4.30	8.06	6.18	9.01	11.42	2.82	2.82	0.67	0.00
Jun	0.56	3.06	1.11	4.86	6.53	20.14	**38.06**	**31.11**	14.72	8.75	13.75	6.39	11.67	6.81	12.08	12.64	1.53	5.83	0.00	0.42
Jul	0.40	2.96	2.42	4.03	10.35	18.82	**31.85**	**30.38**	13.17	11.83	9.68	6.59	8.06	7.93	18.55	15.32	5.24	2.02	0.27	0.13
Aug	0.27	0.94	0.40	0.67	9.54	9.68	**35.89**	29.03	10.89	11.69	8.74	6.99	11.96	7.80	13.44	**29.57**	8.33	3.63	0.54	0.00
Sep	3.19	2.92	5.00	3.33	21.25	16.11	**36.25**	**28.19**	18.06	13.89	9.86	11.25	4.17	7.22	1.94	14.03	0.28	3.06	0.00	0.00
Oct	0.94	2.55	1.88	2.28	15.99	12.90	**41.26**	**23.92**	16.13	13.44	8.47	9.54	8.06	11.96	6.85	20.83	0.40	2.42	0.00	0.13
Nov	0.97	N/A	2.22	N/A	7.36	N/A	**31.67**	N/A	14.72	N/A	10.42	N/A	6.53	N/A	20.69	N/A	5.42	N/A	0.00	N/A
Dec	5.65	N/A	7.53	N/A	13.71	N/A	**38.31**	N/A	11.29	N/A	5.78	N/A	5.11	N/A	8.87	N/A	3.76	N/A	0.00	N/A
Jan	1.21	N/A	1.21	N/A	8.06	N/A	**40.46**	N/A	17.07	N/A	11.02	N/A	7.12	N/A	12.63	N/A	1.21	N/A	0.00	N/A
Feb	0.15	N/A	0.00	N/A	0.00	N/A	**28.42**	N/A	15.18	N/A	9.23	N/A	13.84	N/A	25.60	N/A	7.59	N/A	0.00	N/A
Mar	0.13	N/A	0.00	N/A	3.90	N/A	**32.80**	N/A	13.58	N/A	9.81	N/A	9.27	N/A	22.18	N/A	8.33	N/A	0.00	N/A
Apr	2.08	N/A	3.47	N/A	12.36	N/A	**32.78**	N/A	11.94	N/A	8.06	N/A	14.72	N/A	10.69	N/A	3.75	N/A	0.14	N/A
May- Oct	1.01	3.17	2.03	3.87	12.16	16.62	**36.71**	**28.88**	15.50	11.26	10.28	7.51	8.66	7.98	10.31	17.30	3.10	3.30	0.25	0.11
Nov - Apr	1.70	N/A	2.41	N/A	7.57	N/A	**34.07**	N/A	13.96	N/A	9.05	N/A	9.43	N/A	16.78	N/A	5.01	N/A	0.02	N/A
May -Apr	1.35	N/A	2.22	N/A	9.86	N/A	**35.39**	N/A	14.73	N/A	9.67	N/A	9.05	N/A	13.54	N/A	4.06	N/A	0.14	N/A

* Bolded values show highest percentage within month.

Table A-10: Total Hourly Uplift Charge as a Percentage of HOEP, On and Off-Peak, May 2006 - October 2007
(%)

	On-Peak and Off-Peak		On-Peak		Off-Peak	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	5.37	4.68	6.10	6.13	4.70	3.38
Jun	4.34	5.69	4.75	6.77	3.98	4.74
Jul	4.06	4.47	4.35	4.87	3.86	4.13
Aug	4.12	4.26	4.32	4.97	3.95	3.62
Sep	3.36	4.65	3.57	5.60	3.20	3.94
Oct	3.69	4.27	4.03	5.17	3.40	3.45
Nov	5.05	N/A	5.93	N/A	4.20	N/A
Dec	4.52	N/A	4.92	N/A	4.24	N/A
Jan	4.14	N/A	4.63	N/A	3.69	N/A
Feb	3.86	N/A	4.20	N/A	3.55	N/A
Mar	4.04	N/A	4.62	N/A	3.52	N/A
Apr	3.81	N/A	4.38	N/A	3.40	N/A
May- Oct	4.16	4.67	4.52	5.59	3.85	3.88
Nov - Apr	4.24	N/A	4.78	N/A	3.77	N/A
May -Apr	4.20	N/A	4.65	N/A	3.81	N/A

Table A-11: Total Hourly Uplift Charge by Component,
May 2006 - October 2007
($ Millions)

	Total Hourly Uplift		RT IOG*		DA IOG*		CMSC**		Operating Reserve		Losses	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	35.52	24.03	3.85	2.48	N/A	0.33	14.93	9.70	3.03	1.00	13.71	10.54
Jun	28.23	39.12	2.03	2.26	0.35	1.08	12.53	20.58	0.51	1.24	12.82	13.97
Jul	31.69	26.25	1.85	1.51	0.55	0.65	11.65	8.75	0.84	1.10	16.81	14.24
Aug	36.83	35.96	2.91	2.31	0.72	0.64	16.20	14.58	1.05	0.60	15.95	17.83
Sep	15.22	29.76	0.59	1.72	0.16	2.79	5.27	12.30	0.81	0.77	8.40	12.18
Oct	18.88	27.81	1.65	2.47	0.16	1.35	5.72	10.21	0.96	0.84	10.39	12.94
Nov	33.84	N/A	3.38	N/A	4.18	N/A	10.72	N/A	1.34	N/A	14.23	N/A
Dec	24.95	N/A	2.56	N/A	1.08	N/A	7.18	N/A	1.49	N/A	12.64	N/A
Jan	26.73	N/A	2.53	N/A	0.50	N/A	7.28	N/A	2.13	N/A	14.29	N/A
Feb	31.04	N/A	4.21	N/A	0.16	N/A	8.54	N/A	2.24	N/A	15.90	N/A
Mar	31.00	N/A	4.55	N/A	1.31	N/A	8.62	N/A	1.03	N/A	15.49	N/A
Apr	22.80	N/A	2.41	N/A	0.08	N/A	7.15	N/A	1.49	N/A	11.67	N/A
May- Oct	166.37	182.93	12.88	12.75	1.94	6.84	66.30	76.12	7.20	5.55	78.08	81.70
Nov - Apr	170.36	N/A	19.64	N/A	7.31	N/A	49.49	N/A	9.72	N/A	84.22	N/A
May -Apr	336.73	N/A	32.52	N/A	9.25	N/A	115.79	N/A	16.92	N/A	162.30	N/A

* The IOG numbers are not adjusted for IOG offsets, which was implemented in July, 2002. IOG offsets are reported in Table A-16. All IOG Reversals have been applied to RT IOG.
** Numbers are adjusted for Self-Induced CMSC Revisions for Dispatchable Loads, but not for Local Market Power adjustments.

Table A-12: Operating Reserve Prices,
May 2006 - October 2007
($/MWh)

	10N		10S		30R	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	3.28	0.78	4.55	2.17	3.28	0.78
Jun	0.33	1.21	1.42	2.98	0.33	1.21
Jul	0.50	1.00	2.89	1.97	0.50	1.00
Aug	0.73	0.41	3.19	1.78	0.73	0.41
Sep	0.21	0.63	3.73	1.95	0.21	0.63
Oct	0.56	0.62	2.88	1.90	0.56	0.62
Nov	1.06	N/A	3.73	N/A	1.06	N/A
Dec	1.39	N/A	2.89	N/A	1.39	N/A
Jan	2.09	N/A	3.38	N/A	2.08	N/A
Feb	2.63	N/A	3.64	N/A	2.56	N/A
Mar	0.97	N/A	1.94	N/A	0.95	N/A
Apr	1.40	N/A	2.69	N/A	1.39	N/A
May- Oct	0.94	0.78	3.11	2.13	0.94	0.78
Nov - Apr	1.59	N/A	3.05	N/A	1.57	N/A
May -Apr	1.26	N/A	3.08	N/A	1.25	N/A

Table A-13: Exogenous Factors Affecting HOEP, Off-Peak, May 2006 - October 2007* (Average Hourly MW)

	Nuclear		Base-load Hydroelectric		Self-Scheduling Supply		Ontario Demand (NDL)		Average HOEP ($/MWh)	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	8,857	9,381	1,725	1,992	688	727	13,565	13,429	33.04	24.02
Jun	9,403	9,362	1,642	1,716	803	698	14,522	14,582	33.52	27.22
Jul	10,169	9,700	1,768	1,659	751	641	15,298	14,309	35.09	27.65
Aug	10,823	9,487	1,699	1,573	750	687	14,979	15,056	36.28	35.25
Sep	9,582	8,725	1,812	1,665	799	683	13,570	13,879	25.79	29.53
Oct	8,852	8,195	1,821	1,814	887	802	13,571	13,506	30.35	32.25
Nov	8,226	N/A	1,858	N/A	890	N/A	14,520	N/A	35.49	N/A
Dec	9,455	N/A	2,114	N/A	871	N/A	15,093	N/A	28.61	N/A
Jan	9,216	N/A	1,844	N/A	958	N/A	16,165	N/A	35.45	N/A
Feb	9,721	N/A	1,925	N/A	929	N/A	17,235	N/A	48.25	N/A
Mar	8,986	N/A	1,977	N/A	920	N/A	15,589	N/A	43.92	N/A
Apr	8,860	N/A	1,944	N/A	761	N/A	14,220	N/A	32.83	N/A
May- Oct	9,614	9,142	1,745	1,737	780	706	14,251	14,127	32.35	29.32
Nov - Apr	9,077	N/A	1,944	N/A	888	N/A	15,470	N/A	37.43	N/A
May -Apr	9,346	N/A	1,844	N/A	834	N/A	14,861	N/A	34.89	N/A

* In this table, off-peak hours are defined as HE22 to HE7, inclusive, for all days of the week.

Table A-14: Exogenous Factors Affecting HOEP, On-Peak, May 2006 - October 2007* (Average Hourly MW)

	Nuclear		Base-load Hydroelectric		Self-Scheduling Supply		Ontario Demand (NDL)		Average HOEP ($/MWh)	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	8,843	9,376	2,212	2,381	822	884	16,963	16,767	55.80	48.84
Jun	9,412	9,364	2,103	2,238	936	828	18,264	18,980	55.05	56.64
Jul	10,169	9,711	2,314	2,080	875	756	20,038	18,504	61.54	55.51
Aug	10,826	9,482	2,236	2,002	900	785	19,125	19,443	64.45	66.75
Sep	9,538	8,740	2,205	1,882	932	752	16,964	17,678	42.29	55.42
Oct	8,830	8,195	2,270	2,057	993	884	16,996	16.957	47.24	60.80
Nov	8,247	N/A	2,315	N/A	1,032	N/A	17,820	N/A	59.87	N/A
Dec	9,446	N/A	2,462	N/A	1,008	N/A	18,189	N/A	46.85	N/A
Jan	9,188	N/A	2,378	N/A	1,088	N/A	19,345	N/A	50.92	N/A
Feb	9,745	N/A	2,338	N/A	1,090	N/A	20,029	N/A	66.88	N/A
Mar	8,984	N/A	2,390	N/A	1,070	N/A	18,340	N/A	62.66	N/A
Apr	8,865	N/A	2,349	N/A	921	N/A	17,109	N/A	55.50	N/A
May- Oct	9,603	9,145	2,223	2,107	910	815	18,058	15,231	54.40	57.33
Nov - Apr	9,079	N/A	2,372	N/A	1,035	N/A	18,472	N/A	57.11	N/A
May -Apr	9,341	N/A	2,298	N/A	972	N/A	18,265	N/A	55.75	N/A

* In this table, on-peak hours are defined as HE8 to HE21, inclusive, for all days of the week.

Table A-15: RT IOG Payments, Top 10 Days, May 2007 – October 2007*

Delivery Date	Guaranteed Imports for Day (MWh)	IOG Payments ($ Millions)	Average IOG Payment ($/MWh)	Peak Demand in 5-minute Interval (MW)
2007/06/02	11,385	0.4	35.36	22,302
2007/06/16	9,762	0.32	32.56	21,173
2007/07/11	13,114	0.32	24.51	23,251
2007/06/19	11,915	0.27	22.55	23,271
2007/08/03	15,484	0.27	17.39	26,517
2007/05/16	12,180	0.25	20.92	19,877
2007/10/25	18,629	0.24	12.78	19,851
2007/08/08	10,795	0.22	20.28	25,602
2007/08/29	10,176	0.22	21.59	25,476
2007/05/31	8,238	0.21	25.59	23,211
	Total Top 10 days	**2.72**		
	Total for Period	**13.39**		
	% of Total Payments	**20.31**		

* Numbers are not netted against IOG offset for the 'implied wheel'.

Table A-16: IOG Offsets due to Implied Wheeling, May 2006 - October 2007

	IOG Payments ($'000)		IOG Offset ($'000)		IOG Offset (%)	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	3,848	2,493	39	225	1.01	9.03
Jun	2,070	2,345	158	72	7.66	3.06
Jul	1,868	1,579	63	160	3.39	10.13
Aug	2,922	2,424	106	132	3.64	5.44
Sep	594	1,845	24	138	4.06	7.47
Oct	1,681	2,708	79	156	4.70	5.77
Nov	3,687	N/A	190	N/A	5.15	N/A
Dec	2,636	N/A	283	N/A	10.72	N/A
Jan	2,565	N/A	199	N/A	7.74	N/A
Feb	4,299	N/A	319	N/A	7.43	N/A
Mar	4,704	N/A	401	N/A	8.52	N/A
Apr	2,437	N/A	144	N/A	5.91	N/A
May- Oct	12,983	13,394	469	883	3.61	6.59
Nov - Apr	20,328	N/A	1,536	N/A	7.56	N/A
May -Apr	33,311	N/A	2,005	N/A	6.02	N/A

Table A-17: CMSC Payments, Energy and Operating Reserve, May 2006 - October 2007 ($ Millions)

	Constrained Off		Constrained On		Total CMSC for Energy*		Operating Reserves		Total CMSC Payments**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	9.68	9.57	3.99	1.77	14.61	11.76	1.83	0.59	16.44	12.35
Jun	7.78	11.93	3.76	5.75	12.76	19.91	0.58	1.46	13.34	21.37
Jul	7.78	7.50	4.26	2.27	12.74	9.52	0.41	0.92	13.15	10.45
Aug	6.70	9.76	8.77	4.26	17.34	14.59	0.40	0.49	17.74	15.08
Sep	5.04	8.33	1.32	4.04	6.51	12.72	0.14	0.49	6.65	13.21
Oct	4.11	10.13	1.98	2.13	6.36	12.72	0.64	0.53	6.99	13.26
Nov	5.97	N/A	4.12	N/A	10.67	N/A	1.62	N/A	12.28	N/A
Dec	4.05	N/A	2.81	N/A	7.37	N/A	0.83	N/A	8.20	N/A
Jan	5.00	N/A	2.52	N/A	8.18	N/A	0.90	N/A	9.08	N/A
Feb	4.36	N/A	3.47	N/A	8.35	N/A	1.08	N/A	9.43	N/A
Mar	5.25	N/A	3.35	N/A	9.02	N/A	0.79	N/A	9.81	N/A
Apr	4.36	N/A	2.22	N/A	6.87	N/A	0.82	N/A	7.68	N/A
May- Oct	41.09	57.22	24.08	20.22	70.32	81.22	4.00	4.48	74.31	85.72
Nov - Apr	28.99	N/A	18.49	N/A	50.46	N/A	6.04	N/A	56.48	N/A
May -Apr	70.08	N/A	42.57	N/A	120.78	N/A	10.04	N/A	130.79	N/A

* The sum for energy being constrained on and off does not equal the total CMSC for energy in some months**.** This is due to the process for assigning the constrained on and off label to individual intervals not yet being complete**.** Note that these numbers are the net of positive and negative CMSC amounts.
** The totals for CMSC payments do not equal the totals for CMSC payments in Table A-11: Total Hourly Uplift Charge as the values in the uplift table include adjustments to CMSC payments in subsequent months. Neither table includes Local Market Power adjustments.

Table A-18: Share of Constrained On Payments by Type of Supplier, May 2006 - October 2007
(%)

	Domestic Generators		Imports	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	62	60	38	40
Jun	77	67	23	33
Jul	61	74	39	26
Aug	29	68	71	32
Sep	74	67	26	33
Oct	77	71	23	29
Nov	71	N/A	29	N/A
Dec	77	N/A	23	N/A
Jan	76	N/A	24	N/A
Feb	79	N/A	21	N/A
Mar	80	N/A	20	N/A
Apr	65	N/A	35	N/A
May- Oct	63	68	37	32
Nov - Apr	75	N/A	25	N/A
May -Apr	69	N/A	31	N/A

Table A-19: Share of CMSC Payments Received by Top Facilities, May 2006 - October 2007 (%)

	Share of Total Payments Received by Top 10 Facilities				Share of Total Payments Received by Top 5 Facilities			
	Constrained Off		Constrained On		Constrained Off		Constrained On	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	50.87	58.89	48.39	41.69	34.08	45.46	33.50	27.10
Jun	56.30	57.61	52.09	46.56	45.72	34.93	39.47	30.40
Jul	54.69	59.77	53.18	53.11	39.90	47.84	37.61	38.24
Aug	45.46	67.12	67.07	51.85	31.34	54.33	53.52	34.86
Sep	61.36	67.24	53.48	53.98	43.57	53.91	36.53	38.09
Oct	52.05	75.42	50.27	50.83	38.33	68.72	34.97	34.78
Nov	54.76	N/A	59.80	N/A	40.09	N/A	43.48	N/A
Dec	57.64	N/A	51.97	N/A	41.64	N/A	38.30	N/A
Jan	58.93	N/A	55.80	N/A	40.44	N/A	39.19	N/A
Feb	55.44	N/A	65.89	N/A	44.3	N/A	50.43	N/A
Mar	65.46	N/A	51.99	N/A	51.66	N/A	37.26	N/A
Apr	51.33	N/A	58.03	N/A	39.75	N/A	38.21	N/A
May – Oct	53.46	64.34	54.08	49.67	38.82	50.87	39.27	33.91
Nov - Apr	57.26	N/A	57.25	N/A	42.98	N/A	41.15	N/A
May - Apr	55.36	N/A	55.66	N/A	40.90	N/A	40.21	N/A

Table A-20: Domestic Supply Cushion Statistics, May 2006 – October 2007*

	Pre-Dispatch						Real-time					
	Average Supply Cushion (%)		Negative Supply Cushion (# of Hours)		Supply Cushion < 10% (# of Hours)		Average Supply Cushion (%)		Negative Supply Cushion (# of Hours)		Supply Cushion < 10% (# of Hours)	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	20.0	25.4	34	0	161	34	18.4	19.9	30	4	196	159
Jun	22.4	23.1	2	2	146	126	18.5	20.0	6	15	218	192
Jul	22.8	25.7	1	0	147	68	20.9	22.3	11	0	179	134
Aug	24.3	27.6	10	4	80	56	21.5	21.8	20	8	108	126
Sep	23.9	25.6	0	8	71	47	20.5	17.6	0	28	135	256
Oct	20.4	19.9	3	0	106	147	18.4	16.6	1	3	170	270
Nov	13.8	N/A	25	N/A	310	N/A	10.5	N/A	52	N/A	416	N/A
Dec	15.5	N/A	21	N/A	261	N/A	14.9	N/A	22	N/A	270	N/A
Jan	14.9	N/A	1	N/A	294	N/A	13.6	N/A	7	N/A	336	N/A
Feb	17.8	N/A	0	N/A	102	N/A	15.2	N/A	0	N/A	184	N/A
Mar	14.7	N/A	27	N/A	284	N/A	12.7	N/A	45	N/A	341	N/A
Apr	22.0	N/A	0	N/A	68	N/A	17.6	N/A	3	N/A	160	N/A
May- Oct	22.3	24.6	50	14	711	478	19.7	19.7	68	58	1,006	1,137
Nov - Apr	16.5	N/A	74	N/A	1,319	N/A	14.1	N/A	129	N/A	1,707	N/A
May -Apr	19.4	N/A	124	N/A	2,030	N/A	16.9	N/A	197	N/A	2,713	N/A

Table A-21: Share of Real-time MCP Set by Resource, May 2006 – October 2007 (%)

	Coal		Nuclear		Oil/Gas		Water	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	63	61	0	0	14	13	23	26
Jun	61	61	0	0	22	18	17	21
Jul	52	58	0	0	29	20	20	22
Aug	57	44	0	0	22	38	22	17
Sep	56	52	0	0	18	25	26	23
Oct	62	46	0	0	17	30	21	24
Nov	52	N/A	0	N/A	25	N/A	23	N/A
Dec	62	N/A	0	N/A	16	N/A	22	N/A
Jan	60	N/A	0	N/A	24	N/A	16	N/A
Feb	41	N/A	0	N/A	39	N/A	20	N/A
Mar	49	N/A	0	N/A	27	N/A	24	N/A
Apr	56	N/A	0	N/A	16	N/A	28	N/A
May – Oct	59	54	0	0	20	24	22	22
Nov - Apr	53	N/A	0	N/A	25	N/A	22	N/A
May - Apr	56	N/A	0	N/A	22	N/A	22	N/A

Table A-22: Share of Real-time MCP Set by Resource, Off-Peak, May 2006 – October 2007 (%)

	Coal		Nuclear		Oil/Gas		Water	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	79	72	0	0	4	1	17	27
Jun	81	73	0	0	7	6	12	20
Jul	66	74	0	0	16	5	18	21
Aug	74	70	0	0	10	18	16	12
Sep	68	67	0	0	7	11	24	22
Oct	80	64	0	0	5	13	15	23
Nov	66	N/A	0	N/A	10	N/A	24	N/A
Dec	66	N/A	0	N/A	5	N/A	29	N/A
Jan	74	N/A	0	N/A	8	N/A	18	N/A
Feb	55	N/A	0	N/A	21	N/A	24	N/A
Mar	68	N/A	0	N/A	12	N/A	20	N/A
Apr	64	N/A	0	N/A	9	N/A	26	N/A
May – Oct	75	70	0	0	8	9	17	21
Nov - Apr	66	N/A	0	N/A	11	N/A	24	N/A
May - Apr	70	N/A	0	N/A	10	N/A	20	N/A

Table A-23: Share of Real-time MCP Set by Resource, On-Peak, May 2006 – October 2007 (%)

	Coal		Nuclear		Oil/Gas		Water	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	45	49	0	0	26	26	29	25
Jun	37	47	0	0	39	31	24	22
Jul	30	38	0	0	48	39	22	23
Aug	37	15	0	0	34	62	29	23
Sep	41	32	0	0	32	45	27	24
Oct	40	26	0	0	32	49	28	26
Nov	37	N/A	0	N/A	41	N/A	22	N/A
Dec	57	N/A	0	N/A	30	N/A	13	N/A
Jan	44	N/A	0	N/A	41	N/A	15	N/A
Feb	25	N/A	0	N/A	59	N/A	16	N/A
Mar	26	N/A	0	N/A	44	N/A	29	N/A
Apr	45	N/A	0	N/A	25	N/A	30	N/A
May – Oct	38	35	0	0	35	42	27	24
Nov - Apr	39	N/A	0	N/A	40	N/A	21	N/A
May - Apr	39	N/A	0	N/A	38	N/A	24	N/A

Table A-24: Resources Selected in Real-time Market Schedule, May 2006 – October 2007 (%)

	Injections		Offtakes		Coal		Oil/Gas		Water		Nuclear	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	4	3	10	9	15	13	6	7	27	24	52	56
Jun	5	4	7	8	19	19	7	6	21	23	53	51
Jul	4	4	7	10	21	19	7	6	18	21	53	53
Aug	3	5	9	8	19	23	7	8	17	17	58	51
Sep	3	7	7	8	17	20	7	8	19	19	58	53
Oct	3	7	8	8	17	18	7	9	23	22	53	52
Nov	7	N/A	4	N/A	17	N/A	8	N/A	26	N/A	50	N/A
Dec	3	N/A	5	N/A	13	N/A	7	N/A	26	N/A	54	N/A
Jan	3	N/A	6	N/A	20	N/A	7	N/A	24	N/A	49	N/A
Feb	3	N/A	9	N/A	23	N/A	8	N/A	21	N/A	48	N/A
Mar	5	N/A	7	N/A	19	N/A	8	N/A	23	N/A	51	N/A
Apr	2	N/A	9	N/A	19	N/A	6	N/A	24	N/A	51	N/A
May – Oct	4	5	8	9	18	19	7	7	21	21	55	53
Nov - Apr	4	N/A	7	N/A	18	N/A	7	N/A	24	N/A	51	N/A
May - Apr	4	N/A	7	N/A	18	N/A	7	N/A	22	N/A	53	N/A

Table A-25: Resources Selected in the Real-time Market Schedule, May 2006 – October 2007 (TWh)

	Injections		Offtakes		Coal		Oil/Gas		Water		Nuclear		Domestic Generation*	
	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008
May	0.51	0.39	1.20	1.08	1.90	1.59	0.73	0.81	3.34	2.99	6.58	6.98	12.55	12.36
Jun	0.60	0.47	0.91	1.04	2.47	2.45	0.89	0.85	2.63	3.07	6.77	6.74	12.77	13.11
Jul	0.57	0.49	1.03	1.30	3.03	2.58	1.00	0.86	2.59	2.85	7.57	7.22	14.19	13.51
Aug	0.41	0.67	1.21	1.12	2.63	3.17	0.92	1.15	2.40	2.35	8.05	7.06	14.00	13.73
Sep	0.36	0.87	0.83	0.92	2.00	2.38	0.79	0.90	2.22	2.23	6.88	6.29	11.90	11.80
Oct	0.36	0.80	0.98	0.93	2.16	2.07	0.88	1.02	2.80	2.61	6.58	6.10	12.41	11.79
Nov	0.77	N/A	0.53	N/A	1.95	N/A	0.91	N/A	3.01	N/A	5.93	N/A	11.80	N/A
Dec	0.43	N/A	0.67	N/A	1.71	N/A	0.86	N/A	3.31	N/A	7.03	N/A	12.92	N/A
Jan	0.44	N/A	0.78	N/A	2.74	N/A	1.00	N/A	3.31	N/A	6.84	N/A	13.89	N/A
Feb	0.41	N/A	1.19	N/A	3.13	N/A	1.02	N/A	2.88	N/A	6.54	N/A	13.57	N/A
Mar	0.65	N/A	0.91	N/A	2.50	N/A	1.03	N/A	2.99	N/A	6.68	N/A	13.20	N/A
Apr	0.28	N/A	1.16	N/A	2.38	N/A	0.76	N/A	3.02	N/A	6.38	N/A	12.55	N/A
May – Oct	2.81	3.69	6.16	6.39	14.19	14.24	5.21	5.59	15.98	16.10	42.43	40.39	77.82	76.30
Nov - Apr	2.98	N/A	5.24	N/A	14.41	N/A	5.58	N/A	18.52	N/A	39.40	N/A	77.93	N/A
May - Apr	5.79	N/A	11.40	N/A	28.60	N/A	10.79	N/A	34.50	N/A	81.83	N/A	155.75	N/A

* Domestic generation is the sum of *Coal, Oil/Gas, Water, and Nuclear*.

Table A-26: Offtakes by Intertie Zone, On-peak and Off-peak, May 2006 – October 2007*
(GWh)

		MB		MI		MN		NY		PQ	
		2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	**Off-peak**	0.0	3.1	32.0	170.2	1.2	11.8	625.5	334.2	52.4	57.6
	On-Peak	0.0	3.5	54.0	257.4	0.7	10.9	404.8	197.2	26.4	36.0
Jun	**Off-peak**	0.0	0.5	9.4	65.9	1.6	4.0	513.3	566.6	46.9	39.5
	On-Peak	0.1	0.7	45.7	109.9	0.1	6.9	274.6	228.6	22.4	20.3
Jul	**Off-peak**	0.6	0.0	47.2	76.4	7.9	6.3	606.5	638.4	47.8	42.2
	On-Peak	0.5	0.2	75.3	130.5	8.4	8.9	218.7	376.9	15.6	19.7
Aug	**Off-peak**	0.1	0.0	36.5	61.9	2.6	3.5	668.7	556.0	34.3	52.4
	On-Peak	0.1	0.1	95.4	201.6	1.5	6.0	355.1	215.6	15.5	27.2
Sep	**Off-peak**	2.0	0.0	14.8	21.3	1.9	0.3	441.7	491.4	48.4	65.7
	On-Peak	0.1	0.0	16.5	52.7	2.7	0.7	282.7	258.0	22.3	31.9
Oct	**Off-peak**	18.3	0.0	25.4	72.6	4.8	0.4	480.6	453.1	54.4	30.1
	On-Peak	7.6	0.0	38.0	68.6	4.8	0.5	320.9	284.9	25.0	22.9
Nov	**Off-peak**	30.8	N/A	9.5	N/A	0.8	N/A	275.4	N/A	28.4	N/A
	On-Peak	16.4	N/A	12.0	N/A	1.5	N/A	147.8	N/A	8.4	N/A
Dec	**Off-peak**	28.4	N/A	27.4	N/A	3.1	N/A	362.0	N/A	37.1	N/A
	On-Peak	13.2	N/A	42.9	N/A	0.9	N/A	138.0	N/A	12.5	N/A
Jan	**Off-peak**	25.6	N/A	21.2	N/A	2.2	N/A	346.6	N/A	54.6	N/A
	On-Peak	22.9	N/A	44.6	N/A	3.4	N/A	215.5	N/A	46.1	N/A
Feb	**Off-peak**	25.6	N/A	82.8	N/A	4.4	N/A	480.2	N/A	45.0	N/A
	On-Peak	8.4	N/A	102.0	N/A	2.3	N/A	403.5	N/A	40.3	N/A
Mar	**Off-peak**	16.8	N/A	38.8	N/A	0.7	N/A	457.9	N/A	55.0	N/A
	On-Peak	7.6	N/A	65.3	N/A	1.9	N/A	221.9	N/A	41.1	N/A
Apr	**Off-peak**	33.1	N/A	139.5	N/A	7.5	N/A	436.4	N/A	48.9	N/A
	On-Peak	11.6	N/A	240.7	N/A	8.7	N/A	206.9	N/A	29.6	N/A
May - Oct	**Off-peak**	21.0	3.6	165.3	468.3	20.0	26.3	3336.3	3039.7	284.2	287.5
	On-Peak	8.4	4.5	324.9	820.7	18.2	33.9	1856.8	1561.2	127.2	158.0
	Total	29.4	8.1	490.2	1289.0	38.2	60.2	5193.1	4600.9	411.4	445.5
Nov– Apr	**Off-peak**	160.3	N/A	319.2	N/A	18.8	N/A	2,358.5	N/A	269.1	N/A
	On-Peak	80.2	N/A	507.5	N/A	18.7	N/A	1,333.6	N/A	178.0	N/A
	Total	240.5	N/A	826.7	N/A	37.5	N/A	3,692.1	N/A	447.1	N/A
May - Apr	**Off-peak**	181.3	N/A	484.4	N/A	38.8	N/A	5,694.9	N/A	553.3	N/A
	On-Peak	88.7	N/A	832.4	N/A	36.9	N/A	3,190.3	N/A	305.2	N/A
	Total	270.0	N/A	1,316.8	N/A	75.7	N/A	8,885.2	N/A	858.5	N/A

* MB – Manitoba, MI – Michigan, MN – Minnesota, NY – New York, PQ – Quebec

Table A-27: Injections by Intertie Zone, On-peak and Off-peak, May 2006 - October 2007* (GWh)

		MB		MI		MN		NY		PQ	
		2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	**Off-peak**	58.6	36.9	177.3	33.5	1.2	7.0	5.7	71.1	1.4	4.1
	On-Peak	50.0	17.4	125.6	43.6	13.3	9.4	23.7	55.8	41.7	109.2
Jun	**Off-peak**	69.7	68.0	243.0	84.5	13.8	16.1	11.7	10.0	5.0	23.3
	On-Peak	62.2	49.3	117.6	86.0	16.0	13.1	25.1	50.6	32.3	73.5
Jul	**Off-peak**	98.9	88.5	139.8	121.4	23.4	16.6	22.0	7.1	41.5	5.7
	On-Peak	41.9	40.9	60.8	100.7	12.8	12.2	31.6	53.6	100.7	43.5
Aug	**Off-peak**	78.3	79.1	105.3	173.9	17.1	23.3	7.6	24.4	12.2	5.8
	On-Peak	34.9	65.3	41.5	100.3	11.8	21.4	27.2	115.1	69.9	60.3
Sep	**Off-peak**	63.7	79.0	115.2	340.3	10.6	29.1	14.4	10.4	0.3	6.9
	On-Peak	47.0	57.5	88.4	252.1	9.5	25.7	6.5	46.6	8.1	19.1
Oct	**Off-peak**	27.2	60.2	158.4	275.4	15.1	15.7	8.5	10.3	3.5	14.3
	On-Peak	5.9	45.6	92.8	309.5	7.4	14.8	10.1	37.6	28.4	16.9
Nov	**Off-peak**	7.5	N/A	328.7	N/A	17.6	N/A	17.2	N/A	9.0	N/A
	On-Peak	2.7	N/A	271.0	N/A	12.4	N/A	34.4	N/A	66.2	N/A
Dec	**Off-peak**	14.9	N/A	111.4	N/A	15.0	N/A	13.1	N/A	39.7	N/A
	On-Peak	3.9	N/A	77.7	N/A	6.5	N/A	45.0	N/A	106.6	N/A
Jan	**Off-peak**	24.6	N/A	146.0	N/A	18.7	N/A	17.8	N/A	18.5	N/A
	On-Peak	11.0	N/A	87.2	N/A	10.6	N/A	25.0	N/A	81.2	N/A
Feb	**Off-peak**	8.5	N/A	82.3	N/A	10.3	N/A	16.7	N/A	44.7	N/A
	On-Peak	5.8	N/A	99.6	N/A	11.9	N/A	33.7	N/A	96.6	N/A
Mar	**Off-peak**	26.8	N/A	220.8	N/A	21.9	N/A	14.8	N/A	33.9	N/A
	On-Peak	25.3	N/A	147.2	N/A	13.3	N/A	45.8	N/A	103.9	N/A
Apr	**Off-peak**	21.8	N/A	41.7	N/A	15.2	N/A	11.2	N/A	43.3	N/A
	On-Peak	9.8	N/A	21.4	N/A	6.5	N/A	15.5	N/A	89.0	N/A
May - Oct	**Off-peak**	396.4	411.7	939.0	1029.0	81.2	107.8	69.9	133.3	63.9	60.1
	On-Peak	241.9	276.0	526.7	892.2	70.8	96.6	124.2	359.3	281.1	322.5
	Total	638.3	687.7	1465.7	1921.2	152.0	204.4	194.1	492.6	345.0	382.6
Nov– Apr	**Off-peak**	104.0	N/A	931.0	N/A	98.7	N/A	90.8	N/A	189.1	N/A
	On-Peak	58.5	N/A	704.1	N/A	61.1	N/A	199.4	N/A	543.5	N/A
	Total	162.5	N/A	1,635.1	N/A	159.8	N/A	290.2	N/A	732.5	N/A
May - Apr	**Off-peak**	500.5	N/A	1,869.8	N/A	179.8	N/A	160.7	N/A	252.9	N/A
	On-Peak	300.3	N/A	1,230.7	N/A	132.0	N/A	323.7	N/A	824.5	N/A
	Total	800.7	N/A	3,100.6	N/A	311.8	N/A	484.4	N/A	1,077.5	N/A

* MB – Manitoba, MI – Michigan, MN – Minnesota, NY – New York, PQ – Quebec

Table A-28: Net Exports, May 2006 – October 2007
(MWh)

	On-peak		Off-peak		Total	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	231,286	269,688	454,918	424,277	686,204	693,966
Jun	89,601	93,969	227,996	474,515	317,597	568,484
Jul	70,645	285,182	384,413	523,963	455,058	809,145
Aug	282,463	88,026	521,687	367,333	804,150	455,359
Sep	164,847	(57,635)	304,446	112,928	469,293	55,293
Oct	251,726	(47,476)	370,919	180,297	622,645	132,820
Nov	(200,386)	N/A	(35,002)	N/A	(235,388)	N/A
Dec	(32,210)	N/A	263,848	N/A	231,638	N/A
Jan	117,584	N/A	224,741	N/A	342,325	N/A
Feb	309,106	N/A	475,559	N/A	784,665	N/A
Mar	2,242	N/A	250,960	N/A	253,201	N/A
Apr	355,182	N/A	532,213	N/A	887,395	N/A
May- Oct	1,090,568	631,754	2,264,379	2,083,313	3,354,947	2,715,067
Nov - Apr	551,518	N/A	1,712,319	N/A	2,263,836	N/A
May -Apr	1,642,086	N/A	3,976,698	N/A	5,618,783	N/A

Table A-29: Measures of Difference between 3-Hour Ahead Pre-dispatch Prices and HOEP, May 2006 - October 2007

	3-Hour Ahead Pre-Dispatch Price Minus HOEP ($/MWh)									
	Average Difference		Maximum Difference		Minimum Difference		Standard Deviation		Average Difference as a % of the HOEP	
	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008
May	6.60	7.63	419.55	72.88	(320.42)	(93.58)	30.00	16.11	20.83	30.63
Jun	4.85	6.83	48.06	99.04	(75.35)	(305.24)	12.76	22.95	14.02	25.54
Jul	7.51	3.58	114.61	62.49	(126.79)	(215.90)	15.25	16.64	17.92	15.97
Aug	9.18	7.68	168.10	79.74	(70.41)	(61.26)	27.51	14.90	16.67	19.45
Sep	2.43	3.91	41.59	60.95	(68.61)	(69.49)	8.99	12.18	17.98	17.71
Oct	3.86	6.73	62.51	82.25	(42.27)	(234.52)	10.85	15.40	13.59	25.54
Nov	8.85	N/A	62.20	N/A	(57.01)	N/A	14.87	N/A	25.36	N/A
Dec	8.16	N/A	83.82	N/A	(73.61)	N/A	14.21	N/A	15.19	N/A
Jan	6.48	N/A	46.19	N/A	(89.72)	N/A	13.18	N/A	20.38	N/A
Feb	12.93	N/A	73.34	N/A	(74.95)	N/A	17.30	N/A	29.42	N/A
Mar	11.31	N/A	88.29	N/A	(67.96)	N/A	16.83	N/A	28.05	N/A
Apr	6.76	N/A	81.19	N/A	(145.64)	N/A	18.26	N/A	24.35	N/A
May – Oct	5.74	6.06	142.40	76.23	(117.31)	(163.33)	17.56	16.36	16.84	22.47
Nov - Apr	9.08	N/A	72.51	N/A	(84.82)	N/A	15.78	N/A	23.79	N/A
May - Apr	7.41	N/A	107.45	N/A	(101.06)	N/A	16.67	N/A	20.31	N/A

Table A-30: Measures of Difference between 1-Hour Ahead Pre-dispatch Prices and HOEP, May 2006 - October 2007

	1-Hour Ahead Pre-Dispatch Price Minus HOEP ($/MWh)									
	Average Difference		Maximum Difference		Minimum Difference		Standard Deviation		Average Difference as a % of the HOEP	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	11.94	8.23	1,739.37	71.78	(297.46)	(77.17)	67.55	14.49	29.88	35.18
Jun	5.12	6.99	44.18	94.35	(66.34)	(331.10)	11.20	21.84	15.04	25.21
Jul	6.89	5.26	60.33	62.02	(174.98)	(211.39)	13.61	15.91	18.99	22.34
Aug	9.73	8.16	262.96	74.6	(67.76)	(60.38)	25.64	13.56	19.93	20.05
Sep	3.82	5.96	34.86	83.01	(67.49)	(68.97)	8.56	12.46	24.74	22.37
Oct	6.27	8.17	52.09	66.75	(42.27)	(236.65)	10.44	14.99	21.67	30.09
Nov	8.34	N/A	59.00	N/A	(54.45)	N/A	14.52	N/A	24.82	N/A
Dec	8.77	N/A	91.68	N/A	(67.32)	N/A	13.50	N/A	22.68	N/A
Jan	7.69	N/A	40.71	N/A	(82.87)	N/A	12.08	N/A	23.88	N/A
Feb	14.00	N/A	80.63	N/A	(74.28)	N/A	16.26	N/A	32.21	N/A
Mar	11.06	N/A	87.12	N/A	(67.96)	N/A	16.30	N/A	28.46	N/A
Apr	9.57	N/A	95.48	N/A	(119.44)	N/A	17.18	N/A	31.65	N/A
May – Oct	7.30	7.13	365.63	75.42	(119.38)	(164.28)	22.83	15.54	21.71	25.87
Nov - Apr	9.91	N/A	75.77	N/A	(77.72)	N/A	14.97	N/A	27.28	N/A
May - Apr	8.60	N/A	220.70	N/A	(98.55)	N/A	18.90	N/A	24.50	N/A

Table A-31: Measures of Difference between Pre-dispatch Prices and Hourly Peak MCP, May 2006 – October 2007

	1-Hour Ahead Pre-dispatch Price Minus Hourly Peak MCP			
	Average Difference ($/MWh)		Average Difference* (% of Hourly Peak MCP)	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	4.34	1.13	15.2	13.6
Jun	(0.82)	(1.59)	2.2	8.4
Jul	(0.36)	(1.87)	4.4	6.3
Aug	1.08	0.99	5.1	6.1
Sep	(0.60)	(2.35)	6.4	11.5
Oct	0.51	(3.59)	8.3	6.8
Nov	(1.26)	N/A	5.0	N/A
Dec	0.73	N/A	18.7	N/A
Jan	0.27	N/A	7.8	N/A
Feb	4.13	N/A	13.2	N/A
Mar	1.11	N/A	9.5	N/A
Apr	0.68	N/A	12.8	N/A
May – Oct	0.69	(1.21)	6.9	8.8
Nov - Apr	0.94	N/A	11.2	N/A
May - Apr	0.82	N/A	9.1	N/A

* This is an average of hourly differences relative to hourly peak MCP

Table A-32: Average Monthly HOEP Compared to Average Monthly Peak Hourly MCP, May 2006 – October 2007 ($/MWh)

	Hourly Peak MCP		HOEP		Peak minus HOEP	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	53.92	45.60	46.32	38.50	7.61	7.11
Jun	52.02	52.95	46.08	44.38	5.95	8.57
Jul	57.79	51.04	50.52	43.90	7.26	7.13
Aug	61.37	60.80	52.72	53.62	8.65	7.18
Sep	39.84	52.94	35.42	44.63	4.42	8.31
Oct	45.91	60.66	40.17	48.91	5.74	11.76
Nov	59.25	N/A	49.71	N/A	9.54	N/A
Dec	47.37	N/A	39.25	N/A	8.12	N/A
Jan	51.90	N/A	44.48	N/A	7.42	N/A
Feb	68.99	N/A	59.12	N/A	9.87	N/A
Mar	64.80	N/A	54.85	N/A	9.95	N/A
Apr	54.94	N/A	46.05	N/A	8.89	N/A
May – Oct	51.81	54.00	45.21	45.66	6.61	8.34
Nov – Apr	57.88	N/A	48.91	N/A	8.97	N/A
May - Apr	54.84	N/A	47.06	N/A	7.79	N/A

Table A-33: Frequency Distribution of Difference Between 1-Hour Pre-dispatch and HOEP, May 2006 - October 2007*

	1-Hour Ahead Pre-Dispatch Price Minus HOEP (% of time within range)															
	< -$50.01		-$50.00 to -$20.01		-$20.00 to -$10.01		-$10.00 to -$0.01		$0.00 to $9.99		$10.00 to $19.99		$20.00 to $49.99		> $50.00	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	0.8	0.7	1.2	2.4	1.2	1.5	6.2	11.0	49.3	48.5	**23.0**	17.7	17.5	17.5	0.8	0.7
Jun	0.1	**1.3**	1.9	1.7	3.1	2.5	**15.7**	13.6	53.6	50.4	16.1	13.6	9.4	14.6	0.0	2.4
Jul	0.3	0.8	1.2	2.2	2.7	2.6	13.6	13.0	51.6	53.1	17.9	16.5	12.4	11.3	0.4	0.5
Aug	0.5	0.1	**3.2**	1.1	3.9	1.7	13.2	13.0	44.5	51.9	16.3	16.7	15.3	14.0	**3.1**	1.5
Sep	0.3	0.4	1.1	1.3	1.8	3.7	12.6	13.9	**67.5**	51.8	12.8	19.4	3.9	8.8	0.0	0.7
Oct	0.0	0.3	0.9	0.5	2.8	2.0	12.3	14.9	54.7	45.3	19.3	20.3	9.8	16.5	0.1	0.1
Nov	0.3	N/A	3.1	N/A	**4.3**	N/A	11.1	N/A	42.8	N/A	19.0	N/A	19.0	N/A	0.4	N/A
Dec	0.4	N/A	0.9	N/A	1.3	N/A	10.4	N/A	49.1	N/A	21.5	N/A	15.2	N/A	1.2	N/A
Jan	0.3	N/A	1.2	N/A	2.4	N/A	12.9	N/A	47.3	N/A	20.0	N/A	15.9	N/A	0.0	N/A
Feb	0.2	N/A	1.0	N/A	2.8	N/A	8.9	N/A	34.1	N/A	19.8	N/A	**31.0**	N/A	2.2	N/A
Mar	0.3	N/A	2.0	N/A	2.7	N/A	12.9	N/A	35.9	N/A	20.8	N/A	24.3	N/A	1.1	N/A
Apr	0.6	N/A	2.2	N/A	2.5	N/A	10.1	N/A	45.1	N/A	15.6	N/A	22.6	N/A	1.3	N/A
May – Oct	0.3	0.6	1.6	1.5	2.6	2.3	12.3	13.2	53.5	50.2	17.6	17.4	11.4	13.8	0.7	1.0
Nov – Apr	0.3	N/A	1.7	N/A	2.7	N/A	11.1	N/A	42.4	N/A	19.5	N/A	21.3	N/A	1.0	N/A
May - Apr	0.3	N/A	1.7	N/A	2.6	N/A	11.7	N/A	48.0	N/A	18.5	N/A	16.4	N/A	0.9	N/A

* Bolded values show highest percentage within price range.

Table A-34: Difference between 1-Hour Pre-dispatch Price and HOEP within Defined Ranges, May 2006 - October 2007

	1-Hour Ahead Pre-Dispatch Price Minus HOEP (% of time within range)					
	Greater than $0		Equal to $0		Less than $0	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	90.1	84.3	0.5	0.1	9.4	15.6
Jun	78.6	80.7	0.6	0.3	20.8	19.0
Jul	82.1	81.2	0.1	0.3	17.7	18.6
Aug	79.0	83.9	0.1	0.1	20.8	16.0
Sep	83.5	80.7	0.7	0.0	15.8	19.3
Oct	84.0	82.3	0.0	0.0	16.0	17.7
Nov	81.0	N/A	0.3	N/A	18.8	N/A
Dec	86.7	N/A	0.3	N/A	13.0	N/A
Jan	82.8	N/A	0.4	N/A	16.8	N/A
Feb	86.6	N/A	0.5	N/A	13.0	N/A
Mar	82.0	N/A	0.1	N/A	17.9	N/A
Apr	84.0	N/A	0.6	N/A	15.4	N/A
May – Oct	82.9	82.2	0.3	0.1	16.8	17.7
Nov – Apr	83.8	N/A	0.3	N/A	15.8	N/A
May - Apr	83.4	N/A	0.3	N/A	16.3	N/A

Table A-35: Difference between 1-Hour Pre-dispatch Price and Hourly Peak MCP within Defined Ranges, May 2006 - October 2007

	1-Hour Ahead Pre-Dispatch Price Minus Hourly Peak MCP (% of time within range)					
	Greater than $0		Equal to $0		Less than $0	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	73.7	62.1	2.3	2.4	24.1	35.5
Jun	51.4	57.1	4.2	2.9	44.4	40.0
Jul	57.9	55.7	2.2	3.6	39.9	40.7
Aug	51.8	58.7	3.8	2.4	44.5	38.8
Sep	56.5	46.8	7.2	3.5	36.3	49.7
Oct	59.7	48.9	3.9	2.8	36.4	48.3
Nov	55.0	N/A	4.2	N/A	40.8	N/A
Dec	60.0	N/A	4.0	N/A	36.0	N/A
Jan	56.3	N/A	5.1	N/A	38.6	N/A
Feb	63.1	N/A	5.1	N/A	31.9	N/A
Mar	56.1	N/A	2.8	N/A	41.1	N/A
Apr	60.0	N/A	3.5	N/A	36.5	N/A
May – Oct	58.5	54.9	3.9	2.9	37.6	42.2
Nov – Apr	58.4	N/A	4.1	N/A	37.5	N/A
May - Apr	58.5	N/A	4.0	N/A	37.5	N/A

Table A-36: Demand Forecast Error; Pre-Dispatch versus Average and Peak Hourly Demand, May 2006 - October 2007

	Mean absolute forecast difference: pre-dispatch minus average demand in the hour (MW)				Mean absolute forecast difference: pre-dispatch minus peak demand in the hour (MW)				Mean absolute forecast difference: pre-dispatch minus average demand divided by the average demand (%)				Mean absolute forecast difference: pre-dispatch minus peak demand divided by the peak demand (%)			
	3-Hour Ahead		1-Hour Ahead		3-Hour Ahead		1-Hour Ahead		3-Hour Ahead		1-Hour Ahead		3-Hour Ahead		1-Hour Ahead	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	325	285	302	259	196	173	158	142	2.0	1.8	1.9	1.7	1.2	1.1	1.0	0.9
Jun	379	418	335	350	244	287	185	209	2.2	2.4	2.0	2.1	1.4	1.6	1.0	1.2
Jul	485	399	413	337	344	275	251	201	2.6	2.3	2.3	2.0	1.8	1.6	1.3	1.1
Aug	420	455	353	382	301	307	210	225	2.4	2.5	2.0	2.2	1.6	1.7	1.2	1.2
Sep	297	368	265	318	182	237	144	180	1.9	2.3	1.7	2.0	1.1	1.4	0.9	1.1
Oct	309	336	282	307	190	192	152	160	1.9	2.1	1.8	2.0	1.2	1.2	0.9	1.0
Nov	319	N/A	309	N/A	178	N/A	153	N/A	1.9	N/A	1.9	N/A	1.1	N/A	0.9	N/A
Dec	343	N/A	313	N/A	209	N/A	169	N/A	2.0	N/A	1.8	N/A	1.2	N/A	1.0	N/A
Jan	344	N/A	316	N/A	208	N/A	161	N/A	1.9	N/A	1.7	N/A	1.1	N/A	0.9	N/A
Feb	342	N/A	309	N/A	210	N/A	165	N/A	1.8	N/A	1.6	N/A	1.1	N/A	0.8	N/A
Mar	298	N/A	271	N/A	199	N/A	164	N/A	1.7	N/A	1.6	N/A	1.1	N/A	0.9	N/A
Apr	281	N/A	255	N/A	177	N/A	140	N/A	1.8	N/A	1.6	N/A	1.1	N/A	0.8	N/A
May – Oct	369	377	325	326	243	245	183	186	2.2	2.2	2.0	2.0	1.4	1.4	1.1	1.1
Nov – Apr	321	N/A	296	N/A	197	N/A	159	N/A	1.8	N/A	1.7	N/A	1.1	N/A	0.9	N/A
May - Apr	345	N/A	310	N/A	220	N/A	171	N/A	2.0	N/A	1.8	N/A	1.2	N/A	1.0	N/A

Table A-37: Percentage of Time that Mean Forecast Error (Forecast to Hourly Peak) within Defined MW Ranges, May 2006 – October 2007* (%)

	> 500 MW		200 to 500 MW		100 to 200 MW		0 to 100 MW		0 to -100 MW		-100 to -200 MW		-200 to -500 MW		<-500 MW		>0 MW		< 0 MW	
	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008	2006/2007	2007/2008
May	2	1	16	12	16	15	23	21	19	22	13	16	11	13	0	0	57	49	43	51
Jun	4	4	19	19	15	14	18	17	18	16	14	12	11	15	1	3	56	53	44	47
Jul	9	4	23	21	15	12	15	17	11	17	10	14	14	13	3	1	62	54	38	46
Aug	5	5	18	24	13	16	17	15	15	12	14	11	15	15	2	2	53	60	47	40
Sep	0	3	14	16	15	16	23	20	19	18	15	11	12	15	1	2	53	54	47	46
Oct	1	1	16	18	17	19	19	18	21	21	13	13	12	9	0	1	54	57	46	43
Nov	1	N/A	15	N/A	19	N/A	20	N/A	21	N/A	12	N/A	11	N/A	1	N/A	54	N/A	46	N/A
Dec	1	N/A	17	N/A	16	N/A	19	N/A	17	N/A	14	N/A	13	N/A	1	N/A	54	N/A	46	N/A
Jan	1	N/A	17	N/A	15	N/A	21	N/A	20	N/A	12	N/A	12	N/A	1	N/A	54	N/A	46	N/A
Feb	3	N/A	17	N/A	17	N/A	21	N/A	17	N/A	12	N/A	12	N/A	0	N/A	58	N/A	42	N/A
Mar	2	N/A	15	N/A	14	N/A	20	N/A	19	N/A	15	N/A	14	N/A	1	N/A	50	N/A	50	N/A
Apr	0	N/A	14	N/A	15	N/A	24	N/A	21	N/A	16	N/A	10	N/A	0	N/A	53	N/A	47	N/A
May – Oct	4	3	18	18	15	15	19	18	17	18	13	13	13	13	1	2	56	55	44	46
Nov – Apr	1	N/A	16	N/A	16	N/A	21	N/A	19	N/A	14	N/A	12	N/A	1	N/A	54	N/A	46	N/A
May - Apr	2	N/A	17	N/A	16	N/A	20	N/A	18	N/A	13	N/A	12	N/A	1	N/A	55	N/A	45	N/A

* This data includes dispatchable loads

Table A-38: Discrepancy between Self-Scheduled Generators' Offered and Delivered Quantities, May 2006 – October 2007*

	Pre-Dispatch (MW)		Difference (Pre-Dispatch – Actual) in MW						Fail Rate** (%)	
			Maximum		Minimum		Average			
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	688,775	741,893	292.0	182.2	(68.5)	(194.2)	30.8	2.6	3.1	0.0
Jun	737,975	691,114	188.8	276.5	(99.3)	(144.7)	41.2	32.0	4.4	3.7
Jul	722,572	665,874	239.2	233.8	(100.7)	(147.9)	59.2	40.6	6.4	4.7
Aug	709,496	669,870	206.1	167.5	(55.1)	(167.3)	46.3	26.7	5.6	2.9
Sep	727,818	655,691	250.6	186.6	(136.4)	(162.4)	41.0	17.9	4.8	2.1
Oct	827,835	817,009	164.7	177.9	(136.8)	(247.5)	21.5	18.3	2.1	1.6
Nov	826,319	N/A	221.2	N/A	(148.7)	N/A	16.6	N/A	1.9	N/A
Dec	861,556	N/A	181.9	N/A	(168.0)	N/A	(2.5)	N/A	0.1	N/A
Jan	927,931	N/A	141.2	N/A	(216.3)	N/A	8.9	N/A	0.9	N/A
Feb	843,514	N/A	187.2	N/A	(179.8)	N/A	0.1	N/A	0.2	N/A
Mar	914,915	N/A	244.2	N/A	(191.2)	N/A	(14.0)	N/A	(1.1)	N/A
Apr	766,192	N/A	185.8	N/A	(194.9)	N/A	8.3	N/A	1.2	N/A
May – Oct	735,745	706,909	223.6	204.1	(99.5)	(177.3)	40.0	23.0	4.4	2.5
Nov – Apr	856,738	N/A	193.6	N/A	(183.2)	N/A	2.9	N/A	0.5	N/A
May - Apr	796,242	N/A	208.6	N/A	(141.3)	N/A	21.5	N/A	2.5	N/A

* Self-scheduled generators comprise list as well as those dispatchable units temporarily classified as self-scheduling during testing phases following an outage for major maintenance.
** Fail rate is calculated as the average difference divided by the Pre-Dispatch offer

Table A-39: Discrepancy between Wind Generators' Offered and Delivered Quantities*, May 2006 – October 2007

	Pre-Dispatch (MW)		Difference (Pre-Dispatch – Actual) in MW						Fail Rate** (%)	
			Maximum		Minimum		Average			
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	19,881	68,746	76.3	137.8	(61.7)	(199.9)	1.9	4.2	2.8	4.8
Jun	24,370	54,863	93.5	146.7	(124.7)	(153.0)	3.5	9.4	8.4	14.8
Jul	28,632	44,078	75.6	154.0	(97.8)	(187.8)	3.3	5.7	8.3	14.2
Aug	27,638	54,869	89.9	159.1	(91.5)	(148.8)	8.2	1.7	26.0	(11.1)
Sep	53,686	74,113	130.1	143.3	(115.1)	(205.8)	9.8	(3.3)	19.5	(2.2)
Oct	87,388	106,536	96.1	150.14	(141.1)	(227.9)	10.0	4.1	13.4	0.8
Nov	76,210	N/A	126.1	N/A	(128.6)	N/A	11.7	N/A	17.3	N/A
Dec	112,547	N/A	177.3	N/A	(144.3)	N/A	6.6	N/A	7.2	N/A
Jan	105,340	N/A	145.4	N/A	(178.4)	N/A	13.6	N/A	16.2	N/A
Feb	118,311	N/A	167.8	N/A	(166.6)	N/A	8.3	N/A	7.7	N/A
Mar	112,051	N/A	150.5	N/A	(169.0)	N/A	(11.2)	N/A	(7.7)	N/A
Apr	90,023	N/A	123.7	N/A	(164.1)	N/A	3.6	N/A	9.3	N/A
May – Oct	40,266	67,201	93.6	148.5	(105.3)	(187.2)	6.1	3.6	13.1	3.6
Nov – Apr	102,414	N/A	148.5	N/A	(158.5)	N/A	5.4	N/A	8.3	N/A
May - Apr	71,340	N/A	121.0	N/A	(131.9)	N/A	5.8	N/A	10.7	N/A

* The data has been revised to include Price Farm II generation.

** Fail rate is calculated as the average difference divided by the Pre-Dispatch offer

Table A-40: Failed Imports into Ontario, May 2006 – October 2007*
(Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	121	192	818	453	135	135	3.1	6.3
Jun	187	148	848	400	153	95	4.6	2.9
Jul	207	112	1,020	700	123	123	4.3	2.8
Aug	171	207	405	546	113	118	4.5	3.5
Sep	54	155	300	525	76	146	1.1	2.5
Oct	109	173	240	607	69	116	2.1	2.4
Nov	242	N/A	595	N/A	114	N/A	3.5	N/A
Dec	137	N/A	384	N/A	102	N/A	3.1	N/A
Jan	138	N/A	553	N/A	110	N/A	3.3	N/A
Feb	230	N/A	502	N/A	92	N/A	4.9	N/A
Mar	217	N/A	550	N/A	112	N/A	3.6	N/A
Apr	105	N/A	250	N/A	89	N/A	3.3	N/A
May-Oct	142	164	605	539	112	122	3.3	3.4
Nov-Apr	178	N/A	472	N/A	103	N/A	3.6	N/A
May-Apr	160	N/A	539	N/A	107	N/A	3.4	N/A

* Excludes transaction failures of less than 1 MW.

** The failure rate is calculated as the sum of failed imports divided by the sum of pre-dispatch imports on a monthly basis

Table A-41: Failed Imports into Ontario, On-Peak, May 2006 - October 2007*
(Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	66	107	818	453	123	146	3.1	6.2
Jun	78	83	490	289	132	98	3.9	2.9
Jul	115	69	587	700	107	114	4.8	3.0
Aug	72	121	405	546	91	104	3.4	3.4
Sep	20	80	300	421	99	139	1.2	2.7
Oct	60	97	240	607	74	123	3.0	2.7
Nov	148	N/A	595	N/A	112	N/A	4.1	N/A
Dec	73	N/A	300	N/A	101	N/A	3.0	N/A
Jan	67	N/A	553	N/A	99	N/A	3.0	N/A
Feb	119	N/A	502	N/A	93	N/A	4.3	N/A
Mar	131	N/A	400	N/A	108	N/A	4.1	N/A
Apr	48	N/A	235	N/A	78	N/A	2.6	N/A
May-Oct	69	93	473	503	104	121	3.2	3.5
Nov-Apr	98	N/A	431	N/A	99	N/A	3.5	N/A
May-Apr	83	N/A	452	N/A	101	N/A	3.4	N/A

* Excludes transaction failures of less than 1 MW.
** The failure rate is calculated as the sum of failed imports divided by the sum of pre-dispatch imports on a monthly basis

Table A-42: Failed Imports into Ontario, Off-Peak, May 2006 - October 2007* (Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	55	85	500	450	148	120	3.1	6.3
Jun	109	65	848	400	168	91	5.1	2.9
Jul	92	43	1,020	662	143	138	3.9	2.4
Aug	99	86	385	500	128	138	5.4	3.7
Sep	34	75	200	525	63	153	1.0	2.4
Oct	49	76	191	435	63	107	1.4	2.1
Nov	94	N/A	525	N/A	116	N/A	2.8	N/A
Dec	64	N/A	384	N/A	103	N/A	3.3	N/A
Jan	71	N/A	483	N/A	121	N/A	3.7	N/A
Feb	111	N/A	480	N/A	91	N/A	5.9	N/A
Mar	86	N/A	550	N/A	117	N/A	3.1	N/A
Apr	57	N/A	250	N/A	97	N/A	4.0	N/A
May-Oct	73	72	524	495	119	125	3.3	3.3
Nov-Apr	81	N/A	445	N/A	108	N/A	3.8	N/A
May-Apr	77	N/A	485	N/A	113	N/A	3.6	N/A

* Excludes transaction failures of less than 1 MW.

** The failure rate is calculated as the sum of failed imports divided by the sum of pre-dispatch imports on a monthly basis

Table A-43: Failed Exports from Ontario,
May 2006 - October 2007*
(Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	564	522	1,136	938	318	202	13.0	8.9
Jun	324	382	817	733	176	167	5.9	5.8
Jul	354	350	850	1079	201	175	6.5	4.5
Aug	399	373	914	900	187	163	5.8	5.2
Sep	422	397	788	1071	192	208	8.9	8.2
Oct	412	390	874	898	185	194	7.3	7.5
Nov	317	N/A	765.5	N/A	157	N/A	8.6	N/A
Dec	387	N/A	865	N/A	169	N/A	8.9	N/A
Jan	415	N/A	801	N/A	153	N/A	7.5	N/A
Feb	375	N/A	1,220	N/A	130	N/A	3.9	N/A
Mar	404	N/A	671	N/A	142	N/A	5.9	N/A
Apr	455	N/A	1,028	N/A	160	N/A	5.9	N/A
May-Oct	413	402	897	937	210	185	7.9	6.7
Nov-Apr	392	N/A	892	N/A	152	N/A	6.8	N/A
May-Apr	402	N/A	894	N/A	181	N/A	7.3	N/A

* Excludes transaction failures of less than 1 MW.
** The failure rate is calculated as the sum of failed exports divided by the sum of pre-dispatch exports on a monthly basis

Table A-44: Failed Exports from Ontario, On-Peak, May 2006 - October 2007* (Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	239	199	1,029	938	256	224	11.2	8.1
Jun	123	150	785	733	153	179	5.2	6.8
Jul	126	164	850	1079	193	201	7.1	5.8
Aug	161	155	914	900	215	154	6.9	5.0
Sep	148	146	644	942	163	204	6.9	8.0
Oct	144	160	874	645	162	171	5.6	6.8
Nov	138	N/A	527	N/A	125	N/A	8.5	N/A
Dec	127	N/A	865	N/A	133	N/A	7.5	N/A
Jan	183	N/A	665	N/A	117	N/A	6	N/A
Feb	154	N/A	1,220	N/A	124	N/A	3.3	N/A
Mar	175	N/A	500	N/A	91	N/A	4.5	N/A
Apr	209	N/A	930	N/A	142	N/A	5.6	N/A
May-Oct	157	162	849	873	190	189	7.1	6.7
Nov-Apr	164	N/A	785	N/A	122	N/A	5.9	N/A
May-Apr	161	N/A	817	N/A	156	N/A	6.5	N/A

* Excludes transaction failures of less than 1 MW.

** The failure rate is calculated as the sum of failed exports divided by the sum of pre-dispatch exports on a monthly basis

Table A-45: Failed Exports from Ontario, Off-Peak, May 2006 - October 2007*
(Incidents and Average Magnitude)

	Number of Incidents		Maximum Hourly Failure (MW)		Average Hourly Failure (MW)		Failure Rate (%)**	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	325	323	1,136	902	363	188	14.3	9.5
Jun	201	232	817	570	190	159	6.3	5.2
Jul	228	186	749	627	205	152	6.2	3.6
Aug	238	218	709	722	167	170	5.1	5.2
Sep	274	251	788	1,071	208	209	10.1	8.3
Oct	268	230	710	898	198	211	8.4	8.0
Nov	179	N/A	766	N/A	181	N/A	8.6	N/A
Dec	260	N/A	725	N/A	186	N/A	9.6	N/A
Jan	232	N/A	801	N/A	181	N/A	8.5	N/A
Feb	221	N/A	565	N/A	133	N/A	4.4	N/A
Mar	229	N/A	671	N/A	180	N/A	6.8	N/A
Apr	246	N/A	1,028	N/A	175	N/A	6.1	N/A
May-Oct	256	240	818	798	222	182	8.4	6.6
Nov-Apr	228	N/A	759	N/A	173	N/A	7.3	N/A
May-Apr	242	N/A	789	N/A	197	N/A	7.8	N/A

* Excludes transaction failures of less than 1 MW.
** The failure rate is calculated as the sum of failed exports divided by the sum of pre-dispatch exports on a monthly basis

Table A-46: Sources of Total Operating Reserve Requirements, On-Peak Periods, May 2006 – October 2007

	% of Total Requirements													
	Average Hourly Reserve (MW)		Dispatchable Load		Hydroelectric		Fossil		CAOR		Import		Export	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	1,366	1,346	23.9	19.0	61.7	71.1	6.7	4.4	0.9	0.1	1.6	0.2	4.8	3.4
Jun	1,368	1,334	22.3	19.2	67.0	68.6	5.4	5.6	0.0	0.3	2.4	1.0	2.8	3.4
Jul	1,370	1,317	24.0	18.0	65.8	70.8	6.3	6.1	0.0	0.1	1.8	0.8	2.1	2.4
Aug	1,380	1,324	17.1	16.3	74.4	72.7	5.8	5.5	0.3	0.0	0.4	1.2	2.0	3.1
Sep	1,367	1,320	20.4	17.0	71.8	72.7	4.7	5.2	0.0	0.1	0.4	1.3	2.8	3.1
Oct	1,384	1,330	18.4	16.9	71.2	74.3	5.1	5.7	0.0	0.0	1.3	0.4	2.9	2.5
Nov	1,379	N/A	20.8	N/A	69.7	N/A	6.0	N/A	0.0	N/A	0.5	N/A	0.9	N/A
Dec	1,365	N/A	18.4	N/A	71.2	N/A	6.1	N/A	0.2	N/A	1.8	N/A	0.6	N/A
Jan	1,373	N/A	20.4	N/A	67.2	N/A	7.4	N/A	0.2	N/A	0.0	N/A	4.1	N/A
Feb	1,399	N/A	21.1	N/A	66.9	N/A	6.2	N/A	0.3	N/A	0.2	N/A	4.3	N/A
Mar	1,387	N/A	21.8	N/A	68.1	N/A	4.1	N/A	0.2	N/A	1.4	N/A	4.0	N/A
Apr	1,379	N/A	20.6	N/A	69.1	N/A	5.2	N/A	0.3	N/A	0.9	N/A	2.7	N/A
May-Oct	1,373	1,329	21.0	17.7	68.7	71.7	5.7	5.4	0.2	0.1	1.3	0.8	2.9	3.0
Nov-Apr	1,380	N/A	20.5	N/A	68.7	N/A	5.8	N/A	0.2	N/A	0.8	N/A	2.8	N/A
May-Apr	1,376	N/A	20.8	N/A	68.7	N/A	5.8	N/A	0.2	N/A	1.1	N/A	2.8	N/A

Table A-47: Sources of Total Operating Reserve Requirements, Off-Peak Periods, May 2006 – October 2007

	% of Total Requirements													
	Average Hourly Reserve (MW)		Dispatchable Load		Hydroelectric		Fossil		CAOR		Import		Export	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	1,487	1,340	21.5	19.6	68.4	66.8	7.8	6.4	0.2	0.0	0.4	0.0	1.6	4.7
Jun	1,435	1,315	21.6	20.4	68.0	66.4	6.4	5.9	0.0	0.0	0.2	0.6	3.8	4.2
Jul	1,368	1,318	22.3	19.5	65.1	68.5	8.4	6.9	0.2	0.0	0.3	0.0	3.8	3.0
Aug	1,370	1,316	17.4	17.2	71.9	68.6	7.1	7.4	0.0	0.0	0.2	0.0	3.4	4.7
Sep	1,367	1,317	19.5	18.2	70.0	68.8	6.7	7.0	0.0	0.0	0.0	0.0	3.8	4.9
Oct	1,368	1,316	17.7	18.1	69.0	69.6	6.9	7.8	0.0	0.0	0.0	0.9	4.5	2.9
Nov	1,368	N/A	19.2	N/A	70.1	N/A	6.1	N/A	0.0	N/A	0.0	N/A	1.8	N/A
Dec	1,366	N/A	16.2	N/A	71.4	N/A	7.1	N/A	0.1	N/A	1.2	N/A	1.7	N/A
Jan	1,367	N/A	19.5	N/A	67.7	N/A	6.4	N/A	0.0	N/A	0.0	N/A	4.3	N/A
Feb	1,371	N/A	20.3	N/A	70.0	N/A	3.7	N/A	0.1	N/A	0.0	N/A	4.8	N/A
Mar	1,369	N/A	21.1	N/A	69.1	N/A	3.9	N/A	0.0	N/A	0.5	N/A	4.3	N/A
Apr	1,395	N/A	19.8	N/A	69.3	N/A	5.1	N/A	0.1	N/A	0.3	N/A	3.2	N/A
May-Oct	1,399	1,320	20.0	18.8	68.7	68.1	7.2	6.9	0.1	0.0	0.2	0.3	3.5	4.1
Nov-Apr	1,373	N/A	19.4	N/A	69.6	N/A	5.4	N/A	0.1	N/A	0.3	N/A	3.4	N/A
May-Apr	1,386	N/A	19.7	N/A	69.2	N/A	6.3	N/A	0.1	N/A	0.3	N/A	3.4	N/A

Table A-48: Day Ahead Forecast Error, May 2006 – October 2007
(as of Hour 18)

	Average Forecast Error (MW)		Average Absolute Error (% of Peak Demand)		No. of Hours with Forecast Error ≥ 3%		Percentage of Hours with Absolute Error ≥ 3%	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	(98)	(26)	1.87	1.31	151	53	20	7
Jun	(100)	0	2.91	2.67	279	252	39	35
Jul	178	98	3.02	2.61	317	227	43	31
Aug	26	113	2.55	2.21	258	188	35	25
Sep	101	68	1.70	1.79	127	139	18	19
Oct	6	(70)	1.60	1.53	94	92	13	12
Nov	(76)	N/A	1.52	N/A	83	N/A	12	N/A
Dec	15	N/A	1.73	N/A	114	N/A	15	N/A
Jan	(67)	N/A	1.52	N/A	70	N/A	9	N/A
Feb	23	N/A	1.52	N/A	81	N/A	12	N/A
Mar	(77)	N/A	1.61	N/A	94	N/A	13	N/A
Apr	(38)	N/A	1.55	N/A	84	N/A	12	N/A
May-Oct	19	31	2.28	2.02	1,226	951	28	22
Nov-Apr	(37)	N/A	1.58	N/A	526	N/A	12	N/A
May-Apr	(9)	N/A	1.93	N/A	1,752	N/A	20	N/A

Table A-49: Average One Hour Ahead Forecast Error, May 2006 – October 2007

	Peak Forecast Error (MW)		Average Absolute Error (% of Peak Demand)		No. of Hours with Forecast Error ≥ 2%		Percentage of Hours with Absolute Error ≥ 2%	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	38	(2)	0.96	0.89	82	63	11	8
Jun	45	19	1.03	1.19	92	129	13	18
Jul	82	39	1.32	1.14	160	126	22	17
Aug	38	61	1.15	1.22	123	125	17	17
Sep	8	22	0.89	1.06	56	94	8	13
Oct	23	39	0.93	0.99	59	92	8	12
Nov	18	N/A	0.90	N/A	58	N/A	8	N/A
Dec	20	N/A	0.98	N/A	75	N/A	10	N/A
Jan	19	N/A	0.87	N/A	53	N/A	7	N/A
Feb	42	N/A	0.84	N/A	41	N/A	6	N/A
Mar	3	N/A	0.92	N/A	67	N/A	9	N/A
Apr	8	N/A	0.84	N/A	42	N/A	6	N/A
May-Oct	39	30	1.05	1.08	572	629	13	14
Nov-Apr	18	N/A	0.89	N/A	336	N/A	8	N/A
May-Apr	29	N/A	0.97	N/A	908	N/A	10	N/A

Table A-50: Monthly Payment for Reliability Programs, May 2006 – October 2007 ($ millions)

	DA IOG*		RT IOG*		OR		DA GCG		SGOL		TDRP		ELRP		HADL	
	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008	2006 / 2007	2007 / 2008
May	N/A	0.33	3.81	2.33	3.07	1.01	N/A	1.15	0.43	0.11	-0.01	0.00	N/A	0.00	0.00	0.00
Jun	0.35	1.08	1.91	2.27	0.54	1.24	0.56	2.04	0.52	0.07	0.01	0.00	0.00	0.01	0.00	0.00
Jul	0.55	0.65	1.81	1.42	0.84	1.10	1.89	2.29	0.18	0.22	0.00	0.00	0.00	0.00	0.00	0.00
Aug	0.72	0.64	2.82	2.29	1.05	0.61	2.37	1.58	0.09	0.06	0.03	0.00	0.01	0.00	0.00	0.00
Sep	0.16	2.79	0.57	1.71	0.81	0.78	1.69	1.67	0.13	0.03	0.07	0.00	0.00	0.01	0.00	0.00
Oct	0.16	1.35	1.60	2.55	0.97	0.85	1.14	1.99	0.22	0.04	0.00	0.00	0.00	0.00	0.00	0.00
Nov	4.18	N/A	3.50	N/A	1.34	N/A	2.00	N/A	0.18	N/A	0.00	N/A	0.00	N/A	0.00	N/A
Dec	1.08	N/A	2.35	N/A	1.50	N/A	2.03	N/A	0.15	N/A	0.00	N/A	0.00	N/A	0.00	N/A
Jan	0.50	N/A	2.37	N/A	2.13	N/A	2.35	N/A	0.17	N/A	0.00	N/A	0.00	N/A	0.00	N/A
Feb	0.16	N/A	3.98	N/A	2.24	N/A	2.61	N/A	0.30	N/A	0.01	N/A	0.00	N/A	0.00	N/A
Mar	1.31	N/A	4.34	N/A	1.04	N/A	1.97	N/A	0.20	N/A	0.01	N/A	0.00	N/A	0.00	N/A
Apr	0.08	N/A	2.29	N/A	1.50	N/A	1.70	N/A	0.09	N/A	0.01	N/A	0.00	N/A	0.00	N/A
May – Oct	1.94	6.84	12.52	12.57	7.28	5.59	7.65	10.72	1.57	0.53	0.10	0.00	0.01	0.02	0.00	0.00
Nov – Apr	7.31	N/A	18.83	N/A	9.75	N/A	12.66	N/A	1.09	N/A	0.02	N/A	0.00	N/A	0.00	N/A
May - Apr	9.25	N/A	31.35	N/A	17.03	N/A	20.31	N/A	2.66	N/A	0.12	N/A	0.01	N/A	0.00	N/A

* A total of about $0.83 million was eventually clawed back but not excluded from the table

*Table A-51: Low Price Hours, May 2007 - October 2007**

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/05/01	2	12,698	12,525	-1.4	277	22.07	8.22	-62.8
2007/05/01	3	12,429	12,502	0.6	902	16.60	4.80	-71.1
2007/05/01	4	12,722	12,564	-1.2	185	23.06	12.44	-46.1
2007/05/01	5	13,611	13,152	-3.4	0	25.59	19.85	-22.4
2007/05/02	24	13,748	13,237	-3.7	180	25.35	19.02	-25.0
2007/05/03	1	12,994	12,756	-1.8	170	22.76	19.13	-15.9
2007/05/03	2	12,803	12,487	-2.5	0	22.67	19.73	-13.0
2007/05/03	3	12,597	12,378	-1.7	32	22.17	19.24	-13.2
2007/05/03	24	13,458	13,288	-1.3	290	26.05	18.25	-29.9
2007/05/05	3	11,829	11,697	-1.1	25	14.05	5.62	-60.0
2007/05/05	4	11,764	11,687	-0.7	25	16.00	18.03	12.7
2007/05/05	24	12,588	12,278	-2.5	175	21.80	11.95	-45.2
2007/05/06	1	11,622	11,785	1.4	175	6.96	6.73	-3.3
2007/05/06	2	11,421	11,504	0.7	175	15.20	9.07	-40.3
2007/05/06	3	11,277	11,363	0.8	25	21.49	13.38	-37.7
2007/05/06	5	11,384	11,501	1.0	175	16.60	8.44	-49.2
2007/05/06	6	11,513	11,571	0.5	148	15.09	9.43	-37.5
2007/05/06	7	12,380	12,119	-2.1	181	21.18	6.60	-68.8
2007/05/06	8	13,437	13,072	-2.7	407	24.64	11.62	-52.8
2007/05/06	14	14,080	13,976	-0.7	205	22.41	16.98	-24.2
2007/05/06	15	14,028	13,913	-0.8	250	22.22	6.08	-72.6
2007/05/06	16	14,191	14,125	-0.5	159	24.59	17.37	-29.4
2007/05/06	19	14,488	14,229	-1.8	148	25.96	6.28	-75.8
2007/05/06	23	13,572	13,268	-2.2	325	27.93	18.29	-34.5
2007/05/06	24	12,818	12,514	-2.4	150	26.07	6.86	-73.7
2007/05/07	1	12,040	12,195	1.3	183	6.81	7.95	16.7
2007/05/07	2	11,911	12,081	1.4	325	6.81	5.35	-21.4
2007/05/07	3	11,845	12,035	1.6	175	4.80	5.63	17.3
2007/05/07	4	12,181	12,180	0.0	25	16.18	17.38	7.4
2007/05/07	5	13,313	12,711	-4.5	25	26.85	17.84	-33.6
2007/05/07	23	14,603	14,054	-3.7	331	27.42	14.14	-48.4
2007/05/07	24	13,254	12,982	-2.1	353	16.60	4.70	-71.7
2007/05/08	1	12,556	12,501	-0.4	442	5.53	4.24	-23.3
2007/05/08	2	12,410	12,203	-1.7	199	8.23	6.53	-20.7
2007/05/08	3	12,206	12,036	-1.4	300	8.23	4.56	-44.6
2007/05/08	4	12,383	12,148	-1.9	365	15.20	4.57	-69.9
2007/05/08	5	13,115	12,612	-3.8	0	24.20	11.05	-54.3
2007/05/08	6	14,753	13,711	-7.1	150	29.95	19.73	-34.1
2007/05/10	1	13,345	13,008	-2.5	250	19.58	15.63	-20.2
2007/05/10	2	12,988	12,687	-2.3	100	18.33	15.64	-14.7
2007/05/10	3	12,722	12,515	-1.6	201	17.08	14.82	-13.2
2007/05/10	4	12,771	12,465	-2.4	235	17.49	14.63	-16.4
2007/05/10	5	13,402	12,864	-4.0	347	20.00	7.55	-62.3
2007/05/10	6	14,811	14,061	-5.1	327	29.25	17.80	-39.1
2007/05/10	7	16,335	15,863	-2.9	520	27.98	19.65	-29.8
2007/05/12	3	11,893	11,753	-1.2	60	15.00	5.72	-61.9
2007/05/12	4	11,803	11,785	-0.2	38	10.00	15.55	55.5

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/05/12	5	11,945	11,805	-1.2	0	15.00	6.40	-57.3
2007/05/12	6	12,599	12,113	-3.9	170	22.13	10.28	-53.5
2007/05/12	24	12,317	12,401	0.7	-100	15.44	18.21	17.9
2007/05/13	1	12,207	11,689	-4.2	218	21.80	5.98	-72.6
2007/05/13	2	11,777	11,428	-3.0	375	17.95	4.78	-73.4
2007/05/13	3	11,427	11,314	-1.0	455	18.32	5.05	-72.4
2007/05/13	4	11,417	11,369	-0.4	466	20.00	5.88	-70.6
2007/05/13	5	11,556	11,411	-1.3	300	16.48	5.37	-67.4
2007/05/13	6	11,803	11,508	-2.5	430	15.88	4.56	-71.3
2007/05/13	7	12,499	12,183	-2.5	91	23.52	17.71	-24.7
2007/05/18	24	12,826	12,808	-0.1	175	21.95	15.69	-28.5
2007/05/19	1	12,204	12,278	0.6	200	17.00	7.92	-53.4
2007/05/19	2	12,051	11,899	-1.3	53	14.72	5.05	-65.7
2007/05/19	3	11,711	11,781	0.6	200	20.00	14.55	-27.3
2007/05/19	4	11,610	11,786	1.5	444	20.00	13.12	-34.4
2007/05/19	5	11,946	11,880	-0.6	504	23.58	16.02	-32.1
2007/05/19	6	12,399	12,129	-2.2	299	23.80	16.94	-28.8
2007/05/19	7	13,332	12,831	-3.8	124	23.83	15.43	-35.2
2007/05/19	24	12,584	12,445	-1.1	75	20.68	19.42	-6.1
2007/05/20	1	11,886	11,891	0.0	75	3.99	5.15	29.1
2007/05/20	2	11,654	11,611	-0.4	150	4.75	4.33	-8.8
2007/05/20	3	11,376	11,386	0.1	-30	2.90	2.95	1.7
2007/05/20	4	11,329	11,336	0.1	100	4.15	3.82	-8.0
2007/05/20	5	11,538	11,339	-1.7	0	4.75	4.25	-10.5
2007/05/20	6	11,618	11,407	-1.8	0	4.75	3.60	-24.2
2007/05/20	7	12,394	11,980	-3.3	-50	4.75	3.62	-23.8
2007/05/20	8	13,227	12,931	-2.2	75	21.77	7.39	-66.1
2007/05/20	14	14,167	14,012	-1.1	-175	18.95	19.27	1.7
2007/05/20	15	14,146	13,980	-1.2	175	15.72	6.37	-59.5
2007/05/20	16	14,399	14,122	-1.9	-60	15.72	14.55	-7.4
2007/05/20	20	14,426	13,999	-3.0	150	28.97	18.17	-37.3
2007/05/20	22	14,085	13,844	-1.7	0	21.86	13.32	-39.1
2007/05/20	23	13,185	13,026	-1.2	-188	21.55	18.51	-14.1
2007/05/21	1	11,908	11,860	-0.4	0	27.44	10.62	-61.3
2007/05/21	2	11,691	11,589	-0.9	0	19.23	6.47	-66.4
2007/05/21	3	11,509	11,488	-0.2	0	10.00	7.82	-21.8
2007/05/22	3	11,948	11,803	-1.2	100	17.00	12.72	-25.2
2007/05/22	4	12,282	11,904	-3.1	50	22.87	17.19	-24.8
2007/05/27	1	12,050	12,269	1.8	275	20.27	18.58	-8.3
2007/05/27	2	11,613	11,898	2.5	555	14.00	9.18	-34.4
2007/05/27	3	11,461	11,655	1.7	490	13.92	13.69	-1.7
2007/05/27	4	11,460	11,616	1.4	214	14.00	13.84	-1.1
2007/05/27	5	11,427	11,642	1.9	-49	14.99	17.90	19.4
2007/05/27	6	11,901	11,683	-1.8	184	28.52	14.18	-50.3
2007/05/27	7	12,717	12,291	-3.4	272	29.74	15.74	-47.1
2007/05/27	24	13,616	13,071	-4.0	222	29.82	18.85	-36.8
2007/05/28	1	12,700	12,564	-1.1	302	18.99	10.75	-43.4
2007/05/28	2	12,529	12,322	-1.7	643	19.20	4.02	-79.1
2007/05/28	3	12,136	12,252	1.0	668	21.97	4.04	-81.6

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/05/28	4	12,260	12,317	0.5	338	18.01	5.72	-68.2
2007/05/28	5	13,187	12,763	-3.2	15	25.47	12.10	-52.5
2007/05/28	6	14,838	13,965	-5.9	82	30.65	14.18	-53.7
2007/05/28	24	13,906	13,689	-1.6	575	28.10	19.32	-31.2
2007/05/29	1	13,302	13,057	-1.8	411	24.97	7.39	-70.4
2007/05/29	2	12,769	12,719	-0.4	179	18.29	15.17	-17.1
2007/05/29	3	12,695	12,543	-1.2	275	19.12	6.82	-64.3
2007/05/29	4	12,875	12,598	-2.1	473	24.00	11.26	-53.1
2007/05/29	5	13,569	12,972	-4.4	67	26.99	18.30	-32.2
2007/05/30	1	13,453	13,258	-1.5	150	20.54	15.46	-24.7
2007/05/30	2	13,092	12,883	-1.6	76	18.88	14.40	-23.7
2007/05/30	3	12,824	12,735	-0.7	187	16.69	8.03	-51.9
2007/05/30	4	12,812	12,742	-0.5	463	18.88	6.90	-63.5
2007/05/30	5	13,475	13,096	-2.8	228	26.80	16.58	-38.1
2007/05/31	2	14,391	14,104	-2.0	468	22.33	15.79	-29.3
2007/05/31	3	13,956	13,771	-1.3	200	19.23	16.60	-13.7
2007/05/31	4	13,855	13,691	-1.2	191	19.11	16.46	-13.9
2007/05/31	5	14,505	14,029	-3.3	134	27.93	19.46	-30.3
2007/05/31	6	16,085	15,127	-6.0	149	28.01	16.03	-42.8
May 2007**	**115**	**12,752**	**12,555**	**-1.5**	**200**	**19.15**	**11.73**	**-38.7**
2007/06/02	5	12,975	12,982	0.1	50	7.02	7.02	0.0
2007/06/02	6	13,857	13,212	-4.7	-50	22.38	8.68	-61.2
2007/06/02	7	15,304	14,287	-6.6	150	27.80	10.08	-63.7
2007/06/03	4	13,273	12,942	-2.5	450	25.00	19.63	-21.5
2007/06/03	5	13,187	12,730	-3.5	55	22.84	13.71	-40.0
2007/06/03	6	13,233	12,677	-4.2	242	23.44	7.24	-69.1
2007/06/03	7	14,242	13,412	-5.8	61	25.13	11.35	-54.8
2007/06/03	8	15,178	14,703	-3.1	161	27.00	19.72	-27.0
2007/06/04	3	13,121	13,012	-0.8	430	22.24	13.31	-40.2
2007/06/04	4	13,333	13,074	-1.9	444	22.54	9.69	-57.0
2007/06/04	5	14,108	13,588	-3.7	350	25.00	14.92	-40.3
2007/06/04	24	15,030	14,385	-4.3	434	27.29	16.64	-39.0
2007/06/05	1	14,126	13,680	-3.2	374	16.60	4.69	-71.7
2007/06/05	2	13,585	13,298	-2.1	127	10.00	4.51	-54.9
2007/06/05	3	13,080	13,100	0.2	370	15.10	11.69	-22.6
2007/06/05	4	13,038	13,121	0.6	84	9.06	14.25	57.3
2007/06/05	5	14,016	13,516	-3.6	89	18.39	10.33	-43.8
2007/06/05	6	15,550	14,648	-5.8	-16	27.24	17.72	-34.9
2007/06/05	24	13,613	13,403	-1.5	0	20.10	17.73	-11.8
2007/06/06	1	12,937	12,982	0.4	0	4.70	5.17	10.0
2007/06/06	2	12,660	12,664	0.0	0	4.50	4.86	8.0
2007/06/06	3	12,524	12,552	0.2	0	5.30	6.28	18.5
2007/06/06	4	12,555	12,589	0.3	39	6.27	6.06	-3.3
2007/06/06	5	13,187	12,980	-1.6	8	15.91	8.70	-45.3
2007/06/06	6	15,126	14,102	-6.8	8	27.71	13.32	-51.9
2007/06/06	23	15,265	14,494	-5.0	149	31.76	19.49	-38.6
2007/06/06	24	14,040	13,510	-3.8	0	23.71	18.01	-24.0
2007/06/07	1	13,176	12,911	-2.0	158	17.89	14.25	-20.3

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/06/07	2	12,875	12,590	-2.2	329	16.36	6.54	-60.0
2007/06/07	3	12,712	12,425	-2.3	200	15.00	4.33	-71.1
2007/06/07	4	12,855	12,479	-2.9	252	16.80	4.62	-72.5
2007/06/07	5	13,531	12,882	-4.8	120	27.47	15.67	-43.0
2007/06/07	6	14,859	14,097	-5.1	207	28.29	12.73	-55.0
2007/06/08	1	13,706	13,860	1.1	0	18.82	19.70	4.7
2007/06/08	2	13,490	13,451	-0.3	0	17.78	17.54	-1.3
2007/06/08	3	13,159	13,214	0.4	0	4.70	7.43	58.1
2007/06/08	4	13,303	13,259	-0.3	0	5.00	15.66	213.2
2007/06/08	5	14,099	13,634	-3.3	12	23.07	18.73	-18.8
2007/06/08	6	15,776	14,895	-5.6	0	27.58	15.03	-45.5
2007/06/09	4	12,067	11,908	-1.3	0	21.26	17.67	-16.9
2007/06/09	5	11,903	11,822	-0.7	144	21.89	19.20	-12.3
2007/06/10	2	12,246	11,769	-3.9	0	21.58	8.34	-61.4
2007/06/10	3	11,854	11,536	-2.7	19	21.34	9.72	-54.5
2007/06/10	4	11,671	11,432	-2.0	194	10.43	4.78	-54.2
2007/06/10	5	11,532	11,228	-2.6	100	10.32	4.75	-54.0
2007/06/10	6	11,956	11,318	-5.3	50	20.88	3.81	-81.8
2007/06/10	7	12,580	11,966	-4.9	0	23.53	13.51	-42.6
2007/06/13	6	16,644	15,628	-6.1	333	29.64	18.06	-39.1
2007/06/21	2	13,723	13,358	-2.7	314	22.96	19.11	-16.8
2007/06/21	3	13,157	13,147	-0.1	100	21.19	19.91	-6.0
2007/06/21	4	13,184	13,158	-0.2	100	21.31	19.99	-6.2
2007/06/21	5	13,876	13,446	-3.1	114	26.67	17.92	-32.8
2007/06/22	1	13,685	13,677	-0.1	105	18.36	18.08	-1.5
2007/06/22	2	13,315	13,233	-0.6	110	17.46	16.47	-5.7
2007/06/22	3	12,403	13,015	4.9	65	10.73	19.93	85.7
2007/06/22	4	13,164	13,038	-1.0	275	20.45	17.96	-12.2
2007/06/23	4	11,794	11,914	1.0	150	17.77	17.80	0.2
2007/06/23	5	11,893	11,837	-0.5	225	18.97	11.71	-38.3
2007/06/23	6	12,565	12,241	-2.6	0	6.15	4.83	-21.5
2007/06/23	7	13,645	13,164	-3.5	150	27.34	18.68	-31.7
2007/06/23	8	14,822	14,266	-3.8	0	26.96	18.42	-31.7
2007/06/23	23	14,000	13,880	-0.9	251	20.27	9.55	-52.9
2007/06/23	24	13,204	13,023	-1.4	0	21.39	15.89	-25.7
2007/06/24	2	12,113	12,145	0.3	0	18.34	19.27	5.1
2007/06/24	5	11,589	11,601	0.1	150	21.00	19.63	-6.5
2007/06/24	6	11,865	11,596	-2.3	0	12.63	4.51	-64.3
2007/06/24	7	13,079	12,308	-5.9	200	28.68	18.39	-35.9
June 2007**	**67**	**13,361**	**13,045**	**-2.4**	**126**	**19.29**	**13.06**	**-32.3**
2007/07/02	2	11,709	11,467	-2.1	0	21.25	19.60	-7.8
2007/07/02	3	11,411	11,344	-0.6	135	19.52	17.16	-12.1
2007/07/02	4	11,295	11,300	0.0	75	20.09	19.35	-3.7
2007/07/02	5	11,142	11,234	0.8	0	17.91	19.00	6.1
2007/07/02	6	11,537	11,373	-1.4	339	22.41	16.70	-25.5
2007/07/04	5	13,348	13,083	-2.0	327	26.64	10.54	-60.4
2007/07/04	7	16,198	15,605	-3.7	0	27.42	16.20	-40.9
2007/07/05	2	13,278	12,869	-3.1	0	24.70	19.72	-20.2

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/07/05	4	12,653	12,585	-0.5	325	24.41	11.01	-54.9
2007/07/05	5	13,329	12,963	-2.7	156	27.00	18.74	-30.6
2007/07/07	5	12,769	12,363	-3.2	0	23.56	14.45	-38.7
2007/07/07	6	12,868	12,509	-2.8	0	23.08	10.54	-54.3
2007/07/07	7	14,174	13,423	-5.3	627	30.11	16.84	-44.1
2007/07/08	5	12,386	12,503	0.9	0	17.20	13.12	-23.7
2007/07/08	6	12,990	12,483	-3.9	0	20.01	4.19	-79.1
2007/07/08	7	14,133	13,226	-6.4	0	20.00	2.41	-88.0
2007/07/08	8	15,666	14,390	-8.1	0	28.92	7.26	-74.9
2007/07/12	3	12,940	12,565	-2.9	368	23.91	4.63	-80.6
2007/07/12	4	12,766	12,659	-0.8	400	22.44	4.70	-79.1
2007/07/12	6	14,662	13,816	-5.8	200	30.12	13.96	-53.7
2007/07/12	7	16,402	15,482	-5.6	477	30.54	18.44	-39.6
2007/07/13	1	13,471	13,270	-1.5	0	10.00	8.16	-18.4
2007/07/13	2	13,124	12,845	-2.1	0	10.00	6.06	-39.4
2007/07/13	3	12,658	12,613	-0.4	0	5.83	18.37	215.1
2007/07/13	4	12,603	12,616	0.1	0	7.13	10.48	47.0
2007/07/13	5	13,153	12,951	-1.5	0	23.73	9.04	-61.9
2007/07/13	6	14,384	13,782	-4.2	0	27.91	15.09	-45.9
2007/07/14	2	12,274	12,190	-0.7	0	21.38	10.98	-48.6
2007/07/14	3	11,990	12,007	0.1	0	15.00	13.69	-8.7
2007/07/14	4	11,853	11,879	0.2	0	20.74	16.30	-21.4
2007/07/14	5	11,938	11,913	-0.2	0	15.00	6.85	-54.3
2007/07/14	6	12,347	12,060	-2.3	124	22.00	4.97	-77.4
2007/07/14	7	13,625	12,886	-5.4	108	29.32	18.01	-38.6
2007/07/15	1	12,736	12,324	-3.2	0	22.92	9.35	-59.2
2007/07/15	2	12,186	11,992	-1.6	8	22.26	18.42	-17.3
2007/07/15	3	11,801	11,738	-0.5	200	10.00	4.68	-53.2
2007/07/15	4	11,583	11,599	0.1	158	6.28	6.60	5.1
2007/07/15	5	11,429	11,525	0.8	300	6.28	4.90	-22.0
2007/07/15	6	11,813	11,483	-2.8	200	10.00	4.38	-56.2
2007/07/15	7	12,772	12,150	-4.9	0	25.69	12.07	-53.0
2007/07/17	1	14,000	13,835	-1.2	0	20.16	19.35	-4.0
2007/07/17	2	13,771	13,319	-3.3	8	21.09	18.77	-11.0
2007/07/17	3	13,231	13,039	-1.5	100	18.08	18.21	0.7
2007/07/17	4	13,074	13,046	-0.2	0	18.53	18.64	0.6
2007/07/17	5	13,721	13,354	-2.7	0	20.00	18.88	-5.6
2007/07/17	6	15,086	14,245	-5.6	0	29.87	16.82	-43.7
2007/07/18	3	13,445	13,269	-1.3	100	19.96	18.48	-7.4
2007/07/18	4	13,296	13,270	-0.2	2	19.09	19.33	1.3
2007/07/21	3	12,258	12,193	-0.5	0	18.80	6.27	-66.6
2007/07/21	4	12,078	12,042	-0.3	497	6.26	3.92	-37.4
2007/07/21	5	12,118	12,111	-0.1	448	13.19	4.80	-63.6
2007/07/21	6	12,486	12,192	-2.4	100	15.87	9.61	-39.4
2007/07/21	7	13,528	13,153	-2.8	0	23.41	19.07	-18.5
2007/07/22	5	11,652	11,670	0.2	104	20.40	19.71	-3.4
2007/07/22	6	11,995	11,627	-3.1	108	18.70	3.71	-80.2
2007/07/22	7	13,028	12,322	-5.4	129	26.39	7.59	-71.2
2007/07/22	8	14,158	13,501	-4.6	0	28.39	16.26	-42.7

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
July 2007**	**57**	**12,953**	**12,654**	**-2.3**	**107**	**20.19**	**12.57**	**-37.8**
2007/08/05	2	13,496	12,961	-4.0	83	20.43	5.37	-73.7
2007/08/05	3	13,231	12,646	-4.4	0	20.00	4.67	-76.7
2007/08/05	4	12,620	12,433	-1.5	4	10.00	4.68	-53.2
2007/08/05	5	12,618	12,410	-1.6	0	17.07	15.98	-6.4
2007/08/05	6	12,865	12,315	-4.3	0	15.00	4.63	-69.1
2007/08/05	7	13,665	12,985	-5.0	113	28.46	8.02	-71.8
2007/08/19	4	11,583	11,697	1.0	150	21.00	18.75	-10.7
2007/08/19	5	11,665	11,727	0.5	301	21.56	13.04	-39.5
2007/08/26	3	12,700	12,426	-2.2	413	26.37	12.25	-53.5
2007/08/26	4	12,341	12,286	-0.4	601	23.91	6.16	-74.2
2007/08/31	6	15,264	14,309	-6.3	96	28.25	17.95	-36.5
Aug 2007**	**11**	**12,913**	**12,563**	**-2.7**	**160**	**21.10**	**10.14**	**-52.0**
2007/09/01	2	12,922	12,686	-1.8	247	25.92	7.43	-71.3
2007/09/01	3	12,411	12,398	-0.1	100	20.00	10.64	-46.8
2007/09/01	4	12,182	12,257	0.6	470	20.00	6.86	-65.7
2007/09/01	5	12,407	12,355	-0.4	308	20.00	7.52	-62.4
2007/09/01	6	12,751	12,510	-1.9	33	23.14	10.39	-55.1
2007/09/01	24	13,382	12,987	-3.0	150	28.89	18.63	-35.5
2007/09/02	1	12,531	12,399	-1.1	234	22.72	13.13	-42.2
2007/09/02	2	12,288	12,088	-1.6	0	20.00	12.13	-39.4
2007/09/02	3	11,981	11,852	-1.1	175	17.30	9.52	-45.0
2007/09/02	4	11,651	11,723	0.6	85	10.02	9.65	-3.7
2007/09/02	5	11,890	11,765	-1.0	100	15.00	6.89	-54.1
2007/09/02	6	12,084	11,823	-2.2	200	15.23	6.52	-57.2
2007/09/02	7	12,740	12,178	-4.4	199	15.02	5.07	-66.2
2007/09/02	8	13,738	13,208	-3.9	0	27.60	15.34	-44.4
2007/09/03	1	12,893	12,532	-2.8	0	28.80	10.89	-62.2
2007/09/03	2	12,425	12,154	-2.2	0	24.57	9.39	-61.8
2007/09/03	3	11,905	11,892	-0.1	0	19.91	11.00	-44.8
2007/09/03	4	11,788	11,823	0.3	150	19.33	4.82	-75.1
2007/09/03	6	12,088	12,176	0.7	100	18.09	13.93	-23.0
2007/09/03	7	12,792	12,536	-2.0	134	24.65	12.84	-47.9
2007/09/03	8	13,919	13,497	-3.0	0	28.35	13.18	-53.5
2007/09/12	1	13,186	12,959	-1.7	521	28.35	13.85	-51.1
2007/09/12	5	13,820	13,067	-5.5	21	29.20	19.30	-33.9
2007/09/14	4	12,882	12,694	-1.5	191	21.66	16.94	-21.8
2007/09/15	2	12,586	12,248	-2.7	198	28.10	4.75	-83.1
2007/09/15	3	12,175	12,069	-0.9	150	23.05	17.20	-25.4
2007/09/15	4	11,996	11,986	-0.1	171	23.34	10.92	-53.2
2007/09/15	23	13,359	13,176	-1.4	330	28.46	15.91	-44.1
2007/09/16	2	11,990	11,684	-2.5	447	23.99	6.09	-74.6
2007/09/16	3	11,813	11,497	-2.7	1,071	22.85	0.39	-98.3
2007/09/16	4	11,555	11,450	-0.9	361	4.60	4.47	-2.8
2007/09/16	5	11,662	11,609	-0.5	75	21.00	4.88	-76.8
2007/09/16	7	12,669	12,261	-3.2	425	30.00	14.41	-52.0
2007/09/17	3	12,051	12,072	0.2	375	26.55	7.98	-69.9

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
2007/09/17	4	12,356	12,189	-1.3	550	28.25	18.30	-35.2
2007/09/18	1	13,295	12,902	-3.0	731	25.35	-0.40	-101.6
2007/09/18	2	12,930	12,659	-2.1	100	23.40	4.74	-79.7
2007/09/18	4	12,904	12,501	-3.1	150	24.54	4.68	-80.9
2007/09/28	2	12,823	12,717	-0.8	294	22.33	14.62	-34.5
2007/09/29	2	11,893	12,048	1.3	200	20.97	11.61	-44.6
2007/09/30	2	11,521	11,658	1.2	729	23.99	13.90	-42.1
2007/09/30	3	11,196	11,449	2.3	575	20.00	4.57	-77.2
2007/09/30	4	11,210	11,377	1.5	325	21.20	4.66	-78.0
2007/09/30	5	11,301	11,472	1.5	361	20.20	5.54	-72.6
2007/09/30	6	11,639	11,741	0.9	471	22.55	12.50	-44.6
Sept 2007**	**45**	**12,391**	**12,229**	**-1.3**	**256**	**22.41**	**9.95**	**-55.6**
2007/10/03	4	13,068	12,776	-2.2	898	30.36	9.25	-69.5
2007/10/10	2	12,783	12,724	-0.5	100	26.87	10.42	-61.2
2007/10/11	2	12,743	12,488	-2.0	150	23.37	18.25	-21.9
2007/10/11	3	12,512	12,313	-1.6	220	22.57	11.46	-49.2
2007/10/12	2	12,823	12,471	-2.7	525	27.18	16.57	-39.0
2007/10/13	3	12,015	12,067	0.4	100	20.00	6.21	-69.0
2007/10/13	4	12,080	12,023	-0.5	150	25.10	4.86	-80.6
2007/10/14	2	11,846	11,782	-0.5	0	25.34	19.21	-24.2
2007/10/14	3	11,657	11,622	-0.3	100	23.10	11.97	-48.2
2007/10/17	3	12,544	12,469	-0.6	679	27.78	4.75	-82.9
2007/10/20	1	12,704	12,222	-3.8	392	30.00	16.71	-44.3
2007/10/20	2	12,222	11,920	-2.5	695	29.37	17.93	-39.0
2007/10/20	23	13,498	13,079	-3.1	200	25.00	12.82	-48.7
2007/10/20	24	12,672	12,336	-2.6	100	20.00	7.86	-60.7
2007/10/21	1	11,968	11,811	-1.3	460	27.35	4.60	-83.2
2007/10/21	2	11,788	11,429	-3.0	50	21.00	8.16	-61.1
2007/10/21	3	11,603	11,240	-3.1	50	23.75	8.00	-66.3
2007/10/21	4	11,425	11,137	-2.5	150	24.44	4.59	-81.2
2007/10/21	5	11,640	11,312	-2.8	358	19.20	4.11	-78.6
2007/10/21	6	12,054	11,759	-2.4	360	22.59	4.25	-81.2
2007/10/21	7	12,644	12,215	-3.4	290	25.14	4.34	-82.7
2007/10/21	8	13,480	12,841	-4.7	400	23.67	4.39	-81.5
2007/10/21	9	14,235	13,673	-3.9	146	28.01	8.92	-68.2
2007/10/21	24	13,206	12,578	-4.8	208	29.62	18.12	-38.8
2007/10/22	3	12,003	11,835	-1.4	255	22.54	19.38	-14.0
2007/10/22	4	12,497	11,925	-4.6	300	22.00	2.74	-87.5
2007/10/22	5	13,406	12,481	-6.9	225	25.01	10.02	-59.9
2007/10/24	4	12,753	12,383	-2.9	0	25.01	5.13	-79.5
2007/10/25	3	12,714	12,411	-2.4	50	22.00	4.95	-77.5
2007/10/25	4	13,062	12,569	-3.8	399	22.05	4.45	-79.8
2007/10/25	5	14,073	13,207	-6.2	350	31.73	13.00	-59.0
2007/10/26	2	12,891	12,728	-1.3	93	22.61	17.41	-23.0
2007/10/26	3	12,788	12,599	-1.5	211	22.73	8.25	-63.7
2007/10/28	2	12,212	11,891	-2.6	225	26.37	13.21	-49.9
2007/10/28	3	11,932	11,709	-1.9	510	24.48	4.53	-81.5
2007/10/28	4	11,854	11,662	-1.6	6	24.40	17.88	-26.7

Delivery Date	Delivery Hour	PD Demand (MW)	RT Demand (MW)	Difference (%)	Net Failed Export (MW)	PD Price ($/MWh)	HOEP ($/MWh)	Change (%)
Oct 2007**	**36**	**12,539**	**12,214**	**-2.6**	**261**	**24.77**	**9.96**	**-59.8**
May – Oct	**331**	**12,843**	**12,590**	**-2.0**	**182**	**20.48**	**11.66**	**-43.1**

* Low priced hours are defined as hours when the HOEP is less than $20/MWh.
*Monthly sub-totals reflect the total number of low-priced hours and unweighted averages of the Net Failed Exports, PD and RT Demand, and PD and HOEP prices, during those hours.

TAB 12

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	*Barbara A. MacFarlane and Michael D. Hodgins,* for the 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~~ Defendant~~s~~	*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. Bril

[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

TAB 13

COURT OF APPEAL FOR ONTARIO

CITATION: Hacopian-Armen Estate v. Mahmoud, 2021 ONCA 545
DATE: 20210729
DOCKET: C68655

Strathy C.J.O., Feldman and Sossin JJ.A.

BETWEEN

Armen Hacopian-Armen as Litigation Administrator for the Estate of Armineh Hacopian-Armen, deceased, Armen Hacopian-Armen as Estate Trustee for the Estate of Vrijouhi Casper, deceased and Armen Hacopian-Armen, personally

Plaintiffs (Respondents)

and

Dr. Haidar Mahmoud, Dr. Hassan Deif, Dr. Neil Isaac, and North York General Hospital

Defendant (Appellant)

Kosta Kalogiros and Brittany Cerqua, for the appellant

Christopher I.R. Morrison and Paul J. Cahill, for the respondents

Heard: May 20, 2021 by video conference

On appeal from the judgment of Justice Carole J. Brown of the Superior Court of Justice, dated August 19, 2020, with reasons reported at 2020 ONSC 4946.

Strathy C.J.O.:

A. BACKGROUND

[1] This appeal raises issues of factual and legal causation in the context of a medical negligence action.

[2] Armineh Hacopian-Armen died on August 24, 2011, as a result of Stage IV uterine leiomyosarcoma ("uLMS"), which had metastasized to her lungs. The respondents, members of her family, brought this action against the appellant, her gynecologist. They alleged that the appellant was negligent when he examined Ms. Hacopian-Armen on May 25, 2009, in failing to conduct an endometrial biopsy, a simple in-office procedure for the detection of uterine pathologies and abnormalities. The respondents claimed that this would probably have detected her cancer at an early stage, when treatment would likely have been effective.

[3] The trial judge found that: the appellant breached the applicable standard of care; Ms. Hacopian-Armen and family members had suffered damages as a result; the damage was foreseeable; and the appellant's negligence was causative of the damages.

[4] On appeal, the appellant does not challenge the trial judge's finding that he breached the standard of care by failing to perform an endometrial biopsy. He alleges, however, that the trial judge erred in concluding that his breach of duty caused Ms. Hacopian-Armen's death.

B. FACTS

[5] To appreciate the issues in this appeal, it is necessary to understand the nature and progress of Ms. Hacopian-Armen's condition and the course of treatment she received.

[6] Ms. Hacopian-Armen was diagnosed with fibroids in 1999. Fibroids, also called leiomyoma, are benign, non-cancerous growths that develop in smooth muscle tissues. Uterine fibroids develop in the myometrium, the smooth muscle of the uterus. Fibroids are common, but the majority are asymptomatic – they are frequently very small and cause no problems. They can, however, grow to a significant size, and their size and location can cause pain, heavy bleeding and other symptoms. Fibroids can be treated in several ways, including a procedure known as uterine artery embolization, in which the blood supply to the fibroid is restricted, causing it to shrink and the symptoms to subside.

[7] Counsel called uLMS the "evil twin" of fibroids. It is a rare form of cancer that, like fibroids, also originates in the myometrium. It has features similar to fibroids and cannot be distinguished from fibroids on imaging. For that reason, it frequently goes undetected. It is a very aggressive form of cancer and there is often a poor prognosis when it is discovered.

[8] The uterus has a hollow inner cavity. The interior lining of the uterus is called the endometrium. It, in turn, is surrounded by the muscular wall of the myometrium.

[9] An endometrial biopsy was described by the experts as a simple procedure that can be done in a gynecologist's office and takes only a minute or two. A narrow, straw-like instrument, called a "cannula" or "pipelle" is inserted through the cervix into the uterine cavity. There, it can be manipulated to suction out a small sample of tissue. The tissue sample can then be tested to detect the presence of uterine malignancies or abnormalities, including uterine and endometrial cancers. Depending on certain conditions, discussed by the experts at trial, it may also detect uLMS.

[10] In 2004, some five years after the diagnosis of her fibroids, Ms. Hacopian-Armen began to experience heavy bleeding, with clots, during her menstrual periods. This bleeding lasted approximately two weeks each month. In 2009, her family physician referred her to the appellant for treatment.

[11] At her first appointment with the appellant on May 25, 2009, she presented with what the respondents' experts described as several risk factors for diseases of the uterus and "intrauterine pathology": she was over 40 years old (in fact, she was 47); she was experiencing abnormal uterine bleeding ("AUB"); and she was "nulliparous" – she had never given birth to a child. The appellant took a vaginal

swab but did not perform an endometrial biopsy. He referred her to another physician to discuss the possibility of treating her fibroids with uterine artery embolization.

[12] A few months after her first appointment with the appellant, Ms. Hacopian-Armen began to experience several health problems. In August 2010, she visited the emergency room four times because she felt weak, had heart palpitations, or was short of breath. These visits to the ER led to a variety of tests, which revealed that she had deep vein thrombosis ("DVT") and pulmonary nodules.

[13] In February 2011, two new lung nodules were discovered during a CT scan. In March 2011, Ms. Hacopian-Armen met with a specialist in respiratory and internal medicine at North York General Hospital. The specialist noted that her recurrent DVT and the new lesions on her lungs indicated that she possibly had cancer. The specialist sent a consultation request to the appellant indicating that she needed a Pap test as soon as possible.

[14] On April 7, 2011, the appellant performed an endometrial biopsy, which indicated that Ms. Hacopian-Armen had a high-grade cancerous tumour in her uterus, likely uLMS. At this point, her cancer had metastasized to Stage IV.

[15] In May 2011, Ms. Hacopian-Armen had a hysterectomy and began chemotherapy. Despite these treatments, the disease progressed. Ultimately, she died on August 24, 2011.

C. THE TRIAL JUDGE'S REASONS

(1) Overview

[16] There were three issues before the trial judge: the standard of care, factual causation, and legal causation. The trial judge concluded at para. 156 that: (i) the appellant breached the standard of care that he owed to Ms. Hacopian-Armen by failing to perform an endometrial biopsy; (ii) a biopsy performed at the first appointment on May 25, 2009 would have detected the uLMS and thus significantly improved her prognosis; and (iii) the harm that occurred was foreseeable and related to the appellant's failure to perform the biopsy.

[17] I will explain the trial judge's analysis and conclusions on each of these three issues, but first I will explain the role of expert evidence at the trial.

(2) Expert Witnesses

[18] The trial judge's acceptance of the evidence of the respondents' experts, in preference to that of the appellant's experts, figured large in her findings of fact: at para. 90. The respondents' experts provided opinions on the standard of care, causation, and the identification of metastatic disease. While the appellant contested the respondents' submissions on the standard of care, he led no evidence on this issue. His experts only provided opinions on causation. I will identify the principal experts.

(a) Respondents' Experts

[19] Dr. Allan Covens was a specialist in gynecological oncology – that is, the diagnosis and treatment of cancers of the female reproductive system. He held the position of Chair of the Division of Gynecologic Oncology in the Department of Obstetrics and Gynecology at the University of Toronto. He was also the head of the Division of Gynecologic Oncology at the Odette Cancer Centre at Sunnybrook Hospital in Toronto. He runs a weekly gynecology-oncology clinic, which investigates AUB, among other things. He was qualified to give evidence on the issues of standard of care and causation.

[20] Dr. Andrew Browning was an obstetrician and gynecologist with some 27 years' experience. He had served for two years as Chief of Obstetrics and Gynecology at the Royal Victoria Hospital Regional Health Centre in Barrie, Ontario. He had extensive experience treating fibroids and AUB. He was qualified to give evidence on the issues of standard of care and causation.

(b) Appellant's Experts

[21] Dr. George Vilos was an obstetrician and gynecologist with a primary appointment as a gynecologist in the Department of Obstetrics and Gynecology at the London Health Sciences Centre. He was also a professor in the Department of Obstetrics and Gynecology at the Schulich School of Medicine at the University

of Western Ontario. He gave evidence in relation to causation and the likelihood of detecting uLMS with an endometrial biopsy.

[22] Dr. Nicholas Leyland was a specialist in gynecological oncology, focusing on general gynecology. His evidence was confined to the likelihood of detecting uLMS with an endometrial biopsy.

[23] Dr. Jason Dodge had been a gynecological oncologist until August 2015 and, at the time of trial, had been practicing gynecology in general practice. He was qualified to give evidence on causation.

(c) The Trial Judge's Assessment of the Expert Evidence

[24] The trial judge specifically commented on the credibility of the experts, all of whom were well qualified in their fields. She found the evidence of the respondents' experts, Dr. Browning and Dr. Covens, to be "forthright, impartial and consistent" and found their testimony to be credible.

[25] In contrast, while the trial judge found the appellant's experts to be knowledgeable, she found their evidence in cross-examination contradicted their evidence-in-chief, they were less than forthright in cross-examination and were argumentative.

[26] At para. 90 of her reasons, she explained that she preferred the evidence of the respondents' experts:

> Based on the evidence, the medical records, the agreed statements of fact, the reports and testimony of the experts, where there is a discrepancy between the testimony of the plaintiff's experts and the testimony of the defendant's experts, I prefer the evidence of the plaintiff's experts, unless I state otherwise.

[27] As I will explain, in an appeal that is largely fact-based, the trial judge's assessment of the frequently conflicting evidence of experts is entitled to deference in the absence of palpable and overriding error.

[28] Against this background, I turn to the trial judge's findings in relation to the issues before her.

(3) Part I: The Standard of Care

[29] The trial judge first considered whether the appellant breached the applicable standard of care by failing to perform an endometrial biopsy. At para. 104 of her reasons, she set out the standard of care as that of a reasonable and prudent physician of the same experience and standing, having regard to all the circumstances of the case.

[30] The trial judge found that the appellant had breached the standard of care by failing to consider and perform an endometrial biopsy as recommended by the Guidelines of the Society of Obstetricians and Gynecologists of Canada for the Management of AUB (the "Guidelines"). The Guidelines recommended an endometrial biopsy for patients over 40 who experienced AUB, in order to rule out abnormal pathologies. Ms. Hacopian-Armen presented with both risk factors.

[31] The appellant argued that he did not contravene the Guidelines because Ms. Hacopian-Armen did not have AUB. Without this risk factor, he contended, a biopsy was not required. The appellant submitted that she did not have AUB because her menstrual period occurred regularly, every two weeks, and the heavy bleeding was attributable to her fibroids. The trial judge rejected this submission. Ms. Hacopian-Armen's heavy bleeding began five years after she was diagnosed with fibroids. The trial judge accepted the respondents' expert's opinion that two weeks of heavy bleeding per month was highly abnormal: at para. 115.

(4) Part II: Factual Causation

[32] The trial judge's causation analysis turned on three questions, set out at para. 96 of her reasons:

1. Did Ms. Hacopian-Armen have uLMS at the time of her first appointment with the appellant on May 25, 2009?
2. If so, would an endometrial biopsy performed on May 25, 2009 have detected abnormal pathology or uLMS?
3. If so, would her prognosis likely have been substantially improved as a result?

[33] Both of the respondents' experts opined that Ms. Hacopian-Armen likely had Stage I uLMS on May 25, 2009: at para. 149.

[34] Dr. Browning testified that her AUB in May 2009 was likely caused by the presence of cancerous cells in her uterus. Both Dr. Browning and Dr. Covens testified that uLMS was likely present on May 25, 2009 because the cancer had reached Stage IV by April 2011. The trial judge accepted this evidence: at para. 149.

[35] The trial judge also accepted the respondents' experts' opinions that an endometrial biopsy performed on May 25, 2009 would have likely detected abnormal pathology or uLMS: at para. 146. The medical literature explained that the sensitivity for the detection of uLMS is increased in patients who are menopausal. Dr. Browning and Dr. Covens testified that, in their opinion, women who are nulliparous have a much greater likelihood of early menopause and Ms. Hacopian-Armen was probably close to menopause. The trial judge accepted this evidence and found that Ms. Hacopian-Armen was "hormonally closer to post-menopause than pre-menopause" given her age and the fact that she was nulliparous: at para. 146.

[36] The appellant relied on scientific studies to argue that it was unlikely that an endometrial biopsy could have detected the uLMS because imaging from 2009 showed that the uLMS had not yet broken through the endometrium into the uterine cavity. The trial judge rejected this argument, accepting the evidence of the respondents' experts that it was likely that uLMS was in or near the endometrium, causing AUB, which would further increase the likelihood of detection.

[37] Finally, the trial judge found that Ms. Hacopian-Armen's prognosis would have been substantially improved if the uLMS had been found and treated in 2009: at para. 150. The trial judge's conclusion was, again, largely based on the evidence of the respondents' experts. Dr. Browning noted that early intervention would have likely included a hysterectomy, which would have removed the cancer that had not yet metastasized to the rest of the body. Dr. Covens testified that treatment for the Stage I uLMS in 2009 would have effectively been a cure.

[38] Having found that she likely had uLMS at her first appointment with the appellant, that an endometrial biopsy would have likely detected abnormal uterine pathology or uLMS, and that her prognosis would have been substantially improved, the trial judge concluded that the respondents had proved factual causation on a balance of probabilities. In other words, but for the appellant's failure to perform the biopsy in May 2009, Ms. Hacopian-Armen would probably not have died of Stage IV uLMS.

(5) Part III: Legal Causation

[39] On the third and last issue of legal causation, the trial judge considered whether Ms. Hacopian-Armen's death was foreseeable and sufficiently connected to the appellant's failure to perform an endometrial biopsy. She found that the risk of uLMS was real, and that it was not something that a "reasonable, skilled, specialist would have brushed aside as far-fetched": at para. 155. She also

concluded that it was foreseeable that the presence of uLMS, if not treated, would likely result in serious injury or death.

(6) Part IV: Disposition and Damages

[40] As a result of her findings, the trial judge held, at para. 157, that the appellant was liable for his negligence. The respondents were awarded $300,000 in damages.

D. ISSUES ON APPEAL

[41] The appellant does not challenge the trial judge's finding that he breached the standard of care by failing to perform an endometrial biopsy. He does, however, allege several errors in the trial judge's analysis and conclusions on legal and factual causation.

(1) Legal Causation

[42] The appellant acknowledges that the trial judge correctly identified the principles of legal causation set out at para. 155 of her reasons. He submits, however, that her analysis was inconsistent with these principles and that she erred by engaging in a retrospective approach to causation. He asserts that the trial judge erred by asking whether it was foreseeable that the presence of uLMS, if untreated, would lead to serious injury or harm. According to the appellant, the correct question was whether uLMS, specifically, was foreseeable in May 2009.

[43] To answer this question, the appellant submits that the trial judge should have asked whether it would occur to a reasonable gynecologist that: (i) Ms. Hacopian-Armen had uLMS in May 2009; (ii) an endometrial biopsy would have diagnosed uLMS; and (iii) not performing an endometrial biopsy in May 2009 could lead to a delayed diagnosis of uLMS.

[44] The appellant also submits that the trial judge's erroneous approach to legal causation would create a dangerous precedent, resulting in an increase of retrospective claims and would overburden the medical system by encouraging physicians to order unnecessary tests to avoid the risk of missing an unforeseeable disease.

(2) Factual Causation

[45] The appellant submits that the trial judge committed two reviewable errors in her analysis and conclusion on factual causation. First, he alleges that the trial judge erred when she found that uLMS was likely present in May 2009. According to the appellant, that error has three components: (i) admitting Dr. Covens's testimony, despite the fact that his expert report did not comply with Rule 53.03 of the *Rules of Civil Procedure*; (ii) misapprehending Dr. Covens's and Dr. Browning's testimony on this issue and concluding that uLMS was likely present, despite the fact that there was no evidence to support that conclusion; and (iii) in stating, at para. 152, that the "defendants submit that there is no proof that uLMS was present

on May 25, 2009" (emphasis added), when this did not reflect the appellant's position. The appellant's expert, Dr. Vilos, testified that the evidence showed that it was unlikely that uLMS was present in 2009, not that there was no proof. This misapprehension, the appellant says, went to the core of the defence theory on the absence of uLMS.

[46] Second, the appellant alleges that the trial judge erred in finding that an endometrial biopsy would have likely detected uLMS in 2009. He submits that a single paragraph of the trial judge's reasons contains five palpable and overriding errors. I will identify and discuss these in the analysis section below.

[47] Ultimately, the appellant argues that the trial judge's reasons were "overwhelmed" by these factual and analytical errors. The appellant asks that the trial decision be set aside, and the claim dismissed or that a new trial be ordered.

E. ANALYSIS

[48] While the issues on this appeal relate to the trial judge's conclusion on factual and legal causation, it is helpful to situate those issues in the context of the negligence analysis.

[49] A plaintiff asserting a claim in negligence must establish four things: (a) that the defendant owed the plaintiff a duty of care; (b) that the defendant's conduct breached the applicable standard of care; (c) that the plaintiff sustained damage; and (d) that the defendant caused the damage in fact (factual causation) and in

law (legal causation): *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3.

[50] There was no dispute at the trial about the existence of a duty of care, since Ms. Hacopian-Armen had been referred to the appellant for treatment of her fibroids. Nor was it disputed that she and her family members had suffered compensable damages, which were recoverable if negligence were established. The applicable standard of care and whether it had been breached, was very much in issue, as was causation.

[51] The standard of care and its breach took up a considerable amount of time at trial. Although the appellant did not adduce expert evidence on these issues, he challenged the evidence of the respondents' experts, Dr. Covens and Dr. Browning. They testified that having regard to Ms. Hacopian-Armen's AUB – heavy bleeding, with blood clots, for over 14 days each month – her age (47), and the fact that she was nulliparous, all of which increased the risk of some form of uterine pathology, an endometrial biopsy should have been performed to rule out uterine pathologies or other abnormalities that could have been causing her AUB.

[52] The appellant's evidence was that he assumed that her bleeding was attributable to her fibroids, did not consider that there could be other potential causes of her bleeding and, on those assumptions, did not conduct an endometrial biopsy.

[53] The trial judge accepted the evidence of the respondents' expert witnesses and found that the standard of care required an endometrial biopsy in such circumstances. She also found that the appellant had breached that standard.

[54] Although the evidence concerning Ms. Hacopian-Armen's age, nulliparous state and abnormal bleeding was relevant to standard of care, it was also relevant to legal and factual causation because, in the opinion of Dr. Browning and Dr. Covens, it meant that she was probably close to menopause, making it more likely that an endometrial biopsy would detect her cancer.

(1) First ground of appeal: Did the trial judge err in finding legal causation?

[55] The appellant does not dispute that the trial judge identified the appropriate test for legal causation. Referring to *Mustapha*, the trial judge set out at para. 126 that the plaintiff must establish that the injuries suffered were "foreseeable or not too remote":

> [I]t must be determined whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable. The injury must have been a real risk "which could occur to the mind of a reasonable man in the position of the defendant … and which he would not brush aside as far-fetched".

[56] The trial judge's findings on legal causation were summarized at para. 155 of her reasons:

> In this case, I am satisfied that having failed to conduct an endometrial biopsy on the plaintiff at the first consultation which would have detected whether there was LMS present, it was foreseeable that the presence of LMS, if not treated, would likely result in serious injury or death to the plaintiff, which indeed, it did. I do not find the risk to be something that a reasonable, skilled, specialist would have brushed aside as far-fetched. Accordingly, I am satisfied that legal causation has also been established.

[57] The appellant submits the trial judge asked herself the wrong question and assessed causation with the benefit of hindsight, improperly blending her factual findings with her legal analysis. He submits that the question should have been whether it was foreseeable to a reasonable gynecologist that (a) Ms. Hacopian-Armen had uLMS in May 2009; (b) an endometrial biopsy would have diagnosed the uLMS; and (c) not performing an endometrial biopsy could lead to a delayed diagnosis of uLMS. Relying on the observations of Nash J. in *Tilley v. Man Roland Canada*, 1999 ABQB 364, aff'd 2002 ABCA 309, at para. 183, the appellant submits that "[o]ne cannot now, in hindsight, review the circumstances and conclude, based on the fact of the accident, that it was reasonably foreseeable or ought to have been foreseeable." The appellant submits that uLMS is a rare form of uterine cancer, it was not foreseeable and the harm to Ms. Hacopian-Armen was too remote to fairly hold him liable.

[58] I accept the appellant's submission that the trial judge inappropriately blended into her foreseeability analysis her finding of fact that an endometrial

biopsy performed in May 2009 would have detected the presence of uLMS. The foreseeability analysis ought to have focused on the information reasonably available to the appellant in May 2009, when he failed to conduct an endometrial biopsy. However, on the correct analysis, it did not matter that the appellant was not aware that Ms. Hacopian-Armen had uLMS – what mattered was that the combination of her AUB, her age, and her nulliparous state, not only required an endometrial biopsy, but also made it reasonably foreseeable that the failure to conduct one would preclude detection of a uterine pathology that would cause her serious harm if left untreated.

[59] The appellant's proposed foreseeability analysis is flawed because in focusing on the presence of uLMS, he inappropriately narrows the scope of the risk that he ought to have foreseen. The appellant was not required to foresee the presence of uLMS or the "precise concatenation of events": *R. v. Coté et al.*, [1976] 1 S.C.R. 595, at p. 604. It is sufficient that "the harm suffered must be of a kind, type or class that was reasonably foreseeable as a result of the defendant's negligence": *Frazer v. Haukioja*, 2010 ONCA 249, 101 O.R. (3d) 528, at para. 51. In failing to conduct a test that would have detected the presence of cancers of the "same class" or character as uLMS, including uLMS, it was foreseeable that uLMS or other malignancies would go undetected, with consequent injury to Ms. Hacopian-Armen: *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 60.

[60] Based on the evidence accepted by the trial judge as to the circumstances that Ms. Hacopian-Armen presented with in May 2009, it was foreseeable to a reasonable gynecologist of the same experience and standing that the failure to perform an endometrial biopsy could preclude the detection of a uterine pathology or abnormality, which could lead to serious injury or death.

[61] I reject the appellant's submission that the trial judge's approach to foreseeability would require physicians to order unnecessary tests. The evidence accepted by the trial judge was that in the circumstances that presented themselves to the appellant on May 25, 2009, an endometrial biopsy was a necessary test and one that should have been performed by a competent gynecologist.

[62] I would therefore reject the first ground of appeal.

(2) Second ground of appeal: Did the trial judge err in finding factual causation?

[63] The appellant submits that the trial judge erred in finding factual causation – that is, on a balance of probabilities, "'but for' the defendant's negligence, the injury would not have occurred": *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8.

[64] There are two branches to the appellant's submission. The first branch, discussed in sub-section (a), below, asserts that the trial judge erred in finding that

uLMS was likely present in May 2009. This branch has three parts, identified below. The second branch, discussed in sub-section (b), is that the trial judge erred in finding that an endometrial biopsy would have detected uLMS, had it been present.

[65] To a considerable extent, these submissions challenge the trial judge's findings of fact or assert that the trial judge misapprehended certain evidence. For that reason, I begin with the applicable standard of review.

[66] A trial judge's findings of fact are entitled to deference, particularly where those findings are based on findings of credibility in relation to conflicting evidence. As the Supreme Court observed in *Housen v. Nikolaison*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule is that, where the issue on appeal involves

> the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. [Citations omitted.]

[67] That principle applies where, as here, the trial judge makes factual findings based on the assessment of the credibility of experts called by one party and rejection of the evidence of the other party's experts: *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at paras. 16-23; *Waxman v. Waxman*, 2004 CanLII 39040 (Ont. C.A.), at paras. 300-1, leave to appeal refused, [2004] S.C.C.A. No. 291. The trial judge explicitly found the evidence of the respondents' expert witnesses, notably Dr. Browning and Dr. Covens, to be more reliable than the appellant's witnesses and she gave reasons for her conclusions. Where there was conflict between the experts' evidence, she preferred the respondents' witnesses.

[68] As this court emphasized in *Waxman*, at paras. 291-92, referring to the majority reasons in *Housen*, "there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge" and the "'palpable and overriding' standard demands strong appellate deference to findings of fact made at trial." Thus, as in *Waxman*, a "palpable" error may not be overriding if the impugned finding is supported by other evidence: at para. 297.

[69] In *Waxman*, at paras. 296-97, this court observed:

> The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear. Examples of "palpable" factual errors include findings made in the complete absence of evidence,

> findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one of those findings is founded on a "palpable" error does not automatically mean that the error is "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error. [Emphasis added; citations omitted.]

[70] In *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, 151 O.R. (3d) 609, at paras. 124-25, leave to appeal refused, [2020] S.C.C.A. No. 409, this court explained when a trial judge's misapprehension of the evidence warrants appellate intervention:

> In my view, therefore, the motion judge's finding that he had "no trouble" concluding that several of the *Huang/Hengeveld* indicators of capacity were not met reflects a misapprehension of the evidence. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence". Here, the motion judge made a mistake about the substance of the evidence and failed to give proper effect to the evidence, by finding that the evidence showed that several of the *Huang/Hengeveld* indicators of capacity were absent, when that was not so.
>
> A misapprehension of evidence justifies appellate intervention where it is palpable and overriding, that is, where the misapprehension is obvious and goes to the very core of the outcome of the case. That is so here,

> because the motion judge's misapprehension is obvious and was essential to his conclusion that Mr. Carmichael was incapable of suing GSK until December 2, 2009, because of his psychological condition. [Emphasis added; citations omitted.]

[71] In *Benhaim v. St. Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, itself a medical malpractice case, the majority of the Supreme Court emphasized that a trial judge's findings of fact are entitled to deference when they are based on her assessment of all the evidence, including medical literature and the conflicting evidence of experts: at paras. 37, 72, 75 and 84. It cautioned, at para. 84, that "[a]ppellate courts must be cognizant of the risk of 'tunnel vision' in reviewing medical evidence at trial for palpable and overriding error."

[72] Wagner J. (as he then was) concluded, at para. 86:

> It could be said that it would have been open to the trial judge to find in favour of the plaintiff, particularly if individual components of the evidence had been examined in isolation. However, the trial judge carefully weighed the evidence as a whole, including both the statistical evidence and the evidence specific to Mr. Émond. Against that backdrop, she considered and evaluated three expert opinions, all of which necessarily involved some speculation. Her causation analysis was based on all of this evidence. She made no palpable and overriding error in finding that the plaintiff had failed to establish causation on a balance of probabilities, and deference to her conclusion is in order.

[73] In my respectful view, the Supreme Court's caution against the risk of "tunnel vision" should be kept in mind when we are invited to review a fact-laden decision under the rubric of "misapprehension of the evidence". The focus on

individual “misapprehensions” or even individual errors in the assessment of evidence may tend to exaggerate the significance of the disputed finding of fact and divert attention from the trial judge’s assessment of the entirety of the evidence. Bearing this in mind, I turn to the appellant’s submissions concerning the alleged errors in the trial judge’s analysis of factual causation.

(a) First branch: Did the trial judge err in finding uLMS was likely present in May 2009?

[74] Dr. Browning and Dr. Covens testified that uLMS was likely present on May 25, 2009 when the appellant first examined Ms. Hacopian-Armen. Dr. Browning opined that the uLMS was likely in or near the endometrium and was likely the cause of her AUB. He testified that because such tumours do not grow “overnight”, and the fact that it was present and in Stage IV when it was discovered in April 2011, made it reasonable to conclude that it was present and in an early stage (Stage I) in May 2009. Dr. Covens’s opinion was similar.

[75] The trial judge accepted this evidence, and concluded “[b]ased on all of the evidence before this court, I accept the evidence of the plaintiff’s experts that the LMS, which was found to have metastasized to Stage IV by April 7, 2011, would have been at Stage I in and around May 25, 2009.”

[76] The appellant's argument that the trial judge erred in finding that uLMS was likely present in May 2009 rests on three foundations, which I will address in turn, setting out my conclusion in the applicable heading.

(i) The trial judge did not err in admitting the evidence of Dr. Covens on this issue and, having admitted his evidence, did not misapprehend it

[77] At trial, the appellant sought to limit Dr. Covens's evidence regarding factual causation on the ground that he had failed to provide the foundational basis for his opinion in his expert report, filed pursuant to r. 53.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[78] Rule 53.03 requires a party intending to call an expert witness at trial to serve the expert's report at least 90 days before the pre-trial conference. The purpose of r. 53.03 is to avoid surprise at trial, to enable counsel to prepare to challenge the opinion and to allow for efficiency in preparation and trial.

[79] The expert's report is required to contain certain information set out in r. 53.03(2.1), including the expert's opinion concerning each issue to which the report relates and the expert's reasons for their opinion. It 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. It is well-settled that the report must not simply set out the expert's conclusions, but must also set out reasons for their opinion: *Marchand (Litigation guardian of) v. Public General*

Hospital Society of Chatham, 2000 CanLII 16946, at para. 38, leave to appeal refused [2001] S.C.C.A. No. 66; *Hoang v. Vicentini*, 2012 ONSC 1358, aff'd 2016 ONCA 723, at para. 10.

[80] The relevant portion of Dr. Covens's report was as follows:

> Ms. Hacopian-Armen was noted to have lung metastases on CT scan in February 2011. It is impossible to be 100% certain when this malignancy developed, but I do note that she developed a *de novo* DVT [deep vein thrombosis] in her left calf on August 16, 2010 and a recurrence of it in February 2011, both of which are very suspicious for an underlying malignancy (malignancy disposes patients to DVT's). With no precipitating events (Danazol is not associated with DVT and she took Ovral for only 2 days in August 2010), for her DVT and the fact she was diagnosed with metastatic disease six months later, I am fairly certain that she had her malignancy in August 2010. Furthermore, I think it likely that it was present prior to that, including at her first visit with Dr. Mahmoud in May 2009. [Emphasis added.]

[81] The appellant argued that the report was deficient, because, although Dr. Covens explained why he believed the tumour was present in August 2010, he failed to explain the basis for his opinion that uLMS was present in May 2009. He argued that the first three sentences of the above extract provided the foundational basis for Dr. Covens's opinion that the malignancy was present in 2010, but had nothing to do with the separate issue of whether it had been present in May 2009.

[82] The respondent, however, contended that the basis of that opinion was set out in the report: reasoning backward from the fact that Ms. Hacopian-Armen died in August 2011 from a metastatic cancer discovered in 2011, and that she

had symptoms of malignancy in August 2010, it was likely that she had the disease in May 2009.

[83] The trial judge accepted the respondents' interpretation of the report. The malignancy was probably present in May 2009 – because of the presence of DVT in August 2010 and the fact that the cancer had metastasized by February 2011. She found that if there was a different interpretation, as advanced by the appellant, it would be for Dr. Covens to explain on examination.

[84] When Dr. Covens testified, he was clear that in his opinion it would take a considerable time for the cancer to reach the point of metastasizing. Extrapolating back from its condition in 2011, it was likely present in May 2009. He observed that there has been little study of the growth pattern of such tumours, because they are typically discovered after the uterus has been surgically removed due to malignancy or abnormality.

[85] I see no error in the trial judge's decision to permit Dr. Covens to testify on this issue. Her interpretation of the report was reasonable and consistent with the opinion given in Dr. Covens's testimony. It was obvious that the timing of the origin of the malignancy was a central issue at trial and the appellant adduced expert evidence on that very question. As a result, the appellant could not have been taken by surprise by Dr. Covens's evidence. The appellant demonstrated no prejudice as a result of misunderstanding Dr. Covens's report.

[86] Nor do I accept the appellant's submission that the trial judge misapprehended Dr. Covens's evidence when she stated that it was his opinion that it was "highly likely" that Ms. Hacopian-Armen had Stage I uLMS in May 2009. That was in fact Dr. Covens's opinion, based on the facts set out in his report and his experience with uterine cancers.

(ii) The trial judge did not misapprehend Dr. Browning's evidence

[87] In his factum, the appellant asserted that the trial judge misapprehended the evidence of Dr. Browning when she said that, "[Dr. Browning] stated that [uLMS] does not occur overnight and that in May 2009, it was likely at Stage I, given the progression by April 2011" and that Ms. Hacopian-Armen was "likely suffering from a malignancy on May 25, 2009 which caused the abnormal bleeding."

[88] There was no misapprehension. Dr. Browning's testimony was that there was a "very good chance" that her abnormal bleeding in 2009 was due to the uLMS and that it was "more likely than not" that an endometrial biopsy performed on May 25, 2009 would have detected uLMS.

[89] The appellant did not pursue this issue in oral argument. I would reject this ground of appeal.

(iii) The trial judge did not misapprehend the evidence of the defence expert, Dr. Vilos

[90] The appellant submits that the trial judge misapprehended Dr. Vilos's evidence when she stated at para 152: "The defendants submit that there is no proof that [uLMS] was present on May 25, 2009 when an endometrial biopsy should have been performed. They, therefore, argue that there is no evidence which would establish a link of causation necessary for this case." The appellant says that this misstated his case. He did not contend there was an absence of evidence. Instead, he contended that there was affirmative evidence of Dr. Vilos, based on Ms. Hacopian-Armen's clinical history – the absence of rapidly growing tumours and what he described as bleeding that tracked her menstrual cycle – which established that uLMS was not present in May 2009. This misapprehension of Dr. Vilos's evidence, he contends, was a reversible error.

[91] I do not agree that the trial judge misapprehended Dr. Vilos's evidence. She adverted, correctly, to his testimony that an endometrial biopsy performed on May 25, 2009 would not have been positive because "there is no evidence that a leiomyosarcoma, in my opinion, was there at this time." She also referred to his opinion that Ms. Hacopian-Armen had "regular bleeding" at the time. In my view, the trial judge's rejection of Dr. Vilos's evidence was not the result of a misapprehension of his evidence. It was simply the result of her acceptance of the evidence of the respondents' experts in preference to that of Dr. Vilos.

[92] Finally, although it is not raised as a discrete ground of appeal, the appellant is critical of the trial judge's reference to the principle expressed in *Goodwin v. Olupona*, 2013 ONCA 259, 305 O.A.C. 245. At paras. 152-54, the trial judge observed:

> The defendants submit that there is no proof that LMS was present on May 25, 2009 when an endometrial biopsy should have been performed. They, therefore, argue that there is no evidence which would establish a link of causation necessary for this case.
>
> The reason that there is no evidence is attributable to the fact that Dr. Mahmoud did not perform an endometrial biopsy which would have provided the necessary evidence.
>
> As stated above, where there is a gap in the evidence as regards establishment of causation which is caused by the defendant's own negligence, this cannot be used to shield the defendant from any responsibility. The inability to prove the causal link between the defendant's negligence and the plaintiff's damages, if a direct result of the defendant's failure to act appropriately, cannot be used to shield the defendant: *Goodwin (Litigation Guardian of) v. Olupona, supra, Ghiassi v. Singh, supra, Adams v. Taylor, supra*.

[93] I am not satisfied that the principle expressed in *Goodwin*, at paras. 72-74 and in *Ghiassi v. Sing*, 2018 ONCA 764, at para. 29 has any application to a case such as this, where both parties adduced evidence on the issue of causation. I accept the respondents' submission, however, that the reference to this principle was unnecessary as the trial judge independently accepted the evidence of the

respondents' expert witnesses that Ms. Hacopian-Armen's cancer was probably at Stage I in May 2009.

[94] For these reasons, I would not give effect to this ground of appeal.

(b) Second branch: Did the trial judge err in finding that an endometrial biopsy would likely have detected uLMS, had it been present?

[95] Before addressing this branch of the appellant's submissions, I observe that the appellant does not challenge the trial judge's findings that (a) Dr. Mahmoud breached the standard of care in failing to perform a routine biopsy that was capable of identifying uterine malignancies, including uLMS; (b) the biopsy should have been performed because Ms. Hacopian-Armen was at risk for uterine malignancies because of her age, her AUB and her nulliparous state; and (c) had she been diagnosed with uLMS on May 25, 2009, her outcome would have been substantially improved.

[96] In coming to these conclusions, the trial judge accepted the evidence of Dr. Covens and Dr. Browning, and rejected the evidence of the appellant's experts.

[97] As I have rejected the first ground of appeal, in which the appellant asserted that the trial judge erred in concluding that the uLMS was present in May 2009, the remaining issue is the appellant's assertion that the trial judge erred in concluding that the endometrial biopsy would probably have detected the uLMS.

The appellant alleges that the trial judge misapprehended the evidence, including aspects of the evidence of the appellant's experts. These submissions focus on one paragraph of the trial judge's reasons, para. 144, which I set out in full for reference:

> It is the evidence of the defendant's experts that the likelihood of having found LMS at the first consult in May 2009 is purely speculative and unknowable. The defence argued that there was no evidence of any LMS having broken through the myometrial/endometrial lining into the uterine cavity based on all of the imaging. They contended throughout that LMS could not be detected unless it were in the uterine cavity. The plaintiff's experts refute this position. I note as well that the endometrial biopsy finally undertaken on April 7, 2011 did detect the sarcoma, although the LMS had not yet entered the uterine cavity. The defendant further maintained that the plaintiff was clearly pre-menopausal such that sensitivity of detection would be under 50%. While there were no fibroids seen in the uterine cavity on imaging, this does not exclude the likelihood that LMS, was in or near the endometrium, causing or contributing to the abnormal bleeding while it was still undetectable by diagnostic imaging. The evidence at trial indicated that the diagnostic imaging would not detect a LMS and that 95% of LMS malignancies originate *de novo* and are not part of an existing fibroid. It is of note that the endometrial biopsy conducted in April 2011 did diagnose the presence of a LMS at a time when the plaintiff was still, according to the defendants, "pre-menopausal" as opposed to "peri-menopausal", and at a time when the LMS was not in the uterine cavity. Further, there was no evidence of uterine invasion of the LMS on any kind of diagnostic imaging at that time. This is contrary to the defence theory of the case which suggests that in the circumstances described, the biopsy should have been negative. I should add that I do not find this fact determinative of whether there was LMS present on May

> 25, 2009. In that regard, I have based my findings on other evidence, without using a retrospective analysis.

[98] With that background, I turn to the alleged errors, again summarizing my conclusions in the applicable heading.

(i) The trial judge did not misapprehend the appellant's experts' evidence on the likelihood of detection of uLMS

[99] The appellant submits that the trial judge misapprehended the appellant's experts' position, when she stated that they testified that the likelihood of having found LMS in May 2009 was "purely speculative and unknowable". The appellant submits that this was a misapprehension because the appellant led affirmative evidence that even if uLMS was present in May 2009, it was unlikely that an endometrial biopsy would have diagnosed it, given the poor sensitivity of the test and the fact that the uLMS was not likely in a location that was amenable to sampling.

[100] I begin by observing that the appellant's expert, Dr. Vilos, testified that there was "no evidence" that uLMS was present at the time and "no evidence" that the uLMS had moved into the uterine cavity where, in his opinion, the cancer had to be located in order to be detected by an endometrial biopsy. As the trial judge correctly noted, it was Dr. Vilos's evidence that the uLMS would have had to have broken through the myometrium/endometrium and into the uterine cavity to be detected.

[101] The trial judge did not overlook or misapprehend the appellant's evidence. The appellant is correct to point out that Dr. Vilos's position on the likelihood of finding uLMS in 2009 was not that it was "purely speculative and unknowable", but rather that it was unlikely to have been detected. However, the trial judge correctly referred to Dr. Vilos's evidence a number of times, at paras. 48 and 52. The trial judge's characterization of his evidence, at para. 144, was not central to her conclusion. Again, she simply accepted the evidence of the respondents' experts, who disagreed with Dr. Vilos's evidence. They testified that Ms. Hacopian-Armen was closer to being menopausal than pre-menopausal and that this status increased the sensitivity of the endometrial biopsy and made detection of uLMS more likely than not. Further, the trial judge found, at para. 70, that the studies relied on by the appellant on the correlation between the location of the LMS and its detectability by a biopsy were unreliable and inconclusive.

(ii) The trial judge did not misapprehend the appellant's experts' evidence on the location of uLMS

[102] The appellant submits that the trial judge misapprehended the evidence of the defence experts, when she stated, at paras. 48, 53, and 58, that Dr. Vilos and Dr. Leyland had testified that the uLMS had to be in the "uterine cavity" to be detected by an endometrial biopsy. The appellant asserts that his experts' evidence throughout trial was that the cancer had to be in a location such as the uterine cavity or just underneath the endometrium, so as to be amenable to

sampling by endometrial biopsy which, as the name suggests, is a sampling of the endometrium.

[103] I would not accept this submission. On numerous occasions, the appellant's experts testified that the uLMS had to be in the uterine cavity to be detected. In his examination-in-chief, Dr. Vilos was asked the following questions and gave the following answers:

> Q. And so I understand that's your view on whether or not the cancer was present. I want you to assume for the time being that the cancer was there in May 2009, and when I mean the cancer, I mean the uterine leiomyosarcoma. Assuming the uterine leiomyosarcoma was present in May 2009, Dr. Vilos, would an endometrial biopsy have diagnosed it in any event?
>
> A. No.
>
> Q. And why not?
>
> A. For the biopsy to pick up a leiomyosarcoma, the leiomyosarcoma – remember, its genesis is in the wall of the uterus. For it to be picked up, it would have to move inside the uterine cavity, and we have no evidence here that the – the ultrasound, that it had moved into the uterine cavity. And the other evidence comes from the literature, multiple papers where they say that the sensitivity of endometrial biopsy, it's very low in the presence of leiomyosarcoma, picking up a leiomyosarcoma. [Emphasis added].

[104] And again, later in his evidence:

> Q. And what, if anything, is the significance of this to your opinion?

> A. It's pretty much what I said. For the leiomyosarcoma to be picked up by endometrial biopsy, it has to be sticken [sic] inside the uterine cavity.
>
> Q. And based on the imaging we looked at all the way to December 2009, were there any masses reported to be invading the endometrium or uterine cavity?
>
> A. Not according to any of the ultrasounds. [Emphasis added].

[105] Similarly, Dr. Leyland testified in cross-examination:

> Q. But if I understood your evidence, you said that the tumour has to be in the endometrial cavity in order for the biopsy to be successful. Is that right?
>
> A. Yes.
>
> Q. And if it's not in the, if it's not in the uterine cavity the, the biopsy will not work.
>
> A. Yes. [Emphasis added].

[106] In contrast to this evidence, the respondents' expert, Dr. Covens, testified that the uLMS did not have to be in the uterine cavity to be detected by an endometrial biopsy. He stated, however, in his evidence-in-chief that "obviously the closer [the tumour] is to the uterine cavity, the higher the likelihood one is going to pick it up on a biopsy."

[107] Dr. Covens also explained his disagreement with Dr. Vilos in his examination-in-chief:

> A. [H]ow does an endometrial biopsy identify a leiomyosarcoma? Clearly, if there's invasion into the endometrial tissue that's one possibility.

> Q. Mm-hmm.
>
> A. Second of all, if you've got a deep biopsy that, biopsies not only in the endometrium but that tissue underlying the endometrium, the myometrium, that can pick it up, as well. And thirdly, if you've got a leiomyosarcoma that is what we call a submucosal where it starts impinging, outgrowing towards the uterine cavity, which fibroids can do, as well, that can denude the endometrial lining and you can just biopsy that mass. So, so that's all the endometrial biopsy would indicate from a patient with a leiomyosarcoma.

[108] I am not satisfied that the trial judge misapprehended the evidence of the appellant's experts on this issue. There was a clear conflict in the expert evidence as to whether an endometrial biopsy could detect a cancer that was not in either the uterine cavity or the endometrium. The trial judge was entitled to prefer the evidence of the respondents' experts on this issue.

[109] As noted earlier, there was another aspect of the evidence, hotly contested by the appellant at trial, as to whether Ms. Hacopian-Armen was likely close to menopause, making it more likely that an endometrial biopsy would detect her uLMS. The trial judge found:

> While the defendants relied heavily on certain studies which indicated, *inter alia*, that in pre-menopausal women, an endometrial biopsy has a lower percentage likelihood of detection of LMS, Dr. Browning testified that women who are nulliparous have a 13 times more likely chance of having early menopause; that women 40 to 49 years of age have a greater differentiation in their production of hormones in comparison with 20-29, and 30-39 age ranges and stated that there was evidence to suggest that the plaintiff was beginning to have changes

> which would make her hormonally closer to menopause than pre-menopause, or what he indicated as "peri-menopausal". It was a laboratory report during that time which indicated her to be "peri-menopausal" or "peri". Her FSH levels were rising, which was also a sign that her body was hormonally moving toward menopause. Therefore, even based on the studies relied on by the defendant, there was a greater likelihood that LMS would have been detected in the plaintiff.

[110] In sum, I am not satisfied that the trial judge misapprehended the evidence on this issue or made either a “palpable” or “overriding” error in her assessment of the evidence. She simply preferred the respondents’ experts’ evidence that Ms. Hacopian-Armen’s menopausal or peri-menopausal status was a better indicator of whether an endometrial biopsy would have detected uLMS in 2009 than the location of the LMS. I would not give effect to this ground of appeal.

(iii) The trial judge did not misapprehend the nature and significance of the diagnostic imaging evidence

[111] The appellant submits that the trial judge misapprehended the evidence concerning the capabilities of diagnostic imaging. He asserts there was no evidence to support the trial judge’s conclusion that uLMS could have been in or near the endometrium while it was still undetectable by diagnostic imaging. Further, he submits the imaging from 2009 did not show any masses in or near the uterine cavity, which reduced the likelihood of detection by endometrial biopsy.

[112] I begin by setting out the relevant portion of the reasons for judgment, reproduced in full earlier:

> The defence argued that there was no evidence of any LMS having broken through the myometrial/endometrial lining into the uterine cavity based on all of the imaging. … While there were no fibroids seen in the uterine cavity on imaging, this does not exclude the likelihood that LMS, was in or near the endometrium, causing or contributing to the abnormal bleeding while it was still undetectable by diagnostic imaging. The evidence at trial indicated that the diagnostic imaging would not detect a LMS and that 95% of LMS malignancies originate *de novo* and are not part of an existing fibroid.

[113] The appellant submits that "[o]n the correct evidence, there is no scenario in which uLMS would be in the uterine cavity or submucosal (i.e. near the endometrium) but not appear on imaging." His position at trial was that because uLMS did not show up on Ms. Hacopian-Armen's ultrasounds taken prior to and after May 2009, it was not present in the uterus and obviously could not have been detected by an endometrial biopsy.

[114] The problem with this submission is that it does not accord with the evidence of Dr. Covens, which the trial judge accepted.

[115] To begin with, it was common ground that it was impossible to distinguish between fibroids and uLMS by imaging. Dr. Browning testified that they could only be distinguished at the microscopic level. Dr. Covens opined that she "in all likelihood … did have her sarcoma in 2009, albeit small." He testified that the cancer "originates at the cellular level" and grows from there. However, Dr. Covens noted that even though it might grow to a "mass, a tumour, a bump" that can be visualized, "we don't have any really good detection methods of separating fibroids

from leiomyosarcoma." On cross-examination, he agreed with the observation that in order to be visible on imaging, the cancer has to grow to a size in which it can be observed on radiology. He also stated that at an early stage, the tumour may have been "undetectable from an ultrasound point of view where it might have been detectable by pathology [i.e., a biopsy]."

[116] Dr. Covens also noted that Ms. Hacopian-Armen had declined to have a pelvic transvaginal ultrasound, which he described as the "gold standard test to interpret endometrial, myometrial pathology." When it was put to Dr. Covens that up to December 2009 there was no imaging report of any submucosal or intracavity fibroid, he responded, "[y]es, but she didn't have a transvaginal ultrasound so that might have been somewhat difficult to identify."

[117] I conclude that the trial judge did not misapprehend the evidence on this issue. She simply accepted Dr. Covens's evidence that the tumour was not visible on imaging because it was very small or because it was only detectable by a pelvic transvaginal ultrasound and that did not take place until April 2011, when her cancer was well advanced.

(iv) The trial judge did not err in asserting that the uLMS had not yet entered the uterine cavity in April 2011 and the trial judge did not

improperly rely on the April 2011 endometrial biopsy that detected the uLMS

[118] The appellant's last two submissions on this issue can be addressed together. First, the appellant submits that the trial judge misapprehended the implications of the endometrial biopsy that diagnosed Ms. Hacopian-Armen's uLMS in April 2011. He submits the trial judge misapprehended the evidence when she stated that the tumour had not invaded the uterine cavity in April 2011 when the endometrial biopsy was performed, and subsequently used her erroneous assessment of the evidence to reject the defence submission that uLMS has to be in a location amenable to an endometrial biopsy for a diagnosis to be made. The appellant submits that the 2011 biopsy supported the defence theory that location of the tumour is critical to diagnostic sensitivity, and that the absence of masses in or near the uterine cavity in 2009 made it unlikely that an endometrial biopsy would have detected the cancer.

[119] The appellant's second submission is that the trial judge erred in relying on the 2011 endometrial biopsy altogether because Ms. Hacopian-Armen demonstrated a dramatically different clinical picture in 2011 as opposed to 2009, and the results of the 2011 biopsy were of no value in assessing her condition in 2009.

[120] The appellant's submissions on this issue omit reference to the full scope of the trial judge's reasoning, in which she made it clear that the detection of uLMS by endometrial biopsy in 2011 was not central to her findings about Ms. Hacopian-Armen's condition in 2009. At para. 144, she said:

> It is of note that the endometrial biopsy conducted in April 2011 did diagnose the presence of a LMS at a time when the plaintiff was still, according to the defendants, "pre-menopausal" as opposed to "peri-menopausal", and at a time when the LMS was not in the uterine cavity. Further, there was no evidence of uterine invasion of the LMS on any kind of diagnostic imaging at that time. This is contrary to the defence theory of the case which suggests that in the circumstances described, the biopsy should have been negative. I should add that I do not find this fact determinative of whether there was LMS present on May 25, 2009. In that regard, I have based my findings on other evidence, without using a retrospective analysis. [Emphasis added.]

[121] Further, the question of whether the uLMS had invaded the uterine cavity by 2011 was contested at trial. It was open to the trial judge to note that the defence's theory was potentially undermined if the uLMS was detected by an endometrial biopsy in spite of being outside the uterine cavity. Ultimately, it did not matter, because the trial judge based her findings on the respondents' experts' theory that Ms. Hacopian-Armen's menopausal status, among other things, would have made detection of the uLMS by endometrial biopsy more likely than not.

[122] I am not persuaded that the trial judge erred in her assessment of the evidence in relation to the 2011 biopsy.

[123] I would therefore reject this ground of appeal.

F. DISPOSITION

[124] For these reasons, I would dismiss the appeal.

[125] The parties advised that they expected to agree on costs. If they have been unable to do so, they may make written submissions. The respondents shall serve and file their submissions within ten days of the release of these reasons and the appellant shall have ten days within which to serve and file responding submissions. The submissions shall not exceed three pages, excluding costs outlines.

Released: July 29, 2021 “G.R.S.”

“George R. Strathy C.J.O.”
“I agree. K. Feldman J.A.”
“I agree. Sossin J.A.”

TAB 14

Document: § 12.01 INTRODUCTION

§ 12.01 INTRODUCTION

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.
Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart

Chapter 12 OPINION EVIDENCE

§ 12.01 INTRODUCTION

¶12.1

In this chapter we consider the admissibility of opinion evidence. We begin with the historical development of the rule governing the admissibility of non-expert opinion evidence and discuss the scope and application of the modern rule. We next analyze the principles governing the admissibility of expert evidence, including opinion evidence based on novel scientific theories or techniques. We consider the problem that arises when hearsay forms part or all of the basis of the expert's opinion. We conclude the chapter with a discussion of the examination and cross-examination of expert witnesses.

¶12.2

As a general rule, a witness may not give opinion evidence but should testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter. [1] Thus, expert opinion evidence is permitted to assist the fact-finder form a correct judgment on a matter in issue where ordinary persons are unlikely to do so without the assistance of persons with special knowledge, skill or expertise.

¶12.3

The Supreme Court of Canada recognized, however, that the line between fact and opinion was not always clear. The Court held that a non-expert witness may give an opinion or draw inferences from facts where the witness's opinion constitutes a compendious statement of facts which are too subtle and too complicated to be narrated separately and distinctly so long as the subject matter does not require a particular expertise to draw the inference. Thus, a lay witness will be permitted to give an opinion only with respect to matters that do not require special knowledge and in circumstances where it is virtually impossible to separate the facts from the inferences based on those facts (*e.g.*, a person was drunk). [2] But a lay witness cannot give an opinion on a legal issue, for example, whether a person was negligent, because such an opinion involves the application of legal standards to the facts. [3]

¶12.4

In addition to, or instead of, opinion evidence, experts may give factual evidence. The British Columbia Court of Appeal has explained the differences between fact and opinion evidence given by an expert as

follows:

> …Witnesses who become involved in litigation due to their profession—such as a treating doctor or an engineer overseeing a construction project may be called to testify about their observations. Although the observations may be beyond the knowledge of a layperson, that testimony is not opinion evidence. Examples include a witness describing radiological images, identifying a microbe seen under a microscope, or identifying the pathological process seen on surgery or autopsy. Such evidence is sometimes described as "non-opinion expert evidence". [4]

¶12.5

R. v. Natsis [5] illustrates the difference between expert opinion evidence and an expert's evidence as to facts. The accused was convicted at trial of dangerous driving causing death. At trial and on appeal, she argued that the officer who provided evidence regarding the motor vehicle accident causing the accident was tainted by bias. The Court of Appeal found that the officer's observations and measurements at the accident scene were admissible factual observations "whether or not his opinion evidence about the conclusions he drew from those observations was admitted". [6]

Footnote(s)

1 *R. v. Parada* (2016), 341 C.C.C. (3d) 337, [2016] S.J. No. 431, at para. 23 (Sask. C.A.).

2 *R. v. Collins* (2001), 160 C.C.C. (3d) 85, [2001] O.J. No. 3894, at para. 13 (Ont. C.A.), *per* Charron J.A.

3 *R. v. D. (D.)*, [2000] 2 S.C.R. 275, [2000] S.C.J. No. 44, at paras. 47 and 49 (S.C.C.); *R. v. Graat*, [1982] 2 S.C.R. 819, at 835, 841, [1982] S.C.J. No. 102 (S.C.C.).

4 *Luis v. Marchiori*, 2018 BCCA 317, [2018] B.C.J. No. 2924, at para. 5 (B.C.C.A.).

5 *R. v. Natsis*, 2018 ONCA 425, [2018] O.J. No. 2383 (Ont. C.A.).

6 *R. v. Natsis*, 2018 ONCA 425, [2018] O.J. No. 2383, at para. 20 (Ont. C.A.).

Document: [c] Modern Statement of Lay Opinion Rule: Helpfulness

[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

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 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.), revg (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.), affd [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.

Content Type:

Terms:

Narrow By: -None-

Date and Time: 18 Feb 2025 01:04:42 p.m. EST

Print

Document: [1] General Principles

[1] General Principles

Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 6th Ed.
Sidney N. Lederman, Michelle K. Fuerst, Hamish C. Stewart

Chapter 12 OPINION EVIDENCE

§ 12.03 THE OPINION OF EXPERTS

[1] General Principles

¶12.39

The testimony of experts is commonplace in Canadian courtrooms and the admission of their evidence is an exception to the general rule barring opinion evidence. The law's early scepticism surrounding such evidence [1] derived from the concern that an expert's evidence might well be influenced because the expert was providing testimony to assist one party against another. In this adversarial context, there was some fear that an expert called by one side might give his or her evidence in a less than independent fashion. This concern became a matter of weight rather than of admissibility. More recent case law has modified this approach, so that independence, impartiality and lack of bias are now threshold requirements to admissibility of expert evidence. Where the opposing party is able to establish that the expert witness is unable to meet the duty imposed upon him or her to be independent, impartial and unbiased, the expert's testimony is not admissible. [2] If the expert's partiality is not so intense as to disqualify him or her from testifying, it may nevertheless be considered by the fact-finder in deciding how much weight to give to the expert's opinion. [3]

¶12.40

A threshold requirement for the reception of evidence from lay witnesses is that they must possess firsthand knowledge of a fact perceived through one of their senses. Expert witnesses, on the other hand, have specialized knowledge, skill or experience and are not required to have firsthand knowledge of the facts which form the basis of their opinions. [4] It is the expert's function to provide the trier of fact with a ready-made inference from proven facts since the technical or scientific nature of the subject matter is likely to be beyond the fact-finder's knowledge or experience. Expert opinion evidence is admissible when the fact-finder is unable to draw an inference or to form a proper conclusion without the assistance of experts [5] and the proponent of the expert evidence satisfies the common law and statutory requirements governing admissibility.

¶12.41

Judges recognized an exception to the opinion rule for expert witnesses to provide the trier of fact with the necessary technical or scientific basis upon which to properly assess the evidence presented. [6]

Conceived as a means of assisting jurors in the understanding of complex scientific or technical issues, expert evidence was permitted only in cases where the subject matter in question was beyond the capabilities of inexperienced persons who could not form a correct judgment without such assistance:

> … in other words when it so far partakes of the nature of a science, as to require a course of previous habit or study in order to the attainment of a knowledge of it. [7]

¶12.42

Justice Dickson (as he then was) in *R. v. Abbey*, [8] described the role of the expert in the following way:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": [*R. v.*] *Turner* (1974), 60 Cr. App. R. 80 at p. 83, per Lawton L.J. [9]

¶12.43

In *R. v. Fisher*, [10] Aylesworth J.A. indicated that on some issues such as mental competency and handwriting, a court will admit both lay and expert opinion evidence. [11] It is impossible to delineate the full range of topics about which only experts may testify. The field of matters requiring expert assistance is in a state of continual flux. In each case the trial judge must determine whether the subject matter of the opinion necessitates comprehension beyond the level of the common person. Some areas are obvious.

> Where expert evidence is tendered in such fields as engineering or pathology, the paucity of the lay person's knowledge is uncontentious. The long-standing recognition that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on a realization that in some circumstances the average person may not have sufficient knowledge of or experience within human behavior to draw an appropriate inference from the facts before him or her. [12]

¶12.44

In *R. v. Lavallée*, [13] the Supreme Court of Canada held that expert evidence on the psychological effect of being a battered woman was both relevant and necessary. Because the battering relationship was subject to a large number of myths, it was considered beyond the knowledge of the average juror and thus required explanation through expert testimony. Such testimony could assist the jury in determining whether a woman who had killed her partner had a reasonable apprehension of death and whether she reasonably believed that she could not otherwise preserve herself and had thus killed in self-defence.

¶12.45

In *Saadati v. Moorhead*, [14] the issue before the Supreme Court of Canada was whether recovery for damages for mental injuries requires a claimant to prove, with expert medical opinion, that the plaintiff is suffering a recognizable psychiatric illness. The Court indicated that the requirements under the common law of negligence for proving mental injury are sufficient to protect against unworthy claims. Thus, recovery for mental injury does not require expert evidence and proof of a recognizable psychiatric illness. Expert evidence can be helpful, but is not required as a matter of law. Finally, the Court noted that defendants may call expert evidence to establish that the accident could not have caused any mental injury, or at least any mental injury known to psychiatry.

Footnote(s)

1 See R.P. Croom-Johnson & G.F.L. Bridgman, *Taylor on Evidence*, 12th ed. (London: Sweet & Maxwell, 1931), at 59; *Miller (S.S.) Co. Property Ltd. v. Overseas Tankship (U.K.) Ltd.*, [1963] N.S.W.R. 948, at 963; *Tracey Peerage Case* (1843), 10 Cl. & Fin. 154, 8 E.R. 700 (H.L.); *Thorn v. Worthing Skating Rink Co.* (1876), 6 Ch. D. 415*n* (M.R.), noted in *Plimpton v. Spiller* (1877), 6 Ch. D. 412, at 415 (C.A.).

2 *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] S.C.J. No. 23, [2015] 2 S.C.R. 182, at paras. 26-32 (S.C.C.). See also *Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3,

[2015] S.C.J. No. 16, at para. 106 (S.C.C.); *R. v. Abbey*, 2017 ONCA 640, [2017] O.J. No. 4083, at para. 53 (Ont. C.A.). See this chapter, § 12.03[2][a][iv][B]

3 *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] S.C.J. No. 23, [2015] 2 S.C.R. 182, at para. 46 (S.C.C.).

4 Some experts, for example, a hospital emergency room physician who observes the plaintiff's physical injuries, possess firsthand knowledge of some of the foundational facts as a basis for an opinion of the extent of the injuries suffered by the plaintiff. In *Westerhof v. Gee Estate* (2015), 124 O.R. (3d) 721, [2015] O.J. No. 1472 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 198 (S.C.C.) and [2015] S.C.C.A. No. 201 (S.C.C.), these types of experts are categorized as "participant experts".

5 See *R. v. D. (D.)*, [2000] 2 S.C.R. 275, 148 C.C.C. (3d) 41, [2000] S.C.J. No. 44, at paras. 49-50 (S.C.C.); *R. v. Parrott*, [2001] 1 S.C.R. 178, [2001] S.C.J. No. 4, at para. 55 (S.C.C.); *R. v. N. (R.A.)* (2000), 277 A.R. 288, [2001] A.J. No. 294, at paras. 23-26 (Alta. C.A.); *R. v. K. (A.)* (1999), 45 O.R. (3d) 641, [1999] O.J. No. 3280, at para. 71 (Ont. C.A.); *R. v. Ferguson* (1999), 142 C.C.C. (3d) 353, [2000] O.J. No. 346, at paras. 72-73 (Ont. C.A.); *R. v. Abbey* (2009), 97 O.R. (3d) 330, 246 C.C.C. (3d) 301, [2009] O.J. No. 3534 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.); *R. v. Sadiqi*(2009), 68 C.R. (6th) 346, [2009] O.J. No. 2974 (Ont. S.C.J.); *R. v. Shafia* (2012), 285 C.C.C. (3d) 283, 2012 ONSC 1538, [2012] O.J. No. 1446 (Ont. S.C.J.); *R. v. Boswell* (2011), 277 C.C.C. (3d) 156, [2011] O.J. No. 1646 (Ont. C.A.). For a civil case where the Court found that evidence was not in the nature of expert evidence because the information provided by the witness was not the product of inference and did not lie beyond the knowledge competence of a judge or jury, see *Strata Plan NES 97 v. Timberline Developments Ltd.* (2011), 24 B.C.L.R. (5th) 234, 312 B.C.A.C. 18, [2011] B.C.J. No. 1999 (B.C.C.A.).

6 *Folkes v. Chadd* (1782), 3 Doug. K.B. 157, 99 E.R. 589 (K.B.); *Beckwith v. Sydebotham* (1807), 1 Camp. 116, 170 E.R. 897 (K.B.).

7 *Per* Barry C.J.K.B.D. in *Taylor v. Gray*, [1937] 4 D.L.R. 123, at 599, [1937] N.B.J. No. 4 (N.B.C.A.).

8 [1982] 2 S.C.R. 24, [1982] S.C.J. No. 59 (S.C.C.).

9 *R. v. Abbey*, [1982] 2 S.C.R. 24, at 42, [1982] S.C.J. No. 59 (S.C.C.). See also *R. v. Béland*, [1987] 2 S.C.R. 398, at 415, [1987] S.C.J. No. 60 (S.C.C.); *Kelliher (Village) v. Smith*, [1931] S.C.R. 672, [1931] 4 D.L.R. 102, at 116, [1931] S.C.J. No. 47 (S.C.C.).

10 [1961] O.W.N. 94, 34 C.R. 320 (Ont. C.A.), affd [1961] S.C.R. 535, [1961] S.C.J. No. 31 (S.C.C.).

11 See § 12.02[2].

12 *Per* Wilson J. in *R. v. Lavallée*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97, at 111, [1990] S.C.J. No. 36 (S.C.C.); see also *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656, [1994] S.C.J. No. 30 (S.C.C.).

13 *R. v. Lavallée*, [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97, [1990] S.C.J. No. 36 (S.C.C.); see also *R. v. M. (M.A.)*,[1998] 1 S.C.R. 123, [1998] S.C.J. No. 12 (S.C.C.).

14 2017 SCC 28, [2017] S.C.J. No. 28 (S.C.C.).

Content Type:

Terms:

Narrow By: -None-

Date and Time: 18 Feb 2025 01:03:14 p.m. EST

Print

Cookie Policy

Terms & Conditions

TAB 15

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited *Respondents*

and

Attorney General of Canada and Criminal Lawyers' Association (Ontario) *Interveners*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appelants*

c.

Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, auparavant Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. faisant affaire sous la raison sociale T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: White Burgess Langille Inman *v.* Abbott and Haliburton Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

Répertorié : White Burgess Langille Inman *c.* Abbott and Haliburton Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle n'était pas un témoin expert impartial.

Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence.

Expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her. These concepts, of course, must be applied to the realities of adversary litigation.

Concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Jurisprudence

Arrêts appliqués : *R. c. Mohan*, [1994] 2 R.C.S. 9; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; **arrêt adopté :** *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, autorisation d'appel refusée, [2010] 2 R.C.S. v; **arrêts mentionnés :** *Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *Graat c. La Reine*, [1982] 2 R.C.S. 819; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. c.*

396; *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Statutes and Regulations Cited

Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, arts. 22, 235 [not yet in force].

Civil Procedure Rules (Nova Scotia), rr. 55.01(2), 55.04 (1)(a), (b), (c).

C. (M.), 2014 ONCA 611, 13 C.R. (7th) 396; *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, inf. par [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187; *R. c. Docherty*, 2010 ONSC 3628; *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley c. Punnett*, 2003 BCSC 294; *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame c. Johnstone*, 2006 BCSC 271; *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. c. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz c. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Lois et règlements cités

Loi instituant le nouveau Code de procédure civile, L.Q. 2014, c. 1, art. 22, 235 [non en vigueur].

Règles de la Cour du Banc de la Reine (Saskatchewan), règle 5-37.

Federal Courts Rules, SOR/98-106, r. 52.2(1)(*c*).
Queen's Bench Rules (Saskatchewan), r. 5-37.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 4.1.01(1), (2), 53.03(2.1).
Rules of Civil Procedure (Prince Edward Island), r. 53.03 (3)(g).
Rules of Court, Y.O.I.C. 2009/65, r. 34(23).
Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 11-2(1), (2).

Authors Cited

Anderson, Glenn R. *Expert Evidence*, 3rd ed. Markham, Ont.: LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*. Cowansville, Qué.: Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24. Toronto: Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*. Cowansville, Qué.: Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32. Eagan, Minn.: Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper. Oxford: Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th ed. Pyrmont, N.S.W.: Lawbook Co., 2013.
Halsbury's Laws of Canada: Evidence, 2014 Reissue, contributed by Hamish C. Stewart. Markham, Ont.: LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Civil Justice Reform Project: Summary of Findings & Recommendations* (Osborne Report). Toronto: Ministry of Attorney General, 2007.
Ontario. *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Goudge Report). Toronto: Ministry of the Attorney General, 2008.
Ontario. *The Commission on Proceedings Involving Guy Paul Morin: Report* (Kaufman Report). Toronto: Ministry of the Attorney General, 1998.

Règles de procédure, Y.D. 2009/65, règle 34(23).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 4.1.01(1), (2), 53.03(2.1).
Règles de procédure civile (Nouvelle-Écosse), règles 55.01(2), 55.04(1)a), b), c).
Règles des Cours fédérales, DORS/98-106, règle 52.2 (1)*c*).
Rules of Civil Procedure (Île-du-Prince-Édouard), règle 53.03(3)(g).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règles 11-2(1), (2).

Doctrine et autres documents cités

Anderson, Glenn R. *Expert Evidence*, 3rd ed., Markham (Ont.), LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*, Cowansville (Qc), Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24, Toronto, Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*, Cowansville (Qc), Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32, Eagan (Minn.), Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper, Oxford, Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence : Law, Practice, Procedure and Advocacy*, 5th ed., Pyrmont (N.S.W.), Lawbook Co., 2013.
Halsbury's Laws of Canada : Evidence, 2014 Reissue, contributed by Hamish C. Stewart, Markham (Ont.), LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed., Markham (Ont.), LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., Toronto, Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Commission sur les poursuites contre Guy Paul Morin : Rapport* (Rapport Kaufman), Toronto, Ministère du Procureur général, 1998.
Ontario. *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (Rapport Osborne), Toronto, Ministère du Procureur général, 2007.

Paciocco, David. "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135.
Paciocco, David M. "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565.
Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.
Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds. London: Sweet & Maxwell, 2013.
Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.
Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown and Co., 1898 (reprinted South Hackensack, N.J.: Rothman Reprints, Inc., 1969).
United Kingdom. *Access to Justice: Final Report* (Woolf Report). London: HMSO, 1996.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Oland and Beveridge JJ.A.), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), setting aside in part a decision of Pickup J., 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Appeal dismissed.

Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

Ontario. *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (Rapport Goudge), Toronto, Ministère du Procureur général, 2008.
Paciocco, David. « Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135.
Paciocco, David M. « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565.
Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed., Toronto, Irwin Law, 2015.
Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds., London, Sweet & Maxwell, 2013.
Royaume-Uni. *Access to Justice : Final Report* (Woolf Report), London, HMSO, 1996.
Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd., Cowansville (Qc), Yvon Blais, 2008.
Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*, Boston, Little, Brown and Co., 1898 (reprinted South Hackensack (N.J.), Rothman Reprints, Inc., 1969).

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Beveridge), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), qui a infirmé en partie une décision du juge Pickup, 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Pourvoi rejeté.

Alan D'Silva, *James Wilson* et *Aaron Kreaden*, pour les appelants.

Jon Laxer et *Brian F. P. Murphy*, pour les intimées.

Michael H. Morris, pour l'intervenant le procureur général du Canada.

Matthew Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J. —

I. Introduction and Issues

[1] Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

[2] 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.

[3] Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. *Facts and Proceedings*

[4] The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Rappel des faits et historique judiciaire

A. *Les faits et la procédure*

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

[5] The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action, and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

[6] The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^me^ Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^me^ MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^me^ MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^me^ MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

B. *Judgments Below*

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert . . . does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S. Dissenting)

[8] The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

[9] MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. *Overview*

[10] In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met,

B. *Les juridictions inférieures*

(1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M[me] MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, partant, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [. . .] ne satisfait pas aux critères d'admissibilité » (par. 101).

(2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M[me] MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M[me] MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. Analyse

A. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

however, concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. *Expert Witness Independence and Impartiality*

[11] 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, at p. 374.

[12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infaillible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l]'opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

[13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. *The Legal Framework*

(1) The Exclusionary Rule for Opinion Evidence

[14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l'honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d'un expert jouent au regard de l'admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d'admissibilité, par un pouvoir discrétionnaire permettant d'écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s'inscrit-elle dans le cadre juridique actuel régissant l'admissibilité des témoignages d'experts? Pour répondre à ces questions, nous devons d'abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s'intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d'exclusion des témoignages d'opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L'une d'elles a trait au témoignage d'opinion, lequel fait l'objet d'une règle d'exclusion complexe. La déposition des témoins doit relater les faits qu'ils ont perçus, et non présenter les inférences, ou opinions, qu'ils en tirent. Comme l'a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c'est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d'exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

[15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

[16] Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

[17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9. That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather

pas utiles au juge des faits et peuvent même l'induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Cependant, ce ne sont pas tous les témoignages d'opinion qui sont exclus. L'exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s'applique au témoignage d'opinion d'un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d'après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu'il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) Le cadre juridique actuel régissant le témoignage d'opinion d'un expert

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l'incidence d'une preuve d'expert d'une valeur douteuse sur le déroulement de l'instance. La jurisprudence a clarifié et resserré les critères d'admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l'important rôle de « gardien » du juge qui consiste à écarter d'emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l'affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d'expert et établi un critère à quatre volets pour en évaluer l'admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, at para. 46.)

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s'en remette inconsidérément à l'opinion de l'expert au lieu de l'évaluer avec circonspection. Comme le souligne le juge Sopinka dans l'arrêt *Mohan* :

> La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s'agit de préserver le procès devant juge et jury, et non pas d'y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d'appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d'un « acte de confiance » à l'égard de l'opinion de l'expert (*J.-L.J.*, par. 56). Le danger de « s'en remettre à l'opinion de l'expert » est également exacerbé par le fait que la preuve d'expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d'autres problèmes connexes : le préjudice qui pourrait éventuellement découler d'une opinion d'expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l'objet d'un contre-interrogatoire (*D.D.*, par. 55); le danger d'admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu'un « concours d'experts » ne distraie le juge des faits au lieu de l'aider (*Mohan*, p. 24). Un autre danger bien connu associé à l'admission de la preuve d'expert est le fait qu'elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l'arrêt *Mohan* a établi une structure de base à deux volets

of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J.-L.J.*, at para. 28.

[20] *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

[21] So, for example, the necessity threshold criterion was emphasized in cases such as *D.D.* The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that "[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d'admissibilité du témoignage d'opinion d'un expert. En premier lieu, celui qui cherche à faire admettre une preuve d'opinion émanant d'un expert doit démontrer qu'elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d'aider le juge des faits; (3) l'absence de toute règle d'exclusion; (4) la qualification suffisante de l'expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L'arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d'expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d'exclure une preuve à l'issue d'une analyse coût-bénéfices (p. 21). Il s'agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L'arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s'inscrit dans l'analyse globale. La Cour dans cet arrêt procède à l'analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu'une telle analyse peut relever de l'exercice d'un pouvoir discrétionnaire général qui permet d'exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l'arrêt *Mohan*, la jurisprudence s'est également intéressée à des aspects particuliers du témoignage d'opinion d'un expert, mais souvent sans expliciter la place qu'occupent ces autres préoccupations dans l'analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d'admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l'exigence de nécessité « vise à ce que les dangers liés à la preuve d'expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou "utilité" ne suffit pas » (par. 46). D'autres décisions ont abordé la fiabilité des principes scientifiques à la base d'une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

and concerns such as those about reliability fit into the overall analysis.

[22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

[23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, at para. 72.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

dans l'analyse globale, s'inscrivent l'analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L'arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d'avis de l'adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *Mohan*, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. De plus, dans le cas d'une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s'entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu'à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soupesant les risques et les bénéfices éventuels que présente l'admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l'arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l'arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l'arrêt *Abbey*, lorsqu'il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 76).

[25] With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. *The Expert's Duty to the Court or Tribunal*

[26] There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), c. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, art. 22 (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

[27] One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation . . . .

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . An expert witness in the High Court should

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

[TRADUCTION]

1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .

2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (C.A.), at p. 496.)

[28] Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

[29] There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules* (Saskatchewan), r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of*

comme expert devant la Haute Cour ne doit jamais s'arroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

Civil Procedure, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(*c*).

[30] The formulation in the Ontario *Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan (r. 4.1.01(1)(a)). The *Rules* are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure* of Quebec explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

[31] Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in Nova Scotia, the *Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

[32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)*c*)).

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas

position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev*. 635, p. 638-639). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

E. *The Expert's Duties and Admissibility*

[33] As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

[34] In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality go to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) *The Canadian Law*

[35] The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibilité ou valeur probante?

a) *Le droit canadien*

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

[36] Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with the collaboration of J. Béchard, *L'expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.-M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
>
> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 106)

[37] I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

> Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), no 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), nos 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (D. M. Paciocco, « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565, p. 598-599).
>
> (*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[38] Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

[39] Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920. Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case

315, 293 N.S.R. (2d) 394 (l'expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l'expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l'expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l'issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l'expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l'expert risquait d'être engagée, selon l'issue du procès)). Dans d'autres affaires, l'attitude ou le comportement de l'expert, qui s'était fait le défenseur d'une partie, a justifié l'exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d'autres affaires, les tribunaux, tout en acceptant en principe qu'un manque d'indépendance ou d'impartialité pouvait mener à l'exclusion du témoignage de l'expert, ont néanmoins estimé qu'il n'y avait pas lieu d'écarter ce témoignage eu égard aux faits particuliers de l'espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C'est le point de vue qu'a adopté la Cour d'appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d'avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d'expert qui satisfaisait aux critères énoncés dans l'arrêt *Mohan* et précisé que le parti pris n'entrait en jeu que lorsqu'il s'agissait de déterminer la valeur probante du témoignage de l'expert (voir également

or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

[40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) *Other Jurisdictions*

[41] Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

[42] For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. Violette, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l'expert fondée sur l'existence d'un rapport entre ce dernier et l'une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l'étape de l'admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l'indépendance et l'impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s'ils soutiennent que les questions concernant l'indépendance de l'expert ne devraient jouer qu'au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu'une conclusion quant au manque d'indépendance ou d'impartialité peut entraîner l'inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l'extérieur du Canada, les questions d'indépendance et d'impartialité ont été abordées de diverses façons, dont certaines s'apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l'arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l'expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l'exclusion est justifiée s'il est établi que l'expert ne peut ou ne veut pas s'acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18e éd. 2013), p. 1158-1159). Le simple fait d'avoir un intérêt ou un rapport ne rend pas quelqu'un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l'importance de l'intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l'explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu'un expert n'ait aucun intérêt réel ou apparent dans l'issue d'un procès dans lequel il témoigne, mais une telle neutralité n'est pas automatiquement essentielle à l'admissibilité de son témoignage »

Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), at paras. 312-17.

[43] In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the State of Victoria put it: ". . . to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), at p. 1321. This also seems to be a fair characterization of the situation in the states (*Corpus Juris Secundum*, vol. 32 (2008), at p. 325: "The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) *Conclusion*

[45] 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

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « . . . dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) *Conclusion*

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du

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.-L.J.*: "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).

(2) The Appropriate Threshold

[46] I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept . . . that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

[47] Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my

témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale de notre droit en ce qui concerne les témoignages d'experts et l'importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l'optique canadienne dans l'arrêt *J.-L.J.* : « La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J'ai déjà exposé l'obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d'admissibilité découle de cette obligation. Je suis d'accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l'Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l'obligation d'aider le tribunal, qui l'emporte sur celle qu'ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s'acquitter de cette obligation n'est pas habile à exercer son rôle d'expert et devrait être exclu » (« Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s'en acquitter.

[47] L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu'une répétition inefficace de l'audience sur l'admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu'à affirmer qu'il faut présumer l'indépendance

view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

[48] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

[49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

[50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

[51] Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. *Situating the Analysis in the Mohan Framework*

(1) The Threshold Inquiry

[52] Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one

sa principale obligation envers le tribunal. Je tiens à souligner que la décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); the necessity component (see, e.g., *Docherty*; *Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. Some clarification of this point will therefore be useful.

[53] In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

[54] Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. *Expert Evidence and Summary Judgment*

[55] I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

le juge doit encore tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

G. *Témoignage d'expert et jugement sommaire*

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur — ou, à tout le moins, d'une valeur possible — à la preuve.

H. *Application*

[56] I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

[57] There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

[58] The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

[59] First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMillan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

H. *Application*

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^me^ MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^me^ MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^me^ MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^me^ MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^me^ MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

[60] The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

[61] The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

[62] There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be

[60] Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M[me] MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M[me] MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M[me] MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

[63] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M[me] MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M[me] MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

TAB 16

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 *Appelant*;

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'appelant à l'encontre d'une déclaration de culpabilité d'avoir conduit avec des facultés affaiblies. Pourvoi rejeté.

Edward L. Greenspan, c.r., pour l'appelant.

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?

I

La procédure

L'appelant, 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'appelant 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'appelant 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'appelant 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 vehcile?

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] Me 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.

Me ALLAN:

Votre Honneur, avec égards, même s'il n'a pas vu l'accusé conduire, si le sergent . . .

Me 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 inculpé 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'appelant était affaiblie.

III

En Cour d'appel de l'Ontario

L'appelant 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'appelant 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'appelant.

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*, 5e 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'appelant 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

[TRADUCTION] 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: [TRADUCTION] «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):

[TRADUCTION] 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 Siochana 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.

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 Siochana, 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.

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*.

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*.

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.

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 validement 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* (5e 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 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 that 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, aggressive, 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'empiétement 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'appelant 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 excercise 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.

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.

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 . . .

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.

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.

The trial judge was correct in admitting the opinions of the three police officers and Mr. Wilson.

For the foregoing reasons, as well as for the reasons given by Chief Justice Howland, I would dismiss the appeal.

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.

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.

Le juge du procès a eu raison de recevoir l'opinion des trois agents de police et celle de M. Wilson.

Pour les motifs ci-dessus, et pour les motifs exprimés par le juge en chef Howland, je suis d'avis de rejeter le pourvoi.

Pourvoi rejeté.

Procureurs de l'appelant: Greenspan, Moldaver, Toronto.

Procureur de l'intimée: Le procureur général de la province de l'Ontario.

TAB 17

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 [page722] "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 spondylolisthesis[2]). 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.), revd 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. [page733]

[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 [page738] 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. [page742]

[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 [page743] 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 [page744] 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 [page746] 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 [page749] 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 synovium[7] 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 [page753] 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.

APPENDIX 'A'

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.

TAB 18

CITATION: Starra v. Starra, 2024 ONSC 6613
COURT FILE NO.: 09-80-1
DATE: 20241206

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 PSTD 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 2011where 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 that 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 Guideline*s, 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 *Bracklaw 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 an 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 that 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

TAB 19

CITATION: R. v. Hayatibahar, 2022 ONSC 3692
COURT FILE NO.: CR-19-00010705
DATE: 20220621

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HER MAJESTY THE QUEEN	)	Greg Elder, for the Crown
– and –	)	
FAREIDON HAYATIBAHAR	)	Boris Bytensky, for the Defendant
Defendant	)	**HEARD:** November 29, 30, December 1, 2, 3, 16, 17, 2021, February 28, March 2, 3, 8, April 4, 5, 6, and 8, 2022

REASONS FOR JUDGMENT

DI LUCA J.:

I. Introduction and Overview of Issues

[1] On August 18, 2019, the defendant Fereidon Hayatibahar spent the day at a water park with some friends. He eventually met up with Farbod Riazi. They had known each other since childhood and had recently reconnected. By all accounts, the day was fun-filled and enjoyable. While at the water park, Mr. Hayatibahar and Mr. Riazi consumed a quantity of alcohol. They left the water park in a Mercedes SUV owned by Mr. Riazi's mother. Mr. Riazi was driving when they left.

[2] From the water park, Mr. Riazi and Mr. Hayatibahar made their way to a McDonald's restaurant on Yonge Street in Richmond Hill where they met up with some other friends. A female acquaintance who was with Mr. Hayatibahar needed a ride to a nearby location and Mr. Riazi and Mr. Hayatibahar agreed to drive her a short distance away from the McDonald's.

[3] Mr. Riazi claims that Mr. Hayatibahar drove the Mercedes during this portion of the events. He explains that he wanted to give Mr. Hayatibahar the opportunity to test out the Mercedes and Mr. Hayatibahar was eager to do so.

[4] What happened next is tragic. As the Mercedes was traveling southbound on Yonge Street, heading back to the McDonald's parking lot, it reached speeds of approximately 170 km/h

and possibly higher. The driver lost control of the vehicle and swerved into oncoming traffic. He struck a number of vehicles and caused a horrific collision.

[5] The collision left a massive debris field. The impact was so devastating that the transmission and engine of the Mercedes were flung from the vehicle and eventually came to rest some 200 to 300 metres down the road.

[6] Malihe Ardekani was the driver of the first vehicle struck in the accident. Her car was side swiped by the Mercedes, and she suffered injuries as a result of the accident.

[7] Peyman Masoomi Fard was the driver of the second vehicle struck. The impact between the Mercedes and Mr. Fard's vehicle can only be described as catastrophic. Mr. Fard's vehicle was demolished in the collision. He suffered absolutely gruesome injuries and died at the scene of the crash. His wife, Nazanin Amiri, and his young son Alireza Masoomi Fard, were also in the vehicle. They too suffered significant injuries as a result of the crash but miraculously survived.

[8] Alden Culhane was the driver of the third vehicle involved in the accident. His vehicle was struck by debris from the impact between the Mercedes and the second vehicle. Thankfully, he suffered no injuries.

[9] Mr. Hayatibahar and Mr. Riazi were both arrested at the scene as the attending officers formed the belief that either one or the other was the driver. Based on further investigation, Mr. Riazi was released without charge.

[10] Mr. Hayatibahar was eventually charged with Criminal Negligence Cause Death, Criminal Negligence Cause Bodily Harm x3, Impaired Driving Cause Death, and Impaired Driving Cause Bodily Harm x3.

[11] Mr. Hayatibahar's trial proceeded before me commencing with evidence on the *Charter* motions in November and December 2021, and then the trial proper commencing in late February 2022. The evidence from the *Charter* motions, save and except for the evidence of Mr. Hayatibahar, was applied to the trial proper. As is his absolute right, Mr. Hayatibahar did not testify at trial. After hearing closing submissions on April 8, 2022, I reserved my decision and indicated I would give written reasons. These are those reasons.

[12] The central issue on this trial is whether the Crown has proven beyond a reasonable doubt that Mr. Hayatibahar was the driver of the Mercedes on the night of the accident. The defence position is that the Crown has failed to meet its burden as, at the very least, there exists a reasonable possibility that Mr. Riazi was driving the vehicle at the time of the accident. The defence argues that Mr. Riazi is a manifestly untruthful and unreliable witness who had every motivation to place the blame for the accident on Mr. Hayatibahar.

[13] Apart from the central issue of identity, there are also issues relating to the proof of provenance of the certain blood samples taken at the hospital which are alleged to be Mr. Hayatibahar's. There is also an issue as to whether the driving amounts to criminal

negligence as opposed to the lesser and included offence of dangerous driving as set out in the *Criminal Code*.

[14] That said, there are several matters that are not in issue. First, there is no issue that the driver of the Mercedes was driving it in a manner that constituted dangerous driving at a minimum.

[15] Second, there is no issue that the driver of the Mercedes also caused the death of Peyman Masoomi Fard and caused bodily harm to Nazanin Amiri, Alireza Masoomi Fard and Malihe Ardekani.

[16] Third, there is no issue that if the Crown has proven that the tested blood samples actually came from Mr. Hayatibahar, the unchallenged expert toxicological evidence establishes that Mr. Hayatibahar's ability to drive a motor vehicle was impaired at the time of the accident.

II. Fundamental Legal Principles

[17] Mr. Hayatibahar is presumed innocent of each and every charge in the indictment. The presumption of innocence is of fundamental importance in the criminal justice system, as it serves to place the burden of proof squarely on the Crown and also serves to protect against wrongful conviction.

[18] The presumption of innocence stays with the defendant throughout the trial and is only displaced if I am satisfied that the Crown has proven the charges beyond a reasonable doubt. The Crown has the sole obligation or burden of proving each charge against the defendant. The defendant does not have an obligation to prove anything.

[19] Proof beyond a reasonable doubt is a very high legal standard. A reasonable doubt is not an imaginary or frivolous doubt. It is not a doubt based upon sympathy or prejudice. Rather, it is a doubt based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[20] While likely or even probable guilt is not enough, proof to a level of absolute certainty is not required as that standard is impossibly high. That said, while absolute certainty is an impossibly high standard, proof beyond a reasonable doubt falls much closer to absolute certainty than to proof on a balance of probabilities.

[21] Ultimately, in order to convict the defendant of an offence, I must be *sure* that the defendant has committed the offence. If I am not sure, I must acquit.

III. Assessing Credibility and Reliability

[22] There is no magic formula that applies in determining whether a witness is telling the truth. Instead, the witness' evidence is considered using an approach that is not tainted by myth, stereotype or unwarranted assumption. There are many factors that may be relevant in determining credibility. Some of the key factors include: whether the witness' evidence is

internally consistent, whether it is externally consistent with evidence from other witnesses or exhibits; whether the witness has a bias or motive to give evidence that is more favourable to one side or the other, whether inconsistencies in the evidence are about important or minor matters, what explanations are given for any inconsistencies and whether the inconsistencies suggest that the witness is lying.

[23] I am also mindful that there is a distinction between credibility and reliability. Reliability relates to the accuracy of the witness' testimony which engages a consideration of the witness' ability to accurately observe, recall and recount an event; see *R. v. H.C.*, 2009 ONCA 56 at para. 41. At times, a witness may credibly recount an observation or occurrence. However, that evidence may lack reliability for a number of reasons, including the conditions under which the witness made the observation as well as the impact of information received by the witness after an event. An incredible witness's evidence cannot be relied on. However, the converse is not automatically true as credibility is not a proxy for reliability. A credible witness may, nonetheless, give unreliable evidence; see *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at p. 526.

[24] Where a witness' evidence raises credibility concerns, the court must be cautious in simply accepting the evidence. That said, there is no rule prohibiting the reasoned acceptance of the testimony from a witness with credibility concerns. Moreover, such a witness' evidence may, at times, be corroborated by other evidence. Depending on the circumstances of the case, the corroboration may restore faith in the witness' evidence, despite their credibility issues; see *R. v. Khela*, 2009 SCC 4.

[25] In this case, the Crown's central witness is Farbod Riazi. He directly places Mr. Hayatibahar behind the wheel of the Mercedes at the time of the accident. The Crown's case is also based on a number of eyewitnesses who were present at the scene of the accident.

[26] While Mr. Hayatibahar did not testify, he did call one eyewitness on the trial proper. He also relies on elements of the evidence of various other Crown witnesses which include exculpatory utterances he made shortly after the accident. His position is that he was not the driver of the vehicle at the time of the crash.

[27] Arriving at a verdict in this case requires that I determine issues of credibility and reliability. In other words, I have to decide whether the witnesses told the truth and if so, whether the witness' evidence can be relied upon as accurate.

[28] However, and to be clear, this case is not simply a credibility contest between Mr. Riazi and the evidence that favours Mr. Hayatibahar. My task is not to decide which body of evidence I prefer. Rather, my task is to decide whether the Crown has proven the case against Mr. Hayatibahar on each charge beyond a reasonable doubt. In making this determination I can accept some, none or all of any witness' evidence.

[29] The methodology for assessing the evidence in cases where credibility is a key issue was set out by the Supreme Court of Canada many years ago in *R. v. W.D.*, [1991] 1 S.C.R.

742. Modified for the circumstances of a case such as this, I must apply the following methodology:

> First, if I believe and/or accept the evidence that favours Mr. Hayatibahar, I must find him not guilty.
>
> Second, if I do not believe and/or accept the evidence that favours Mr. Hayatibahar, but am left in reasonable doubt by it, I must find him not guilty.
>
> Third, even if I am not left in doubt by the evidence that favours Mr. Hayatibahar, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the guilt of the defendant.

[30] In considering the first two steps of the *W.D*. analysis, the evidence that favours the defendant must be considered in the context of the evidence as a whole, including Mr. Riazi's evidence. In other words, the assessment is not simply whether the evidence that favours the defendant standing alone and without context is believed or leaves me with a reasonable doubt; see *R. v. Carriére* (2001), 159 C.C.C. (3d) 51 (Ont.C.A.) at para. 51, *R. v. Hull*, 2006 CanLII 26572 (ON CA), and *R. v. J.J.R.D*. (2006), 215 C.C.C. (3d) 252 (Ont.C.A.).

[31] Where the evidence in a case is circumstantial, the Crown must prove that the accused's guilt is the only reasonable inference available on the evidence, see *R. v. Villaroman*, 2016 SCC 33 and *R. v. Choudhury*, 2021 ONCA 560 at para. 19. The consideration of circumstantial evidence requires the drawing of reasonable inferences based on logic, experience and common sense. Speculation and conjecture are impermissible. The line between speculation and reasonable inference may be at times difficult to draw. However, the ease of drawing the inference is not the standard. The standard is whether the inference is based in logic and reason.

[32] The analysis must be based on the totality of the evidence before the court, see R. v. *Aslami*, 2021 ONCA 249 and *R. v. Smith*, 2016 ONCA 25, at para. 81. If, after all of the evidence is considered, a reasonable inference inconsistent with guilt on any essential element of the offence exists, the accused is entitled to an acquittal or a conviction on a lesser and included offence, as the case may be. An inference inconsistent with guilt must be reasonable, not simply possible.

[33] The Crown is not required to negative every possible inference conceivable. However, an inference inconsistent with guilt does not need to arise from "proven facts", see *Villaroman, supra*, at para. 35 and *R. v. Robert* (2000), 143 C.C.C. (3d) 330 (Ont.C.A.) at para. 17. It can arise as a matter of logic and experience based on a consideration of all the evidence and the absence of evidence, see *R. v. Ali*, 2021 ONCA 362 at paras. 97 and 98.

IV. The Elements of the Offences Charged

[34] In view of the admissions and the focussed nature of the issues I need to decide, I will not spend a significant amount of time canvassing the elements of the offences charged. As

mentioned, it is admitted that the Mercedes was being driven dangerously at the time of the accident. The element of causation in relation to the death and bodily harm suffered by the victims is also admitted.

[35] In terms of the offence of impaired driving, there is no issue that the offence simply requires proof beyond a reasonable doubt that the defendant's ability to operate a motor vehicle was impaired to any degree by alcohol and/or drugs, see *R. v. Stellato*, [1994] 2 S.C.R. 478.

[36] Turning lastly to the offence of criminal negligence, I note that the distinction in the *mens rea* between criminal negligence and dangerous driving is one of degree. The offence of dangerous driving requires proof a "marked departure" from the conduct of a reasonable person in the circumstances, see *R. v. Roy*, 2012 SCC 26 at para. 30 and *R. v. Beatty*, 2008 SCC 5 at para. 33. With the offence of criminal negligence, the requisite degree of departure is heightened. It must be a "marked and substantial" departure from the conduct of a reasonable person in the circumstances, see *R. v. J.F.*, 2008 SCC 60 at para. 9, *R. v. Akhtar*, 2022 ONCA 279 and *R. v. Durani*, 2022 ONCA 17 at paras. 9-10.

V. Review of Evidence and Findings

[37] I start my analysis of the evidence in this case by briefly reviewing the nature of the accident that occurred on August 18, 2019. I will then address the core issue, which is the identity of the driver of the Mercedes at the time of the accident. In addressing the issue of the identity of the driver, I will start with a review of Mr. Riazi's evidence and I will also consider the circumstantial evidence, including the alleged seatbelt injuries sustained by both Mr. Riazi and Mr. Hayatibahar. I will also consider the evidence of the witnesses who were at the scene and made observations of the occupants of the Mercedes. As part of this analysis, I will consider the evidence that favours Mr. Hayatibahar mindful of the *W.D.* analysis.

A. The Nature and Cause of the Accident

[38] The accident occurred just before 9:30 p.m. on Yonge Street near Townwood Drive in the City of Richmond Hill. The first responders who arrived on scene were confronted with a very large debris field hundreds of metres long. Cars and car parts were strewn over a long stretch of road. A large number of civilians had gathered to offer assistance and observe the scene. Some civilians were trying to photograph and take videos of the victims. Emergency crews were arriving and tending to the scene and the various parties. The scene was chaotic.

[39] Cst. Barak and Cst. McWatters were among the first responders. They quickly approached a white Mazda that was in the ditch at the side of the road. The car was demolished, and the front passenger cabin was essentially pushed into the rear passenger cabin. Cst. McWatters and Cst. Barak tended to the driver of the vehicle, Mr. Fard, who had suffered gruesome injuries and had no vital signs. They managed to get Mr. Fard out of the car and took turns doing chest compressions on him while in the ditch. Cst. Barak spoke with Ms. Amiri who was trapped in the car and bleeding. He cut her out of her seatbelt and told her

help was coming. He also directed a civilian to stay with the couple's young child who was in the back seat. Despite life saving efforts, Mr. Fard was pronounced dead at approximately 9:45 p.m.

[40] The Mercedes was also essentially demolished and had initially come to rest on its side on the roadway. The force of the accident caused the engine, transmission and three wheels to become detached from the vehicle.

[41] Mr. Hayatibahar exited the vehicle first and was seen attempting to pull the vehicle off its side and back onto the pavement right side up. Mr. Riazi eventually exited the vehicle as well. Dr. Soroush Nomigolzar, a physician who happened to be driving on Yonge Street at the time of the accident, stopped and offered first aid assistance. He spoke with Mr. Hayatibahar and Mr. Riazi in Farsi and checked on their condition.

[42] Cst. Barak was one of the first officers to attend at the Mercedes. He observed Mr. Hayatibahar lying on his back on the grass at the side of the road. Mr. Riazi was nearby sitting upright. Firefighters were present and interacting with both of them. Cst. Barak noted signs of impairment on both Mr. Hayatibahar and Mr. Riazi, including a very strong smell of alcohol. Cst. Barak concluded that Mr. Riazi and Mr. Hayatibahar were obviously impaired.

[43] Cst. McWatters explained that after the attempts to treat the deceased, he walked over and observed that the two males from the Mercedes were being treated by emergency services personnel. He asked if they were "ok", but had no further conversation. Based on his initial observations, Cst. McWatters noted an overwhelming smell of alcohol on both males. He too concluded they were impaired.

[44] The scene of the accident was forensically examined and an accident reconstruction report was tendered at trial. Det. Cst. Steve Kucan, the author of the report, opined that the accident was caused by the Mercedes which was driving southbound on Yonge Street at excessive speed. He opined that the vehicle veered into the centre turn lane and then into oncoming traffic where it first side swiped the Hyundai and then collided with the Mazda essentially head on. Debris from the Mercedes then struck the Toyota causing further damage.

[45] In terms of speed estimates, Det. Cst. Kucan observed that the speedometer on the Mercedes was seized at approximately 168-170 km/h. Based on his review of relevant research and input from another accident reconstructionist expert, Det. Cst. Kucan opined that the vehicle would have been traveling at a range of speed between 142 km/h and 193 km/h. He explained that the speedometer was likely stuck at the speed the vehicle was travelling at when it lost power. He further noted that the loss of power would likely have occurred when the Mercedes collided head on with the Mazda. By that time, the Mercedes had already side-swiped the Hyundai and therefore would have lost some speed.

[46] The Mercedes was equipped with an on-board "Infotainment" system which recorded certain events, including GPS coordinates and related speeds. While data for earlier

portions of the day was available, the data related to the specific time of the accident was not available. As well, data from the Airbag Control Module on the Mercedes, which would ordinarily record various events including pre-crash speed, was invalid and could not be interpreted.

B. Identification of the Driver

(i) Evidence of Farbod Riazi

[47] On August 18, 2019, Mr. Riazi went to a water park in Mississauga. He drove his mother's Mercedes and was accompanied by another friend. Members of his family were also present, but they travelled in a different vehicle. While Mr. Riazi had his own vehicle, he preferred driving the Mercedes as he liked it better.

[48] Once at the water park, he and his group were listening to music and playing on the water slides. Towards the end of the day, Mr. Hayatibahar also joined this group. Mr. Riazi knew Mr. Hayatibahar from their childhood days in Iran before they came to Canada. This was the first time he had seen Mr. Hayatibahar since coming to Canada. The meet up was not planned. Mr. Hayatibahar simply happened to run into Mr. Riazi's father at the water park.

[49] Mr. Riazi purchased a beer from a stand at the water park. As the line up was very long, he decided to leave the park to go buy more alcohol at a nearby liquor store. He purchased a bottle of tequila and a large bottle of Smirnoff Ice cooler to use as a "chaser." Mr. Riazi could not recall whether Mr. Hayatibahar joined him on the trip to the liquor store.

[50] Upon returning to the water park, Mr. Riazi consumed alcohol. He could not recall specifically how much as he was not measuring. He agreed that he told ambulance attendants that he had five or six drinks, but explained that it could have been more or less. He could not recall if Mr. Hayatibahar was drinking with the group upon his return.

[51] In terms of his sobriety, Mr. Riazi explained that he was not getting "hammered" as his parents were at the water park. When asked whether he could feel the alcohol "kick in" he replied "probably", but could not recall when this would have been.

[52] At a certain point, he left the water park with Mr. Hayatibahar and a female friend, whose name he could not recall. Mr. Hayatibahar was in the passenger seat, the female friend was in the middle rear seat. The plan was to drive from the water park to the McDonald's on Yonge Street where they were to meet some other friends.

[53] Mr. Riazi and his passengers arrived at the McDonald's before the other friends. They went inside the McDonald's and used the bathroom. They possibly consumed more alcohol while at McDonald's, but Mr. Riazi could not specifically recall which alcohol and how much was consumed. At a certain point, the female friend asked to be dropped off at a nearby location.

[54] According to Mr. Riazi, Mr. Hayatibahar asked to drive the Mercedes on the drive to drop off the female friend. He agreed and said he would sit in the passenger seat. Mr. Riazi

explained that he gave the key to the Mercedes to Mr. Hayatibahar. While the Mercedes could be started with the push of a button, Mr. Hayatibahar specifically asked for the key. Mr. Riazi denied that he may have simply given Mr. Hayatibahar the key while they were in the bathroom at the McDonald's and for a purpose unrelated to driving. Mr. Riazi agreed that he told police in a statement taken two weeks after the accident that he did not remember who had the key. He also agreed that at the preliminary inquiry, he testified that he did not recall why he gave Mr. Hayatibahar the key. Mr. Riazi strongly denied the suggestion that he really did not know what happened to the key. He maintained that he gave it to Mr. Hayatibahar symbolically as a representation of responsibility for the vehicle.

[55] Following their departure from the McDonald's, they proceeded north on Yonge Street to a Persian supermarket, approximately five or six kilometres away. According to Mr. Riazi, there was nothing untoward about the driving on the way there. Mr. Riazi agreed that if he had observed Mr. Hayatibahar driving at excessive speeds, he would have not permitted him to continue driving the vehicle. Mr. Riazi also denied being aware that Mr. Hayatibahar was impaired. He agreed that Mr. Hayatibahar had been drinking, but he did not suspect him to be drunk and he drove the vehicle without issue on the way to the supermarket.

[56] Once at the supermarket, all three entered. It appeared to Mr. Riazi that the employees of the supermarket knew Mr. Hayatibahar. Mr. Riazi believes the female friend remained at the supermarket. In cross-examination, Mr. Riazi was shown geo-coordinate data taken from the Mercedes Infotainment system which showed that the Mercedes drove to a townhouse complex prior to the supermarket. It was suggested to Mr. Riazi that the female passenger was actually dropped off at the townhouse complex and not the supermarket. Mr. Riazi had no recollection of this portion of the trip, though he agreed it was possible.

[57] Once Mr. Riazi and Mr. Hayatibahar exited the supermarket, Mr. Hayatibahar returned to the driver's seat. Mr. Riazi explained that he wanted to let Mr. Hayatibahar experience the car "a bit more."

[58] According to Mr. Riazi, as they left the supermarket, Mr. Hayatibahar's driving was "pretty normal." They were both wearing their seatbelts. Mr. Riazi claims he "blacked out" for a period of time. He was either on his phone or listening to music with his head down. At a certain point he noticed that they were travelling at 170 km/h, and he heard Mr. Hayatibahar yell his name. He could sense that the car was "at the end of its breath" and could not go much faster. He could sense that they were travelling at a high rate of speed.

[59] Mr. Riazi noticed that they were in the middle of the road and he saw the lights on a car that was approaching. He closed his eyes and felt the hardest hit he had ever felt. He sensed the vehicle was spinning and hitting other vehicles. He felt his body move in different directions and was holding his breath while holding on to the passenger side door handle. He could not recall the car leaving the roadway but knew that when the car stopped it was on its side. He noted that both he and Mr. Hayatibahar were held in their seats by the seatbelts they were wearing. He could feel the seatbelt, particularly the shoulder belt portion, tighten. He described how the seatbelt felt like a rope and he was hanging from it.

[60] Mr. Riazi explained that when the car was on its side, Mr. Hayatibahar asked him to switch seats as he did not have a driver's licence. He was surprised by the request but did not answer. Mr. Riazi explained he stayed in the passenger seat for a period of time as he wanted people to see him in that seat. He agreed in cross-examination that he had not mentioned this fact prior to trial.

[61] Eventually, Mr. Riazi tried to open the passenger side door, but it was too heavy. Bystanders were arriving and Mr. Hayatibahar moved to the back seat where he exited from the rear passenger door. When he saw Mr. Hayatibahar exit the vehicle he decided to follow and eventually exited through the same door. Mr. Riazi believed that they both exited the car when it was down on the ground. He denied that Mr. Hayatibahar exited first and pulled the car down so that it was right side up. He denied exiting the car through the driver's side door.

[62] Mr. Riazi was shown photos of his injuries and he explained that these were injuries caused by the seatbelt that he was wearing. He explained the most painful part of the accident was when he was hanging from the seatbelt, which caused pain to his collar bone. The following day, Mr. Riazi took further photos of his injury in a friend's vehicle without his shirt on. He did this in in order to show where the seatbelt would have been located. He also explained that he had various other bruises and pain "all over."

[63] Mr. Riazi was shown a security camera video taken at the McDonald's. The video shows Mr. Riazi leaving the McDonald's and getting into the driver's seat of the vehicle before they drive off. Mr. Riazi confirmed that the video appears to show him get into the driver's seat, though he did not specifically recall this. He went on to explain that before exiting the McDonald's parking lot, they drove a short distance into the rear parking lot at the McDonald's.

[64] Mr. Riazi was asked about his usual pattern of driving. While he admitted that on occasion he would speed, even upwards of 150 or 160 km/h, he denied driving that fast on the day of the accident. Mr. Riazi was cross-examined at some length on the geo-coordinate data taken from the Mercedes' Infotainment system. This data revealed the route travelled by the Mercedes as it went from the water park to the McDonald's. The data also revealed the various speeds of the vehicle including the following;

a. As the Mercedes was travelling on a dirt road leaving the water park it reached a speed of 89 km/h in a very short distance;

b. On Steeles Ave. before Highway 27, the Mercedes reached a speed of 127 km/h in a 60 km/h zone;

c. On Steeles Ave. between Kipling and Islington, the Mercedes reached speeds between 114 and 143 km/h, with rapid acceleration;

d. On Highway 400, the Mercedes reached speeds between 120 and 170 km/h;

e. On Elgin Mills between Bathurst and Yonge St., the Mercedes reached speeds of 119 km/h in a 50 km/h zone.

[65] Mr. Riazi acknowledged that he was driving the Mercedes during this period of time. He claimed to have no recollection of driving at the speeds indicated, and acknowledged that he testified in chief that his driving had been "normal" and that he had not driven at these high speeds on the day of the accident. He admitted that his style of driving was not something he was proud of. He also acknowledged having a record of traffic offences, including a conviction for speeding.

[66] Mr. Riazi was confronted with the data showing that as the Mercedes was traveling northbound on Yonge Street towards the supermarket, it reached speeds of 146 to 163 km/h. Mr. Riazi denied that this driving was consistent with the pattern of his driving earlier that day. He maintained that it was Mr. Hayatibahar who was driving and maintained that he was not paying attention to the driving during this portion of the trip.

[67] Mr. Riazi denied that he wanted Mr. Hayatibahar to claim responsibility for driving and further denied that when he made the suggestion, Mr. Hayatibahar explained that he had no driver's licence. He denied that his motivation for doing this was related to the fact that he was impaired, and he believed that Mr. Hayatibahar was sober.

[68] In re-examination, Mr. Riazi was asked about "constructed memory" which was a phrase he used during his evidence. He offered a lengthy response and during his response he stated, "I'm in the driver's seat." The Crown did not initially catch this comment, but the following day, the issue was raised and the Crown sought leave to re-call Mr. Riazi to explore the obvious inconsistency. I ruled that the Crown would be permitted to seek clarification and Mr. Riazi was recalled. He was not advised why he was being recalled. Once back on the witness stand, the audio recording of his lengthy response was played for him, and he was asked about his comment. Mr. Riazi explained that he was tired following the lengthy day in court and had simply misspoken.

(ii) Circumstantial Evidence of Identity of Driver

[69] In addition to the direct evidence of Mr. Riazi, the Crown seeks to rely on two main items of circumstantial evidence in support of its position that Mr. Hayatibahar was the driver of the Mercedes at the time of the accident.

[70] The first item is not overly controversial. When Mr. Hayatibahar was searched incident to arrest while he was at the hospital, the key for the Mercedes was found in his pocket. The Crown argues that the key was in Mr. Hayatibahar's possession because Mr. Riazi gave it to him when they left the McDonald's parking lot. The Crown argues that while a key is not required to physically start the Mercedes, Mr. Hayatibahar would have no reason to have it in his possession unless it was given to him by Mr. Riazi for the purpose of driving the vehicle. The defence position is that the key could have been passed to Mr. Hayatibahar for any number of reasons unrelated to driving the vehicle. The defence notes that the key would not need to be in Mr. Hayatibahar's possession in order for the car to be started

and/or driven by Mr. Hayatibahar. It would have been sufficient for the key to remain with Mr. Riazi inside the vehicle. This suggests that perhaps there was another reason for handing the key over. The defence also notes that Mr. Riazi' evidence on the key has evolved. When he was first asked about the key, he had no recollection of where it went. By the time of trial, he testified that he gave the key to Mr. Hayatibahar.

[71] The second item of circumstantial evidence is more controversial. The Crown seeks to rely on the presence of certain injuries on Mr. Hayatibahar and Mr. Riazi as circumstantial evidence supporting the singular inference that Mr. Hayatibahar was the driver of the vehicle at the time of the accident. In support of this argument, the Crown also initially sought to tender the lay opinion evidence of various witnesses. In a bottom line ruling delivered during the trial, I ruled that the proposed evidence was not proper lay opinion and therefore inadmissible, but I held that the underlying factual observations were properly admissible as circumstantial evidence. I indicated that I would provide reasons and I do so now.

[72] By way of background, during the *Charter voir dire* a number of police witnesses were asked to articulate their grounds for initially arresting both Mr. Hayatibahar and Mr. Riazi and later releasing Mr. Riazi unconditionally. Several police witnesses referred to the presence of "seatbelt rash" on the neck and chest area of both individuals. Based on the directionality of the injuries, the officers formed the belief that Mr. Hayatibahar was the driver and Mr. Riazi was the passenger. While the evidence on the *Charter voir dire* and trial proper was received in a blended fashion, the defence objected to the admissibility of the officers' opinion on the "seatbelt rash" on the trial proper, though not in relation to forming grounds for arrest.

[73] During the trial proper, Taylor Bosquet, a paramedic, testified and was asked to offer his opinion on how the observed injuries were caused. The defence objected to the admissibility of this opinion, and the evidence on this issue was received in a *voir dire*.

[74] Taylor Bosquet was one of the paramedics who attended at the scene of the accident, and offered assistance to Mr. Riazi and then transported him to hospital. Mr. Riazi complained of left lateral and left shoulder pain. Once at the hospital, Mr. Bosquet observed a red-purple abrasion on Mr. Riazi which extended from his right shoulder across the chest, downwards towards the left hip. The abrasion was "a couple inches" in width. Based on his experience as a paramedic having attended many motor vehicle collisions, he concluded that the injury was a seatbelt injury. He explained that this was an injury that would be observed in individuals who had been wearing a seatbelt during a collision, and he further explained that where individuals were not wearing a seatbelt no such injury would be present.

[75] In cross-examination, Mr. Bosquet agreed that he had no specific training on mechanisms of injury causation. He also agreed that there could be many variables relating to how an injury like this was caused, including the size of the person, the clothing worn, the presence of airbags, the degree or force of impact and whether the seatbelt was worn properly. In terms of the specific injury to Mr. Riazi, Mr. Bosquet had no note of how long the abrasion

was. He could not recall where the injury on the neck started or how far it was from the outside edge of the shoulder. In re-examination, Mr. Bosquet confirmed that he believed this was a seatbelt injury purely based on how the injury presented.

[76] Det. Cst. Rosilius attended at the MacKenzie Health hospital and observed Mr. Hayatibahar as he was on a gurney in a hallway. She observed red marks on his left shoulder and neck area. From her experience she interpreted these marks as seatbelt marks and concluded that Mr. Hayatibahar had been wearing the driver's side seatbelt. She also observed Mr. Riazi at the hospital and noted marks on the opposite side of his body, which in her mind suggested he was the passenger. Det. Cst. Rosilius identified photos of Mr. Riazi taken at the hospital which show red marks on the side of his neck and upper chest.

[77] In cross-examination, Det. Cst. Rosilius agreed that she had no training on how injuries are caused, what force would be required to cause the noted injuries, or whether the accident in this case would or would not cause the injuries observed. She agreed that the injuries simply appeared consistent with the use of a seatbelt, assuming that the seatbelt was worn properly.

[78] Cst. McWatters testified that when he was in the ambulance with Mr. Riazi, one of the paramedics pulled Mr. Riazi's shirt down and he observed injuries which in his mind were consistent with a "seatbelt rash." Once at the hospital, he observed Mr. Hayatibahar and noted a 3" long rash over his left shoulder. This observation made him believe that Mr. Hayatibahar was the driver. In cross-examination, he agreed that he had no training on how injuries occur and that the best he could say is that the injuries appeared consistent with what a seatbelt injury would look like. In re-examination, Cst. McWatters added that when he examined the injuries with the better lighting at the hospital, he observed a patterned imprint that looked like seatbelt material.

[79] Cst. Barak accompanied Mr. Hayatibahar in the ambulance to the hospital. During the trip, he noted a mark on Mr. Hayatibahar's left shoulder. He described it as bruising and chaffing that went across his body and appeared to come from a seatbelt strap.

[80] Dr. Nicholas Clarridge was on duty as an emergency room physician when Mr. Hayatibahar arrived at MacKenzie Health hospital. He was the initial treating physician, and he conducted an examination of Mr. Hayatibahar that was memorialized in the patient records. He testified that he observed an abrasion on Mr. Hayatibahar's left shoulder. The abrasion was linear with two edges. At some point after the examination, he drew a representation of his observation on a diagram of a torso. He also noted on the diagram that Mr. Hayatibahar had a pain reaction to the lower left side of his chest. While he had no specific recollection of the injury, he explained that the purpose of marking the diagram was to show where the trauma was and to capture by way of approximation the size, shape and location of the trauma. He did not attribute a cause to the observed abrasion.

[81] Dr. Clarridge was shown a series of screen shots of Mr. Hayatibahar taken while Mr. Hayatibahar was in the back seat of a police car being transported from the hospital to the courthouse. He explained that the injuries he observed were either not present or covered

by the shirt worn by Mr. Hayatibahar in the photos. He noted that when he made his observations, Mr. Hayatibahar would not have been wearing a shirt. Dr. Clarridge was also shown photos of Mr. Riazi's injuries. While he noted that the injury appeared linear, he could not state whether the injury depicted in the photo was similar to the injury he observed on Mr. Hayatibahar.

[82] As indicated during my review of Mr. Riazi's evidence, Mr. Riazi provided direct evidence that he was the passenger in the Mercedes at the time of the crash and further that he was wearing a seatbelt. The day after the collision, Mr. Riazi arranged for a friend to take a picture of him showing the injuries to his neck area. In one photo, he is wearing a shirt and the injury is readily visible across the right shoulder and neckline. In a second photo, he is shirtless, seated in the passenger seat of a vehicle and wearing a seatbelt. In this photo, the injury can be seen in rough parallel with the seatbelt. Mr. Riazi explained that he had these photos taken on the recommendation of a friend.

[83] Lastly, Det. Cst. Kucan, the accident reconstructionist, also gave evidence regarding the use of the seatbelts in the Mercedes. As set out in his report and expanded on in his *viva voce* evidence, Det. Cst. Kucan explained that he examined the front seatbelts in the Mercedes and noted both seatbelts showed signs of "loading" and friction marks on the D-ring and buckle, which suggested that they were being worn at the time of the crash. While he could not conclude the seatbelt pre-tensioner had fired, he believed that it had. The rear seatbelts showed no signs of being worn at the time of the crash. In cross-examination, he agreed that he could not say where the shoulder portion of the belt would have rested on the specific person using the belt, nor could he determine from his examination whether the seatbelt was being worn properly at the time of the crash.

[84] I turn next to the legal issue of the admissibility of the lay opinion on the "seatbelt rash." The Crown asks that I receive the lay opinion of the ambulance attendant, and by implication, also the lay opinion of the various police officers who observed the injuries and concluded that they were caused by wearing a seatbelt. The Crown seeks to draw an analogy to the line of cases dealing with lay opinion evidence on recognition as discussed in *R. v. Leaney* (1989), 50 C.C.C. (3d) 289 (S.C.C.), *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.) and *R. v. Berhe*, 2012 ONCA 716. The Crown argues that by virtue of their experience, the ambulance attendant and the police officers are essentially "better placed" than I am, and therefore able to give lay opinion evidence essentially "recognizing" the injuries as being caused by a seatbelt.

[85] The defence argues that the Crown should have called expert opinion evidence on this issue but chose not to. While the defence accepts that the witnesses can relate their observations of the injuries, the defence argues that the witnesses should not be permitted to offer lay opinion as to the causation of those injuries. The evidence does not fall within the permissible categories of admissible lay opinion evidence discussed in *R. v. Graat*, [1982] 2 S.C.R. 819.

[86] I agree with the defence that the issue of causation of the injuries is an issue on which the Crown could have called a properly qualified expert. Indeed, in other cases, expert evidence

has been called on this very issue, see for example *R. v. McKeown*, 2010 ONSC 1492 and *R. v. Hickey*, 2009 CanLII 7101 (ON SC).

[87] However, the mere fact that expert evidence was called on this issue in other cases does not necessarily mean that in all cases the Crown *must* call expert evidence on the issue before the trier of fact can draw an inference about how an injury was caused. The decision to call an expert depends on the specific facts of the case, the nature of the issues on which the evidence might be relevant and the litigation strategy adopted. In some cases, expert evidence will be necessary in order to help the trier of fact make determinations about the nature of injuries. In other cases, the trier of fact may be perfectly placed to draw inferences and reach conclusions from the available evidence even in the absence of expert evidence.

[88] I provide the following examples to demonstrate this point. A complainant in a domestic assault case is observed to have a bruise around her eye, and she testifies that she was punched in the eye by the defendant and suffered a "black eye" as a result. While an expert witness might be called to opine on the causal connection between the punch to the eye and the bruise, the trier of fact could readily conclude that the punch to the eye caused the bruise even in the absence of expert evidence. The trier of fact could rely on the complainant's direct evidence about the details of the assault, and evidence about the absence of any other accident or assault that could have caused the injury, as well as the circumstantial evidence about the nature and location of the bruise, and when it first appeared, to draw the conclusion that it resulted from the alleged punch. The trier of fact would be entitled to consider the combined effect of the direct and circumstantial evidence. In other words, the existence of the bruise could be seen as corroborating the complainant's evidence that she was punched in the eye.

[89] In a different case, a complainant alleges an incident of choking. Following the incident, she is examined at a hospital and the attending physician notes petechia, i.e. small red spots on the skin or eyes resulting from broken capillaries. In this scenario, while the complainant could offer direct evidence about having been choked, she may not be aware of the petechia or connect them to the choking. The trier of fact also might not be able to simply infer causation based on the circumstantial evidence of the injury alone, without expert evidence to explain the possible connection between the injury and the alleged choking. In such a circumstance, the Crown would be wise to consider calling an expert to assist the trier of fact in determining whether that specific injury was caused by the alleged choking.

[90] In this case, the Crown has chosen not to call an expert witness even though it could have. That is not necessarily fatal to the Crown's position on the issue. Rather, it simply leaves me as the trier of fact restricted to examining the direct and circumstantial evidence that has been placed before me. It may still be possible for me to draw conclusions even without the assistance of an expert opinion.

[91] Turning to the issue of lay opinion, I note that in *Graat*, the Supreme Court held that while lay opinion is generally inadmissible, lay witnesses can properly express opinions on a number of issues such as: the identification of handwriting, persons and things; apparent age; the bodily plight or condition of a person, including death and illness; the emotional

state of a person; intoxication; the condition of things, e.g. worn, shabby, used or new; certain questions of value; and estimates of speed and distance. The reason for the exception is that these are matters within everyday ordinary experience and not matters "where scientific, technical, or specialized testimony is necessary" in order for the trier of fact to properly make factual determinations, see *Graat* at p. 838. The Court also explained that in these instances, the lay opinion is essentially a "compendious" mode of presenting factual observations which would otherwise be too subtle or complicated to be narrated individually or distinctly, see S. Casey Hill, David M. Tanovich and Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Thomson Reuters, 2017), at p. 12-9 and *R. v. H.B.*, 2016 ONCA 953 at paras. 131-134.

[92] In accordance with *Graat*, it is permissible for an eyewitness to a crime to come to court and offer the opinion that the perpetrator and the defendant are the same person. As the Ontario Court of Appeal observed in *R. v. Panovski*, 2021 ONCA 905 at para. 109, "recognition evidence is non-expert lay opinion evidence", as is evidence of non-recognition by an eyewitness. In typical eyewitness identification situations, the eyewitness has the obvious advantage over the trier of fact of having actually seen the perpetrator. The eyewitness's lay opinion that the defendant is or is not the same person that he or she saw committing the crime is likely to give the trier of fact better information about the issue of identification than would be provided if the eyewitness was limited to describing what he or she can now remember about what the perpetrator looked like, although the trier of fact must also be mindful of the well-known frailties of eyewitness identification evidence.

[93] In *Leaney*, the facts presented a twist on the *Graat* principles. The Crown had a videotape of a robbery, and it asked a number of police officers to offer their opinion on the identity of the perpetrator. The police officers were not eyewitnesses to the robbery. They were merely viewing the video of the robbery which was also played for the trier of fact. Five police officers viewed the video and identified the perpetrator as the defendant. Four of the police officers had no prior acquaintance with the defendant, but a fifth police officer had known the defendant since childhood.

[94] Writing for the majority, McLachlin J. (as she then was) found that the evidence of the four officers was inadmissible as these officers were in no different a position than the trier of fact in assessing whether the person in the video was the defendant. However, McLachlin J. went on to find that the fifth police officer, by virtue of his prior experience with the defendant was in a better position than the trier of fact, and therefore his lay opinion on identification would have been admissible. In doing so, McLachlin J. recognized that while the task of comparing a photo or video image of the alleged perpetrator with the defendant in court would ordinarily fall entirely to the trier of fact, in instances where the witness had a sufficient prior acquaintance with the defendant, the witness' lay opinion on recognition would be admissible as the witness was in a better position than the trier of fact to identify the defendant.

[95] The principles in *Leaney* have been applied not only to instances of human recognition but also to instances where the identification of vehicles is in issue, see *R. v. Lee*, 2018 ONSC 377, *R. v. Layne*, 2019 ONSC 7585 and *R. v. Truong*, 2021 ABQB 856.

[96] In my view, the Crown's reliance on *Leaney* in this case is misplaced. *Leaney* deals with recognition evidence, which is a type of lay opinion evidence admissible under *Graat*. In this case, the Crown seeks to have a paramedic and a number of police officers give lay opinion that the bruising they observed on Mr. Riazi and Mr. Hayatibahar is "seatbelt rash." This is not "recognition" evidence. The witnesses are not being asked to identify a face or a car that they are familiar with. They are being asked to look at an injury and offer their view on what caused that injury based on their experience with seeing other people with what are said to be similar injuries. The mechanics of injury causation are not, in my view, the proper subject for lay opinion. Using the language from *Graat*, the opinion that the injuries were caused by a seatbelt is not simply a "compendious" manner of describing an every day common observation or observations.

[97] Ultimately, I find that the Crown seeks to proffer opinion evidence that sits somewhere between expert opinion evidence and lay opinion evidence. The opinion on causation could have been proffered by a duly qualified expert but the Crown chose not to call one. Instead, the Crown sought the opinion of various first responders who provided an opinion based on their work experience. The difficulty with this position is that there is no half-way house of opinion evidence. Either the matter is one in which we permit ordinary witnesses to opine on because we recognize that their opinion is essentially comprised of a compilation or collation of regular everyday observations that would otherwise be difficult to articulate, or the opinion is one that should be offered by a duly qualified expert because it requires specialized knowledge that ordinary people may not possess.

[98] Returning briefly to the examples I provided earlier, in the case where the domestic assault complainant suffered a bruised eye following a punch, an ambulance attendant's evidence that the bruise was consistent with a punch would not be admissible lay opinion evidence. However, it would be open to the court to infer from the presence of the bruise and the complainant's evidence that the bruise was caused by the assault. In the second scenario, involving the allegation of choking and the petechial hemorrhages, an ambulance attendant would also not be permitted to offer an opinion on the causation of petechial hemorrhages. However, a properly qualified medical expert could offer the opinion and in the absence of such expert evidence, the court might be left in a position where it is unable to make a finding on causation.

[99] I turn next to assessing the circumstantial evidence of injuries. I find that Mr. Hayatibahar had an injury as described by Dr. Clarridge. This injury was a linear abrasion with two edges and appeared as depicted in the medical sketch he prepared. While the diagram is neither precise nor to scale, it shows an injury on Mr. Hayatibahar's left shoulder extending downwards towards his right hip. The description and diagram by Dr. Clarridge roughly match the observations of the injury by Det. Cst. Rosilius, Cst. Barak and Cst. McWatters. I am satisfied that these witnesses all saw an abrasion injury on Mr. Hayatibahar on the evening of the accident. This finding is not undermined by the photo/video evidence taken of Mr. Hayatibahar the following day as he was being transported to court. The clarity of the photos/video is not ideal, and Mr. Hayatibahar is wearing a shirt.

[100] I am also satisfied that Mr. Riazi suffered a similar injury on his right shoulder extending across his chest towards his left hip. The photos taken at the hospital combined with the observations of the various officers and the ambulance attendant amply establish the presence, shape and directionality of this injury. In addition, the photos of the injuries taken a day or two later vividly show the injury.

(iii) Evidence of Civilians on Scene

[101] The Crown called a number of witnesses who were present at the scene and who made various observations. Perhaps unsurprisingly, while these witnesses were all observing the same series of events, their recollections and observations differed significantly.

[102] Dr. Soroush Nomigolzar is the physician who happened to be travelling in a vehicle on Yonge Street at the time of the accident. When he first saw the Mercedes, it was flipped on its side with the driver's side towards the ground. He observed some young men trying to bring the car back down onto the pavement and was concerned that they would be injured. He observed a person in a black shirt, later identified as Mr. Hayatibahar, help another person exit the vehicle from the passenger side. Dr. Nomigolzar conducted quick physical examinations and asked some brief questions in Farsi. When he asked who was driving, Mr. Hayatibahar said he was the passenger. Mr. Riazi did not respond. Mr. Hayatibahar also stated they had been drinking, though Dr. Nomigolzar did not note a smell of alcohol. According to Dr. Nomigolzar, Mr. Riazi appeared drowsy, in shock and not coherent. At the time, Dr. Nomigolzar believed that Mr. Riazi was the driver despite the fact that he exited from the passenger side of the vehicle. At trial, Dr. Nomigolzar explained that he based this belief on what he had been told by Mr. Hayatibahar. He agreed that he did not offer this explanation to police in his statement.

[103] Maksym Us was walking north on Yonge Street on the evening of the accident. He initially saw the Mercedes as it was coming southbound on Yonge Street going towards the McDonald's restaurant. Moments later, he saw the car turn back out onto Yonge Street and head northbound. He observed the car zigzag around cars while driving very fast. He estimated the speed at 160 km/h. The Mercedes continued northbound, and he eventually lost sight of it. After perhaps 10 minutes, he observed the Mercedes coming southbound on Yonge Street. It appeared to him that the car was going "way over" 160 km/h. He could hear the engine "roaring." He saw the vehicle enter the centre "emergency" lane, and eventually observed the driver lose control and collide with northbound vehicles.

[104] Mr. Us watched the Mercedes collide with three vehicles, including a head on impact with a Mazda which resulted in a minor explosion. Mr. Us explained that the Mercedes rolled more than two times and ended up on its roof. As Mr. Us was approaching the Mercedes, he saw two people exit the vehicle. He was facing the windshield and the car was on its roof with its wheels "sticking up." He observed a male in a black shirt crawl out of the right side of the vehicle and another male in a white shirt crawled out of the left side of the car through a window. The two males exited at the same time. He also observed a number of people trying to flip the car over.

[105] When asked to identify which of the two males were driving, Mr. Us testified that the male wearing the white shirt who exited the left side of the car was driver. Mr. Riazi was later identified as the male in the white shirt. In cross-examination, Mr. Us explained that when he was facing the car, it was on its roof. He maintained that he knew which side of the car the steering wheel would be on, even though the car was on its roof. He also explained that he knew it was important to keep this observation clear in his memory.

[106] Mr. Us could not recall seeing the Mercedes on its side, nor could he recall if either of the two males were trying to flip the car. He also did not recall anyone helping either male exit the vehicle. Photos of the Mercedes were tendered during the evidence of Det. Cst. Kucan. The photos reveal no significant damage to the roof of the Mercedes. Det. Cst. Kucan opined that if the car had landed on its roof, he would have expected to see much more damage.

[107] Jeffrey Mendiola was in a vehicle that was exiting a Subway restaurant on Yonge Street. While waiting to turn out onto Yonge Street, he heard the crash and saw an explosion. He observed a white vehicle come to rest on its side, with the driver's side down to the ground. The car was not on its roof. He observed the rear passenger side door open and saw a person emerge from the vehicle. That person started rocking the vehicle back and forth and the car eventually landed right side up on the ground. Mr. Mendiola then observed a second person exit the vehicle from the front driver's side door. Mr. Mendiola could not recall the colour of the shirts on either male who exited from the vehicle. While he believed that the first male exited through the rear passenger door, he agreed that he was possibly mistaken and the person exited through the front passenger side door.

[108] Darya Barghian was one of Mr. Riazi's friends. She did not know Mr. Hayatibahar but learned of him the day of the accident. At the time of the accident, she was with a fairly large group of friends at the McDonald's waiting for Mr. Riazi and Mr. Hayatibahar to return. It was taking longer than expected and she observed emergency vehicles travelling north on Yonge Street. Fearing the worst, she decided to investigate. Just prior to departing she overheard a telephone conversation between her friend Parsa and a male individual who did not sound like Mr. Riazi. She was familiar with Mr. Riazi's voice having spoken to him on the phone and would have recognized it if it was him. She understood that her friend was trying to reach both Mr. Riazi and Mr. Hayatibahar and that this call was with Mr. Hayatibahar. While she had never heard Mr. Hayatibahar, she believed it was him on the phone.

[109] According to Ms. Barghian, she heard Mr. Hayatibahar say "we are fucked" in Persian. Later, she attended at the hospital and saw who she believed was Mr. Hayatibahar on a stretcher in the hallway. He was shouting in Persian and she identified his voice as "very familiar."

[110] Ryan Law was called as a defence witness. He was in the same vehicle as Mr. Mendiola and was seated in the rear passenger seat. Mr. Law explained that the accident happened right in front of the car he was in, and he saw a ring of fire as debris expanded after the collision.

[111] He and his friends went over to the Mercedes which was on its side. He observed a male in a dark shirt exit from the passenger side. He explained that this observation was premised on his assumption of the direction that the car was facing. He explained that if the car was facing northbound, the person in the dark shirt would have been the passenger and the person in the white shirt would have been the driver. Ultimately, while Mr. Law was certain that the person in the dark shirt was the first to exit followed by the person in the white shirt, he was not certain as to who was the driver and who was the passenger. He agreed that he was trying to be accurate but could not really be sure.

(iv) Mr. Hayatibahar's Utterances

[112] Mr. Hayatibahar is alleged to have said "we're fucked" on a phone call that was overheard by Ms. Barghian. The Crown submits that this is an implicit admission of wrongdoing on his part. I place no weight on Ms. Barghian's evidence about this comment. Even assuming that the comment was uttered by Mr. Hayatibahar, it provides little, if any, probative insight as to who the driver of the vehicle was. The comment is at best equivocal.

[113] There are also two exculpatory utterances wherein Mr. Hayatibahar denied being the driver and claimed to be the passenger. As described above, the first utterance was made to Dr. Nomigolzar at the roadside. The second utterance occurred a short time later when Mr. Hayatibahar was being assessed by EMS first responders. On this second occasion, Cst. Barak overheard Mr. Hayatibahar telling firefighters that he was not driving the vehicle.

(v) Findings on Identification

[114] I turn next to assessing the evidence of identification. In doing so, I am mindful of the *W.D.* analysis. My task is not simply to choose between the competing bodies of evidence. My task is to assess the totality of the evidence, including the absence of evidence, to determine whether the Crown has proven beyond a reasonable doubt that Mr. Hayatibahar was the driver of the vehicle. Mr. Hayatibahar does not have to prove anything. If at the end of the analysis, I am left with a reasonable doubt on the identity of the driver of the Mercedes at the time of the accident, I must find Mr. Hayatibahar not guilty.

[115] I start with Mr. Riazi's evidence. To state it bluntly, Mr. Riazi was a terrible witness. His evidence reveals significant and obvious credibility and reliability concerns. He was highly combative and argumentative throughout much of the cross-examination. He was conveniently forgetful on important issues such as the nature of his driving between the water park and the McDonald's. His recollection of events not only suffered from selective memory, but was also limited as a result of his impairment.

[116] Most importantly, Mr. Riazi had significant motives to lie in his testimony. His mother's Mercedes was destroyed in a horrific accident. The accident resulted in a loss of life and significant injuries to others. He was impaired by alcohol at the relevant time. His driving after leaving the water park involved extremely high speeds and periods of rapid acceleration. Given these motivations, there exists a real concern that he attempted to mislead the court on his involvement in the events that culminated in the tragedy.

[117] In short, Mr. Riazi presents as a witness with obvious credibility and reliability concerns. I find that it would be dangerous to rely on his evidence in the absence of independent evidence that corroborates it.

[118] That said, I also find that there is evidence capable of restoring faith in key aspects of his testimony, particularly his evidence that Mr. Hayatibahar was the driver of the Mercedes at the time of the accident. I reach this conclusion for the following reasons.

[119] First, I find that the evidence relating to the injuries suffered by both Mr. Hayatibahar and Mr. Riazi, when viewed in concert, manifestly supports the singular inference that Mr. Hayatibahar was the driver and Mr. Riazi was the passenger. Mr. Hayatibahar's injury is on his left shoulder angled towards his right hip and Mr. Riazi's injury is on his right shoulder angled towards his left hip. The injuries are mirror images. Viewed in this fashion, I readily infer that these injuries were caused by seatbelts worn by both of them during the accident. This finding is significantly strengthened by the photo of Mr. Riazi with his shirt off, seated in the passenger seat of a motor vehicle with the seatbelt fastened. While he is not seated in the same type of vehicle, the very visible injury clearly tracks the positioning of the seatbelt.

[120] In reaching this conclusion, I am cognizant that I do not have expert evidence on the causation of these injuries. However, this is an instance where the I am satisfied that I can safely draw the inference about seatbelt use. The mirror image nature of the injuries amply supports the inference as to who was seated where in the vehicle, especially in view of the physical evidence that seatbelts were worn at the time of the crash. The force of the crash was also sufficient enough to leave marks on the seatbelts themselves, suggesting that the seatbelts restrained their wearers during the impact. I reject the submission that there is no evidence that the seatbelts were worn properly. It would be speculative to conclude that the seatbelts were being improperly worn with the shoulder portion of belt either behind the occupant's back or in some other fashion.

[121] As well, I am not taking judicial notice that the injuries are "classic" seatbelt injuries as occurred in *R. v. Nelson*, 2020 BCCA 204. Rather, I am simply drawing inferences based on the totality of the evidence on this issue.

[122] While my findings in relation to the injuries provide significant corroboration of Mr. Riazi's evidence on the issue of who was driving the vehicle, I should add that even in the absence of evidence from Mr. Riazi, the evidence of the injuries to both parties coupled with the physical evidence of seatbelt use constitute a formidable body of circumstantial evidence which supports the singular inference that Mr. Hayatibahar was the driver of the vehicle and Mr. Riazi was the passenger.

[123] A second item of corroborating evidence is the presence of the key in Mr. Hayatibahar's pocket following the accident. I find that this evidence supports Mr. Riazi's assertion that he let Mr. Hayatibahar drive the car and handed the key over when doing so. While I find that Mr. Riazi's recollection of handing the key over is exaggerated and has developed over time, I ultimately accept that the presence of the key on Mr. Hayatibahar corroborates Mr.

Riazi's evidence on who the driver was. Mr. Hayatibahar would have had no reason to have the key in his possession otherwise and I reject the submission that Mr. Riazi handed the key over to Mr. Hayatibahar while they were at the McDonald's so that Mr. Hayatibahar perhaps could sit in the car while Mr. Riazi was elsewhere. The video from the McDonald's offers no support for this submission. I also reject the submission that the value of this evidence is significantly lessened by the fact that the key was not required to start the Mercedes. I find that the act of handing the key over remains a physical act consistent with an intention to allow the recipient to drive even if the key is not required to physically start the car. In short, while Mr. Riazi's evidence on this issue was late-breaking and likely arrived at in hindsight, I accept his description that the transfer of the key was essentially symbolic of transferring responsibility for the vehicle.

[124] A third item of corroborating evidence relates to the Infotainment data from the Mercedes. Mr. Riazi acknowledged that the McDonald's video shows him entering the driver's seat of the Mercedes as they leave the McDonald's. Mr. Riazi testified that he drove the car a short distance to the back parking lot of the McDonald's and he and Mr. Hayatibahar would have changed seats at this location. The Infotainment data confirms that the vehicle was driven a short distance away and the vehicle stopped, its doors opened and closed, and then the vehicle proceeded out to Yonge Street. I find that the Infotainment data corroborates Mr. Riazi's evidence by demonstrating that the vehicle did move to the rear parking lot before proceeding out onto Yonge Street. I also find that the data showing the opening and closing of doors supports an inference that this is when Mr. Hayatibahar and Mr. Riazi switched seats.

[125] I now turn to consider the evidence that favours Mr. Hayatibahar. In this regard, I must consider his exculpatory utterances to Dr. Nomigolzar and to the firefighters, as overheard by Cst. Barak. I also consider that Mr. Riazi was present for the exculpatory utterance to Dr. Nomigolzar and said nothing in response. I consider the evidence of the civilian witnesses, some of whom came to the conclusion that Mr. Riazi was the driver and some of whom observed Mr. Riazi apparently exiting from the driver's side of the vehicle. Lastly, I consider the absence of evidence, including the absence of scientific evidence such as DNA or fingerprints placing Mr. Hayatibahar in the driver's seat of the vehicle.

[126] When I consider these items of evidence individually and cumulatively, I do not accept that this evidence demonstrates that Mr. Hayatibahar was not the driver, nor does this evidence leave me a reasonable doubt on the issue.

[127] In terms of Mr. Hayatibahar's roadside exculpatory utterances, I find that these utterances are simply bald denials given moments after a massive collision that was obviously caused by the Mercedes. Viewed in context with Mr. Riazi's evidence, these utterances come after Mr. Hayatibahar had already suggested that Mr. Riazi should take the blame for the accident as Mr. Hayatibahar was unlicensed. In these circumstances, the utterances are entitled to no weight. They are self-serving. In any event, the exculpatory utterances are also entirely undermined by the evidence of the injuries to Mr. Hayatibahar and Mr. Riazi viewed in concert.

[128] I also place no weight on Mr. Riazi's silence in the face of Mr. Hayatibahar's exculpatory utterance to Dr. Nomigolzar. This is not a circumstance where I can find that Mr. Riazi adopted the utterance by silence. First, I am not satisfied that Mr. Riazi heard the utterance. In any event, Dr. Nomigolzar described Mr. Riazi as being in shock when he was dealing with him in the immediate aftermath of the accident. Even if Mr. Riazi was within earshot, I am not satisfied that he would have been in a position to properly appreciate the significance of the utterance. I reach this conclusion despite Mr. Riazi's evidence that he reacted to Mr. Hayatibahar's request to switch seats by remaining in his seat long enough so that others on scene would see where he was sitting. Mr. Riazi's evidence on this issue was exaggerated. I find that what likely happened is that Mr. Hayatibahar asked to switch seats and Mr. Riazi did not respond as he needed some time to process the comment in the aftermath of the accident. I accept Dr. Nomigolzar's evidence that Mr. Riazi appeared to be in shock immediately after the accident. In these circumstances, I find that while he may have appreciated that Mr. Hayatibahar wanted to switch seats, he did not do or say much about it at the time.

[129] When I assess the evidence of the civilians who were at the scene, I start by noting that these witnesses were all watching a very traumatic event unfolding unexpectedly before their eyes. It is not surprising that their accounts of the same incident vary, at times significantly.

[130] Mr. Us is a witness who demonstrates classic reliability problems. I have every confidence that he was attempting to relay his evidence in court in an accurate and honest fashion. On his evidence, Mr. Riazi was the driver and Mr. Hayatibahar was the passenger. He inferred this from the seats they were in when he observed the demolished Mercedes upside down on its roof. The problem with Mr. Us's evidence is that the Mercedes was never upside down on its roof. On the evidence that I accept, the Mercedes came to rest on its side and was then pulled back down onto the road right side up. While I accept Mr. Us's sincerity, he simply could not have seen what he is certain to have seen. As such, I give no weight to his evidence about who was driving the vehicle.

[131] Mr. Mendiola's evidence also offers little support for the defence position. He observed the first person exit the car through the rear passenger door and the second person exit through the front driver's side door. He could not recall the colour of the shirts worn by these parties and could not tell where each had been seated within the vehicle.

[132] Lastly, Mr. Law testified that depending on the orientation of the vehicle, it appeared to him that Mr. Hayatibahar was the passenger and Mr. Riazi was the driver. That said, Mr. Law was clear that this depended on which way the car was facing which was an issue on which he was uncertain. Ultimately, Mr. Law's evidence was that he could not be sure who sat where within the vehicle.

[133] When I consider this evidence in concert, I find that it does not leave me with a reasonable doubt as to who was driving the vehicle. I find that Mr. Hayatibahar was likely the first person out of the vehicle. The vehicle was on its side with the driver's side to the ground. Mr. Hayatibahar likely exited through the rear passenger door. I find that this occurred

because Mr. Riazi was in the front passenger seat held in place by the seatbelt. Once outside of the vehicle, Mr. Hayatibahar helped Mr. Riazi get out of the vehicle. It is possible that this was done before the vehicle was flipped back down, in which case Mr. Riazi would have exited through one of the passenger side doors. It is also possible that this occurred once the vehicle was down on the road right side up, in which case Mr. Riazi could have exited from any door. Even if Mr. Riazi exited through the driver's door, I would not be left with a reasonable doubt on this issue given the positioning of the car after the accident.

[134] I also consider Mr. Riazi's comment in re-examination in which he suggested that he was in the driver's seat. When Mr. Riazi was recalled, this evidence was presented to him in a manner which permitted me to assess his instant reaction. Having watched him closely, I am satisfied that his comment in re-examination was an honest slip that came at the end of the long day and following a lengthy and at times heated cross-examination. This was not a "slip" that actually revealed the truth. This evidence alone or taken with the other exculpatory evidence does not leave me with a reasonable doubt.

[135] I note as well, the absence of evidence. On this issue, there was no evidence called about the presence of DNA or fingerprints on the airbags or seatbelts of the vehicle. As well, a number of other persons who were at the McDonald's and who might have seen who drove the vehicle as it left were not called. While the absence of evidence can give rise to a reasonable doubt, the absence of evidence in this case does not. The strength of the circumstantial evidence of the injuries to both Mr. Hayatibahar and Mr. Riazi is not undermined by this absence of evidence.

[136] Lastly, I consider whether the similarity in the pattern of driving demonstrated by Mr. Riazi as he drove from the water park to the McDonald's and the driving around the time of accident suggests that he was the driver throughout the day. While I agree that the pattern of driving is similar in that involves very high speeds, it does not leave me with a reasonable doubt as to who was driving at the time of the accident. I find that Mr. Riazi drove the Mercedes at very high speeds, likely while impaired, between the water park and the McDonald's. When he handed the key over to Mr. Hayatibahar, Mr. Hayatibahar also drove at very high speeds both on the way to drop off the female passenger and during the return trip which culminated in the accident. I entirely reject Mr. Riazi's evidence that there was nothing untoward about Mr. Hayatibahar's driving until the last moment when he accelerated to very high speeds. The truth is that Mr. Hayatibahar drove exactly like Mr. Riazi did. Mr. Riazi's evidence on this issue is an attempt to shield himself from fault for letting Mr. Hayatibahar drive the vehicle in the fashion he did.

[137] When I view the evidence as a whole, I am satisfied beyond a reasonable doubt that Mr. Hayatibahar was the driver of the Mercedes at the time of the accident. Mr. Riazi's direct evidence on this issue is sufficiently supported by the available independent corroborating evidence. In any event, I would reach the same conclusion based on the totality of the circumstantial evidence.

C. Impaired Driving

[138] I turn next to assess the evidence of impairment and determining whether the Crown has proven beyond a reasonable doubt that Mr. Hayatibahar's ability to drive a motor vehicle was impaired at the time of the accident.

(i) The Blood Samples

[139] Cst. Barak testified that he observed blood being drawn from Mr. Hayatibahar at the hospital at approximately 10:57 p.m. on August 18, 2019. When Cst. Barak made this observation, he asked the nurse for her name and was told it was Arghawan Presunka. He asked her to spell her name and made a note in his memo book. He was advised that the blood would be taken to the lab for testing. When challenged in cross-examination, Cst. Barak denied that he made a mistake in noting down the name of the person who drew blood from Mr. Hayatibahar. He explained that he was "pretty sure" he noted the name correctly.

[140] Ms. Presunka, a Registered Nurse at Mackenzie Health hospital, was on shift when Mr. Hayatibahar was brought in for treatment. She explained that as an ER nurse, she would assist in triaging arriving patients. The triaging would be aimed at determining what help the patient needed and where the help could be best provided. The triaging would occur when the patients first arrived in the ER and then, depending on the outcome of the triaging, patients would be sent to different care areas in the hospital.

[141] Ms. Presunka explained that the acute care area of the hospital was usually staffed by four nurses. While each patient had a primary care nurse, any nurse on shift in the acute care area could draw blood from a patient if required. Ms. Presunka explained that when blood was drawn from a patient, the usual process would be to draw a curtain to ensure privacy.

[142] Ms. Presunka had some recollection of dealing with Mr. Hayatibahar. Her recollection was assisted by her review of his medical chart. She recalled that her first contact with Mr. Hayatibahar was at 2230 hours. Mr. Hayatibahar arrived by ambulance and was on a back board with a neck collar. He complained of pain and she noted a left shoulder deformity or injury. She recalled that his demeanour was calm and quiet during triage. She did not note any odour of alcohol coming from Mr. Hayatibahar and explained that she would have noted it had it been present. Mr. Hayatibahar was in the triage area for approximately 5 to 10 minutes.

[143] Ms. Presunka did not order any bloodwork. She merely assessed Mr. Hayatibahar to determine which area of the hospital was appropriate for him. She could not recall drawing blood from him and ruled out the possibility based on the fact that as a triage nurse, she would not have been involved in that process and would not have entered the acute care area of the ER in order to care for patients. While she was shown photos of the vials of Mr. Hayatibahar's blood, none of the markings on the vials refreshed her memory or changed her evidence on this issue. She also could not recall giving the spelling of her name to a

police officer, though she vaguely recalled having some interactions with a police officer who was present.

[144] When asked about the process for taking blood, Ms. Presunka explained that any nurse on duty could draw blood and then scan the label into the hospital medical data system. In order to do so, a label would be printed and placed on the vial or vials. The label would be scanned as would the patient's identification bracelet, which includes the patient's name, date of birth and OHIP number. Ms. Presunka explained that if the patient's name did not match the blood vial label, the sample could not be submitted for analysis.

[145] Emma Chen is also a Registered Nurse who was on duty in the ER at Mackenzie Health hospital when Mr. Hayatibahar arrived for treatment. While she had no specific recollection of the events of that evening, she testified based on entries contained in Mr. Hayatibahar's medical charts which she had reviewed. She advised that she ordered bloodwork known as a "CBC" or "complete blood count" at approximately 2244 or 2245 hours. She also ordered an ethanol test relating to blood-alcohol levels at 2245 hours.

[146] In terms of the ethanol test, Ms. Chen explained that Mr. Hayatibahar had been involved in a trauma, there was a high risk of injury and his behaviour appeared altered as he was agitated, combative and belligerent. She had received information that alcohol had been consumed, though she could not recall where this information came from. Based on her observations and the available information, she wanted to rule out substance use. She could not tell from the records who had specifically drawn the blood from Mr. Hayatibahar and she had no recollection of doing it herself. She noted that the results of the bloodwork were conveyed to her colleague, Christopher Bari.

[147] Ms. Chen also discussed the process for taking blood samples. She explained that she would place the order for bloodwork on the hospital computer system. A label would then be created on the system. The next step would involve scanning the patient's information which would be contained on the patient's armband and then scanning the label. The label would then be placed on the vial with the sample taken from the patient and the vial would then be submitted for analysis.

[148] Christopher Bari was also on duty on August 18, 2019 at the Mackenzie Health hospital. He had some recollection of the events of the evening and also refreshed his memory using the medical charts. He explained that he would have been involved in documenting entries in Mr. Hayatibahar's charts. He confirmed that blood was drawn from Mr. Hayatibahar but he could not recall who drew the blood. He explained that the "documenter" would not necessarily be the person who drew the blood. While he had a passing recollection of actually seeing the blood being drawn, he was not certain and eventually agreed that he could not recall seeing the blood being drawn. He explained that any of the nurses on duty could have drawn the blood, and that the person who scanned the blood sample into the system may not be the person who actually drew the blood. Mr. Bari explained that lab results normally are entered straight into the hospital's medical data system. In this case, he received the bloodwork results by telephone from the lab. Prior to conveying the lab

result to him, the lab technician would have confirmed that he was the nurse looking after the specific patient.

[149] While at the hospital on August 19, 2019, Det. Cst. Rosilius was advised that blood had been taken from Mr. Hayatibahar. Later that same day, at approximately 5:29 p.m., she called the hospital to confirm that the blood samples were there. She told the hospital to keep the blood pending judicial authorization for seizure by police. She did this because she knew from past experience that hospitals would discard blood samples once they were no longer needed for medical treatment. During the call with the hospital, Det. Cst. Rosilius was provided with the identifying numbers for five vials of Mr. Hayatibahar's blood and was advised that one vial had already been disposed of. She could not recall whether she asked for this information or if it was offered by hospital staff.

[150] Det. Cst. Rosilius called the hospital again on August 27, 2019. She did not have the warrant for the blood yet but wanted to make sure the hospital did not dispose of the blood. On September 10, 2019, she made one further call to the hospital to confirm that the blood had been set aside. Eventually, the hospital blood samples were seized under warrant.

(ii) Expert Evidence

[151] Dr. Nathalie Desrosiers, a forensic scientist with the toxicology unit of the Centre of Forensic Sciences, analyzed a sample of blood taken by the hospital. The sample she analyzed was logged as CFS Item #3, and described as "hospital blood 2ml from HAYATIBAHAR, FEREIDON (19C-230H0328.1) collected on aug 18, 2019 22:45, lavender top". The result of the testing on this sample revealed an ethanol concentration of 178 mg/ml +/- 3mg/100ml.

[152] Karryn Wall, a forensic scientist with the toxicology unit of the Centre of Forensic Sciences, also prepared a report and gave testimony "reading back" the blood sample tested by Dr. Desrosiers and the plasma/serum portion of the blood sample tested at the hospital. In order to do this Ms. Wall noted that the blood samples were taken at 10:57 p.m., and she then used a time of driving of approximately 9:20-9:27 p.m., which roughly captures the time of the accident.

[153] Ms. Wall explained that the plasma/serum tested at the hospital had an alcohol concentration of 45.4 mmol/L, which would be equivalent to a blood alcohol concentration of 180 mg/100ml. Reading this result back to 9:20 p.m. to 9:27 p.m., Ms. Wall opined that Mr. Hayatibahar's blood alcohol concentration would have been between 180 to 212 mg/100ml.

[154] When Ms. Wall examined the sample tested by Dr. Desrosiers, she opined that Mr. Hayatibahar's blood-alcohol concentration at the time of driving would have been between 178 to 210mg/100ml of blood.

[155] Ms. Wall explained that these projected ranges were dependent on the following factors:

a. A rate of elimination ranging from 10 to 20 mg/100 ml per hour;

b. Allowance for a plateau of up to two hours;

c. No consumption of large quantities of alcoholic beverages within approximately 15 minutes prior to the incident; and,

d. No consumption of alcoholic beverages after the incident and before the sample collection.

[156] On the issue of impairment, Ms. Wall opined that based on her review of relevant scientific literature, impairment with respect to driving becomes significant at a blood alcohol concentration of 50 mg/100ml and increases from then onward. She further noted that impairment could occur in the absence of visible signs of intoxication. She concluded that an individual with the projected ranges of blood alcohol concentration would be impaired in their ability to operate a motor vehicle.

[157] In her *viva voce* evidence, Ms. Wall was asked some hypothetical questions about how many alcoholic drinks would need to be consumed in order to have the noted low end of the projected range of blood/alcohol concentration. Based on assumed weights of 150 lbs, 160 lbs and 170 lbs, Ms. Wall opined that the hypothetical person would need to consume between 6 and 6¾ standard drinks. In cross-examination, Ms. Wall was presented with a hypothetical of a male having consumed either five or six standard drinks by 6:00 p.m. and was asked to opine on what that individual's blood alcohol concentration would have been at 9:30 p.m. She opined that with five drinks, the blood alcohol concentration would be between 64 and 117 mg/100ml and that with six drinks it would be between 90 and 147 mgs/100 ml. She opined that in any of these scenarios, the person's ability to drive would be impaired by the effects of alcohol.

[158] Ms. Wall was asked about the standard size of drink, particularly "shots" and she explained that a "shot" is typically 1.5 ounces of 40% alcohol. She agreed that 1 ounce could be considered a "shot", and when asked to calculate the earlier hypothetical using five or six one-ounce shots, she opined that the individual's blood alcohol concentration would be between 19 and 66 mgs/100 ml for five shots and 37-86 mgs/100 ml for six shots.

(iii) Other Evidence of Impairment

[159] A number of witnesses testified about their involvement with Mr. Hayatibahar shortly after the accident, during transport to the hospital and then at the hospital. These witnesses were asked about their observations of signs of impairment on Mr. Hayatibahar.

[160] When Cst. McWatters initially approached Mr. Hayatibahar and Mr. Riazi, he noted an "overwhelming" smell of alcohol and formed the opinion that they were both impaired and had alcohol in their body. Once at the hospital, he made further observations of Mr. Hayatibahar noting that he appeared "extremely intoxicated" with an extremely strong smell of alcohol. He explained that he could smell the alcohol from a distance of 12 feet away. He noted that Mr. Hayatibahar was extremely incoherent, slurring his words, was at times passed out and snoring. He observed that Mr. Hayatibahar was yelling at everyone

and had urinated himself. He noted that Mr. Hayatibahar had to be restrained to his bed by hospital staff.

[161] Cst. Barak initially approached Mr. Hayatibahar when Mr. Hayatibahar was speaking with firefighters. He noted that Mr. Hayatibahar had bloodshot eyes and smelled of alcohol. He observed that his eyes would roll back in his head, and he was slurring his words and not making sense.[1] Cst. Barak formed the belief that Mr. Hayatibahar was "obviously drunk." Cst. Barak also accompanied Mr. Hayatibahar in the ambulance to hospital. While in the ambulance, he noted a smell of alcohol on his breath. Mr. Hayatibahar kept dozing off and was slurring his words. While at the hospital, Cst. Barak observed Mr. Hayatibahar become agitated after he was triaged and eventually had to be restrained to his bed.

[162] Cst. Ahmadi attended at the MacKenzie Health hospital at approximately 11:36 p.m. He was tasked with assisting with rights to counsel. He speaks Farsi, as does Mr. Hayatibahar. While speaking with Mr. Hayatibahar, he noted a strong smell of alcohol. He also noted that Mr. Hayatibahar was agitated, was not making sense and started yelling and shouting in both English and Farsi. He did not observe any slurring. Hospital staff had placed him in restraints and later administered a sedative, and he was unconscious by approximately 11:40 p.m.

[163] Cst. Di Lorenzi made some observations of Mr. Hayatibahar and Mr. Riazi at the scene. She noted a smell of alcohol coming from Mr. Riazi but did not note it coming from Mr. Hayatibahar, though he was further away from her during their interactions at the scene.

[164] Dr. Ping Fu, a physician who treated Mr. Hayatibahar in the emergency room, noted a smell of alcohol and described Mr. Hayatibahar as intoxicated. He based this conclusion on the smell of alcohol and the fact that Mr. Hayatibahar was agitated and uncooperative. In cross-examination, he agreed that his conclusion on intoxication was also based on the lab results of ethanol testing that were conveyed to him shortly after midnight.

[165] Dr. Nomigolzar had some interactions with both Mr. Hayatibahar and Mr. Riazi while administering first aid. He spoke with Mr. Hayatibahar in Farsi. While he did not specifically ask Mr. Hayatibahar if he had been drinking, Mr. Hayatibahar stated "we drank" as Dr. Nomigolzar was evaluating his condition. He did not smell alcohol on either Mr. Riazi or Mr. Hayatibahar.

[166] Mr. Riazi could not specifically recall whether Mr. Hayatibahar was drinking or how much he consumed while at the water park. Mr. Riazi also revealed that further alcohol was consumed at the parking lot of the McDonald's shortly prior to the accident. He explained that he had "a snapshot" recollection of Mr. Hayatibahar drinking at the McDonald's,

[1] In accordance with the ruling on the *Charter* application, I have not considered the utterances and gestures made by Mr. Hayatibahar to Cst. Barak between the time when Cst. Barak was directed to arrest Mr. Hayatibahar and the time of Mr. Hayatibahar's actual arrest, see *R. v. Hayatibahar*, 2022 ONSC 1281.

though he could not recall the specifics of who drank and how much was consumed. Mr. Riazi did not view Mr. Hayatibahar's condition as impaired.

(iv) Analysis and Findings on Impairment

[167] I am satisfied beyond a reasonable doubt that at the time of the accident, Mr. Hayatibahar's ability to drive was impaired by the effects of alcohol. I reach this conclusion for the following reasons:

a. I am satisfied that Mr. Hayatibahar's blood was taken by a nurse at the MacKenzie Health hospital. I accept Cst. Barak's evidence that he directly observed the taking of the blood. While I accept that the procedure of taking blood is conducted in a fashion that respects a person's privacy, I find that Cst. Barak would have been in a position to make this observation as Mr. Hayatibahar was in his custody at the time and they would have been in close proximity in the Emergency Room area of the hospital.

b. I also accept Cst. Barak's evidence that he asked the nurse whom he believed took the blood her name and was given Ms. Presunka's name. That said, I also accept Ms. Presunka's evidence that she did not take the blood herself. Cst. Barak may well have asked Ms. Presunka for her name believing she was the person who drew the blood. Ms. Presunka may be honestly mistaken on whether she drew the blood. Another nurse may have given Ms. Presunka's name. Ultimately, the confusion on this issue does not leave me concerned about the provenance of the blood that was tested. I accept the evidence of Ms. Chen and Ms. Presunka about the process for ordering, labeling and submitting blood samples. I further accept Ms. Presunka's evidence that the process for taking and logging blood samples for testing requires that the patient's identification bracelet matches the sample. That was done in this case as one of the blood samples was accepted for testing at the hospital. As such, I am satisfied that the blood sample that was submitted for testing was a blood sample that was drawn from Mr. Hayatibahar. I am also satisfied that the remaining samples, later obtained by police through a warrant, were also taken from Mr. Hayatibahar. These blood samples were drawn at the same time as the blood sample tested at the hospital. The vial numbers were obtained by Det. Cst. Rosilius the following day and the samples eventually obtained had Mr. Hayatibahar's name on them. The photos of the vials provide additional circumstantial evidence in this regard.

c. The continuity of the blood sample sent from the hospital to the Centre of Forensic Sciences is admitted from the time the samples left the hospital.

d. Taken together, I am satisfied that the blood tested at the hospital and the blood tested at the Centre of Forensic Sciences is Mr. Hayatibahar's blood. Based on the blood analysis and the "read back" evidence of Ms. Wall, I am satisfied that Mr. Hayatibahar would have had a blood-alcohol concentration of at least 170mgs/100 ml of blood at the time of driving. I note that there is no serious

challenge to the assumptions that underly the expert's opinion in this regard. While there is some evidence that Mr. Hayatibahar may have consumed an unknown quantity of alcohol in the parking lot of the McDonald's, there is no suggestion that this amount would constitute bolus drinking.

e. While some hypothetical drinking patterns were put to Ms. Wall in cross-examination, none of the hypothetical patterns were supported by the evidence. As such, there is no evidence on which I could either conclude or have a reasonable doubt about the blood alcohol concentration at the time of driving.

f. Based on the uncontradicted expert opinion evidence, a person with a blood alcohol concentration of at least 170 mgs/100 ml of blood would have an impaired ability to operate a motor vehicle.

g. Even in the absence of the blood analysis and expert evidence, the evidence of the accident itself coupled with observations of the various first responders also provide a sufficient evidentiary basis for concluding that Mr. Hayatibahar's ability to drive a motor vehicle was impaired at the time of driving. I note that Mr. Hayatibahar lost control of the vehicle while driving at incredibly high speeds. Several of the first responders noted indicia of impairment, such as a smell of alcohol, glossy eyes and slurred speech. Once at the hospital, Mr. Hayatibahar's demeanour decompensated and he became aggressive and belligerent. I accept that some of the observed indicia could have alternate explanations. For example, Mr. Hayatibahar's slurred speech could be related to the fact that he spoke very little English. His decompensation once at the hospital could be related to his frustration over his lack of ability to communicate with his brother. Lastly, his glassy eyes could be related to the deployment of the air bags in the Mercedes. It is also possible that the very violent nature of the collision also contributed to his presentation before the first responders and at hospital. However, when all the observed indicia are viewed cumulatively in concert with the nature of the driving leading up to the accident, a finding that Mr. Hayatibahar's ability to drive was impaired by alcohol is the only reasonable conclusion. I do not find that the failure of certain witnesses to note a smell of alcohol undermines this finding.

D. Criminal Negligence Versus Dangerous Driving

[168] The defence fairly concedes that the Crown has proven dangerous driving. In other words, the defence accepts that at the time of the accident, the driving constituted a marked departure from that expected of a reasonable person in the circumstances. The remaining issue is whether the Crown has proven that the driving is a "marked and substantial" departure from that expected of a reasonable person in the circumstances.

[169] When I consider the evidence as a whole, I am readily satisfied beyond a reasonable doubt that the driving amounted to a marked and substantial departure from that expected of a reasonable person in the circumstances.

[170] Mr. Hayatibahar was driving an unfamiliar vehicle on Yonge Street at night while there were a number of other cars on the road. He had a blood alcohol concentration more than double the legal limit. His ability to drive was manifestly impaired.

[171] Mr. Hayatibahar was also driving at an incredible rate of speed. I am satisfied that as the vehicle was initially headed northbound on Yonge Street prior to the accident, it reached speeds of 146-163 km/h. I am satisfied that on the return trip back down Yonge Street, the Mercedes was again being driven at a very high rate of speed. The speedometer of the Mercedes was stuck at approximately 168 km/h According to Cst. Kucan, the expert accident reconstructionist, the speedometer is likely stuck at the speed at which the vehicle was travelling when power was lost.

[172] I am not prepared to find that the acceleration to a very high rate of speed was a momentary or singular event. I find that the Mercedes was being driven at high speeds for a prolonged period of time. This driving occurred during the trip northbound to drop off the passenger and resumed on the return trip. The distance from the McDonald's to the Persian supermarket was estimated at five or six kilometres. I also accept that the Mercedes was dodging cars that would have been travelling on the roadway at normal speeds. I find that the Mercedes eventually crossed over into oncoming traffic and caused the tragic accident.

[173] When this evidence is viewed cumulatively, there can be no doubt that the vehicle was driven in a criminally negligent manner.

VI. Conclusion

[174] I am satisfied beyond a reasonable doubt that the defendant, Fareidon Hayatibahar, was the driver of the Mercedes at the time it crossed the centre line of Yonge Street and collided with the victims' vehicles.

[175] I am further satisfied beyond a reasonable doubt that at the time of the accident his ability to operate a motor vehicle was impaired by the consumption of alcohol.

[176] Lastly, I am satisfied that his operation of the Mercedes was criminally negligent, and further that it caused the death of Peyman Masoomi Fard and bodily harm to Nanzin Amiri, Alireza Masoomi Fard and Malihe Ardekani.

[177] As a result, I find Mr. Hayatibahar guilty on all counts.

[178] I remain grateful to counsel for most capably, cooperatively, and efficiently presenting the evidence and the complex legal issues involved in this challenging and tragic case.

J. Di Luca J.

Released: June 21, 2022

CITATION: R. v. Hayatibahar, 2022 ONSC 3692

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

FAREIDON HAYATIBAHAR

Defendant

REASONS FOR JUDGMENT

The Honourable Justice J. Di Luca

Released: June 21, 2022

TAB 20

CITATION: Slover v. Rellinger, 2019 ONSC 6497
COURT FILE NO.: CV-16-5069-00ES
DATE: 20191112

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
JOAN SLOVER	)	*Ross F. Earnshaw and Sean M. Sullivan,* for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
JAMES RELLINGER, in his personal capacity, and as Estate Trustee of the Estate of Gertrude Rellinger, deceased	)	
	)	*Edwin A. Flak, Morris Manning and Paul Murphy,* for the Defendant
Defendant	)	
	)	
	)	
	)	**HEARD:** February 4-7, 11-15, 19-22, March 4-7, 25, April 4-5 and May 14-15 2019

REASONS FOR JUDGMENT

SANFILIPPO, J.

Overview

[1] Gertrude Rellinger was born on May 14, 1922 and died almost 94 years later on April 22, 2016. She was autocratic and strong-willed, dominant and controlling, and skillful as a stock investor. She became wealthy and was generous, donating to charity and providing monetary gifts totaling $14,469,870 to her children, Joan Slover and James Rellinger, in the period from 1989 to 2013. At her death, she left more than $21,000,000 in assets.

[2] Within ten days of her passing, James sued Joan for a declaration that would have the effect of entitling him to all of Gertrude's wealth. Joan responded that Gertrude's wealth should be distributed between them in equal shares. The detailed evidence that emerged from this ensuing 22-day trial brought sharply into focus Gertrude's relationship with her children and

they with each other, and Gertrude's testamentary capacity, including whether she suffered from a mental condition at the time of distributing her assets. Although not present, Gertrude was at the centre of this trial throughout.

[3] My determination of the parties' conflicting positions hinges on my analysis of the estate planning documents that Gertrude put in place leading to her death. To do this, I assessed four stages in Gertrude's life in which she made testamentary dispositions designed to distribute her wealth. Gertrude executed Wills in February and December 2005 and again in July 2008. Each of these Wills provided that Gertrude would pass her wealth on her death to each of her children in equal shares. Each such Will was supported by an Alter Ego Trust that owned the Investment Account that held Gertrude's assets. No one challenged the validity of these Wills.

[4] In May 2013, Gertrude changed her Will to favour James, so that on her passing, he would receive 75% of Gertrude's estate and Joan would receive 25%. Later, in the period of Gertrude's life after August 20, 2013, when James arranged for her to move from Waterloo to Toronto, Gertrude executed nineteen documents during a thirteen-month period. These documents, which I will refer to as the "Post-August 2013 Documents" would, if valid, have the effect of entitling James to all of Gertrude's wealth and Joan to nothing.

[5] Joan challenged the validity of the May 2013 Will and all the Post-August 2013 Documents on the basis that Gertrude lacked testamentary capacity because she was affected by delusions that caused her erroneously to believe that Joan was uncaring, unkind, and inattentive toward her which Joan claims was untrue. Joan maintained that James exerted undue influence over Gertrude from May 2013 onward. Joan's position was that the last Will that Gertrude made free of mental incapacity and free of undue influence was her 2008 Will, and that all documents executed thereafter must be set aside. Joan thereby claimed entitlement to 50% of Gertrude's estate.

[6] James contended that Gertrude was lucid and capable to her death and denied that she suffered from any delusions that influenced her will-making. He testified that Gertrude's decision to punish Joan through diminished inheritance had its roots in their often-tense relationship, conjuring long-past incidents and more recent friction to show that Gertrude had a factual basis on which to disinherit her daughter.

[7] James denied that he unduly influenced his mother in her decision to leave him everything. He contended that he arranged for Gertrude's re-location to Toronto out of concern for her well-being and to provide comfort in the last stage of her life. At this same time, Gertrude lost her long-standing Waterloo-based lawyer and financial advisor while James directed the retainer in Toronto of a team of three lawyers and an on-call capacity advisor, he says at Gertrude's direction and on her instructions to seek late-life tax planning. It was coincidental, James insisted, that the by-product of this flurry of complex legal, banking, and estate planning activity and the resultant stream of complex documents presented to Gertrude in her 91st year, when she was frail and rebounding from home to hospital, was that Gertrude's wealth was transferred to a joint account with James, referred to as the "BMO Investment Account",

stripping her estate of any value and rendering any of her Wills meaningless. Joan denied that any of this was for tax planning, stating that James set out to galvanize his hold on an unequal share of Gertrude's wealth before their mother changed her mind and reverted to equal distribution.

[8] James claimed that the assets that were transferred to him by Gertrude in the BMO Investment Account were his on Gertrude's death pursuant to a right of survivorship that he says he purchased from his mother, in an arm's length contract for consideration. Joan submitted that James holds these assets subject to a resulting trust in favour of Gertrude's estate.

[9] For the reasons that follow, I have determined that Gertrude had testamentary capacity throughout, including when she entered into the May 2013 Will. I find that Gertrude entered into the May 2013 Will without undue influence. I have concluded that the May 2013 Will and its related amendment to the Alter Ego Trust were the last valid testamentary documents executed by Gertrude. I find that the Post-August 2013 Documents that impact Gertrude's distribution of her wealth were entered while Gertrude was subject to undue influence and are thereby invalid. They shall be set aside. I conclude that James holds the assets transferred to him by Gertrude, including the BMO Investment Account, subject to a trust in favour of Gertrude's estate, and is required, as estate trustee under the May 2013 Will, to distribute those assets in accordance with the May 2013 Will: 75% to James and 25% to Joan.

[10] I refer to the family members in these Reasons by their first names, respectfully, for clarity and for ease of review of what follows. I will at times refer to Gertrude as the "testator", following the current practice of using the term "testator" to apply to anyone who dies leaving a Will.

I. PROCEDURAL HISTORY

[11] Before identifying the issues that arose from this trial, I will explain the procedural history that resulted in the parties' two applications being consolidated for adjudication as a trial.

A. The Applications

[12] James' Application was brought on May 2, 2016 in this Court's file number 05-69/16 against Joan, Joan's daughter, and the Bank that held the Investment Account that contained Gertrude's wealth at the time of her death: the Bank of Montreal ("BMO"). James sought a declaration that the May 2013 Will and nine of the nineteen Post-August 2013 Documents were effective in transferring to James all the accounts that Gertrude held jointly with James, principally the BMO Investment Account.

[13] Joan brought an Application on June 6, 2016 in this Court's file number 05-100/16 against James both in his personal capacity and as Estate Trustee of Gertrude's estate. Joan sought an Order that all Wills, trust indentures, powers of attorney, testamentary dispositions, and other estate planning arrangements entered into by Gertrude after January 1, 2008 are invalid on the basis of lack of capacity, or because they were procured by undue influence, duress, or

fraud. The allegation of fraud was withdrawn prior to trial. Joan sought to set aside the nine Post-August 2013 Documents identified by James, and seven other Post-August 2013 Documents.

[14] Both James and Joan characterized the Post-August 2013 Documents in their Applications as "Estate Planning Documents". The materiality of this will become more evident when I address James' submission that certain of these documents were not Estate Planning Documents, or "Will Substitutes", or testamentary instruments, but rather were contracts.

B. The Orders

[15] From May 2016 onward, there were a series of Orders that affected the development of this case to trial. I will address those that had an impact on the trial process.

(a) The Fund Preservation Orders

[16] On May 5, 2016, Gordon J. ordered, on consent, that two-thirds of the BMO Investment Account be released to James but that one-third be preserved pending judgment of the parties' Applications (the "Preserved Funds"). On June 17, 2016, Mesbur J. continued the preservation of these funds pending trial. On June 21, 2017, Hainey J. issued an Order directing the use of certain of the Preserved Funds to pay the income taxes that had been generated by their growth.

(b) The Orders Consolidating the Applications and Conversion to a Trial

[17] On October 4, 2016, Hainey J. issued ordered that the Applications be consolidated to continue under court file number CV-16-5069-00ES (the "Consolidated Application"), with James constituted as Applicant and Joan as the Respondent. Joan's daughter and BMO were removed from the Consolidated Application. On June 13, 2017, Hainey J. ordered that the Consolidated Application be converted to a trial.

(c) The Order Regarding Statements of Issues for Trial

[18] On December 7, 2017, McEwen J., implemented a timetable for the development of the Consolidated Application to trial and on April 18, 2018 ordered, on consent, that the pleadings in the Consolidated Application would consist of the parties' Notices of Application and Statements of Issues that each party would deliver to supplement their pleading. In furtherance of this Order, each party delivered a Statement of Issues which, they acknowledged, supplemented their Notices of Application and together constituted the Trial Record.

[19] The parties agreed, and I ordered on their consent, that Joan would be constituted as the Plaintiff in the trial of this Consolidated Application, and James as the Defendant.

II. ISSUES

[20] Gertrude made testamentary dispositions during four phases of her life: three Wills leading to 2005; July 2008; May 2013, and; on January 4, 2014 as one of the nineteen Post-August 2013 Documents. The 2005 Wills and the 2008 Will are not challenged.

[21] Joan sought to set aside all of Gertrude's testamentary dispositions after her 2008 Will. James sought to uphold the Post-August 2013 Documents which if valid would, together with the 2014 Will and its Codicil, have the effect of revoking all previous Wills.

[22] This trial raised two foundational issues for determination:

1. What is the effect of the Post-August 2013 Documents? If the testamentary dispositions, gifts and transfers contained among them are valid, they govern the distribution of Gertrude's assets.

2. If those Post-August 2013 Documents that pertain to Gertrude's distribution of her wealth are not valid, is the May 2013 Will, and its related amendment to the Alter Ego Trust, valid? If so, it will revoke the 2008 Will and govern the distribution of Gertrude's estate. If not, the 2008 Will, contested by no one, governs.

[23] I will now summarize the approach that I will take to the analysis of these issues.

III. APPROACH TO ANALYSIS

A. Analytical Approach to Determining Whether the May 2013 Will is Valid

[24] The starting point for my analysis is not the Post-August 2013 Documents, even though these are the last estate planning documents executed by Gertrude prior to her death, but rather the events leading to May 28, 2013. It was on that day that Gertrude executed her May 2013 Will and thereby revoked her previous, 2008 Will which provided for equal distribution of her wealth on her death to her children in identical shares; instead leaving 75% to James and 25% to Joan.

[25] To assess whether the May 2013 Will is valid, my analysis will focus on the following:

(i) Was the May 2013 Will executed in suspicious circumstances? If so, the rebuttable presumption of testamentary capacity is displaced and the propounder of the Will has the burden of establishing that the testator had the mental capacity to execute the Will: *Vout v. Hay*, [1995] 2 S.C.R. 876, at paras. 25-27.

(ii) Did Gertrude have testamentary capacity in May 2013? The only challenge that Joan made to the long-established test for testamentary capacity originated in *Banks v. Goodfellow* (1870), [1861-73] All ER Rep 47 (E.W. Q.B.), is that Gertrude suffered from delusions that affected the disposition of her estate. I will assess whether the beliefs that influenced Gertrude to change her testamentary dispositions in her 91st year were the result of delusions.

(iii) Was Gertrude subject to undue influence at the time of execution of the May 2013 Will? I must assess whether Gertrude's change in her will-making was of her own intention or the expression of James' mind: *Geffen v. Goodman Estate,* [1991] 2 S.C.R. 353, at p. 377. The party challenging the May 2013 Will, Joan, has the burden of establishing undue influence: *Seguin v. Pearson*, 2018 ONCA 355, 141 O.R. (3d) 684, at para. 11.

(iv) If Gertrude's May 2013 Will is valid, was it revoked by the testamentary dispositions that are amongst the Post-August 2013 Documents?

[26] I will assess Joan's contention that the May 2013 Will and all the Post-August 2013 Documents are invalid, and all must be set aside, on the basis that Gertrude did not have testamentary capacity and was subject to James' undue influence. Joan submitted that I should uphold and give effect to the 2008 Will that gifts Gertrude's estate to Joan and to James equally.

[27] I will also assess James' contention that the Post-August 2013 Documents are all valid and must all be applied as the proper expression of Gertrude's testamentary disposition.

B. Approach to Determining the Validity of the Post-August 2013 Documents

[28] The unequal wealth distribution provided for by the May 2013 Will set in motion a torrent of activity. In the thirteen-month period from August 15, 2013 to September 12, 2014, James or the professionals chosen and retained by him prepared and presented to Gertrude nineteen documents, which I refer to collectively as the "Post-August 2013 Documents". To explain my determination of their validity, I will first describe what they are.

(a) Categorizing the Post-August 2013 Documents

[29] The following is a list of the Post-August 2013 Documents with the titles that I will attribute to them in the analysis that follows and with the date of execution by Gertrude:

(i) TD Joint Account Application, August 9, 2013;
(ii) August 2013 Investment Distribution Agreement, August 20, 2013;
(iii) BMO Joint Account Opening Documents, on September 5, 2013, September 25, 2013 and October 21, 2013;
(iv) 2013 Sale of Right of Survivorship, October 5, 2013;
(v) 2013 Fund Disposition Agreement, October 5, 2013;
(vi) 2013 Use of Funds Agreement, October 5, 2013;
(vii) 2013 Joint Account Agreement, October 5, 2013;
(viii) October 2013 Power of Attorney for Personal Care, October 5, 2013;
(ix) October 2013 Personal Care Appointment, October 5, 2013;
(x) 2014 Gift of Indebtedness Agreement, January 3, 2014;
(xi) 2014 Deed of Gift, January 3, 2014;
(xii) 2014 Will, January 3, 2014;

(xiii) 2014 Alter Ego Trust Revocation Deed, January 3, 2014;
(xiv) 2014 Power of Attorney for Property, February 7, 2014;
(xv) 2014 Intention Declaration, August 1, 2014;
(xvi) 2014 Wish Declaration, August 1, 2014;
(xvii) 2014 Conflict of Interest Waiver, August 19, 2014;
(xviii) 2014 Will Codicil, August 22, 2014;
(xix) 2014 Ratification Declaration, September 12, 2014.

[30] This array of documents was presented to Gertrude in her 91st and 92nd year, some upon her discharge from hospital and others just before her admission. At least one was executed while hospitalized. They collectively comprise over 60 pages of dense, often repetitive terms, some documents bearing titles three lines in length. The sheer volume, mass, and weight of these documents stands in stark contrast to the simple, straightforward Wills that Gertrude had previously implemented, once every few years, in 2005, 2008, and 2013, with the assistance of her long-standing and trusted counsel, Mr. Michael McCarter.

[31] I will have much more to say about each of the Post-August 2013 Documents. But now, I will categorize them into groups, for ease of analysis, except for the 2014 Conflict of Interest Waiver which defies categorization, as follows:

(i) The Powers of Attorney: The October 2013 Power of Attorney for Personal Care; the October 2013 Personal Care Appointment; the 2014 Power of Attorney for Property.

(ii) The Bank Account Applications: The TD Joint Account Application; the BMO Joint Account Opening Documents.

(iii) The 2014 Will and Codicil: the 2014 Will; the 2014 Alter Ego Trust Revocation Deed; the 2014 Will Codicil.

(iv) The Lifetime Gift Documents: The 2014 Gift of Indebtedness Agreement; the 2014 Deed of Gift; the 2013 Use of Funds Agreement.

(v) The Estate Planning Documents: The August 2013 Investment Distribution Agreement; the 2013 Sale of Right of Survivorship; the October 2013 Fund Disposition Agreement; the October 2013 Use of Funds Agreement; the October 2013 Joint Account Agreement; the 2014 Intention Declaration; the 2014 Wish Declaration; the 2014 Ratification Declaration.

[32] Joan admitted that Gertrude had capacity to manage her property. As such, there was no challenge to Gertrude's capacity to enter the Bank Account Applications. Similarly, Joan did not challenge the validity of the Powers of Attorney.

[33] There can be no question that the 2014 Will and Codicil are testamentary dispositions. The Gifts During Lifetime category lists those documents that constitute gratuitous transfers of assets made by Gertrude in the period from August 2013 to her death.

[34] This leaves the group of eight documents that I have grouped together as the "Estate Planning Documents": termed as such because, as I will explain, they all were created to have a role in Gertrude's distribution of her wealth on her death.

(b) Characterizing the Estate Planning Documents

[35] The nature and character of the Estate Planning Documents is important to my analysis of their validity. This is because my assessment of Gertrude's capacity and the issue of undue influence, and the application of the appropriate test, presumption, and burden, will depend on my characterization of the Estate Planning Documents.

[36] Too much trial time was consumed in James' argument that the Estate Planning Documents were not part of Gertrude's estate planning, notwithstanding his characterization of them as such in his Notice of Application and in his Statement of Issues, and notwithstanding that they clearly flowed from Gertrude's distribution of her wealth. James submitted that the Estate Planning Documents were contracts designed to advance Gertrude's goal of tax planning. This argument fueled James' contention that Joan could not even be heard to challenge the 2013 Sale of Right of Survivorship because she did not have privity of contract and because she failed to plead that Gertrude lacked capacity to contract. I do not accept these submissions.

[37] James contended, alternatively, that the Estate Planning Documents were gifts by Gertrude to James during her lifetime of the ownership interest in Gertrude's assets upon her death. I found that certain of the gratuitous transfers contemplated by these documents took effect during Gertrude's life, but others on her death.

[38] Joan contended that the Estate Planning Documents were testamentary gifts, or testamentary dispositions in the nature of 'Will substitutes' because their purpose was to direct the distribution of Gertrude's wealth on her death.

[39] For reasons that will follow, I determined that the Estate Planning Documents all had at their core the distribution of Gertrude's wealth on her death. This was seen in reference to whether the Investment Account in which Gertrude's wealth was preserved would be owned by James, outright, by operation of his ownership of the right of survivorship, or whether James would at that time hold the Investment Account in trust for Gertrude's estate. But Gertrude also made other dispositions of a testamentary nature through these documents, whereby she would grant or deny entitlements to her children. Accordingly, I find that the Estate Planning Documents are testamentary in nature. I state this determination now to frame the legal principles that I will apply to determine whether the Estate Planning Documents are valid.

(c) Analytical Principles in Assessing the Validity of the Post-August 2013 Documents

[40] I will assess the validity of the challenged Post-August 2013 Documents using the principles applicable to their characterization. The validity of the 2014 Will and Codicil, as testamentary dispositions, will be assessed using the same analysis as I will apply in assessing the validity of the May 2013 Will: *Banks*; and *Hall v. Bennett Estate* (2003), 64 O.R. (3d) 191 (C.A.).

[41] The validity of the Lifetime Gift Documents will be assessed by the principles applicable to *inter vivos* gifts. For reasons that I will explain, I find that in the period from August 2013 to September 2014, James was in a relationship of influence with his mother with the potential for dominance: *Morreale v. Romanino*, 2017 ONCA 359, at paras. 22-23. Accordingly, as donee, James had the onus of establishing that Gertrude had capacity to donate and he had the burden of rebutting the presumption of undue influence and the presumption of resulting trust: *Foley (Re)*, 2015 ONCA 382, 125 OR (3d) 721, at paras. 25-28.

[42] The validity of the Estate Planning Documents will be assessed using principles applicable to testamentary dispositions for both issues of capacity and undue influence, as these documents pertain to the transfer to James of rights that had effect at the time of Gertrude's death: *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481 (Ont. C.A.), leave to appeal refused, [2000] S.C.C.A. No. 300. Regarding the issue of testamentary capacity, James has the burden of establishing that Gertrude was capable at the time of the execution of these documents as I have found, for reasons that I will explain, that there were suspicious circumstances present at the time of Gertrude's will-making: *Vout*, at paras. 25-27.

[43] If the Estate Planning Documents are invalid, James will have received Gertrude's assets, including joint ownership in the BMO Investment Account, through gratuitous transfers. Gratuitous transfers between a parent and an adult child are subject to the presumption of resulting trust in favour of the deceased parent's estate and are subject to the presumption of undue influence, in accordance with the principles stated in *Pecore v. Pecore*, 2007 SCC 17, 1 S.C.R. 795; *Sawdon Estate v. Sawdon*, 2014 ONCA 101, 119 OR (3d) 81, at para. 35, 56-57; *Foley (Re)*, at para. 26; *Mroz v. Mroz*, 2015 ONCA 171, 125 OR (3d) 105, at para. 72.

[44] For *inter vivos* gifts, my assessment of undue influence will be different than for testamentary dispositions. This is because *inter vivos* gifts, made in circumstances that have a potential for dominance, give rise to a rebuttable presumption of undue influence while a party attacking a testamentary disposition has the onus of proving undue influence, on a balance of probabilities: *Seguin*, at paras. 10-11.

C. Factual Framework for Analysis

[45] My assessment of whether Gertrude had testamentary capacity required a determination of whether she suffered from delusions that influenced her will-making. Did Gertrude have delusions that caused her to falsely conclude that Joan was unkind, uncaring, inattentive, and untrustworthy, and thereby treat her unequally in her will-making, as submitted by Joan, or were Gertrude's beliefs towards Joan in 2013 and onward the product of a lifetime of tense emotions

and destructive incidents that reached a breaking point, as submitted by James? To answer this question, I have considered all the parties' evidence, which dates to childhood.

[46] Similarly, to assess whether James exerted undue influence over Gertrude, I must assess the factual circumstances that lead to Gertrude's making of her May 2013 Will and her execution of the 19 Post-August 2013 Documents. I must determine whether the facts that I find establish that Gertrude's disinheriting of Joan was an expression of her own intentions, as submitted by James, or the result of her volition and will being dominated by James' manipulation, coercion, or outright abuse of power, as contended by Joan.

[47] I will provide an outline of the facts that I have found to apply to my determination of the issues, focusing on the following segments in Gertrude's life as they pertain to her testamentary dispositions:

I. Events Leading to the 2005 Wills
II. Events Leading to the 2008 Will
III. Events Leading to the May 2013 Will
IV. Steps Taken by James Upon Learning of the May 2013 Will
V. Events Pertaining to the Estate Planning Documents and the 2014 Will

IV. EVENTS LEADING TO THE 2005 WILLS

A. The Family

[48] Gertrude Berges was born on May 14, 1922, into an entrepreneurial family that owned and operated the Grand Hotel in the Kitchener-Waterloo community where Gertrude would reside for 91 years. Gertrude married LeRoy Rellinger, and through marriage became Gertrude Rellinger.

[49] LeRoy was an accountant whose passion was stock investment. And so it was that Gertrude became a keen, committed student of the stock market. Her parish priest, Monsignor Edward David Sheridan, recounted Gertrude's statement that to have a successful marriage with a passionate stock investor husband, she was intent on learning the ways of the stock market. She did.

[50] When Gertrude was 35 years old, she had her first child, Joan, followed by James 6 years later in 1963. Joan graduated from the University of Toronto in 1980 and had a lengthy career in her area of study. Joan married and resided with her family throughout in the Waterloo community.

[51] James lived at home while attending university and graduated in 1986. He left home in 1989 but did not work in his area of study and did not begin work in his current field as a realtor until 24 years later. Instead, he worked in a hardware store, then as a massage therapist, and in an administrative capacity in a therapy clinic.

[52] In 1992, James angered his mother by marrying in circumstances Gertrude did not approve. He separated in 2005. James would later settle his matrimonial law obligations using money provided to him by Gertrude, including a loan of some $1,500,000, and he divorced in 2007. In 2011 James remarried and has lived in Toronto. He stopped working in 2013, stating that he did so to dedicate himself to his mother's needs.

[53] James testified that Gertrude always provided money to fund his family's expenses. He conceded that in his adult life, he could not have maintained his standard of living on his own earnings. He needed and came to rely on his mother's gifts, whether in times of difficulty, such as his matrimonial litigation, or generally to support his lifestyle. He accepted Gertrude's generosity unabashedly, stating that Gertrude wanted him to have a nice life and not to worry about money. But along with the security that came with Gertrude's financial support was the insecurity that derived from the possibility that it might someday no longer be available.

B. The Family Dynamics

[54] Joan and James testified that Gertrude was autocratic and strong-willed. These observations were echoed by all the witnesses who knew her. The parties spoke of Gertrude as an astute, diligent, and passionate stock investor, independent and confident, who was also controlling and dominant in her parenting. All recalled Gertrude's philosophy, repeated throughout the trial as if a mantra and foisted on Gertrude as if life-defining, that those who treated her well would be rewarded and those who treated her poorly would be punished.

[55] Joan testified that mother-daughter conflict emerged in her teen years and, in one form or another, permeated her life-long relationship with Gertrude. Joan complained that Gertrude treated James better. As children, he had fewer family chores and fewer expectations. Gertrude criticized him less and praised him more easily. His transgressions were more readily forgiven and forgotten. James stated, and Joan agreed, that Joan was more defiant than James in dealing with Gertrude. Joan would choose confrontation when James would choose concession if not outright submission.

[56] James testified to incidents of bad conduct and bad judgment by Joan, to seek to establish that Joan would thereafter be branded as a person of poor character in Gertrude's estimation. Joan admitted that in about 1982, she took one of her father's valuable stock certificates, stored meticulously by him. Joan stated that she told her father of it within a week and explained that she had taken it to urge him to carry through with his promise to assist in her purchase of a home. James maintained that Joan hid the stock certificate for some two years, and only conceded to having taken it when cornered, misplacing it in the process, necessitating its replacement at a fee.

[57] James testified that when Joan was a teenager, she took one of Gertrude's diamond rings and scratched it along the face of a mirror to determine whether it was real, destroying the mirror in the process. James recalled that Joan angered Gertrude when she was late in bringing home a boyfriend for a family dinner, and when confronted, threw a pot that dented the kitchen stove.

[58] Significant trial time was consumed in James' presentation of anecdotes like these, intended to cast aspersion on Joan's character and to provide historical foundation for sentiments held by Gertrude some 35 years later, that Joan was distrustful, uncaring, and unkind. James characterized these moments and others like them as pivotal events seared in Gertrude's memory that forever tarnished her view of Joan, while Joan saw them as islands in a life-long stream of family interaction, taken out of historical context and flaunted opportunistically.

[59] The evidence was clear, and I accept, that throughout these decades, Joan had a different form of relationship with Gertrude than did James. Joan was the contact person for Gertrude's everyday needs, while James visited periodically. Gertrude expected and came to rely on Joan's support while being an apologist for James' absence.

[60] However, I find that regardless of the skirmishes and strains that existed in the children's relationship with their mother, that when she made gifts to them of her sizable wealth, she did so until 2005 in equal amounts, calculated deliberately with purposeful and meticulous precision.

C. Gertrude Gifted Her Wealth Equally to Her Children Until 2005

[61] In June 1989, LeRoy died. As matriarch of the Rellinger family, Gertrude set out to put her estate in order, and did so with the assistance of Mr. Michael William McCarter, a partner of the Kitchener law firm, McCarter, Grespan, Beynon, Weir LLP.

[62] Mr. McCarter was not available to testify due to illness. His law partner, Mr. John Angus Weir practiced with Mr. McCarter and testified in Mr. McCarter's place. There are many instances in my analysis where I will comment on Mr. McCarter's provision of legal services to Gertrude. I have no hesitation in finding that from at least 2003 to August 2013 – for 10 years - Mr. McCarter was Gertrude's long-standing trusted, reliable, and respected lawyer.

[63] On October 23, 2003, Gertrude executed a Will prepared for her by Mr. McCarter. This Will appointed Joan and James as estate trustees, and on Gertrude's death gave to them the residue of her estate in equal shares: "To divide all the rest and residue of my estate into as many equal shares as there are those children of mine…".

[64] The parties stated that by January 2005, Gertrude had become angry with James and his first wife. Joan explained that this resulted in Gertrude consulting with Mr. McCarter about a possible amendment to her Will to limit James' inheritance to $2,000,000 and leaving the rest of her wealth to Joan. However, Gertrude did not carry through, instead choosing to scold her adult son, in a letter handwritten on January 27, 2005: "Remember, I am the matriarch of the Rellinger family. I am in charge and nobody tells me what to do with my property or money. … I have been very generous with you and at 82 years, I don't need to be treated so badly. … Grow Up!"

[65] Days later, on February 8, 2005, again assisted by Mr. McCarter, Gertrude executed a Will that modified the 2003 Will by removing James as a Trustee, leaving only Joan in this capacity. However, in section III(d) of this February 2005 Will, Gertrude continued to give one-

half of her estate to each of her children. I find that this is an example of Gertrude's consistent approach of equal division of her wealth to her children, notwithstanding disappointment.

[66] Along with the February 2005 Will, on June 1, 2005 Gertrude created an Alter Ego Trust as part of her estate planning. Gertrude executed that day a Trust Deed (the "2005 Alter Ego Trust Deed") to establish a trust that would hold her increasingly sizable assets, referred to as "Settled Property". These assets, mostly stock investments, were at that time held in an Investment Account with Toronto Dominion Bank managed by Gertrude (the "TD Investment Account").

[67] The Alter Ego Trust held the TD Investment Account for distribution on Gertrude's death. The beneficiaries designated in the 2005 Alter Ego Trust Deed were Joan and James. The 2005 Alter Ego Trust Deed operated, in its section 2.2, in conjunction with the February 2005 Will in providing that on Gertrude's death, the Trustee would transfer the amounts in the Trust, principally the TD Investment Account, to Joan and James in equal shares.

[68] On December 16, 2005, Gertrude executed another Will, again with the assistance of Mr. McCarter, that modified the February 2005 Will by reinstating James as an Estate Trustee, along with Joan. In section III(d) of this December 2005 Will, Gertrude continued to give one-half of her estate equally to each of her children, using the same grant as contained in the February 2005 Will. The 2005 Alter Ego Trust Deed was not amended.

[69] Throughout the years 1989 to 2005, Gertrude made gifts to Joan and James and kept careful track of them. I found revealing two separate ledgers, each in the cursive handwriting that all agreed was Gertrude's, remarkable for its clarity and obvious attention to detail. These ledgers contain one carefully dated entry on each row, with three columns: one explaining the reason for the gift, and two distinct columns dedicated to each of Joan and James. The columns showing the amounts provided to each of Joan and James are mirror images. On 32 different occasions, from October 1989 to December 2005, Gertrude gave Joan and James 32 identical gifts: to the penny.

[70] The occasions were varied: special days such as Christmas, Birthdays, or Valentine's Day; or days on which Gertrude cashed in a stock and gave the proceeds to her children. On each of the 32 entries made over a 6-year period, Gertrude gave precisely equal amounts to Joan and James. The monetary amounts were often substantial, by any standard. Gertrude's ledger shows that in the period from October 1989 to December 2005, Joan received from Gertrude monetary gifts totalling $4,261,935, and James received the identical amount on roughly identical dates.

[71] From this I conclude that for the 16-year period from 1989 to 2005, Gertrude had a demonstrated intention to provide for her children *equally* in life and *equally* in the distribution of her Estate on her death. This is amply demonstrated both in her conduct in *inter vivos* gifts and in the unchallenged Wills of 2003 and 2005. I find, as well, that Gertrude consistently held this intention notwithstanding her sometimes-strained relationship with each of her children.

V. EVENTS LEADING TO THE 2008 WILL

A. Gertrude's Decline from 2005 to 2008 and Declining Relationship with Joan

[72] In May 2005, at 83 years of age, Gertrude sold the family home that she had owned and lived in for 49 years and arranged to move into Waterloo Heights, an adult lifestyle retirement residence. Joan assisted Gertrude in her move, but her stay in this independent setting would be brief. Four days later, Gertrude was admitted to hospital. A bone scan disclosed that Gertrude had fractured her vertebra. She was diagnosed with severe spinal stenosis, necessitating three weeks of hospital care followed by three months of therapy in a functional enhancement unit.

[73] Gertrude was not physically fit to return to independent living at Waterloo Heights, due to increased need for care. Gertrude was, by reason of her new physical limitations, required to move out of Waterloo Heights even before she had settled in.

[74] Joan assisted Gertrude in the search for a long-term care facility. Joan testified that there were limited options available in Waterloo. Neither James nor Joan testified of any broader search in Toronto, where James resided, or indeed that James had any role in Gertrude's search for a care facility in Waterloo, or even in his mother's care at that time.

[75] Gertrude's first choice had a waiting list. With Joan's input, Gertrude settled on Columbia Forest Long-Term Care Centre in Waterloo ("Columbia Forest"). It was then a newer facility and was close to Joan's home. Gertrude moved in on November 9, 2005.

[76] Joan testified that she visited Gertrude on average once a week, usually on a Friday, sometimes more and at times less. She recalled that Gertrude was not happy, principally complaining of the food. Joan would bring her treats and would run errands. James lived in Toronto and Joan stated that he visited Gertrude only on special occasions three to four times a year. James denied this, stating that he called his mother frequently, and would visit monthly. The Columbia Forest admissions form showed that Joan was the primary family contact for Gertrude.

[77] Gertrude's health worsened on June 29, 2007 when she fell during a visit at Joan's home. She sustained a gash to her forehead and was in pain. Joan took Gertrude back to Columbia Forest, considering the injuries to be minor. However, when assessed at Columbia Forest, Gertrude was transferred to hospital, where she was diagnosed with a fractured hip, resulting in an operation, and a lengthy hospital stay. When Gertrude was discharged, she had greater physical limitations than before and greater dependence on her caregivers, causing her considerable distress.

[78] I find that this unfortunate fall while at Joan's home, the ramifications of which to Gertrude were initially underestimated by Joan, caused a deterioration in Gertrude's physical condition and mobility, and also initiated a steady erosion in her relationship with Joan.

[79] Joan testified that Gertrude began to make unfounded allegations of her. In 2007 Gertrude accused Joan of taking money out of one of Gertrude's bank accounts. Joan explained that the funds had been transferred between accounts to facilitate the payment of expenses. Gertrude accused Joan of taking her furniture. Joan explained that she had arranged for the storage of Gertrude's furniture from her move out of Waterloo Heights, and then had the furniture delivered to James, as she had requested. Gertrude accused Joan of using Gertrude's money to pay for Joan's homeowner's insurance policy premium. Joan explained that Gertrude's money was applied to cover the cost of an insurance rider meant to insure Gertrude's jewelry, and not for home insurance.

[80] Joan spoke of these exchanges to illustrate a deteriorating relationship with her ever-more demanding mother, who increasingly viewed Joan as distrustful: according to Joan, for no reason.

B. Gertrude's 2008 Will

[81] On July 18, 2008, Gertrude executed another Will (the "2008 Will"), again with the assistance of Mr. McCarter, that modified the December 2005 Will by removing Joan as an Estate Trustee, leaving James as the sole Estate Trustee. In section III(e) of this Will, Gertrude continued to give one-half of her estate equally to each of her children in the same manner – indeed in the same wording - as she had done with the February 2005 and December 2005 Wills.

[82] But there was an important change. Gertrude inserted a new clause that directed her Estate Trustee to: "forgive the outstanding principal and interest balance of any and all loans made by me to my said son or daughter prior to the date of this my Will". Gertrude had not loaned money to Joan. She loaned money only to James, including the $1,500,000 to fund his matrimonial litigation.

[83] I find that to the extent that the 2008 Will served to forgive amounts that Gertrude had loaned to James without balancing with a gift in an equal amount to Joan, it constituted Gertrude's first manifestation of an intention in a testamentary disposition to grant an unequal division of wealth to her children.

[84] Along with the 2008 Will, Gertrude executed on July 18, 2008, an amending deed to the 2005 Alter Ego Trust Deed (the "2008 First Amending Deed"), which amended paragraph 9 of the 2005 Alter Ego Trust to remove Joan as a substitute trustee, leaving James alone in this capacity.

C. Findings on Gertrude's History of Will-Making From 2003 to 2008

[85] In assessment of Gertrude's conduct from 2003 to 2008 on the issue of wealth distribution on her death, I find that a clear pattern emerged. Gertrude's changes to her Wills tracked closely the tenor of her relationship with her children. Each of them came in and out of appointment as an estate trustee depending on whether, in James' words, they were "in Gertrude's bad books".

[86] Gertrude's approach toward equal treatment bent from time-to-time but did not break until 2008. Why then? I accept Joan's testimony that her relationship with Gertrude steadily deteriorated in the period from 2005 to 2008. Gertrude came to resent her placement at Columbia Forest, and faulted Joan for her advice in the selection of this long-term care centre. Gertrude broke her hip while at Joan's house on June 29, 2007, and faulted Joan for the resultant decline in her health and mobility. I accept Joan's testimony that Gertrude accused her in 2007 of taking her money, furniture, and jewellery. While Joan took the brunt of her mother's transitional turmoil and aging angst, James was the recipient of Gertrude's financial support to assist with his divorce.

[87] I find that Gertrude's removal of Joan as an Estate Trustee in her 2008 Will was not a casual step. Rather, I find that by this, as well as Gertrude's forgiveness of James' debt contained in the 2008 Will, Gertrude demonstrated through conduct her evolving rift and distrust of Joan.

[88] I pause to make two observations that I will return to later but preview now. Joan does not complain that her mother suffered from a mental condition, including insane delusions, when Gertrude first evidenced her intention to treat her children unequally through the 2008 Will. Indeed, Joan seeks to propound the 2008 Will. Yet, I find that Gertrude's strained relationship with Joan, fraught with accusations that Joan claimed were untrue, began *before* the 2008 Will with no complaint by Joan that her mother was at that time delusional and thereby lacked capacity.

[89] Second, there is a constant throughout Gertrude's will-making from 2003 onwards: Mr. McCarter. He was, throughout, in a position to observe each of Gertrude's intentions in will-making on multiple occasions through his role in preparing and advising on the 2003 Will, the 2005 Wills, and the 2008 Will. This will have an impact on my consideration of Mr. McCarter's assessment of Gertrude's testamentary capacity in executing the May 2013 Will.

VI. EVENTS LEADING TO THE MAY 2013 WILL

A. Gertrude Gifted Her Wealth Unequally from 2005 to 2013

[90] From 2008 to 2010, Gertrude continued to express an intention to treat her children equally in the distribution of her wealth. In a letter to James dated January 4, 2010, Gertrude confirmed that James did not influence her to appoint him the sole trustee of her 2008 Will, and that she intended that her assets be divided equally between her children: "I also want to be sure that my assets are divided equally between the two of you, and what the two are left will eventually belong to my grandchildren. … Half of my assets will be yours. Half of my assets will be Joan Slover's".

[91] In a letter to James dated March 22, 2010, Gertrude explained that the manner by which she acquired new shares was designed to facilitate their equal division between James and Joan: "I have always bought my equities in amounts that could easily divide in two, i.e., ½ of the shares of R.B.C. or T.C.P. would automatically be transferred to you and ½ to Joan". Gertrude

did so. I earlier explained my finding that from October 1989 to December 2005, Gertrude provided monetary gifts to her children in equal amounts. As of December 2005, Gertrude's ledgers show that she had gifted a total of $8,523,870 to her children, in equal amounts of $4,261,935, each.

[92] However, this equal distribution changed. Joan testified, and James conceded, that by the end of June 2013, Gertrude's total monetary gifts to her children had by then increased to $14,469,870, but in unequal amounts: $8,650,435 to James and $5,819,435 to Joan. This showed that of the $5,946,000 gifted by Gertrude to her children in the almost eight-year period from December 2005 to June 2013, 73.8% went to James while 26.2% was given to Joan.

[93] Joan contended that this unequal distribution, which would be codified in the May 2013 Will, was caused by Gertrude's delusions, in the form of fixed, false beliefs that Joan was uncaring, unkind, inattentive and untrustworthy. James submitted that the unequal treatment emerged from Joan's growing disengagement in Gertrude's care and disconnection with her emotional needs. I will explain my assessment of the evidence presented by the parties to support these positions.

B. Gertrude's Treatment at Columbia Forest from 2011-2013

[94] From 2011 to 2013, Gertrude became increasingly critical of Joan and of her care at Columbia Forest. A clear picture of this was presented by Columbia Forest's medical director, Dr. Edgar Ross Kennel.

[95] Dr. Kennel has been a medical doctor since 1982. He has throughout conducted a family practice, where at least 20% of his practice has involved geriatric medicine. When Columbia Forest opened in 2002, Dr. Kennel was appointed its medical director. He has been the attending physician for about one-quarter to one-third of Columbia Forest's residents, including Gertrude.

[96] Dr. Kennel was examined at length on the Progress Notes that he maintained of his care of Gertrude, mostly for the two-year period from September 2011 to August 2013. I found Dr. Kennel to be a credible and sincere witness whose testimony, supported reliably by the Progress Notes, allowed for an understanding of Gertrude's conditions and her relationship with her children.

[97] Dr. Kennel stated candidly that he had difficulty managing Gertrude's care. He said that he would have eagerly transferred her care to another doctor, had he been able to do so. Gertrude was, in his estimation, the most difficult patient that he has ever treated. He viewed her as excessively demanding and incapable of understanding her limitations and the systemic constraints on others to meet her needs, most evident in three ways:

(a) Gertrude had a neurogenic bladder that was addressed by a permanent indwelling catheter. She complained of discomfort and inconvenience. Dr. Kennel conceded that intermittent catheterization would have been ideal for Gertrude but was not practical at Columbia Forest due to scheduling and staffing limitations;

(b) Gertrude experienced falls that she attributed to Columbia Forest's staff, particularly their use of part-time staff. Gertrude complained that her demand to be treated by only certain, select members of the Columbia Forest staff was not heeded;

(c) Gertrude disliked Columbia Forest's physical premises, food, and social environment. She made clear that they were not to her standards.

[98] Dr. Kennel testified that he struggled to "create allegiance" in his physician/patient relationship. For example, he observed that Gertrude was constantly watching the business channel and so he feigned interest in stock investment. Gertrude engaged by offering Dr. Kennel stock advice, which he ignored, and then accused Dr. Kennel of profiting from her stock tips without expressing adequate gratitude, demanding that he reward her with a gift.

[99] By December 2012, Gertrude had, with Mr. McCarter's assistance, filed a complaint with the Ministry of Health and Long-Term Care accusing Columbia Forest of regulatory infractions. Gertrude threatened to similarly file a complaint of Dr. Kennel, accusing him of not providing her with proper care and treatment.

[100] Dr. Kennel was examined on a series of Columbia Forest Progress Notes, which documented his care of Gertrude and his thoughts on her conditions and how best to treat them. Dr. Kennel struggled in his ongoing assessment of whether his most difficult patient had a personality disorder that caused her to be rude, accusatory, and belittling of others, in his words "just plain mean", or whether Gertrude had cognitive issues. His evidence based on his Progress Notes showed that he vacillated depending on the severity of Gertrude's abuse of him and the staff.

[101] Dr. Kennel did not deny that Gertrude lived with the discomfort and pain of the indwelling catheter and had sustained falls at Columbia Forest in April 2013. James produced photographs that showed bruising, open scabs, and sores on Gertrude's right leg and right arm. He agreed that Gertrude had never integrated with the Columbia Forest community. In addition to her complaints of Dr. Kennel and the staff, Gertrude was becoming increasingly angry with Joan. The Progress Notes are replete with references of Gertrude's complaint that "her daughter does not visit anyway".

[102] I accept from Dr. Kennel's testimony that in the period from September 2011 to August 2013, Gertrude's physical condition was worsening. Gertrude expressed to Dr. Kennel and to most anyone who took time to listen, that Joan was uncaring, inattentive, and unkind. During this period, the physical and emotional rift between Gertrude and Joan was becoming even more pronounced.

C. Gertrude's Deteriorating Relationship with Her Children

[103] Joan testified that in 2012 she simply could not please her mother. She arranged for and took Gertrude to medical and dental appointments that only caused greater criticism.

[104] On October 26, 2012, Joan met with Dr. Kennel. In a Progress Note of that day, he recorded that Joan was "frustrated, angry and hurt by her mother's behaviour and accusations". Dr. Kennel wrote that "there are a lot of family dynamics and family history at play here including sibling rivalry and jealousy". Dr. Kennel told Joan that she had three choices in dealing with her mother: to decide the inheritance money "is not worth it and refuse to be abused", or; become submissive, as does her brother, and not be confrontational with Gertrude, or; enter into a "business relationship with her brother in that they act together in the best interests of her mother".

[105] Joan disengaged. On Joan's evidence, I find that she did not visit Gertrude in December 2012, not even for the Holidays, and did not resume regular weekly visits with Gertrude until April 19, 2013. I find that Joan and Gertrude had not gotten along well for some time, but from December 2012 to April 2013 they were physically estranged in addition to being emotionally disconnected.

[106] Joan testified that the reason why she did not visit during this time is because she sustained a spinal injury that caused her significant pain and loss of mobility. She stated that she attempted to call her mother periodically and at times made contact by phone. In cross-examination, Joan conceded that she resumed her hobby of curling in January 2013, but still was not physically able to visit her mother, or to have Gertrude to her home.

[107] Whatever the reason for her absence, the evidence established, and I find, that Joan disengaged for a period some five months and when she sought to re-engage with Gertrude the results were unpleasant. Gertrude was increasingly angry with her, rejecting Joan's advice that she ought to accept her physical limitations and stop being chronically angry, resenting Joan's lack of support for her campaign of criticism against her caregivers and was angered by Joan's lack of empathy for the sores attributable to her transfers. Gertrude blamed Joan for the selection of her care facility, for her fall at Joan's home, but most of all for her increasing sense of vulnerability arising from her aging in what Gertrude viewed to be an uncaring, isolated environment.

[108] My conclusion of the intensifying rift between Gertrude and Joan is best exemplified by Joan's unhappy visit with her mother on her 91st birthday, May 14, 2013. Gertrude did not come out of her washroom to visit with Joan, causing Joan to shout her birthday greetings through the closed washroom door, deposit a piece of birthday cake on the table, and leave.

[109] The last time that Joan visited with Gertrude in Columbia Forest was in July 2013. Gertrude accused Joan of having stolen her diamond ring. Joan summoned a member of the Columbia Forest nursing staff to assist in the search for the ring, without result. The discussion became heated, and Joan was dispatched to file a police report and an insurance claim, as the ring was listed on Joan's homeowner's insurance. Joan testified that this meeting was "very bad" and that Gertrude was very angry with her. Joan allowed for some cooling off time and did not return to visit her mother for the Summer. As matters would develop, Joan would not see Gertrude again for eight months.

[110] James was not spared in feeling insecure in his relationship with Gertrude. Dr. Kennel testified, with his note of February 22, 2013, that James contacted him, panicked that his mother had made serious and offensive allegations of him that he says were not true. Dr. Kennel wrote that James was concerned "about his inheritance and that it might be threatened". Dr. Kennel testified that James felt that Gertrude was "delusional", but Dr. Kennel disagreed. He thought that Gertrude's judgment might be "questionable" but that this "was a different issue than competency". Dr. Kennel had a follow-up call with James on April 19, 2013, in which James stated that he continued to be "in her bad books".

[111] In testimony, James denied the accuracy of Dr. Kennel's note or of any concern in February 2013 regarding his inheritance. I do not accept James' denial of concern and prefer the evidence of Dr. Kennel. I do so because James sent an email to Joan on February 24, 2013, 2 days after his discussion with Dr. Kennel, conveying his concerns and confirming that he had discussed them with Dr. Kennel. Further, in email messages to Joan of April 19 and 26, 2013 and May 3, 2013, James continued to voice concerns that Gertrude was acting inappropriately, consulting with Mr. McCarter without informing her children, and might be displaying cognitive impairment. This is an instance where I found that James' testimony lacked credibility. I will later detail others.

[112] I find that Joan and James were both concerned about their relationships with Gertrude during 2013. They both knew that there was the possibility that in her ongoing consultations with Mr. McCarter she might change her Will without their knowledge. She did.

D. Gertrude's 2013 Will and Amendment to the Alter Ego Trust

[113] In May 2013, Gertrude retained Mr. McCarter to act for her in the preparation and execution of a new Will and the corresponding amendment of the 2005 Alter Ego Trust Deed.

[114] In an internal email of May 6, 2013, Mr. McCarter told his law partner, Mr. Weir, that Gertrude wanted to change the 2008 Will from leaving her estate to her children in equal shares to 75% to James and 25% to Joan. Messrs. McCarter and Weir advanced two steps: they retained a research lawyer, Mr. David Finch, to assist them in identifying the appropriate steps to determine testamentary capacity, and; they retained Ms. Janice Woynarski to conduct a capacity assessment.

(a) Janice Woynarski's Capacity Assessment

[115] Ms. Janice Woynarski has undergraduate and postgraduate degrees in Social Work. She is a member of the Ontario College of Social Workers and has been a certified Capacity Assessor since 1998. Ms. Woynarski estimated that she has conducted over 350 capacity assessments.

[116] On May 8, 2013, Mr. McCarter retained Ms. Woynarski to assess Gertrude's capacity to execute a revised Will. Ms. Woynarski met with Gertrude on May 13, 2013 for about an hour, and then spent another 20 minutes speaking with Dr. Kennel and unidentified Columbia Forest

staff members. Ms. Woynarski issued her report on May 27, 2013. In her opinion, Gertrude did not have testamentary capacity to make changes to her 2008 Will.

[117] Ms. Woynarski found that Gertrude understood the nature of a Will and unquestionably understood the amount of her stock portfolio, assets, and holdings. Gertrude acknowledged that her children would expect equal shares of her estate upon her passing and confirmed to Ms. Woynarski her appreciation that any deviation from equal sharing would result in a dispute. She concluded, correctly in my view, that all these factors pointed toward testamentary capacity.

[118] The basis for Ms. Woynarski's conclusion that Gertrude lacked testamentary capacity was that she did not have a logical thought process in her decision-making. Ms. Woynarski testified that Gertrude told her that her rationale for changing the distribution of her estate to a percentage that favoured James was that James is an attentive son while Joan is unkind and inattentive: "she does not like Joan and likes James". Ms. Woynarski determined, based on her discussions with Dr. Kennel and unidentified staff members of Columbia Forest, that Gertrude's reasoning was based on a false belief – was delusional – because Joan visited Gertrude and cared for her regularly.

(b) Gertrude's Execution of the May 2013 Will

[119] Mr. Weir testified that he and Mr. McCarter received and considered Ms. Woynarski's capacity report prior to meeting with Gertrude. They also received and reviewed Mr. Finch's research memorandum, that contained his views concerning the test to determine testamentary capacity. From it, Mr. Weir and Mr. McCarter concluded, in my view correctly, that their determination of Gertrude's testamentary capacity would be based on the principles set out by the Ontario Court of Appeal in *Hall*, which expanded on the factors set out in *Banks*.

[120] It is clear from Mr. Finch's memorandum, that he and Messrs. McCarter and Weir were focused on the issue of whether Gertrude's desire to change her Will to reduce Joan's inheritance was based on a mistaken belief. Mr. Finch identified case law that considered circumstances in which a testator may be found to suffer from insane delusions, negating testamentary capacity, again in my view correctly. He cited *Skinner v. Farquharson* (1902), 32 S.C.R. 58, and *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Ct. J. (Gen. Div.)) as authority for the proposition that a delusion is "more than just getting the facts wrong." Rather, it is "a persistent belief in a supposed state of facts that no rational person would hold to be true, and thus exists as real only in the mind of the believer."

[121] Mr. Finch's memorandum provided Messrs. McCarter and Weir with a list of issues to be considered, in addition to the "traditional *Banks v. Goodfellow* criteria", and specific questions designed to probe the relationship between Joan and Gertrude to determine whether Gertrude's disaffection with Joan, and her resultant desire to reduce her inheritance, was based on delusions.

[122] I accept Mr. Weir's testimony that he and Mr. McCarter reviewed Mr. Finch's research memorandum and discussed its contents in preparation for their meeting with Gertrude. He

recalled that Gertrude was calling their office incessantly asking that they attend with a new Will so that she might change the distribution of her wealth to her children unequally.

[123] On May 28, 2013, Mr. McCarter and Mr. Weir met with Gertrude at Columbia Forest for between 60 and 90 minutes. Mr. Weir testified that Mr. McCarter asked Gertrude why she wanted to change her Will, and that she responded that Joan was an unkind and inattentive daughter. Gertrude told them that Joan had, at one time, called her an offensive and derogatory term. Gertrude told the lawyers that she had assisted the children over the many years, providing generous amounts, but no longer wanted to benefit Joan equally as she was, in Gertrude's view, not a "good daughter". Mr. McCarter explained that Joan would challenge any change in the Will. Mr. Weir swore that Gertrude was adamant that she wanted to reduce Joan's inheritance to 25%.

[124] Mr. Weir and Mr. McCarter concluded, from their discussions with Gertrude, that she had testamentary capacity. Indeed, Mr. Weir testified that there was "no doubt in his mind" that Gertrude had testamentary capacity to change her Will and the 2005 Alter Ego Trust Deed.

[125] As in Gertrude's 2008 Will, James remained the sole estate trustee of the May 2013 Will. Unlike the 2008 Will, Gertrude directed that her estate, then valued at in excess of $20,000,000, would be divided on her death in unequal shares to her children, 75% to James and 25% to Joan, as follows (the "May 2013 Will"): "To divide the residue of my estate into two unequal shares, one such share, being one-quarter of the residue of my estate, in respect of my daughter, JOAN CATHERINE SLOVER, if then living, and the other such share, being three-quarters of the residue of my estate, in respect of my son, JAMES FRANCIS RELLINGER, if then living;…"

[126] At the same meeting on May 28, 2013, Gertrude executed a second amendment to her Alter Ego Trust (the "2013 Second Amending Deed") to delete section 2.2 of the 2005 Alter Ego Trust Deed and replace it with a provision that would result in unequal division between her children of the trust funds on her death, in the percentages set out in the 2013 Will: "2.2 Division Among Beneficiaries on Distribution Date. As soon as reasonably possible following the Distribution Date, the Trustees shall pay and transfer the balance, if any, of the Trust Fund then remaining to the children of the Settlor alive on the Distribution Date in two unequal shares: a three-quarters share to her son, JAMES FRANCIS RELLINGER, and a one-quarter share to her daughter, JOAN CATHERINE SLOVER,…"

[127] Mr. McCarter and Mr. Weir witnessed the execution of the May 2013 Will and the 2013 Second Amending Deed by Gertrude on May 28, 2013.

[128] I found Mr. Weir's evidence to be credible and reliable. His testimony was internally consistent and plausible. I was impressed by his sincerity and the thoughtfulness of his testimony, which was admitted with no cross-examination. I accept Mr. Weir's evidence on the steps taken by him and Mr. McCarter in assisting Gertrude with her May 2013 Will and the circumstances by which this Will was executed. I will address later the soundness of the

determination by Messrs. McCarter and Weir that Gertrude had testamentary capacity and was not under undue influence.

VII. STEPS TAKEN BY JAMES UPON LEARNING OF THE MAY 2013 WILL

A. James's Retainer of Professionals

[129] On May 30, 2013, Mr. McCarter and Mr. Weir spoke with James, on Gertrude's direction, to notify him that Gertrude changed her Will to give him 75% of her estate on her death, with Joan receiving 25%. Mr. McCarter told James what, I find, he already knew: that Joan would challenge any change by Gertrude that resulted in an unequal distribution of her estate to her children.

[130] On June 5, 2013, Mr. McCarter delivered to James the May 2013 Will and the 2005 Alter Ego Trust Deed, as amended, together with a copy of Ms. Woynarski's capacity assessment. James testified that he retained a lawyer, Mr. Edwin Flak, in July 2013 to act for him in relation to his interests in Gertrude's estate. Mr. Flak did not testify regarding the role that he had in the steps taken by James after August 2013. Rather, he acted as James' trial counsel.

[131] I accept Mr. Weir's evidence that in July 2013, James began calling him and Mr. McCarter, incessantly. By July 29, 2013, Mr. Weir concluded that James and Joan were certain to litigate. Mr. Weir adduced into evidence the audio of a voicemail recording that Mr. McCarter received from Gertrude on August 8, 2013. Gertrude, with prompting from James, read from a script that directed Mr. McCarter not take any steps on her behalf without James' authority. The transcription of this voicemail message, wherein Gertrude's gentle voice resonates in marked contrast to James' loud, forceful interjections, displayed by [underlining], is as follows:

> Hello? [Just read it.] Hello? [Read what it says there.] Mr. McCarter? [Read it. Read that.] It's Gertrude Rellinger calling, and he said and I'm going to tell you do not write any more letters for me and do not do anything without first discussing it with my son James Rellinger. OK?

[132] On August 9, 2013, Messrs. McCarter and Weir met with Gertrude to act on her instructions to revoke her existing power of attorney for personal care, substituting Joan for James (the "August 2013 Power of Attorney for Personal Care"). I accept Mr. Weir's evidence that Gertrude was angry with Joan because she believed that Joan was only interested in Gertrude's money and not her care.

[133] I accept as well that by August 26, 2013, Mr. Weir and Mr. McCarter were concerned that Gertrude might be under the undue influence of James. They concluded that they were compromised in their ability to continue to act in Gertrude's interests, as they had received her instructions to filter their work through James' for his pre-approval. Mr. McCarter wrote to

Gertrude that day to ask that she retain new counsel as his firm would no longer act on her behalf.

[134] Mr. McCarter could not have known that James had by that time already taken significant steps to affect Gertrude's interests. James testified that in August 2013, with the assistance of his lawyer, Mr. Flak, he retained four professionals, he says on his mother's behalf and at her direction:

(a) Barry Corbin, a lawyer called to the Bar in Ontario in 1982, who practised in the areas of estate planning and administration. Mr. Corbin testified that he was retained by James to provide advice to Gertrude about transferring Gertrude's assets to joint ownership with James.

(b) Mr. Morris Manning, to act as litigation counsel to Gertrude in any estate proceeding. Mr. Manning did not testify. He acted with Mr. Flak as James' trial counsel.

(c) Ms. Ella Mary Agnew, a lawyer called to the Bar in Ontario in 1975, who practised as a solicitor in estate planning and administration. She testified that she was contacted by James' lawyer, Mr. Flak, to act for Gertrude, and began to do so after an introductory meeting with Mr. Flak in August 2013.

(d) Dr. Elaine Yiu, a medical doctor, graduated in 1992 and certified in 1997 as a psychiatrist was retained by James on the advice of Mr. Flak, to conduct her first testamentary capacity assessment. Dr. Yiu signed a retainer agreement on August 22, 2013 with three parties: Mr. Flak, stated as acting in his capacity as Gertrude's agent; Ms. Agnew in her capacity as Gertrude's solicitor, and; Mr. Manning, described as acting for Gertrude, "principally as counsel for possible and actual litigation".

[135] On August 15, 2013, *before* receiving any advice from Mr. Corbin, James obtained and completed the TD Bank form required to open a new investment account jointly with Gertrude.

B. The Investment Account Transfer Plan

[136] On August 16, 2013, Mr. Corbin produced to James a memorandum (the "Corbin Memorandum") that began by introducing his mandate. Mr. Corbin recorded that James asked him to advise of the consequences of Gertrude withdrawing her investments from the TD Investment Account and placing them into an account that James would jointly own with Gertrude:

> You [James] have asked me to comment on the income tax, legal and practical effects arising if your mother, Gertrude Rellinger ("Gertrude"), withdraws investments from the [Alter Ego Trust] for herself and, immediately thereafter, transfers those investments from herself into the

> names of Gertrude and you, so that you hold those investments jointly with a right of survivorship. I understand from you that Gertrude wishes these transfers to take place immediately. [Emphasis Added]

[137] Mr. Corbin explained to James that in the 2007 decision of *Pecore*, the Supreme Court of Canada held that when a parent transfers funds into a joint account with an adult child, with a right of survivorship, there is a presumption of resulting trust. This meant, he explained, that without more, the adult child would hold the assets as bare trustee for the estate of the parent.

[138] Mr. Corbin advised, further, that the Supreme Court stated in *Pecore* that where a parent conveys a right of survivorship alone, the parent is not making a disposition. Mr. Corbin thereby provided his opinion, with express caution that the Canada Revenue Agency might not concur, that the conveyance by Gertrude to James of the right of survivorship of a joint investment account could result in a tax-free transfer of Gertrude's investment account, in certain circumstances. Mr. Corbin opined that if the transfer of the right of survivorship is determined to be effective, Gertrude's investments would belong to James at the time of Gertrude's death and would not form part of her estate.

[139] Mr. Corbin's plan for the tax-free transfer of Gertrude's wealth to James was referred to during trial as the "Pecore Plan", due to its stated intention to respect the principles set out by the Supreme Court in that decision. But I will refer to it as the "Investment Account Transfer Plan", because that is what I find it to be. It had the following four steps:

(a) Create a joint bank account held by James and Gertrude wherein James would have a right of survivorship;

(b) Transfer the assets that Gertrude held in the Alter Ego Trust, being the TD Investment Account, to the new joint bank account;

(c) Construct a sale of right of survivorship agreement designed to establish that Gertrude was not making a disposition of the Investment Account prior to her death, but rather was conveying solely the right of survivorship to James;

(d) Upon Gertrude's death, the TD Investment Account would belong to James.

[140] I find that there is a by-product to the Investment Account Transfer Plan that is inconsistent with the Will that Gertrude implemented some three months earlier with the assistance of Messrs. McCarter and Weir. It stripped any assets from the Alter Ego Trust and thereby stripped any wealth from Gertrude's estate. This meant that any wealth distribution that Gertrude intended through her just-completed May 2013 Will would be meaningless as her estate would be valueless. On her death, her assets would be owned by James: not by Gertrude's estate.

VIII. EVENTS PERTAINING TO THE ESTATE PLANNING DOCUMENTS AND THE 2014 WILL

[141] After receipt of the Corbin Memorandum on August 16, 2013, James had Mr. Corbin's opinion that *if* the Investment Account Transfer Plan were implemented, including *if* Gertrude's investments were transferred to an investment account held jointly with James, *if* Gertrude transferred to James the right of survivorship of any such account, and *if* the transfer of the right of survivorship were determined to be valid, Gertrude's assets would belong to James at the time of Gertrude's death and would not form part of her estate. In Mr. Corbin's words: "If the right of survivorship is an effective transfer, it would mean that the investments would belong to you as a consequence of Gertrude's death by operation of law and would not form part of her estate."

[142] The first step was for James to open an investment account with Gertrude.

A. August 15, 2013 – The Attempt to Transfer the Investment Account

[143] On Monday, August 15, 2013, the day *before* James received the Corbin Memorandum, James obtained from TD Bank the form necessary to open a new investment account jointly with Gertrude, with a right of survivorship. James testified that he completed the required fields and executed the new account application form together with Gertrude on August 15, 2013.

[144] James admitted that he did *not* speak with Mr. Corbin *before* receiving his Memorandum. I thereby find that James was not aware of Mr. Corbin's recommended Investment Account Transfer Plan at the time that he set upon opening a joint investment account with Gertrude.

[145] James faced an impediment in the transfer of the Investment Account to a joint account owned by him and Gertrude: Mr. Mark Andrew Ewald, the advisor with TD Wealth, a division of the TD Bank where the TD Investment Account was held. Mr. Ewald, with a degree in business and a professional designation as a Chartered Accountant, had been Gertrude's investment account advisor since 2007, and assisted Gertrude in the management of the assets held in the Investment Account, then in excess of $20,000,000. Mr. Ewald knew that Gertrude *alone* conducted all the stock investment research and *alone* directed all the trading in her investment account.

[146] Mr. Ewald testified that he returned from vacation on August 19, 2013 to find that James had called his office repeatedly from August 15, 2013 to August 19, 2013 to transfer the TD Investment Account from the Alter Ego Trust to a joint account with James. When James was told by staff that Mr. Ewald was absent from the office, James demanded that his request for the account transfer be escalated to management for immediate attention, professing "urgency".

[147] Mr. Ewald testified, uncontradicted by James, that James told him on August 19, 2013 that Gertrude wanted to proceed immediately with the opening of a new investment account jointly with James and the transfer of all the assets from the TD Investment Account. Mr. Ewald would not do so without first obtaining Gertrude's clear direction. I accept Mr. Ewald's evidence that he was concerned about Gertrude's interests in the transfer of the TD Investment Account and asked for the capacity assessment report that he knew, from discussion with Mr. McCarter,

had been prepared. I also accept that James denied Mr. Ewald access to the capacity assessment report.

[148] On August 20, 2013, Mr. Ewald met with Gertrude and James and stated his concern that the transfer of the TD Investment Account could have tax and regulatory considerations that Gertrude might not have the capacity to understand. Mr. Ewald obtained an opinion that day from the TD Bank legal department, which stated that the account transfer from an Alter Ego Trust to a joint account, in the circumstances of the recent Will and Alter Ego Trust amendments, ought not to be completed until "the issue of [Gertrude's] capacity to make those documents is determined".

[149] On August 21, 2013, Mr. Ewald met with Gertrude again, this time to read this legal opinion to her. He would not be contacted again by Gertrude or James until October 9, 2013, when they directed the transfer of the TD Investment Account (except for a small holding) to a Bank of Montreal account held jointly by Gertrude and James. Mr. Ewald's concerns for Gertrude were not addressed, but rather they were by-passed by changing to another bank.

[150] I found Mr. Ewald to be a credible and reliable witness, whose evidence was plausible and consistent with the documentary evidence. The cross-examination of Mr. Ewald suggested that he improperly delayed the transfer of the TD Investment Account and improperly consulted with Gertrude's lawyer, Mr. McCarter, about their common client's competence. I found this cross-examination to be unhelpful and unpersuasive. I find that Mr. Ewald set out to diligently attend to the interests of his long-standing, elderly client. I accept Mr. Ewald's testimony, including in all areas where it conflicts with James' testimony.

B. August 20, 2013 – The Investment Distribution Agreement

[151] On August 20, 2013, four days after receipt of the Corbin Memorandum, James met with Gertrude at Columbia Forest and presented to her a document that I will refer to as the "August 2013 Investment Distribution Agreement", although it bears a decidedly more complex title:

> Declarations of, and Agreement, between Gertrude Rellinger and James Rellinger, concerning the dispositions of funds and investments on Gertrude Relliner's (*sic*) death as a result of the transfer of the right of survivorship to James Rellinger ("this document")

[152] Mr. Corbin denied that he prepared this document. I accept James' testimony that it was prepared by his lawyer, Mr. Flak. I also accept that this document was not prepared at Gertrude's direction because there is no evidence that in August 2013 Gertrude directed anyone to prepare a document of this nature on her behalf. There was also no evidence that Gertrude had any advance opportunity to review this document prior to its presentation to her. She executed it, after discussing its contents only with James, who testified that this document was further to Gertrude's request for "tax planning".

[153] The August 2013 Investment Distribution Agreement provided for the following:

(a) Gertrude's direction that the TD Investment Account be transferred out of the Alter Ego Trust to a new joint investment account to be held with James, with her agreement that on her death, the entirety of the account would belong to James;

(b) Should James receive 100% of the new investment account on Gertrude's death, Gertrude wished for James "to share twenty-five percent of the after-tax value" with Joan, "at a time which James decides is appropriate". The Agreement recited that Gertrude knows "that James will act reasonably in determining the correct time, or times, to provide these funds to Joan";

(c) If Joan did not agree, within five days of James requesting her agreement, that the May 2013 Will and related amendment to the Alter Ego Trust are valid, and unless Joan agreed not to challenge Gertrude's funding of the new joint investment account with James and his right to ownership of it on her death, Gertrude did "not wish to provide any benefit to Joan, nor for Joan to obtain any benefit from James".

[154] Gertrude did not receive any legal advice in relation to this document. Her lawyer, Mr. McCarter was not consulted or involved. James' lawyer drafted the following clause to address the exclusion of Mr. McCarter:

> I [Gertrude] have not involved Mr. McCarter with this agreement, the creation of joint accounts, with James and my sale of the survivorship interest in the investment and other accounts because I clearly understand these transactions and I am concerned about whether Mr. McCarter will be able to act promptly, in accordance with my wishes, without disclosure to others, in connection with these transactions, including the related documents.

[155] I find that this clause is flawed. First, the transactions that are said to have been "clearly understood" by Gertrude had not even yet occurred. The joint investment account had not by that date been opened, and the sale of the survivorship interest would not take place for another six weeks. How could she have "clearly understood" the sale of a right of survivorship without explanation from anyone? Second, on August 20, 2013, the only "disclosure to others" that Mr. McCarter had been involved in was a discussion with Mr. Ewald, which occurred the day before.

C. The Retainer of Dr. Wendy Yiu

[156] Dr. Yiu travelled to Waterloo to meet with Gertrude on August 21, 2013, the day *after* Gertrude signed the August 2013 Investment Fund Transfer Agreement. This meeting was organized by James' lawyer, and was further to the "Primary Mandate" set out in the retainer agreement that Dr. Yiu would sign the next day: to conduct an "objective, independent, expert assessment of Gertrude Rellinger's capacity to conduct material financial and legal transactions, her testamentary capacity and her vulnerability to undue influence from anyone, especially from her son, James Rellinger."

[157] I find revealing that Dr. Yiu's retainer agreement, signed August 22, 2013, was with Mr. Flak, Ms. Agnew, and Mr. Manning. I will explain later that Mr. Agnew testified that she did not meet Gertrude until a month later, in September 2013, and Mr. Manning did not meet Gertrude, and obtain a retainer to act for her, until two months later, in October 2013. By the terms of Dr. Yiu's Retainer Agreement, two of Gertrude's lawyers, Ms. Agnew and Mr. Manning, entered into a contract to retain Dr. Yiu as a capacity assessor months before they met their client.

D. Analysis – Findings Regarding the Events of August 2013

[158] My findings regarding the events of August 2013 impact my assessment of the Estate Planning Documents, the Lifetime Gift Documents and the 2014 Will and Codicil. For the reasons that follow, I find that Mr. Corbin did not act for Gertrude, but rather for James, and I find that the basis for the Investment Account Transfer Plan was not tax planning, as contended by James, but rather the transfer of Gertrude's wealth to a joint account with James.

(a) Mr. Barry Corbin

[159] James testified that he retained Mr. Corbin as agent for his mother, and at her request. Mr. Corbin testified that even though the Corbin Memorandum is addressed to James and even though its advice is directed to James, that his client was Gertrude. He claimed that James caused him to be retained on Gertrude's behalf pursuant to a Power of Attorney for Property that Mr. Corbin never saw, did not have in his file, and that was not tendered into evidence at trial.

[160] I do not accept Mr. Corbin's evidence that he was retained by or on behalf of Gertrude for a number of reasons. First, he had no basis on which to conclude that James was authorized to retain him on behalf of Gertrude. Second, he did not take steps to confirm this retainer with Gertrude, even though she was available throughout. Third, Mr. Corbin did not provide advice to Gertrude, either in person or by telephone. He did not explain the Investment Account Transfer Plan to Gertrude even though it had a profound impact on her, but rather directed all his advice to James. There was no evidence to establish that Gertrude was even aware of Mr. Corbin's retainer. Fourth, Mr. Corbin billed James $27,260.38 for 54 hours of legal services from August 2013 to July 2014 but did not have any discussion or any contact of any nature with Gertrude until August 1, 2014: and then only to witness her execution of a single-sentence document.

[161] Fifth, James' own conduct established that Mr. Corbin acted for him. On August 19, 2014, a document entitled "Acknowledgement and Agreement of Gertrude Rellinger: Waiver of Potential Conflicts" (the "2014 Conflict of Interest Waiver"), prepared either by Mr. Corbin or Mr. Flak, was presented to Gertrude for execution. This document contained two elements: an acknowledgement that Mr. Flak and Mr. Corbin acted as counsel for James, directly, and in James' capacity as agent for Gertrude, and waived any right to complain about any potential or actual conflict arising from this dual retainer; second, that Gertrude was said to have paid for the "great majority" of Mr. Flak's and Mr. Corbin's legal fees, and that she wishes "for the same arrangement to continue after my death."

[162] Sixth, in her 2014 Power of Attorney for Property which was executed by Gertrude on February 7, 2014, Gertrude appointed Mr. Corbin as her substitute attorney for property, describing him as James' solicitor: "In the unlikely evet that my son, James Rellinger, is unable to act for me, I appoint *my son's solicitor, Barry Corbin*, to be my attorney for the management of property…"

[163] On all the evidence, I do not accept that Mr. Corbin's retainer was with or on behalf of Gertrude. I find that Mr. Corbin was retained by James to provide advice to James in relation to the transfer of the TD Investment Account, precisely as stated by Mr. Corbin in the first paragraph of the Corbin Memorandum.

(b) The Basis for the Investment Account Transfer Plan

[164] I do not accept James' testimony that the Investment Account Transfer Plan was created for "tax planning" purposes at Gertrude's direction. There was no evidence that Gertrude was even aware, in August 2013, that Mr. Corbin, or any expert, had been retained to provide tax advice.

[165] On my assessment of all the evidence, I do not accept that Gertrude directed James, in July or August 2013, to retain a tax or estate law expert to re-organize her holdings to achieve a tax advantage and, in the process, transfer her wealth to a joint account with James. The *only* source of evidence that Gertrude asked, in the period from May 2013 to August 2013, for tax planning advice was James' testimony, which was not corroborated by any other witness or any other evidence.

[166] There are a number of reasons why I do not find credible and thereby reject James' evidence that Gertrude requested tax planning advice, and therefore the implementation of the Investment Account Transfer Plan. First, there was no evidence that Gertrude asked Messrs. McCarter or Weir for tax planning advice at the time that they assisted her with the May 2013 Will, or when they met with her again on August 9, 2013. Gertrude called Mr. McCarter freely on issues of concern and consulted with him liberally over the many years. There was no evidence that she was, at any time, concerned about receiving tax planning advice. Second, there was no evidence that Gertrude asked Mr. Ewald about estate tax planning, even though he assisted her with the TD Investment Account, held by the Alter Ego Trust, for six years leading to 2013. Third, in all the Progress Notes admitted through Dr. Kennel's evidence, there is no evidence of Gertrude expressing a concern to receive tax planning advice, even though Gertrude raised a multitude of other concerns, requests, and demands. Fourth, in Gertrude's handwritten notes, which are uniformly thoughtful, thorough and comprehensive, there is no mention that she sought tax planning advice at any time from anyone.

[167] Fifth, the evidence established, and I accept, that Gertrude was in frail health in August 2013, expecting a move from Waterloo to Toronto, whereupon she was admitted to St. Joseph's Hospital on September 9, 2013. Photographs showed that Gertrude had scars, blemishes and unhealed wounds on her arms and legs at this time. I find it implausible that in these

circumstances, Gertrude came up with a late-life objective to implement creative estate tax planning and did so only after James learned of the unequal gifting through the May 2013 Will. Sixth, the Corbin Memorandum, in explaining Mr. Corbin's mandate, did not record a request for estate tax planning but rather an explanation of the ramifications, from an income tax standpoint, of Gertrude's wealth being transferred to a joint account with James. The Corbin Memorandum recited that James was the only source for Mr. Corbin's understanding that Gertrude wanted to transfer her Investment Account to a joint account with James.

[168] But perhaps the most significant evidence that Mr. Corbin's advice did not give rise to the concept of transferring the TD Investment Account from Gertrude to a joint account with James but rather followed it is the timing of James' application for a joint investment account. James obtained the TD Bank Application to open a joint investment account with Gertrude *before* he obtained the Corbin Memorandum. This established that the impetus to transfer the TD Investment Account to a joint account did not *result from* tax advice, but rather the tax advice was sought, further to the objective already stated by James, to transfer the account holdings to a joint account.

[169] On these findings, I conclude that Gertrude did not direct James to obtain estate planning tax advice in August 2013. I find that the Investment Account Transfer Plan was not authorized by Gertrude in August 2013, but rather was presented to her by James through the August 2013 Investment Distribution Agreement.

[170] The effect of the Investment Account Transfer Plan was to transfer Gertrude's Investment Account from the Alter Ego Trust, where its distribution on Gertrude's death would be directed by Gertrude through her Will, to James' control to be distributed on Gertrude's death at his discretion. The initial instrument for giving effect to this, the August 2013 Investment Distribution Agreement, embodied three estate distribution elements that Gertrude did *not* implement in her May 2013 Will, mere months earlier, with the benefit of consultation and advice from Mr. McCarter and Mr. Weir, but rather were prepared by James' lawyer and presented by James to Gertrude, as follows:

(a) The Vanishing Inheritance Concept: The August 2013 Investment Distribution Agreement is the first introduction of the concept that Joan's inheritance will reduce to zero if she contests either the May 2013 Will or the further testamentary dispositions that have not yet been implemented by Gertrude. I saw no evidence that Gertrude had ever previously considered disinheriting one of her children entirely;

(b) The Asset Transfer Concept: Before the August 2013 Investment Distribution Agreement, there was no evidence that Gertrude had ever considered transferring her TD Investment Account out of the Alter Ego Trust. Gertrude had established the Alter Ego Trust in 2005 and had retained it as a component of her estate planning through three amendments of her Will.

(c) The Loss of Control in Wealth Distribution. Gertrude had retained control of her estate throughout her lifetime, directing through her Will the transfer of her wealth to her children on her death. The Investment Account Transfer Plan changed this by giving James' control over Gertrude's assets on her passing and gave James control and discretion over whether to distribute a portion of Gertrude's assets to Joan, and the timing of doing so. Central to this was James' ownership of the right of survivorship of the joint Investment Account.

[171] I do not accept that Gertrude requested these concepts. I do not see any evidence, apart from James' testimony, to support James' submission that Gertrude sought to make such a significant shift so soon after her May 2013 Will all in the name of estate tax planning. I do not accept that in August 2013 Gertrude understood the meaning of a right of survivorship or the distinction between James holding her funds in trust for her estate as opposed to having an entitlement to own them outright.

[172] I have determined, on all the evidence, that the retainer of Mr. Corbin, the formulation of the Investment Account Transfer Plan, and the August 2013 Investment Distribution Agreement and the three novel concepts embodied in it, were all steps taken by James, directly or through his lawyers, and then presented to Gertrude in August 2013, but not directed by Gertrude.

E. September 3, 2013 – Gertrude's Move to Toronto

[173] On August 23, 2013, three days after signing the August 2013 Investment Distribution Agreement, Gertrude told Dr. Kennel that James was taking her to live with him. On September 3, 2013, James assisted Gertrude in checking out of Columbia Forest and moving to Toronto.

[174] Neither James nor Gertrude notified Joan that her mother was leaving the Waterloo community in which she had resided for 91 years. On September 3, 2013, James sent an email to Joan that stated simply that Gertrude was "very unhappy about being at Columbia Forest" and that James had "made arrangements" so that she would be staying with him "for the next while". By that time, Gertrude had moved out of Columbia Forest.

[175] James testified that he re-located Gertrude to his home because he was deeply concerned about her medical condition and wanted to help her heal from the chronic lack of care that she had endured at Columbia Forest. However, within two days of her arrival at James' home, on September 5, 2013, James, with the assistance of Mr. Corbin, arranged for Ms. Virginia Shanker, an account advisor with the Bank of Montreal, to meet with Gertrude and James, to present application materials for the opening of a joint investment account at the BMO.

[176] That day, James and Gertrude executed a BMO Joint Account Agreement, witnessed by Ms. Shanker (the "September 5 BMO Account Opening Document"). James admitted in cross-examination that he did not provide Ms. Shanker with either Ms. Woynarski's capacity assessment or the TD Bank legal opinion stating that TD Wealth cautioned against a transfer of the Investment Account until Gertrude's capacity was first assessed.

[177] Four days later, on September 9, 2013, Gertrude was admitted to St. Joseph's Hospital for examination by a geriatric service staff member. Gertrude was discharged to home care, with direction to have intermittent catherization to address her neurogenic bladder, and physiotherapy. On Gertrude's return from St. Joseph's Hospital, while still in the transition from her move from Waterloo without yet having settled into a retirement home or care facility, James arranged for Gertrude to meet with Ms. Agnew.

F. Ella Mary Agnew

[178] Ms. Ella Mary Agnew was called to the Bar of Ontario in 1975 and has practised in estate planning and administration. She testified that she was contacted by James' lawyer, Mr. Flak, to act for Gertrude and, in early September 2013, attended a briefing session with Mr. Flak.

[179] Ms. Agnew had little recollection about her initial briefing meeting with James' lawyer. Ms. Agnew conceded that she had little, if any, memory of any events independent of her strict reliance on her notes, which were handwritten contemporaneously but edited and transcribed subsequently. I found that I could only rely on Ms. Agnew's evidence to the extent that she read from her notes, as she demonstrated little independent recollection.

[180] Mr. Flak's office arranged for Ms. Agnew to meet with Gertrude and provided her with documents, but Ms. Agnew could not recall which documents. Ms. Agnew had no memory of having received a copy of the Corbin Memorandum by the time of her first meeting with Gertrude. Ms. Agnew understood that her role was to assist Gertrude in estate planning, at a meeting to be scheduled by James' lawyer, with documents prepared by James' lawyers.

[181] James was present at Ms. Agnew's initial meeting with Gertrude, which took place on September 16, 2013. Ms. Agnew observed that Gertrude was attentive but had "horrible black and red marks on her legs" and was "very deaf". Ms. Agnew recorded background of Gertrude's family and completed a family origin worksheet. Ms. Agnew did not discuss with Gertrude the Investment Account Transfer Plan, even though by then Gertrude had executed the August 2013 Investment Distribution Agreement and the September 5 BMO Joint Account Opening Document.

G. Living Life on the Avenue

[182] On September 18, 2013, Gertrude moved into Living Life on the Avenue Seniors Retirement Residence in Toronto ("Living Life"). James had sourced this retirement home and testified that Gertrude agreed with its selection. The admission form contained a direction, emphasized in disproportionately large capital letters, that no information about Gertrude was to be provided to Joan: "Do not give any care information to daughter Joan – Redirect to son Jim".

[183] A similar direction was inscribed in the Resident/Guest Profile completed that day, specifically stating that no information was to be shared with Joan except as directed by James: "Daughter Joan Slover…Do not share info – she must speak with her brother."

[184] At trial, James testified that Gertrude provided these instructions directly to the staff at Living Life. James was cross-examined on inconsistency in his testimony, as his sworn evidence at examination for discovery was that he provided these instructions to the staff at Living Life on his mother's direction. I accept James' discovery evidence that he provided these directions to the staff at Living Life, but do not accept that he did so at the direction of his mother, for reasons that I will later explain.

[185] On September 19, 2013, the day after moving into her new residence, Gertrude was admitted to St. Joseph's Hospital, where she would remain for 8 days, with a urinary tract infection. In a series of emails, James notified Joan of Gertrude's new home address at Living Life, and her hospitalization. James asked Joan to deliver any jewelry or belongings that she had, and to account for any money received from the insurance claim that she filed for Gertrude's lost ring.

[186] Throughout these email exchanges, James did not advise Joan of any of the steps that had been taken to affect the distribution of Gertrude's wealth on her death. He did not tell her about the May 2013 Will, or the Investment Account Transfer Plan, or that he had opened a BMO investment account jointly with Gertrude, or that he had arranged, he says on Gertrude's direction, for the retainer of a new lawyer (Ms. Agnew), new banker (Ms. Shanker), and new estate planner (Mr. Corbin) all of whom had been selected on the recommendation of his lawyer. He did not disclose to Joan the August 2013 Investment Distribution Agreement.

H. Estate Planning Documents Executed by Gertrude in October 2013

[187] On October 2, 2013, five days after Gertrude's discharge from her 8-day stay in hospital, Ms. Agnew met with Gertrude, along with Dr. Yiu, to explain the following four documents:

(i) An Agreement Pertaining to the Sale of the Right of Survivorship (the "2013 Sale of Right of Survivorship");

(ii) Declaration of Gertrude Rellinger, and Agreement of James Rellinger, concerning the disposition of money and investments acquired on Gertrude Rellinger's death by James Rellinger as a result of the transfer of the right of survivorship to him (the "2013 Fund Disposition Agreement");

(iii) Declaration of, and Agreement between Gertrude Rellinger and James Rellinger (the "2013 Use of Funds Agreement");

(iv) Declaration of Gertrude Rellinger concerning joint accounts (the "2013 Joint Account Agreement").

[188] Ms. Agnew was given these documents by Mr. Corbin and assumed that he drafted them but did not know for certain. As a familiar refrain that reverberated throughout her testimony, she stated that she had no role in the drafting of the documents that were given to her by James'

lawyers to review with Gertrude but that they could have been prepared by "Mr Corbin or Mr. Flak".

[189] Ms. Agnew did not investigate the origin or purpose of the documents. She did not know whether Mr. Corbin was retained by James directly or on behalf of Gertrude, and she did not inquire into this. She had no knowledge of Gertrude having asked for any such documents to be prepared on her behalf. She simply took to Gertrude and presented the documents provided to her by James' lawyers.

[190] Ms. Agnew testified that she read these documents in advance and discussed them with Mr. Corbin by telephone and understood that these documents were in relation to the Investment Account Transfer Plan authored by Mr. Corbin. She was uncertain whether she had by that time even seen the Corbin Memorandum by which the Investment Account Transfer Plan was conceived. I found that, in her testimony, Ms. Agnew had some difficulty explaining her understanding of the Investment Account Transfer Plan and was particularly uncertain of whether James would hold the joint Investment Account in trust for Gertrude's estate.

[191] Ms. Agnew met Dr. Yiu in the lobby of the Living Life and only then proceeded to the meeting with Gertrude. This too became a regular pattern in Ms. Agnew's provision of advice to Gertrude. Ms. Agnew would first coordinate with the capacity assessor before advising her client.

[192] Ms. Agnew recalled that Dr. Yiu had a solid understanding of the Investment Account Transfer Plan, in fact, by Ms. Agnew's admission, better than hers. It did not occur to Ms. Agnew as noteworthy that the capacity assessor had been briefed about the Investment Account Transfer Plan in advance of a meeting with her client. Ms. Agnew admitted that she let Dr. Yiu take the lead in explaining this plan to Gertrude, stating that Dr. Yiu "understood it well", seeing no issue in delegating to the capacity assessor the explanation to her elderly client of the complexities of the Investment Account Transfer Plan.

[193] The four documents that Mr. Corbin and/or Mr. Flak had authored, and Mr. Corbin had explained to Ms. Agnew, and Ms. Agnew then explained to Gertrude with the assistance of the capacity assessor, contained the following components:

(i) The 2013 Sale of Right of Survivorship repeating the Asset Transfer Concept contained in the August 2013 Investment Distribution Agreement: namely, Gertrude would transfer the funds from the TD Investment Account held by the Alter Ego Trust to BMO, and then into a joint account with James. In consideration of James' payment to Gertrude of $5,000, Gertrude would agree to transfer to James the right of survivorship in the BMO Investment Account. Section 2 of this agreement stated that Gertrude "considers this agreement to constitute only a technical sale and considers its overall effect to be to implement a gift of a right of survivorship."

(ii) The 2013 Fund Disposition Agreement reiterated in paragraph 1, the Asset Transfer Concept and reiterated, in paragraphs 2 and 3, the Vanishing Inheritance Concept, both first contained in the August 2013 Investment Distribution Agreement. This agreement also provided James with control over distribution of Gertrude's wealth, stating that the decision whether to convey 25% of Gertrude's wealth to Joan on Gertrude's death is entirely in James' "absolute discretion".

(iii) The 2013 Use of Funds Agreement reiterated the Vanishing Inheritance Concept, and stated that in anticipation of implementing the Asset Transfer Concept, and in anticipation of conveying to James the right of survivorship to any such account, James was authorized to use money in the Investment Account to pay "lawyers, accountants and their or his agents" to ensure implementation of these agreements.

(iv) The 2013 Joint Account Agreement reiterated the Asset Transfer Concept. It stated that Gertrude had gifted to James the sum of $5,000 (sections 4 and 7) that James would use to purchase from her the right of survivorship of a not-yet-established investment account (section 5). This document stated that James would not exercise any rights or entitlements to the investment account until after Gertrude's death (sections 7 and 8). Gertrude gifted to James 90 shares of Canadian Utilities stock (section 11). In section 9, the document reiterated the concept contained in section 2 of the Sale of Right of Survivorship that the sale was "only technical": "While James used the same $5,000 which I gifted to him to purchase a right of survivorship, I consider and intend the "purchase and sale" aspect of the transaction to be only technical [emphasis added]."

[194] Ms. Agnew testified that after explaining these four documents to Gertrude, she then left the documents with her for her ongoing review, to continue October 4, 2013.

[195] In the meantime, the Living Life chart of October 3, 2013, directed that Joan's contact with her mother was to be filtered through James: "If daughter Joan calls, we can say she is doing well, but not comment on the care provided. These questions must be directed to Jim." James admitted that he provided this direction to the staff at Living Life but emphasized that he did so on his mother's direction. This became a familiar refrain, that James' ongoing increasing restriction of Joan's access to their mother was justified as James carrying out his mother's intentions.

[196] On October 4, 2013, Ms. Agnew and Dr. Yiu conferred in advance on their approach to the meeting with Gertrude, and then met with her, focusing principally on Gertrude's reasoning for treating James and Joan unequally through her Will. Ms. Agnew testified that Gertrude vented that Joan was an uncaring, unkind, inattentive daughter, more concerned about Gertrude's money than Gertrude's well-being, while James would return to Waterloo "as often has he could". Ms. Agnew recorded Gertrude's statement that, when 15 years old, Joan referred to her in a hateful and derogatory manner and continued to berate her during her time at Columbia Forest.

[197] Ms. Agnew concluded that Gertrude was an alert and capable person who fully understood her holdings, had a clear understanding of how she wanted to pass her assets to her children, and understood that there would be a dispute between them resulting from the unequal distribution.

[198] Ms. Agnew and Dr. Yiu re-attended on October 5, 2013, at which time Gertrude executed the four documents initially detailed earlier. In addition, Gertrude executed that day two documents supplementing the authority provided to James on August 9, 2013 to attend to her personal care: a Power of Attorney for Personal Care Made in Accordance with the *Substituted Decisions Act, 1992* (the "October 2013 Power of Attorney for Personal Care"), and; an Appointment of Agent for Personal Care (the "October 2013 Personal Care Appointment").

I. Ms. Agnew's Role as Gertrude's Lawyer

[199] Ms. Agnew testified that her procedure in relation to each of the six documents *would have been* to go through the documents with Gertrude, review the purpose of the documents and how they fit into the Investment Account Transfer Plan. However, I do not accept that Ms. Agnew recalled having done so, but rather spoke of her expected, routine practice. Ms. Agnew's notes, the lifeline to her testimony, do not contain any detail of her explanation to Gertrude of the meaning or technical operation or effect of the four documents initially provided on October 2, 2013. Dr. Yiu testified that Gertrude was advised by Ms. Agnew that she continued to have control over the distribution of her investment funds on her passing. This was not accurate. James would control the distribution of Gertrude's wealth to Joan, in his "absolute discretion".

[200] I accept that Ms. Agnew confirmed with Gertrude her intention that James would receive more of her wealth and Joan would receive less, consistent with the May 2013 Will. However, I find troubling that Ms. Agnew did not obtain instructions from Gertrude concerning her testamentary intentions and then set upon creating a document to implement her purported wishes. Rather, Ms. Agnew acted on the presumption, through briefing by James' lawyers, that Gertrude had already agreed to the Investment Account Transfer Plan, the Asset Transfer Concept, the Vanishing Inheritance Concept, and the Loss of Control in Estate Distribution *prior to* her retainer. I am not satisfied that Ms. Agnew explained to Gertrude the impact of the concepts contained in the documents affecting Gertrude's estate planning, apart from assessing whether Gertrude agreed with what was being proposed by James' lawyers. I will explain why.

[201] Ms. Agnew was not able to explain at trial the inconsistencies in the four Estate Planning Documents and so I find that she was not able to explain them to Gertrude. She had no explanation of the meaning that the Sale of Right of Survivorship was only a "technical sale". There was confusion in her evidence on James' ability to use the funds during Gertrude's life. Most importantly, she conceded, with some overt expression of surprise, that these documents gave James a discretion of whether to transfer *any* amount of Gertrude's wealth to Joan on Gertrude's death after emphasizing that Gertrude intended, throughout, to remain in control of her investment account and of the distribution of her wealth on her death. Ms. Agnew justified

this by stating that Gertrude was certain that James would carry out her wishes even though he was empowered with discretion of whether to do so.

[202] I am bolstered in this finding by how Ms. Agnew handled these Estate Planning Documents after their execution by Gertrude. Ms. Agnew did not retain them for the purpose of attending to Gertrude's wishes, but rather delivered the executed documents to James' lawyer, Mr. Flak.

[203] Ms. Agnew next met with Gertrude on October 11, 2013, together with Dr. Yiu and Mr. Manning, who was then first introduced to Gertrude. Ms. Agnew testified that she presented Gertrude with a letter that Ms. Agnew had prepared at the direction of James' lawyer, Mr. Flak. The letter was directed to Mr. Ewald, for the purpose of notifying him that Gertrude "did not wish to speak with Mr. Ewald further and that any further communications by Mr. Ewald must be to her counsel, Ms. Agnew". This severed Gertrude's long-standing relationship with Mr. Ewald.

[204] The next day, on October 12, 2013, Gertrude was admitted to Sunnybrook Hospital, where she would remain hospitalized for six days with a bleeding duodenal ulcer. The admission report stated that Gertrude experienced "a 2-minute unresponsiveness and feeling weak and fatigued while being transferred from the bed". Gertrude was transfused, examined, and stabilized in Sunnybrook's Short Stay Unit.

J. Opening the BMO Joint Account

[205] On October 18, 2013, the day that Gertrude was discharged from hospital, Gertrude met with Ms. Virginia Shanker, the account manager with BMO. This meeting was not arranged by Gertrude's lawyer, Ms. Agnew. According to Mr. Corbin, this meeting was scheduled by James' lawyers. Specifically, Mr. Corbin testified that Mr. Flak asked him to set up a "privilege umbrella" to protect the confidentiality of documents provided to BMO. Mr. Corbin stated that he agreed to direct Ms. Shanker on Gertrude's behalf although, again, he had no mandate from her to do so.

[206] On the same day, Mr. Corbin provided Ms. Shanker with documents to provide BMO with the "necessary assurances as to Gertrude's intentions in creating the joint accounts, as to the manner in which the tax issues have been addressed, and as to the reason for James' request to create an account to hold 30 common shares of BMO". Mr. Corbin asked Ms. Shanker whether "this smooths the way to complete the steps that BMO Nesbitt Burns had been instructed to implement". I find that these instructions to BMO originated from James and his lawyers.

[207] Mr. Corbin stated that Ms. Shanker reported to him on October 18, 2013 that she was satisfied from her discussions with Gertrude that the transfer of the assets in the Investment Account to a joint account with James was "her choice". Ms. Shanker's also wrote that she would convey to her principals at BMO the urgency of the transfer of the investment account as "Gertrude is at great risk due to internal bleeding which is unstable". Amongst the documents

supporting the opening of the BMO Investment Account is a Certificate of Foreign Status of Beneficial Owner for U.S. Tax Withholding. This document states that it was executed by Gertrude on September 25, 2013. On that day, Gertrude was a patient at St. Joseph's Hospital.

[208] I do not accept Mr. Corbin's characterization of Ms. Shanker's assessment of Gertrude because it is hearsay and unreliable. James did not call Ms. Shanker to testify, even though she set-up the BMO investment account to which Gertrude's assets would be transferred.

[209] Joan submitted that I should draw an adverse inference from James' failure to call Ms. Shanker to testify, since it was clear that she had evidence that was material to Gertrude's opening of the BMO Investment Account jointly with James, relying on the principles set out in *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60 (C.A.), at para. 161-162; *Kaytor v. Lion's Driving Range Ltd.* (1962), 40 W.W.R. 173 (B.C. S.C.), at p. 176. I decline to do so for two reasons. First, an adverse inference ought to be drawn against a party for failure to give material evidence only "when that party alone could bring the witness before the court": *Robb Estate*, at para. 161, relying on *Lambert v. Quinn* (1994), 110 D.L.R. (4th) 284 (Ont. C.A.), at pp. 287-288. Joan could have summoned Ms. Shanker. Each party had a burden of proof to which Ms. Shanker's testimony was material: Joan, to prove undue influence in relation to Gertrude's testamentary dispositions and, James to rebut the presumption of undue influence in relation to the gratuitous transfers by Gertrude to him. Second, an adverse inference is unnecessary, as there is no dispute in the evidence that the meeting between Ms. Shanker and Gertrude was coordinated and directed entirely by James' lawyers, Mr. Corbin and Mr. Flak, and took place the day Gertrude was discharged from six days of hospitalization, at a time that Gertrude was frail and vulnerable.

[210] Two weeks later, on November 2, 2013, Gertrude was re-admitted to Sunnybrook Hospital, with pneumonia. She was stabilized, and discharged home on November 4, 2013 for 24-hour care.

K. The Legacy Letter

[211] On November 13, 2013, Ms. Agnew and Dr. Yiu met with Gertrude to present to her the draft of a letter that Ms. Agnew prepared. Ms. Agnew described the document as a "Legacy Letter", by which Gertrude could communicate her intentions in distribution of her assets. The letter was not needed to convey this to James, who was intimately aware of all that had occurred. Its obvious focus was Joan, who at that time knew nothing.

[212] Gertrude did not request the preparation of this letter: it was Ms. Agnew's idea. Ms. Agnew spoke with Dr. Yiu, about the letter and recorded Dr. Yiu's comment that she "doubts that Gertrude will approve but agrees that it is worth a try".

[213] Ms. Agnew testified that Gertrude did not reject the idea of sending the Legacy Letter, recording in her notes: "Gertrude not opposed to sending it in principle and general approach! Hurrah." Ms. Agnew did not explain why lawyers were preparing documents for Gertrude to

consider and execute without having received any instructions from her to do so. Ms. Agnew left the draft Legacy Letter with Gertrude, for her consideration, and set-out to work on a new Will.

L. 2014 Will and Estate Planning Documents Executed by Gertrude in January 2014

[214] On January 3, 2014, Ms. Agnew and Dr. Yiu met with Gertrude and brought with them five documents for Gertrude to consider, titled as follows:

(i) Declaration of Gertrude Rellinger, and Agreement of James Rellinger, concerning the gift of all indebtedness of James Rellinger and Joan Slover owed to Gertrude Rellinger (the "2014 Gift of Indebtedness Agreement"):

(ii) Deed of Gift from Gertrude Rellinger to James Rellinger ("2014 Deed of Gift");

(iii) A further version of the Legacy Letter;

(iv) Will (the "2014 Will");

(v) Deed revoking the Alter Ego Trust (the "2014 Alter Ego Trust Revocation Deed").

[215] There was no evidence that these documents had been previewed with Gertrude in advance of the meeting of January 3, 2014, whether by telephone or by preparatory meeting, as had occurred with the documents executed by Gertrude on October 5, 2013. There was no evidence that Gertrude had requested that any of these documents be prepared.

[216] Ms. Agnew did not draft the 2014 Gift of Indebtedness Agreement or the 2014 Deed of Gift. She again surmised that they were authored by either Mr. Corbin or Mr. Flak, and provided by one of them for her to review with Gertrude. Ms. Agnew authored the 2014 Will and the 2014 Alter Ego Trust Revocation Deed.

[217] These five documents contained the following components:

(i) The 2014 Gift of Indebtedness Agreement stated that Gertrude gifted to James any indebtedness owed to her by either James or Joan. This agreement reiterated that the decision of whether to share 25% of Gertrude's estate with Joan is James' decision to be made at the time of Gertrude's death (first contained in the August 2013 Investment Distribution Agreement and then in the 2013 Fund Disposition Agreement).

(ii) The 2014 Deed of Gift repeated that Gertrude gifted to James the debt owed to her, identical to the 2014 Gift of Indebtedness Agreement. Also, by this agreement, Gertrude gifted to James all her personal property and assets except for the BMO Investment Account.

(iii) The Legacy Letter contained the changes that Ms. Agnew stated were mandated by Gertrude to explain to her children her wealth distribution objectives.

(iv) The 2014 Will repeated the direction expressed by Gertrude in her May 2013 Will that on her death James was to receive 75% of her estate and Joan is to receive 25%. Unlike the May 2013 Will, the 2014 Will contained the Vanishing Inheritance Concept: should Joan contest the Will, she would receive nothing.

(v) The 2014 Alter Ego Trust Revocation Deed simply revoked the Alter Ego Trust.

[218] Ms. Agnew and Dr. Yiu testified that Gertrude understood the meaning and effect of these documents and had capacity to enter them. Gertrude executed these documents on January 3, 2014.

M. Internal Inconsistencies in the January 2014 Estate Planning Documents

[219] Ms. Agnew was cross-examined on the internal inconsistencies in the Estate Planning Documents that her client had executed between October 2013 and January 2014. There were three major inconsistencies that I find were not effectively explained in Ms. Agnew's testimony.

[220] First, with the implementation of the Investment Account Transfer Plan through the various Estate Planning Documents, which purported to convey the BMO Investment Account to James on Gertrude's death, and now with the gift to James of everything else that Gertrude owned, why did Gertrude need a new Will? What purpose would be served by the 2014 Will when nothing would pass through Gertrude's estate? Ms. Agnew did not know. She recorded in her note of January 3, 2014 that: "We discussed the appointment of Barry Corbin who made the [Investment Account Transfer Plan] so really she won't need the Will – it is more of a back-up situation". Ms. Agnew stated that she did not know what this meant.

[221] Second, if a new Will is being implemented in January 2014, why was the Alter Ego Trust being revoked? This Alter Ego Trust was founded in 2005 to support Gertrude's wealth distribution through her Will. The revocation of the Alter Ego Trust was consistent with the transfer of its only holding, the BMO Investment Account, but inconsistent with the execution of a new Will. Again, Ms. Agnew did not have an adequate explanation.

[222] Third, if Gertrude was prepared to trust James to convey 25% of her wealth to Joan on Gertrude's passing in his "discretion", as Ms. Agnew stated and as was now provided by three documents (the August 2013 Investment Distribution Agreement, the 2013 Fund Disposition Agreement, and the 2014 Gift of Indebtedness Agreement) why did she need to provide this direction to James, in his capacity as Estate Trustee, through the 2014 Will? Ms. Agnew did not have a sensible explanation.

[223] I do not accept that Ms. Agnew explained to Gertrude, or that Gertrude understood that the Estate Planning Documents presented to her had the effect of rendering her estate valueless, her Will meaningless, and entrusted to James complete control over whether Joan would receive

any of Gertrude's wealth on her passing. The Estate Planning Documents gave James "*absolute discretion*" over any inheritance to Joan, and gave James the power to use any of the funds in the BMO Investment Account during Gertrude's lifetime, as necessary to pay legal and accounting expenses, "including reimbursing himself for expenses which become payable or were already paid, *in his absolute discretion*": 2013 Fund Disposition Agreement, section 2; 2013 Use of Funds Agreement, at para. 1. This was a significant transfer of control by Gertrude to James in the use of her wealth during her lifetime and in the distribution of her wealth on her death.

[224] Both parties and all witnesses, including Ms. Agnew and Dr. Yiu, testified that Gertrude was always dominant and controlling in her financial affairs. They stated, as did James, that she jealously and proudly guarded this role. I accept this. I also accept that Gertrude would not have knowingly and of her own volition relinquished to James this control over her wealth and its distribution on her death.

N. The Disclosure to Joan

[225] The Legacy Letter was sent to Joan on January 3, 2014. Joan was at that time estranged from Gertrude, not having seen her since July 2013. Joan learned, for the first time, that her inheritance was reduced to 25%, and that she would receive nothing if she contested Gertrude's documents: "Your 25% is strictly conditional on your now agreeing never to contest Jim's future legal ownership of these investments or my Will or any other legal documents signed by me."

[226] I find that the Legacy Letter contained statements that were inconsistent with the Estate Planning Documents executed by Gertrude to that time, showing that Gertrude could not have fully understood the interaction of the documents. For example, Gertrude stated in the Legacy Letter: "I also do not want any of my carefully accumulated wealth to be wasted on lawyer's fees". At that same time, according to James, Gertrude had directed the retainer of a team of lawyers and had authorized James, in the Use of Funds Agreement, to "use any funds which he wishes to access, in the joint accounts which I will open at BMO Nesbitt Burns, for the purpose of paying lawyers."

[227] Gertrude wrote that she wanted Joan to enter into an agreement that would respect her wishes. The Legacy Letter did not explain that James held a joint ownership interest in the BMO Investment Account, with a purported Right of Survivorship, by which he was said to have an "absolute discretion" regarding whether to pay Joan 25% of the value of the Investment Account, and when. If valid, Joan's inheritance would be in James' hands: not Gertrude's.

[228] In the weeks following the delivery of the Legacy Letter, James took two steps. First, he arranged for Ms. Agnew to meet with Gertrude on February 7, 2014 to execute a Continuing Power of Attorney for Property. Second, James' lawyer forwarded to Joan a Confidentiality and Non-Disclosure Agreement (the "Confidentiality Agreement"). Ms. Agnew denied that she drafted this Agreement and again stated that it was prepared by one of James' lawyers: Mr. Corbin or Mr. Flak.

[229] The Confidentiality Agreement represented that 7 documents were pertinent to Gertrude's distribution of her assets and defined these documents as the "Confidential Information". However, this was far from the totality of the documents that Gertrude had signed. The Confidentiality Agreement did not identify or disclose several documents that directly affected Gertrude's distribution of her wealth, including the documents that resulted in *inter vivos* gifts to James. In paragraph 3 of the Confidentiality Agreement, in order to retain her 25% inheritance, Joan was required to agree not to challenge Gertrude's distribution of her wealth, but without disclosure, knowledge, or access to all documents affecting Gertrude's testamentary dispositions.

[230] Joan testified that she was upset that her mother had deviated from her life-long intention of treating her children equally. She was troubled that she was being asked to agree to the unequal distribution without disclosure of what had occurred. Joan intensified her attempts to reach her mother by telephone, without success. She decided to travel to Toronto to see her.

O. Joan's Visit with Gertrude in March 2014 – The Restriction on Access

[231] On March 2, 2014, after having not seen Gertrude for 8 months, Joan travelled to Toronto together with her family and a friend to visit Gertrude. Joan testified that Gertrude received them happily, that the half hour visit was surprisingly pleasant with no animosity or tension. Joan asked if she could contact her more regularly going forward, and Gertrude accepted without hesitation. Joan recalled that she had follow-up calls with her mother on March 3, 2014 and March 5, 2013, that were also pleasant. When Joan attempted to call Gertrude on March 7, 2014, she could no longer reach her. Joan could not have known the steps that her visit with Gertrude had set in motion.

[232] Ms. Agnew testified that Mr. Flak convened a meeting on March 7, 2014, with Gertrude, James, Mr. Flak and Dr. Yiu. Ms. Agnew's note of that meeting recorded the purpose: "Meeting at Jim's house around dining table following 'invasion' by Joan". Ms. Agnew characterized Joan's one-half hour social visit as "arriving unannounced and stampeding over her [personal support worker] and rocking her routine and schedule."

[233] Ms. Agnew stated, with no direct recollection but based on her notes, that Gertrude recounted that Joan had visited unannounced, that there was no argument, but rather the social visit was friendly. James testified, as did Ms. Agnew, that Gertrude was pleased with her interaction with Joan, was happy to see her, and delighted to see her granddaughter.

[234] Ms. Agnew recalled that Mr. Flak provided Gertrude with "more context". He told her that Joan had still not executed the Confidentiality Agreement and "was stalling". At this point, Ms. Agnew heard Gertrude say that she did not trust Joan. Ms. Agnew recorded that Gertrude then agreed with the suggestion made to her that Joan should not get her "confidential information".

[235] Following this meeting, steps were taken to restrict Joan's access to Gertrude. On March 10, 2014, Ms. Agnew wrote to Joan demanding that Joan not visit Gertrude without first arranging with James. James provided the Living Life staff with a memorandum stating that if anyone visited Gertrude without "permission" from him, the staff must "politely tell them they must leave immediately". James directed that if any visitor, including Joan, would not leave, the staff must call the Toronto Police and report that there is an "unwanted intruder" in Gertrude's room.

[236] There were several other records generated in the period from March 8 to 10, 2014, that contain James' direction that Joan and her family be denied access to Gertrude without James' prior approval. They all have the same common features: the direction to restrict access was credited to James; the restriction on access to Gertrude was specific to Joan and her family; the gateway to Gertrude was exclusively through James, whose permission was required for anyone to see Gertrude or to receive information concerning her care. These restrictions were for in person visits as well as screening of telephone calls. Last, if anyone did not respect these restrictions and entered Gertrude's room, the Toronto Police were to be summoned.

[237] James testified that he undertook each of these steps at his mother's specific request. I do not find this evidence to be credible or plausible. There is no corroborative testimony by others to support James' testimony. In all the copious and detailed notes and records authored by the Living Life staff and produced in this trial, there was not a single recording that Gertrude asked that Joan and her family be excluded. No other witness testified that Gertrude asked that Joan and her family be barred from visiting. Further, each direction restricting access, regardless of whether the direction is from the staff, the security personnel, or the personal support workers, attributed the direction to James and none to Gertrude. Last, I accept Joan's evidence that her discussions with her mother in March 2014, including a telephone call of March 24, 2014 that Joan recalled lasting almost an hour, were pleasant and non-confrontational, such that there would be no reason to restrict her from access to Gertrude.

[238] On April 18, 2014, James denied Joan's request for a visit with Gertrude over the Easter weekend, writing that Gertrude "feels that it would be inappropriate to have a visit at this time". Joan stated that she spoke with her mother on May 14, 2014, on Gertrude's 92nd birthday. Joan admitted that she inquired why Gertrude had changed her Will, and Gertrude responded that Joan's refusal to sign the Confidentiality Agreement caused a problem. Joan recalled that Gertrude stated that she missed her granddaughter and wanted to see her.

[239] This would be the last time that Joan would speak with Gertrude.

P. Joan's 2014 Application

[240] On June 24, 2014, Joan initiated an Application against Gertrude and James, and the Public Guardian and Trustee, for a wide spectrum of relief (the "2014 Application"). Joan sought production of powers of attorney executed by Gertrude for her care, medical records, accounting of James' handling of Gertrude's expenses as her attorney, a passing of accounts and, most

particularly, Joan sought an Order compelling Gertrude to undergo a capacity assessment by the psychiatrist of Joan's choosing, Dr. Kenneth Shulman. I will have more to say about this later.

Q. Estate Planning Documents Executed by Gertrude in August 2014

[241] On July 15, 2014, Gertrude was admitted to St. Joseph's Hospital with acute renal failure. She was found to weigh less than 40 kg. and was diagnosed with a lengthy list of serious conditions. Gertrude refused several recommended treatments. The medical caregivers concluded that the primary goal was comfort, maintaining Gertrude's life as long as possible. Gertrude was prescribed a fentanyl patch, and discharged on August 1, 2014, to 24-hour home care.

[242] On the same day that Gertrude was discharged from hospital, James arranged for Mr. Corbin and Dr. Yiu to meet with Gertrude. This meeting of August 1, 2014 was Mr. Corbin's first and only meeting or discussion with Gertrude, notwithstanding his evidence that she was his client. Mr. Corbin brought with him a document that he had prepared entitled, "Declaration of Intention", which contained a single sentence (the "2014 Intention Declaration"): "Because my daughter, Joan Slover, has commenced a legal proceeding against me and my son, James Rellinger, I do not wish her to receive any of my property after my death, either from me or my son".

[243] Mr. Corbin did not state who directed him to prepare this Declaration, but there is no evidence that Gertrude did so. James admitted that he arranged the meeting and I find, consistent with this, that James' lawyer prepared this document. Mr. Corbin testified that he explained this single-sentenced document to Gertrude, and that she understood its content.

[244] James testified that he arranged three more meetings by his mother with Ms. Agnew and Dr. Yiu in the weeks after her discharge from hospital. James swore, without any corroborating evidence, that on each such instance, Gertrude asked to see a lawyer and James obliged by scheduling meetings. I do not accept that in her frail state, just discharged from hospital and on fentanyl, and having executed numerous Estate Planning Documents, Gertrude asked for more.

[245] On August 19, 2014, Ms. Agnew and Dr. Yiu met with Gertrude with a document entitled, "My Wish". Ms. Agnew stated that she did not prepare this document and did not know who did. I conclude that, consistent with the manner of preparation of the 2014 Intention Declaration, it was drafted by one of James' lawyers, at James' direction. The document contains one sentence (the "2014 Wish Declaration"): "I do not want Joan Slover to receive any money from me or from James Rellinger because she refused to support my wishes and financial planning and is suing James Rellinger and me."

[246] Ms. Agnew did not explain why Gertrude was presented with two documents to express her testamentary wishes when the Estate Planning Documents that she had already executed purported to give James "absolute discretion" over whether to transfer any of her wealth to Joan.

[247] Ms. Agnew presented a second document to Gertrude on August 19, 2014, the 2014 Conflict Waiver. By this document, Gertrude would waive any claim against James' lawyers, Mr. Flak and Mr. Corbin. Ms. Agnew did not prepare this document and did not have any instructions from Gertrude to do so. She surmised, I find correctly, that it was drafted by James' lawyers.

[248] Ms. Agnew prepared a Codicil to Gertrude's 2014 Will and presented it to Gertrude on August 22, 2014. The 2014 Will Codicil stated that it was Gertrude's "express wish that none of my assets whatsoever are to pass on my death, directly or indirectly, to my daughter, Joan Slover, or to a trust for her daughter". Ms. Agnew and Dr. Yiu testified that Gertrude wanted the 2014 Will Codicil because Joan had started the Application against her.

[249] The evidence of Ms. Agnew and Dr. Yiu was that Gertrude thought that the 2014 Will and the 2014 Will Codicil had some meaningful effect. But if the Estate Planning Documents were effective, the 2014 Will and its Codicil would not have any effect because there would be nothing in Gertrude's estate to pass through her Will. This confusion is evident in the third paragraph of the 2014 Will Codicil, which shows Gertrude's understanding that James was holding her assets in trust for her or her estate:

> Because Joan has disregarded my wishes, and, instead, Joan has started proceedings in the courts against me, I am changing my Will and confirming my previous instructions to my son, James Rellinger, about all the assets he holds for me in trust. [Emphasis added]

[250] If the 2013 Sale of Right of Survivorship is effective, if the 2013 Fund Disposition Agreement is valid, then James was not holding the BMO Investment Account in trust for Gertrude's estate. This was a foundational principle of the Investment Account Transfer Plan. Ms. Agnew did not provide an explanation regarding the inconsistency between the 2014 Will Codicil and the Estate Planning Documents. Gertrude thought, on August 22, 2014, that James held her assets "in trust", to be distributed on her death through her 2014 Will.

[251] Ms. Agnew and Dr. Yiu met again with Gertrude on September 12, 2014, this time to present a document entitled, "Sworn Declaration of Gertrude Rellinger" (the "2014 Ratification Declaration"). Again, there was no evidence that Gertrude requested this document, and Ms. Agnew had no evidence as to who prepared it. James stated that he arranged this meeting at Gertrude's request, but did not say the purpose for the meeting. There was no evidence that the document was provided to Gertrude before the meeting for advance review. I find, in all the circumstances, that the 2014 Ratification Document was prepared by either Mr. Flak or Mr. Corbin and provided to Ms. Agnew for presentation to Gertrude.

[252] Ms. Agnew recalled that this document was intended to be a re-affirmation by Gertrude of all of the Post-August 2013 Documents that she had already executed: "I also ratify *all other documents signed in 2013 and 2014* which provide benefits to James, and none to my daughter,

Joan Slover." Ms. Agnew did not explain the list of documents to which this omnibus declaration pertained, and without this, I do not see how anyone could have understood its meaning.

[253] Even more importantly, paragraph 5 of the 2014 Ratification Agreement contained a clause that was inconsistent with the just-executed 2014 Will Codicil: "My wish is now for James to unconditionally own all my assets at the time of my death". This clause was opposite to the 2014 Will Codicil wherein Gertrude stated, and in my view intended, that James would hold her assets in trust for her and her estate.

R. The Settlement of Joan's 2014 Application

[254] On October 2, 2014, the parties settled the 2014 Application. Joan agreed to abandon the 2014 Application on the agreement that Dr. Yiu complete her capacity assessment with consideration of Joan's evidence and the evidence of others, and to share the report with Joan upon completion. In furtherance of this settlement, Joan met with Dr. Yiu on two occasions, for more than 12 hours, providing documents that she considered material to Dr. Yiu's assessment.

[255] On November 3, 2015, Dr. Yiu delivered a 51-page report entitled, "Assessment of Financial and Testamentary Capacities of Gertrude Rellinger". Dr. Yiu delivered her report to James' lawyer who, provided a copy to Joan's lawyer, in accordance with the term of settlement of the 2014 Application. Dr. Yiu's assessment concluded that Gertrude had testamentary capacity throughout. I will have more to say later about Dr. Yiu's assessment.

S. Gertrude's Death

[256] On March 15, 2016, James wrote to Joan that Gertrude, then 94 years old, was unwell and frail. James informed Joan that Gertrude's wish was that Joan not attend her funeral. Proposals and counter-proposals were sent in negotiation of Gertrude's funeral arrangements, without agreement.

[257] Gertrude died on April 22, 2016. James notified Joan the next day. Joan's request for details of their mother's funeral arrangements went unanswered. Joan and her family were deprived of an opportunity to attend Gertrude's funeral. James swore that this was his mother's wish.

[258] After Gertrude's death, Joan received, for the first time, the myriad estate planning documents that had been generated in the time from August 2013 to September 2014. On May 2, 2016, ten days after Gertrude's death, James sued Joan. She responded with an Application of her own one month later. Joan contended that on the date of her death, the BMO Investment Account held Gertrude's assets valued at $21,520,600.

IX. CREDIBILITY DETERMINATIONS

[259] I evaluated the credibility and reliability of all witnesses and have explained already my determination of the credibility of certain witnesses. I will explain my credibility assessment of

the evidence provided by Joan and James, which has a significant role in my analysis of Gertrude's testamentary capacity and of the issue of undue influence.

[260] In assessing credibility, I am guided by the statement of McLachlin J. in *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 248, as applied in *R. v. R. (D.)*, [1996] 2 S.C.R. 291, at para. 93, that: "Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter". I have assessed the credibility and reliability of the witnesses by referring to facts proven by others independently, and by considering whether their evidence is contradicted or corroborated by the evidence of other credible witnesses. My evaluation of a witness' credibility is based on my assessment of how that evidence fits into the entirety of the evidence presented at the trial.

[261] I have also assessed the interests and motives of the parties, whether questions are answered in a forthright and frank manner, whether their testimony was impeached in cross-examination and whether it is consistent with their examination for discovery evidence, whether they prevaricate or vacillate, whether they evade or argue or quibble, or whether they readily and candidly provide a response without focus on its implication to their position. I have considered whether their evidence is plausible, following the statement by O'Halloran J.A. in *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.), at p. 357, that: "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". I am also guided by the criteria applied by Cameron J. in *Prodigy Graphics Group Inc. v. Fitz-Andrews*, 2000 CarswellOnt 1178 (S.C.) as applicable to my determination of credibility.

[262] Applying all of these elements, I found Joan's evidence to be credible and reliable. She testified sincerely and in a forthright manner and answered, without debate or hesitation, questions that elicited responses that were contrary to her position. Her evidence was plausible, internally consistent, and largely corroborated.

[263] I had significant concerns about the credibility and plausibility of James' testimony. I explain some of the grounds for these concerns throughout my analysis but will provide some further reasons. James denied that he told Dr. Kennel about concerns that he had about his inheritance, and his belief that Gertrude might be "delusional", contrary to his sworn testimony at discovery and also against the weight of Dr. Kennel's precise evidence memorialized in his notes of February 22, 2013, April 19, 2013, and May 3, 2013 attributing these comments to James, which I accept. James' failure to disclose to his sister his conduct with their mother in the period from August 2013 onward and his gradual drip-feeding to Joan of the myriad documents and steps that he was taking on their mother's behalf, never revealing the entirety of the testamentary dispositions until the litigation was underway, showed a lack of candour and a pre-conceived design to obtain unfair advantage. Several of James' email communications to Joan in 2014 were shown in examination to be disingenuous. I found James' testimony was at times evasive, and at times calculated.

[264] I also could not accept James' consistent fall-back response, utilized repeatedly in answering questions on issues material to my assessment of undue influence, that he did what he did because that was what Gertrude wanted. This explanation was provided regarding several key areas: the retainer of Mr. Corbin to provide estate planning tax advice; the various meetings set up with lawyers when Gertrude was ailing, frail, or even recently hospitalized; the restriction on Joan's access to visit or call her mother; the transfers of wealth to him from Gertrude during her lifetime; and the payment by Gertrude of legal fees incurred by James. None resonated more than when James used this response to justify his refusal to tell his sister of their mother's funeral arrangements, insensitive to Joan's stated desire to attend. In each instance, James' testimony of Gertrude's stated intention was not supported by any reasoned or sensible explanation, and was against the preponderance of probabilities, resulting in his evidence at times seeming more convenient than genuine.

[265] I may accept none, part, or all of the witness' evidence, and may attach different weight to different components of a witness' evidence. Having considered all their evidence, I accept Joan's evidence over James' evidence on those issues where they conflict. I accept some elements of James' testimony where it is corroborated by the evidence of others.

X. CHARACTERIZING THE ESTATE PLANNING DOCUMENTS

[266] My analysis of whether the Estate Planning Documents, the Lifetime Gift Documents and the 2014 Will and Codicil are valid and are thereby applicable to determination of Gertrude's wealth distribution, begins with an assessment of their nature and character.

A. Characterization of the Estate Planning Documents

[267] If the Estate Planning Documents are valid, James would receive Gertrude's wealth on her death by reason of a right of survivorship, James would have the "absolute discretion" whether to share any of Gertrude's wealth with Joan, Gertrude's estate would be rendered penniless, and Gertrude's Will would be meaningless. The fulcrum on which these agreements pivots is the 2013 Sale of Right of Survivorship, which traces its origin to the August 2013 Investment Distribution Agreement and is replicated, re-affirmed, or referred to in the other Estate Planning Documents.

(a) The Principles Applicable to Determination of the Validity of the Estate Planning Documents

(i) The Estate Planning Documents are Gratuitous Transfers for Wealth Distribution, not Contracts

[268] The common element that is found in all the Estate Planning Documents is the transfer to James of the right of survivorship in any Investment Account that James held jointly with Gertrude: most notably, the BMO Investment Account in which Gertrude's wealth was held. The transfer of the right of survivorship by Gertrude to James is either a transfer by contract - through bargain and sale - as alleged by James, or it was a gratuitous transfer – a testamentary gift - as

alleged by Joan. This characterization is critical to my determination of the validity of the Estate Planning Documents and, through them, to my assessment of the manner by which James currently possesses the funds in the BMO Investment Account.

[269] I cannot accept James' submission that the August 2013 Investment Distribution Agreement, and the 2013 Sale of the Right of Survivorship that flows from it, are contracts. These documents contain none of the elements present in contracts. They were not negotiated. There was no offer and acceptance; no bargain or compromise. This applies equally to all Estate Planning Documents.

[270] In the case of the August 2013 Investment Distribution Agreement, Gertrude was not represented by a lawyer, was given no opportunity for legal advice, had no preview of the agreement that was presented to her while in her long-term care facility and, I find, had no understanding of the complex terms contained in the agreement, including the concept of right of survivorship. Most importantly, the August 2013 Investment Distribution Agreement flowed directly from the principles for wealth distribution set out in Gertrude's May 2013 Will: James was to manage Gertrude's funds on her death, as Estate Trustee, and was to distribute 25% to Joan. The refinements that James says were implemented by the August 2013 Investment Distribution Agreement were tools for distribution of Gertrude's wealth on her death: not a contract.

[271] James contended that the Sale of the Right of Survivorship was for monetary consideration, the amount of $5,000. This was, by James' admission, the return by him to Gertrude of $5,000 that Gertrude had given to him. I cannot accept James' submission that the consideration for receiving a contractual entitlement to $21,000,000 is to return to the same donor the amount of $5,000 that was gifted earlier.

[272] Even by its very wording, the 2013 Sale of the Right of Survivorship stated that Gertrude did not consider it to be a contract. This document provided that it shall "constitute only a technical sale and considers its overall effect to be to implement a gift of a right of survivorship": section 2. This concept is replicated in the 2013 Joint Account Agreement which states, at section 9: "While James used the same $5,000 which I gifted to him to purchase a right of survivorship, I consider and intend that the 'purchase and sale' aspect of the transaction to be only technical".

[273] In section 9 of the 2013 Joint Account Agreement, executed at the same time as the Sale of the Right of Survivorship, Gertrude described the Sale of the Right of Survivorship as a gift: "I consider and intend the transactions, and the effects of all transactions, which are described above, to be aspects of my making gifts to James, which have an unknown future value, which can only be established at the time of my death."

[274] To establish a gift, a party must show "[an] intention to donate, sufficient delivery of the gift, and acceptance of the gift": *Foley (Re)*, at para. 25, citing *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 24. I conclude that the Estate Planning Documents

provide for a gratuitous transfer to James, on Gertrude's death, of the right of survivorship of the BMO Investment Account, not a contractual sale of this right.

(ii) As the Gratuitous Transfer of the Right of Survivorship Occurs on Gertrude's Death, it must be Assessed Using Principles Applicable to Testamentary Gifts

[275] In assessing the character of the August 2013 Investment Distribution Agreement and the 2013 Sale of the Right of Survivorship and the manner by which their validity should be determined, I am assisted by the finding of the Court of Appeal in *Keljanovic*. In that case, the deceased owned a residential property as a tenant in common with her partner. While in palliative care, she executed a transfer of the title of the property from tenancy in common, by which her interest would pass through her will, to joint tenancy, by which the property would transfer to her partner on her death by operation of the right of survivorship. In assessing the validity of the transfer of the title from tenancy in common to joint tenancy, the Court of Appeal upheld the trial judge's determination that "because the transfer only had a practical effect when one of the joint tenants died and the survivor acquired the deceased's interest in the property, she should apply the principles applicable to testamentary dispositions for both issues, capacity and undue influence": *Keljanovic*, at paras. 36-37.

[276] Like the right of survivorship in *Keljanovic*, the Estate Planning Documents only had practical effect on Gertrude's death. For example, the August 2013 Investment Distribution Agreement, the 2013 Sale of the Right of Survivorship and the 2013 Joint Account Agreement stated that James did not have any entitlement to the funds in the Investment Account during Gertrude's life: 2013 Joint Account Agreement, section 3: "I do not presently intend to transfer any equity in those accounts to James while I am alive…"; 2013 Sale of the Right of Survivorship, section 3.1: "…no present or future value in the joint account accrues, or will accrue, to [James] until the moment of Gertrude's death…"

[277] On the authority of *Keljanovic*, I will apply the principles applicable to testamentary dispositions in determining the validity of the Estate Planning Documents. I note that other Courts have found that the test for establishing capacity for monetarily significant gifts is the same as the principles for establishing capacity for a testamentary disposition: *Brydon v. Malamas*, 2008 BCSC 749, at para. 230; *Miller v. Turney*, 2010 BCSC 101, at paras. 32-33; *Gironda v. Gironda*, 2013 ONSC 4133, at para. 99, citing *Re Beaney*, [1978] 2 All E.R. 595 (Ch. D.) at p. 601: "..if [the gift's] effect is to dispose of the donor's only asset of value and thus for practical purposes to preempt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will."

(iii) The Rebuttable Presumptions

[278] If the Estate Planning Documents are invalid, I must then determine the ownership of the assets that were transferred to James by Gertrude.

[279] The Supreme Court stated in *Pecore*, at para. 36, that gratuitous transfers between a parent and an adult child are subject to the presumption of resulting trust in favour of the deceased parent's estate. The presumption of resulting trust places on the recipient of the transfer the onus to demonstrate that a gift was intended. The Supreme Court explained this at paras. 24-25:

> The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E.E. Gillese and M. Milczynkski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

[280] The burden of proof is on the transferee, in this case James, to rebut the presumption of resulting trust by proving a contrary intention on the part of Gertrude, on a balance of probabilities: *Foley (Re)*, at para. 26, relying on *Sawdon*, at paras. 56-57; *Mroz*, at para. 72. My task is to weigh all the evidence in order to determine Gertrude's actual intention at the time that she transferred her assets to be held jointly with James, most notably the BMO Investment Account: *Foley (Re)*, at para. 26, citing *Pecore*, at para. 44; *Sawdon*, para. 57; *Mroz*, at para. 72.

(b) The Validity of All Wills Must Be Determined Using the Principles Applicable to Testamentary Capacity and Undue Influence

[281] The May 2013 Will and the corresponding amendment to the Alter Ego Trust Deed, and the 2014 Will, the 2014 Alter Ego Trust Revocation Deed, and the 2014 Will Codicil are, definitionally, testamentary dispositions. Their validity will be determined using the principles of capacity and undue influence applicable to testamentary dispositions.

(c) The Validity of the *Inter Vivos Gifts* Will be Determined with Rebuttable Presumption of Undue Influence

[282] "A valid *inter vivos* gifts is one that is intended to take effect during the lifetime of the donor": *Foley (Re)*, at para. 25. The 2014 Deed of Gift purported to gift to James all of Gertrude's possessions except the BMO Investment Account. The 2013 Use of Funds Agreement gifted to James access to the funds contained in the BMO Investment Account during Gertrude's

life, for discrete purposes, principally the payment of legal and accounting fees associated with defending any challenge to the Estate Planning Documents and the 2014 Will and Codicil.

[283] The 2014 Gift of Indebtedness Agreement gifted to James any indebtedness owed to Gertrude by her children. This document is ambiguous regarding whether this gift of indebtedness occurred during Gertrude's life or upon her death. However, the 2014 Deed of Gift, executed by Gertrude at the same time, stated that Gertrude gifted "all present indebtedness" of her children to James. To read these two agreements consistently, I find that the 2014 Gift of Indebtedness Agreement must be interpreted to mean that the indebtedness gifted to James was intended to be during Gertrude's lifetime.

[284] The validity of these documents will be assessed using the principles of capacity and undue influence applicable to *inter vivos* gifts. As these gifts are monetarily significant, the test that I will apply to determine capacity is the same as for testamentary disposition: *Brydon*, at para. 230; *Miller*, at paras. 32-33. I will determine whether the relationship between James and Gertrude had a "potential for dominance" so as to give rise to a presumption of undue influence: *Morreale*, at paras. 22-23. If so, the recipient, James, has the burden of rebutting the presumption of undue influence, on principles that I will apply from *Seguin*, at paras. 10-11.

XI. DID GERTRUDE HAVE TESTAMENTARY CAPACITY?

[285] To determine the validity of the May 2013 Will, the 2014 Will and its Codicil, the Estate Planning Documents and the Lifetime Gift Documents, I must assess Gertrude's testamentary capacity.

A. The Test for Testamentary Capacity

[286] The pertinent time for determination of testamentary capacity is at the time of giving instructions and executing the testamentary document: *Smith Estate v. Rotstein*, 2010 ONSC 2117, at para. 118; *Botnick et al. v. The Samuel and Bessie Orfus Family Foundation et al.*, 2011 ONSC 3043, at para. 103; *Gironda*, at para. 50.

[287] As the Ontario Court of Appeal stated in *Stekar v. Wilcox*, 2017 ONCA 1010, at para. 14, the test for determining testamentary capacity has been well-established since the Supreme Court, in *Skinner* adopted the test set out in *Banks*, at p. 56:

> It is essential to the exercise of such power that a testator shall understand the nature of the acts and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made

[288] In *Hall*, at para. 14, the Ontario Court of Appeal stated that a testator must have a "sound disposing mind" to make a valid will. The elements of a sound and disposing mind require that, on her or his own volition and initiative, the testator appreciate the bequeaths being made in the Will. Testamentary capacity is negated when a testator does not have a sound and disposing mind, through mental disorder, that influences the distribution of the estate: *Hall*, at paras. 14-15; *Banks*, at p. 59. In *Leger v. Poirier*, [1944] S.C.R. 152, at p. 161, the Supreme Court stated that "[a] 'disposing mind and memory' is one able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions and the like".

B. The Onus to Establish Testamentary Capacity

(a) Applicable Principles to Determine Onus - Suspicious Circumstances

[289] In *Vout*, at para. 26, the Supreme Court of Canada held that the propounder of a testamentary disposition has the legal burden of establishing due execution, knowledge, approval and testamentary capacity. However, once due execution of the document having been read by the testator is established, there is a rebuttable presumption that the testator knew and approved of the testamentary disposition: "Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity."

[290] The presumption of capacity on the part of the testator places the evidentiary burden on the person challenging the Will. However, this rebuttable presumption does not apply when suspicious circumstances exist. The presumption of testamentary capacity is displaced when suspicious circumstances regarding the preparation and execution of the will are established and, if the suspicious circumstances pertain to mental capacity, the propounder also has the legal burden of establishing that the testator had the mental capacity to execute the Will: *Stekar v. Wilcox*, 2017 ONCA 1010 (C.A.), at para. 8. Sopinka J. explained this in *Vout*, at para. 27:

> Where suspicious circumstances are present, then the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standard.

[291] The presence of suspicious circumstances does not impose a higher burden of proof on the propounder of the will than the civil standard on a balance of probabilities: *Royal Trust Corp. of Canada v. Saunders*, 2006 CanLII 19424 (Ont. S.C.) at para. 77, relying on *Vout* and *Scott v. Cousins,* [2001] O.J. No. 19 (S.C.).

[292] In *Gironda*, at para. 55, and in *Royal Trust*, at para. 78, the Courts held that the presence of suspicious circumstances can be assessed by considering the following factors: the extent of physical and mental impairment of the testator at the time the Will was executed; whether the Will under consideration constituted a significant change from the former Will; whether the Will under consideration makes "testamentary sense"; the factual circumstances surrounding the execution of the Will; whether a beneficiary was instrumental in the preparation of the Will.

[293] In order to rebut the presumption of testamentary capacity, and shift the burden of proof to James, Joan must adduce sufficient evidence to "raise an issue" as to testamentary capacity: *Royal Trust*, at para. 76. There must be "some evidence that 'excites the suspicion of a court'": *Royal Trust*, at para. 76 relying on *Scott*, at para. 41. In *Vout*, at para. 25, the Supreme Court stated that suspicious circumstances may be raised by: "(1) circumstances surrounding the preparation of the will, (2) circumstances tending to call into question the capacity of the testator, or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud."

(b) Analysis – The Presence of Suspicious Circumstances

[294] At the time that Gertrude began to execute the Estate Planning Documents in August 2013 and thereafter, including to execution of the 2014 Will and then its Codicil, there are a number of facts that I find to constitute suspicious circumstances. Gertrude's health was frail in August 2013, and for significant periods thereafter. She was socially isolated and distressed in August 2013. The Estate Planning Documents and then the 2014 Will and its Codicil contain significant changes from her May 2013 Will, in the areas that I have explained, which include her transfer of her wealth to a joint account with James, the delegation to James of control over the distribution of wealth on her death, and the reduction in inheritance to Joan, eventually to zero.

[295] I find that the circumstances surrounding Gertrude's execution of the August 2013 Investment Distribution Agreement particularly troubling, as Gertrude was presented with this document without the benefit of preview or counsel. The pace and volume of the documents presented to Gertrude throughout the 13-month period from August 2013 to September 2014 also, in my determination, raise suspicious circumstances, as does the factor that, on my findings, Gertrude did not request that many of these documents be prepared on her behalf and most, including those most contentious, were prepared by James' lawyers.

[296] The May 2013 Will was, on the other hand, directed by Gertrude and executed by her with the assistance of her long-standing counsel. Gertrude had an opportunity to reflect on the basis of the significant change that she made to an unequal distribution to her children of her assets on her death. None of these elements present suspicious circumstances. However, Dr. Kennel's evidence called into question the capacity of Gertrude's mental and emotional health at the time of her execution of the May 2013 Will which, if accepted, would constitute suspicious circumstances, as does the capacity assessment by Ms. Woynarski.

(c) Conclusion – James Has the Onus of Establishing that Gertrude had Testamentary Capacity

[297] I have determined that there were suspicious circumstances present throughout Gertrude's execution of the Post-August 2013 Documents, which includes the Estate Planning Documents, the Lifetime Gift Documents and the 2014 Will and its Codicil. By reason of the presence of suspicious circumstances, the presumption that Gertrude had capacity is displaced, and James, as the propounder of these documents, bears the onus of establishing that Gertrude had testamentary capacity at the times of their execution.

[298] In the event that I should determine that the Estate Planning Documents and the 2014 Will and its Codicil are invalid, either because Gertrude lacked testamentary capacity or was subject to undue influence, James propounds the May 2013 Will as valid. I have determined that there were suspicious circumstances present at the time that Gertrude executed the May 2013 Will. As such, James, as the propounder, in the alternative, of the May 2013 Will, bears the onus of establishing that Gertrude had testamentary capacity at the times of execution of the May 2013 Will.

C. The Challenge to Gertrude's Testamentary Capacity – Mental Disorder Resulting from Delusions

[299] Joan did not challenge Gertrude's testamentary capacity on four of the five criteria set out in *Banks*. Specifically, Joan conceded that, throughout, Gertrude understood the nature of a Will and its effect; that she understood the nature and extent of her property relevant to the disposition; that she was capable of evaluating the claims of those who might expect to benefit from her estate, and; that she was capable of communicating a clear and consistent rationale for the distribution of her property on her death.

[300] I pause to observe that, on the evidence, there could be no viable challenge of Gertrude's satisfaction of these four criteria. Not only was Gertrude well-aware of her holdings, but she earned over $800,000 on her investments in 2013, at 91 years of age. She lived a lifetime knowing that only her two children had a claim to benefit from her estate, and she was, by all evidence, capable of communicating a clear basis for the handling and distribution of her wealth.

[301] Rather, Joan challenged Gertrude's testamentary capacity in May 2013 primarily on a single ground, that insane delusions influenced Gertrude's will-making. This challenge is based on the requirement, first stated in 1870 in *Banks*, at p. 56, and applied since, that if a person suffers from delusions that interferes with her or his ability to make a "rational disposal of property" then the testamentary disposition cannot stand:

> If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and

> disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence - in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.

[302] Joan contended that Gertrude's insane delusions caused her to believe that Joan was an uncaring, unkind, inattentive daughter who was untrustworthy, and thereby alienated Gertrude's affection toward Joan and influenced her testamentary dispositions, in circumstances where the basis for Gertrude's beliefs had no factual basis in reality.

D. What is a Delusion?

[303] Dr. Shulman and Dr. Yiu both testified, and I accept, that a delusion is a fixed false belief that is out of keeping with one's educational, cultural and religious background, that is incapable of being altered when shown to be unfounded. In *Skinner*, at p. 76, the Supreme Court stated that a "[d]elusion is insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however illogically upon the assumption of their existence".

[304] Joan's position that Gertrude harboured illusions that influenced her testamentary dispositions relied heavily on two cases: the decision of the British Columbia Supreme Court in *Brydon*, and; the decision of Cullity J. in *Banton*.

[305] In *Brydon*, a testator had executed Wills in which her niece was the main beneficiary. The testator had, during her lifetime, transferred to her niece a residential property on the promise that her niece would not sell it, or would not sell it to anyone outside the family. The testator changed her Will to exclude her niece, on her belief that her niece had sold the residential property. The parties seeking to uphold the Will submitted that the testator had removed the niece as a beneficiary because the new beneficiaries had developed a more loving relationship with the testator, because the niece's relationship with the testator had deteriorated, because the niece had already received gifts from the testator during her lifetime, and because the testator believed that the niece had broken her promise not to sell the residential property.

[306] The Court determined that the testator's statements that the plaintiff had promised not to sell the residential property, and had broken that promise, were false, such that there was no basis in fact, for the testator's beliefs. Rather, the Court found that the testator had proceeded on delusions that rendered her incapable of distributing her assets. The Court thereby concluded that the parties seeking to propound the Will failed, on a balance of probabilities, to establish that the testator had testamentary capacity because she suffered from delusions: *Brydon*, at paras. 220-225.

[307] In *Banton*, the testator did not leave anything to his children because he believed that he had been abused by them and that his family was not interested in him but only his wealth. Even though Cullity J. accepted that the testator genuinely held these beliefs, the Court also

determined that these beliefs were contrary to all the evidence and were in conflict with what the testator must have known if not cognitively impaired. The Court concluded that the testator's false beliefs were based on insane delusions, with the result that the proponent of the Will failed to discharge her burden of establishing testamentary capacity. Cullity J. stated that the distinction between a perceptively unkind decision to disentitle a beneficiary for seemingly insufficient cause and a delusion will depend on the circumstances of the individual case: *Banton* at para. 47.

[308] The Court in *Banton* stated, at para. 33, that insane delusions are "not limited to beliefs that are so bizarre that their content, by itself, evidences mental disorder". Rather, the "delusions include beliefs whose extreme improbability is apparent only when the surrounding facts are known". Cullity J. posed the approach to the analysis as follows, at para. 33: "In all cases where delusions of this kind are alleged to exist, there will be a question whether the belief should be characterized merely as quite unreasonable, on the one hand, or as something that, in the particular circumstances, no one 'in their senses' could believe." I am guided by Cullity J.'s formulation of the question that must be answered to find that a testator is without capacity by reason of an insane delusion at para. 33:

> The nature of the belief is not necessarily the turning point, or even the apparent lack of a basis for such belief. Rather the question is whether, considering all the facts and circumstances, it is fairly shown that the will proceeded from and on account of a deranged mind. [Citation omitted]

[309] In *Royal Trust*, at paras. 67-74, Blishen J. conducted a survey of cases that had analysed whether a testator's capacity was lost by reason of insane delusions: *Wilson v. Churchmack*, [1998] O.J. No. 3733 (Ct. J. (Gen. Div.)), at para. 197: "For a delusion to affect testamentary capacity it must so take over a testatrix's mind that it governs the making of her will"; *Re Barter*, [1939] 2 D.L.R. 201 (N.B. S.C. (A.D.)); *Re McLeod's Estate* (1989), 94 N.S.R. (2d) 148 (N.S. Prob. Ct.), aff'd 95 N.S.R. (2d) 61 (N.S. C.A.); *Re Schwartz*, [1970] 2 O.R. 61 (C.A.); *Burge v. Burge* (1989), 77 Nfld. & P.E.I.R. 58 (N.L. S.C.(T.D.)); *Abrahamson Estate, Re* (1994), 96 Man R. (2d) 150 (Q.B.), aff'd 102 Man R. (2d) 233 (C.A.), *Re Ward Estate*, [1990] O.J. No. 819 (Ont. Ct. J. (Gen. Div.)); *Royal Trust v. Ford*, [1971] S.C.R. 831 ("*Royal Trust v. Ford*").

[310] The thread that runs through these cases is that for a testator to be found incapable on the basis of insane delusions, the delusion must be shown to be false and fixed, that is incapable of explanation or rationalization, and it must have taken over the person's will-making. Anger or resentment based on a factual basis that exists is not enough.

E. Framing the Analysis of Whether Gertrude had a Delusional Disorder

[311] The question that I must answer is whether Gertrude's belief that Joan was an uncaring, unkind, inattentive daughter who was untrustworthy were "fixed, false beliefs", as defined by the expert psychiatrists. Were they, on the evidence that I have accepted, delusions? This is more than Gertrude getting the facts wrong or misinterpreting a situation or exaggerating or posturing. This is more than Gertrude being vindictive, spiteful, mean-spirited, or unforgiving. This is a

persistent belief in a state of facts that no rational person could hold to be true but rather exist only in the mind of the deluded testator: *Skinner*, at p. 76. As stated by Cullity J. in *Banton*, at para. 47, this is a fact specific analysis that calls for a determination of whether the testator had a factual basis for the belief that influenced her will-making, whether the testator's will-making was made on delusion or whether it had some basis in fact, however tenuous:

> The question whether an erroneous belief crosses the line between an unreasonable and capricious conclusion with some very tenuous, illogical or illusory basis in facts and a delusion due to mental weakness or disorder will often be one of degree and will depend upon the particular circumstances.

[312] My task is to determine whether Gertrude's decision, in May 2013 and in the period from August 2013 to September 2014, to reduce Joan's inheritance from 50% to 25% and then to zero, was based at least on a "tenuous, illogical or illusory" basis in facts, or rather was the product of delusions. In contending that Gertrude was suffering from a delusional disorder, Joan relied mainly on her testimony, the evidence of Dr. Kennel, the contemporaneous capacity assessment by Janice Woynarski in May 2013, and the retrospective capacity assessment conducted by Dr. Shulman.

[313] James contended that Gertrude's beliefs towards Joan had a basis in fact: even if only an "unreasonable and capricious conclusion with some very tenuous, illogical or illusory basis". James relied principally on his testimony, the assessment made by Messrs. McCarter and Weir of Joan's testamentary capacity in May 2013, the evidence of Mr. Corbin and Ms. Agnew and the testamentary capacity assessment conducted by Dr. Yiu.

F. Analysis – Was Gertrude's Will-Making Affected by Delusions?

[314] All who testified stated that Gertrude's decision to treat Joan unequally than James in her testamentary dispositions, and indeed in her gifting, was based on her belief that Joan was an "uncaring, unkind, inattentive" daughter who was "untrustworthy". I accept that these beliefs influenced Gertrude's decisions in distribution of her wealth in the May 2013 Will, in the Estate Planning Documents, in the Lifetime Gift Documents and in the 2014 Will and its Codicil. Accordingly, should I determine that Gertrude held these beliefs due to insane delusions, it would follow that she lacked testamentary capacity because I have determined that these beliefs informed her testamentary dispositions and *inter vivos* gifts.

(a) The Expert Opinion Evidence

[315] The parties called two experts to testify to Gertrude's capacity at the time of her execution of the May 2013 Will and during the time of her execution of the Post-August 2013 Documents. Joan called Dr. Kenneth Shulman and James called Dr. Wendy Yiu.

(i) Dr. Kenneth Shulman

[316] Dr. Shulman's qualifications as an expert geriatric psychiatrist were not challenged by James. Since completing fellowships in psychiatry in the United Kingdom and Canada in 1978, he has been a full-time staff member in the Department of Psychiatry at Toronto's Sunnybrook Health Sciences Centre. He has been a professor in the Department of Psychiatry at the University of Toronto since 1994. He is the accomplished author of a vast collection of articles, studies, treatises, and books in psychiatry, with a focus on geriatric psychiatry. He is the recipient of multiple honours in medical practice and teaching.

[317] In her 2014 Application, Joan sought an Order that Dr. Shulman conduct a testamentary capacity assessment of Gertrude. This was opposed by Gertrude and James, and this Application was settled without determination of this issue. Joan did not have the opportunity for Dr. Shulman to conduct a contemporaneous capacity assessment of Gertrude, leaving Dr. Shulman to conduct a retrospective testamentary capacity assessment that was based on his analysis of the voluminous records that were produced in this Consolidated Application.

[318] James objected to the admissibility of Dr. Shulman's expert opinion evidence, mainly on the basis that Dr. Shulman's retrospective capacity assessment was not reliable, emphasizing that Dr. Shulman had not met and assessed Gertrude but rather proposed to offer opinions based on a "paper review" of the records. Having denied Dr. Shulman the opportunity to conduct a contemporaneous capacity assessment of Gertrude when sought by Joan, thereby limiting Dr. Shulman to a retrospective capacity assessment, James then objected to the admissibility of Dr. Shulman's expert opinion evidence on the basis that it was not contemporaneous and therefore unreliable. I did not accept this submission. I admitted Dr. Shulman as an expert in the area of geriatric psychiatry to give opinion evidence in the area of retroactive testamentary capacity assessment.

[319] Dr. Shulman testified that Gertrude satisfied all the criteria set out in *Banks* for testamentary capacity except for one: namely, Dr. Shulman opined that Gertrude suffered from a delusional disorder, causing her thinking, behaviour, and disposition of her assets to be influenced by her delusions. Dr. Shulman explained that a delusion is a fixed, false belief that is out of keeping with one's educational, cultural, and religious background.

[320] Dr. Shulman's opinion that Gertrude suffered from delusions was formed on his interpretation of Gertrude's conduct. Dr. Shulman found that Gertrude had a consistent, persistent pattern of accusation and confrontation with Joan, Dr. Kennel, and the staff at Columbia Forest. He set out to investigate whether Gertrude's beliefs concerning these people had a factual basis or whether they were the product of a fixed, false belief. Dr. Shulman underwent the same analytical quandary as Dr. Kennel: is Gertrude abusive, rude, and purposefully confrontational, or is she delusional? Is she basing her belief that Joan is uncaring, Dr. Kennel unresponsive, and the Columbia Forest staff incompetent on a factual basis or on delusion?

[321] I found that Dr. Shulman's expert opinion evidence was relevant, reliable, and necessary to frame my assessment of Gertrude's testamentary capacity, in applying the psychiatric concept

of delusional disorder and its constituent elements. However, beyond assisting in framing my analysis, Dr. Shulman's opinion evidence was of limited value because, as Dr. Shulman freely volunteered in his testimony, the determination of whether Gertrude suffered from a delusional disorder depended on my finding and interpretation of the facts that fueled Gertrude's beliefs regarding Joan and others. If Gertrude had a factual basis for her beliefs, then she was not delusional. Gertrude could, according to Dr. Shulman, have controlling personality characteristics, be strong-willed and dominant, and even be abusive and unkind toward her children and still be capable. The issue would be determined on whether, on the facts that I find, Gertrude had some basis, however tenuous, for her beliefs.

(ii) Dr. Wendy Yiu

[322] Joan objected to Dr. Yiu's qualifications to perform a testamentary capacity assessment because, after some 16 years as a practising psychiatrist, this was her first such assignment. I do not accept this submission. Dr. Yiu had the education, training, professional certification, and the experience necessary to be qualified to provide expert opinion evidence of Gertrude's testamentary capacity.

[323] Joan's broader objection to the admissibility of Dr. Yiu's expert opinion evidence was that Dr. Yiu was not independent. Joan contended that Dr. Yiu was part of the "team" assembled by James to guard against any challenge that Joan might make to Gertrude's unequal distribution of her wealth. I admitted Dr. Yiu's expert opinion testimony on the basis that she was a participant expert, who was able to provide admissible evidence of her observations and participation in the events in issue and her opinions that derived from the ordinary exercise of her skill, knowledge, training and experience while observing or participating in such events, in accordance with *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at paras. 59-64. I will explain.

[324] Although Dr. Yiu delivered a *Rule* 53-compliant report and Acknowledgement of expert duty, apart from her testimony pertaining to Gertrude's capacity at the time of her execution of the May 2013 Will, Dr. Yiu was substantively a participant expert, as that term is defined in *Westerhof*. When Dr. Yiu conducted her ongoing assessment of Gertrude, there was no litigation pending. Her capacity assessment was on behalf of Gertrude, who is a non-party to this Consolidated Application. I find that when Dr. Yiu assessed Gertrude she did so as her assessing psychiatrist *well-before* any litigation was initiated, and Dr. Yiu delivered her capacity assessment report before the inception of litigation.

[325] Dr. Yiu testified that she perceived that her role as a capacity assessor changed in October 2014, when a term of settlement of Joan's 2014 Application required that she complete her capacity assessment report with consideration of evidence that she was to gather from Joan and others and share the report with Joan. Dr. Yiu did so, conducting interviews, receiving documents, and fact finding. She delivered her capacity assessment report on November 2015 to both James and Joan, months before the initiation of litigation between these parties, further bolstering my conclusion that Dr. Yiu was a participant expert.

[326] As a result, the unusual closeness that Dr. Yiu had with the patient whose capacity she was assessing, the high number of visits to assess capacity, numbering 22 in a 14-month period from August 2013 to October 2014, the proximity that she had with Gertrude's lawyers, are compelling considerations in assessment of the independence of a litigation expert, but was part of the narrative by which Dr. Yiu assessed and observed Gertrude before the initiation of litigation. These considerations go to the weight that I attribute to Dr. Yiu's evidence as a participant expert. I will explain some limitations that I have placed on the weight that I will give to Dr. Yiu's evidence.

[327] Dr. Yiu's conduct and involvement with Gertrude went well-beyond that expected or required for a capacity assessment. Dr. Yiu's process of evidence gathering, witness interviews, document collection and analysis, and the weighing and assessment of the information was beyond her role in conducting a capacity assessment and providing opinion evidence of a psychiatric nature. Dr. Yiu testified that she viewed herself as the "eyes and ears of the Court". She had no such role.

[328] Dr. Yiu stated that she formed her opinion of Gertrude's testamentary capacity, in part, on the basis of days of interviews that she conducted of Joan and Dr. Kennel and some 18,000 pages of documents that she professed to having reviewed, the vast majority of which was not proven at trial as evidence. I disregard the opinions that Dr. Yiu derived from her self-acclaimed "investigation", except to the extent that the evidence that she relied upon in coming to her opinion was proven at trial.

[329] I specifically disregard any opinion that Dr. Yiu proffered on whether Gertrude was subject to undue influence by James. I do so for the following reasons. First, this was not an issue that came within the permissible scope of testimony for which Dr. Yiu was qualified, rendering any opinion that she provided on the issue of undue influence inadmissible. Second, she was not in a position even to make this assessment. By the time that Dr. Yiu was retained and her services were activated, Gertrude had already executed the August 2013 Investment Distribution Agreement and the formulation and implementation of the Investment Account Transfer Plan was underway. Any assessment made by Dr. Yiu of undue influence was, like Ms. Agnew, made in a context whereby Gertrude's willingness to transfer her assets to a joint account, disentitle Joan to any inheritance, and delegate to James the discretion of whether to transfer wealth to Joan was already set in motion.

[330] I accept that Dr. Yiu met with Gertrude on 22 occasions in the 14-month period commencing on August 23, 2013 and ending on October 30, 2014. I accept that she was in a position to observe Gertrude's conduct and to assess her mental status. She was present and observed as Gertrude considered and signed the Post-August 2013 Documents. To this extent, I found Dr. Yiu's opinion evidence to be admissible under *Westerhof* and useful.

[331] Dr. Yiu stated that all people have cognitive biases, and that the challenge in diagnosing delusional disorder is to determine whether the person's beliefs are based on delusion or perception, interpretation, or personality. Dr. Yiu explained that delusional disorders occur in

less than .2% of the population. Dr. Yiu stated that she assessed whether Gertrude had any cognitive disorder, including delusions. To do so, Dr. Yiu assessed Gertrude's affect, appearance, eye contact, volume of voice, memory and attention span, ability to maintain contact, insight, and judgment. She also focused on whether Gertrude was prepared to consider different outcomes if the facts on which she was proceeding were shown to be unfounded.

[332] Dr. Yiu's expert opinion was that Gertrude did not suffer from a delusional disorder. She based this opinion on her observation that Gertrude had a factual basis for the views that she held of Joan that influenced her decisions and that when confronted with contrary circumstances, Gertrude was prepared to alter her beliefs. Dr. Yiu stated that, in her view, Gertrude had testamentary capacity at the times that she executed the Post-August 2013 Documents in Dr. Yiu's presence as Gertrude did not have, at those times, any mental condition or disorder influencing her decisions or affecting her ability to understand and appreciate the documents that she was executing.

(iii) Conclusions Regarding the Expert Testimony

[333] I accept Dr. Shulman's eminent qualifications and insightful testimony in principles of geriatric psychiatry, but I do not accept his conclusion regarding Gertrude's testamentary capacity. Dr. Shulman's conclusion was based on presumed facts that I do not accept. For example, Dr. Shulman's findings that Gertrude had provided gifts to her children equally until 2013, that Joan had visited Gertrude and cared for her consistently throughout, and that Gertrude had no sensible basis for complaint of her care at Columbia Forest were not proven. Dr. Shulman's opinion, which relied on these and others similarly unproven, cannot therefore be given weight. I note, as well, that Dr. Shulman did not cite a single instance of Gertrude having a fixed, false belief that derived from Gertrude's conduct from the time that she left Columbia Forest in September 2013 to her death in April 2016.

[334] I acknowledge as valid Joan's contention that Dr. Yiu crossed the line from Gertrude's objective capacity assessor to Gertrude's physician, having a role in Gertrude's care and health support. This is seen from Dr. Yiu's agreement to act, for some time, as Gertrude's substitute attorney for care and in periodically providing input on Gertrude's health needs and care. However, this does not diminish Dr. Yiu's unique position as a participant expert to observe Gertrude's mental condition, to assess Gertrude's processing of information and formulation of beliefs, at the numerous times post-August 2013 that are material to my analysis of her testamentary capacity.

[335] I accept Dr. Yiu's evidence that, as a qualified psychiatrist, she saw no sign that Gertrude had a delusional disorder in the 22 occasions that Dr. Yiu observed Gertrude from August 2013 to October 2014 and did not diagnose any cognitive disorder that affected Gertrude's will-making. This is useful evidence as Dr. Yiu was uniquely positioned to make these assessments, but only one element in my analysis. I will decide the ultimate issue of Gertrude's testamentary capacity on all the evidence presented: *Dujardin v. Dujardin*, 2018 ONCA 597.

(b) Analysis: Was There a Factual Basis for Gertrude's Beliefs?

[336] To assess whether Gertrude suffered from insane delusions, I must determine whether there is a factual basis – even very tenuous, illogical, or illusory – for Gertrude's belief that Joan was an uncaring, unkind, and inattentive daughter, and that she was untrustworthy. I am not required to determine whether Joan had these characteristics, and I specifically decline to do so. In the following analysis, I assess solely whether Gertrude had a factual basis for these beliefs.

(i) The Unequal Gifting Started Well-Before the 2013 Will

[337] I do not accept James' contention that Gertrude's strained relationship and disappointment with Joan traces back to childhood, and that this family history provides the foundational backdrop to Gertrude's conclusions in 2013 to 2014 to disinherit Joan. I have found that Gertrude gifted money to her children equally in the 16-year period from 1989 to 2005. I concluded that she did so notwithstanding that Gertrude had a different relationship with Joan than with James. Accordingly, regardless of what had happened historically, up to 2005 Gertrude distributed her wealth equally to both children.

[338] However, the change that I found in Gertrude's gifting to her children in the period from 2005 to 2008 was a precursor to what would follow. The unequal gifting by Gertrude to her children beginning in 2005 resulted in James receiving 73.8% of Gertrude's gifts and Joan 26.2%, closely replicating the unequal percentages employed by Gertrude in her May 2013 Will.

[339] The loan forgiveness provided for by the 2008 Will, which favoured James unequally to the extent of some $1,500,000, was the start of unequal treatment by Gertrude of her children in her Will. The formalization of an unequal percentage distribution in the May 2013 Will was the culmination of this direction in Gertrude's approach to her wealth distribution but was not a change. I conclude that the unequal gifting in the May 2013 Will then was not a directional change from the 2008 Will but rather it was an incremental change.

(ii) Factual Basis for Beliefs of Regarding Care and Kindness

[340] I accept Joan's testimony that she visited her mother once a week, or so, at Columbia Forest in the period from November 2005 to December 2012. I also accept Joan's evidence that these visits involved Joan bringing items that Gertrude required and attending to tasks and errands on her behalf. I did not hear evidence of activities that Joan engaged in with Gertrude, common interests that they discussed, or outings that they shared apart from medical appointments and the visit to Joan's house on June 29, 2007 when Gertrude fell and broke her hip.

[341] I also accept Joan's evidence that Joan stopped seeing Gertrude in December 2012 and did not resume her regular weekly visits until April 19, 2013.

[342] When Gertrude told the capacity assessor, Ms. Woynarski, on May 13, 2013, that her daughter had not visited her for Christmas, it was not a delusion: it was true. Joan submitted that

when Gertrude told Ms. Woynarski that her daughter had not visited her for her birthday, it was a delusion because Gertrude's birthday was the day following. I cannot accept that this was an insane delusion as opposed to an exaggeration. Indeed, as matters would have it, while Joan did not visit with her mother the next day, on her birthday, the visit was brief and perfunctory.

[343] I do not accept Joan's submission that Gertrude was delusional in that she forgot that Joan had visited her on a regular basis for a 7-year period. On all the evidence, I find that Gertrude's statement to Ms. Woynarski, Dr. Kennel, Mr. Weir, and anyone else who would listen, that Joan did not visit with her, had a factual basis in Joan's physical and emotional absence from Gertrude's life in the period from December 2012 to April 2013.

[344] Joan complained that she accompanied her mother to dental and ophthalmology appointments and that Gertrude complained that Joan's physician choices were ill-founded and the practitioners unsuitable. I do not see this as a delusion, or a fixed, false belief, as contended by Joan, but rather an expression of opinion.

[345] And last, Joan stated that Gertrude was delusional because she accused Joan of calling her a derogatory term, and told her that no one likes her, when Joan denied having made such comments. From my assessment of the totality of the evidence, including Joan's testimony, I readily find that Joan's relationship with Gertrude had some terse episodes and tense exchanges that gave rise to the probability of regrettable language. I am satisfied that Gertrude's attribution of derogatory references by Joan of her was not devoid of any basis in fact, even if tenuous or exaggerated.

[346] I accept Joan's testimony that Gertrude blamed her for her move to Columbia Forest, which Gertrude came to resent, for her declining health, and for her sense of abandonment. Joan had a participation in these events. Joan advised Gertrude in the selection of Columbia Forest and her move there, Gertrude sustained a major injury while in the company of Joan and her family, and Gertrude's sense of abandonment at Columbia Forest correlates to Joan's absence.

[347] Without in any manner determining whether Joan was, in fact, an "uncaring, inattentive, unkind daughter who was untrustworthy", which I am not required to decide for my analysis and decline to do so, I find that Gertrude had a factual basis – even tenuous, illogical, or illusory – to hold these beliefs. Accordingly, I do not accept that these beliefs were based on insane delusions.

(iii) Factual Basis for Belief Regarding Trustworthiness

[348] I have assessed Joan's submission that Gertrude's insane delusions are evident from her accusation that Joan was untrustworthy. Joan relies on the following episodes: Gertrude's accusation that Joan was paying her homeowner's insurance policy with Gertrude's money; that Joan took Gertrude's jewelry without her consent, and; that Joan had 'cleared out' Gertrude's bank account.

[349] I find that in each case Gertrude's allegation had some connection to an admitted fact, even if then extended, extrapolated, or interpreted in a manner that offended Joan. Joan's

homeowner's insurance policy did include a rider that covered jewelry belonging to Gertrude, so that she had a basis for inquiry into the payment of the policy premium. Joan did transfer a small balance of funds between two of Gertrude's accounts, causing one to be closed. And Gertrude did lose jewelry that she thought had been entrusted to Joan.

[350] Joan contended that Gertrude was delusional because she would not exonerate Joan from her perceived untrustworthiness when Joan demonstrated that what she had done had an honest objective and intention. On all the evidence, the stubbornness and singlemindedness shown by Gertrude in these instances, the unwillingness to admit that she was in error, the continued exaggeration to prove her point, was consistent with long-standing, well-established personality traits attributed to Gertrude by several witnesses

[351] I do not accept Joan's submission that Gertrude had a "fixed, false belief" that Joan was the perpetrator of misdeeds and thereby held the insane delusion that Joan was untrustworthy. Gertrude's beliefs of Joan's involvement in her financial matters, although tenuous and perhaps unfair, did not cross the line to insane delusions.

[352] Again, in making these findings, I am not required to determine whether Joan was, in fact, untrustworthy and decline to do so. It is sufficient for my analysis that I assess whether Gertrude had a factual basis for forming this belief, and I find that she did.

(iv) Factual Basis for Criticisms of Care Facility

[353] During the time that Joan was absent in December 2012 and four months following, Gertrude directed Mr. McCarter to prepare a detailed letter to the Ministry complaining of Columbia Forest, received a response, considered Mr. McCarter's report, and prepared a detailed handwritten reply. Joan submitted that Gertrude's complaints of Columbia Forest were delusional because the Ministry found that Columbia Forest was compliant. I cannot accept this submission. That the Ministry determined that Columbia Forest had not breached any regulation did not mean that Gertrude did not have cause for complaint of her living conditions.

[354] The parties adduced evidence of Gertrude's catheter being plugged on occasion, scheduling complications in changing the bag, incidents of the catheter poking her bladder, incidents of the catheter being removed while still inflated and falls during transfers. The Progress Notes showed that Gertrude fell while in the care of Columbia Forest staff. There is a chart entry where Gertrude was "found on floor". The water leak into Gertrude's room and on her bed was real. Gertrude's request that students not be assigned to her was not respected, causing her to feel that she was not receiving the attention and priority to which she felt entitled. She voiced her view throughout that the food was not to her liking

[355] I find, on this evidence, that Gertrude had a factual basis for her complaints. Further, Joan sided with Dr. Kennel and Columbia Forest, encouraging her mother to find common ground and compromise in her demands. This presented a factual basis for Gertrude to consider that Joan did not care about her living conditions.

[356] I do not make any finding of whether Columbia Forest was compliant with its obligations. I find only that Gertrude did have a factual basis for the criticism that she steadily directed at Columbia Forest, without determination of whether these complaints were legitimate.

(c) Assessment of Dr. Kennel's Evidence on Testamentary Capacity

[357] I found Dr. Kennel to be a sincere, forthright witness, whose helpful evidence concerning his observations of Gertrude provided me with significant insight into her conditions and conduct during the years he treated her, November 2005 to September 2013. Joan contended that Dr. Kennel's evidence supported her submission that Gertrude suffered from insane delusions. I do not accept this submission. I will explain why.

[358] Dr. Kennel volunteered that treating Gertrude was challenging. In his words: "She is probably in a class of one, just where she wants to be". Dr. Kennel observed that she often "played one of her children off the other". He testified, supported by his note of March 9, 2012, that his initial view was that Gertrude likely had a narcissistic personality disorder, characterized by a sense of grandiosity, a lack of empathy for others, and a willingness to exploit relationships to achieve her objectives. Dr. Kennel's Progress Note of March 9, 2012 recorded these observations: "I find Gertrude to be rude and unkind. I accept this may be related to some cognitive impairment, but I think it is a personality disorder that has been the same all of her life."

[359] Dr. Kennel vacillated in his views of Gertrude's conditions. On October 19, 2012 he wrote: "I think she is cognitively compromised and that further complicates her personality disorder". But two weeks later Dr. Kennel wrote that: "cognition is likely not the issue".

[360] Dr. Kennel's treatment of Gertrude became marred, if not entirely permeated with conflict. Gertrude's complaints of Columbia Forest escalated in 2013 and along with them her criticisms of Dr. Kennel, who was increasingly placed in the unenviable position of defending himself while trying to care for his patient. Dr. Kennel wrote on January 25, 2013: "Her accusations and beliefs are unfounded and fictional and may be delusional. Regardless, we cannot argue or correct a fixed false belief". Yet, just over a week later, on February 22, 2013, Dr. Kennel rejected James' suggestion that Gertrude was delusional, writing:

> [James] says that she is delusional. I indicated that I believed [Gertrude] fully understood what she was doing and saying and understood the consequences of her actions. I believed that she was capable of directing her own care and affairs. I agreed that her judgment may be skewed, but that was a different problem than incompetency.

[361] Many of Dr. Kennel's views were expressed causally in the Progress Notes, including a series of observations made largely while he was on the defensive, repelling Gertrude's accusations while under attack from her relentless complaints and allegations of breach of care. I noted in Dr. Kennel's Progress Notes of May 17, 2013; May 31, 2013; June 14, 2013; and July 6,

2013, and others, that Gertrude continued to berate him, criticize the staff and reiterate her threat of reporting him and Columbia Forest to regulatory authorities. Dr. Kennel recorded that Gertrude's negative comments about him, and Columbia Forest are "bordering on libel and simply are not true" but stated candidly in cross-examination that many of Gertrude's complaints were based in fact, and many that weren't were intended to provoke, exaggerate, or to make a point.

[362] I find that Dr. Kennel was challenged to care for Gertrude while defending himself, and pondered throughout without conclusion, of whether, in his words, Gertrude purposefully "manufactured" the truth to "serve her immediate purposes as lies", and through this was "abusive and rude", or whether she was affected by "fixed, false beliefs". I did not find in Dr. Kennel's evidence an examination of Gertrude's mental status giving rise to a considered and reasoned diagnosis that she suffered from insane delusions, as contended by Joan.

(d) The Competing May 2013 Contemporaneous Assessments

[363] I have considered the conflicting testamentary capacity assessments conducted of Gertrude by Ms. Woynarski and Messrs. McCarter and Weir in May 2013. I accept the conclusion reached by Messrs. McCarter and Weir that Gertrude had testamentary capacity, at that time, over the contrary opinion reached by Ms. Woynarski. I will explain why.

[364] Ms. Woynarski's conclusion that Gertrude lacked testamentary capacity was based on her finding that Gertrude could not provide a "logical reason for her decision to make changes in the distribution of her estate". Ms. Woynarski reported that Gertrude told her of her that Joan was an uncaring daughter from whom she was estranged but found that Gertrude's beliefs that yielded this sentiment were unfounded, and thereby delusional. Ms. Woynarski based this finding on unspecified information that she received from unidentified Columbia Forest staff members and Dr. Kennel, to the effect that Joan visited Gertrude regularly, and that Gertrude's complaints of them, Joan, and Dr. Kennel were unfounded.

[365] The factual basis on which Ms. Woynarski formed her conclusions was not proven at trial. As the collateral, information on which Ms. Woynarski's opinion was based was not established, or accurate, I do not give any weight to Mr. Woynarski's capacity assessment.

[366] Mr. McCarter had known Gertrude for much longer than Ms. Woynarski: to be precise, at least ten years longer. Ms. Woynarski assessed Gertrude once, on May 13, 2013 for about an hour. Mr. McCarter had assessed Gertrude's testamentary capacity on four previous occasions, on Gertrude's execution of Wills in 2003, 2005, and 2008. He had a baseline and background to draw upon.

[367] Leading to May 2013, Mr. McCarter had just endured months of dealings with Gertrude in her complaints of Columbia Forest to the Ministry. I draw the inference from this that Mr. McCarter would also have heard Gertrude's frustrations with her living conditions, her health, and her relationship with her children. Mr. McCarter also knew Joan.

[368] I find that Mr. McCarter was, by reason of his history with Gertrude, his training and his familiarity with principles of testamentary capacity, well-positioned to assess Gertrude's testamentary capacity in May 2013. Together with Mr. Weir, he did so. Joan submitted that Mr. McCarter did not adequately investigate whether Gertrude had a logical reason to reduce Joan's inheritance. I do not agree. I find that Mr. McCarter had ample history to draw upon.

[369] Mr. Weir testified that he and Mr. McCarter concluded that Gertrude had testamentary capacity when she considered and executed the May 2013 Will. I accept fully Mr. Weir's testimony on his and Mr. McCarter's preparation of the May 2013 Will, their explanation of its contents to Gertrude, their oversight of the formalities of its execution, and their assessment and conclusion that Gertrude had testamentary capacity to enter into the May 2013 Will.

G. Conclusion – Gertrude Did Not Have a Mental Disorder that Affected her Ability to Distribute her Estate: She Had Testamentary Capacity

[370] To lose testamentary capacity on the basis that the testator lacks a sound and disposing mind, a lack of mental capacity or mental disorder must be established. This is more than being "eccentric, unfair or capricious": *Royal Trust*, at para. 59; also, *Gironda*, at para. 51. It is more than entertaining "wrong-headed notions" and doing "eccentric … absurd and foolish acts": *Beal v. Henri*, [1950] O.R. 780 (C.A.), at p. 786. "Such things as imperfect memory, inability to recollect names and even extreme imbecility, to not necessarily deprive a person of testamentary capacity" provided that the testator's mind is sufficiently sound to understand the nature of the property being bequeathed: *Woodward v. Grant*, 2007 BCSC 1192, at para. 125, citing *Field v. James*, [1999] B.C.J. No. 1398 (S.C.), at para. 52, referring to *Banks*, at p. 57-58. A will-maker can be unfair, capricious and even mean but still have testamentary capacity so long as the testator does not suffer from a mental disorder: *Chambers v. Uzelac*, 2004 BCCA 533, 35 B.C.L.R. (4th) 252; *Re Millar* (1927), 60 O.L.R. 434 (C.A.). "A testator has the right to treat hopeful beneficiaries unjustly", so long as there is testamentary capacity: *Tate v. Gueguegirre*, 2012 ONSC 6890, at paras. 167-168.

[371] I accept and apply Cullity J.'s statement in *Banton*, at para. 47, that: "an unreasonable conclusion drawn from facts is not by itself sufficient to amount to a delusion that will give rise to testamentary incapacity". The expression of this principle is based on the Supreme Court's statement in *Skinner*, at p. 60: "It is not the law that anyone who entertains wrong-headed notions, capricious whims, or absurd idiosyncrasies cannot make a will".

[372] I am satisfied that Gertrude did not suffer from delusions that influenced her decisions in wealth distribution. I conclude that James has discharged his burden of establishing that Gertrude had testamentary capacity at the time that she executed the May 2013 Will and throughout the period from August 2013 to September 2014.

XII. WAS GERTRUDE SUBJECT TO UNDUE INFLUENCE?

[373] The next step in my analysis is to determine whether Gertrude was subject to undue influence exerted by James when she executed her Will in May 2013 and when she executed the Estate Planning Documents, the Lifetime Gift Documents and the 2014 Will and its Codicil in the period from August 2013 to January 2014.

A. The Doctrine of Undue Influence

[374] The doctrine of undue influence was developed "not to save people from the consequences of their own folly but to save them from being victimized by other people": *Geffen*, at p. 368, per Wilson J. citing *Allcard v. Skinner* (1887), 36 Ch. D. 145 (E.W. C.A.), at pp. 182-183. The doctrine of undue influence will intervene and set aside arrangements when the testator or gift giver's volition is dominated by another person, with the result that the person really did not express his or her mind: *Geffen*, at p. 377; *Craig v. Lamoureux* (1919), 50 D.L.R. 10 (P.C.), at p. 15.

[375] The principles of undue influence apply differently to testamentary dispositions than to *inter vivos* gifts.

B. The Burden of Proof

[376] In *inter vivos* gifts involving a relationship of influence by a donee over the donor of a gift, there is a presumption of undue influence. In *Geffen*, at p. 370, Wilson J. stated that the gift-giving by a parent to a child is one such relationship in which undue influence is presumed. The Supreme Court explained, at p. 379, that once the presumption is established, the onus moves to the recipient of the gift to rebut the presumption.

[377] Testamentary dispositions are different. In the case of a testamentary disposition, the burden of proof is on the party challenging the testamentary disposition to demonstrate that it was the product of undue influence: *Craig*, at p. 14; *Banton*, at para. 61. Even the finding of suspicious circumstances surrounding the execution of a testamentary disposition does not shift the burden to the propounder of the document to disprove undue influence: *Vout*, applied in *Keljanovic*, at para. 62; *Banton*, at para. 61.

[378] The reason for the presumption of undue influence in *inter vivos* gifts is that these gifts risk the impoverishment of the gift-giver while they are living and in need of material possessions for their support and well-being. This was explained by the Privy Council in *Craig*, at p. 14-15: "…a will, which merely regulates succession after death, is very different from a gift *inter vivos*, which strips the donor of his property during his lifetime." I am guided by the statement of Wilson J., in *Geffen*, at p. 376, that the process leading to gifting must be subject to judicial scrutiny "because there is something so completely repugnant about the judicial enforcement of coerced or fraudulently induced generosity."

[379] The distinction between the differing application of the principles of undue influence in *inter vivos* gifts as opposed to testamentary dispositions was recently illustrated by the Court of Appeal in *Seguin*. There, three children challenged their father's will which named his common

law spouse as principal beneficiary, and also challenged an *inter vivos* transfer to her of an interest as joint tenant in his house. The Court of Appeal outlined the distinction as follows, at paras. 10-11:

> The rebuttable presumption of undue influence arises only in the context of *inter vivos* transactions that take place during the grantor's lifetime. It arises from particular relationships when the validity of *inter vivos* dispositions or transactions is in issue; once the presumption is established, the onus shifts to the transferee to rebut the presumption: [citing *Banton*, at paras. 59-61].
>
> In the case of wills, it is testamentary undue influence, amounting to outright and overpowering coercion of the testator, which must be considered. The party attacking the will bears the onus of proving undue influence on a balance of probabilities: [citing *Vout*, at para. 21; see also *Neuberger v. York*, 2016 ONCA 191, 129 O.R. (3d) 721, at paras. 77-78].

[380] I will summarize the principles pertinent to my analysis.

C. Principles Pertaining to Undue Influence

[381] A testamentary disposition will only be invalidated on the basis of undue influence when the person challenging the document establishes, on a balance of probabilities, "that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not of the deceased": *Banton*, at para. 89. In such circumstances, the testamentary disposition does not reflect the intentions of the person who made the testamentary disposition but rather the wishes of the person exerting the undue influence.

[382] As the Court of Appeal stated in *Seguin*, at para. 11, testamentary undue influence consists of "outright and overpowering coercion of the testator". In *Sample Estate, Re*, [1955] 3 D.L.R. 199 (S.C.C.), at p. 210, Chief Justice Martin explained that coercion in testamentary undue influence is a "pressure if exerted so as to overpower the volition without convincing the judgment" of the testator. I found particularly instructive the statement of the Privy Counsel in *Craig*, at p. 15, that undue influence is established when "the execution of a paper pretending to express a testator's mind … really does not express his mind, but something else which he really did not mean". Cullity J. applied this concept in *Banton*, at paras. 59-60, when he stated that undue influence is present when a Court finds that the testator or gift giver "simply delegated the will-making power to the other person".

[383] In cases of *inter vivos* gifts, the donee can rebut the presumption of undue influence by establishing that there was no actual undue influence: *Keljanovic*, at para. 63. In *Geffen*, at p. 379, Wilson J. stated that "influence" constitutes the domination of the will of another person, including through manipulation:

> It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power. … To dominate the will of another simply means to exercise a persuasive influence over him or her. [Emphasis added]

[384] To assess whether actual undue influence has been established, I will look at all of the circumstances surrounding the execution of the May 2013 Will and its related amendment to the Alter Ego Trust, the Estate Planning Documents, the Lifetime Gift Documents and the 2014 Wil and Codicil, to determine whether Gertrude had a "sufficiently independent operating mind" to withstand competing influences and act on her own free volition. The Supreme Court stated that this necessitated judicial scrutiny of "the process leading up to the gifting": *Geffen*, at p. 376.

D. Indicators of Undue Influence

[385] An assessment of undue influence does not require that the Court identify specific coercion at the time that the testamentary document was executed or the *inter vivos* gift provided. Rather, it is sufficient that the surrounding circumstances show undue influence. In conducting this assessment, Courts have identified indicators of undue influence. In *Gironda*, at para. 77, Penny J. identified six indicators of undue influence:

> Indications of the potential for undue influence include where the testator is dependent on the beneficiary for emotional and physical needs, where the testator is socially isolated, where the testator has experienced recent family conflict, where the testator has experienced recent bereavement, where the testator has made a new will not consistent with prior wills, and where the testator has made testamentary changes simultaneously with changes to other legal documents such as powers of attorney.

[386] In *Tate v. Gueguegirre*, 2015 ONSC 844 (Div. Ct.), at para. 9, Corbett J. applied the same factors as identified by Penny J. in assessing the existence of undue influence, and added others, including: substantial pre-death transfers of wealth; using a lawyer previously unknown to the testator and chosen by the alleged influencer; the alleged influencer communicating instructions to the lawyer acting for the testator; the alleged influencer receiving a draft of the document prior to the testator.

[387] I adopt the indicators of undue influence identified by these Courts and will apply them to my analysis.

E. Analysis – Was Gertrude Subject to Undue Influence?

[388] I will begin my analysis of undue influence by clarifying that it pertains to two different times in Gertrude's will-making: May 2013, with the execution of the May 2013 Will, and; the period from August 2013 to September 2014, when Gertrude executed the Post-August 2013 Documents.

(a) Was There Undue Influence in the Making of the May 2013 Will?

[389] I will address first whether Gertrude was subject to undue influence at the time of her execution of the May 2013 Will. I find that she was not because there was, simply, no evidence of undue influence at that time. I will explain the reasons for this determination.

[390] In May 2013, James was as uncertain about the status of his prospective inheritance as was Joan. There is no evidence that he or Joan were prompting Gertrude to change the equal distribution provided for by the 2008 Will. I accept Mr. Weir's testimony, supported by his file and Mr. McCarter's file, that the Gertrude's impetus to change her 2008 Will came entirely and directly, and indeed persistently, from Gertrude. Mr. Weir and Mr. McCarter's files disclosed no evidence that James knew about Gertrude's contemplated change in her 2008 Will until after the May 2013 Will was executed.

[391] I accept Mr. Weir's testimony, reliably supported by his careful handwritten note made contemporaneous with the events of May 28, 2013, that he asked Gertrude if it was James' idea for her to make the change to her Will, and that Gertrude responded that it was not. She stated that while James knew of her intention to change her Will, "it was her decision alone".

[392] Ms. Woynarski's evidence corroborates Mr. Weir's assessment that there was no undue influence in May 2013. Ms. Woynarski's template for her capacity assessment recorded Gertrude's response to the question of whether anyone had influenced her decision to change her Will: "My own decision – definitely". I accept this assessment of undue influence made by Ms. Woynarski.

[393] As the party challenging the May 2013 Will, Joan had the burden of demonstrating that the May 2013 Will was the product of undue influence: *Craig*, at paras, 10-11. She did not do so. I conclude that Gertrude was not subject to undue influence at the time that she executed the May 2013 Will. I find that the unequal distribution of her wealth to her children that Gertrude provided for in her May 2013 Will, and in the related 2013 Second Amending Deed to the Alter Ego Trust, was a free and independent expression of her will and intention.

(b) Was Gertrude Subject to Undue Influence in the Period from August 2013 to September 2014?

[394] I will analyse whether Gertrude was subject to undue influence at the time of her execution of the Post-August 2013 Documents by using the indicators of undue influence identified in *Gironda*, at para. 77, and in *Tate*, at para. 9.

(i) Had the Testator Experienced Recent Family Conflict?

[395] Gertrude was clearly estranged from Joan by August 2013. In 2013, Joan did not visit Gertrude regularly until April 2013, and then saw her on a few occasions until July, throughout in circumstances fraught with misunderstanding, accusation, anger, and resentment. After July 2013, Joan had not engaged with Gertrude, at all.

[396] Although Gertrude's relationship with Joan had been tense, I find that Gertrude was in conflict with Joan leading to August 2013, and thereafter did not see her again until March 2014. On these findings, I conclude that Gertrude had experienced family conflict at the time of execution of the Post-August 2013 Documents.

(ii) Was the Testator Socially Isolated?

[397] The evidence showed that Gertrude never integrated socially at Columbia Forest. Her conflict with the staff and with Dr. Kennel was well-established. There was no evidence of friends, Joan became estranged, and James was distant. Apart from her children, the only constant contacts that Gertrude had were Monsignor Sheridan who, beginning in 2009, visited Gertrude every other month to provide spiritual guidance and faith-based support, Mr. Ewald who from 2007 addressed Gertrude's investment and stock- trading requirements, and Mr. McCarter, who supported Gertrude in her legal needs.

[398] I find that Gertrude was socially isolated in August 2013. More importantly, when James retained his own lawyers, Mr. Flak and Mr. Corbin, and then replaced Mr. McCarter with a lawyer of his choosing, Ms. Agnew, and replaced Mr. Ewald with a financial advisor of his choosing, Ms. Shanker, he removed from Gertrude the only consistent and trusted support advisors that she was accustomed to.

[399] James' explanation for replacing Gertrude's long-standing advisors was unpersuasive. Mr. McCarter was concerned that Gertrude was coming under James' undue influence and stated that he could not act for Gertrude under James' direction. Mr. Ewald was replaced because he would not facilitate, without assessment, the transfer of a 91-year old's life savings to a joint account with one of her two children in circumstances in which the client's capacity had been placed in issue. Both were impediments in the path to implementation of the Investment Account Transfer Plan.

[400] I find that Gertrude's isolation increased after August 2013 as her long-standing support base of advisors had been replaced by substitutes selected and instructed by James or his lawyers. I conclude that Gertrude was socially isolated from anyone except those within James' family and circle of advisors in the period after August 2013.

(iii) Did the Testator Make New Testamentary Dispositions Inconsistent with Previous Wills?

[401] The August 2013 Investment Distribution Agreement enacted three concepts that Gertrude had not included in her May 2013 Will, executed mere months earlier: the Vanishing Inheritance Concept; the Asset Transfer Concept, and; the Loss of Control in Wealth Distribution. These three concepts had never been raised by Gertrude with Messrs. McCarter and Weir and are not evident in any discussions by Gertrude with others or amongst her handwritten notes. In fact, these concepts were completely opposite to the principles in will-making that Gertrude had valued for a lifetime.

[402] Before the August 2013 Investment Distribution Agreement, Gertrude had never mentioned the possibility that one of her children would be disinherited. I saw no evidence that Gertrude had ever considered the possibility that she would give Joan nothing if she should do what she had already done for a lifetime: challenge Gertrude. James testified that disinheriting Joan was consistent with Gertrude's life-defining philosophy: that those who treated her well would be rewarded and those who treated her poorly would be punished. But even if I were to accept that Gertrude had the degree of spitefulness urged upon me by this submission, there was no evidence that she had ever previously considered completely disinheriting one of her children.

[403] I find that the Asset Transfer Concept was an aberration to all that Gertrude had stood for. Gertrude was independent in the control of her assets and proudly carried this mantle alone. This was the clear evidence by all, including Mr. Ewald. I do not accept that Gertrude would willingly and knowingly have transferred the TD Investment Account to a joint account with James and conferred to him a right to the account on her death and outside her Will. I accept, instead, that Gertrude proceeded on the understanding, to death, that her investment account, now the BMO Investment Account, would be distributed in accordance with her Will, as is evident from the wording of the 2014 Will and its Codicil.

[404] And last, Gertrude's delegation to James of the decision of whether to provide an inheritance to Joan after Gertrude's death ("in his absolute discretion") was inconsistent with her lifelong control over the distribution of her assets on her death. This was certainly opposite to Gertrude's clear statement to James in her letter of January 27, 2005: "I am the matriarch of the Rellinger family. I am in charge and nobody tells me what to do with my property or money".

[405] I conclude that Gertrude made new testamentary dispositions after August 2013 that were inconsistent with the principles that informed her life-long estate planning to that date.

(iv) Did the Testator Make Changes to Testamentary Dispositions Simultaneously with Changes to Other Legal Documents?

[406] Gertrude not only made dramatic changes to her testamentary dispositions through the August 2013 Investment Distribution Agreement, but then was made to repeat them, again and again. The Vanishing Inheritance Concept first contained in this August 2013 Investment Distribution Agreement was repeated in the 2013 Use of Funds Agreement and in the October 2013 Fund Disposition Agreement. The Asset Transfer Concept, first contained in the August 2013 Investment Distribution Agreement was repeated in the 2013 Sale of Right of Survivorship, the 2013 Fund Disposition Agreement, and in the 2013 Joint Account Agreement. The Loss of Control in Wealth Distribution, first provided in the August 2013 Investment Distribution Agreement, was repeated in October 2013 Fund Disposition Agreement, the 2014 Use of Funds Agreement, and the 2014 Gift of Indebtedness Agreement. And last, *all* these repetitive documents were *re-affirmed* in the 2014 Ratification Declaration.

[407] These concepts were not the only to be repeated. The 2014 Gift of Indebtedness Agreement and the 2014 Deed of Gift both gifted to James the forgiveness of any loans by Gertrude to her children. The 2014 Intention Declaration and the 2014 Wish Declaration are substantively identical.

[408] There is a thin line between repetition of concepts being affirmation of a testator's intention and repetitious agreements being evidence of undue influence. Here, my assessment that the repetition constitutes the latter and not the former is supported by analysis of the remarkable speed and frequency by which James mobilized the changes to Gertrude's testamentary dispositions, many at times when Gertrude was about to be admitted to hospital or recently discharged.

[409] I find that the number of changes made by Gertrude the documents executed in the period from August 2013 to September 2014 pertaining to the distribution of her wealth, the speed at which they were done, the repetition of similar concepts through complicated documents totalling 19 in 13 months and the presentation of so many of them to Gertrude while frail are, on the evidence presented in this case, factors that are suggestive of undue influence.

(v) Were the Changes Made in the Testamentary Dispositions made Using a Lawyer Previously Unknown to the Testator?

[410] All of the steps taken by Gertrude in the Post-August 2013 Documents were done with a lawyer previously unknown to her. Gertrude's long-standing lawyer, Mr. McCarter, had been replaced.

(vi) Was the New Lawyer Chosen and Retained by the Alleged Influencer?

[411] As I have explained, all the lawyers and professionals who interacted with Gertrude after August 2013 were chosen and retained by James, directly or with his lawyer, Mr. Flak. This includes Mr. Corbin, Mr. Manning, Ms. Shanker, and Dr. Yiu. I specifically find that Ms. Agnew, who was the only lawyer retained to advise Gertrude, was chosen by James or his lawyer and was not identified and selected by Gertrude.

(vii) Did the Alleged Influencer Communicate Instructions to the Lawyer Acting for the Testator?

[412] James' lawyer briefed Ms. Agnew on the estate planning issues affecting Gertrude. Ms. Agnew testified that she was provided with documents by Mr. Flak prior to her first meeting with Gertrude in September 2013 and was provided with the Corbin Memorandum prior to her meeting with Gertrude on October 2, 2013. James' lawyer, Mr. Flak, provided direction to Ms. Agnew concerning the Estate Planning Documents that were to be presented to Gertrude further to the Investment Account Transfer Plan that had been constructed by James' lawyer, Mr. Corbin.

(viii) Did the Alleged Influencer Receive a Draft of the Document Prior to the Testator?

[413] The evidence of James, Mr. Corbin, Ms. Agnew and Dr. Yiu was all consistent, and I accept, that apart from the 2014 Will and its Codicil, *all* the other Estate Planning Documents and Lifetime Gift Documents were prepared by James' lawyers: either Mr. Flak or Mr. Corbin. I do not accept that Gertrude requested that the August 2013 Investment Distribution Agreement or the Sale of the Right of Survivorship be prepared on her behalf and find that they were prepared by James' lawyers on James' instructions.

[414] The meetings that Ms. Agnew and Dr. Yiu conducted with Gertrude were uniformly organized by James or his lawyers: not by Gertrude. The documents that were presented to Gertrude at these meetings were, apart from the 2014 Will and its Codicil, prepared by James' lawyers and provided to Ms. Agnew. There is no evidence that any of the documents were modified in a substantive way to reflect changes sought by Gertrude.

(ix) Did the Testator Make Substantial Pre-Death Transfers of Wealth to the Alleged Influencer?

[415] Joan tendered Ms. Lindsay Campbell as an expert in forensic accounting, without objection by James as to her qualifications. Ms. Lindsay Campbell has been a Chartered Accountant since 2004 and a Chartered Business Valuator since 2011. In 2014, she was certified in Financial Forensics by the American Institute of Certified Public Accountants. Further to my gatekeeping role, I am satisfied that Ms. Campbell's evidence is admissible on issues of forensic accounting.

[416] Ms. Campbell testified that she was retained to review all the monetary transfers that were made from accounts held by Gertrude in the period from September 2013 to Gertrude's death on April 22, 2016. This review showed that the amount of $2,524,318 was paid to James during this time period, and the sum of $1,800,650 was paid for legal and professional fees. After further adjustments to reflect additional materials and information provided by James, Ms. Campbell concluded the sum of $3,628,176 was paid from accounts held by Gertrude, alone or jointly with James, to James, or at James' direction, in the period under analysis.

[417] Joan contended that the sum of $3,628,176 constituted the amount by which Gertrude's holdings were depleted by James in the period from September 2013 to Gertrude's death. This amount comprised legal and professional fees, expenses paid by James on Gertrude's behalf for her care, housing, and staff, but also showed that significant amounts were paid to James and were unaccounted for. Ms. Campbell identified at least nineteen such unspecified payments to James in rounded amounts. By example, a cheque to James on May 7, 2014 with no accompanying detail in the amount of $300,000; a cheque to James on July 20, 2014 specified as "gift" in the amount of $200,000; a cheque to James on his birthday in the amount of $30,000; a cheque to James on August 31, 2015 in the amount of $350,000, termed "gift".

[418] James submitted that Ms. Campbell's review does not allow for a complete and accurate valuation of the amounts transferred to James because her analysis recorded only what amounts James received and did not account for his use of the money for his mother's benefit. She had no evidence of where the funds went after transfer to James. Also, Ms. Campbell did not take into consideration the impact of tax applicable to the amounts in the bank and investment accounts.

[419] I accept that Ms. Campbell's review disclosed that, for the period under analysis, cheques and transfers totalling at least $1,103,649 were paid by Gertrude to James apart from amounts specifically attributed to legal fees or Gertrude's expenses. I accept, as well, that the precise valuation of the amount transferred to James for his use is affected by the additional considerations identified by James, such that an exact calculation of the amount gratuitously transferred to James is not possible on the current record. However, even without more detailed and exacting valuation evidence, I conclude that Gertrude made pre-death transfers of her wealth to James.

(x) Was the Testator Dependent on the Alleged Influencer for Emotional and Physical Needs?

[420] In the period after September 3, 2013, when James moved Gertrude from Columbia Forest to his home and then, on September 18, 2013 into Living Life, she was entirely dependent on James for the management of her everyday physical needs and became increasingly dependent on James for her emotional needs. James did not dispute this. In fact, James stopped working in 2013 to dedicate himself full-time to Gertrude's care. Gertrude was well-taken care of physically while at Living Life. Monsignor Sheridan spoke of a marked improvement in her living conditions, and in her physical appearance, much more in keeping, in his estimation and that of Gertrude, with Gertrude's expectations.

[421] At the same time, anyone who had any contact with Gertrude after September 2013 went through James. The 24-hour personal support staff and staff at Living Life were subject to James' direction and supervision. He tended to Gertrude's outings and her visits with his family. The frequency and quality of Gertrude's visits with James and his family were significantly greater than James' time with Gertrude prior to her execution of the May 2013 Will. I conclude that Gertrude was dependent on James at all times after August 2013 for emotional and physical needs.

(xi) Was the Testator Kept Socially Isolated from Disinherited Family Members?

[422] From Gertrude's initial admission into Living Life, James restricted Joan's access to Gertrude: "Do not give any care information to daughter Joan". All information had to pass through James. This sheltering of Gertrude continued unabated, and when Joan visited Gertrude in May 2014, intensified to even tighter security. On the reasons stated, I find that these restrictions were implemented by James without the need for Gertrude's direction. In addition, James checked Gertrude's incoming telephone calls and mail, and arranged Gertrude's meetings

with advisors. Gertrude had never lived in Toronto, and thereby had no community to draw on apart from James.

[423] I find that after August 2013, Gertrude was socially isolated from Joan and her family, the only family that she had apart from James.

(xii) What Was the Impact of the Advice by Ms. Agnew on the Issue of Undue Influence?

[424] James relied heavily on the evidence of Ms. Agnew to rebut the presumption of undue influence and of resulting trust and to establish that there was no actual undue influence. He submitted that Ms. Agnew provided independent advice to Gertrude of each of the Post-August 2013 Documents, each time ensuring that Gertrude was acting of her own will and without the undue influence of others. I do not accept this submission, for reasons that I will now explain.

[425] First, Ms. Agnew did not provide advice on the first two Post-August 2013 Documents executed by Gertrude: the TD Joint Account Application and; the August 2013 Investment Distribution Agreement. I considered whether Ms. Agnew's later advice to Gertrude of the concepts set out in these documents could have the effect of retrospectively rebutting the presumptions that applied to Gertrude's execution of these documents, and instead I find the opposite. By the time that Ms. Agnew was briefed by James' lawyers, Gertrude had already been moved down the path of the Investment Account Transfer Plan. Ms. Agnew initiated her advice to Gertrude with the understanding, from Gertrude's lawyers, that the process of implementing a transfer of the TD Investment Account to a joint account with James and the transfer to him of the right of survivorship had already been formulated in the Corbin Memorandum and set in motion by the August 2013 Investment Distribution Agreement.

[426] Second, as I have explained, there were a number of internal inconsistencies in the Post-August 2013 Documents presented by Ms. Agnew to Gertrude that were incapable of reconciliation and showed divergent intentions on the part of Gertrude. Some examples are the inconsistency between the 2013 Sale of the Right of Survivorship and the 2014 Will regarding whether James owned the Investment Account outright or in trust for Gertrude; the inconsistency between Gertrude's expression in the 2014 Wish Declaration and the 2014 Intention Declaration of how she wanted Joan to be treated in her inheritance when Gertrude had already provided James with "absolute discretion" on this issue and when, according to James, there was nothing left in Gertrude's estate for distribution; the 2014 Ratification Agreement wherein she ratified "all other documents signed in 2013 and 2014 which provide benefits to James" without explanation of the list of documents or how their inconsistencies would be reconciled. Put simply, all the Estate Planning Documents, 2014 Will and 2014 Will Codicil cannot functionally co-exist, having in common only that they all benefit James in different ways.

[427] Third, Ms. Agnew's evidence, almost entirely dependent on her notes, does not contain technical detail of explanation to Gertrude of the key elements underlying the operation of the Investment Account Transfer Plan. Ms. Agnew's notes refer to the right of survivorship as a

"legal nicety" and as a "small side transaction", which it was not. I noted a lack of clarity in Ms. Agnew's understanding of whether the objective of the Investment Fund Transfer Plan was for James to hold Gertrude's assets in trust as her trustee or to ensure that the assets were transferred to James on Gertrude's death. This is one of the areas where Ms. Agnew's evidence did not have clear detail of her explanation to Gertrude of the technical interplay between the documents.

[428] Fourth, I do not see a discerning analysis being applied by Ms. Agnew regarding which documents her client should be executing, as opposed to the rote presentation to Gertrude of documents given to her by James' lawyers for execution. I saw no degree of analytical skepticism, no questioning of whether a document should be put to Gertrude for execution. The best example of this is the 2014 Conflict of Interest Waiver. Gertrude did not ask for it, but rather it was prepared by James' lawyers and provided to Ms. Agnew for execution by Gertrude. Ms. Agnew did not challenge the advisability of her client providing an express waiver of "any right to complain about any such actual or potential conflict" arising from Mr. Flak and Mr. Corbin having both acted for James "in his own right and partly to assist his implementation of my wishes in his capacity as my agent". I saw no analysis of the advisability of Gertrude releasing any such claims, or even why this was of interest to Gertrude on August 19, 2014, the date of its execution, 18 days after Gertrude was released from hospital with serious unresolved medical conditions.

[429] Fifth, I do not accept that Ms. Agnew's advice to Gertrude was independent of the influence of James and his lawyers. Ms. Agnew was briefed by James' lawyers at the inception of her retainer and was briefed again at different times throughout. She presented to her client documents provided by James and his lawyer and, apart from the 2014 Will and its Codicil and the Legacy Letter, the Post-August 2013 Documents presented to her for execution by Gertrude were prepared by James' lawyers and presented at their direction. Ms. Agnew's meetings with Gertrude were largely arranged by James and his lawyers, not by Gertrude. Ms. Agnew was never far removed or disconnected from James' circle of advisors.

[430] On the basis of these reasons, I do not accept that the retainer of Ms. Agnew to provide advice to Gertrude, in the circumstances that I have found, established that Gertrude had independent advice sufficient to rebut the presumption of undue influence pertaining to the *inter vivos* gifts by Gertrude to James, or to defend Joan's submission that the Estate Planning Documents and the 2014 Will and its Codicil were executed while Gertrude was subject to James' undue influence.

F. Conclusion – Gertrude was Subject to Undue Influence in the Period from August 2013 to September 2014

[431] Undue influence can manifest through manipulation, coercion, or subtle abuse of power. My assessment of undue influence required determination of whether the influence imposed by James on Gertrude was, to use the words of Cullity J., "so great and overpowering that the document reflects the will of the former and not the deceased": *Banton*, at para. 59.

[432] Joan had the burden of proving, on a balance of probabilities, that Gertrude was subject to undue influence at the time that she executed the testamentary dispositions amongst the Post-August 2013 Documents (the 2014 Will and Codicil) and the Estate Planning Documents, which I determined must be assessed using principles applicable to testamentary dispositions. I find that she has done so. The Investment Account Transfer Plan, and the numerous documents of a testamentary nature that it spawned, presented to Gertrude for execution while increasingly frail, within a closed group of advisors selected by James, did not allow for an expression by Gertrude of her own free will. These documents were executed in an environment where the only opportunity that Gertrude had to change or reconsider her testamentary decisions was in a manner favourable to James. Joan has established that Gertrude was subject to undue influence that was so significant that the 2014 Will and Codicil and the Estate Planning Documents do not express Gertrude's mind and intention, and must thereby be set aside

[433] In regard to the gratuitous transfers, *inter vivos* gifts, there is a presumption of undue influence provided that there was "the potential for domination" in the relationship between James and Gertrude in the period from August 2013 to September 2014: *Geffen*, at p. 378; *Morreale*, at paras. 22-23. I have considered the whole of the relationship between James and Gertrude in this time period and find that there was the potential for James to dominate Gertrude's will. Accordingly, I find that James had the burden of rebutting undue influence in the gratuitous transfers made to him by Gertrude.

[434] I have concluded that James has failed to establish that there was no "actual undue influence", as is required to rebut this presumption: *Keljanovic*, at para. 63. Accordingly, the *inter vivos* transfers were granted by Gertrude while subject to undue influence with the result that James holds the assets so transferred in trust for Gertrude's estate.

XIII. CONCLUSIONS - WHAT IS THE EFFECT OF THE DOCUMENTS EXECUTED BY GERTRUDE?

[435] With my determinations now made on the characterization of the documents executed by Gertrude, her testamentary capacity and the issue of undue influence, I will now outline my conclusions of the validity of the documents that the parties submit should govern the distribution of Gertrude's wealth.

A. The 2014 Will and Codicil, and the 2014 Alter Ego Trust Revocation Deed

[436] The 2014 Will, if valid, will have the effect of revoking the May 2013 Will. The 2014 Alter Ego Trust Revocation Deed, if valid, would have the effect of revoking the 20015 Alter Ego Trust.

[437] James was the propounder of the 2014 Will, the 2014 Will Codicil and the 2014 Alter Ego Trust Revocation Deed. As such, James had the burden of proof with respect to due execution, knowledge and approval of the 2014 Will and the 2014 Will Codicil, which I find that he has discharged. As I found that there were suspicious circumstances present at the time of

Gertrude's execution of this Will and related documents on January 3, 2014 and at the time of her execution of the 2014 Will Codicil on August 22, 2014, the presumption of testamentary capacity was displaced, with the result that James had the burden of establishing, on balance of probabilities, that Gertrude had testamentary capacity at the time of execution of the 2014 Will and related documents and at the time of execution of the 2014 Will Codicil. I find that he has discharged this burden.

[438] As the party challenging the 2014 Will and the related Alter Ego Trust Revocation Deed and the 2014 Will Codicil, Joan had the burden of establishing, on a balance of probabilities, that Gertrude was subject to undue influence at the time of execution of the 2014 Will and at the time of execution of the 2014 Will Codicil. I find that Joan has discharged this burden. Accordingly, the 2014 Will, the 2014 Alter Ego Trust Revocation Deed and the 2014 Will Codicil are invalid and shall be set aside.

B. The Estate Planning Documents

[439] As I determined that the validity of the Estate Planning Documents must be analysed using principles applicable to testamentary dispositions, both as to capacity and undue influence, I have reached the same conclusions regarding the validity of the Estate Planning Documents as I did in relation to the 2014 Will and Codicil. By reason of my finding that there were suspicious circumstances present at the time of their execution, James had the burden of proving Gertrude's testamentary capacity, and did so. Joan had the burden of proving undue influence at the time of Gertrude's execution of the Estate Planning Documents and did so. Accordingly, the Estate Planning Documents are invalid and shall be set aside.

C. The Joint Investment Account

[440] With the Estate Planning Documents set aside, I must determine the status of the assets held by James jointly with Gertrude in the BMO Investment Account and, indeed, any account held by James jointly with Gertrude after August 2013. I will assess this issue within my determination that the nature of the relationship between James and Gertrude after August 2013 was one in which James had the potential to dominate Gertrude's will.

[441] I agree with the analysis by Woollcombe J. in *Johnson v. Johnson Estate*, 2015 ONSC 3765, at para. 25, that the Court has, in *Pecore*, *Sawdon*, and *Mroz*, identified four possible outcomes regarding the status of funds in a joint account held by a parent and an adult child:

> "a. The funds in the accounts result back to the estate as a consequence of the death of the parent by way of a resulting trust (*Mroz* at para. 72, *Pecore* at para. 36, *Sawdon Estate* at paras. 67-71).
> b. The funds were placed into a joint account by the transferor parent with the transferee adult child with the intention that the adult parent retain exclusive control of the account until her death and thereby

gift the right of survivorship to the adult child (*Pecore* at paras. 46 and 70).

c. An outright gift was made to the adult child when the joint account was created (*Pecore* at para. 70);
d. An express trust was created when the adult parent created a joint account (*Sawdon Estate*, para. 67)."

[442] Here the third and fourth possible outcomes need not be considered because there is no submission that Gertrude simply gifted the BMO Investment Account to James at the time that the funds were transferred from the TD Investment Account, and there is similarly no suggestion that an express trust was created at that time.

[443] In determining which of the first two possible outcomes is applicable, I must weigh all the evidence to determine Gertrude's intention at the time of establishment of the BMO Investment Account. When I do so, I conclude that Gertrude's intention was that the assets in the BMO Investment Account result back to her estate at the time of her death. I will explain the basis on which I reach this conclusion.

[444] First, Gertrude had always retained control over her Investment Account, including its distribution on her death. She manifested the continued intention to do so as recently as May 28, 2013 in executing the May 2013 Will which continued her control over the disposition of her assets on her death. I do not accept that Gertrude changed this intention, at any time. Second, Gertrude's 2014 Will and 2014 Will Codicil reflect her continued intention to distribute her wealth through her Will. As noted earlier, Gertrude stated in her 2014 Will Codicil her continued understanding that James was holding her assets in trust for her and, through her, for her estate. There would be no purpose for the 2014 Will and the 2014 Will Codicil but for Gertrude's intention that the BMO Investment Account pass through her estate. Third, the 2014 Deed of Gift expressly excluded Gertrude's "interests in joint accounts" from the gifts that she intended to provide to James.

[445] Fourth, I have found that the agreements that James relied upon to support his submission that Gertrude intended that James own the assets in the joint investment account on Gertrude's death are invalid and must be set aside. I do not accept that these documents reflect Gertrude's intentions.

[446] On the findings that I have made on the evidence, and on the reasons stated, I conclude that James did not rebut the presumption of resulting trust and the presumption of undue influence pertaining to the joint investment account that he received, in my determination gratuitously, from Gertrude. As such, on the authority of *Pecore*, the assets in the BMO Investment Account result back to Gertrude's estate to be distributed in accordance with the terms of the Will that I find to be applicable.

D. The *Inter Vivos* Gifts

[447] The 2014 Deed of Gift, the 2014 Gift of Indebtedness and a component of the 2013 Use of Funds Agreement constitute *inter vivos* gifts because they are intended to take effect during Gertrude's lifetime. In addition to these documents, which I have referred to as the Lifetime Gift Documents, any transfers of wealth made by Gertrude to James in the period from August 2013 to Gertrude's death on April 22, 2016 of funds for his own use would also be *inter vivos* gifts, to the extent that they constitute a voluntary transfer of property from Gertrude to James with the full intention that the property not be returned, and acceptance by James: *Foley (Re)*, at para. 25, relying on *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 24.

[448] As gratuitous transfers from Gertrude during her lifetime to James, the law presumes that these gifts are being held by James on a resulting trust for Gertrude's estate. James did not rebut the presumption of resulting trust or the presumption of undue influence in relation to the *inter vivos* gifts. They must result back to Gertrude's estate to be distributed in accordance with the terms of the Will that I find to be applicable.

[449] Any issue pertaining to the value of *inter vivos* transfers of wealth made by Gertrude to James from August 2013 to April 22, 2016 shall be determined by subsequent adjudication, failing agreement between the parties on their valuation.

E. The May 2013 Will

[450] James was the propounder of the May 2013 Will, in the alternative. As such, James had the burden of proof with respect to due execution, knowledge, and approval of the May 2013 Will, which I find he has discharged. As I found that there were suspicious circumstances present at the time of Gertrude's execution of this Will on May 28, 2013, the presumption of testamentary capacity was displaced, with the result that James had the burden of establishing, on balance of probabilities, that Gertrude had testamentary capacity at the time of execution of the May 2013 Will. I find that he has discharged this burden.

[451] As the party challenging the May 2013 Will, Joan had the burden of establishing, on a balance of probabilities, that Gertrude was subject to undue influence at the time of execution of the May 2013 Will. I find that she has failed to discharge this burden.

[452] The same analysis on all issues applies equally to the 2013 Second Amending Deed to the Alter Ego Trust.

[453] Accordingly, I conclude that the May 2013 Will is good, valid, and enforceable, as is the 2005 Alter Ego Trust Deed, as amended. I conclude that these testamentary dispositions govern the distribution of Gertrude's estate.

F. Summary of Conclusions

[454] On the basis of these reasons for judgment, I have concluded as follows:

(a) The Estate Planning Documents, the Lifetime Gift Documents, the 2014 Will and its Codicil and the 2014 Alter Ego Trust Revocation Deed are invalid on the basis of undue influence, and shall thereby be set aside;

(b) The assets in any Investment Account held jointly by James with Gertrude, including the BMO Investment Account, that have passed to James by reason of the right of survivorship are held by James subject to a resulting trust in favour of Gertrude's estate;

(c) The *inter vivos* gifts that James received from Gertrude from August 2013 to her death are held by him in trust for Gertrude's estate;

(d) The May 2013 Will is valid and governs the distribution of assets in Gertrude's estate. The 2005 Alter Ego Trust, as amended, is valid.

XIV. DISPOSITION

[455] I order as follows:

(a) A declaration is granted that the following documents executed by Gertrude Rellinger are invalid and thereby set aside:

(i) Declarations of, and Agreement, between Gertrude Rellinger and James Rellinger, concerning the dispositions of funds and investments on Gertrude Relliner's (*sic*) death as a result of the transfer of the right of survivorship to James Rellinger, dated August 20, 2013;

(ii) The Sale of the Right of Survivorship, dated October 5, 2013;

(iii) Declaration of Gertrude Rellinger, and Agreement of James Rellinger, concerning the disposition of money and investments acquired on Gertrude Rellinger's death by James Rellinger as a result of the transfer of the right of survivorship to him, dated October 5, 2013;

(iv) Declaration of, and Agreement between Gertrude Rellinger and James Rellinger, dated October 5, 2013;

(v) Declaration of Gertrude Rellinger concerning joint accounts, dated October 5, 2013;

(vi) Declaration of Gertrude Rellinger, and Agreement of James Rellinger, concerning the gift of all indebtedness of James Rellinger and Joan Slover owed to Gertrude Rellinger, dated January 3, 2014;

(vii) Deed of Gift from Gertrude Rellinger to James Rellinger, dated January 3, 2014;

(viii) Last Will and Testament of Gertrude Rellinger, dated January 3, 2014;

(ix) Deed Revoking Alter Ego Trust, dated January 3, 2014;

(x) Declaration of Intention, dated August 1, 2014;

(xi) Declaration entitled My Wish, darted August 19, 2014;

(xii) First Codicil to Last Will and Testament dated January 3, 2014, executed August 22, 2014;

(xiii) Sworn Declaration of Gertrude Rellinger, dated September 12, 2014.

(b) A declaration is granted that the Last Will and Testament executed by Gertrude Rellinger on May 28, 2013, is a valid Will.

(c) A declaration is granted that the Alter Ego Trust Deed executed by Gertrude Rellinger on June 1, 2005, and amended by Amending Deeds on July 18, 2008 and May 28, 2013, is valid.

(d) A declaration is granted that the assets and accounts of Gertrude Rellinger held jointly with James Rellinger at the time of her death, and which transferred to James Rellinger by right of survivorship, including the BMO Investment Account, and *inter vivos* gifts made by Gertrude to James for his use, are held by James Rellinger in trust for the estate of Gertrude Rellinger, to be administered and distributed in accordance with Gertrude Rellinger's Will of May 28, 2013.

XV. ISSUES REMAINING FOR DETERMINATION

[456] On the parties' agreement, the valuation of Gertrude's estate was reserved for subsequent adjudication, pending my determination of the governing testamentary disposition. The issues pertaining to valuation include the following:

(a) The value of the BMO Investment Account, including the value of the Preserved Funds and the Order required for its distribution;

(b) The value of the *inter vivos* transfers of assets to James by Gertrude that, by reason of my determination of resulting trust, are held by him in trust for Gertrude's estate;

(c) The passing of accounts.

[457] In addition, there is the issue of costs.

[458] The timing and process for the determination of the issue of costs will be affected by whether the parties require further adjudication regarding the valuation issues, or whether the valuation issues are capable of resolution. I encourage the parties to confer on both issues. In the event that the parties have not reached an agreement by December 12, 2019, the parties shall, through my judicial assistant, coordinate a case conference to schedule the further process required to determine the valuation issues and/or the issue of costs.

Sanfilippo J.

Released: November 12, 2019

CITATION: Slover v. Rellinger, 2019 ONSC 6497
COURT FILE NO.: CV-16-5069-00ES
DATE: 20191112

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

JOAN SLOVER

Plaintiff

– and –

JAMES RELLINGER, in his personal capacity, and as Estate Trustee of the Estate of Gertrude Rellinger, deceased

Defendant

REASONS FOR JUDGMENT

Sanfilippo J.

Released: November 12, 2019

TAB 21

CITATION: Talluto v. Marcus, 2016 ONSC 3340
COURT FILE NO.: CV-12-112416-00
DATE: 20160519

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
AMANDEO TALLUTO	)	
Plaintiff	)	Diana Edmonds, for the Plaintiff
– and –	)	
SANDRA MARCUS	)	Joanne Blacklock, for the Defendant
Defendant	)	
	)	**HEARD:** May 16, 2016

REASONS FOR DECISION

MCKELVEY J.:

Introduction

[1] This case involves a claim for personal injury by the plaintiff Amadeo Tulluto which is alleged to arise out of a motor vehicle accident on November 29, 2011. The trial commenced on May 16, 2016, with the selection of a jury. Following jury selection the following issues were raised and addressed in argument before me:

1. The right of the plaintiff to introduce opinion evidence, by an economic loss expert Steven Polisuk, on the value of an alleged pension loss;

2. The right of the plaintiff's family doctor, Dr. John Castiglione to give an opinion on whether the motor vehicle accident affected the plaintiff's pre-existing back condition.

3. The right of the plaintiff to file two reports from a treating psychiatrist, Dr. Mallia, pursuant to s.52 of *The Evidence Act.*

[2] It is significant to note that this case was originally scheduled to be tried in the November, 2015 sittings. It was adjourned after the plaintiff served a medical report

approximately one week in advance of the anticipated trial date. When the defence advised that it would object to the late filing of the report the plaintiff advised that he would be seeking an adjournment of the trial. The defence consented to the plaintiff's adjournment on condition that the trial be put over to the next sittings which commenced on May 16, 2016.

[3] At the conclusion of argument I advised the parties of my decision and that written reasons would follow. These are those written reasons.

The right of the plaintiff to introduce opinion evidence from Steven Polisuk on the value of the alleged pension loss

[4] The plaintiff served an economic loss report from Steven Polisuk with respect to the alleged pension loss on March 29, 2016. An earlier report with respect to other pecuniary losses had earlier been served on July 20, 2015. The report served on March 29th updated figures from the earlier report and also included the quantification for an alleged pension loss which had not been referenced in the earlier report. The first occasion on which the defence was advised of a claim for pension loss was in a letter dated March 28, 2016. In that letter the plaintiff's solicitor enclosed documents relating to the plaintiffs pension entitlement and advised that they were having a calculation of the present value of the future loss of pension income prepared and would provide it to defence counsel. A courier receipt provided by the plaintiff's solicitor suggests that this letter was delivered to defence counsel on March 29, 2016. However, the evidence from defence counsel is that this letter together with the attached documentation was not received. When the letter dated March 29, 2016 was sent by the plaintiff's solicitor to defence counsel on March 29, 2016, it attached a copy of Mr. Polisuk's report of March 29th but did not specifically alert defence counsel to the fact that the report contained an opinion for a new heading of damages. Defence counsel did not immediately review the report and only became aware of the fact that a new heading of damages was being claimed on April 14th. At that point she sent a letter to the plaintiff's counsel objecting to the introduction of the report as it relates to the pension loss claim.

[5] The plaintiff's position is that while service of the report was not in accordance with the time prescribed by Rule 53.03, Rule 53.08 governs and absent any prejudice leave must be granted to rely on the report on terms that are just.

[6] The defence takes the position that it has in fact been prejudiced. It states that the additional pension loss now takes this claim above the policy limits for the named defendant who is insured. The defence points out that the defendant has been participating throughout this litigation on the premise that his insurer was providing full indemnity and he therefore has never been given an opportunity to retain counsel to protect his interests.

[7] Rule 53.03 governs the time limits for delivery of expert reports. Subsection 3 provides that a supplementary report of an expert shall be served not less than 30 days before the commencement of the trial. The plaintiff takes the position that the report of Mr. Polisuk

which was delivered on March 29th was a supplementary report because his initial report was delivered in July, 2015. If this position is correct then the report which was delivered on March 29, 2016 did meet the timeline provided for under the rules. I disagree however, with the plaintiff's position that this was a supplementary report with respect to the opinions expressed on the pension loss. The claim for the pension loss was not referenced in Mr. Polisuk's earlier report. In connection with the pension loss claim it cannot be said that the opinions expressed by Mr. Polisuk were supplemental to what was contained in the earlier report. There was in fact no reference to a pension loss claim in the earlier report. The applicable time limit for delivery of such a report would, in my view, be covered by Rule 53.03 (1) which requires the report to be delivered no less than 90 days before the pre-trial conference. As the pre-trial in this action was held on October 22, 2015 the opinion related to the pension loss ought to have been delivered in July, 2015. I therefore do not view this case as one where the plaintiff's breach in complying with Rule 53 was trivial or of no consequence. The delivery of this report was a serious breach of the plaintiff's obligations under the rules and the defendant has been unfairly put in a position where it has had almost no time to respond to the report.

[8] Rule 53.03(4) provides that the time provided for service of an expert report may be extended by the court on a motion. Such a motion has been brought by the plaintiff. The test on such a motion is set out under Rule 53.08. This rule provides that where evidence is admissible only with leave of the trial judge, "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".

[9] The case law makes it clear that in considering whether leave should be granted under Rule 53.08, a trial judge must grant leave unless to do so will cause prejudice that cannot be overcome by an adjournment or costs. See *Marchand (Litigation Guardian of) v. The Public General Hospital Society of Chatham* [2000], 51 OR (3rd) 97 (ONCA). The *Marchand* decision was recently referred to in the Court of Appeal decision *Iannarella v. Corbett*, 2015 ONCA 110. Although that decision dealt with the disclosure of surveillance evidence the court once again noted that the mandatory orientation of Rule 53.08 is understandable since relevant evidence is ordinarily admissible.

[10] In *Gardner v. Hann*, 2011 ONSC 3350 Justice Wilson adopts the comments of Justice Barr in *Hunter v. Ellenberger*, 1988 Carswell Ont 340 where the court noted that anytime a court excludes relevant evidence the court's ability to reach a just verdict is compromised. The court went on to state that relevant evidence should not be excluded on technical grounds, such as lack of timely delivery of a report, unless the court is satisfied that the prejudice to justice in receiving the evidence exceeds the prejudice to justice involved in excluding it.

[11] The main issue with respect to prejudice raised by the defence in this case is that the addition of the claim for lost pension income will raise the overall value of the claim beyond the defendant's insurance limits. In this regard, however the plaintiff has undertaken to limit the economic loss claims to the amount pleaded in in its statement of claim which is $500,000. By virtue of this undertaking the plaintiff has effectively

limited its claim to that which is within the defendant's policy limits. Thus, the defendant will not be exposed to a claim in excess of his available coverage. This effectively eliminates any prejudice to the defendant in relation to his insurance coverage.

[12] In addition, any prejudicial effect by the late service of the expert report can be addressed through an adjournment of the trial if requested by the defence. The case can be put on the trial list for the November, 2016 sittings. This should allow the defendant to properly respond to the report. While it is unfortunate that there would be a six-month delay this must be balanced against the prejudice to the plaintiff of not being able to include a claim for pension loss which is asserted to be in the area of $180,000. In the circumstances I do not view a delay of six months to constitute undue delay in the trial of this action.

[13] I have also taken into account the fact that in this case no steps have been taken at trial beyond selection of the jury. This means that no steps have been taken by either of the parties to disclose their trial strategy in a way that might compromise their position if the trial is adjourned to the next sittings.

[14] Taking all of these factors into account and balancing the respective prejudice which could flow to either the plaintiff or defendant, I have concluded that the balance favours permitting the plaintiff's expert to give evidence on the alleged pension loss and allowing an adjournment of the trial if requested by the defendant's solicitor. The quantum of the alleged pension loss is substantial and represents just under 20 percent of the plaintiff's claim. To deny the plaintiff the opportunity to pursue this claim could result in a real injustice for the plaintiff.

[15] There must, however, be some recognition that the conduct of the plaintiff in delivering the expert report on the pension loss so close to trial is not an acceptable practice. The rules with respect to delivery of expert reports were not meant to be ignored. The purpose and intent of the rules is to ensure that expert reports will be delivered well in advance of the pre-trial and the trial itself so that there can be meaningful discussion of the issues in the case and also so that counsel will be prepared to try the case if it does not resolve. When counsel deliver expert reports which are not in compliance with the rules it increases the likelihood that an adjournment may be required. In the event that an adjournment is required because of a party's failure to comply with the rules it is appropriate to make an order with respect to costs that addresses this issue. The plaintiff argues that an order for costs payable forthwith may deprive the plaintiff of his right to pursue his claim through to trial. The plaintiff argues that the injuries caused by the defendant's negligence have resulted in him not being able to work and that he is required to now live on long term disability benefits as well as a CPP disability pension. However, no evidence has been introduced by the plaintiff with respect to his other assets which would potentially be available to satisfy a judgement for costs. Thus, there is no evidence before me that the plaintiff is in fact impecunious and would not be able to satisfy an order for costs. In light of the absence of adequate evidence before me on the state of the plaintiff's ability to pay, I leave this issue to be addressed by the court if the situation arises.

[16] I would also note that if the defendant elects to adjourn the case this will be the second occasion that an adjournment has been necessitated by the plaintiff's failure to comply with the rules with respect to the delivery of expert reports. The plaintiff should be aware that the court will be reluctant to consider any further adjournments based on a failure to comply with the rules. At that point the issue of undue delay would become a serious issue which might well preclude any further consideration of an adjournment.

The right of the family doctor, Dr. Castiglione to give opinion evidence on whether the motor vehicle accident affected the plaintiff's pre-existing back condition

[17] The plaintiff is proposing to file two reports from the plaintiff's family doctor, Dr. Castiglione. The first report is dated June 21, 2015 and no objection has been taken by the defence to the plaintiff's right to file this report in accordance with s.52 of *The Ontario Evidence Act.* The second report is dated January 1, 2016. The defendant objects to the filing of this report on the basis that it is an expert opinion and is not Rule 53 compliant. It is agreed that no acknowledgement of an expert's duty (Form 53) signed by Dr. Castiglione has been delivered by the plaintiff's solicitor.

[18] The plaintiff's position is that the opinions expressed in Dr. Castiglione's report are that of a treating physician and therefore compliance with Rule 53.03 is not required.

[19] The distinction between participant experts and experts covered by Rule 53.03 was considered by the Court of Appeal in *Westerhof v. Gee Estate,* 2015 ONCA 206. In that decision the court stated that a witness who is an expert by reason of their special skill and knowledge and who has not been engaged by or on behalf of a party to the litigation may give opinion evidence without complying with Rule 53.03 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.

[20] Such witnesses are referred to by The Court of Appeal as "participant experts".

[21] The court goes on to state, however:

> 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. (Emphasis added)

[22] I have concluded that the expert opinion set out in Dr. Castiglione's report of January 1, 2016, goes beyond the limits of a participant expert and therefore compliance with Rule

53.03 is required. In his report of January 1, 2016, Dr. Castiglione gives the following opinion:

> With regard to the question as to whether the motor vehicle accident of November 24, 2011 affected Mr. Talluto's pre-existing back condition and that it and if so, in what manner, I can answer this question in the affirmative in the sense that prior to this accident his complaints of his back were very infrequent and relatively mild. Prior to the accident his medical problems revolved around other issues and not his back.

[23] Dr. Castiglione then goes on in his report to outline the evidence which in his view supports his conclusion as noted above. In my view the opinions expressed by Dr. Castiglione go clearly to the question as to what extent the plaintiff's post-accident symptoms can be related to the motor vehicle accident as opposed to a pre-existing back condition. I would not consider these opinions to be part of his ordinary practice in treating the plaintiff as his family physician. Rather this opinion is directed to the issue of causation which will be a significant issue in the law suit.

[24] My conclusion that Dr. Castiglione is not expressing an opinion as a participant expert is further reinforced by the instructing letter to him from the plaintiff's solicitor dated December 14, 2015 which refers to the pending trial. In the covering letter from plaintiff's counsel it states:

> Would you kindly provide us with a medical legal report providing your opinion as to whether the motor vehicle collision of November 24, 2011 affected Mr. Talluto's pre-existing back condition, and, if so, in what manner.

[25] The fact that Dr. Castiglione has previously provided a report on his treatment of the plaintiff further supports a conclusion that the opinion he expressed in his report of January 1, 2016 was given for purposes of litigation as opposed to an opinion he had formed at the time of treatment.

[26] The *Westerhof* decision makes it clear that where an expert proffers an opinion which extends beyond his role as a participant expert he "must comply with Rule 53.03" with respect to that opinion. This is a mandatory obligation. As the plaintiff has not delivered an acknowledgement signed by Dr. Castliglione of his expert's duty he is not qualified as a Rule 53.03 expert. As he is not a Rule 53.03 compliant expert he is not entitled to give the opinions expressed in his report of January 1, 2016, if the trial proceeds at these sittings.

The right of the plaintiff to file two reports from a treating psychiatrist, Dr. Mallia under s. 52 of The Evidence Act

[27] Dr. Mallia is a psychiatrist and has been treating the plaintiff since November, 2015. The plaintiff seeks to introduce these reports under s. 52 of *The Evidence Act.* The defence

objects on the basis that the reports from Dr. Mallia were served shortly before the commencement of trial although one of the reports was also included in the long term disability file.

[28] The plaintiff appears to have made reasonable efforts to obtain the reports of Dr. Mallia since January 28, 2016. In the affidavit material before me it suggests that there was considerable difficulty in getting Dr. Mallia's records. However, from the defence perspective it is apparent that the delivery of the reports by Dr. Mallia raise a significant new issue as the plaintiff had not seen a psychiatrist since 2012 before he started treatment with Dr. Mallia in late 2015. The defence argues that the reports should not go in or that alternatively an adjournment is required by the defence to deal with the psychiatric issue.

[29] I have concluded that the reports of Dr. Mallia should be admissible at the trial of the action. However, in light of the fact that these reports were only recently produced to the defence and raise a significant new issue I find that the defendant should be entitled to an adjournment of the trial on this basis as well. I accept the defence position that the inclusion of a report from Dr. Mallia in long term disability file was not sufficient to put the defence on notice that the plaintiff would be pursuing a claim based on a psychiatric illness which extended beyond 2012. However, excluding the evidence of Dr. Mallia which is otherwise admissible could result in significant prejudice to the plaintiff.

Order

[30] For the reasons set out above I have made the following orders:

1. The plaintiff is entitled to rely on the opinions of Mr. Polisuk with respect to the value of the alleged pension loss.

2. The plaintiff is not entitled to rely on the causation opinion provided by Dr. Castiglione in his report dated January 1, 2016 if the trial proceeds at these sittings.

3. The plaintiff is entitled to rely upon the reports of Dr. Mallia as a participant expert pursuant to s.52 of *The Ontario Evidence Act.*

4. The defendant is entitled to an adjournment of the trial. If the defendant exercises his right to an adjournment the defendant will be granted an order for its costs thrown away as a result of the adjournment to be paid by the plaintiff.

Justice M. McKelvey

Released: May 19, 2016

CITATION: Talluto v. Marcus, 2016 ONSC 3340

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

AMANDEO TALLUTO

Plaintiff

– and –

SANDRA MARCUS

Defendant

REASONS FOR DECISION

Justice M. McKelvey

Released: May 19, 2016

TAB 22

SUPREME COURT OF CANADA

CITATION: R. *v.* Kruk, 2024 SCC 7

APPEALS HEARD: May 18, 2023
JUDGMENT RENDERED: March 8, 2024
DOCKETS: 40095, 40447

BETWEEN:

His Majesty The King
Appellant

and

Christopher James Kruk
Respondent

- and -

Independent Criminal Defence Advocacy Society, Criminal Lawyers' Association (Ontario) and Trial Lawyers Association of British Columbia
Interveners

AND BETWEEN:

His Majesty The King
Appellant

and

Edwin Tsang
Respondent

- and -

Attorney General of Alberta, Independent Criminal Defence Advocacy Society, Association québécoise des avocats et avocates de la défense, West Coast Legal Education and Action Fund Association, Women's Legal Education and Action Fund Inc. and Trial Lawyers Association of British Columbia
Interveners

CORAM: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 127)	Martin J. (Wagner C.J. and Côté, Kasirer, Jamal and O'Bonsawin JJ.)
CONCURRING REASONS: (paras. 128 to 249)	Rowe J.

His Majesty The King *Appellant*

v.

Christopher James Kruk *Respondent*

and

Independent Criminal Defence Advocacy Society,
Criminal Lawyers' Association (Ontario) and
Trial Lawyers Association of British Columbia *Interveners*

- and -

His Majesty The King *Appellant*

v.

Edwin Tsang *Respondent*

and

Attorney General of Alberta,
Independent Criminal Defence Advocacy Society,
Association québécoise des avocats et avocates de la défense,
West Coast Legal Education and Action Fund Association,
Women's Legal Education and Action Fund Inc. and
Trial Lawyers Association of British Columbia *Interveners*

Indexed as: R. *v.* Kruk

2024 SCC 7

File Nos.: 40095, 40447.

2023: May 18; 2024: March 8.

Present: Wagner C.J. and Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Appeals — Standard for appellate intervention — Credibility and reliability assessment — Common-sense assumptions — Accused both convicted of sexual assault at trial — Court of Appeal finding that trial judges' credibility and reliability assessments were based on common-sense assumptions not grounded in evidence — Court of Appeal overturning convictions on basis that trial judges erred in law by failing to abide by rule against ungrounded common-sense assumptions — Whether error of law based on rule against ungrounded common-sense assumptions should be recognized.

K and T were convicted of sexual assault in separate and unrelated matters. In both cases, the Court of Appeal overturned the convictions on the basis of alleged errors of law in the trial judges' credibility and reliability assessments. Using the rule

against ungrounded common-sense assumptions, which originated in a series of appellate cases, the Court of Appeal found that the trial judges erred in law by making assumptions about human behaviour not grounded in the evidence. In K's appeal, the court held that the trial judge's conclusion that it was unlikely that a woman would be mistaken about the feeling of penile-vaginal penetration relied on speculative reasoning and was not the proper subject of judicial notice. In T's appeal, the court held that the trial judge had made three assumptions about human behaviour that had impacted her assessment of the evidence: (1) a person would not ask to be spanked while engaging in sexual foreplay out of the blue; (2) a controlling person would not refrain from engaging in vaginal intercourse because they could not find a condom; and (3) a person would not abruptly and unceremoniously drive away from the person with whom they had engaged in consensual sex. The court found that these generalizations were not based in the evidence and engaged in speculative reasoning, and that these errors were material. New trials were ordered for K and T.

Held: The appeals should be allowed and the convictions restored.

Per Wagner C.J. and Côté, **Martin**, Kasirer, Jamal and O'Bonsawin JJ.: The rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law. Such an error of law would represent a radical departure from how appellate courts have typically approached credibility and reliability assessments, especially in the context of sexual assault. The proposed rule is in no way analogous to the body of law protecting sexual assault complainants from myths and

stereotypes, nor can it be justified as necessary to ensure fairness to the accused. It also treats any and all factual assumptions drawn in the course of testimonial assessments as errors of law and thereby represents an unjustified departure from well-established principles governing testimonial assessment and appellate standards of review. The faulty use of common-sense assumptions in criminal trials should continue to be controlled by existing standards of review and rules of evidence. In some cases, a trial judge's use of common sense will be vulnerable to appellate review because it discloses recognized errors of law. Otherwise, like with other factual findings, credibility and reliability assessments — and any reliance on the common-sense assumptions inherent within them — will be reviewable only for palpable and overriding error. In the instant cases, assessing the trial judges' credibility and reliability findings using the proper standard of palpable and overriding error, no such errors were made.

First, the proposed rule against ungrounded common-sense assumptions is not a logical extension of the prohibition against myths and stereotypes about sexual assault complainants. It reflects a misunderstanding of the distinct body of law associated with myths and stereotypes in sexual assault cases, which has a unique history and a specific remedial purpose: to remove discriminatory legal rules that contributed to the view that women, as a group, were less worthy of belief and did not deserve legal protection against sexual violence. Several myths and stereotypes have been jurisprudentially condemned as errors of law and significant legislative changes were made with a view to protecting the rights of women and children given their particular vulnerability to sexual violence. This history puts into perspective the distinct

reasons why relying on myths and stereotypes to discredit sexual assault complainants amounts to an error of law, as opposed to being an ordinary factual finding reviewable for palpable and overriding error. Conversely, the proposed rule does not relate to specific, identified, erroneous generalizations about a specific category of witness, nor does it protect elements of an offence from taking on a distorted meaning. It instead lumps together the sorts of pernicious, discriminatory stereotypes that both the courts and Parliament have worked to condemn and correct with more benign generalizations that, while they may be factually wrong, have nothing to do with inequality of treatment.

The rule would also drastically expand the scope of permissible questioning into a complainant's sexual history, effectively requiring both parties to apply to adduce other sexual activity evidence that may not otherwise be relevant or permitted, opening a back door to prohibited twin-myth reasoning. Although framed in terms of ensuring equal treatment for the accused, this approach in fact risks resurrecting the very prejudice against sexual assault complainants that the law on myths and stereotypes was designed to eliminate. Recognizing an identical rule mirroring the treatment of myths and stereotypes between complainants and accused is not necessary and would be misguided. The accused's rights remain safeguarded by crucial legal protections explicitly designed to ensure fairness to the accused that find their source in their own robust body of law flowing from principles such as the presumption of innocence, the right to silence, and reasonable doubt. Such protections ensure fairness to the accused and must guide trial judges in assessing testimony.

Furthermore, the proposed rule is counterproductive to proper testimonial assessment and incompatible with the often inextricable role common-sense assumptions play in credibility and reliability assessments. By prohibiting ungrounded common-sense assumptions, the rule interferes with the necessary recourse to common sense as a part of testimonial analysis. It is effectively impossible to draw a clear boundary between using human experience to interpret evidence or draw inferences (which is permissible under the rule) and introducing new considerations into the evidence (which is not). The rule invites appellate courts to substitute their opinions about what generalizations are appropriate or instructive for those of trial judges, improperly transforming their strong opposition to a trial judge's factual inferences into supposed legal errors, thus creating uncertainty and unfairness on appeal.

The rule also runs contrary to established standards of review and would unduly increase the scope of appellate intervention into the credibility and reliability assessments of trial judges. These assessments can be the most important and difficult judicial determinations in a criminal trial, especially in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. Although credibility and reliability findings may be overturned on correctness if errors of law are disclosed, in most cases it is preferable to review them using the nuanced and holistic standard of palpable and overriding error — which defers to the conclusions of trial judges who have had direct exposure to the witnesses themselves and have expertise in assessing and weighing the facts. The reasons for the deference accorded to a trial judge's factual and credibility findings

include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise and advantageous position of the trial judge. Appellate courts are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focusing narrowly on particular issues as opposed to seeing the case and the evidence as a whole. Invoking the proposed rule, appellate courts have been invited to parse trial reasons, attack generic statements made in the course of credibility assessments, and frame any credibility findings based on human behaviour as impermissible stereotype or common-sense assumptions untethered to evidence. The jurisprudence in this area is variable, even volatile, and evinces the need for a more consistent approach to appellate review.

In view of the rejection of the proposed rule, appellate courts should continue to rely on the existing and well-established law on assessing a trial judge's credibility or reliability assessments. First, where an appellant alleges that a trial judge erroneously relied on a common-sense assumption in their testimonial assessment, the reviewing court should consider whether what is being impugned is, in fact, an assumption. What might appear to be an assumption may actually be a judge's particular finding about the witness based on the evidence. Second, if the trial judge did rely on an assumption that is beyond the bounds of what common sense and the judicial function support, the reviewing court should identify the appropriate standard of review applicable to the impugned portion of the trial judge's credibility or reliability assessment. The standard of review will be correctness if the error alleged is a

recognized error of law, such as reliance on myths and stereotypes about sexual assault complainants, or improper and incorrect assumptions about accused persons contrary to fundamental principles such as the right to silence and the presumption of innocence. Stereotypes based in other forms of inequality of treatment that are analogous to myths and stereotypes about sexual assault complainants may also be recognized as errors of law in future cases. Testimonial assessments may also become vulnerable to correctness review for reasonable apprehension of bias, making a finding of fact for which there is no evidence, and improperly taking judicial notice.

Absent an error of law, the standard of review will be palpable and overriding error. The reviewing court must first determine whether the erroneous reliance on the assumption is palpable, such as where the assumption in question is obviously untrue on its face, or where it is untrue or inapplicable in light of the other accepted evidence or findings of fact. Once a palpable error has been identified, the reviewing court must also find that the erroneous reliance on the assumption was overriding, where it has affected the result or goes to the very core of the outcome of the case. If it cannot be shown that the error was palpable and overriding, a trial judge's assessment of credibility or reliability will be entitled to deference and there will be no basis for appellate intervention.

In K and T's cases, the Court of Appeal erred in using the rule against ungrounded common-sense assumptions and reviewing the alleged improper generalizations on a correctness standard. The trial decisions in both cases should have

been reviewed for palpable and overriding error. In K's case, the Court of Appeal erred in concluding that the trial judge relied on speculative reasoning in accepting the complainant's evidence based on his observation that it is extremely unlikely that a woman would be mistaken about the feeling of penile-vaginal penetration. Viewing the reasons as a whole and in context, the trial judge did not reject the defence theory because of an assumption that no woman would be mistaken, but rather because he accepted the complainant's testimony that she, herself, was not mistaken. The trial judge's conclusion was grounded in his assessment of the complainant's testimony and no palpable and overriding errors were made. In T's case, the Court of Appeal erred in concluding that the trial judge's assessment of the accused and the complainant's credibility was fatally affected by three material unfounded assumptions about normal behaviour. The first two assumptions were not assumptions but statements that reflected the trial judge's reasoning process and findings of fact. The third assumption was truly an assumption and one that was palpably incorrect. However, it was not overriding, as it did not affect the core of the trial judge's finding of guilt.

Per **Rowe** J.: Generalized expectations based on common sense and human experience play a necessary role in the judicial fact-finding process; however, reliance on generalized expectations in a criminal proceeding is not without limits, as some expectations may not be accurate or reliable predictors of general human behaviour. The proliferation of appellate jurisprudence identifying concerns about the limits of this exercise points to the need for guidance in the form of a clear and consistent framework for appellate review. This framework is composed of three questions that

an appellate court should ask when reviewing for potential legal error in a trial judge's reliance on generalized expectations in the fact-finding process: (1) Did the trial judge rely on a generalized expectation in their reasoning process? (2) If the trial judge relied on a generalized expectation, was the expectation reasonable? (3) Did the trial judge rely on a generalized expectation as itself a conclusive and indisputable fact?

The first question asks whether the trial judge relied on a generalized expectation in their reasoning process. If the appellate court determines that the judge relied on a generalized expectation, the analysis will proceed to the second question. Where a judge has not relied on any generalized expectation, for example where the judge assessed the evidence with reference to other accepted evidence or facts from the trial, the review for potential error under the framework ends. At this stage of the analysis, the appellate court is not identifying any error. It is not an error of law *per se* for a judge to rely on a generalized expectation as a logical benchmark to assess the evidence; rather, it is a well-recognized and necessary part of the judicial fact-finding process. In answering this first question, the appellate court is simply determining what the trial judge really decided, why the judge decided that way, and whether there is a basis for further scrutiny. This is a highly case-dependent inquiry — an appellate court must assess whether the reasons, read as a whole and in context of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review. Appellate courts must not finely parse the trial judge's reasons in search for error.

If the trial judge relied on a generalized expectation, the second question then asks whether the expectation was reasonable. It is an error of law for a judge to rely on an unreasonable generalized expectation to assess the evidence. Unreasonable generalized expectations masquerading as common sense or collective human experience are not a legitimate basis on which to assess and understand the evidence in a criminal trial. A standard of reasonableness imparts a measure of objectivity and community consensus in shaping the boundaries of a judge's reliance on common sense and human experience to make decisions, ensuring that triers of fact do not rely on generalized expectations that are inaccurate or unreliable. It also recognizes that as society evolves, its understanding of what is reasonable may change. Public confidence in the administration of justice and the judicial fact-finding process require that appellate courts be able to intervene where trial judges employ generalized expectations that are not a reasonably accurate reflection of what is true in most circumstances and are not a reliable benchmark to assess the evidence. However, where a trial judge relies on a reasonable generalized expectation, an appellate court may not interfere with the judge's assessment of the evidence based on that expectation just because it would have come to a different conclusion.

Appellate review for legal error should extend to the reasonableness of any generalized expectation relied on by the trial judge. The categories of generalized expectations that may not, as a matter of law, be relied on should not be limited to what might be considered myths or stereotypes or to the context of sexual assault trials. Such a narrow approach creates artificial distinctions in the law, unduly limits the important

role of appellate courts in the criminal justice system, and risks undermining public confidence in the administration of justice. On a conceptual level, the underlying rationale for reliance on a generalized expectation is the same, regardless of whether the generalized expectation can be considered a myth, a stereotype, or something else. There is no principled basis to separate particular categories of generalized expectations for distinct treatment. Such an exercise invites artificial distinctions in the law with no clear boundaries and fails to account for generalized expectations that cannot accurately be classified as myths or stereotypes about complainants in sexual assault cases yet would nonetheless be unacceptable to rely on in a criminal trial.

All reliance on unreasonable generalized expectations should be recognized as an error or law. Support for this is found in the relevant policy reasons for why appellate courts defer to trial judges' factual findings on one hand, and the wide discretion for appellate intervention on questions of law on the other hand. Appellate courts defer to trial judges on factual matters for at least three overarching policy reasons: (1) to limit the number, length, and cost of appeals; (2) to promote the autonomy and integrity of trial proceedings; and (3) to recognize the expertise of the trial judge and the judge's advantageous position to assess the evidence. Reviewing unreasonable expectations on a standard of correctness would have a limited impact on those policy considerations. Concerns about preserving public resources or promoting the autonomy and integrity of trials are secondary to the rights of the accused in a criminal proceeding, in light of the interests at stake and Parliament's decision to provide broad access to a first level of appeal. It is the recognition of the trial judge's

expertise and advantageous position that forms the central basis for appellate deference on factual matters in the context of criminal proceedings; however, trial judges are not more experienced or in a more advantageous position than appellate judges in identifying a reasonable generalized expectation based on common sense or human experience, as the basis for the general reliability of such expectations is that they are common or the shared experience of the entire community.

The primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. They therefore maintain a broad scope of review on questions of law, which require clear and consistent answers in order to maintain public confidence in the administration of justice. Any approach to appellate review that dilutes the important role of appellate courts would do significant damage to the criminal justice system. The characterization of an issue as a question of law is also significant to the grounds for appellate jurisdiction in criminal matters, especially the limited grounds for Crown appeals from acquittals. If the reasonableness of a generalized expectation were treated as a question of fact, then the Crown would not be able to appeal from acquittals that rest on generalized expectations that do not amount to myths or stereotypes, no matter how unreasonable or contrary to society's collective expectations. The need to preserve public confidence in the administration of justice mandates that verdicts in criminal cases not be founded on assumptions that are not reasonably accurate reflections of what is true in most circumstances. The correctness standard requires setting out expressly an alternative line of reasoning and demonstrating why it should be followed. Properly applied, correctness demands

greater conceptual clarity and analytical rigour. By contrast, the palpable and overriding standard of review can be misused to generate a decision-making black box that facilitates ad hoc decision-making, whereby if the Court of Appeal agrees with what the trial judge has done, it shows deference, but if it prefers another outcome, it labels the trial judge's decision as a palpable and overriding error and substitutes its preferred outcome.

Finally, the third question asks whether the judge relied on a generalized expectation as itself a conclusive and indisputable fact. Trial judges have considerable latitude to rely on reasonable general expectations as a logical benchmark in assessing the evidence, and an appellate court may not interfere with the judge's assessment of the evidence just because it would have come to a different conclusion. However, there is an important limit on the use of even a reasonable generalized expectation: the trial judge cannot treat the generalized expectation as itself a conclusive and indisputable fact, such that the judge ignores or forecloses their mind to the evidence. This is because people may always act contrary to a generalized expectation of what common sense or human experience would ordinarily anticipate, and therefore it is the trial judge's duty to determine on the evidence what really happened. Generalized expectations based on human experience and common sense are only one consideration, which assist with interpreting the evidence, but the focus must remain on the evidence. It is an error of law for a judge to fail to consider all of the evidence on the ultimate issue of guilt or innocence, or to make a factual conclusion in the absence of evidence. Where a judge relies on a generalized expectation as itself a factual conclusion, what the judge is really

doing is taking judicial notice, which is subject to a stringent test — a standard that will rarely, if ever, be met by a generalized expectation about people due to the variability of human experience and behaviour. And where a factual conclusion is based neither on the evidence, nor on judicial notice, then it is speculation, which is an error of law.

Applying these principles to the cases at hand, the appeals should be allowed and the convictions restored. In K's case, under the framework's first question, the trial judge relied on a generalized expectation about the likelihood of a woman being mistaken about the feeling of vaginal penetration. Under the framework's second question, it is a reasonable generalized expectation about general human perception that a woman is unlikely to be mistaken about the feeling of vaginal penetration, as a sexual act of this nature would have a profound and traumatic impact on the bodily integrity of an individual, and ordinary people would not generally require special knowledge to assess this sort of evidence. Under the framework's third question, the trial judge did not treat this as an indisputable fact but instead used it as a benchmark to assess the complainant's evidence in light of the totality of the evidence. There was therefore no basis for the Court of Appeal to intervene.

In T's case, the Court of Appeal wrongly identified the trial judge as having relied on a generalized expectation regarding the first two assumptions, where the latter was actually assessing the whole of the evidence; this led the Court of Appeal to move beyond its role and reweigh the evidence. In respect of the third assumption, the trial judge did err by relying on an unreasonable expectation about how people ordinarily

behave after a consensual sexual encounter. Under the framework's second question, it is unreasonable to expect any logical connection between an individual waiting for their sexual partner to enter a home and the consensual or non-consensual nature of the preceding encounter. Nevertheless, this error of law was so harmless or minor that it could not have had any impact on the verdict, because the judge's verdict clearly turned on her favourable assessment of the complainant's credibility, as well as her complete rejection of T's testimony as inconsistent with the events and contrived to explain away the complainant's injuries.

Cases Cited

By Martin J.

Overruled: *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286; *R. v. J.C.*, 2021 ONCA 131, 401 C.C.C. (3d) 433; **referred to:** *R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. J.J.*, 2022 SCC 28; *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634; *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218; *R. v. C.M.M.*, 2020 BCCA 56; *R. v. Kodwat*, 2017 YKCA 11; *R. v. Thompson*, 2019 BCCA 1, 370 C.C.C. (3d) 354; *R. v. T.L.*, 2020 NUCA 10, 393 C.C.C. (3d) 195; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Kribs v. The Queen*, [1960] S.C.R. 400; *Timm v. The Queen*, [1981] 2

S.C.R. 315; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Esau*, [1997] 2 S.C.R. 777; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Kirkpatrick*, 2022 SCC 33; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. G. (C.M.)*, 2016 ABQB 368, 41 Alta. L.R. (6th) 374; *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Noble*, [1997] 1 S.C.R. 874; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152; *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146; *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326; *Wild v. The Queen*, [1971] S.C.R. 101; *Rousseau v. The Queen*, [1985] 2 S.C.R. 38; *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Clark*, 2015 BCCA 488, 407 D.L.R. (4th) 610, aff'd 2017 SCC 3, [2017] 1 S.C.R. 86; *R. v. Drydgen*, 2021 BCCA 125; *R. v. Petrolo*, 2021 ONCA 498, 156 O.R. (3d) 321; *J.P. v. R.*, 2022 QCCA 104; *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301; *R. v. Munoz* (2006), 86 O.R. (3d) 134; *R. v. Delmas*, 2020 ABCA 152, 452 D.L.R. (4th) 375, aff'd 2020 SCC 39, [2020] 3 S.C.R. 780; *R. v. R.R.*, 2018 ABCA 287, 366 C.C.C. (3d) 293; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Kiss*, 2018 ONCA 184; *R. v. Adebogun*, 2021 SKCA 136, [2022] 1 W.W.R. 187; *R. v. Kontzamanis*, 2011 BCCA 184; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Gagnon*, 2006 SCC 17,

[2006] 1 S.C.R. 621; *Maxwell v. The Queen*, [1979] 2 S.C.R. 1072; *R. v. Norman* (1993), 16 O.R. (3d) 295; *Faryna v. Chorny*, [1952] 2 D.L.R. 354; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726; *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362; *R. v. Pelletier* (1995), 165 A.R. 138; *R. v. Virk*, 2015 BCSC 981; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *Schwartz v. Canada*, [1996] 1 S.C.R. 254; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *R. v. Pastro*, 2021 BCCA 149, 71 C.R. (7th) 296; *R. v. Greif*, 2021 BCCA 187; *R. v. Al-Rawi*, 2021 NSCA 86, 410 C.C.C. (3d) 385; *R. v. K.B.W.*, 2022 SKCA 8; *R. v. L.L.*, 2022 ONCA 50; *R. v. Lapierre*, 2022 NSCA 12; *Kritik-Langer v. R.*, 2022 QCCA 657; *R. v. Kavanagh*, 2022 BCCA 225; *R. v. D.B.*, 2022 SKCA 76, 415 C.C.C. (3d) 455; *R. v. S.A.*, 2022 ONCA 642; *R. v. S.M.*, 2023 ONCA 417; *South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286; *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Poperechny*, 2020 MBCA 81, 396 C.C.C. (3d) 478; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6; *R. v. Corbett*, [1988] 1 S.C.R. 670; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433.

By Rowe J.

Overruled: *R. v. J.C.*, 2021 ONCA 131, 401 C.C.C. (3d) 433; **considered:**

R. v. Quartey, 2018 ABCA 12, 430 D.L.R. (4th) 381, aff'd 2018 SCC 59, [2018] 3 S.C.R. 687; *R. v. L. (J.)*, 2018 ONCA 756, 143 O.R. (3d) 170; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107; **referred to:** *R. v. Kodwat*, 2017 YKCA 11; *R. v. A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471, aff'd 2018 SCC 6, [2018] 1 S.C.R. 218; *R. v. Kiss*, 2018 ONCA 184; *R. v. Paulos*, 2018 ABCA 433, 79 Alta. L.R. (6th) 33; *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634; *R. v. F.B.P.*, 2019 ONCA 157; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286; *R. v. Pilkington*, 2019 BCCA 374; *R. v. Percy*, 2020 NSCA 11, 61 C.R. (7th) 7; *R. v. Delmas*, 2020 ABCA 152, 452 D.L.R. (4th) 375, aff'd 2020 SCC 39, [2020] 3 S.C.R. 780; *R. v. Pastro*, 2021 BCCA 149, 71 C.R. (7th) 296; *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. François*, [1994] 2 S.C.R. 827; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149; *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3; *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000; *R. v. Gibson*, 2021 ONCA 530, 157 O.R. (3d) 597; *R. v. Chanmany*, 2016 ONCA 576, 338 C.C.C. (3d) 578; *Lampard v. The Queen*, [1969] S.C.R. 373; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Mohan*, [1994] 2 S.C.R. 9; *R. v. Morrissey* (1995), 22 O.R. (3d) 514; *Canadian Pacific Railway Co. v. Murray*, [1932] S.C.R. 112; *R. v. Béland*, [1987] 2 S.C.R. 398; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405; *R. v. Sarrazin*,

2011 SCC 54, [2011] 3 S.C.R. 505; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823; *R. v. Samaniego*, 2022 SCC 9; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609; *R. v. Morin*, [1988] 2 S.C.R. 345; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527; *R. v. R.R.*, 2018 ABCA 287, 366 C.C.C. (3d) 293; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Osolin*, [1993] 4 S.C.R. 595; *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190; *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. J.C.*, 2018 ONSC 5547; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592; *R. v. Morin*, [1992] 3 S.C.R. 286; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245.

Statutes and Regulations Cited

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, ss. 5, 19.

Act to amend the Criminal Code (sexual assault), S.C. 1992, c. 38, preamble.

Canadian Charter of Rights and Freedoms, s. 11(c), (d).

Criminal Code, R.S.C. 1985, c. C-46, ss. 273.1(1) "consent", (2), 273.2, 274, 275, 276, 278.1 to 278.91, 686(1)(a), (b)(iii).

Criminal Code, S.C. 1953-54, c. 51, s. 131(1).

Authors Cited

Benedet, Janine. “Judicial Misconduct in the Sexual Assault Trial” (2019), 52 *U.B.C. L. Rev.* 1.

Benedet, Janine, and Isabel Grant. “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007), 52 *McGill L.J.* 515.

Cochran, Patricia. *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice*. Montréal: McGill-Queen’s University Press, 2017.

Coughlan, Steve. *Criminal Procedure*, 4th ed. Toronto: Irwin Law, 2020.

Dufraimont, Lisa. “Current Complications in the Law on Myths and Stereotypes” (2021), 99 *Can. Bar Rev.* 536.

Dufraimont, Lisa. “Myth, Inference and Evidence in Sexual Assault Trials” (2019), 44 *Queen’s L.J.* 316.

Ehrlich, Susan. “Perpetuating — and Resisting — Rape Myths in Trial Discourse”, in Elizabeth A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism*. Ottawa: University of Ottawa Press, 2012, 389.

Hill, S. Casey, David M. Tanovich and Louis P. Strezos. *McWilliams’ Canadian Criminal Evidence*, 5th ed. Toronto: Thomson Reuters, 2013 (loose-leaf updated December 2023, release 5).

Oxford English Dictionary (online: www.oed.com), “myth”.

Paciocco, David M., Palma Paciocco and Lee Stuesser. *The Law of Evidence*, 8th ed. Toronto: Irwin Law, 2020.

Koshan, Jennifer. “Marriage and Advance Consent to Sex: A Feminist Judgment in *R v JA*” (2016), 6 *Oñati Socio-legal Series* 1377.

Lederman, Sidney N., Michelle K. Fuerst and Hamish C. Stewart. *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. Toronto: LexisNexis, 2022.

Randall, Melanie. “Sexual Assault Law, Credibility, and ‘Ideal Victims’: Consent, Resistance, and Victim Blaming” (2010), 22 *C.J.W.L.* 397.

Tanovich, David M. “Regulating Inductive Reasoning in Sexual Assault Cases”, in Benjamin L. Berger, Emma Cunliffe and James Stribopoulos, eds., *To Ensure*

that Justice is Done: Essays in Memory of Marc Rosenberg. Toronto: Thomson Reuters, 2017, 73.

Watt, David. *Watt's Manual of Criminal Evidence*. Toronto: Thomson Reuters, 2023.

APPEAL from a judgment of the British Columbia Court of Appeal (Tysoe, Stromberg-Stein and Marchand JJ.A.), 2022 BCCA 18, [2022] B.C.J. No. 90 (Lexis), 2022 CarswellBC 102 (WL), setting aside the conviction entered by Tammen J., 2020 BCSC 1480, [2020] B.C.J. No. 2418 (Lexis), 2020 CarswellBC 3779 (WL), and ordering a new trial. Appeal allowed.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Voith JJ.A.), 2022 BCCA 345, 419 C.C.C. (3d) 187, 84 C.R. (7th) 314, [2022] B.C.J. No. 1943 (Lexis), 2022 CarswellBC 2858 (WL), setting aside the conviction entered by Phillips Prov. Ct. J., 2020 BCPC 306, [2020] B.C.J. No. 2446 (Lexis), 2020 CarswellBC 3826 (WL), and ordering a new trial. Appeal allowed.

Susanne Elliott, *Christie Lusk* and *Lauren Chu*, for the appellant.

Brent R. Anderson and *Christopher Johnson*, *K.C.*, for the respondent Christopher James Kruk.

Richard S. Fowler, *K.C.*, and *Eric Purtzki*, for the respondent Edwin Tsang.

Sarah Clive, for the intervener the Attorney General of Alberta.

Gregory P. DelBigio, K.C., and *Daniel J. Song, K.C.*, for the intervener the Independent Criminal Defence Advocacy Society.

Breana Vandebeek, for the intervener the Criminal Lawyers' Association (Ontario).

Mark Iyengar and *Benjamin Reedijk*, for the intervener the Trial Lawyers Association of British Columbia.

Hugo Caissy and *Myralie Roussin*, for the intervener Association québécoise des avocats et avocates de la défense.

Megan Stephens, *Humera Jabir* and *Roxana Parsa*, for the interveners the West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.

The judgment of Wagner C.J. and Côté, Martin, Kasirer, Jamal and O'Bonsawin JJ. was delivered by

MARTIN J. —

I. Introduction

[1] These appeals in two sexual assault matters concern the standard for appellate intervention with respect to a trial judge's credibility and reliability findings in a criminal trial and the appropriate role of common sense when assessing the evidence of witnesses. The respondents ask this Court to recognize a novel rule referred to as the "rule against ungrounded common-sense assumptions". A breach of this proposed rule would provide a new, stand-alone basis for correctness review of credibility and reliability assessments whenever an appellate court determines that a trial judge has relied on a common-sense assumption that was not grounded in the evidence. This significant departure from established standards of review in respect of credibility and reliability assessments in criminal cases has been applied by some appellate courts — often in sexual assault cases that turn on the competing accounts of the accused and the complainant.

[2] For the reasons provided below, no such change to the law is warranted, and I decline to recognize the rule against ungrounded common-sense assumptions as giving rise to an error of law. The current standards under which appellate courts review trial judgments are well-designed, long-established, and promote the fair assessment of testimony. There is no need to fashion a new rule of law against any assumption not supported by particular evidence in the record to strive for what existing rules already accomplish. Furthermore, the proposed rule is not a coherent extension of existing errors of law pertaining to myths and stereotypes against sexual assault complainants. Adopting it would undercut the functional and flexible approach to appellate intervention and create mischief across the entire criminal law.

[3] The faulty use of common-sense assumptions in criminal trials will continue to be controlled by existing standards of review and rules of evidence. In some cases, a trial judge's use of common sense will be vulnerable to appellate review because it discloses recognized errors of law. Otherwise, like with other factual findings, credibility and reliability assessments — and any reliance on the common-sense assumptions inherent within them — will be reviewable only for palpable and overriding error. This standard is better equipped to the task than the new error of law the respondents propose.

[4] In both cases before us, the Court of Appeal for British Columbia overturned the sexual assault convictions on the basis of alleged errors of law in the trial judges' credibility and reliability assessments. Using the rule against ungrounded common-sense assumptions, the Court of Appeal found that the trial judges erred in law by making assumptions about human behaviour not grounded in the evidence. Having rejected this new error of law, I would assess the trial judges' findings using the proper standard of palpable and overriding error. I conclude that they made no such errors in their credibility and reliability findings. In the result, I would allow both appeals and restore the convictions.

II. Background

A. *Mr. Kruk*

[5] The respondent Christopher James Kruk was charged with sexual assault based on an allegation of non-consensual penile-vaginal penetration. The main issue at trial was whether the sexual activity occurred, which depended almost entirely upon the trial judge's assessment of the credibility of Mr. Kruk and the reliability of the complainant.

[6] Mr. Kruk found the complainant intoxicated, lost, and distressed one night in downtown Vancouver. He decided to take her to his house, and connected with the complainant's parents by phone. The complainant did not remember much of what happened next, but she testified that she woke up with her pants off and Mr. Kruk on top of her with his penis inside her vagina. Mr. Kruk denied this, testifying that after the complainant spilled a glass of water on herself and went to his room to change, he found her passed out on his bed with her pants around her ankles. He said that when he tried to wake her, she was startled and must have assumed the worst, because she kicked off her pants and began running around the house in a panic.

(1) Trial Decision, 2020 BCSC 1480

[7] The trial judge found Mr. Kruk guilty of sexual assault. He did not believe Mr. Kruk and rejected his evidence on multiple points because of material inconsistencies in his testimony. Specifically, the trial judge rejected Mr. Kruk's explanation of the complainant's state of undress when she awoke, and "flatly rejected" his claim that he contacted the complainant's family to get her home safely. In turn, the trial judge considered the complainant's account to be largely unreliable due to her

intoxication and "massive gaps in her memory" (para. 48 (CanLII)). However, the trial judge accepted her evidence on the core of the sexual assault allegation — that she had felt Mr. Kruk's penis inside of her vagina:

> [The complainant's] evidence is devoid of detail, yet she claims to be certain that she was not mistaken. She said she felt [Mr. Kruk's] penis inside her and she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely that a woman would be mistaken about that feeling. [Emphasis added; para. 68.]

[8] The trial judge also held there was important circumstantial evidence consistent with a sexual encounter, providing further reason to accept the complainant's account and reject Mr. Kruk's. At one point while the complainant was in Mr. Kruk's bedroom, he had taken off all his clothes and put on swim trunks. The complainant's pants had been completely removed, and the trial judge considered the notion that the complainant had done so herself to be "fanciful" given her state of intoxication. Finally, phone records admitted at trial revealed that after their initial conversation with Mr. Kruk, the complainant's parents had repeatedly called and texted and he failed to respond. In the overall circumstances, the trial judge considered that Mr. Kruk's failure to contact the complainant's parents was consistent with an intention to take advantage of her sexually while she was in an extremely vulnerable state.

(2) British Columbia Court of Appeal Decision, 2022 BCCA 18

[9] The Court of Appeal unanimously overturned Mr. Kruk's conviction and ordered a new trial. The court observed that although trial judges can rely on personal

life experiences to assess the credibility of witnesses, they "must be careful . . . to 'avoid speculative reasoning that invokes « common sense » assumptions not grounded in the evidence'" (para. 41 (CanLII), quoting *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, at para. 65). The trial judge's conclusion regarding the unlikelihood of any complainant ("a woman") being mistaken about the feeling of penile-vaginal penetration relied on speculative reasoning and was not the proper subject of judicial notice, engaging "questions of neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the body's sensory system) and psychiatry (the impact of alcohol and/or trauma on perception and memory)" (paras. 65 and 67). Since the trial judge's finding regarding penetration was considered to be the primary reason he had accepted the complainant's evidence, the court held that the trial judge's reasoning had been fatally affected by a legal error.

B. *Mr. Tsang*

[10] The respondent Edwin Tsang was charged with sexual assault based on alleged non-consensual fellatio, digital vaginal and anal penetration, and penile-vaginal penetration. Although the parties' accounts of what sexual activity had happened also diverged, the main issue was consent, which primarily hinged on the credibility of both the complainant and the accused.

[11] The complainant and Mr. Tsang met at a music festival she attended with her friend, and the three subsequently went to an after-party at a club in downtown Vancouver, where they danced and drank. Mr. Tsang then offered to drive the

complainant home, and on the way, they stopped in a parking lot. They got into the backseat and the complainant consented to kissing Mr. Tsang. The complainant's and Mr. Tsang's testimonies diverged significantly at this point. The complainant testified that Mr. Tsang, all without her consent, forced her to perform fellatio on him, digitally penetrated her vagina and anus, and forced her to have vaginal intercourse. Mr. Tsang testified that they engaged in consensual, rough oral sex and digital penetration, and that the complainant had initiated and was an active participant during the sexual encounter. He also denied having vaginal intercourse or engaging in anal penetration.

[12] The morning after the alleged assault, the complainant was examined by a sexual assault physician examiner, who also testified as an expert at trial. The examiner documented extensive injuries to the complainant's genital area, including a tear in her genital opening only typically seen after childbirth.

(1) Trial Decision, 2020 BCPC 306

[13] The trial judge found Mr. Tsang guilty of sexual assault. She acknowledged that the complainant had consented to getting into the backseat of the car and to kissing, but rejected Mr. Tsang's evidence that the subsequent sexual acts had been consensual, which she found to be at odds with the evidence she had accepted. The trial judge found that Mr. Tsang's testimony sounded contrived, as if he were describing how he thought such an encounter might unfold rather than what had really happened. She also took issue with Mr. Tsang's evidence that the complainant had initiated each step of the sexual encounter, finding instead that the accused had

dominated and controlled the complainant, and "orchestrated" the events. By contrast, the judge found the complainant was credible and reliable and held that the Crown's case, which relied heavily on her testimony, did not raise a reasonable doubt. The judge concluded that Mr. Tsang knew the complainant was not consenting as soon as he began forcing her to give him fellatio, and accordingly found him guilty of sexual assault.

[14] The trial judge made three factual findings that became crucial on appeal. First, it was not believable that the complainant had asked Mr. Tsang to spank her and was "gearing up for rough sex" (para. 126 (CanLII)). Second, Mr. Tsang's explanation that they did not have vaginal intercourse because he could not find a condom was contrived and inconsistent with the level of control he had conveyed over all of their interactions that evening and in court. Third, Mr. Tsang's rapid departure once he dropped the complainant off at her friend's house was consistent with a sexual assault having occurred.

(2) British Columbia Court of Appeal Decision, 2022 BCCA 345, 419 C.C.C. (3d) 187

[15] The Court of Appeal unanimously overturned Mr. Tsang's conviction and ordered a new trial. The court found that the trial judge had made three assumptions about human behaviour that had impacted her assessment of the evidence: (1) a person would not ask to be spanked while engaging in sexual foreplay "out of the blue"; (2) a controlling person would not refrain from engaging in vaginal intercourse because they

could not find a condom; and (3) a person would not abruptly and unceremoniously drive away from the person with whom they had engaged in consensual sex. Relying on the rule against ungrounded common-sense assumptions, these generalizations were not based in the evidence and engaged in speculative reasoning, and thus constituted reversible legal errors. The court also found these errors were material, as the judge would not necessarily have rejected Mr. Tsang's evidence without erring in law.

III. Analysis

[16] In both Mr. Kruk and Mr. Tsang's cases, the British Columbia Court of Appeal reviewed the trial judges' credibility and reliability findings on a standard of correctness. In line with this approach, the respondents now ask this Court to recognize the proposed rule against ungrounded common-sense assumptions as grounding an error of law.

[17] These appeals are part of a broader pattern in which special rules have been proposed for the assessment of credibility and reliability in sexual assault cases.[1] The rule against ungrounded common-sense assumptions is before this Court for the first time, and the question of whether it should be adopted should be approached based on first principles relating to credibility and reliability assessments and existing standards

[1] For example, this Court has rejected the notion that the questions in the *W. (D.)* analysis need to be posed in a specific order (*R. v. W. (D.)*, [1991] 1 S.C.R. 742; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639); furthermore, trial judges can, in the right circumstances, reject the testimony of the accused because they believe the testimony of the complainant (*R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.)). This Court has also expressed reservations about whether uneven scrutiny of Crown and defence evidence is a proper, independent ground of appeal (*R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801).

of review. When the rule comes into play in sexual assault cases in particular, constitutional imperatives call for the consideration of the *Charter* rights of both accused persons and complainants as well as the interests of society at large (*R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. J.J.*, 2022 SCC 28). This approach is part of the obligation to strive towards "the fair, ethical and non-discriminatory adjudication of sexual assault cases" (D. M. Tanovich, "Regulating Inductive Reasoning in Sexual Assault Cases", in B. L. Berger, E. Cunliffe and J. Stribopoulos, eds., *To Ensure that Justice is Done: Essays in Memory of Marc Rosenberg* (2017), 73, at p. 95).

[18] These reasons proceed as follows. First, I explore the origins and treatment of the proposed rule. Next, I explain why it should not be recognized as giving rise to an error of law. Finally, applying the correct legal principles to both cases on appeal, I find that no palpable and overriding errors were made by the trial judge in Mr. Kruk's case, and that while the trial judge in Mr. Tsang's case relied on a palpably wrong generalization, the error was not overriding.

A. *The Proposed Rule Against Ungrounded Common-Sense Assumptions*

[19] The proposed rule against ungrounded common-sense assumptions originated in a trio of key cases — *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286; and *Roth* — and has been most clearly and recently articulated in *R. v. J.C.*, 2021 ONCA 131, 401 C.C.C. (3d) 433. The Court of Appeal in Mr. Kruk's case cited to the trio of cases and specifically

quoted the rule as stated by the British Columbia Court of Appeal in *Roth*, while the Court of Appeal in Mr. Tsang's case relied on the rule as stated in *J.C.*

[20] In *Perkins*, the Ontario Court of Appeal held that the trial judge's finding that a "virile young man with a full erection bound on having a climax would not lose his erection" was not the use of acceptable common sense, but was instead a conclusion reached outside the evidence and beyond the proper scope of judicial notice (paras. 35-36; see also para. 40). In *Cepic*, the Ontario Court of Appeal held that the trial judge's characterization of the accused's testimony as "implausible" and "nonsensical" was untethered to the evidence and reflected erroneous assumptions about what a young woman would do and stereotypes about male aggression (paras. 19-27). Both *Perkins* and *Cepic* were subsequently invoked in *Roth*, at para. 65, in which the British Columbia Court of Appeal articulated the following rule: ". . . although judges are entitled to rely on their human experience in assessing the plausibility of a witness's testimony, they must avoid speculative reasoning that invokes 'common sense' assumptions not grounded in the evidence . . . ." The court went on to find that the trial judge had erred in relying on the speculative assumption that the accused, "a fit and healthy young man who regularly worked out and trained as a power lifter" (para. 56), would not fall asleep during a cab ride, erroneously leading the trial judge to reject the accused's narrative.

[21] In *J.C.*, the trial judge had found the accused guilty of sexual assault and extortion, accepting the complainant's testimony that the accused had threatened to

post a sexual video recording of her online if she did not continue her sexual relationship with him. On appeal, the accused alleged that the trial judge made two errors in his credibility assessment. First, the accused alleged that the trial judge impermissibly used stereotype to reject his testimony about expressly seeking the complainant's consent before engaging in specific sexual acts — the trial judge had held that the accused's testimony on this point was "too perfect, too mechanical, too rehearsed, and too politically correct to be believed" (para. 4). Second, the accused alleged that the trial judge had erred in characterizing the defence's theory that the complainant had fabricated the allegations to conceal cheating from her boyfriend as relying on stereotype, when in fact it had been grounded in the evidence.

[22] The Ontario Court of Appeal unanimously allowed the appeal, set aside the convictions, and ordered a new trial. The court theorized a new approach to credibility and reliability assessments in sexual assault cases that consisted of two separate but interrelated rules: the new "rule against ungrounded common-sense assumptions", and the modification of an existing "rule against stereotypical inferences", the latter of which prevents judges from relying on stereotypes about how sexual assault complainants or accused persons are expected to act in assessing their credibility (*J.C.*, at para. 63, citing *Roth*, at para. 129; *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634, at para. 5; *Cepic*, at paras. 14 and 24). The court considered that failing to abide by either rule was an error of law reviewable on a standard of correctness where the error played a material role in the impugned conclusion.

[23] The appeals before this Court are therefore part of a body of recent jurisprudence that seeks to transform how credibility and reliability findings in sexual assault cases are reviewed on appeal. This jurisprudence undertakes three significant legal innovations. First, it introduces a novel general rule against ungrounded common-sense assumptions. Second, it classifies any breach of this rule as an error of law. Third, it takes the existing error of law barring the use of myths and stereotypes about sexual assault complainants and transposes it into a separate, parallel error of law relating to all factual assumptions about all witnesses, including the accused.

[24] Mindful of the context in which many of these cases have been argued, at the core of this novel approach is an explicit analogy between the historic treatment of myths and stereotypes undermining the credibility of sexual assault complainants and the principles to be applied when assessing the testimony of accused persons in sexual assault cases. In *J.C.*, the court considered that because reliance on myths and stereotypes against sexual assault complainants is an error of law, it would be "equally wrong to draw inferences from stereotypes about the way accused persons are expected to act" (paras. 63; see paras. 72-74, citing *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218; *A. (A.B.)*). Embracing the proposed rule, other courts have agreed that this established error of law pertaining to myths and stereotypes about sexual assault complainants must also extend to other types of stereotypes or factual assumptions that can work to undermine an accused's testimony. Collectively, these cases advance the notion that, although myths and stereotypes have traditionally operated to prejudice complainants, these *same* myths and stereotypes can simultaneously prejudice the

accused (*R. v. C.M.M.*, 2020 BCCA 56, at para. 139 (CanLII); *R. v. Kodwat*, 2017 YKCA 11, at para. 41 (CanLII); *R. v. Thompson*, 2019 BCCA 1, 370 C.C.C. (3d) 354, at paras. 56-57; *R. v. T.L.*, 2020 NUCA 10, 393 C.C.C. (3d) 195, at para. 35).

[25] The parallel treatment proffered in this line of cases is at the forefront of the cases on appeal. At para. 25, the Court of Appeal in Mr. Tsang's case relied upon a lengthy extract from *J.C.* that included the idea that it is "equally wrong" to invoke this historical set of myths and stereotypes about complainants in assessing the testimony of accused persons. Going further, in Mr. Kruk's case, the Court of Appeal expressly drew a parallel between the historic use of myths and stereotypes as applied against sexual assault complainants, and the use of improper assumptions more generally:

> Historically, the issue of improper assumptions typically arose in the context of trial judges drawing adverse inferences about the credibility of sexual assault complainants based on discredited myths and stereotypes. The authorities are clear, however, that trial judges must not rely on assumptions and stereotypes in their assessment of testimony given by both sexual assault complainants and accused persons. [Emphasis added; para. 42.]

[26] The proposed rule against ungrounded common-sense assumptions thus represents a radical departure from how appellate courts have typically approached credibility and reliability assessments, especially in the context of sexual assault. Crucially, the rule transformed all factual findings that could be said to constitute "assumptions" — which, in the ordinary course, were previously subject to review for palpable and overriding error — into errors of law reviewable on a standard of correctness. The rule also enlarged the well-established prohibition against myths and

stereotypes about complainants — a relatively narrow error of law targeted at the fair assessment of a discrete category of witness testimony in a particular subset of criminal trials — well beyond its original scope, presenting it as the doctrinal basis for the creation of a far broader error that applies to credibility assessments of *any* witness in *all* criminal trials.

B. *The Proposed Rule Against Ungrounded Common-Sense Assumptions Should Not Be Adopted*

[27] For the following reasons, the proposed rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law.

[28] First, in the sexual assault context, the rule disregards the distinct nature of myths and stereotypes about complainants, transforming all factual generalizations regardless of their nature into errors of law and imposing a false symmetry to the circumstances of accused persons. Second, the rule runs contrary to long-settled law on credibility and reliability assessments and existing standards of review, leading to unprecedented and undesirable consequences.

(1) The Proposed Rule Is Not a Logical Extension of the Prohibition Against Myths and Stereotypes About Sexual Assault Complainants

[29] As noted, the proposed rule against ungrounded common-sense assumptions builds on the well-established prohibition against the use of myths and stereotypes when assessing the testimony of sexual assault complainants. In the

ordinary course, credibility and reliability assessments are reviewable for palpable and overriding error and are otherwise entitled to deference. However, if a trial judge relies on myths or stereotypes about sexual assault complainants in their reasons, this amounts to an error of law. The proponents of the rule against ungrounded common-sense assumptions argue that if reliance on myths and stereotypes about complainants is an error of law, then all unfounded and speculative assumptions about all witnesses, including the accused, should be treated in the same manner.

[30] With respect, this impulse towards symmetry and formally identical treatment is unwarranted. It reflects a misunderstanding of the distinct body of law associated with myths and stereotypes in sexual assault cases, which developed in a particular historical context to protect complainants alone.

(a) *The History of Myths and Stereotypes Against Complainants*

[31] The prohibition against myths and stereotypes that undermine the credibility of sexual assault complainants has a unique history and a specific remedial purpose: to remove discriminatory legal rules that contributed to the view that women, as a group, were less worthy of belief and did not deserve legal protection against sexual violence.

[32] In the past, multiple legal barriers operated to ensure that the testimony of sexual assault complainants — who, at the time, were almost exclusively women — was treated as inherently unreliable. The term “myths and stereotypes” was coined to

describe how the exceptional procedural protections historically afforded to those accused of sexual assault discriminated against complainants and made sexual assault not only the most underreported crime, but one that was exceptionally difficult to prove in court. These myths and stereotypes, formerly embedded into the law, arose in relation to both credibility and consent, and made sexual assault inherently dissimilar to other crimes.

[33] Before 1983, "rape" was a main type of sexual offence: it criminalized non-consensual penetration of a penis into a vagina and was thus understood as a gendered crime committed by men against women. Under the express terms of the prohibition, a married woman could not be raped by her husband as she was deemed, by her status as a wife, to have forfeited her legal capacity to refuse unwanted sexual activity. The law thereby enforced the notion that certain relationships provided men with a right to women's sexual availability (see, e.g., J. Koshan, "Marriage and Advance Consent to Sex: A Feminist Judgment in *R v JA*" (2016), 6 *Oñati Socio-legal Series* 1377, at p. 1387).

[34] Special evidentiary rules also governed the testimony of sexual assault complainants. The statutory corroboration requirement obliged judges to instruct juries that it was dangerous to convict the accused of a sexual offence based only on the testimony of a complainant (*Criminal Code*, S.C. 1953-54, c. 51, s. 131(1); corroboration requirements were abolished by *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain*

other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, ss. 5 and 19; see also *Criminal Code*, R.S.C. 1985, c. C-46 ("*Code*"), s. 274; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 676). The doctrine of recent complaint required immediate disclosure of a sexual assault to avoid an adverse credibility inference, meaning a complainant's initial silence could be taken as "a virtual self-contradiction of her story" (*R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paras. 60-61, quoting *Kribs v. The Queen*, [1960] S.C.R. 400, at p. 405; see also *Timm v. The Queen*, [1981] 2 S.C.R. 315).

[35] By virtue of these rules, not only were women as a group seen as lacking credibility, there was a construct about the specific subset of women who *could* be believed. Negative social attitudes about women were often used to differentiate "real" rape victims from women suspected to be concocting false allegations out of self-interest or even revenge. Prejudicial beliefs about women who were Indigenous, racialized, persons with disabilities, or part of the 2SLGBTQI+ community also operated to socially prescribe ideals and norms about sexual assault victims. To the extent a particular complainant deviated from the characteristics of the idealized real rape victim, her credibility and entitlement to the law's protection was diminished, sometimes to zero (see, e.g., J. Benedet, "Judicial Misconduct in the Sexual Assault Trial" (2019), 52 *U.B.C. L. Rev.* 1; S. Ehrlich, "Perpetuating — and Resisting — Rape Myths in Trial Discourse", in E. A. Sheehy, ed., *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (2012), 389; M. Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010), 22

C.J.W.L. 397; J. Benedet and I. Grant, "Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues" (2007), 52 *McGill L.J.* 515).

[36] This Court has repeatedly recognized the prevalence of myths and stereotypes about sexual assault complainants, some of which include the following:

- Genuine sexual assaults are perpetrated by strangers to the victim (*Seaboyer*, at p. 659, per L'Heureux-Dubé J., dissenting in part; *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 130, per Wagner C.J. and Rowe J.).

- False allegations of sexual assault based on ulterior motives are more common than false allegations of other offences (*Seaboyer*, at p. 669, per L'Heureux-Dubé J., dissenting in part; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 625, per L'Heureux-Dubé J., dissenting; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 3, per L'Heureux-Dubé J., concurring).

- Real victims of sexual assault should have visible physical injuries (*Seaboyer*, at pp. 650 and 660, per L'Heureux-Dubé J., dissenting in part; *R. v. McCraw*, [1991] 3 S.C.R. 72, at pp. 83-84, per Cory J. for the Court).

- A complainant who said “no” did not necessarily mean “no”, and may have meant “yes” (*Seaboyer*, at p. 659, per L’Heureux-Dubé J., dissenting in part; *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 82, per McLachlin J. (as she then was), dissenting; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 87 and 89, per L’Heureux-Dubé J., concurring; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 167, per Arbour J., dissenting; *R. v. Kirkpatrick*, 2022 SCC 33, at para. 54, per Martin J. for the majority; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at paras. 44 and 74, per Karakatsanis J. for the majority).

- If a complainant remained passive or failed to resist the accused’s advances, either physically or verbally by saying “no”, she must have consented — a myth that has historically distorted the definition of consent and rendered rape “the only crime that has required the victim to resist physically in order to establish nonconsent” (*Ewanchuk*, at paras. 93, 97 and 99, per L’Heureux-Dubé J., concurring, quoting S. Estrich, “Rape” (1986), 95 *Yale L.J.* 1087, at p. 1090; see also para. 103, per McLachlin J., concurring, and para. 51, per Major J. for the majority; see further *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3, at p. 4, per Sopinka J. for the Court; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 101, per McLachlin C.J. for the Court; *Cinous*, at para. 167, per Arbour J., dissenting; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579,

at paras. 98, 105, 107, 109 and 118, per Moldaver J. for the majority; *Friesen*, at para. 151, per Wagner C.J. and Rowe J. for the Court).

- A sexually active woman (1) is more likely to have consented to the sexual activity that formed the subject matter of the charge, and (2) is less worthy of belief — otherwise known as the "twin myths", which allowed for regular canvassing of the complainant's prior sexual history at trial, regardless of relevance, thereby shifting the inquiry away from the alleged conduct of the accused and towards the perceived moral worth of the complainant (*Seaboyer*; *Ewanchuk*).

[37] Myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true — such as the now-discredited notions that sexual offences are usually committed by strangers to the victim or that false allegations for such crimes are more likely than for other offences. Myths, in particular, convey traditional stories and worldviews about what, in the eyes of some, constitutes "real" sexual violence and what does not. Some myths involve the wholesale discrediting of women's truthfulness and reliability, while others conceptualize an idealized victim and her features and actions before, during, and after an assault. Historically, all such myths and stereotypes were reflected in evidentiary rules that only governed the testimony of sexual assault complainants and invariably worked to demean and diminish their status in court.

[38] Overall, this legal backdrop reflected a time in which less was known about the prevalence of sexual violence and its lifelong harms. Eventually, Parliament, the courts, academics, and the public came to understand that the previous legal rules and the inaccurate, outdated, and inequitable social attitudes they represented impeded the equal treatment of sexual assault complainants and, hence, the overall fairness of trials.

[39] New *Criminal Code* provisions were drafted replacing the former offence of rape with a new offence of sexual assault, and the marital rape exemption was repealed — reflecting the reality that while women continue to make up the vast majority of sexual assault complainants, the offence of sexual assault can be perpetrated by and against people of all genders. Consent was expressly defined in s. 273.1(1) of the *Code* as the voluntary agreement of the complainant to engage in the sexual activity in question, and ss. 273.1(2) and 273.2 clearly circumscribed when no consent is obtained and the scope of mistaken belief in consent. The corroboration requirement was abolished and the doctrine of recent complaint was abrogated, pursuant to ss. 274 and 275 of the *Code*, respectively. Finally, ss. 276 and 278.1 to 278.91 now govern the admissibility of a complainant's prior sexual activity and the production and admission of records containing the complainant's highly sensitive personal information that is either held by a third party or comes into the hands of the accused.

[40] The significant legislative changes in this area of law were made with a view to protecting the rights of women and children given their particular vulnerability to sexual violence. In the preamble to the Act that amended s. 276 of the *Code* post-

Seaboyer and reformed the definition of consent to sexual activity, Parliament explicitly focused on combatting "the prevalence of sexual assault against women and children" and expressed a particular intention to "ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*" (*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38). Parliament also expressed an intention to "encourage the reporting of incidents of sexual violence" and emphasized that the admission of the complainant's sexual history into evidence is "inherently prejudicial" and "should be subject to particular scrutiny" (*ibid.*). In amending ss. 278.1 to 278.91 of the *Code*, Parliament sought to protect complainants' privacy interests in highly sensitive personal information and, in turn, preserve their dignity. Amendments such as these appropriately balance respect for complainants' dignity, privacy, and equality and the fundamental right of the accused to the presumption of innocence and a fair trial and they have been endorsed as constitutionally compliant by this Court (see *Mills*; *Darrach*; *J.J.*).

[41] In turn, several of the myths and stereotypes outlined above have now been jurisprudentially condemned as errors of law. For example, it is prohibited for a trial judge to rely on notions such as: delay in a complainant's disclosure of a sexual assault, alone, undermines the credibility of the disclosure (*D.D.*; *R. v. Lacombe*, 2019 ONCA 938, 383 C.C.C. (3d) 114); a complainant's "failure" to dress modestly indicates that she is more likely to have consented (*Ewanchuk*, at para. 103); a complainant's "failure" to resist or cry out is suggestive of consent (para. 93); the mere fact of a complainant having psychiatric or therapeutic consultations is relevant to their

credibility or reliability (s. 278.3(4) of the *Code*); or a complainant associating with or not avoiding the accused after the alleged sexual assault suggests that there was consent and that no assault occurred (*A. (A.B.)*, at paras. 6-12).

[42] The legislative and jurisprudential treatment of these issues reflects a collective understanding that courts should strive to eradicate myths and stereotypes from their decisions because they threaten the rights of complainants and undermine the truth-seeking function of trials. Today, sexual offences remain underreported and continue to occur mostly against women and children. There remains a "need to affirm the principles of equality and human dignity in . . . criminal law by addressing the problem of myths and stereotypes about complainants in sexual assault cases" (*A.G.*, at para. 1, per L'Heureux-Dubé J., concurring; see *R. v. O'Connor*, [1995] 4 S.C.R. 411).

[43] This Court has repeatedly held that "myths and stereotypes have no place in a rational and just system of law, as they jeopardize the courts' truth-finding function" (*A.G.*, at para. 2). A trial is a truth-seeking process, and reliance on myths and stereotypes distorts the truth. In *Mills*, this Court explained that myths and stereotypes about sexual assault victims hamper the search for truth and impose "harsh and irrelevant burdens on complainants in prosecutions of sexual offences" (para. 119). While the accused's constitutional rights must remain at the forefront of any criminal trial, this Court has also acknowledged that measures can be taken to avoid reliance on myths and stereotypes without compromising those rights. Myths and stereotypes in

fact *undermine* a fair trial — meaning a trial that is fair not only to the accused, but to the complainant and the public (see *J.J.*, at paras. 1-2).

[44] All of this history puts into perspective the distinct reasons why relying on myths and stereotypes to discredit sexual assault complainants amounts to an *error of law* — as opposed to being an ordinary factual finding reviewable for palpable and overriding error. The very reason this error of law emerged was to prevent the accused from discrediting complainants' testimony on unwarranted, discriminatory grounds, and accordingly to correct the particular advantage accused persons historically had in sexual assault cases as compared to accused persons in other cases: myths and stereotypes are no longer meant to play any role in mounting a defence. The judicial and legislative developments designed to eradicate the categorical discounting of women as witnesses do not create any special benefits in law for complainants in sexual assault cases. They simply remove discriminatory barriers, establish a level testimonial field between sexual assault complainants and complainants in other cases, and ensure the truth-seeking function of the trial is not distorted.

(b) *The Proposed Rule Should Not Be Adopted as a Corollary to the Prohibition Against Myths and Stereotypes*

[45] In sum, the prohibition against myths and stereotypes about sexual assault complainants carries with it a discrete history, purpose, and character. It was designed with the specific goal of protecting complainants against prejudicial or discriminatory reasoning in criminal trials. The proposed rule against ungrounded common-sense

assumptions should be rejected because it enlarges that particular context beyond its proper scope.

(i) The Proposed Rule Disregards the Distinct Character of Myths and Stereotypes

[46] The types of assumptions captured by the proposed rule do not share the distinct discriminatory character of myths and stereotypes relating to sexual assault complainants, which form a unique category of legal error created to be explicitly remedial in nature. As noted in *Find*, this Court has been willing to accept the prevailing existence of myths and stereotypes about sexual assault complainants based on "overwhelming evidence" from the social science literature (para. 101). There is no comparable legislative recognition of a pattern of improper reliance upon a specific, circumscribed set of generalizations to incorrectly assess the testimony of accused persons in sexual assault cases. Myths and stereotypes about sexual assault complainants are governed by a limited set of legal principles that emerged to redress pervasive systemic prejudice, which was embedded in law and directed against a distinct category of witness — they cannot be coherently analogized to support a rule prohibiting any generalizations about any witness, including the accused.

[47] Unlike the proposed rule, the authorities that target sexual assault myths and stereotypes remove from the law specific erroneous assumptions and notions that formerly distorted judicial reasoning and fact-finding on a widespread basis. These myths and stereotypes unfairly undermine the perceived credibility of a specific

category of witness before the evidence has even been heard, effectively imbuing complainants' evidence with a *prima facie* judgment of frailty. They also distort the legal significance of consent. The legal principles that prohibit judges from relying on specific stereotypes when assessing the testimony of complainants are therefore in a separate category and are fundamentally different from a blanket prohibition on generalizations when assessing testimony at large. Conversely, the proposed rule does not relate to specific, identified, erroneous generalizations about a specific category of witness, many of which were first imposed by law, nor does it protect elements of an offence from taking on a distorted meaning. The rule instead casts a vast net — effectively transforming *all* types of factual generalizations, regardless of their nature, into errors of law. In doing so, the rule impermissibly expands the bounds of existing errors of law to any and all factual findings that can be said to amount to assumptions about human behaviour.

[48] As noted above, there is significant overlap between the rule against common-sense assumptions and the related rule against stereotypical reasoning articulated in *J.C.*: both rules bar trial judges from using "stereotypes" in their assessments of credibility. However, in *J.C.* and as adopted by the British Columbia Court of Appeal, the term "stereotype" not only demarcated an error of law, but was used in a manner that effectively encompassed *all* generalizations about human behaviour. With respect, this is not the correct approach: just because something is a generalization does not necessarily mean it amounts to a stereotype that can be understood as an error of law.

[49] Generally speaking, *all* ungrounded assumptions about human behaviour, including stereotypes, share two characteristics. First, they take a general proposition and apply it to a specific individual, foregoing any assessment of that person's unique characteristics or circumstances. Second, that general proposition is inaccurate or untrue, either in all cases or as applied to that specific individual (see, e.g., *R. v. G. (C.M.)*, 2016 ABQB 368, 41 Alta. L.R. (6th) 374, at para. 60). However, stereotyping goes one step further and connotes a particular legal meaning that merely generalizing does not: specifically, a meaning rooted in discrimination and inequality of treatment.

[50] The discriminatory character of stereotypes is made plain from our jurisprudence's understanding of stereotypes about sexual assault complainants. Reliance on such stereotypes was recognized as an error of law for the very purpose of eliminating discrimination against women and promoting their dignity and equality within the justice system. For example, the requirement that a woman raise a "hue and cry" was based on the now-discredited assumption that, because rape was the worst thing that could happen to a woman, any *credible* victim would immediately disclose what happened to the first person she encountered. Accordingly, it is now an error of law to draw an adverse inference from the mere fact that the complainant did not report the assault immediately (*D.D.*, at para. 65). The historical requirement that a complainant's testimony be corroborated, now abolished, was based on the discriminatory assumption that the testimony of a woman was not, in law, equal to that of a man. The twin myths, now prohibited by s. 276 of the *Code*, were again based on

the discriminatory notion that women who had sex were less trustworthy and did not deserve equal respect and treatment under the law (*Seaboyer*). The negative stereotypes about sexual assault complainants were recognized as errors of law because they often originated in law, took statutory form, and were founded on the misinterpretation of the now-clear definition of consent as the voluntary, communicated agreement to the sexual activity in question — a misinterpretation that undermined the core principle of equal justice for all.

[51] The problem with the proposed rule against ungrounded common-sense assumptions is that it fails to appreciate this crucial dimension. It instead lumps together the sorts of pernicious, discriminatory stereotypes that both the courts and Parliament have worked to condemn and correct with more benign generalizations that, while they may be factually wrong, have nothing to do with inequality of treatment.

[52] In *J.C.*, for example, the Ontario Court of Appeal found that the trial judge's characterization of the accused's evidence as *mechanical*, *rehearsed*, and *politically correct* relied on "stereotype" and therefore amounted to an error of law. In *Roth*, although the British Columbia Court of Appeal rejected the submission that the trial judge had relied on stereotypes about male behaviour, it nevertheless found that the trial judge's improper generalization about the accused *being a power lifter* amounted to an error of law. Regardless of whether these factual assumptions were wrong or right, there is no question they are fundamentally of a different character than inequality-based stereotypes. A witness being discredited because they testified in what

the trial judge considered to be an implausible manner, or because of their fitness habits, is simply not the same thing as a complainant being discredited because of her sexual history and therefore "unchaste" character, because she did not resist her assailant, or because she did not report the assault right away. This is in no way meant to *condone* reliance on improper generalizations in credibility assessments. Rather, it illustrates that ordinary factual generalizations — which are of a different character than those relating to myths and stereotypes about sexual assault complainants, and do not disclose other recognized errors of law — should be evaluated for palpable and overriding error.

[53] The legislative shift towards a more gender-neutral understanding of sexual violence compels courts to also be sensitive to the fact that complainants in sexual assault cases come from all walks of life. By eliminating the inherently gendered crime of rape, Parliament signalled that sexual assault is no longer meant to be limited to the male accused, female complainant paradigm. Stereotypes about complainants that formerly targeted women alone now have the potential to compromise the testimonial assessment of *all* types of complainants — for example, although it remains the case that the majority of sexual assault complainants are women, it is an error of law to rely on the doctrine of immediate complaint or on stereotypes about a complainant's past sexual activity *regardless* of the complainant's gender. The wholesale discrediting of complainants as a particular category of witness, at its core, is also rooted in inequality of treatment, as this Court recognized in *O'Connor* (at para. 123):

> . . . a legal system which devalues the evidence of complainants to sexual assault by *de facto* presuming their uncreditworthiness would raise similar concerns. It would not reflect, far less promote, "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171). [Emphasis deleted.]
>
> (See also *Seaboyer*, at p. 654.)

[54] In turn, all sexual assault cases have the potential to engage a broad range of stereotypes beyond those about female complainants. In *Barton*, for example, this Court recognized specific myths and stereotypes that apply to Indigenous women, which may in turn hinder proper assessments of their credibility and reliability. Courts have also moved away from treating the testimony of very young complainants with inherent suspicion, recognizing that past attitudes did not account for the inherent vulnerability of children and the particular problems they may face when giving evidence (see *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569). I would also stress at this juncture that reliance on stereotypes, being rooted in inequality of treatment, is certainly not just a problem for sexual assault complainants alone. Stereotypical reasoning based in the sort of inequality of treatment at the heart of myths and stereotypes against sexual assault complainants has the potential to affect the testimony of all witnesses in all trials. It remains open to all parties in future cases, including the accused, to argue that trial judges have employed stereotypes rooted in other, analogous forms of inequality of treatment, and therefore erred in law.

[55] In addition to its unsound foundations, the proposed rule interacts particularly poorly with sexual offence cases given the carefully crafted rules that now govern the assessment of a complainant's testimony. The Court of Appeal in Mr. Tsang's case acknowledged the reality that for certain common-sense assumptions about sexual activity to be "grounded" in the evidence, evidence of a "complainant's own predilections" may be required (para. 19). In that case, to "ground" the trial judge's finding that it was unbelievable the complainant would ask for rough sex, the complainant would first have to be subjected to deeply intrusive questioning about her sexual preferences or past practices. In Mr. Kruk's case, to "ground" the complainant's testimony that she was not mistaken about the physical sensation of penile-vaginal penetration in the evidence, the complainant would need to testify about previously feeling that sensation.

[56] The proposed rule thereby drastically expands the scope of permissible questioning into a complainant's sexual history, effectively requiring both parties to apply, pursuant to *Seaboyer* (at p. 619) or s. 276 of the *Code*, to adduce "other sexual activity" evidence that may not otherwise be relevant to the main issues in the case or permitted to make its way into the trial *at all*. It opens a back door to prohibited twin-myth reasoning insofar as, in the process of "grounding" the trial judge's findings about her testimony, evidence of the complainant's sexual history may be treated as logically probative of her credibility or consent. Although framed in terms of ensuring "equal" treatment for accused in these cases, this approach in fact risks resurrecting the very

prejudice against sexual assault complainants that the law on myths and stereotypes was designed to eliminate.

[57] In sum, the proposed rule against ungrounded common-sense assumptions cannot be understood as a logical extension of legal rules against stereotyping. To the extent it conflates stereotyping with all assumptions about human behaviour, it runs off course. The concept of a stereotype is not closed and no doubt will continue to evolve in future cases: the closer an error is to the types of myths and stereotypes pertaining to sexual assault complainants that have been recognized in the jurisprudence, the more likely it is that it will amount to an error of law. However, all other mere assumptions drawn in the course of credibility and reliability assessments, like other findings of fact, must remain reviewable for palpable and overriding error.

(ii) The Accused's Rights Remain Protected

[58] The respondents argue that the proposed rule against ungrounded common-sense assumptions should be adopted in sexual assault cases out of fairness to the accused. This argument, too, must be rejected. There are crucial legal protections explicitly designed to ensure fairness to the accused that find their source in their own robust body of law. It is essential that these legal protections be taken seriously and given their full effect to ensure the accused's constitutional rights remain safeguarded. However, the idea that an identical rule mirroring the treatment of myths and stereotypes between complainants and accused is necessary to achieve that goal is misguided.

[59] The overarching principle of the presumption of innocence, enshrined in s. 11(d) of the *Charter*, and the correlative principle of the Crown's burden of proof, must always govern the fact-finding process. The presumption of innocence — a "hallowed principle lying at the very heart of criminal law" (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 119) — requires the Crown to bear the onus of proving all essential elements of the offence charged, beyond a reasonable doubt, before a conviction may be entered (*Osolin*). Closely related to the presumption of innocence is the accused's right to silence as enshrined in s. 11(c) of the *Charter*, which safeguards human dignity and privacy against processes or reasoning that would compel an accused person to incriminate themselves with their own words (*R. v. Noble*, [1997] 1 S.C.R. 874, at paras. 69-78).

[60] Various protections relating to the assessment and weighing of evidence flow from the presumption of innocence and the right to silence. Notably, an accused's silence at trial may not be treated as evidence of guilt, as such reasoning would violate both principles (*Noble*, at para. 72). Likewise, it is improper to discount the credibility of accused persons on the basis that, because they face criminal penalties, they will say anything to protect themselves. Though considering the possibility that the accused may have a motive to lie will not necessarily offend this rule, courts should be wary of going further and drawing the "impermissible assumption" that they will do so in all cases (*R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 14). Such reasoning is premised on a supposition of guilt and therefore offends the presumption of innocence (para. 12).

[61] The presumption of innocence also restricts how credibility is assessed in cases of conflicting testimony between defence and Crown witnesses. The analysis of testimony must never be treated as a contest of credibility, and triers of fact need not accept the defence's evidence or version of events in order to acquit (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 23; *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 757). The burden *never* shifts to the accused to establish their own innocence, and the onus always lies with the Crown to prove every essential element (*R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, at para. 13).

[62] Reasonable doubt applies to credibility assessments such that if the evidence the Crown adduced does not rise to the level required of a criminal conviction, an accused cannot be found guilty simply because they are disbelieved (see *W. (D.)*). Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much — or all — of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, the accused is entitled to an acquittal (*J.H.S.*, at paras. 9-13; *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C.C.A.); *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, at p. 533; *R. v. Avetysan*, 2000 SCC 56, [2000] 2 S.C.R. 745, at para. 19). Finally, where the Crown relies on circumstantial evidence to establish guilt, the trier of fact may only convict if guilt is the only reasonable inference from the evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 30).

[63] Protections like these ensure fairness to the accused and must guide trial judges in assessing testimony. They impose specific prohibitions regarding identifiable forms of improper reasoning. In so doing, they safeguard the accused's fundamental *Charter* rights. Where full effect is properly accorded to them, further restrictions on how trial judges may assess the credibility and reliability of the accused and the complainant that go beyond existing errors of law and the standard of palpable and overriding error are rendered unnecessary. Even where recognized errors of law pertaining to the accused's rights are *not* engaged, where the accused chooses to testify or otherwise lead evidence, appellate courts must ensure that trial judges have thoroughly and properly assessed the accused's account of events. Reliance on illogical, untrue, or otherwise improper assumptions in assessing the evidence of an accused is wrong and remains reversible on appeal if it amounts to palpable and overriding error. It is just that such ordinary factual assumptions cannot be recognized, wholesale, as stand-alone errors of law.

[64] It must also be emphasized that the concept of myths and stereotypes concerning sexual assault complainants is not unbounded. It has produced a circumscribed set of legal rules that require careful application, close attention to context, and a nuanced understanding of the purpose for which any given piece of evidence is tendered. Some scholars have suggested that the law of myths and stereotypes is presently being *over*used in contexts where it is inapplicable, or applied without rigour (see, e.g., L. Dufraimont, "Current Complications in the Law on Myths and Stereotypes" (2021), 99 *Can. Bar Rev.* 536). If this problem exists, the appropriate

solution is not to extend parallel errors of law that apply to accused persons as well as complainants. Rather, mindful that myths and stereotypes against sexual assault complainants give rise to an error of law, courts must ensure these myths and stereotypes are not extended beyond their permissible scope.

[65] For example, just because the evidence happens to align with a myth or stereotype does not necessarily mean that any inferences that can be drawn from that evidence will be prejudicial. While it is a myth that women regularly fabricate allegations of sexual assault, it is not an error to consider whether the circumstances of a particular case support the existence of a motive to fabricate (see, e.g., *R. v. Esquivel-Benitez*, 2020 ONCA 160, 61 C.R. (7th) 326, at paras. 9-15) — indeed, where the defence adduces evidence on this point, a trial judge is *obliged* to consider it to give full effect to the presumption of innocence, and a failure to do so constitutes reversible error. Furthermore, while s. 276 of the *Code* prohibits the use of prior sexual history to support either twin myth, it clearly does *not* prohibit such evidence point-blank and for all purposes. So long as it is properly screened by s. 276, such evidence may be used, for instance, to resolve inconsistencies between the complainant and the accused's testimony as to their relationship.

[66] Our existing legal framework is sufficient to ensure that the accused's rights remain protected in sexual assault cases. It is vital that the accused's *Charter* rights be carefully respected, that any evidence the accused gives be properly assessed, and that the concept of myths and stereotypes remain appropriately constrained to its

proper scope. However, there is no need to adopt the proposed rule against ungrounded common-sense assumptions in order to correct any putative unfairness.

(iii) The Difference Between Factual and Legal Speculation

[67] The conceptual slippage between stereotyping and generalizing in the jurisprudence of the lower courts illustrates the importance of precisely defining errors of law and keeping them distinct from other factual findings, even erroneous ones. In this vein, brief comment is also warranted in response to the respondent Mr. Tsang's argument that the proposed rule against ungrounded common-sense assumptions is a logical offshoot of the error of law of "speculation". With respect, this submission confuses the colloquial meaning of speculation — drawing conclusions without basis in fact — with the more precise form of speculation as an *error of law*.

[68] Speculation as an error of law arises where a trial judge has found that certain evidence "creates a reasonable doubt as to the guilt of the accused, when, on a proper view of the law, that evidence is not capable of creating any doubt as to his guilt" (*Wild v. The Queen*, [1971] S.C.R. 101, at p. 111). In other words, it is an error of law to fail to distinguish between a rational conclusion as to reasonable doubt based on evidence, and an unsupported conclusion based on conjecture (see *Wild*; *Rousseau v. The Queen*, [1985] 2 S.C.R. 38; *R. v. B. (G.)*, [1990] 2 S.C.R. 57; *R. v. Clark*, 2015 BCCA 488, 407 D.L.R. (4th) 610, at para. 43, aff'd 2017 SCC 3, [2017] 1 S.C.R. 86). The term "speculation" as invoked in the courts below does not refer to this legal error, but rather is used, as it is in common parlance, to signify drawing *any* inferences that

are allegedly unsupported by evidence.[2] To the extent that, in recognizing the proposed rule, the courts below rely on the error of law of speculation — which most often arises where trial judges err in *acquitting* the accused based on speculative alternative explanations — they are stretching the case law beyond what it logically bears.

(2) The Proposed Rule Runs Contrary to Established Standards of Review and Is Counterproductive to Proper Testimonial Assessment

[69] Although the proposed rule against ungrounded common-sense assumptions has often been invoked in the sexual assault context, its applications extend to all criminal cases. I approach these reasons primarily in the context of sexual assault given that this is the offence immediately before the Court, but nothing in them should be taken as an endorsement of the proposed rule in any other case. Part of the justification for the rule's rejection in the context of these appeals is rooted in the body of law relating to sexual assault myths and stereotypes. However, cognizant that the rule has also been invoked in other contexts,[3] its fundamental weaknesses extend to all criminal appeals.

---

[2] For example, in *Roth*, the British Columbia Court of Appeal held that the trial judge erred in discounting the accused's evidence "on the basis of an unfounded (and therefore speculative) assumption about his physical stamina arising from his training as a powerlifter" (para. 71 (emphasis added)). The fact that the court used the terms "unfounded" and "speculative" interchangeably in this context does not mean that the court meant to indicate that *any* form of speculation, as it is colloquially understood, amounts to an error of law.

[3] See e.g. *R. v. Drydgen*, 2021 BCCA 125 (aggravated assault); *R. v. Petrolo*, 2021 ONCA 498, 156 O.R. (3d) 321 (breach of trust and obstruction of justice); *J.P. v. R.*, 2022 QCCA 104 (assault, indecent assault and threats to cause death or bodily harm).

[70] With that in mind, another reason why this proposed rule should not be adopted is that it is profoundly incompatible with the established law associated with credibility and reliability findings. The rule is not a cautious or incremental extension of existing principles — it is instead an unwarranted departure from how appellate courts typically treat trial judges' credibility findings. By exposing trial judges' findings to overly invasive appellate review, it creates a serious barrier to meaningful testimonial assessment, creating mischief that will extend across the entire criminal law.

(a) *The Role of Common Sense in Evaluating a Witness's Testimony*

[71] First, the proposed rule is incompatible with the often inextricable role common-sense assumptions play in credibility and reliability assessments. Testimonial assessment is largely based on inductive reasoning and the particular circumstances of the case: it requires the trier of fact to make assessments based on probable interpretations of the evidence (*R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301, at para. 111; *R. v. Munoz* (2006), 86 O.R. (3d) 134 (S.C.J.), at para. 23). Testimonial assessment therefore necessarily depends on the life experience a trial judge brings to their task, which, in turn, informs the common-sense inferences they draw from what they see before them.

[72] It is widely recognized that testimonial assessment *requires* triers of fact to rely on common-sense assumptions about the evidence. In *R. v. Delmas*, 2020 ABCA 152, 452 D.L.R. (4th) 375, at para. 31, aff'd 2020 SCC 39, [2020] 3 S.C.R. 780, the

Alberta Court of Appeal observed that triers of fact may rely on reason and common sense, life experience, and logic in assessing credibility. In *R. v. R.R.*, 2018 ABCA 287, 366 C.C.C. (3d) 293, the same court held that triers of fact "must invariably fall back on their common sense, and their acquired knowledge about human behaviour in assessing the credibility and reliability of witnesses" (para. 6). Finally, in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, this Court considered that the life experience of trial judges — though of course not a substitute for evidence, and subject to appropriately circumscribed limits — "is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility", and assists with a "myriad of decisions arising during the course of most trials" (para. 13). Reasoning about how people *generally* tend to behave, and how things *tend* to happen, is not only permissible, it is often a necessary component of a complete testimonial assessment.

[73] In turn, common-sense assumptions necessarily underlie *all* credibility and reliability assessments. Credibility can only be assessed against a general understanding of "the way things can and do happen"; it is by applying common sense and generalizing based on their accumulated knowledge about human behaviour that trial judges assess whether a narrative is plausible or "inherently improbable" (*R. v. Kiss*, 2018 ONCA 184, at para. 31 (CanLII); *R. v. Adebogun*, 2021 SKCA 136, [2022] 1 W.W.R. 187, at para. 24; *R. v. Kontzamanis*, 2011 BCCA 184, at para. 38 (CanLII)). Common sense underpins well-established principles guiding credibility assessment — including the now-universal idea that witnesses who are inconsistent are less likely to be telling the truth — and assists in assessing the scope and impact of particular

inconsistencies. Reliability also requires reference to common-sense assumptions about how witnesses perceive, remember, and relay information, invoking generalizations about how individuals tend to present information that they are remembering accurately and completely, as opposed to matters about which they are unsure or mistaken. A trial judge may, for example, infer that a witness was credible yet unreliable because they appeared sincere but displayed indicia that tend to suggest an unclear or uncertain memory (e.g., equivocation, phrases such as "hmm . . . let me see", long pauses, or failure to provide much detail).

[74] Even the proponents of the rule against ungrounded common-sense assumptions accept that common sense is necessary and, to some extent, inevitable, to the task of testimonial assessment. The Court of Appeal in Mr. Kruk's case acknowledged that in "working through the minefield of legal and evidentiary issues, trial judges apply their common sense to the evidence to reach sound verdicts" (para. 2), and indeed, "[r]elying on their life experience to assess the credibility of witnesses is a daily and appropriate exercise for trial judges" (para. 41). In *J.C.*, the court held that there is no bar on relying on common sense or human experience to *identify* inferences arising from the evidence — otherwise, circumstantial evidence, which depends on bridging gaps between the evidence and the inference drawn using human experience, would not be admissible at all. The court also correctly observed that there is no bar on using human experience to *draw* inferences from evidence. Otherwise, many other well-established principles of evidence — such as the idea that fleeing the

scene or destroying evidence after a criminal offence is generally proof of concealment of guilt — would also be put at risk.

[75] By *prohibiting* ungrounded common-sense assumptions, the proposed rule interferes with the necessary recourse to common sense as a part of testimonial analysis. Trial judges are uniquely tasked with assessing the testimony they hear and interpreting the range of possible inferences arising from the evidence. They must be able to rely not only on their judicial experience as fact-finders, but also on their common sense and the generalized expectations it generates about human behaviour. Trial judges will naturally rely on "ungrounded" assumptions about human behaviour in their testimonial assessments and thereby draw on factors that lie outside the immediate record. The judicial function entitles them to do so without requiring extrinsic evidence to support each and every one of their conclusions.

[76] The proposed rule's rationale is belied by a contradiction inherent in its own logic. It prohibits relying on common sense to introduce new considerations not arising from evidence — while simultaneously acknowledging that common sense *can* be used as an interpretive aid, which necessarily involves importing considerations arising not from the evidence itself but from a judge's accumulated life experience. It is effectively impossible to draw a clear boundary between using human experience to interpret evidence or draw inferences (which is permissible under the rule) and introducing new considerations into the evidence (which is not).

[77] According to the rule as described by the majority of the Court of Appeal below in Mr. Tsang's case, impermissible reasoning is: "affected by implicit, unsupported assumptions about 'normal behaviour'" (para. 53); "unsubstantiated, untethered to the evidence and a prejudicial stereotype" (para. 65); "assumptions with respect to human behaviour" (para. 73); "generalizations about normative behaviour [that] did not rest on the evidence" (para. 74); "unfounded" assumptions or "generalizations" (paras. 84 and 112); and "unsupported inferences" (para. 115). On the other hand, permissible reasoning includes: ". . . a conclusion about what this complainant is likely to have done in these circumstances" (para. 39 (emphasis deleted)); and "the class of inferences relating to behaviour that may fairly be drawn" and "not used to draw an inference that is 'unfair and inaccurate'" (para. 40). Curiously, the Court of Appeal in Mr. Tsang's case considered it *permissible* to infer that people who have recently met are unlikely to want to share drinking glasses, because such an inference is "based on common sense and [is] not prejudicial" (para. 40). Yet this inference is undeniably a generalization about human behaviour that was not grounded in any evidence.

[78] Given that a trial judge is inevitably bound to rely on a common-sense assumption at *some* point when assessing a witness's testimony, the ill-defined requirement that such assumptions must be "grounded in evidence" would also compel counsel in criminal cases to lead direct evidence to establish a wide range of notions that are generally true. To return to the example from Mr. Tsang's case, to *properly* be able to find that people who have just met are unlikely to share drinking glasses at a

bar — putting aside whether this is actually the case — the court would require direct evidence, presumably from the witnesses themselves. This evidence might include how closely each witness typically interacts with strangers in bars, their personal hygiene habits, and any inclinations or aversions they may have to sharing drinks with people they do not know, as well as presumably the underlying reasons for all of these propositions. Such matters are mundane, take up inordinate amounts of trial time, and are often of minimal, if any, relevance to the alleged offence. Particularly in sexual assault cases, which are already fraught with complexities, the incredible complications this type of evidentiary obligation would occasion cannot be understated.

[79] In sum, the proposed rule is fundamentally unfaithful to the necessary and proper use of common sense when assessing the testimony of witnesses. Worse, the rule also fails to establish any discernable boundary between the permissible and impermissible uses of common-sense assumptions. There is no coherent method to determine what assumptions are sufficiently uncontroversial to be "grounded in the evidence", nor *how* much evidence is required to "ground" them. Instead, as explained further below, the rule seems to reduce this question to what a particular reviewing court *deems* to be fair, accurate, or uncontentious. The rule thereby invites appellate courts to substitute their opinions about what generalizations are appropriate or instructive in any given circumstance for those of trial judges, improperly transforming their "strong opposition to [a] trial judge's factual inferences . . . into supposed legal errors" (*R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17; A.F. (Tsang), at para. 74). This dynamic creates uncertainty and unfairness on appeal.

(b) *Established Standards of Review for Credibility and Reliability Assessments*

[80] The proposed rule runs contrary to well-established standards of review and would unduly increase the scope of appellate intervention into the credibility and reliability assessments of trial judges. Adopting the rule would compromise the delicate task trial judges undertake when evaluating the evidence of a witness by subjecting their reasons to unjustifiably invasive appellate scrutiny.

[81] Assessments of credibility and reliability can be the most important judicial determinations in a criminal trial. They are certainly among the most difficult. This is especially so in sexual assault cases, which often involve acts that allegedly occurred in private and hinge on the contradictory testimony of two witnesses. The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621).[4] With respect to credibility in particular, while coherent reasons are

[4] Credibility assessments engage factors such as: the internal consistency and coherence of the witness's testimony and the incidence of inconsistencies with prior statements, especially those made under oath (*Maxwell v. The Queen*, [1979] 2 S.C.R. 1072); consistency with other accepted facts and probable circumstances (*R. v. Norman* (1993), 16 O.R. (3d) 295 (C.A.), at p. 314, citing *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.)); the plausibility of the narrative presented by the testimony (*Kiss*, at para. 31); evidence of a motive to fabricate (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 803); and demeanour, though courts should not rely exclusively on this consideration and should be conservative in according it weight (*R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 25-26; *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628, at para. 14; *R. v. Rhayel*, 2015 ONCA 377, 324 C.C.C. (3d) 362, at paras. 84-94; *R. v. Pelletier* (1995), 165 A.R. 138 (C.A.), at para. 18). Reliability assessments engage

crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.

[82] The governing standard of review applicable to findings of credibility and reliability is well established: absent a recognized error of law, such findings are entitled to deference unless a palpable and overriding error can be shown (*Gagnon*, at para. 10, citing *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at paras. 32-33; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 74). Credibility and reliability findings typically do not engage errors of law, as at their core they relate to the extent to which a judge has relied upon a particular factor and how closely that factor is tied to the evidence. Although such findings may be overturned on correctness if errors of law are disclosed, in most cases it is preferable to review them using the nuanced and holistic standard of palpable and overriding error — which defers to the conclusions of trial judges who have had direct exposure to the witnesses themselves.

factors such as: the conditions under which the witness made the material observations; the level of detail in their testimony; the amount of time that elapsed between the observations and the testimony; and whether any intervening factors may have tainted the witness's memory (see, e.g., *R. v. Virk*, 2015 BCSC 981, at para. 117 (CanLII), discussing reliability in relation to eyewitness identifications).

[83] Trial judges have expertise in assessing and weighing the facts, and their decisions reflect a familiarity that only comes with having sat through the entire case. The reasons for the deference accorded to a trial judge's factual and credibility findings include: (1) limiting the cost, number, and length of appeals; (2) promoting the autonomy and integrity of trial proceedings; and (3) recognizing the expertise and advantageous position of the trial judge (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 12-18). In light of the practical difficulty of explaining the constellation of impressions that inform them, it is well-established that "particular deference" should be accorded to credibility findings (*G.F.*, at para. 81). Appellate courts are comparatively ill-suited to credibility and reliability assessment, being restricted to reviewing written transcripts of testimony and often focussing narrowly, even telescopically, on particular issues as opposed to seeing the case and the evidence as a whole (*Housen*, at para. 14, citing R. D. Gibbens, "Appellate Review of Findings of Fact" (1991-92), 13 *Advocates' Q.* 445, at p. 446).

[84] The unique nature of testimonial assessment also guides how reviewing courts approach their task on appeal. Appellate courts must be mindful of the acute practical difficulties trial judges face in articulating why a particular witness was believed or disbelieved, tasked as they are with interpreting the various impressions and inferences that arise from the evidence (*Gagnon*, at para. 20; see also *R.E.M.*, at para. 28; *G.F.*, at para. 81). An appellate court should examine a trial judge's reasons as a whole and refrain from parsing their "individual linguistic components", as such an invasive approach would "undermine the trial judge's responsibility for weighing

all of the evidence" (*Gagnon*, at para. 19; see also *Housen*, at para. 72; *G.F.*, at para. 69; *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at para. 33; *R.E.M.*, at paras. 35 and 54). The need to review the entire record and for a full, flexible and functional approach when scrutinizing the findings of a trial judge is tied to the nature of the decision-making process at trial: reasons for judgment "are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict" (*R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 525).

[85] The palpable and overriding error standard strikes the appropriate balance between deference to the factual findings of the trial judge and the need for meaningful review of criminal cases on appeal. Although this standard is duly deferential to the trial judge's unique vantage point and expertise, even under this more deferential standard, appellate courts must determine whether the trial judge's findings on credibility and reliability are "the product of an evidence-based and context-specific assessment" of the witness's testimony (*R. v. Pastro*, 2021 BCCA 149, 71 C.R. (7th) 296, at para. 67). Trial judges must "clearly articulat[e]" the basis for their assessments and point to "a nexus to the facts of the case" as opposed to relying on "assumptions about expected responses or conduct" (Tanovich, at p. 92). Yet, the proposed rule against ungrounded common-sense assumptions undercuts the rationale for the palpable and overriding error standard by inviting appeal courts to examine the specific language of particular common-sense reasoning and scrutinize it on a standard of correctness. The ensuing appellate review exercise quickly becomes highly interventionist, cumbersome, and almost entirely unpredictable.

[86] Invoking the proposed rule, appellate courts have been invited to parse trial reasons, attack generic statements made in the course of credibility assessments, and frame any credibility findings based on human behaviour as impermissible stereotypes or common-sense assumptions untethered to evidence. In *Perkins*, *Cepic*, *Roth*, and *J.C.*, the appeal courts quashed the convictions due to errors in the trial judges' credibility assessments, concluding that the trial judges went beyond allowable common-sense inferences and engaged in reasoning not grounded in the evidence. In other cases, a review of the findings as a whole demonstrated that the trial judges had employed no unfounded assumptions and rather the credibility assessments had been conducted in relation to the parties and circumstances before the court. The jurisprudence in this area is variable, even volatile, and evinces the need for a more consistent approach to appellate review (see *Perkins*; *Roth*; *Cepic*; *J.C.*; see, *contra*, *Pastro*, at paras. 68-69; *R. v. Greif*, 2021 BCCA 187, at paras. 68-69 (CanLII); *Adebogun*; *R. v. Al-Rawi*, 2021 NSCA 86, 410 C.C.C. (3d) 385; *R. v. K.B.W.*, 2022 SKCA 8; *R. v. L.L.*, 2022 ONCA 50; *R. v. Lapierre*, 2022 NSCA 12; *Kritik-Langer v. R.*, 2022 QCCA 657; *R. v. Kavanagh*, 2022 BCCA 225; *R. v. D.B.*, 2022 SKCA 76, 415 C.C.C. (3d) 455; *R. v. S.A.*, 2022 ONCA 642; *R. v. S.M.*, 2023 ONCA 417).

[87] With respect, the Court of Appeal's decision in Mr. Tsang's case illustrates the microscopic form of appellate review this very Court has cautioned against. The Court of Appeal targeted specific word choices, approving certain formulations of the trial judge's credibility findings while implying that even slightly different word choices would have been erroneous. For example, in holding that the trial judge did *not*

rely on a prejudicial generalization in refusing to believe the complainant had physically expressed her interest in the accused on the dance floor, the court emphasized that the "trial judge did not conclude simply that [the idea] was 'not capable of belief'" but that "it was not capable of belief *in the circumstances*" (para. 33 (emphasis in original)). Similarly, approving of the trial judge's conclusion that it was unlikely the parties would have shared a drink because they were effectively strangers, the court held, "[i]mportantly . . ., the trial judge did not say [Mr. Tsang's] evidence about sharing a drink was 'unbelievable', it was simply 'unlikely' to have occurred" (para. 40).

[88] The proposed rule also risks diverting the focus of the trial judge's reasons on plausibility to issues of form over substance, creating a chilling effect against thorough and frank reasons. Under the rule, it would be permissible for a trial judge to find it implausible that x, y, or z would have occurred in the circumstances of the case — but it would be impermissible to plainly state the common-sense premise that *underpins* the finding of implausibility, for fear that an appellate court would deem that premise "ungrounded" in the evidence at trial. The unstated barometer underpinning plausibility is a generalized expectation about how events tend to unfold and how people tend to behave in particular situations, meaning that common-sense assumptions represent a necessary measuring stick against which to assess the plausibility of a narrative. Yet the proposed rule leads judges into a catch-22, as the judge's reasons (read functionally and contextually) must provide both the "what" *and* the "why" (*G.F.*, at paras. 68-70).

[89] This form of appellate review directly cuts against established principles and leads to arbitrariness in outcomes. It does not, in my respectful view, advance the interests of justice. To the extent trial judges are the ones who have heard the evidence, they are best placed to make the complex and multifaceted factual findings that culminate in fair and nuanced credibility assessments. Deference to trial judges' assessments of that evidence and the words they choose to describe it is warranted.

[90] In general, the introduction of new errors of law has the potential to upset the established balance in relation to credibility and reliability findings. Review based on an error of law may invite a "yes-no" answer measured on a standard of correctness, which opens the door to undue scrutiny of matters properly before the trial judge. To some extent, the materiality inquiry associated with the rule against ungrounded common-sense assumptions — under which the appellant must show that such reasoning "mattered in arriving at the impugned factual finding" (*J.C.*, at para. 100) — mitigates the categorical nature of an error of law. However, in my view, it remains preferable to assess whether an error has been made *in the first place* based on the palpable and overriding standard. An overriding error is necessarily material because it must be shown to have affected the trial judge's decision — but it is important to emphasize that an *overriding* error affects not just an isolated finding of fact, which may or may not have played a role in reaching the outcome, but the trial judge's decision as a whole. It is not enough for an appellant asserting palpable and overriding error to pull at leaves and branches and leave the tree standing; the entire tree must fall (*South Yukon Forest Corp. v. Canada*, 2012 FCA 165, 431 N.R. 286, at para. 46, cited

in *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, and *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 116).

[91] Overall, the palpable and overriding error standard fosters an appropriately holistic approach to appellate review. As compared to the invasive method associated with the proposed error of law, palpable and overriding error is far better attuned to the deference rightly afforded to trial judges' factual findings, including with respect to credibility and reliability findings. There is simply no need for this Court to endorse a departure from that established approach — let alone one so substantial — by recognizing a new error whose far-reaching repercussions would reverberate across the entire criminal law.

(3) Summary

[92] For the reasons outlined above, the proposed rule against ungrounded common-sense assumptions should not be recognized as giving rise to an error of law. The rule is in no way analogous to the body of law protecting sexual assault complainants from myths and stereotypes, nor can it be justified as necessary to ensure fairness to the accused. It also treats any and all factual assumptions drawn in the course of testimonial assessments as errors of law and thereby represents an unjustified departure from well-established principles governing testimonial assessment and appellate standards of review.

[93] Without the rule in play, appellate courts are left to rely on the existing and well-established law on assessing a trial judge's credibility or reliability assessments. For the utmost clarity, the applicable framework can be summarized as follows.

[94] First, where an appellant alleges that a trial judge erroneously relied on a "common-sense" assumption in their testimonial assessment, the reviewing court should first consider whether what is being impugned is, in fact, an assumption. Given the nature of how witnesses give evidence and the need to read the trial judge's reasons as a whole, what might appear to be an assumption on its face may actually be a judge's particular finding about the witness based on the evidence.

[95] Second, once satisfied that the trial judge did, in fact, rely on an assumption that is beyond the bounds of what common sense and the judicial function support, the reviewing court should identify the appropriate standard of review applicable to the impugned portion of the trial judge's credibility or reliability assessment.

[96] The standard of review will be correctness if the error alleged is a recognized error of law. Nothing in these reasons should be taken to limit the scope of existing errors of law relating to testimonial assessments that this Court has previously approved. Such errors may include reliance on myths and stereotypes about sexual assault complainants, as well as any improper and incorrect assumptions about accused persons that run contrary to fundamental principles such as the right to silence and the presumption of innocence. Testimonial assessments may also become vulnerable to correctness review for reasonable apprehension of bias (*S. (R.D.)*, at paras. 91-141),

making a finding of fact for which there is *no* evidence (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at para. 25; *Schuldt v. The Queen*, [1985] 2 S.C.R. 592, at p. 604), and improperly taking judicial notice (see, e.g., *R. v. Poperechny*, 2020 MBCA 81, 396 C.C.C. (3d) 478). As discussed, reliance on stereotypes other than myths and stereotypes about sexual assault complainants, but which are similarly rooted in inequality of treatment, may also amount to errors of law, and it remains open to all parties to argue as much in future cases. The list of errors of law is not closed — but the rule against ungrounded common-sense assumptions is not on it.

[97] Absent an error of law, the standard of review will be palpable and overriding error. The reviewing court must first determine whether the erroneous reliance on the assumption is palpable, in that it is "plainly seen", "plainly identified", or "obvious" (see *Housen*, at paras. 5-6; *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, at para. 9; *Benhaim*, at para. 38, citing *South Yukon Forest Corp.*, at para. 46). Palpable errors in this context will include, for example, where the assumption in question is obviously untrue on its face, or where it is untrue or inapplicable in light of the other accepted evidence or findings of fact. Although trial judges are clearly best placed to make factual findings and assess the accuracy of generalizations, appellate courts can balance the need for deference to those findings with employing their own common sense to determine whether the presumption was *clearly* illogical or unwarranted so as to make out a palpable error. Appellate courts are routinely tasked with, for example, considering whether based on "logic and human experience" a particular piece of evidence was relevant or whether an accused's after-the-fact conduct was consistent

with that of a guilty person (*R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 715; see *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 17). In the context of factual generalizations, so long as the assessment remains focused on whether there was any *palpable* error, such an exercise remains an integral part of the judicial function of a reviewing court.

[98] Once a palpable error has been identified, the reviewing court must also find that the erroneous reliance on the assumption was overriding, in that it is "shown to have affected the result" or "goes to the very core of the outcome of the case" (*Clark* (2005), at para. 9; *Benhaim*, at para. 38, citing *South Yukon Forest Corp.*, at para. 46). If it cannot be shown that the error was palpable *and* overriding, a trial judge's assessment of credibility or reliability will be entitled to deference and there will be no basis for appellate intervention.

[99] Given that I have found that a breach of the proposed rule against ungrounded common-sense assumptions should *not* be recognized as an error of law, many of the assumptions identified in the cases below, including those in the cases before this Court, in fact should have been reviewed for palpable and overriding error. Such an approach accords due deference to the trial judges' factual findings and the role common sense played in their testimonial assessments. At the same time, it should also be emphasized that common sense is far from a catch-all phrase that licenses any form of reasoning, no matter how faulty. Common sense is not always "common", does not always make "sense", and worst of all, may be based on falsehoods or

discriminatory beliefs. However, so long as the trial judge's use and invocation of common sense is appropriately constrained by the legal principles applicable to appellate review in general, there is nothing inherently objectionable about its use in testimonial assessment. If and when the permissible bounds of common sense have been exceeded, appellate courts may intervene. As Fitch J.A. succinctly summarized in *Pastro* (at para. 41):

> Judges are entitled, and expected, to rely on their life experience in making credibility findings. This necessarily includes drawing common-sense inferences from established facts. Juries are routinely instructed along the same lines — to come to common-sense conclusions based on the evidence they accept. Where it is apparent from a review of the reasons as a whole that a credibility assessment is rooted in the evidence, and is the product of a case-specific determination about what the complainant and accused did or did not do, there will be no basis for appellate intervention, absent palpable and overriding error in fact . . . . [Emphasis added; citations omitted.]

IV. Application

[100] Having rejected the proposed rule, I would allow both appeals and restore the convictions. In both cases, the Court of Appeal erred in using the rule against ungrounded common-sense assumptions and reviewing the alleged improper generalizations on a correctness standard. As a result, the court failed to adopt the required contextual and functional review, leading it to overturn the trial judges' decisions without a proper basis to do so.

[101] With respect, the Court of Appeal's approach in both cases reflects the fundamental problems with the rule against ungrounded common-sense assumptions. The rule invited the court to parse the trial judges' reasons in search of any assumptions drawn in their credibility and reliability assessments. This had the unfortunate effect of *mis*identifying particular phrases the trial judges used as "assumptions", divorcing those findings from their context and the reasons as a whole. In going even further and elevating the alleged assumptions into *errors of law*, the court applied the wrong standard of review. As a result, in both cases, many of the assumptions identified by the court were either not assumptions at all or were otherwise ordinary factual findings reviewable for palpable and overriding error.

A. *Mr. Kruk*

[102] In Mr. Kruk's case, the Court of Appeal erred in concluding that the trial judge relied on speculative reasoning in accepting the complainant's evidence based on his observation that it "is extremely unlikely that a woman would be mistaken about that feeling [of having a penis inside her]" (trial reasons, at para. 68 (emphasis added)). In context, it is clear that the impugned statement, while perhaps unfortunately worded, was in fact not a generalization at all, but a specific articulation of the judge's response to a theory advocated by the defence.

[103] First, in its analysis of the impugned statement, the Court of Appeal erred in failing to consider the whole of the judge's findings. The court observed that the trial judge had "rejected important parts of Mr. Kruk's evidence" — including his evidence

that he had given the complainant's parents his address, that the complainant had kicked off her own pants, and that he had only failed to contact the complainant's mother after a certain point because his phone had died — and that the judge had found inconsistencies between Mr. Kruk's testimony and prior statement to police (paras. 28-29). The court also acknowledged that despite the trial judge's concerns about the complainant's reliability due to her intoxication, the trial judge had accepted her "core assertion" that she woke up to Mr. Kruk's penis inside of her, as well as the circumstantial evidence in support thereof (paras. 30-32). However, these same findings appeared to play no role in the court's analysis. Despite noting at the outset that, in addition to the complainant's reliability, Mr. Kruk's credibility was a central issue in the case, the court's analysis focused *solely* on the issue of the complainant's reliability, the judge's acceptance of the complainant's assertion of sexual assault, and the single impugned statement at para. 68 of the trial reasons: "It is extremely unlikely that a woman would be mistaken about that feeling." The Court of Appeal characterized this single statement as the "primary reason" for the trial judge's acceptance of the complainant's evidence — the "why" of the judgment (paras. 63 and 65 (emphasis deleted)) — when it was para. 68 of the trial reasons *as a whole*, in conjunction with the judge's adverse credibility findings concerning Mr. Kruk and his observations at paras. 69-70 of the trial reasons about circumstantial evidence consistent with a sexual encounter having occurred, that in fact conveyed "why" Mr. Kruk should be convicted.

[104] In this vein, the Court of Appeal also failed to give due regard to the judge's specific credibility findings respecting Mr. Kruk. Though briefly acknowledged

elsewhere, the court's *analysis* of the trial judge's errors makes no reference to the judge's characterization of Mr. Kruk's explanation that the complainant kicked off her own pants as "improbable in the extreme" and the finding that Mr. Kruk lied to police about an extremely important fact: that he was wearing swim trunks, with no shirt, when the complainant's father arrived to find his daughter (trial reasons, at paras. 60 and 63). Nor is there any consideration of the fact that Mr. Kruk's failure to contact the complainant's mother was "inconsistent with [his stated] desire to be rid of the complainant and potentially consistent with some other motivation on his part" (trial reasons, at para. 67). These important findings are part and parcel of the judge's finding of guilt and worked to contextualize the impugned statement about the complainant — "a woman" — not being mistaken about the feeling of penetration. In my respectful view, this statement was merely a reflection of the trial judge's reasoning as opposed to reliance on an improper generalization.

[105] Viewed as a whole and in context, the trial judge did not reject the defence theory because of an assumption that *no woman* would be mistaken, but rather because he accepted the complainant's testimony that *she* was not mistaken. Despite her intoxication, he found the complainant's evidence on the material issue of whether there was penile-vaginal penetration to be reliable and therefore sufficient to ground a conviction. The trial judge addressed this theory at para. 68 of his reasons, acknowledging that whether the offence had been proven beyond a reasonable doubt depended on the complainant's core assertion that she felt Mr. Kruk's penis inside her vagina. He went on to say (at para. 68):

> [The complainant's] evidence is devoid of detail, yet she claims to be certain that she was not mistaken. She said she felt his penis inside her and she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely that a woman would be mistaken about that feeling.

[106] A functional and contextual reading of this passage of the trial reasons demonstrates that the impugned line was not an assumption or inappropriate "speculation", as the Court of Appeal characterized it, but rather a response to the defence theory advanced in closing submissions: that the complainant, though sincere, was mistaken about the physical sensation of penile-vaginal penetration due to her intoxication and panic after she awoke, which caused her to assume the worst.

[107] Even accepting the possibility that the trial judge relied on an assumption in making this finding, the Court of Appeal erred in reviewing that assumption for correctness based on the proposed rule against ungrounded common-sense assumptions. The appropriate standard of review was palpable and overriding error. In this regard, the trial judge bore in mind that, as a matter of common sense, it is extremely unlikely that someone would be mistaken about the feeling of penile-vaginal penetration. This assumption is not wrong in the sense of being untrue or inaccurate. It was a permissible assumption against which to consider the complainant's testimony that she was certain as to what she had felt. It discloses no palpable or overriding error.

[108] The Court of Appeal also considered that the trial judge's conclusion about the complainant's perception of penile-vaginal penetration was not the proper subject of judicial notice, as it engaged questions of "neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the

body's sensory system) and psychiatry (the impact of alcohol and/or trauma on perception and memory)" (para. 67). With respect, the court's analysis on this point illustrates the potentially absurd consequences of the rule against ungrounded common-sense assumptions. It belies belief that questions of neurology, physiology, or psychiatry would be engaged by testimony that an intoxicated witness was certain they were physically assaulted in some other way, such as a punch to the face or a kick to the shins, *such that expert evidence would be required to support that testimony* — yet this is exactly the type of evidence the court implied was necessary for the trial judge to reach the conclusion he did in the context of penile-vaginal penetration. Even putting aside the impracticalities associated with *finding* experts willing and able to testify on such issues, such testimony is simply not necessary to establish what the trial judge determined to be what happened, having heard the complainant's testimony and considering it in light of all the other evidence.

[109] Where a person with a vagina testifies credibly and with certainty that they felt penile-vaginal penetration, a trial judge must be entitled to conclude that they are unlikely to be mistaken. While the choice of the trial judge to use the words "a woman" may have been unfortunate and engendered confusion, in context, it is clear the judge was reasoning that it was extremely unlikely that the complainant would be mistaken about the feeling of penile-vaginal penetration because people generally, even if intoxicated, are not mistaken about that sensation. In other words, the judge's conclusion was grounded in his assessment of the complainant's testimony. The Court of Appeal erred in finding otherwise.

B. *Mr. Tsang*

[110] In Mr. Tsang's case, the Court of Appeal erred in concluding that the judge's assessment of the accused and the complainant's credibility was fatally affected by three material unfounded assumptions about normal behaviour: a person would not ask to be spanked "out of the blue"; a controlling person would not refrain from engaging in vaginal intercourse because they could not find a condom; and a person would not abruptly drive away from someone with whom they had just had consensual sex. Again, these first two assumptions were, in fact, not assumptions but statements that reflected the trial judge's reasoning process and findings of fact. The third assumption, though truly an assumption and one that was palpably incorrect, was not overriding, as it did not affect the core of the trial judge's finding of guilt.

[111] As a general observation, just as was the case in Mr. Kruk's appeal, the Court of Appeal erred by not considering the whole of the trial judge's reasons when it conducted its review. At the outset of its analysis, the court stated at para. 29 that the "focus of [their] attention" was on the trial judge's assessment of the complainant's and Mr. Tsang's credibility set out at paras. 117-58 of her reasons. While the identified paragraphs comprise the whole of the trial judge's credibility analysis, the court's assessment of each alleged error was narrower in scope. In particular, the court artificially segmented what happened in the car from what happened earlier in the night and thus did not view the judge's analysis as a whole.

[112] This is especially apparent from the court's finding that the trial judge had rejected Mr. Tsang's evidence about what happened in the car, where the alleged assault occurred, based on unfounded assumptions. The court explicitly held that the judge's prior finding that Mr. Tsang was untruthful about what had occurred at the after-party at the club was "bound to have coloured her assessment of [Mr. Tsang's] evidence about what happened later", but the court was unwilling to find that the earlier rebuffing of Mr. Tsang "weighed heavily in her rejection" of his evidence on what happened in the car (para. 45). In other words, the court disregarded the trial judge's adverse credibility findings against Mr. Tsang (trial reasons, at paras. 118-23).

[113] The court also segmented the complainant's evidence. It acknowledged the judge's finding that the complainant had no interest in Mr. Tsang while at the club, but then characterized the "sexual foreplay" that occurred in the car as a "marked departure from her previous behaviour", noting that the "complainant's resistance to [Mr. Tsang's] advances clearly diminished by the time they got to the parking lot" (para. 52). As such, the court determined that "the complainant's conduct earlier in the evening cannot be said to provide a reliable basis for conclusions with respect to consensual behaviour in the parked car" (para. 52). Though not the main issue on appeal, I note that in doing so, the court improperly reweighed the evidence to come to its own finding about what evidence could provide a "reliable basis" for the judge's subsequent conclusions.

[114] This description of the complainant's behaviour in the car as a "marked departure" ignores the thrust of her evidence: that "she was engaging in risk management" and chose to remain in the car because she was "scantily attired" and did not feel safe walking home through a bad neighbourhood where the sex trade occurs (trial reasons, at para. 53). She decided to get into the backseat of the car to kiss Mr. Tsang, even though the tip of his penis was exposed, because: ". . . the two of them had mutual friends and she thought she had a general idea of who he was. She said a man could just grab her off the street or she could stay with a guy she thought she knew. She thought that maybe giving Mr. Tsang a bit of what he wanted by making out, meaning kissing, was a little safer" (para. 54 (emphasis added)).

[115] The trial judge's analysis was alive to this aspect of the complainant's evidence. In considering the evidence that the complainant sat on Mr. Tsang's lap at the club, the judge quoted the complainant's testimony that "you pick your fights" (para. 141). Then, in considering that the complainant directed Mr. Tsang to pull into a parking lot, the judge observed that the complainant "weighed her options in her drunken state and decided to stay with a man who she had not perceived to be a threat to her that evening rather than walk home dressed as she was in a neighbourhood she thought to be unsafe" (para. 143). In finding that the complainant's behaviour was a "marked departure", the Court of Appeal did not accord appropriate deference to the trial judge's findings about what happened earlier in the night and the judge's uses of those findings to assess the testimony about what happened in the car, and improperly reweighed the evidence.

[116] Just as in Mr. Kruk's case, the court's approach to reviewing the reasons led it astray. When the trial judge's reasons are viewed holistically and in context, in my respectful view, the first two "assumptions" the Court of Appeal identified were not assumptions at all, and the third assumption did not amount to an overriding error.

[117] On the first alleged assumption, the Court of Appeal found two paragraphs in particular to be problematic:

> While I accept Mr. Tsang's evidence that [the complainant] got into the back seat with him and consented to engage in some sexual foreplay, it is not believable that [the complainant] would have asked him to spank her. Moreover, given the encounter thus far in the back seat, a belief that [the complainant] was gearing up for rough sex with Mr. Tsang would be a fanciful and unfounded one on his part. The comments he testified to sounded contrived as if he were describing how he thought such an encounter might unfold rather than what really happened in the parking lot that night.
>
> . . .
>
> . . . Mr. Tsang's evidence this was consensual rings hollow in the opinion of the Court. His testimony about the things he said to [the complainant] and what she said to him seemed lifted from a pornographic script completely at odds with their encounter up to that point.
>
> (trial reasons, at paras. 126 and 148)

[118] The Court of Appeal characterized the trial judge's conclusion that it was unbelievable the complainant would ask to be spanked as "a bald statement untethered to any evidence", considering that the trial judge's "primary rationale" for rejecting the conclusion appeared to be "simply that it is 'unbelievable'" (paras. 48-49). The court went on to emphasize that, absent extrinsic evidence to support it, the trial judge's conclusion about spanking could "only have been founded upon an assumption about

what activity [the complainant] might have willingly engaged in after she willingly engaged in some sexual foreplay", and that the trial judge's assessment of the evidence in this regard was thus affected by "implicit, unsupported assumptions about 'normal behaviour'" (para. 53).

[119] While the Court of Appeal appeared to be preoccupied with finding some evidence in the record to support the trial judge's conclusion, it simultaneously disregarded the fact that that the trial judge's assessment of the complainant's evidence was based on a record that, when assessed *as a whole*, contained the very evidence needed to contextualize that conclusion. Although clearly there was no evidence about what activities the complainant would have willingly engaged in after sexual foreplay, the complainant *specifically testified* that she had not agreed to being spanked and had not asked the accused for rough sex. This evidence formed the backdrop for the credibility findings at paras. 117-58 of the trial judge's reasons and for her ultimate decision to reject the accused's account as contrived. As was the case in Mr. Kruk's appeal, the Court of Appeal's reasoning in this context reflects the fundamental problems with the proposed rule against ungrounded common-sense assumptions: in search of some extrinsic source of support for generalizations, appellate courts risk missing the evidence that is actually in the record.

[120] The trial judge's conclusion that it was unbelievable the complainant would ask to be spanked or for rough sex must also be understood in the context of the broader body of evidence that the complainant was uninterested in Mr. Tsang, but

engaged in a risk analysis and agreed to limited sexual activity in the car — kissing, but nothing more. The trial judge's finding in this respect was tethered to her assessment of Mr. Tsang's evidence as contrived: her remark that Mr. Tsang sounded "as if he were describing how he thought such an encounter might unfold" represents her explanation for why she found Mr. Tsang's testimony that the complainant asked to be spanked to be unbelievable (para. 126). Put simply, the judge accepted the complainant's evidence that she did not ask to be spanked or consent to have sex — rough or otherwise — and rejected Mr. Tsang's evidence. Her conclusion was not based on an assumption, but rather represents her assessment of the direct testimony of the two key witnesses.

[121] With respect to the second alleged assumption, the Court of Appeal held the trial judge erred in finding that Mr. Tsang's description "about the prospect of intercourse being thwarted by the lack of a condom in his car when there was one available was contrived . . . and contrary to the level of control he conveyed about that evening and in court" (trial reasons, at para. 129). The Court of Appeal considered this finding to be "problematic" and characterized it as an assumption that a controlling person would not refrain from having unprotected sex (paras. 64-65).

[122] Mr. Tsang's evidence was not assessed in relation to an assumption about whether controlling people would refrain from sex without a condom — rather, his evidence on this point was inconsistent with the judge's other findings, and so was disbelieved. Properly viewed, the judge's finding was that *the accused himself* was

controlling and did not respect the complainant's wishes, a finding which the Court of Appeal agreed was open to her to make. In particular, the judge found that Mr. Tsang had, at various points, exercised control to ignore the wishes of the complainant and her friend, including by insisting that the women drink at the club and leave their bags in his car. In light of these findings, the judge found Mr. Tsang's evidence about not having sex, because the complainant asked if he had a condom and he could not find one, to be unbelievable. Because the Court of Appeal artificially isolated the findings about what happened in the car from what happened in the club, it did not properly consider these other findings and thus reached the erroneous conclusion that the judge had made an assumption.

[123] The third assumption the Court of Appeal identified relates to the judge's assessment of Mr. Tsang driving away quickly after dropping the complainant off. The judge made the following remarks:

> His lack of interest . . . at [the complainant's] invitation to meet again was at odds with his evidence that they had just had a great time, but is consistent with a non-consensual event where he got what he wanted without regard for her and drove away.
>
> . . .
>
> Mr. Tsang's testimony aligned with that of [the complainant] and [the complainant's friend] that he drove off as soon as [the complainant] got out of his car and he did not watch her go inside the house. I find this fact more consistent with [the complainant's] claim of non-consensual sex than with Mr. Tsang's version of what had just happened. He took off right away because of what he had just done to her and because she meant nothing to him. It is inconsistent with his evidence that he wanted to pleasure [the complainant] that night. [paras. 131 and 153]

[124] I agree that the judge erred here in relying on an assumption that people do not drive off quickly after consensual sexual encounters. However, without the rule against ungrounded common-sense assumptions in play, this assumption again falls to be assessed under the palpable and overriding error standard. This is the standard the Court of Appeal should have applied, and had it done so, it would have found no basis for reviewable error.

[125] I accept that the inaccuracy of this assumption is palpable, as it is obviously untrue and plainly observable. Mr. Tsang's after-the-fact decision to drive off quickly is neither consistent nor inconsistent with a sexual assault having occurred. As a matter of logic, the *speed* at which someone leaves after sexual activity generally has no bearing whatsoever on whether the activity was consensual or non-consensual. One can think of plenty of reasons why a person such as Mr. Tsang would want or need to depart quickly after *consensual* sex — including reasons completely irrelevant to the sexual activity itself, such as needing to get home after a late night. There are also plenty of reasons why a person who commits sexual assault would insist on staying at the scene for *longer* once the assault was over — for example, to ensure that the complainant does not say anything to others about what happened. In the context of this case, the fact that Mr. Tsang drove off as soon as the complainant got out of his car and "did not watch her go inside the house" (para. 153) has nothing to do with whether the complainant consented to the sexual activity earlier that night. I accept that the trial judge's reliance on this generalization was a palpable error.

[126] Nevertheless, the assumption is not overriding. Although it formed part of the judge's assessment of Mr. Tsang's testimony and contributed to the trial judge's finding that Mr. Tsang was a non-credible witness who "gave a very contrived and unbelievable story" (para. 156), the assumption itself did not form an essential part of the trial judge's decision to convict Mr. Tsang. Given all the other adverse credibility findings against Mr. Tsang, I am left with no doubt whatsoever that the judge would still have disbelieved him even without the assumption in play. Moreover, given the judge found the complainant to be credible and reliable, I am left with no doubt that the judge would still have convicted Mr. Tsang of sexual assault.

V. Disposition

[127] I would allow both appeals, set aside the orders of the British Columbia Court of Appeal, and restore the convictions.

The following are the reasons delivered by

ROWE J. —

TABLE OF CONTENTS

		Paragraph
I.	Overview	128
II.	Jurisprudential Background	134
III.	Principles of the Fact-Finding Process	141
A.	*Foundational Concepts*	142

B. *Generalized Expectations in the Fact-Finding Process* 151

IV. Framework for Appellate Review of the Use of Generalized Expectations in the Fact-Finding Process 160

A. *Did the Trial Judge Rely on a Generalized Expectation in Their Reasoning Process?* 165

(1) Materiality and the Curative Proviso 171

B. *If the Trial Judge Relied on a Generalized Expectation, Was the Expectation Reasonable?* 181

(1) Question of Law or Fact? 190

(2) The "Rules" in *J.C.* 209

C. *Did the Trial Judge Rely on a Generalized Expectation as Itself a Conclusive and Indisputable Fact?* 214

V. Application to These Appeals 220

A. *Mr. Kruk* 221

B. *Mr. Tsang* 233

(1) A Person Would Not Ask To Be Spanked While Engaging in Sexual Foreplay "Out of the Blue" 236

(2) A Controlling Person Would Not Refrain From Engaging in Vaginal Intercourse Because of the Absence of a Condom 240

(3) A Person Would Not Abruptly and Unceremoniously Leave Another With Whom He Had Engaged in Consensual Sex 245

VI. Conclusion 249

Appendix

I. Overview

[128] These two appeals ask how appellate courts should review trial judges' reliance on generalized expectations based on common sense and human experience in the fact-finding process. In both cases, the accused was convicted at trial by judge alone of one count of sexual assault, but the Court of Appeal for British Columbia unanimously ordered a new trial on the basis that the trial judge erred in their reliance

on generalized expectations about human perception or behaviour. The Crown appeals to this Court, seeking to restore the convictions.

[129] Generalized expectations based on common sense and human experience play a necessary role in the judicial fact-finding process. They serve as a logical benchmark against which to compare the evidence for the purposes of drawing inferences from circumstantial evidence or assessing a witness's credibility. However, intermediate appellate courts have increasingly identified concerns about the limits of this exercise. In these reasons, I propose three questions that an appellate court should ask when reviewing for potential legal error in a judge's reliance on generalized expectations in the fact-finding process.

[130] First, did the trial judge rely on a generalized expectation in their reasoning process? Often, a factual conclusion may appear to reflect a generalized expectation, but the judge may not have actually relied on such an expectation and instead assessed the evidence with reference to other accepted evidence or facts from the trial. If the appellate court determines that the judge relied on a generalized expectation, then no error of law has yet been identified, and the analysis will proceed to the second question. In contrast, where a judge has *not* relied on any generalized expectation, the review for potential error under this framework ends.

[131] Second, if the trial judge relied on a generalized expectation, was the expectation reasonable? In my view, it is an error of law for a judge to rely on an *unreasonable* generalized expectation to assess the evidence. Unreasonable

generalized expectations masquerading as common sense or collective human experience are not a legitimate basis on which to assess and understand the evidence in a criminal trial. They are not confined to what might be considered "myths" or "stereotypes" or to the context of sexual assault trials, but may arise throughout the fact-finding process in any criminal trial. Public confidence in the administration of justice and the judicial fact-finding process require that appellate courts be able to intervene where trial judges employ generalized expectations that are not a reasonably accurate reflection of what is true in most circumstances and are not a reliable benchmark to assess the evidence.

[132] Third, did the judge rely on a generalized expectation as itself a conclusive and indisputable fact? Although judges have considerable latitude to rely on reasonable generalized expectations as a benchmark for assessing the evidence, such expectations are not a *replacement* for the evidence. It is an error of law for a judge to fail to consider all of the evidence on the ultimate issue of guilt or innocence, or to make a factual conclusion in the absence of evidence. Where a judge relies on a generalized expectation as itself a factual conclusion, what the judge is really doing is taking judicial notice, which is subject to a stringent test.

[133] Applying these principles to the appeals at hand, I would allow the appeals and restore the convictions. In Mr. Kruk's case, the trial judge relied on a generalized expectation about the likelihood of a woman being mistaken about an invasive physical experience (2020 BCSC 1480). This was a reasonable expectation about general human

perception. The trial judge did not treat this as an indisputable fact but instead used it as a benchmark to assess the complainant's evidence in light of the totality of the evidence. There was therefore no basis for the Court of Appeal to intervene. In Mr. Tsang's case, the Court of Appeal wrongly identified the trial judge as having relied on a generalized expectation in two instances where the latter was actually assessing the whole of the evidence; this led the Court of Appeal to move beyond its role and reweigh the evidence. In one instance, the trial judge did err by relying on an unreasonable expectation about how people ordinarily behave after a consensual sexual encounter. However, this error could have had no impact on the verdict, and I would have maintained the conviction pursuant to the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46.

II. Jurisprudential Background

[134] The two decisions on appeal are part of an influx of recent decisions by intermediate appellate courts on the use of "common sense", "human experience", "logic", "generalizations", "assumptions", "myths", "stereotypes", and other similar concepts used by trial judges in the fact-finding process. Such issues have become especially prevalent in appeals from sexual assault verdicts, both from acquittals and convictions (see, e.g., *R. v. Kodwat*, 2017 YKCA 11; *R. v. A.R.D.*, 2017 ABCA 237, 422 D.L.R. (4th) 471 ("*A.R.D.*"), aff'd *R. v. A.R.J.D.*, 2018 SCC 6, [2018] 1 S.C.R. 218 ("*A.R.J.D.*"); *R. v. Quartey*, 2018 ABCA 12, 430 D.L.R. (4th) 381, aff'd 2018 SCC 59, [2018] 3 S.C.R. 687; *R. v. Kiss*, 2018 ONCA 184; *R. v. L. (J.)*, 2018 ONCA 756, 143

O.R. (3d) 170; *R. v. Paulos*, 2018 ABCA 433, 79 Alta. L.R. (6th) 33; *R. v. A. (A.B.)*, 2019 ONCA 124, 145 O.R. (3d) 634; *R. v. F.B.P.*, 2019 ONCA 157; *R. v. Cepic*, 2019 ONCA 541, 376 C.C.C. (3d) 286; *R. v. Pilkington*, 2019 BCCA 374; *R. v. Percy*, 2020 NSCA 11, 61 C.R. (7th) 7; *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107; *R. v. Delmas*, 2020 ABCA 152, 452 D.L.R. (4th) 375, aff'd 2020 SCC 39, [2020] 3 S.C.R. 780; *R. v. Pastro*, 2021 BCCA 149, 71 C.R. (7th) 296). Various attempts have been made to articulate the principles by which appellate courts should approach these issues. A coherent solution has been elusive.

[135] The parties and interveners point to the efforts of the Court of Appeal for Ontario in *R. v. J.C.*, 2021 ONCA 131, 401 C.C.C. (3d) 433, with varying degrees of approval. This decision was noted to be helpful by the Court of Appeal for British Columbia in Mr. Tsang's appeal (2022 BCCA 345, 419 C.C.C. (3d) 187). It was not cited directly in the decision on appeal in Mr. Kruk's case (2022 BCCA 18), but both of these decisions refer to similar authorities, such as *Roth*, *Cepic*, and *R. v. Perkins*, 2007 ONCA 585, 223 C.C.C. (3d) 289. It is therefore helpful to review *J.C.* at some length.

[136] In *J.C.*, Justice Paciocco, for the Court of Appeal, described "two relevant legal rules that identify impermissible reasoning relating to the plausibility of human behaviour" (para. 57). First, there is a "rule against ungrounded common-sense assumptions", which says that "judges must avoid speculative reasoning that invokes 'common-sense' assumptions that are not grounded in the evidence or appropriately

supported by judicial notice" (para. 58). The rule "does not bar using human experience about human behaviour to interpret evidence"; however, "[i]t prohibits judges from using 'common-sense' or human experience to introduce new considerations, not arising from evidence, into the decision-making process, including considerations about human behaviour" (para. 61).

[137] Second, there is an overlapping "rule against stereotypical inferences", which says that "factual findings, including determinations of credibility, cannot be based on stereotypical inferences about human behaviour" (para. 63). This means "it is an error of law to rely on stereotypes or erroneous common-sense assumptions" about how a complainant or accused person is expected to act, either to bolster or compromise their credibility (*ibid.*). This rule only prohibits *inferences* based on "stereotypes" or "prejudicial generalizations" from being drawn, not the admission or use of certain kinds of evidence. A factual conclusion may logically *reflect* a stereotype but will not be an error if it is based on the evidence.

[138] In addition, Justice Paciocco considered that "errors" arising from violating the rule against ungrounded common-sense assumptions or the rule against stereotypical inferences "are reversible only when they 'ground' the relevant inference by playing a material or important role in the impugned conclusion" (para. 71).

[139] *J.C.* has been relied on by intermediate appellate courts in numerous instances in the few years since it was decided. This reflects the prevalence of the issues now before this Court concerning trial judges' reliance on matters such as "common

sense" and "human experience" to decide cases. Professor Lisa Dufraimont describes the attempt to clarify the law in *J.C.* as a "real advance", while expressing some hesitation with respect to the breadth and malleability of the described rules ("Current Complications in the Law on Myths and Stereotypes" (2021), 99 *Can. Bar Rev.* 536, at pp. 563-64).

[140] A key issue raised by some of the parties and interveners in these appeals is whether the "rule against ungrounded common-sense assumptions" described in *J.C.* should be recognized as a basis for appellate intervention. The Crown and certain interveners say that the rule is unworkable and should be rejected by this Court, while the respondents and other interveners support the proposed approach in *J.C.* In contrast, the "rule against stereotypical reasoning" is (seemingly) less controversial; the parties all agree that stereotypical reasoning is a basis for appellate intervention. There is, however, a lack of clarity as to how some of the parties and interveners view the relationship between these two "rules". Further, the parties disagree as to whether an error must play a "material" or "important" role in the impugned conclusion in order for the error to be "reversible", as described in *J.C.*

III. Principles of the Fact-Finding Process

[141] The proliferation of appellate jurisprudence and the submissions before this Court point to the need for guidance in the form of a clear and consistent framework for appellate review. In my view, a significant reason for the lack of clarity and consistency is the imprecise use of terminology, such as "common sense",

"stereotypes", "myths", "inferences", "judicial notice", and "speculation". I therefore find it helpful to begin with what I consider to be fundamental principles of the fact-finding process. I set out these principles with a view to using precise terms deliberately.

A. *Foundational Concepts*

[142] The essential purpose and feature of the trial process is the search for truth by identifying the "fact[s]" to which the law will be applied (S. N. Lederman, M. K. Fuerst and H. C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (6th ed. 2022), at ¶1.40). In a criminal trial, the trier of fact is tasked with applying the law to the facts to determine whether the accused is guilty or not guilty of the offences charged. The law is set out by statute or by common law and must be correctly understood and applied. The facts, on the other hand, are the province of the trier of fact. The trier of fact's primary task is to make conclusions on the "facts in issue" in the trial; in a criminal case, the required elements of the offence are the key facts in issue. In addition to the facts in issue, any other fact will be relevant where it "proves or renders probable the past, present or future existence (or non-existence) of any fact in issue" (¶2.57). In addition, "[f]acts relating to the credibility of the witness giving direct or circumstantial evidence of a fact in issue are relevant" (¶2.58).

[143] A conclusion of fact can be arrived at in one of two general ways: (a) by taking of judicial notice or (b) by "findings of fact" derived from the evidence or through "inferences" from other facts.

[144] "Judicial notice" is the acceptance by a court of the truth of a particular fact without "proof" (Lederman, Fuerst and Stewart, at ¶19.25). The threshold for taking judicial notice of fact is strict — "a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48). Once a fact is taken on judicial notice, consideration of evidence on the fact will generally be foreclosed, as satisfying the test for judicial notice means the fact is not reasonably debatable; however, this does not mandate that any "inference" from the judicially-noticed fact must be drawn (Lederman, Fuerst and Stewart, ¶¶19.74-19.75). Due to the consequences of drawing a fact on judicial notice, judges should give the parties notice and the opportunity to respond before relying on such facts (¶¶19.78 et seq.).

[145] "Evidence" is the primary means to facilitate the introduction of all logically relevant facts at trial (Lederman, Fuerst and Stewart, at ¶1.1). There are various types of evidence; I focus in these reasons on *viva voce* testimony from witnesses at trial. Evidence must be admissible in order to be considered by the trier of fact; I do not discuss issues of admissibility in these reasons. Evidence is not itself fact. Witnesses testify as to their observations and experiences, and the trier of fact *may* accept all, some, or none of the witness's evidence as fact (see, e.g., *R. v. François*, [1994] 2 S.C.R. 827, at p. 837; *R. v. D.A.I.*, 2012 SCC 5, [2012] 1 S.C.R. 149, at para. 72).

[146] Whether evidence is accepted as fact by the trier of fact will depend on an assessment of the witness's "credibility" and "reliability". Credibility refers to a witness's honesty or sincerity. Reliability, meanwhile, is about the accuracy of the witness's testimony, referring to the witness's ability to observe, recall, and recount events (see *R. v. H.C.*, 2009 ONCA 56, 244 O.A.C. 288, at para. 41). Assessing credibility and reliability is not a science (see *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20). Credibility and reliability are assessed based on various factors including the character, demeanor, and conditions and capabilities of the witness, the plausibility and internal consistency of the testimony, and supporting information; it is also assessed in light of its consistency with other facts and evidence (D. M. Paciocco, P. Paciocco and L. Stuesser, *The Law of Evidence* (8th ed. 2020), at p. 593).

[147] There are, broadly speaking, two types of evidence: "direct evidence" and "circumstantial evidence". Direct evidence is "evidence which, if believed, resolves a matter in issue" (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at para. 88, quoting D. Watt, *Watt's Manual of Criminal Evidence* (2001), at § 8.0). For example, a witness who testifies that they saw it raining outside is providing direct evidence that it was raining. Circumstantial evidence, also known as "[i]ndirect evidence", is evidence from which the trier of fact is asked to draw certain "inferences" (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, at para. 23, quoting National Committee on Jury Instructions of the Canadian Judicial Council, *Model Jury Instructions* (online), s. 10.2). For example, a witness who testifies they saw someone enter the courthouse wearing a raincoat and carrying an umbrella, both dripping wet, is providing

circumstantial evidence, from which an inference may be drawn that it was raining (see *ibid.*). Circumstantial evidence "is all about inferences" (S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), at § 31:17, citing *R. v. Gibson*, 2021 ONCA 530, 157 O.R. (3d) 597, at para. 76).

[148] An "inference" is a finding of fact that may logically and reasonably be drawn from another fact (or group of facts) found or otherwise established in the proceedings (e.g., through judicial notice) (Hill, Tanovich and Strezos, at § 31:17, citing *R. v. Chanmany*, 2016 ONCA 576, 338 C.C.C. (3d) 578, at para. 45; *Lampard v. The Queen*, [1969] S.C.R. 373; D. Watt, *Watt's Manual of Criminal Evidence* (2023), at §12.01). Thus, triers of fact draw inferences from facts (known as "primary facts") in order to conclude the existence of further facts (which are inferences). Inferences may — not must — be drawn in the circumstances (Watt, at §12.01).

[149] An "opinion" can be understood as a particular *inference* proffered by a witness (see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 14). The line between fact and opinion is not always clearly drawn (*Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 835). As a general rule, however, witnesses may not give opinions, but should testify only to "facts" in their knowledge, observation, and experience; it is for the trier of fact to draw inferences from proven facts (Lederman, Fuerst and Stewart, at ¶12.2). However, a qualified expert witness may provide the trier of fact with a "ready-made inference" that the trier of fact would otherwise not be able to draw because of the technical nature of the

subject matter (*ibid.*; *R. v. Mohan*, [1994] 2 S.C.R. 9). A lay witness may also be able to give an opinion on certain matters (see *Graat*); however, as the evidence approaches the central issues that the court must decide, resistance to admissibility increases (Lederman, Fuerst and Stewart, at ¶12.15).

[150] "Speculation" is a concept that has been given several meanings in different contexts. Notably, inferences must be ones which can be reasonably and logically drawn from a primary fact established by the evidence (or on judicial notice); however, "[a]n inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation" (*R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 530). It follows that reasoning that is not based on the facts established by evidence is generally speculative. However, "[t]he boundary that separates permissible inference from impermissible speculation in connection with circumstantial evidence is often a very difficult one to determine" (Watt, at §12.01; see also Hill, Tanovich and Strezos, at § 31:17; *Canadian Pacific Railway Co. v. Murray*, [1932] S.C.R. 112, at p. 117).

B. *Generalized Expectations in the Fact-Finding Process*

[151] The foregoing sets out certain foundational concepts of the fact-finding process. Missing from this array is the role of the trial judge's *reasoning*, which bridges the gaps between evidence and fact, primary fact and inference, and so on.

[152] Common sense has been described as "both self-evident and inscrutable" (P. Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice* (2017), at p. 15). At various points in the fact-finding process, trial judges will necessarily rely on their "common sense" and "human experience" (or "experience of human affairs" (*R. v. Béland*, [1987] 2 S.C.R. 398, at p. 418)) when assessing the evidence and deciding the facts in a case (see *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 13, 29, 38 and 130; *Villaroman*, at para. 30). As Justice Major explained in *S. (R.D.)*:

> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write in their book *The Law of Evidence* (1996), at p. 277:
>
> > In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact. [Emphasis deleted; para. 39.]

[153] Thus, common sense and human experience are the foundation for what can be described as "generalized expectations" — whether about typical human behaviour, human perception, or other shared experiences of humanity. In these reasons, I will rely on the language of "generalized expectations" to encompass considerations based on "common sense" or "human experience" in the judicial reasoning process. This phrase highlights that such considerations are both *generalized* (meaning they relate not to any particular person or event, but about people or things

in general) and are *expectations* (meaning they are ideas about what is *usually* or *ordinarily* true, not about what is definitively true in a particular case). Such generalized expectations are often referred to, *inter alia*, as "assumptions" (including "common-sense assumptions"), "generalizations", or "common-sense inferences". I do not favour those terms, insofar as they necessarily imply error through negative connotations or invite confusion with inferences as factual conclusions drawn from the evidence or other primary facts.

[154] Common sense, upon which generalized expectations are based, is the "predominant source of assessment for trier of fact decision-making" (Hill, Tanovich and Strezos, at § 31:16). Generalized expectations are an input into the reasoning process, acting as a logical *benchmark* against which to compare the evidence. For example, during the reasoning process used to arrive at an *inference* from a primary fact, trial judges may compare a proposed inference against the benchmark of a generalized expectation of events based on common sense and human experience. To parse out the wet raincoat and umbrella example raised earlier, the proposed inference might be that it was raining. A witness may offer the circumstantial evidence that they saw someone with a dripping raincoat and umbrella. In order to draw the inference that it was raining, the trier of fact might rely on the *generalized expectation* that raincoats and umbrellas are usually wet due to the rain. My point is that the generalized expectation is an input in the inference-drawing process, whether implicit or explicitly relied on. The inference, of course, is subject to the other evidence in the record.

[155] Similarly, in assessing the *credibility* of a witness, trial judges are also expected to apply common sense and human experience as a benchmark against which to weigh the plausibility of the evidence (Paciocco, Paciocco and Stuesser, at p. 608; see also *R. v. Marquard*, [1993] 4 S.C.R. 223, at p. 248); thus, the trial judge applies their experiences and common sense when judging the witness's demeanour, character, or the internal or external plausibility of their evidence to decide whether an individual's evidence is believable (Paciocco, Paciocco and Stuesser, at p. 593).

[156] Generalized expectations based on common sense are frequently recognized in the jurisprudence. For example, it is a common-sense expectation that a person foresees the natural and probable consequences of their actions (*R. v. Walle*, 2012 SCC 41, [2012] 2 S.C.R. 438, at para. 64), or is unlikely to flee a crime scene if they are not responsible for the act (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 50), or is unlikely to make false statements against their own interest (*R. v. O'Brien*, [1978] 1 S.C.R. 591, at p. 594). There is no closed list of common-sense assumptions; these are merely examples of the basic premise that triers of fact need not check their common sense and life experiences at the courthouse door.

[157] Some generalized expectations have been recognized in the jurisprudence as myths and stereotypes. "[M]yths and stereotypes" as a unified phrase is often understood in Canadian legal discourse as referring to "false beliefs about sexual assault that distort the fact-finding process", often concerning complainants and particularly women and children (L. Dufraimont, "Myth, Inference and Evidence in

Sexual Assault Trials" (2019), 44 *Queen's L.J.* 316, at pp. 330-32). This Court has recognized "the prevailing existence of such myths and stereotypes" based on overwhelming evidence from relevant social science literature (*Find*, at para. 101). Regarding complainants in cases of sexual assault, this Court has noted that myths and stereotypes "are particularly invidious because they comprise part of the fabric of social 'common sense' in which we are daily immersed" and they "create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors" (para. 103).

[158] In my view, concepts such as "myths" and "stereotypes" should be given distinct meanings. I would adopt a conception of "stereotypes" as referring to biases arising from "traits that one associates with a particular group" (*R. v. Chouhan*, 2021 SCC 26, [2021] 2 S.C.R. 136, at para. 53 (emphasis added), per Moldaver and Brown JJ., quoting A. Roberts, "(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias" (2012), 44 *Conn. L. Rev.* 827, at p. 833). In contrast, a "myth" might be considered a "widely held misconception" (*Oxford English Dictionary* (online)) about *people in general*, particularly with regard to sexual behaviour; for example, the "twin myths" set out in s. 276(1) relate to *all* complainants where their past sexual activity is at issue, although these myths have historically and continue to be targeted disproportionately at women and children. While there may be overlap in the meaning of these terms, efforts should be made to clearly set out the relevant concerns at play in a given case.

[159] I note that reliance on generalized expectations in judicial reasoning has been understood by some as a form of implicit "judicial notice" (see, e.g., Hill, Tanovich and Strezos, at § 26:2). In my view, it is best to avoid the term "judicial notice" in this context to distinguish (a) the *reasoning process* relating to evidence based on consistency with a generalized expectation from (b) the *conclusion* of indisputable or notorious facts through judicial notice (as an alternative to findings of fact from the evidence). As I will explain later, these concepts should be kept distinct.

IV. Framework for Appellate Review of the Use of Generalized Expectations in the Fact-Finding Process

[160] The principles described above disclose two overarching ideas, which can be in tension, though not necessarily in conflict.

[161] On one hand, triers of fact necessarily rely on generalized expectations based on common sense or human experience as a logical benchmark when assessing the evidence. This occurs in at least two ways: (1) when drawing inferences from primary facts (by comparing the proposed inference to a generalized expectation of what is likely to happen from a given set of circumstances), and (2) when assessing credibility (by comparing the witness's evidence to a generalized expectation of what people do or feel).

[162] On the other hand, reliance on generalized expectations in a criminal proceeding is not without limits. Some expectations may not be accurate or reliable

predictors of general human behaviour. This includes (but, as I will explain, is not limited to) "stereotypes" or other prejudicial assumptions about a particular *group* of people, as well as certain widely-held misconceptions about human behaviour that the law has identified as "myths". Furthermore, even if an expectation may be acceptable as a *general* proposition, it is always possible that reality may run contrary to that expectation. The trial judge's duty is to decide what *really* happened, based on the evidence. Relatedly, a factual *conclusion* derived *entirely* from a generalized expectation in the absence — or to the exclusion — of the evidence is best conceptualized as a fact drawn on judicial notice, which is subject to a stringent test. This is distinguishable from the use of generalized expectations as an input into the reasoning process when assessing evidence.

[163] In my view, these overarching ideas disclose three questions that an appellate court should ask when reviewing for potential legal error in a trial judge's reliance on generalized expectations in the fact-finding process:

> A. Did the trial judge rely on a generalized expectation in their reasoning process?
>
> B. If the trial judge relied on a generalized expectation, was the expectation reasonable?

C. Did the trial judge rely on a generalized expectation as itself a conclusive and indisputable fact?

[164] The first question is a means of distinguishing the judge's overall appreciation of the evidence from the use of generalized expectations in the reasoning process. The second and third questions can disclose errors of law by the trial judge, but only if, under the first question, the judge has indeed relied on a generalized expectation. I will discuss each question in turn. I include a diagram of this framework as an appendix to these reasons.

A. *Did the Trial Judge Rely on a Generalized Expectation in Their Reasoning Process?*

[165] Where a trial judge makes a conclusion about a witness's credibility or an inference or a finding of fact from the evidence, that conclusion may appear to *reflect* a generalized expectation about the behaviour of *most* people (or a particular type of person), but the judge may not have actually *relied* on a generalized expectation. Instead, the judge may have assessed the evidence by comparing it to other accepted evidence or facts from the trial. Generally speaking, an appellate court may not interfere with the trial judge's overall appreciation of the evidence, absent a palpable and overriding error of fact or unless the resulting verdict is unreasonable under s. 686(1)(a)(i).

[166] Thus, where a judge is alleged to have improperly relied on a generalized expectation, appellate courts must first review the judge's reasons to determine whether the judge indeed relied on the alleged generalized expectation. Where no generalized expectation is employed, there is no basis for further appellate scrutiny, absent some other recognized basis for appellate intervention such as an unreasonable verdict. If, on the other hand, the appellate court concludes that the trial judge *did* rely on a generalized expectation, then the analysis proceeds to the next question.

[167] At this stage of the analysis, the appellate court is not identifying any error. It is not an error of law *per se* for a judge to rely on a generalized expectation as a logical benchmark when assessing the evidence. To the contrary, as I have explained, this is a well-recognized and necessary part of the judicial fact-finding process. Rather, in answering this first question, the appellate court is simply determining what the trial judge really decided, why the judge decided that way, and whether there is a basis for further scrutiny.

[168] Many errors often alleged before appellate courts would be resolved under this question. For example, in *Quartey*, the accused — a man — testified that he was not interested in sex with the complainant and that he had refused the complainant's attempt to perform fellatio on him because he did not enjoy fellatio. The trial judge rejected his evidence and found him guilty of sexual assault. On appeal, the accused argued that the judge found his testimony unbelievable because the judge assumed men are more interested in engaging in sex than women and that all men enjoy fellatio. This

Court agreed with the Court of Appeal of Alberta that the trial judge did not "err by applying generalizations and stereotypes in rejecting the appellant's evidence", because "the trial judge's statements in this regard were directed to the appellant's *own* evidence and to the believability of *the appellant's* claims about how *he* responded to the specific circumstances of this case, and not to some stereotypical understanding of how *men* in those circumstances would conduct themselves" (para. 3 (emphasis in original); see also, e.g., *Pastro*, at paras. 41 and 66; *Percy*, at para. 107).

[169] As Professor Dufraimont observes, "[t]he clear implication of *Quartey* . . . is that the accused's appeal would have succeeded if the trial judge had indeed relied on stereotypes about men and male sexuality" ((2021), at p. 548). Thus, a negative answer to this first question may obviate appellate intervention, even where an alleged generalized expectation, *had it been relied on*, would have amounted to an error of law (as discussed below).

[170] How can appellate courts determine whether a trial judge relied on a generalized expectation (meaning the analysis proceeds to the next two questions below) or made a determination based on the evidence and facts in the particular case (meaning there is no need for further scrutiny under this framework)? This is a highly case-dependent inquiry. However, this Court has provided repeated guidance in recent cases to which appellate courts should direct themselves. An appellate court must assess whether the reasons, read as a whole and in the context of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that

permits effective appellate review. Appellate courts must not finely parse the trial judge's reasons in a search for error (see *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 69, referring to *R. v. Chung*, 2020 SCC 8, [2020] 1 S.C.R. 405, at paras. 13 and 33). Thus, appellate courts must not view a single statement that might appear to reflect a generalized expectation in isolation. The reasons read as a whole and considered in light of the evidence and submissions at trial may indicate that the statement related to the circumstances of the particular case or a conclusion made by the judge elsewhere in the reasons.

(1) Materiality and the Curative Proviso

[171] Before turning to the second question of my proposed framework, I pause to distinguish the question of whether the trial judge relied on a generalized expectation, as described above, from the question of "materiality" and the operation of the curative proviso under s. 686(1)(b)(iii) of the *Criminal Code*. As I have explained, the Court of Appeal for Ontario in *J.C.* considered that, *after* identifying errors in the trial judge's reasons (with respect to a "rule against ungrounded common-sense assumptions" or a "rule against stereotypical reasoning"), an appellate court may reverse the trial judge's decision "only when [the errors] 'ground' the relevant inference by playing a material or important role in the impugned conclusion" (para. 71). Justice Paciocco stated that the burden to prove the materiality of an error falls on the accused who appeals, and that this consideration is distinct from the operation of the curative proviso, where the burden falls on the Crown (paras. 100-101). This aspect

of *J.C.* led the Court of Appeal for British Columbia in Mr. Tsang's case to conduct an extensive review of the evidence and the trial judge's reasons to determine whether the judge committed a reversible error, *after* having found that the judge had erred.

[172] The requirement for materiality or importance in *J.C.* appears to be founded on the idea that a judge may not have actually "relied on" a given "stereotype or improper inference", as in cases such as *Quartey* (see *J.C.*, at paras. 71-74). I would give effect to this question pursuant to the first question that I have described above. In my view, appellate courts must address the question of "reliance" at the *outset* of the analysis, rather than as part of a secondary "materiality" analysis *after* identifying an error. This encourages restraint and simplicity in terms of how appellate review is conducted by obviating the need for unnecessary scrutiny into the reasonableness of hypothetical generalized expectations or "stereotypes" that were not actually relied on by the trial judge.

[173] However, unlike the framework proposed in *J.C.*, this question does *not* turn on whether the judge's reliance on a generalized expectation was "material" or "important" to the analysis. Whenever an appellate court identifies the trial judge as having relied on a generalized expectation, the analysis proceeds to the second question that I describe below, regardless of whether that reliance was material or important. Again, an affirmative answer to this first question does not yet amount to an error.

[174] I come to this conclusion because, as I will explain, the question of whether an error was "material" to the conviction plays no role in *identifying an error of law*.

Rather, it is only *after* an error of law has been identified on an appeal that the burden falls on the *Crown* to demonstrate whether the error was "material" to the conviction. The particulars of the Crown's burden in this respect differ depending on the identity of the appealing party and the nature of the alleged error.

[175] In an appeal by the accused from a conviction, the question of materiality is addressed under the curative proviso in s. 686(1)(b)(iii) of the *Criminal Code*. Whenever an appellate court identifies an error of law by the trial judge in a conviction appeal, it may nonetheless decline to intervene under the curative proviso on the basis that no substantial wrong or miscarriage of justice has occurred. The curative proviso may be invoked in two circumstances: (1) where the error can be considered "harmless", or (2) where the Crown's case is "overwhelming" (*R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, at para. 25 (emphasis deleted)). The burden falls on the Crown to demonstrate one of these requirements (*R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34). In either instance, "the underlying question is always whether the verdict would have been the same if the error had not been committed" (*Van*, at para. 36).

[176] The principles of appellate review for legal error and the application of the curative proviso must be kept distinct. The *Criminal Code* and this Court's jurisprudence mandate a structured analysis. The appellant must first demonstrate an error of law. Only then does the Crown, should it choose to rely on the curative proviso, bear the burden to satisfy one of the bases for its application. This division of

responsibility "acknowledges that, when an error of law . . . is established, a presumption is created in favor of allowing the appeal, unless it is shown that the error or irregularity is curable" (*R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 88; see also *Morrissey*). The burden on the Crown is heavy, "reflecting the limited role of an appellate court and the need to safeguard the criminal justice process from the risk of wrongful convictions" (*R. v. Samaniego*, 2022 SCC 9, at para. 162, per Côté and Rowe JJ., dissenting). It would effectively reverse this burden to require the appellant in a conviction appeal to demonstrate materiality when identifying an error of law, as this simply mirrors the considerations under the curative proviso. For example, the Court of Appeal for Ontario in *J.C.* considered that a reversible error will arise only where "it cannot safely be said that the trial judge would have reached the same conclusion without the error" (para. 73). It is difficult to see how one could ever conclude that "the verdict would have been the same if the error had not been committed" under the curative proviso if it had already been decided that the judge may not have reached the same conclusion without the error.

[177] The Court of Appeal in *J.C.* may have mistakenly imported the requirement for materiality from two contexts in which materiality is required. However, there is a distinct rationale for the materiality requirement in those contexts, which cannot be translated to appeals from convictions on an error of law.

[178] First, the requirement for an error of law to be material arises in appeals by the *Crown* from *acquittals* (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at para.

14). In such appeals, the burden remains with the Crown to prove *both* the existence of legal error as well as the materiality of that error. The burden on the Crown is a "heavy one", recognizing that acquittals ought not to be overturned lightly (*R. v. Morin*, [1988] 2 S.C.R. 345, at p. 374; *Graveline*, at para. 15; S. Coughlan, *Criminal Procedure* (4th ed. 2020), at p. 587). Thus, "different policy considerations apply in providing the Crown with a right of appeal against acquittals" (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33). The same concerns about limiting Crown appeals cannot be imputed onto accused persons in appeals from convictions where, again, errors of law are presumed to have prejudiced the accused unless the Crown can prove otherwise under the curative proviso.

[179] Second, the issue of materiality arises in the context of misapprehensions of evidence amounting to a miscarriage of justice (see *Morrissey*; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3). Here, the appellant in a conviction appeal must prove materiality because misapprehensions of evidence are, generally speaking, factual issues, not questions of law. There is no presumption that factual issues are material and thus constitute a miscarriage of justice, such that the grounds for appellate intervention under s. 686(1)(a) of the *Criminal Code* are engaged. As explained by Justice Doherty in *Morrissey*, "[w]here the error is one of law the Crown bears the burden of demonstrating that the error did not result in a miscarriage of justice. Where the error is not one of law alone the appellant bears that burden" (p. 540).

[180] With this precision in hand, I turn to discuss the second question that an appellate court should ask, if it has determined that the trial judge relied on a generalized expectation.

B. *If the Trial Judge Relied on a Generalized Expectation, Was the Expectation Reasonable?*

[181] Again, it is not an error of law *per se* for a trial judge to rely on a generalized expectation as a logical benchmark when assessing the evidence. Generalized expectations are necessarily relied on as inputs in the inference-drawing process, as well as when determining credibility. However, as I have explained, generalized expectations are based not on the evidence, but on common sense and human experience. Some generalized expectations may be widely held by the community but may be revealed over time to be inaccurate or unreliable, including through developments in psychological or social science research. Other expectations may not be widely held and may instead be the product of the trial judge's own intuition, which may sometimes fail to accurately or reliably predict the behaviours or experiences of ordinary people. It is not controversial that inferences themselves cannot be based on "[i]ntuitive notions of probability at odds with objectively relevant probability theory" or "unsupportable stereotypical or prejudicial reasoning" (Hill, Tanovich and Strezos, at § 31:25). Similarly, where an inference is drawn pursuant to a generalized expectation, that expectation must reflect some measure of objective common sense rather than an individual's assumption that may be intuitive but, ultimately, inaccurate. Thus, "if the trial process is a search for the truth, then misplaced

assumptions about human behaviour which drive the trier of fact to draw incorrect inferences from the evidence must be unmasked if this process is not to be subverted rather than furthered" (*Marquard*, at pp. 265-66 (emphasis added), per L'Heureux-Dubé J., dissenting).

[182] I would therefore propose the following question for appellate review. If, under the first question, the appellate court concludes that the trial judge did rely on a generalized expectation in assessing the evidence, then the appellate court should determine whether the generalized expectation was *reasonable*. A standard of reasonableness imparts a measure of objectivity and community consensus in shaping the boundaries of a judge's reliance on common sense and human experience to make decisions, thus ensuring that triers of fact do not rely on generalized expectations that are inaccurate or unreliable. It also recognizes that as society evolves, its understanding of what is reasonable may change.

[183] I note that the standard could have been couched in terms of "accurate", "true", "plausible", etc. In my opinion, "reasonableness" is preferable. It strikes a balance between: (a) ensuring that triers of fact do not rely on unacceptably prejudicial or inaccurate generalizations on one hand, and (b) respect for the trier of fact's role and the necessity of common sense and human experience in fact-finding on the other hand.

[184] Where a trial judge relies on an *unreasonable* generalized expectation in assessing the evidence, then the judge has committed an error of law. This will invite appellate intervention, subject to the Crown successfully invoking the curative proviso

or, in an appeal by the Crown, subject to the Crown's ability to demonstrate the materiality of the error (as explained above, these inquiries are distinct from the identification of legal error). I add that the fact that this is a "reasonableness" standard does not foreclose appellate review on a correctness standard for errors of law; other standards with an element of "reasonableness" (e.g., the existence of reasonable and probable grounds (*R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, at para. 20)) can entail a question of law.

[185] Similar to how drawing the line between a reasonable inference and speculation is "not always easy" (*Villaroman*, at paras. 38 and 43), it is difficult to set out, in the abstract, what amounts to a reasonable generalized expectation with perfect precision. It will be up to appellate courts to consider the reasonableness of a proposition derived from common sense or human experience. The crucial point, however, is that a generalized expectation must be a reasonably accurate reflection of what is true in most circumstances, such that it can be used as a reliable benchmark to assess the evidence.

[186] Examples of reasonable generalized expectations abound in the jurisprudence. Often, these generalized expectations relate to human experience or behaviour. This includes the "common-sense assumptions" I have referred to that a person foresees the natural consequences of their actions or is unlikely to make false statements against their own interest. Such expectations are frequently relied on in the fact-finding process because they are understood as reasonably accurate reflections of

ordinary human behaviour or experience, until proven otherwise. This does not mean that these expectations are *invariably* true, only that they are *usually* true. The reasoning process depends on these "assumptions about the ordinary conduct of people in assessing credibility, and in assessing circumstantial evidence" (*R. v. R.R.*, 2018 ABCA 287, 366 C.C.C. (3d) 293, at para. 5; see, e.g., *A.R.D.*, at para. 100; see *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 67). Thus, what is available as a generalized expectation in one case will be available in any other case (this relates to the principle of universality, which I discuss below).

[187] Where the boundaries of common sense or human experience end and the trial judge relies on an inaccurate proposition masquerading as "common sense" or "human experience", the expectation cannot be said to be a reasonable reflection of what is true in most circumstances and should not be used as a benchmark to assess the evidence. Myths and stereotypes are recognized examples of inaccurate generalized expectations that "jeopardize the courts' truth-finding function" (*R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439, at para. 2). For example, the common law historically reflected the generalized expectation that victims of sexual assault are likely to report the acts, and that the failure to do so suggested that the acts did not occur. While at one time this was considered a fair expectation reflected in the "doctrine of recent complaint", improved understanding over time has shown it to be an inaccurate and therefore unreasonable generalized expectation (see *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at paras. 60-63 and 65). However, myths and stereotypes are not exhaustive examples of unreasonable generalized expectations. As I will explain, my view is that

an inaccurate generalized expectation about ordinary human behaviour should not be relied on to assess evidence, whether or not it can be characterized as a myth or stereotype.

[188] I stress that this inquiry targets a specific and limited part of the fact-finding process. Again, generalized expectations based on common sense and human experience are an input into the fact-finding process. They serve as a logical benchmark against which to assess the evidence to make conclusions of credibility or inferences of fact. Appellate review under this question is concerned solely with that benchmark, and not with the evidence being interpreted or any conclusions drawn from that evidence. Where a trial judge relies on a *reasonable* generalized expectation, an appellate court may not interfere with the judge's assessment of the evidence based on that expectation just because it would have come to a different conclusion.

[189] The foregoing sets out my view of how appellate courts should assess the reasonableness of generalized expectations. In the following sections, I will discuss two further points arising from the Crown's submissions: (1) whether the reasonableness of a generalized expectation is a question of law, and (2) whether the framework set out by the Court of Appeal for Ontario in *J.C.* should be endorsed, including the "rule against ungrounded common-sense assumptions" and the "rule against stereotypical inferences".

(1) Question of Law or Fact?

[190] Central to the parties' disagreement on the legal principles engaged in these appeals is the issue of whether a trial judge's reliance on a generalized expectation engages a question of law or a question of fact. This characterization is important to both appellate jurisdiction and the standard of appellate review.

[191] It is not disputed that there are limitations to reliance on generalized expectations that amount to questions of law. Notably, various expectations founded on myths or stereotypes about complainants, particularly women and children, in the context of sexual assault trials have been identified as errors of law, either by statute or by the courts. For example, s. 276(1) of the *Criminal Code* proscribes the drawing of inferences from the complainant's past sexual activity to conclude on the question of consent or the credibility of the complainant — these are often referred to as the "twin myths". Courts have identified other expectations that, as a matter of law, may not be relied on, such as the expectation that a person who has been sexually assaulted would necessarily exhibit avoidant behaviour towards the aggressor (see *A.R.J.D.*; see also, e.g., *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 90; *R. v. Osolin*, [1993] 4 S.C.R. 595, at p. 670).

[192] To be clear, nothing in my reasons should be understood as altering or diluting the jurisprudence on recognized myths and stereotypes in the context of sexual assault trials. Such myths and stereotypes — including the "twin myths" set out in the *Criminal Code* and other discredited expectations of how individuals, disproportionately women and children, behave during sexual encounters — have no

place in the law and are appropriately denounced as errors of law (*A.R.J.D.*, at para. 2). Nor should my reasons be understood as suggesting that all persons endure the same experiences of prejudice and marginalization, or to the same degree, irrespective of characteristics such as gender, age, and race.

[193] However, the Crown suggests that the categories of generalized expectations that may not, as a matter of law, be relied on are *limited* to what may be considered a discredited "myth" or a "stereotype". I disagree. In my view, such a narrow approach creates artificial distinctions in the law, unduly limits the important role of appellate courts in the criminal justice system, and risks undermining public confidence in the administration of justice. Rather, for the reasons below, appellate review for legal error should extend to the reasonableness of any generalized expectation relied on by the trial judge.

[194] On a conceptual level, the underlying rationale for reliance on a generalized expectation is the same, regardless of whether the generalized expectation can be considered a "myth", a "stereotype", or something else. While the *prevalence* and *experience* of people subject to such generalized expectations will differ, all generalized expectations purport to derive from the same source: "common sense" and "human experience". I am not persuaded that there is a principled basis to separate particular categories of generalized expectations for distinct treatment. Such an exercise invites artificial distinctions in the law with no clear boundaries.

[195] On a practical level, intermediate appellate courts have increasingly identified concerns about trial judges relying on unreasonable generalized expectations beyond the paradigmatic categories of myths and stereotypes about complainants in sexual assault cases. Professor Dufraimont observes that other categories have emerged in the jurisprudence, such as stereotypes about men and persons accused of sexual assault, or on grounds other than sex and gender such as against Indigenous and racialized people (see (2021), at pp. 546-50 and 557-59). In my view, these concerns cannot be disregarded out of hand as mere interventionism.

[196] I also agree with the intervener Association québécoise des avocats et avocates de la défense that the Crown's narrower view would fail to account for generalized expectations that could not accurately be classified as "myths" or "stereotypes" about complainants in sexual assault cases yet would nonetheless be unacceptable to rely on in a criminal trial. For example, the trial judge in *J.C.*, in rejecting the accused's evidence, relied on the expectation that people (namely, people accused of sexual assault) generally do not achieve the "politically correct" ideal of obtaining consent for each escalating sexual act. In *Roth*, the trial judge appeared to assume that the accused, being a power lifter, was "somehow less susceptible to the effects of fatigue resulting from a long day, physical activity and the consumption of alcohol" (para. 70). These sorts of expectations are difficult to properly characterize as a "myth" or a "stereotype" as those terms are commonly understood in the jurisprudence (e.g., in *Roth*, the Court of Appeal for British Columbia considered that the trial judge did not rely on a "stereotyp[e]" about "male behaviour" (para. 66)), but

I agree with the appellate courts in those cases that such expectations cannot reasonably be considered an accurate reflection of general human behaviour by which matters as significant as a criminal trial can be decided.

[197] The Crown asserts that appellate review of generalized expectations should be narrow because such expectations are deployed as part of the factual assessment of the evidence. Of course, deference is owed to trial judges on factual matters. However, not all issues that involve matters of evidence are necessarily questions of fact to which deference is owed. This Court has acknowledged at least four types of cases where the mishandling of evidence can constitute an error of law: (1) it is an error of law to make a finding of fact for which there is no evidence; (2) the legal effect of findings of fact or undisputed facts raises a question of law; (3) the assessment of the evidence based on a wrong legal principle is an error of law; and (4) the failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence is an error of law (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197). Thus, reliance on "myths" or "stereotypes" is recognized as an error of law despite relating to the assessment of evidence, as it amounts to an assessment of evidence based on a wrong legal principle — the third category set out in *J.M.H.* (see *A.R.D.*, at para. 28; Coughlan, at p. 589, fn. 135). Again, in my view, the same logic extends to all reliance on unreasonable generalized expectations.

[198] I find support for my conclusion in the relevant policy reasons for why appellate courts defer to trial judges' factual findings on one hand, and the wide discretion for appellate intervention on questions of law on the other hand.

[199] Appellate courts defer to trial judges on factual matters for at least three overarching policy reasons, as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (a civil case): (1) to limit the number, length, and cost of appeals; (2) to promote the autonomy and integrity of trial proceedings; and (3) to recognize the expertise of the trial judge and the judge's advantageous position to assess the evidence (paras. 16-18).

[200] In my view, reviewing unreasonable expectations on a standard of correctness would have a limited impact on these policy considerations. Concerns about preserving public resources or promoting the autonomy and integrity of trials, while important, are secondary to the rights of the accused in a criminal proceeding, in light of the interests at stake and Parliament's decision to provide broad access to a first level of appeal (see, e.g., *Sarrazin*, at para. 27, affirming the high standard for the curative proviso). Rather, it is the recognition of the trial judge's expertise and advantageous position that forms the central basis for appellate deference on factual matters in the context of criminal proceedings (see, e.g., *R. v. Spencer*, 2007 SCC 11, [2007] 1 S.C.R. 500, at para. 17; *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, at para. 62). However, trial judges are not more experienced or in a more advantageous position than appellate judges in identifying a reasonable generalized expectation based

on common sense or human experience. To the contrary, the basis for the general reliability of such expectations is that they are "*common*" or the *shared* experience of the entire community.

[201] In contrast, "the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application" (*Housen*, at para. 9). Appellate courts therefore maintain a broad scope of review on questions of law. The principle of universality dictates that legal questions require clear and consistent answers in order to maintain public confidence in the administration of justice. Further, the public expects courts to fulfill a law-making function by bringing a measure of expertise on the art of just and practical rule-making. Appellate courts make law not only for the case under review, but also for future cases (*ibid.*).

[202] In the context of appeals from criminal matters, appellate courts play an especially important role in reviewing trial proceedings to prevent wrongful convictions and ensure that all convictions arise through a fair process that maintains public confidence in the administration of justice. As explained in *Biniaris*, "[c]riminal appeals on questions of law are based in part on the desire to ensure that criminal convictions are the product of error-free trials. Error-free trials are desirable as such, but even more so as a safeguard against wrongful convictions" (para. 26). It has been explained that "[a] person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice" (*Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at

p. 240; *Morrissey*, at p. 541). Any approach to appellate review that dilutes the important role of appellate courts would do significant damage to the criminal justice system as a whole.

[203] The characterization of an issue as a question of law is also significant to the grounds for appellate jurisdiction in criminal matters, especially the limited grounds for Crown appeals from acquittals. The Crown maintains a limited right to appeal on questions of law, which provides an avenue to balance the legitimate needs of a criminal justice system operating under the rule of law against the accused's entitlement to finality when acquitted of criminal charges. Parliament and the courts have recognized the importance of protecting the dignity, privacy, equality, and other interests of *all* participants in the criminal justice system — including complainants — in order to maintain public confidence in the administration of justice (see, e.g., *R. v. Ewanchuk*, [1999] 1 S.C.R. 330). If the reasonableness of a generalized expectation were treated as a question of fact, then the Crown would not be able to appeal from acquittals that rest on generalized expectations that do not amount to "myths" or "stereotypes", no matter how unreasonable or contrary to society's collective expectations they are.

[204] In my view, these considerations support the application of a correctness standard when determining the reasonableness of a generalized expectation. This inquiry is not dependent on the evidence and instead rests on what is reasonably true in *most* instances. The need to preserve public confidence in the administration of justice

mandates that verdicts in criminal cases — whether convictions or acquittals — not be founded on assumptions that are not reasonably accurate reflections of what is true in most circumstances. Appellate courts play an important role in ensuring the consistency and legitimacy of judicial reliance on generalized expectations, for the benefit of not only the case under review, but all future cases.

[205] Appellate courts should take caution that nothing in these reasons should be construed as meaning that the Crown can appeal an acquittal merely on a reassessment of the facts.

[206] We should not undermine the important institutional role of courts of appeal. Trial judges and courts of appeal have complementary roles, the latter being a safety net for errors by the former. In criminal law, effective appellate review is critical to avoiding improper verdicts. In earlier times, courts of appeal too readily intervened to substitute their own assessment of the evidence for that of the trial judge. More recently, under the banner of "deference", there is increasing risk that the "safety net" role of courts of appeal is being unduly weakened.

[207] The palpable and overriding standard of review can be misused to generate a decision-making "black box" that facilitates *ad hoc* decision-making. By this, I mean an approach whereby if the Court of Appeal agrees with what the trial judge has done, it "shows deference", while where the appellate court prefers another outcome, it labels the trial judge's decision as a palpable and overriding error and substitutes its preferred outcome.

[208] Of course, this can also occur in applying the correctness standard, as was so in the "bad old days" where appellate courts too readily substituted their own assessment of the evidence. But, application of the palpable and overriding standard can be an opaque process. By contrast, the correctness standard, by its nature, requires setting out expressly an alternative line of reasoning and demonstrating why it should be followed. Properly applied, correctness demands greater conceptual clarity and analytical rigour. In part, this perspective underlies my analysis.

(2) The "Rules" in *J.C.*

[209] Having set out my view of the scope and standard of appellate review, I turn to consider whether the Court of Appeal for Ontario's approach in *J.C.* should be endorsed. As I have explained, *J.C.* represents a notable effort to address the concerns identified by intermediate appellate courts in many recent decisions. The Crown directs its attention to the "rule against ungrounded common-sense assumptions" described in *J.C.* and says that the rule should be rejected because it encourages appellate courts to interfere too readily with trial judges' reliance on generalized expectations, as exemplified by the Court of Appeal for British Columbia in Mr. Tsang's case.

[210] I would not adopt the articulation of the "rule against ungrounded common-sense assumptions" as described in *J.C.* It implies that a generalized expectation can be rejected merely because it is not "grounded" in the evidence. However, generalized expectations are not themselves grounded in the evidence, but are instead grounded in

common sense and human experience. They nonetheless play a necessary role in the reasoning process when assessing the evidence.

[211] In my view, the difficulty with the standard set out in *J.C.* is exemplified by the Court of Appeal's application of the proposed rule to the circumstances of that case. The accused testified about his practice of securing consent from the complainant on each progressive stage of sexual activity. The trial judge concluded that the accused's testimony was "not in accord with common sense and experience about how sexual encounters unfold" (*R. v. J.C.*, 2018 ONSC 5547, at para. 88 (CanLII)). The Court of Appeal considered that the trial judge came to this conclusion based on the assumption that "people engaged in sexual activity simply do not achieve the 'politically correct' ideal of expressly discussing consent to progressive sexual acts" (para. 97); in the Court of Appeal's view, this ran afoul of the rule against ungrounded common-sense assumptions because the judge's assumption was "a bald generalization about how people behave" and was "not derived from anything particular to the case, or any evidence before the trial judge on how all sexual encounters unfold" (para. 96). With respect, this is not a workable standard for appellate scrutiny. The lack of evidence supporting a generalized expectation cannot itself be a basis to reject reliance on that expectation. The Crown cannot be expected to elicit evidence on how sexual encounters ordinarily unfold in every sexual assault trial before a trial judge can rely on their common sense or human experience with respect to human sexual behaviour (see *R.R.*, at para. 8).

[212] While I would not adopt *J.C.*'s articulation of a "rule against ungrounded common-sense assumptions", this does not mean that the Court of Appeal in *J.C.* did not identify a legitimate concern with the trial judge's reasoning in that case. The Court of Appeal concluded that the impugned expectation also contravened the "rule against stereotypical inferences", as "it presupposes that no-one would be this careful about consent" (para. 97), and "the behaviour the trial judge rejected as 'too perfect', 'too mechanical', and 'too politically correct' to be believed is encouraged by the law, and certainly prudent" (para. 98). Respectfully, it is difficult to characterize the judge's expectation in that case as a "stereotype" (To what group of persons is this stereotype directed?). However, I observe that the Court of Appeal in *J.C.* considered it an error of law under this rule to rely not only on stereotypes, but also on "erroneous common-sense assumptions" (para. 63). As I have explained, I would characterize all such assumptions within the broader category of unreasonable generalized expectations.

[213] Thus, the trial judge's generalized expectation in *J.C.* was problematic not because it was ungrounded in the evidence, or because it was a "stereotype", but because it is unreasonable to expect that people generally do not achieve the "politically correct" ideal of obtaining consent. The result and underlying rationale in *J.C.* are therefore compatible with my proposed framework, even though I would not adopt the same formulations of the principles as the Court of Appeal for Ontario.

C. *Did the Trial Judge Rely on a Generalized Expectation as Itself a Conclusive and Indisputable Fact?*

[214] As I have explained, trial judges have considerable latitude to rely on *reasonable* generalized expectations as a logical benchmark in assessing the evidence. An appellate court may not interfere with the judge's assessment of the evidence just because it would have come to a different conclusion from the evidence and any reasonable generalized expectations relating to that evidence.

[215] However, there is an important limit on the use of even a reasonable generalized expectation: The trial judge cannot treat the generalized expectation as *itself* a conclusive and indisputable *fact*, such that the judge ignores or forecloses their mind to the evidence. This is because people may always act *contrary* to a generalized expectation of what common sense or human experience would ordinarily anticipate. The trial judge's duty is to determine on the evidence what really happened. For example, when drawing inferences from circumstantial evidence, a judge must consider the evidence "in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense" (*Villaroman*, at para. 30 (emphasis added)). Thus, generalized expectations based on human experience and common sense are only one consideration, which *assist* with interpreting the evidence. In the end, the focus must remain on the evidence.

[216] There is nothing novel about this aspect of my proposed framework. There are at least two reasons why the foregoing amounts to an error of law. First, it is an error of law for a trial judge to fail to consider all of the evidence on the ultimate issue of guilt or innocence — this is the fourth category of error described in *J.M.H.* (paras.

31-32; see also *Walle*, at para. 46). Second, where the judge treats a generalized expectation as itself an indisputable fact, what the judge is really doing is taking *judicial notice* of a fact. This is subject to the strict test for judicial notice — a standard that will rarely, if ever, be met by a generalized expectation about people due to the variability of human experience and behaviour. Where a factual conclusion is based neither on the evidence, nor on judicial notice, then it is speculation. This is an error of law, falling under the first category of errors described in *J.M.H.* — a finding of fact for which there is no evidence (para. 25; see *Schuldt v. The Queen*, [1985] 2 S.C.R. 592).

[217] For example, in *L. (J.)*, the trial judge did not engage with the complainant's and accused's testimony and instead "relied on two facts to explain why he accepted that the complainant communicated a lack of consent to further sexual contact and that the [accused] pressed on in an attempt at intercourse", one of which was "his finding that it 'defies reason and common sense' that 'a young woman would go outside wearing a dress in mid-December, lie down in dirt, gravel and wet grass and engage in consensual sexual activity'" (para. 43). The Court of Appeal for Ontario considered that, although trial judges are permitted to exercise common sense when deciding a case, the judge erred "by relying on an assumption regarding what young women will and will not do, as if it were a fact" (para. 47 (emphasis added)). Coupled with the judge's failure to consider the accused's evidence or to explain why it failed to raise a reasonable doubt, this amounted to an error of law.

[218] Of course, a trial judge is not required to refer to every item of evidence or to explain how each piece of evidence was assessed (*J.M.H.*, at paras. 31-32). "A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was error in law in this respect" (*R. v. Morin*, [1992] 3 S.C.R. 286, at p. 296).

[219] In addition, this aspect of my proposed framework is of considerably less utility to the Crown on an appeal from an acquittal than an accused on an appeal from a conviction. This is for several reasons. First, an error of law due to the absence of evidence for a finding of fact "will happen as regards an acquittal only if there has been a transfer to the accused by law of the burden of proof of a given fact" (*Schuldt*, at p. 604). This is because "absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused" (p. 610). Relatedly, a trial judge's decision to *acquit* based on a reasonable doubt "is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met" (*J.M.H.*, at para. 25). A reasonable doubt leading to an acquittal therefore does not need to arise from the evidence and can instead arise from the *absence* of evidence (paras. 26-27; *Villaroman*, at para. 36). Thus, when reviewing trial judges' reasons for legal error, appellate courts must take particular care in Crown appeals from acquittals: "Caution must be taken to avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to create a ground of 'unreasonable

acquittal' which is not open to the court under the provisions of the *Criminal Code* . . ." (*R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at para. 2).

V. Application to These Appeals

[220] Having set out what I consider to be the three questions to ask on appellate review of a trial judge's use of generalized expectations, I turn to the purported errors in each of the two appeals before this Court.

A. *Mr. Kruk*

[221] Mr. Kruk was charged with one count of sexual assault from an incident at his home in the early hours of May 27, 2017. Earlier that evening, he came upon the heavily intoxicated complainant on the street. The complainant testified that she woke up in Mr. Kruk's bed with her pants off, Mr. Kruk on top of her, and his penis inside her vagina. Mr. Kruk testified that he took care of the complainant throughout the evening and intended to drive her to her home in the morning. He denied any sexual touching of the complainant and said the complainant removed her own pants while intoxicated. He proposed that the complainant woke up, still intoxicated, found her pants were off, and assumed the worst.

[222] The trial judge found Mr. Kruk's testimony did not raise a reasonable doubt. In accepting the complainant's testimony despite the reliability concerns from her intoxication, the judge stated: "She said she felt [the accused's] penis inside her and

she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely that a woman would be mistaken about that feeling" (para. 68 (CanLII)). The Court of Appeal concluded the judge erred in law by engaging in "speculative reasoning" and making an assumption on a matter that was not a matter of common sense or the proper subject of judicial notice.

[223] I disagree with the Court of Appeal. Answering the three questions I have described above leads me to the conclusion that the trial judge committed no error.

[224] Under the first question, the trial judge *did* rely on a generalized expectation about people — here, about physical perception. There was no evidence about whether *this* complainant was unlikely to be mistaken about the feeling of vaginal penetration. Thus, the judge assessed the plausibility of the complainant's evidence with reference to an expectation of what the judge believed people — or, more specifically, women — *in general* would or would not experience.

[225] As I have explained, the fact that the judge relied on a generalized expectation is not itself problematic. To the contrary, it is a necessary part of judicial reasoning to assess evidence in relation to a benchmark of what might be ordinarily expected. However, the fact that the trial judge relied on a generalized expectation raises the possibility of an error of law under the second and third questions that I have described. My analysis therefore proceeds to those questions.

[226] Under the second question, I conclude that it is a reasonable generalized expectation that a woman is unlikely to be mistaken about the feeling of vaginal penetration. This is not to say that this is an incontrovertible *fact* about *all* women in *all* instances, or that a woman can *never* be mistaken. However, as a general proposition, it is perfectly reasonable. As the Crown observes, a sexual act of this nature would have a profound and traumatic impact on the bodily integrity of an individual, and ordinary people would not generally require special knowledge of such an aspect of human perception to assess this sort of evidence. To suggest otherwise would resurrect the long-rejected view that a complainant's evidence about sexual assault cannot, without corroborating evidence, support a conviction. Further, it would impose an unnecessary, unrealistic, and invasive burden on the Crown to adduce expert medical evidence about the complainant's basic physiology in every sexual assault case.

[227] The Court of Appeal implied that further detail from the complainant's testimony about her experience may have assisted, noting that the complainant "was not asked, for example, to put into words what [the feeling of penetration] felt like, whether she experienced any pain, whether she had been injured or even why she felt so confident about her testimony" (para. 55 (CanLII)). I disagree that a more detailed description of the complainant's physical experience would have assisted in this case. Nothing would have turned on such gratuitous evidence; the complainant's testimony, if accepted, readily made out the *actus reus* of sexual assault.

[228] Mr. Kruk suggests that it was problematic for the trial judge, a man, to rely on a generalized expectation about what *women* would likely feel, as the judge would have "no personal experience regarding the matter" (R.F., at para. 56; see also para. 64). I disagree. While the trial judge would not have direct life experience of this precise experience, it is perfectly reasonable for any person to expect another person to not be mistaken about the sensation of having their bodily integrity violated in such a manner.

[229] Mr. Kruk also says that the reasonableness of an expectation depends on the particular circumstances of the case, and that "[t]he further the circumstance comes from the norm to the outlying extreme, the less likely that it is a matter of common sense" (transcript, at p. 70). Thus, in his submission, the fact that the complainant "was extremely intoxicated and disoriented" meant that the judge's generalized expectation was no longer reasonable (*ibid.*). This misunderstands the nature of a generalized expectation and its role in the reasoning process of fact-finding. It is sufficient for an expectation to be reasonable in a *generalized* manner, meaning it would be true in *most* circumstances. The complainant's state of intoxication and the resulting concerns about her reliability were certainly important aspects of the evidence that the judge was required to consider when assessing the complainant's evidence, but the particulars of the evidence do not alter the reasonableness of the *generalized* expectation at issue. Rather, the complainant's evidence needed to be assessed *both* with reference to a reasonable benchmark, *and* in light of the evidence as a whole, including the evidence of intoxication. This is also the case, for example, with consideration of the "common

sense inference" that a person intends the reasonable and probable consequences of their actions, even where there is evidence that the accused was impaired (*Walle*, at paras. 58-67). This relates to the third question of my proposed framework, to which I now turn.

[230] In my view, the Court of Appeal's conclusion most closely reflects a concern arising under the third question. The Court of Appeal considered the trial judge erred by making a "finding" that was not the "proper subject of judicial notice" (para. 67), which caused the trial judge to "engag[e] in speculative reasoning that was not grounded in the evidence" (para. 68). If this were true, I agree that this would amount to an error of law. However, I disagree that the trial judge committed this error. The trial judge did not treat the generalized expectation that a woman is unlikely to be mistaken about the feeling of vaginal penetration as a conclusive and indisputable *fact* in this case (i.e., as a fact drawn on judicial notice). Rather, he properly relied on that generalized expectation as a *benchmark* for assessing the plausibility of the complainant's evidence.

[231] Crucially, the judge did not foreclose his mind to the rest of the evidence on the basis that a woman could *never* be mistaken about the feeling of vaginal penetration. The judge relied on circumstantial evidence that he considered was "consistent with a sexual encounter having occurred between the accused and the complainant", including their respective states of undress and the removal of the complainant's pants (para. 69). The judge also considered "the failure of the accused

to contact the complainant's parents in the overall circumstances . . . to be consistent with an intention to take sexual advantage of a young woman he knew to be in an extremely compromised and vulnerable state" (para. 70). The judge was also clearly alive to the reliability concerns about the complainant's evidence (para. 48). The judge was entitled to find the complainant's evidence reliable on this point by assessing that evidence with reference to a reasonable generalized expectation about human perception as a benchmark, and in light of the other circumstantial evidence.

[232] For the reasons above, I conclude that the trial judge did not commit the error alleged by Mr. Kruk or identified by the Court of Appeal.

B. *Mr. Tsang*

[233] Mr. Tsang was charged with one count of sexual assault from an incident in his car in the early hours of December 29, 2018. He and the complainant met at a music concert and attended a subsequent event at the Commodore Ballroom in Vancouver. The two then departed in Mr. Tsang's car. The complainant testified that on the way to drop her off, Mr. Tsang stopped the car at a parking lot, where he asked to make out in the back seat. She consented, expecting no more. However, without her consent, Mr. Tsang forced her to perform oral sex and penetrated her vaginally and anally. He then dropped her off at her friend's home and abruptly drove away as soon as she exited the vehicle. Evidence from a sexual assault medical examiner noted trauma to the genital area, including a tear to the vagina. Mr. Tsang testified that the complainant suggested and led all instances of sexual activity, including the oral sex

and digital vaginal penetration; that she asked to be "spanked" and for other instances of "rough sex"; that he never penetrated her anally; and that they did not engage in penile-vaginal intercourse because he could not find a condom. The trial judge rejected Mr. Tsang's evidence and concluded that Mr. Tsang controlled the complainant throughout the night and "orchestrated" the events. She found the complainant to be credible, accepted her evidence, and convicted Mr. Tsang (2020 BCPC 306).

[234] The Court of Appeal concluded that the judge erred in rejecting Mr. Tsang's testimony by making three "assumptions" or "generalizations" about human behaviour that amounted to "speculative reasoning": that (1) a person would not ask to be spanked while engaging in sexual foreplay "out of the blue"; (2) a controlling person would not refrain from engaging in vaginal intercourse because of the absence of a condom; and (3) a person would not abruptly and unceremoniously leave another with whom he had engaged in consensual sex (paras. 73-74).

[235] I will address each of these three purported errors in turn.

(1) A Person Would Not Ask To Be Spanked While Engaging in Sexual Foreplay "Out of the Blue"

[236] Under the first question that I have described, I conclude that the trial judge did *not* rely on a generalized expectation of human behaviour when she found that the complainant did not ask to be spanked or otherwise encourage "rough sex". I note that while the Court of Appeal at times focused on the judge's rejection of Mr. Tsang's

evidence that the complainant "asked him to spank her" (para. 28), it expressed a broader concern that the judge "rejected [Mr. Tsang's] evidence that the complainant encouraged rough sex" (para. 43).

[237] The trial judge's rejection of Mr. Tsang's "rough sex" evidence was not based on a generalized expectation about whether *any person* would ask to be spanked or otherwise encourage rough sex. Instead, it was based on the judge's assessment of the evidence about the particular individuals in question and her conclusions about Mr. Tsang's credibility in particular. The judge's reasons clearly indicate that she did not believe Mr. Tsang's story that the complainant had instigated all flirtatious or sexual advances that evening. The judge had, at this point in her reasons, noted that the complainant "had expressed no interest" in Mr. Tsang throughout the night until the incident in his vehicle, and that she "had been with another man earlier in the evening" (para. 121 (CanLII)). The judge had also rejected Mr. Tsang's testimony about the complainant initiating a kiss on the Commodore Ballroom dance floor — a conclusion that the Court of Appeal acknowledged was open to the judge based on the evidence (para. 39). Further, and importantly, the trial judge considered Mr. Tsang's evidence about rough sex was contrived to explain the presence of injuries (para. 158). Taken at its highest, Mr. Tsang's evidence suggested the complainant wanted to be "spanked" or to have "harder" digital penetration. The judge considered, in light of the complainant's injuries, that this sort of purportedly consensual "rough sex" failed to explain the *severity* of the injuries actually exhibited by the complainant. It was in light of these conclusions that the judge found it was "not believable" that *this* complainant

would have asked to be spanked or was "gearing up for rough sex" with Mr. Tsang (para. 126).

[238] With respect, the Court of Appeal reweighed the evidence. It downplayed aspects of the judge's reasoning by concluding, for example, that "little turns upon the events that preceded those that took place in the parking lot" (para. 42) and that it could not be said that other aspects of the evidence "weighed heavily" in the judge's assessment of the evidence (para. 45). The trial judge's assessment of the evidence was clearly informed by the entire transaction of events during the evening and her overall assessment of the evidence. The Court of Appeal was not entitled to substitute its own view of how much "turned" on different parts of the narrative.

[239] Accordingly, the trial judge did not rely on a generalized expectation of what people are likely to do during sexual activity. There is therefore no need to consider the second and third questions that I have described in relation to this alleged error.

(2) A Controlling Person Would Not Refrain From Engaging in Vaginal Intercourse Because of the Absence of a Condom

[240] As with the first purported error, I conclude under the first question that the trial judge did not rely on a generalized expectation about human behaviour when she rejected Mr. Tsang's evidence that he refrained from vaginal intercourse because of the

absence of a condom. There is therefore no need to consider the second and third questions that I have described.

[241] The impugned statement in the trial judge's reasons is as follows:

> The accused's description about the prospect of intercourse being thwarted by the lack of a condom in his car when there was one available was contrived in my view and contrary to the level of control he conveyed about that evening and in court. He said [the complainant] told him she wanted to give him oral sex to finish him and she did so again. He said he used his hand to grab her hair lightly and guide her. He recalled that she choked on it a bit and then used her mouth and hands again. Mr. Tsang said he asked [the complainant] if she spat or swallowed. When [the complainant] answered "swallow; spit is for losers", he ejaculated inside her mouth. I find Mr. Tsang's behaviour to have been focussed on himself at this time but for which it would have been apparent that [the complainant] was only participating so that he would finish and not because she wanted to or was enjoying it. [Emphasis added; para. 129.]

[242] The Court of Appeal considered that the trial judge relied on a "prejudicial stereotype" about "controlling" people to assume that such people would not abstain from sex because of the lack of a condom (para. 65). In my view, there is no generalized expectation about "controlling" people at play in the trial judge's reasons. The judge concluded that Mr. Tsang *himself* was "controlling" and had "orchestrated" events throughout the night, based on circumstances such as Mr. Tsang's insistence that the complainant and her friend leave their fanny packs and belongings in his car and his encouragement of further drinking. The trial judge thus found it contrived that the inability to find a condom would have "thwarted" his motivation to have sexual intercourse with the complainant, in light of all of the other evidence of his behaviour throughout the evening. Her overall conclusion was, of course, informed by the

complainant's direct evidence that he *did* instigate sexual intercourse, which the judge accepted. This conclusion was also informed by the judge's finding that Mr. Tsang had exhibited few inhibitions through the night and was focussed on his own pleasure while in the car, as indicated by his indifference to hearing the complainant crying and gagging during oral sex.

[243] The Court of Appeal again reweighed the evidence in order to identify an error. It did not question the trial judge's conclusion that Mr. Tsang was "controlling" and had "orchestrated" the events throughout the night. It acknowledged the various aspects of the evidence that the judge considered. Despite acknowledging these points, the Court of Appeal downplayed the significance of the trial judge's impressions of Mr. Tsang, again by stating that "little turns upon the events that preceded those that took place in the parking lot" (para. 42). There was no basis for the Court of Appeal to intervene with the trial judge's appreciation of the evidence as a whole.

[244] As I would dismiss this argument under the first question, there is no need to consider the reasonableness of any generalized expectation under the second question, as none was relied on. However, I would add that, in my view, the Court of Appeal's characterization of the trial judge's analysis as relying on a "prejudicial stereotype" about "controlling people" distorts a proper understanding of stereotypes. "Controlling people" are not members of a particular group who are subject to biases that could fairly be described as "stereotypes". The Court of Appeal's approach would imply that any characterization about a person's personality, such as being "aggressive"

or "careless", could be labelled a "stereotype", even where such characterizations arise from the evidence of the person's behaviour.

(3) A Person Would Not Abruptly and Unceremoniously Leave Another With Whom He Had Engaged in Consensual Sex

[245] I turn to the final error identified by the Court of Appeal. The impugned passages of the trial judge's reasons are as follows:

> [Mr. Tsang's] lack of interest . . . at [the complainant's] invitation to meet again was at odds with his evidence that they . . . just had a great time, but is consistent with a non-consensual event where he got what he wanted without regard for her and drove away.
>
> . . .
>
> Mr. Tsang's testimony aligned with that of [the complainant] and [her friend] that he drove off as soon as [the complainant] got out of his car and he did not watch her go inside the house. I find this fact more consistent with [the complainant's] claim of non-consensual sex than with Mr. Tsang's version of what had just happened. He took off right away because of what he had just done to her and because she meant nothing to him. It is inconsistent with his evidence that he wanted to pleasure [the complainant] that night. [Emphasis added; paras. 131 and 153.]

[246] Under the first question that I have described — and unlike the first two purported errors — I consider that the trial judge *did* rely on a generalized expectation about how people ordinarily behave after a consensual sexual encounter. I disagree with the Crown that the judge was solely considering the consistency between Mr. Tsang's evidence that he and the complainant had just had a great time with the evidence of Mr. Tsang's abrupt driving away. The judge did not simply say that Mr.

Tsang's evidence was inconsistent, but she affirmatively considered that Mr. Tsang driving away *was* "consistent with a non-consensual event where he got what he wanted without regard for her" and "more consistent with [the complainant's] claim of non-consensual sex". There was nothing in the evidence to suggest that Mr. Tsang was the type of person who would or would not abruptly drive away from a person with whom he had engaged in consensual sex. Rather, the judge considered that *most* people do not do this.

[247] Furthermore, under the second question, I consider that it is unreasonable to expect any logical connection between an individual waiting for their sexual partner to enter a home and the consensual or non-consensual nature of the preceding encounter. Driving away could certainly indicate impoliteness or a lack of social tact. Yet this is a far cry from suggesting that the person has just participated in a non-consensual sexual encounter. This cannot be understood to be a reasonably accurate reflection of what is true in most circumstances, such that it can be used as a reliable benchmark to assess the evidence.

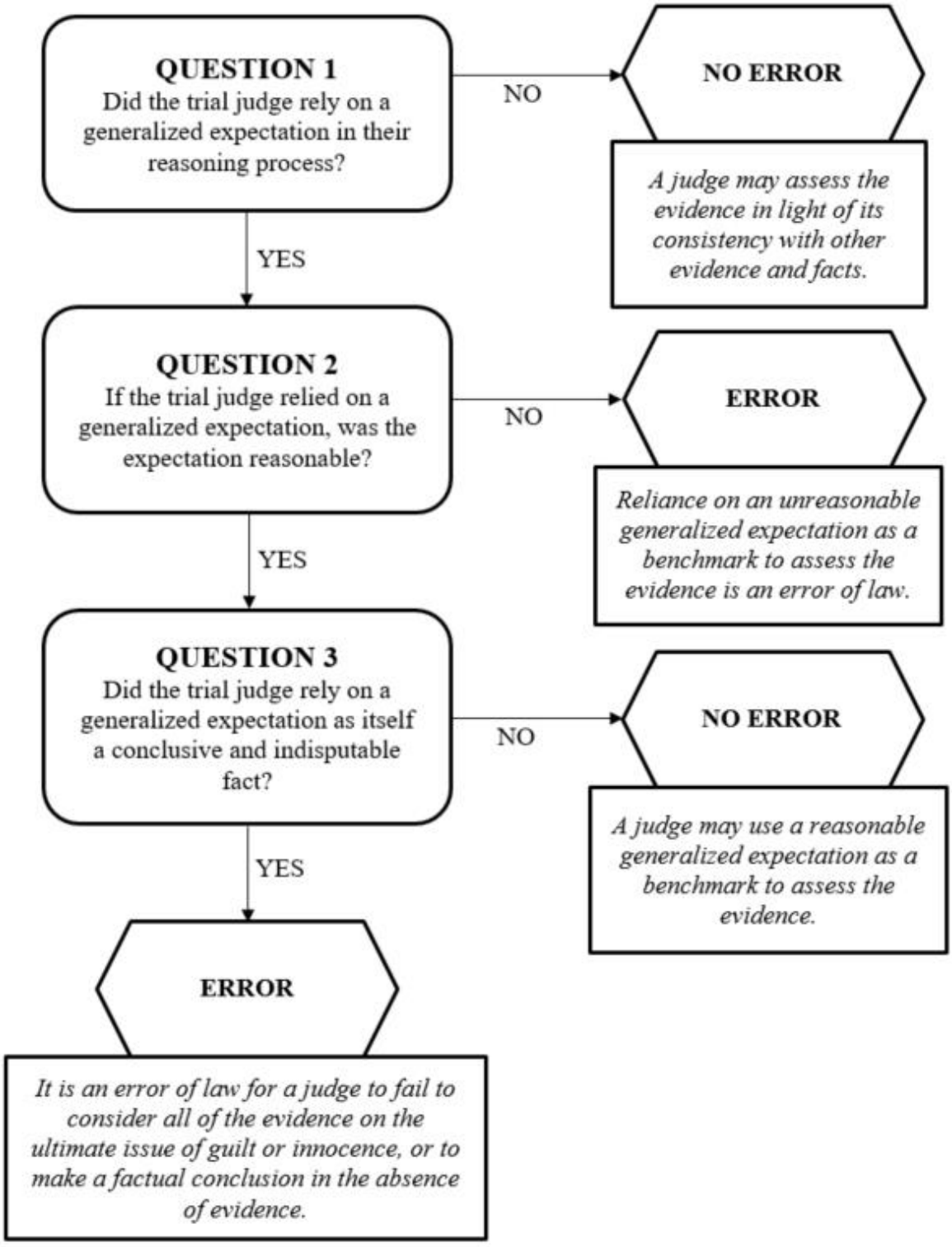
[248] Despite this error of law, I would uphold the conviction under the curative proviso on the basis that no substantial wrong or miscarriage of justice has occurred. In my view, this error of law was "so harmless or minor that it could not have had any impact on the verdict" (*Van*, at para. 34). As the Crown observes, this generalized expectation played a very minor role in the trial judge's analysis. The judge's verdict clearly turned on her favourable assessment of the complainant's credibility, as well as

her complete rejection of Mr. Tsang's testimony as inconsistent with the events throughout the evening and contrived to explain away the complainant's injuries. While the judge did consider Mr. Tsang's abrupt driving away as further evidence of a non-consensual encounter, she only entertained this evidence in response to Mr. Tsang's suggestion that he and the complainant had just had a great evening. In these circumstances, it is inconceivable that the trial judge would have had a reasonable doubt about consent had she not relied on the evidence about his abrupt driving away.

VI. Conclusion

[249] For the reasons above, I would allow both appeals and restore the convictions.

APPENDIX



Appeals allowed.

Solicitor for the appellant: Ministry of Attorney General — Criminal Appeals, Vancouver.

Solicitors for the respondent Christopher James Kruk: Johnson Doyle Nelson & Anderson, Vancouver.

Solicitors for the respondent Edwin Tsang: Fowler & Blok, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Alberta Crown Prosecution Service — Appeals and Specialized Prosecutions Office, Calgary.

Solicitors for the intervener the Independent Criminal Defence Advocacy Society: Thorsteinssons, Vancouver; Pringle Law, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Gorham Vandebeek, Toronto.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Peck and Company, Vancouver; Olthuis van Ert, Vancouver.

Solicitors for the intervener Association québécoise des avocats et avocates de la défense: Hugo Caissy (ad hoc), Amqui, Que.; Beaudry Roussin, Québec.

Solicitors for the interveners the West Coast Legal Education and Action Fund Association and the Women's Legal Education and Action Fund Inc.: *Megan Stephens Law, Toronto; West Coast LEAF, Vancouver; Women's Legal Education and Action Fund (LEAF), Toronto.*