Court File No.: A-102-20

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONSE OF THE CANADIAN TRANSPORTATION AGENCY TO THE DIRECTION OF JUSTICE GLEASON WITH RESPECT TO THE PROPER RESPONDENT IN THE PROCEEDING

(Rule 303 of the *Federal Courts Rules*)

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1. By Direction dated February 19, 2021, the Court requested submissions from the parties and invited submissions from the Attorney General of Canada ("Attorney General") on the question of whether the Attorney General should be substituted for the Canadian Transportation Agency ("Agency") as respondent in this proceeding. The Court requested that this question be addressed generally, and more specifically with respect to the propriety of the Agency's appearing and taking positions in an application that seeks to enjoin its Members from hearing claims in connection with public statements posted on the Agency's website on the basis of an alleged reasonable apprehension of bias.

2. With respect to the general question of whether the Attorney General should be substituted as respondent in this proceeding, the Court refers to paragraph 303(1)(a) and subsection 303(2) of the *Federal Courts Rules*.[1] Paragraph 303(1)(a) provides that in an application, an applicant shall name as a respondent every person directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought. Subsection 303(2) indicates that where there are no such respondents, the Attorney General of Canada is to be named as

[1] SOR/98-106.

respondent.

3. The above rules generally operate to exclude tribunals from participating as respondents in judicial review proceedings. Courts have identified different reasons for this rule, including avoiding situations where the decision-maker is participating in a review of its own decision[2] as this gives rise to impartiality concerns, or preventing the decision-maker from bootstrapping their reasons for decision.[3] Another reason given for excluding tribunals as respondents is that an agency that is a federal "department" within the meaning of the *Financial Administration Act*[4] does not, by operation of the *Crown Liability and Proceedings Act*,[5] have a legal personality separate from the Crown. Any such "department" must therefore be represented by the Attorney General unless legislation authorizes proceedings to be taken against the department in its own name.[6]

4. As a general comment, this proceeding concerns a Statement that, according to this Court, is not amenable to judicial review because it does not affect rights, impose legal obligations or cause prejudicial effects.[7] While paragraph 303(1)(a) is not limited in scope to applications for review of tribunal decisions, the Agency submits that the applicability of this rule in a context where an impugned statement is found not to be reviewable is a novel question.

5. The Agency respectfully submits that its statutory right to be heard under subsection 41(4) of the *Canada Transportation Act*[8] ("CTA" or the "Act") is responsive to the concerns of impartiality, bootstrapping and separate legal identity identified by this Court, despite the fact that the provision applies to statutory appeals.

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[2] *Warnaco Inc. v Canada (Attorney General)*, [2000] FCJ No 463, 2000 CanLII 15214 (FC) at paras 8-9.

[3] *Natco Pharma (Canada) Inc. v Canada (Health)*, 2020 FC 788 at para 78.

[4] RSC 1985, c F-11, s 2 and Schedule I.1.

[5] See section 23 of that Act, RSC, 1985, c C-50.

[6] See reasons of Justice Gleason, dissenting but not on this point, in *Canada (Attorney General) v Zalys*, 2020 FCA 81 at paras 23-25.

[7] *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 (leave to appeal to the Supreme Court of Canada denied: *Air Passenger Rights v Canadian Transportation Agency*, 2020 CanLII 102983 (SCC); *Air Passenger Rights v Canada (Transportation Agency)*, 2020 FCA 155.

[8] SC 1996, c 10.

6. Section 41 of the CTA provides that an appeal may be brought before this Court, with leave, on a question of law or jurisdiction with respect to an Agency decision, order, rule or regulation. Pursuant to subsection 41(4) of the CTA, the Agency is entitled to be heard by counsel or otherwise on the argument of such appeals.

7. Subsection 41(4) demonstrates Parliament's intent that the Agency be heard where its own actions are challenged. In fact, the Agency is permitted to be heard "on the argument of an appeal", which suggests that its entitlement extends to the merits of the matter under review; it is not limited to participating as an intervener.

8. The provision further demonstrates that Parliament intended that the Agency have a legal personality that is separate from the Attorney General in the litigation context. While the statute expresses that right in relation to appeals, this is because the Act contemplates only one form of judicial challenge: an appeal, with leave. Nevertheless, this statutory right to participate on the argument of an appeal is relatively rare in federal legislation and, as a consequence, the Agency suggests that Parliament's decision to grant this status should not be automatically overlooked because the challenge takes the form of a judicial review, not an appeal.

9. In our respectful view, the relief sought in the Notice of Application suggests that subsection 41(4) of the Act is, in fact, relevant. As filed, the Notice of Application has sought a declaration that "the Agency's Statement is **not** a decision, order or any other ruling of the Agency and has no force or effect of law." The Notice of Application squarely raised questions of law or jurisdiction in relation to *whether* the Agency's Statement is a decision, order or ruling. These are questions that come within the ambit of the Agency's statutory entitlement under subsection 41(4) of the CTA, which applies to Agency orders or decisions. Accordingly, it is not clear that the prohibition against naming a tribunal as respondent in paragraph 303(1)(a) of the *Federal Courts Rules* applies given the nature of the order sought in the initiating Notice of Application.

10. In other words, there is no obvious rationale as to why the Agency can be heard when a decision or order is being challenged in an appeal, but cannot when the Court is called upon to confirm, in a judicial review proceeding, whether or not a statement is an order. If the Applicant sought this specific relief in its Notice of Application, it can only be because of a concern that the Statement could be considered to be, or to have the effect of, an order. For this reason, the

Agency respectfully submits that subsection 41(4) of the CTA is engaged.

11. The Notice of Application suggests an additional reason to consider that the Agency has been properly named as a respondent in this proceeding. Paragraph 303(1)(a) of the *Federal Courts Rules* provides that an applicant shall name "every person directly affected by the order sought." While the Agency acknowledges that a tribunal is not directly affected where its decision is under review, it is respectfully submitted that a tribunal is directly affected when injunctive relief is sought against it. In this case, the Notice of Application seeks several heads of injunctive relief against the Agency specifically. In particular, the Notice of Application seeks a permanent order that the Agency remove the impugned statement from its website; post messages that the statement has been removed by Court order; enjoin the Agency or its Members from dealing with or deciding cases with respect to refunds from air carriers related to the COVID-19 pandemic; and inform complainants of this Court's judgment. The Agency respectfully submits that it is appropriate that it should act as a separately named party given that any injunctive orders this Court may make will affect it, and be binding upon it, directly.

12. With respect to the specific question of the propriety of the Agency appearing and making submissions where allegations of a reasonable apprehension of bias are made, the Agency wishes to place the submissions it has made into their context.

13. To the extent that the Agency has made submissions regarding the scope of the issues the Court will be called upon to address, these submissions were made in the specific context of a motion for disclosure under Rules 317 and 318 of the *Federal Courts Rules*. In that context, the Agency was addressing a request to obtain all records in the Agency's possession pertaining to the impugned web pages. The Agency addressed this motion for disclosure in light of the test that applies to the evaluation of motions under Rules 317 and 318, namely that of relevance and necessity in relation to the grounds for review.[9] The Agency's submissions were geared towards addressing whether the breadth of the documents requested were justified in light of that test. In so doing, the Agency addressed whether the documents requested were ones that "may have affected the decision of [a] Tribunal or that may affect the decision that this Court will make on

[9] *Maax Bath Inc. v Almag Aluminum et al.,* 2009 FCA 204.

the application for judicial review" within the meaning of key jurisprudence on this issue.[10] It is only in this sense that the Agency took positions on the scope of the issues the Court will need to address with respect to the bias allegations raised in the application.

14. More broadly, the Agency respectfully submits that the Supreme Court of Canada's ("Supreme Court") decision in *Ontario (Energy Board) v Ontario Power Generation Inc.*[11] has called for a discretionary and case-by-case approach to tribunal standing.

15. That decision suggests that it is not inherently improper that a tribunal make submissions in the context of litigation, even when allegations of reasonable apprehension of bias are advanced. The Supreme Court indicated in that decision that "on some occasions, it has permitted tribunals to participate as full parties without comment".[12] The Court's use of the word "permitted" suggests that it deliberately allowed such participation. In connection with that statement, the Supreme Court cites two decisions it has rendered concerning the appropriateness of institutionalized consultations among tribunal members in connection with the exercise of their decision-making functions.[13] In those cases, the Supreme Court heard from the tribunal on whether procedural fairness was breached and a reasonable apprehension of bias arose as a consequence of those internal consultations.[14] In light of these examples, the Agency respectfully submits that it is not impermissible that a tribunal should participate in the review of institutional actions or practices, and to make submissions with respect to alleged breaches of procedural fairness or reasonable apprehension of bias. The Agency submits that the Notice of Application raises analogous questions; the Agency therefore submits that it is not inappropriate that it be permitted to act as a party and make submissions in this proceeding.

16. Finally, the Agency respectfully submits that the circumstances in which the allegations of reasonable apprehension of bias arise in this case are peculiar. The Applicant has advanced this allegation before the Court without any decision from Agency Members on the question of bias

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[10] *Ibid* at paras 9-10.

[11] *Ontario (Energy Board) v Ontario Power Generation Inc.,* 2015 SCC 44, [2015] 3 SCR 147.

[12] *Ibid* at para 45.

[13] *Tremblay v Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 SCR 952 [*Tremblay*]; *Ellis-Don Ltd. v Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 SCR 221 [*Ellis-Don*].

[14] *Ellis-Don*, *supra* note 13 at paras 46-51; *Tremblay*, *supra* note 13 at 973-975.

or recusal, making the proceeding an unusual one. This Court has indicated that requests for recusal are appropriately dealt with by the decision-maker in first instance who is seized of a matter in which a reasonable apprehension of bias is claimed.[15] This Court has also said that allegations of bias cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum.[16]

17. Had Agency Members been asked to pronounce themselves on any question of potential bias or recusal in the context of an adjudicative proceeding, the Court would have the benefit of the Agency Member or Members' reasons on the matter. As it stands, the Court has no such reasons. Moreover, any such Agency decision would be subject to appeal, with leave. In that case, the Agency would have the statutory right to be heard within the accepted boundaries of tribunal participation concerning its jurisdiction and explaining the record. The Agency respectfully submits that, given the circumstances in this case, it is not improper that the Agency be granted standing to make submissions on judicial review on the grounds of bias, to the same extent that it would be permitted to participate where bias is alleged in an appeal proceeding.

18. While the Agency defers to this Court on the issue of whether the Attorney General is the proper respondent in this proceeding, the Agency respectfully submits that the Agency's participation as a party is not precluded or improper.

19. The Agency notes that pursuant to paragraph 104(1)(b) of the *Federal Courts Rules,* the Court has the discretion to add as a party anyone whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined. The Agency respectfully submits that the Court has discretion, for the reasons outlined above, to confirm the Agency's status as a respondent in this proceeding.

20. Alternatively, this Court also has discretion to permit interveners in its proceedings. Should the Court find that the Agency is not a proper party in this proceeding, the Agency reserves its right to apply for intervener status pursuant to Rule 109, by way of separate motion.

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[15] *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 39.

[16] *Hennessey v Canada*, 2016 FCA 180 at para 20.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Gatineau, in the Province of Quebec, this 22nd day of March, 2021.

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Counsel for the Canadian Transportation Agency

LIST OF AUTHORITIES

Appendix A – Statues and Regulations

Canada Transportation Act, SC 1996, c 10, s 41(4).

Federal Courts Rules, SOR/98-106, r 104, 109, 303, 317, 318.

Financial Administration Act, RSC, 1985, c F-11, s 2 and Schedule I.1.

Crown Liability and Proceedings Act, RSC, 1985, c C-50, s 23.

Appendix B – Case Law

Air Passenger Rights v Canadian Transportation Agency, 2020 CanLII 102983 (SCC).

Air Passengers Rights v Canada (Transportation Agency), 2020 FCA 92.

Air Passenger Rights v Canada (Transportation Agency), 2020 FCA 155.

Canada (Attorney General) v Zalys, 2020 FCA 81.

Ellis-Don Ltd. v Ontario (Labour Relations Board), 2001 SCC 4, [2001] 1 SCR 221.

Exeter v Canada (Attorney General), 2014 FCA 251.

Hennessey v Canada, 2016 FCA 180.

Maax Bath Inc. v Almag Aluminum et al., 2009 FCA 204.

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Ontario (Energy Board) v Ontario Power Generation Inc., 2015 SCC 44, [2015] 3 SCR 147.

Tremblay v Quebec (Commission des affaires sociales), 1992 CanLII 1135 (SCC), [1992] 1 SCR 952.

Warnaco Inc. v Canada (Attorney General), 2000 CanLII 15214 (FC).

Appendix A

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 24, 2021

Last amended on June 10, 2020

À jour au 24 février 2021

Dernière modification le 10 juin 2020

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 24, 2021. The last amendments came into force on June 10, 2020. Any amendments that were not in force as of February 24, 2021 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 24 février 2021. Les dernières modifications sont entrées en vigueur le 10 juin 2020. Toutes modifications qui n'étaient pas en vigueur au 24 février 2021 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence

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Loi maintenant l'Office national des transports sous le nom d'Office des transports du Canada, codifiant et remaniant la Loi de 1987 sur les transports nationaux et la Loi sur les chemins de fer et modifiant ou abrogeant certaines lois

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Air Transportation

Interpretation and Application

Prohibitions

Licence for Domestic Service

Licence for Scheduled International Service

Licence for Non-scheduled International Service

Issuance of International Charter Permits

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Transport aérien

Définitions et champ d'application

Interdictions

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Service international régulier

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PARTIE VII

Abrogations, dispositions transitoires, modifications connexes, modifications conditionnelles et entrée en vigueur

Abrogations

Inquiries

Inquiry into complaint

37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.

Appointment of person to conduct inquiry

38 (1) The Agency may appoint a member, or an employee of the Agency, to make any inquiry that the Agency is authorized to conduct and report to the Agency.

Dealing with report

(2) On receipt of the report under subsection (1), the Agency may adopt the report as a decision or order of the Agency or otherwise deal with it as it considers advisable.

Powers on inquiry

39 A person conducting an inquiry may, for the purposes of the inquiry,

(a) enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Review and Appeal

Governor in Council may vary or rescind orders, etc.

40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Appeal from Agency

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of

Enquêtes

Enquêtes sur les plaintes

37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Délégation

38 (1) L'Office peut déléguer son pouvoir d'enquête à l'un de ses membres ou fonctionnaires et charger ce dernier de lui faire rapport.

Connaissance du rapport

(2) Sur réception du rapport, l'Office peut l'entériner sous forme de décision ou d'arrêté ou statuer sur le rapport de la manière qu'il estime indiquée.

Pouvoirs de la personne chargée de l'enquête

39 Toute personne chargée de faire enquête peut, à cette fin :

a) procéder à la visite de tout lieu autre qu'une maison d'habitation — terrain, construction, ouvrage, matériel roulant ou navire —, quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Révision et appel

Modification ou annulation

40 Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour

jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Report of Agency

Agency's report

42 (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(a) applications to the Agency and the findings on them; and

(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Additional content

(2) The Agency shall include in every report referred to in subsection (1)

(a) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act;

(b) in respect of the year to which the report relates, information about, including the number of, the following:

d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Rapport de l'Office

Rapport de l'Office

42 (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Contenu

(2) Le rapport contient notamment :

a) l'évaluation de l'Office de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci;

b) les renseignements, au regard de l'année en cause, concernant les éléments ci-après, y compris leur nombre :

(i) les inspections menées, au titre de la présente loi, à toute fin liée à la vérification du respect ou à la

CANADA

CONSOLIDATION

CODIFICATION

Crown Liability and Proceedings Act

Loi sur la responsabilité civile de l'État et le contentieux administratif

R.S.C., 1985, c. C-50

L.R.C. (1985), ch. C-50

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An Act respecting the liability of the Crown and proceedings by or against the Crown

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Loi relative à la responsabilité civile de l'État et aux procédures applicables en matière de contentieux administratif

Procedure

Taking of proceedings against Crown

23 (1) Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in the name of the agency, in the name of that agency.

Service of originating document

(2) Where proceedings are taken against the Crown, the document originating the proceedings shall be served on the Crown by serving it on the Deputy Attorney General of Canada or the chief executive officer of the agency in whose name the proceedings are taken, as the case may be.

R.S., 1985, c. C-50, s. 23; 1990, c. 8, s. 29; 2001, c. 4, s. 47(F).

Defences

24 In any proceedings against the Crown, the Crown may raise

(a) any defence that would be available if the proceedings were a suit or an action between persons in a competent court; and

(b) any defence that would be available if the proceedings were by way of statement of claim in the Federal Court.

R.S., 1985, c. C-50, s. 24; 1990, c. 8, s. 30; 2001, c. 4, s. 48.

No judgment by default without leave

25 In any proceedings against the Crown, judgment shall not be entered against the Crown in default of appearance or pleading without leave of the court obtained on an application at least fourteen clear days notice of which has been given to the Deputy Attorney General of Canada.

R.S., 1985, c. C-50, s. 25; 1990, c. 8, s. 31.

No jury trials

26 In any proceedings against the Crown, trial shall be without a jury.

R.S., 1985, c. C-50, s. 26; 1990, c. 8, s. 31.

Rules of court

27 Except as otherwise provided by this Act or the regulations, the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.

R.S., 1985, c. C-50, s. 27; 1990, c. 8, s. 31.

Procédure

Exercice des poursuites visant l'État

23 (1) Les poursuites visant l'État peuvent être exercées contre le procureur général du Canada ou, lorsqu'elles visent un organisme mandataire de l'État, contre cet organisme si la législation fédérale le permet.

Signification de l'acte introductif d'instance

(2) Dans les cas visés au paragraphe (1), la signification à l'État de l'acte introductif d'instance est faite au sous-procureur général du Canada ou au premier dirigeant de l'organisme concerné, selon le cas.

L.R. (1985), ch. C-50, art. 23; 1990, ch. 8, art. 29; 2001, ch. 4, art. 47(F).

Moyens de défense

24 Dans des poursuites exercées contre lui, l'État peut faire valoir tout moyen de défense qui pourrait être invoqué :

a) devant un tribunal compétent dans une instance entre personnes;

b) devant la Cour fédérale dans le cadre d'une demande introductive.

L.R. (1985), ch. C-50, art. 24; 1990, ch. 8, art. 30; 2001, ch. 4, art. 48.

Nécessité d'une autorisation pour les jugements par défaut

25 Dans les poursuites exercées contre lui, l'État ne peut faire l'objet d'un jugement par défaut de comparaître ou de plaider qu'avec l'autorisation du tribunal obtenue sur demande, un préavis d'au moins quatorze jours francs devant être donné de celle-ci au sous-procureur général du Canada.

L.R. (1985), ch. C-50, art. 25; 1990, ch. 8, art. 31.

Procès sans jury

26 Les procès instruits contre l'État ont lieu sans jury.

L.R. (1985), ch. C-50, art. 26; 1990, ch. 8, art. 31.

Règles de pratique

27 Sauf disposition contraire de la présente loi ou de ses règlements, les instances suivent les règles de pratique et de procédure du tribunal saisi.

L.R. (1985), ch. C-50, art. 27; 1990, ch. 8, art. 31.

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to February 24, 2021

Last amended on June 17, 2019

À jour au 24 février 2021

Dernière modification le 17 juin 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

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Case Management

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Status Review — Federal Court of Appeal

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PART 10

Orders

PARTIE 9

Gestion des instances et services de règlement des litiges

Gestion des instances

Examen de l'état de l'instance — Cour fédérale

Examen de l'état de l'instance — Cour d'appel fédérale

Instance à gestion spéciale

Services de règlement des litiges

PARTIE 10

Ordonnances

Registration
SOR/98-106 February 5, 1998

FEDERAL COURTS ACT

Federal Courts Rules

P.C. 1998-125 February 5, 1998

Whereas, pursuant to subsection 46(4)[a] of the *Federal Court Act*, a copy of the proposed *Federal Court Rules, 1998* was published in the *Canada Gazette* Part I on September 20, 1997 and interested persons were invited to make representations with respect to the proposed Rules;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to subsection 46(1)[b] of the *Federal Court Act*, hereby approves the annexed *Federal Court Rules, 1998*, made by the rules committee of the Federal Court of Canada on January 26, 1998.

[a] S.C. 1990, c. 8, s. 14(4)

[b] S.C. 1990, c. 8, s. 14(1)

Enregistrement
DORS/98-106 Le 5 février 1998

LOI SUR LES COURS FÉDÉRALES

Règles des Cours fédérales

C.P. 1998-125 Le 5 février 1998

Attendu que, conformément au paragraphe 46(4)[a] de la *Loi sur la Cour fédérale*, le projet de règles intitulé *Règles de la Cour fédérale (1998)*, conforme en substance au texte ci-après, a été publié dans la *Gazette du Canada* Partie I le 20 septembre 1997 et que les intéressés ont ainsi eu l'occasion de présenter leurs observations à ce sujet,

À ces causes, sur recommandation de la ministre de la Justice et en vertu du paragraphe 46(1)[b] de la *Loi sur la Cour fédérale*, Son Excellence le Gouverneur général en conseil approuve les *Règles de la Cour fédérale (1998)*, ci-après, établies le 26 janvier 1998 par le comité des règles de la Cour fédérale du Canada.

[a] L.C. 1990, ch. 8, par. 14(4)

[b] L.C. 1990, ch. 8, par. 14(1)

Joinder, Intervention and Parties

Joinder

Joinder of claims

101 (1) Subject to rule 302, a party to a proceeding may request relief against another party to the same proceeding in respect of more than one claim.

Separate capacity

(2) A party may request relief in a separate capacity in respect of different claims in a single proceeding.

Interest in all relief not essential

(3) Not all parties to a proceeding need have an interest in all relief claimed in the proceeding.

Multiple persons joined as parties

102 Two or more persons who are represented by the same solicitor may join in one proceeding as plaintiffs, applicants or appellants where

(a) if separate proceedings were brought by each of them, a common question of law or fact would arise in all of the proceedings; or

(b) the relief claimed, whether joint, several or alternative, arises from substantially the same facts or matter.

Misjoinder and nonjoinder

103 (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a person or party.

Issues to be determined

(2) In a proceeding in which a proper person or party has not been joined, the Court shall determine the issues in dispute so far as they affect the rights and interests of the persons who are parties to the proceeding.

Order for joinder or relief against joinder

104 (1) At any time, the Court may

(a) order that a person who is not a proper or necessary party shall cease to be a party; or

Réunion de causes d'action, jonction de parties, interventions et parties

Réunion de causes d'action et jonction de parties

Causes d'action multiples

101 (1) Sous réserve de la règle 302, une partie à une instance peut faire une demande de réparation contre une autre partie à l'instance à l'égard de deux ou plusieurs causes d'action.

Réparation à titre distinct

(2) Une partie peut demander réparation à titre distinct pour diverses causes d'action faisant l'objet d'une instance.

Réparation ne visant pas toutes les parties

(3) Il n'est pas nécessaire que chacune des parties à l'instance soit visée par toutes les réparations demandées dans le cadre de celle-ci.

Jonction de personnes représentées par le même avocat

102 Deux ou plusieurs personnes représentées par le même avocat peuvent être jointes dans une même instance à titre de codemandeurs ou de co-appelants dans les cas suivants :

a) si des instances distinctes étaient engagées par chacune de ces personnes, les instances auraient en commun un point de droit ou de fait;

b) les réparations demandées, à titre conjoint, solidaire ou subsidiaire, ont essentiellement le même fondement.

Jonction erronée ou défaut de jonction

103 (1) La jonction erronée ou le défaut de jonction d'une personne ou d'une partie n'invalide pas l'instance.

Questions tranchées par la Cour

(2) La Cour statue sur les questions en litige qui visent les droits et intérêts des personnes qui sont parties à l'instance même si une personne qui aurait dû être jointe comme partie à l'instance ne l'a pas été.

Ordonnance de la Cour

104 (1) La Cour peut, à tout moment, ordonner :

a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas

(b) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.

nécessaire au règlement des questions en litige soit mise hors de cause;

b) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.

Directions

(2) An order made under subsection (1) shall contain directions as to amendment of the originating document and any other pleadings.

Directives de la Cour

(2) L'ordonnance rendue en vertu du paragraphe (1) contient des directives quant aux modifications à apporter à l'acte introductif d'instance et aux autres actes de procédure.

Consolidation of proceedings

105 The Court may order, in respect of two or more proceedings,

(a) that they be consolidated, heard together or heard one immediately after the other;

(b) that one proceeding be stayed until another proceeding is determined; or

(c) that one of the proceedings be asserted as a counterclaim or cross-appeal in another proceeding.

Réunion d'instances

105 La Cour peut ordonner, à l'égard de deux ou plusieurs instances :

a) qu'elles soient réunies, instruites conjointement ou instruites successivement;

b) qu'il soit sursis à une instance jusqu'à ce qu'une décision soit rendue à l'égard d'une autre instance;

c) que l'une d'elles fasse l'objet d'une demande reconventionnelle ou d'un appel incident dans une autre instance.

Separate determination of claims and issues

106 Where the hearing of two or more claims or parties in a single proceeding would cause undue complication or delay or would prejudice a party, the Court may order that

(a) claims against one or more parties be pursued separately;

(b) one or more claims be pursued separately;

(c) a party be compensated for, or relieved from, attending any part of the proceeding in which the party does not have an interest; or

(d) the proceeding against a party be stayed on condition that the party is bound by any findings against another party.

Instruction distincte des causes d'action

106 Lorsque l'audition de deux ou plusieurs causes d'action ou parties dans une même instance compliquerait indûment ou retarderait le déroulement de celle-ci ou porterait préjudice à une partie, la Cour peut ordonner :

a) que les causes d'action contre une ou plusieurs parties soient poursuivies en tant qu'instances distinctes;

b) qu'une ou plusieurs causes d'action soient poursuivies en tant qu'instances distinctes;

c) qu'une indemnité soit versée à la partie qui doit assister à toute étape de l'instance dans laquelle elle n'a aucun intérêt, ou que la partie soit dispensée d'y assister;

d) qu'il soit sursis à l'instance engagée contre une partie à la condition que celle-ci soit liée par les conclusions tirées contre une autre partie.

Separate determination of issues

107 (1) The Court may, at any time, order the trial of an issue or that issues in a proceeding be determined separately.

Court may stipulate procedure

(2) In an order under subsection (1), the Court may give directions regarding the procedures to be followed, including those applicable to examinations for discovery and the discovery of documents.

Interpleader

Interpleader

108 (1) Where two or more persons make conflicting claims against another person in respect of property in the possession of that person and that person

(a) claims no interest in the property, and

(b) is willing to deposit the property with the Court or dispose of it as the Court directs,

that person may bring an *ex parte* motion for directions as to how the claims are to be decided.

Directions

(2) On a motion under subsection (1), the Court shall give directions regarding

(a) notice to be given to possible claimants and advertising for claimants;

(b) the time within which claimants shall be required to file their claims; and

(c) the procedure to be followed in determining the rights of the claimants.

Intervention

Leave to intervene

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

Contents of notice of motion

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

Instruction distincte des questions en litige

107 (1) La Cour peut, à tout moment, ordonner l'instruction d'une question soulevée ou ordonner que les questions en litige dans une instance soient jugées séparément.

Ordonnance de la Cour

(2) La Cour peut assortir l'ordonnance visée au paragraphe (1) de directives concernant les procédures à suivre, notamment pour la tenue d'un interrogatoire préalable et la communication de documents.

Interplaidoirie

Interplaidoirie

108 (1) Lorsque deux ou plusieurs personnes font valoir des réclamations contradictoires contre une autre personne à l'égard de biens qui sont en la possession de celle-ci, cette dernière peut, par voie de requête *ex parte*, demander des directives sur la façon de trancher ces réclamations, si :

a) d'une part, elle ne revendique aucun droit sur ces biens;

b) d'autre part, elle accepte de remettre les biens à la Cour ou d'en disposer selon les directives de celle-ci.

Directives

(2) Sur réception de la requête visée au paragraphe (1), la Cour donne des directives concernant :

a) l'avis à donner aux réclamants éventuels et la publicité pertinente;

b) le délai de dépôt des réclamations;

c) la procédure à suivre pour décider des droits des réclamants.

Interventions

Autorisation d'intervenir

109 (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

Avis de requête

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

Directions

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

Questions of General Importance

Notice to Attorney General

110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,

(a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;

(b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

(c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Parties

Unincorporated associations

111 A proceeding may be brought by or against an unincorporated association in the name of the association.

Partnerships

111.1 A proceeding by or against two or more persons as partners may be brought in the name of the partnership.

SOR/2002-417, s. 11.

Sole proprietorships

111.2 A proceeding by or against a person carrying on business as a sole proprietor may be brought in the name of the sole proprietorship.

SOR/2002-417, s. 11.

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

Directives de la Cour

(3) La Cour assortit l'autorisation d'intervenir de directives concernant :

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

Question d'importance générale

Signification au procureur général

110 Lorsqu'une question d'importance générale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :

a) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;

b) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;

c) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.

Parties

Associations sans personnalité morale

111 Une instance peut être introduite par ou contre une association sans personnalité morale, en son nom.

Société de personnes

111.1 Une instance introduite par ou contre deux ou plusieurs personnes en qualité d'associées peut l'être au nom de la société de personnes.

DORS/2002-417, art. 11.

Entreprise non dotée de la personnalité morale

111.2 Une instance introduite par ou contre une personne qui exploite une entreprise à propriétaire unique non dotée de la personnalité morale peut l'être au nom de l'entreprise.

DORS/2002-417, art. 11.

h) aux demandes pour l'enregistrement, la reconnaissance ou l'exécution d'un jugement étranger visées aux règles 327 à 334.

DORS/2002-417, art. 18(A); DORS/2004-283, art. 37; 2014, ch. 20, art. 366(A).

General

Contents of application

301 An application shall be commenced by a notice of application in Form 301, setting out

(a) the name of the court to which the application is addressed;

(b) the names of the applicant and respondent;

(c) where the application is an application for judicial review,

(i) the tribunal in respect of which the application is made, and

(ii) the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant;

(d) a precise statement of the relief sought;

(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and

(f) a list of the documentary evidence to be used at the hearing of the application.

SOR/2004-283, s. 36.

Limited to single order

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

Respondents

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.

Dispositions générales

Avis de demande — forme et contenu

301 La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :

a) le nom de la cour à laquelle la demande est adressée;

b) les noms du demandeur et du défendeur;

c) s'il s'agit d'une demande de contrôle judiciaire :

(i) le nom de l'office fédéral visé par la demande,

(ii) le cas échéant, la date et les particularités de l'ordonnance qui fait l'objet de la demande ainsi que la date de la première communication de l'ordonnance au demandeur;

d) un énoncé précis de la réparation demandée;

e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable;

f) la liste des documents qui seront utilisés en preuve à l'audition de la demande.

DORS/2004-283, art. 36.

Limites

302 Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

Défendeurs

303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

Application for judicial review

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.

Substitution for Attorney General

(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.

Service of notice of application

304 (1) Unless the Court directs otherwise, within 10 days after the issuance of a notice of application, the applicant shall serve it on

(a) all respondents;

(b) in respect of an application for judicial review or an application appealing the order of a tribunal,

(i) in respect of an application other than one relating to a decision of a visa officer, the tribunal in respect of which the application is brought,

(ii) any other person who participated in the proceeding before the tribunal in respect of which the application is made, and

(iii) the Attorney General of Canada;

(c) where the application is made under the *Access to Information Act*, Part 1 of the *Personal Information Protection and Electronic Documents Act*, the *Privacy Act* or the *Official Languages Act*, the Commissioner named for the purposes of that Act; and

(d) any other person required to be served under an Act of Parliament pursuant to which the application is brought.

Motion for directions as to service

(2) Where there is any uncertainty as to who are the appropriate persons to be served with a notice of application, the applicant may bring an *ex parte* motion for directions to the Court.

Défendeurs — demande de contrôle judiciaire

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

Remplaçant du procureur général

(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

Signification de l'avis de demande

304 (1) Sauf directives contraires de la Cour, le demandeur signifie l'avis de demande dans les 10 jours suivant sa délivrance :

a) aux défendeurs;

b) s'il s'agit d'une demande de contrôle judiciaire ou d'un appel d'une ordonnance d'un office fédéral :

(i) à l'office fédéral visé par la demande, sauf s'il s'agit d'un agent des visas,

(ii) à toute autre personne qui a participé à l'instance devant l'office fédéral visé par la demande,

(iii) au procureur général du Canada;

c) si la demande est présentée en vertu de la *Loi sur l'accès à l'information*, la *Loi sur la protection des renseignements personnels*, la partie 1 de la *Loi sur la protection des renseignements personnels et les documents électroniques* ou la *Loi sur les langues officielles*, au commissaire compétent sous le régime de cette loi;

d) à toute autre personne devant en recevoir signification aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.

Directives sur la signification

(2) En cas de doute quant à savoir qui doit recevoir signification de l'avis de demande, le demandeur peut, par voie de requête *ex parte*, demander des directives à la Cour.

Exceptions to General Procedure

Ex parte proceedings

316.1 Despite rules 304, 306, 309 and 314, for a proceeding referred to in paragraph 300(b) that is brought *ex parte*,

(a) the notice of application, the applicant's record, affidavits and documentary exhibits and the requisition for hearing are not required to be served; and

(b) the applicant's record and the requisition for hearing must be filed at the time the notice of application is filed.

SOR/2013-18, s. 10.

Summary application under *Income Tax Act*

316.2 (1) Except for rule 359, the procedures set out in Part 7 apply, with any modifications that are required, to a summary application brought under section 231.7 of the *Income Tax Act*.

Commencing the application

(2) The application shall be commenced by a notice of summary application in Form 316.2.

SOR/2013-18, s. 10.

Material in the Possession of a Tribunal

Material from tribunal

317 (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

Request in notice of application

(2) An applicant may include a request under subsection (1) in its notice of application.

Service of request

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

SOR/2002-417, s. 19; SOR/2006-219, s. 11(F).

Exceptions aux règles générales de procédure

Instances présentées *ex parte*

316.1 Malgré les règles 304, 306, 309 et 314, s'agissant d'instances visées à l'alinéa 300b) qui sont présentées *ex parte* :

a) l'avis de demande, le dossier du demandeur, les affidavits et pièces documentaires du demandeur et la demande d'audience n'ont pas à être signifiés;

b) le dossier du demandeur et la demande d'audience doivent être déposés au moment du dépôt de l'avis de demande.

DORS/2013-18, art. 10.

Demande sommaire en vertu de la *Loi de l'impôt sur le revenu*

316.2 (1) À l'exception de la règle 359, la procédure établie à la partie 7 s'applique, avec les modifications nécessaires, à la demande sommaire présentée en vertu de l'article 231.7 de la *Loi de l'impôt sur le revenu*.

Introduction de la demande

(2) La demande est introduite par un avis de demande sommaire établi selon la formule 316.2.

DORS/2013-18, art. 10.

Obtention de documents en la possession d'un office fédéral

Matériel en la possession de l'office fédéral

317 (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

Demande inclue dans l'avis de demande

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

Signification de la demande de transmission

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

DORS/2002-417, art. 19; DORS/2006-219, art. 11(F).

Material to be transmitted

318 (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(a) a certified copy of the requested material to the Registry and to the party making the request; or

(b) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

Directions as to procedure

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

Return of material

319 Unless the Court directs otherwise, after an application has been heard, the Administrator shall return to a tribunal any original material received from it under rule 318.

References from a Tribunal

Definition of *reference*

320 (1) In rules 321 to 323, ***reference*** means a reference to the Court made by a tribunal or by the Attorney General of Canada under section 18.3 of the Act.

Procedures on applications apply

(2) Subject to rules 321 to 323, rules 309 to 311 apply to references.

Notice of application on reference

321 A notice of application in respect of a reference shall set out

(a) the name of the court to which the application is addressed;

Documents à transmettre

318 (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

Directives de la Cour

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

Documents retournés

319 Sauf directives contraires de la Cour, après l'audition de la demande, l'administrateur retourne à l'office fédéral les originaux reçus aux termes de la règle 318.

Renvois d'un office fédéral

Définition

320 (1) Dans les règles 321 à 323, ***renvoi*** s'entend d'un renvoi fait à la Cour par un office fédéral ou le procureur général du Canada en vertu de l'article 18.3 de la Loi.

Application d'autres dispositions

(2) Sous réserve des règles 321 à 323, les règles 309 à 311 s'appliquent aux renvois.

Contenu de l'avis de demande

321 L'avis de demande concernant un renvoi contient les renseignements suivants :

a) le nom de la cour à laquelle la demande est adressée;

CANADA

CONSOLIDATION

CODIFICATION

Financial Administration Act

Loi sur la gestion des finances publiques

R.S.C., 1985, c. F-11

L.R.C. (1985), ch. F-11

Current to February 24, 2021

Last amended on February 1, 2021

À jour au 24 février 2021

Dernière modification le 1 février 2021

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 24, 2021. The last amendments came into force on February 1, 2021. Any amendments that were not in force as of February 24, 2021 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 24 février 2021. Les dernières modifications sont entrées en vigueur le 1 février 2021. Toutes modifications qui n'étaient pas en vigueur au 24 février 2021 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations

TABLE ANALYTIQUE

Loi relative à la gestion des finances publiques, à la création et à la tenue des comptes du Canada et au contrôle des sociétés d'État

R.S.C., 1985, c. F-11

An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations

Short Title

Short title

1 This Act may be cited as the *Financial Administration Act*.

R.S., c. F-10, s. 1.

Interpretation

Definitions

2 In this Act,

appropriate Minister means,

(a) with respect to a department named in Schedule I, the Minister presiding over the department,

(a.1) with respect to a division or branch of the federal public administration set out in column I of Schedule I.1, the Minister set out in column II of that Schedule,

(b) with respect to a commission under the *Inquiries Act*, the Minister designated by order of the Governor in Council as the appropriate Minister,

(c) with respect to the Senate and the office of the Senate Ethics Officer, the Speaker of the Senate, with respect to the House of Commons, the Board of Internal Economy, with respect to the office of the Conflict of Interest and Ethics Commissioner, the Speaker of the House of Commons, and with respect to the Library of Parliament, the Parliamentary Protective Service and the office of the Parliamentary Budget Officer, the Speakers of the Senate and the House of Commons,

L.R.C., 1985, ch. F-11

Loi relative à la gestion des finances publiques, à la création et à la tenue des comptes du Canada et au contrôle des sociétés d'État

Titre abrégé

Titre abrégé

1 *Loi sur la gestion des finances publiques*.

S.R., ch. F-10, art. 1.

Définitions

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

agent agréé Personne autorisée par le ministre à placer des valeurs auprès de souscripteurs ou d'acquéreurs. (*authorized agent*)

agent comptable Outre les agents comptables nommés en vertu de la partie IV, la Banque du Canada. (*registrar*)

agent financier Outre les agents financiers nommés en vertu de la partie IV, la Banque du Canada. (*fiscal agent*)

biens publics Biens de toute nature, à l'exception de fonds, appartenant à Sa Majesté du chef du Canada. (*public property*)

billet du Trésor Billet, avec ou sans certificat, émis par Sa Majesté ou en son nom, constatant le droit du bénéficiaire inscrit ou du porteur de toucher, à une date située dans les douze mois suivant celle de son émission, la somme qui y est spécifiée à titre de principal. (*treasury note*)

(c.1) with respect to a departmental corporation, the Minister designated by order of the Governor in Council as the appropriate Minister, and

(d) with respect to a Crown corporation, the appropriate Minister as defined in subsection 83(1); (*ministre compétent*)

appropriation means any authority of Parliament to pay money out of the Consolidated Revenue Fund; (*crédit*)

Auditor General of Canada means the officer appointed pursuant to subsection 3(1) of the *Auditor General Act*; (*vérificateur général*)

authorized agent means any person authorized by the Minister to accept subscriptions for or make sales of securities; (*agent agréé*)

Consolidated Revenue Fund means the aggregate of all public moneys that are on deposit at the credit of the Receiver General; (*Trésor*)

Crown corporation has the meaning assigned by subsection 83(1); (*société d'État*)

department means

(a) any of the departments named in Schedule I,

(a.1) any of the divisions or branches of the federal public administration set out in column I of Schedule I.1,

(b) a commission under the *Inquiries Act* that is designated by order of the Governor in Council as a department for the purposes of this Act,

(c) the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service and office of the Parliamentary Budget Officer, and

(d) any departmental corporation; (*ministère*)

departmental corporation means a corporation named in Schedule II; (*établissement public*)

fiscal agent means a fiscal agent appointed under Part IV and includes the Bank of Canada; (*agent financier*)

fiscal year means the period beginning on April 1 in one year and ending on March 31 in the next year; (*exercice*)

Minister means the Minister of Finance; (*ministre*)

bon du Trésor Bon, avec ou sans certificat, émis par Sa Majesté ou en son nom, constatant le droit du bénéficiaire inscrit ou du porteur de toucher, à une date située dans les douze mois suivant celle de son émission, la somme qui y est spécifiée à titre de principal. (*treasury bill*)

certificat de valeur Certificat émis par Sa Majesté ou en son nom qui représente une partie de la dette publique du Canada. (*security certificate*)

crédit Autorisation donnée par le Parlement d'effectuer des paiements sur le Trésor. (*appropriation*)

effet de commerce Titre négociable, notamment chèque, chèque de voyage, traite, lettre de change ou titre de versement postal. (*negotiable instrument*)

établissement public Personne morale mentionnée à l'annexe II. (*departmental corporation*)

exercice La période commençant le 1er avril d'une année et se terminant le 31 mars de l'année suivante. (*fiscal year*)

fonctionnaire public Ministre ou toute autre personne employée dans l'administration publique fédérale. (*public officer*)

fonds Sommes d'argent; y sont assimilés les effets de commerce. (*money*)

fonds publics Fonds appartenant au Canada, perçus ou reçus par le receveur général ou un autre fonctionnaire public agissant en sa qualité officielle ou toute autre personne autorisée à en percevoir ou recevoir. La présente définition vise notamment :

a) les recettes de l'État;

b) les emprunts effectués par le Canada ou les produits de l'émission ou de la vente de titres;

c) les fonds perçus ou reçus pour le compte du Canada ou en son nom;

d) les fonds perçus ou reçus par un fonctionnaire public sous le régime d'un traité, d'une loi, d'une fiducie, d'un contrat ou d'un engagement et affectés à une fin particulière précisée dans l'acte en question ou conformément à celui-ci. (*public money*)

ministère

a) L'un des ministères mentionnés à l'annexe I;

money includes negotiable instruments; (*fonds*)

negotiable instrument includes any cheque, draft, traveller's cheque, bill of exchange, postal note, money order, postal remittance and any other similar instrument; (*effet de commerce*)

non-certificated security includes a security for which no certificate is issued and a certificated security held within a security clearing and settlement system in the custody of a custodian or nominee; (*valeur sans certificat*)

parent Crown corporation has the meaning assigned by subsection 83(1); (*société d'État mère*)

public money means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes

(a) duties and revenues of Canada,

(b) money borrowed by Canada or received through the issue or sale of securities,

(c) money received or collected for or on behalf of Canada, and

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract; (*fonds publics*)

public officer includes a minister of the Crown and any person employed in the federal public administration; (*fonctionnaire public*)

public property means all property, other than money, belonging to Her Majesty in right of Canada; (*biens publics*)

registrar means a registrar appointed under Part IV and includes the Bank of Canada; (*agent comptable*)

securities means securities of Canada in certificated form or non-certificated securities of Canada, and includes bonds, notes, deposit certificates, non-interest bearing certificates, debentures, treasury bills, treasury notes and any other security representing part of the public debt of Canada; (*valeurs* ou *titres*)

security certificate means a tangible certificate issued by or on behalf of Her Majesty representing part of the public debt of Canada; (*certificat de valeur*)

a.1) l'un des secteurs de l'administration publique fédérale mentionnés à la colonne I de l'annexe I.1;

b) toute commission nommée sous le régime de la *Loi sur les enquêtes* désignée comme tel, pour l'application de la présente loi, par décret du gouverneur en conseil;

c) le personnel du Sénat, celui de la Chambre des communes, celui de la bibliothèque du Parlement, celui du bureau du conseiller sénatorial en éthique, celui du bureau du commissaire aux conflits d'intérêts et à l'éthique, celui du Service de protection parlementaire et celui du bureau du directeur parlementaire du budget;

d) tout établissement public. (*department*)

ministre Le ministre des Finances. (*Minister*)

ministre compétent

a) Dans le cas d'un ministère mentionné à l'annexe I, le ministre chargé de son administration;

a.1) dans le cas d'un secteur de l'administration publique fédérale mentionné à la colonne I de l'annexe I.1, le ministre mentionné à la colonne II de cette annexe;

b) dans le cas d'une commission visée par la *Loi sur les enquêtes*, le ministre chargé de son administration par décret du gouverneur en conseil;

c) dans le cas du Sénat et du bureau du conseiller sénatorial en éthique, le président du Sénat, dans celui de la Chambre des communes, le bureau de régie interne, dans celui du bureau du commissaire aux conflits d'intérêts et à l'éthique, le président de la Chambre des communes et dans celui de la bibliothèque du Parlement, du Service de protection parlementaire et du bureau du directeur parlementaire du budget, le président de chaque chambre;

c.1) dans le cas d'un établissement public, le ministre que le gouverneur en conseil charge, par décret, de son administration;

d) dans le cas d'une société d'État, le ministre de tutelle au sens du paragraphe 83(1). (*appropriate Minister*)

société d'État S'entend au sens du paragraphe 83(1). (*Crown corporation*)

société d'État mère S'entend au sens du paragraphe 83(1). (*parent Crown corporation*)

treasury bill means a bill in certificated form, or a non-certificated security, issued by or on behalf of Her Majesty for the payment of a principal sum specified in the bill to a named recipient or to a bearer at a date not later than twelve months after the date of issue of the bill; (*bon du Trésor*)

treasury note means a note in certificated form, or a non-certificated security, issued by or on behalf of Her Majesty for the payment of a principal sum specified in the note to a named recipient or to a bearer at a date not later than twelve months after the date of issue of the note. (*billet du Trésor*)

R.S., 1985, c. F-11, s. 2; R.S., 1985, c. 1 (4th Supp.), s. 25; 1991, c. 24, s. 50(F); 1992, c. 1, ss. 69, 143(E); 1995, c. 17, s. 57; 1999, c. 31, s. 98(F); 2003, c. 22, s. 224(E); 2004, c. 7, s. 8; 2006, c. 9, s. 7; 2015, c. 36, s. 125; 2017, c. 20, s. 160.

Trésor Le total des fonds publics en dépôt au crédit du receveur général. (*Consolidated Revenue Fund*)

valeur sans certificat Outre la valeur mobilière qui n'est pas constatée par un certificat, y est assimilé le certificat de valeur confié à un dépositaire ou un intermédiaire pour des services de compensation et de règlement. (*non-certificated security*)

valeurs ou ***titres*** Valeurs du Canada, avec ou sans certificat, qui représentent une partie de la dette publique. La présente définition vise notamment les obligations, les billets, les certificats de dépôt, les certificats ne portant pas intérêt, les débentures, les bons du Trésor et les billets du Trésor. (*securities*)

vérificateur général Personne nommée conformément au paragraphe 3(1) de la *Loi sur le vérificateur général*. (*Auditor General of Canada*)

L.R. (1985), ch. F-11, art. 2; L.R. (1985), ch. 1 (4e suppl.), art. 25; 1991, ch. 24, art. 50(F); 1992, ch. 1, art. 69 et 143(A); 1995, ch. 17, art. 57; 1999, ch. 31, art. 98(F); 2003, ch. 22, art. 224(A); 2004, ch. 7, art. 8; 2006, ch. 9, art. 7; 2015, ch. 36, art. 125; 2017, ch. 20, art. 160.

Alteration of Schedules

Addition to Schedule I.1, II or III

3 (1) The Governor in Council may, by order,

(a) add to Schedule I.1 in column I thereof the name of any division or branch of the federal public administration and in column II thereof opposite that name a reference to the appropriate Minister;

(a.1) add to Schedule II the name of any corporation established by an Act of Parliament that performs administrative, research, supervisory, advisory or regulatory functions of a governmental nature; and

(b) add to Part I or II of Schedule III the name of any parent Crown corporation.

Alteration of Schedule I.1

(1.1) The Governor in Council may, by order, amend Schedule I.1 by striking out the reference in column II thereof opposite the name of a division or branch of the federal public administration in column I thereof and by substituting therefor another reference in column II thereof opposite that name.

Idem

(1.2) The Governor in Council may, by order, delete from Schedule I.1 the name of any division or branch of the federal public administration that has been changed and shall thereupon add the new name of the division or branch to that Schedule.

Annexes

Inscription aux ann. I.1, II ou III

3 (1) Le gouverneur en conseil peut, par décret :

a) inscrire à l'annexe I.1 tout secteur de l'administration publique fédérale ainsi que le ministre compétent;

a.1) inscrire à l'annexe II toute personne morale constituée par une loi fédérale et chargée de fonctions étatiques d'administration, de recherche, de contrôle, de conseil ou de réglementation;

b) inscrire aux parties I ou II de l'annexe III toute société d'État mère.

Modification de l'ann. I.1

(1.1) Le gouverneur en conseil peut, par décret, modifier à l'annexe I.1 toute mention de la colonne II figurant en regard d'une mention de la colonne I.

Idem

(1.2) Le gouverneur en conseil peut, par décret, remplacer à l'annexe I.1 l'ancienne dénomination d'un secteur de l'administration publique fédérale par la nouvelle.

SCHEDULE I.1

(Sections 2 and 3)

Column I Division or Branch of the Federal Public Administration	Column II Appropriate Minister
Administrative Tribunals Support Service of Canada *Service canadien d'appui aux tribunaux administratifs*	Minister of Justice
Atlantic Canada Opportunities Agency *Agence de promotion économique du Canada atlantique*	Member of the Queen's Privy Council for Canada appointed by Commission under the Great Seal to be the Minister for the purposes of the *Atlantic Canada Opportunities Agency Act*
Canadian Grain Commission *Commission canadienne des grains*	Minister of Agriculture and Agri-Food
Canadian Human Rights Commission *Commission canadienne des droits de la personne*	Minister of Justice
Canadian Intergovernmental Conference Secretariat *Secrétariat des conférences intergouvernementales canadiennes*	President of the Queen's Privy Council for Canada
Canadian Northern Economic Development Agency *Agence canadienne de développement économique du Nord*	Minister of the Canadian Northern Economic Development Agency
Canadian Radio-television and Telecommunications Commission *Conseil de la radiodiffusion et des télécommunications canadiennes*	Minister of Canadian Heritage
Canadian Security Intelligence Service *Service canadien du renseignement de sécurité*	Minister of Public Safety and Emergency Preparedness
Canadian Space Agency *Agence spatiale canadienne*	Minister of Industry
Canadian Transportation Agency *Office des transports du Canada*	Minister of Transport
Civilian Review and Complaints Commission for the Royal Canadian Mounted Police *Commission civile d'examen et de traitement des plaintes relatives à la Gendarmerie royale du Canada*	Minister of Public Safety and Emergency Preparedness
Communications Security Establishment *Centre de la sécurité des télécommunications*	Minister of National Defence
Copyright Board *Commission du droit d'auteur*	Minister of Industry
Correctional Service of Canada *Service correctionnel du Canada*	Minister of Public Safety and Emergency Preparedness

ANNEXE I.1

(articles 2 et 3)

Colonne I Secteur de l'administration publique fédérale	Colonne II Ministre compétent
Administration du pipe-line du Nord *Northern Pipeline Agency*	Le ministre des Ressources naturelles
Agence canadienne de développement économique du Nord *Canadian Northern Economic Development Agency*	Le ministre de l'Agence canadienne de développement économique du Nord
Agence canadienne d'évaluation d'impact *Impact Assessment Agency of Canada*	Le ministre de l'Environnement
Agence de développement économique du Canada pour les régions du Québec *Economic Development Agency of Canada for the Regions of Quebec*	Le ministre de l'Agence de développement économique du Canada pour les régions du Québec
Agence de la consommation en matière financière du Canada *Financial Consumer Agency of Canada*	Le ministre des Finances
Agence de la santé publique du Canada *Public Health Agency of Canada*	Le ministre de la Santé
Agence de promotion économique du Canada atlantique *Atlantic Canada Opportunities Agency*	Le membre du Conseil privé de la Reine pour le Canada chargé, par commission sous le grand sceau, de l'application de la *Loi sur l'Agence de promotion économique du Canada atlantique*
Agence fédérale de développement économique pour le Sud de l'Ontario *Federal Economic Development Agency for Southern Ontario*	Le ministre du Développement économique et des Langues officielles
Agence spatiale canadienne *Canadian Space Agency*	Le ministre de l'Industrie
Bibliothèque et Archives du Canada *Library and Archives of Canada*	Le ministre du Patrimoine canadien
Bureau de l'enquêteur correctionnel du Canada *Office of the Correctional Investigator of Canada*	Le ministre de la Sécurité publique et de la Protection civile
Bureau de l'infrastructure du Canada *Office of Infrastructure of Canada*	Le ministre de l'Infrastructure et des Collectivités
Bureau du commissaire à la magistrature fédérale *Office of the Commissioner for Federal Judicial Affairs*	Le ministre de la Justice
Bureau du commissaire au renseignement *Office of the Intelligence Commissioner*	Le premier ministre

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Economic Development Agency of Canada for the Regions of Quebec *Agence de développement économique du Canada pour les régions du Québec*	Minister of the Economic Development Agency of Canada for the Regions of Quebec
Federal Economic Development Agency for Southern Ontario *Agence fédérale de développement économique pour le Sud de l'Ontario*	Minister of Economic Development and Official Languages
Financial Consumer Agency of Canada *Agence de la consommation en matière financière du Canada*	Minister of Finance
Financial Transactions and Reports Analysis Centre of Canada *Centre d'analyse des opérations et déclarations financières du Canada*	Minister of Finance
Immigration and Refugee Board *Commission de l'immigration et du statut de réfugié*	Minister of Citizenship and Immigration
Impact Assessment Agency of Canada *Agence canadienne d'évaluation d'impact*	Minister of the Environment
Leaders' Debates Commission *Commission des débats des chefs*	President of the Queen's Privy Council for Canada
Library and Archives of Canada *Bibliothèque et Archives du Canada*	Minister of Canadian Heritage
Military Grievances External Review Committee *Comité externe d'examen des griefs militaires*	Minister of National Defence
Military Police Complaints Commission *Commission d'examen des plaintes concernant la police militaire*	Minister of National Defence
National Farm Products Council *Conseil national des produits agricoles*	Minister of Agriculture and Agri-Food
National Film Board *Office national du film*	Minister of Canadian Heritage
National Security and Intelligence Review Agency Secretariat *Secrétariat de l'Office de surveillance des activités en matière de sécurité nationale et de renseignement*	Prime Minister
Northern Pipeline Agency *Administration du pipe-line du Nord*	Minister of Natural Resources
Office of Infrastructure of Canada *Bureau de l'infrastructure du Canada*	Minister of Infrastructure and Communities
Office of the Auditor General *Bureau du vérificateur général*	Minister of Finance

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Bureau du directeur général des élections *Office of the Chief Electoral Officer*	Le président du Conseil privé de la Reine pour le Canada
Bureau du secrétaire du gouverneur général *Office of the Governor General's Secretary*	Le premier ministre
Bureau du surintendant des institutions financières *Office of the Superintendent of Financial Institutions*	Le ministre des Finances
Bureau du vérificateur général *Office of the Auditor General*	Le ministre des Finances
Centre d'analyse des opérations et déclarations financières du Canada *Financial Transactions and Reports Analysis Centre of Canada*	Le ministre des Finances
Centre de la sécurité des télécommunications *Communications Security Establishment*	Le ministre de la Défense nationale
Comité externe d'examen de la Gendarmerie royale du Canada *Royal Canadian Mounted Police External Review Committee*	Le ministre de la Sécurité publique et de la Protection civile
Comité externe d'examen des griefs militaires *Military Grievances External Review Committee*	Le ministre de la Défense nationale
Commissariat à l'intégrité du secteur public *Office of the Public Sector Integrity Commissioner*	Le président du Conseil du Trésor
Commissariat au lobbying *Office of the Commissioner of Lobbying*	Le président du Conseil du Trésor
Commissariat aux langues officielles *Office of the Commissioner of Official Languages*	Le président du Conseil privé de la Reine pour le Canada
Commissariats à l'information et à la protection de la vie privée du Canada *Offices of the Information and Privacy Commissioners of Canada*	Le ministre de la Justice
Commission canadienne des droits de la personne *Canadian Human Rights Commission*	Le ministre de la Justice

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Office of the Commissioner of Lobbying *Commissariat au lobbying*	President of the Treasury Board
Office of the Commissioner of Official Languages *Commissariat aux langues officielles*	President of the Queen's Privy Council for Canada
Office of the Correctional Investigator of Canada *Bureau de l'enquêteur correctionnel du Canada*	Minister of Public Safety and Emergency Preparedness
Office of the Director of Public Prosecutions *Bureau du directeur des poursuites pénales*	Minister of Justice
Office of the Governor General's Secretary *Bureau du secrétaire du gouverneur général*	Prime Minister
Office of the Intelligence Commissioner *Bureau du commissaire au renseignement*	Prime Minister
Office of the Public Sector Integrity Commissioner *Commissariat à l'intégrité du secteur public*	President of the Treasury Board
Office of the Superintendent of Financial Institutions *Bureau du surintendant des institutions financières*	Minister of Finance
Offices of the Information and Privacy Commissioners of Canada *Commissariats à l'information et à la protection de la vie privée du Canada*	Minister of Justice
Parole Board of Canada *Commission des libérations conditionnelles du Canada*	Minister of Public Safety and Emergency Preparedness
Patented Medicine Prices Review Board *Conseil d'examen du prix des médicaments brevetés*	Minister of Health
Privy Council Office *Bureau du Conseil privé*	Prime Minister
Public Health Agency of Canada *Agence de la santé publique du Canada*	Minister of Health

Colonne I Secteur de l'administration publique fédérale	Colonne II Ministre compétent
Commission canadienne des grains *Canadian Grain Commission*	Le ministre de l'Agriculture et de l'Agroalimentaire
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Commission de la fonction publique *Public Service Commission*	Le président du Conseil privé de la Reine pour le Canada
Commission de l'immigration et du statut de réfugié *Immigration and Refugee Board*	Le ministre de la Citoyenneté et de l'Immigration
Commission des débats des chefs *Leaders' Debates Commission*	Le président du Conseil privé de la Reine pour le Canada
Commission des libérations conditionnelles du Canada *Parole Board of Canada*	Le ministre de la Sécurité publique et de la Protection civile
Commission d'examen des plaintes concernant la police militaire *Military Police Complaints Commission*	Le ministre de la Défense nationale
Commission du droit d'auteur *Copyright Board*	Le ministre de l'Industrie
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Conseil d'examen du prix des médicaments brevetés *Patented Medicine Prices Review Board*	Le ministre de la Santé
Conseil national des produits agricoles *National Farm Products Council*	Le ministre de l'Agriculture et de l'Agroalimentaire
Gendarmerie royale du Canada *Royal Canadian Mounted Police*	Le ministre de la Sécurité publique et de la Protection civile
Office des transports du Canada *Canadian Transportation Agency*	Le ministre des Transports
Office national du film *National Film Board*	Le ministre du Patrimoine canadien
Registraire de la Cour suprême du Canada et le secteur de l'administration publique fédérale nommé en vertu du paragraphe 12(2) de la *Loi sur la Cour suprême* *Registrar of the Supreme Court of Canada and that portion of the federal public administration appointed under subsection 12(2) of the Supreme Court Act*	Le ministre de la Justice

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Public Service Commission *Commission de la fonction publique*	President of the Queen's Privy Council for Canada
Registrar of the Supreme Court of Canada and that portion of the federal public administration appointed under subsection 12(2) of the Supreme Court Act *Registraire de la Cour suprême du Canada et le secteur de l'administration publique fédérale nommé en vertu du paragraphe 12(2) de la Loi sur la Cour suprême*	Minister of Justice
Royal Canadian Mounted Police *Gendarmerie royale du Canada*	Minister of Public Safety and Emergency Preparedness
Royal Canadian Mounted Police External Review Committee *Comité externe d'examen de la Gendarmerie royale du Canada*	Minister of Public Safety and Emergency Preparedness
Secretariat of the National Security and Intelligence Committee of Parliamentarians *Secrétariat du Comité des parlementaires sur la sécurité nationale et le renseignement*	Leader of the Government in the House of Commons
Shared Services Canada *Services partagés Canada*	Minister of State (Digital Government)
Statistics Canada *Statistique Canada*	Minister of Industry
Veterans Review and Appeal Board *Tribunal des anciens combattants (révision et appel)*	Minister of Veterans Affairs

1992, c. 1, s. 72; 1993, c. 3, s. 14; SOR/93-84, 298, 359, 536, 537, 538; SI/93-104, 114, 115, 118, 119, 120, 205, 207, 208; 1994, c. 31, s. 17, c. 38, s. 17, c. 41, s. 25; SOR/94-272, 585; 1995, c. 1, ss. 42, 43, c. 5, ss. 18, 19(F), c. 29, ss. 14, 17, 30; SOR/95-594; 1996, c. 8, s. 23, c. 10, ss. 229.1, 229.2, c. 11, ss. 56 to 57.1; SOR/96-101, 102, 355, 386, 452, 537; 1998, c. 9, ss. 42, 43, c. 26, ss. 74, 75, c. 35, s. 122; SOR/98-99, 118, 147; SOR/98-318, s. 1; SOR/98-329, 564; 1999, c. 31, ss. 119 to 121; SOR/99-66, 152; SOR/2000-286; 2001, c. 9, s. 588, c. 29, ss. 53, 54, c. 34, ss. 47, 48; SOR/2001-141, s. 1; SOR/2001-198, 332; 2002, c. 8, ss. 142, 143; SOR/2002-46, 69, 289, 293; 2003, c. 22, ss. 168, 224(E), 247; SOR/2003-145, 146, 419, 420, 424, 425, 431, 433, 436, 437, 441, 442, 443, 444, 445; 2004, c. 11, ss. 29, 30; SOR/2004-21, 161, 162, 163, 164, 204, 224; 2005, c. 10, s. 34, c. 26, s. 24, c. 34, s. 67, c. 38, s. 114, c. 46, ss. 56.2, 56.3; 2006, c. 9, ss. 92, 93, 138, 222; SOR/2006-26, 30, 31, 35, 37, 38, 39, 42, 48, 68, 97, 101; 2008, c. 22, s. 47; SOR/2008-127, 132; SOR/2009-35; SOR/2009-171, ss. 1 to 3; SOR/2009-240, 245, 273, 274; 2010, c. 12, s. 1779; SOR/2011-159, 252; SI/2011-51, 53; 2012, c. 1, s. 160, c. 19, ss. 470, 573, c. 31, s. 291; 2013, c. 18, ss. 47, 48, c. 24, ss. 118, 119, c. 33, s. 180, c. 40, ss. 450, 451; SI/2013-88, 91, 92; 2014, c. 20, ss. 394 to 399; 2015, c. 3, s. 96; SOR/2015-233, 234, 235, 236; SOR/2016-209; 2017, c. 15, s. 37; SOR/2017-254; 2018, c. 18, s. 5, c. 27, s. 666; SOR/2018-161, 162, 192, 242; 2019, c. 13, s. 27; 2019, c. 13, s. 28; 2019, c. 13, s. 63; 2019, c. 13, s. 64; 2019, c. 28, s. 103; 2019, c. 28, s. 104; 2019, c. 28, s. 105; 2019, c. 29, s. 352; SOR/2019-341; SOR/2019-342; SOR/2019-350; SOR/2019-351; SOR/2019-352; SI/2020-66.

Colonne I Secteur de l'administration publique fédérale	Colonne II Ministre compétent
Secrétariat de l'Office de surveillance des activités en matière de sécurité nationale et de renseignement *National Security and Intelligence Review Agency Secretariat*	Le premier ministre
Secrétariat des conférences intergouvernementales canadiennes *Canadian Intergovernmental Conference Secretariat*	Le président du Conseil privé de la Reine pour le Canada
Secrétariat du Comité des parlementaires sur la sécurité nationale et le renseignement *Secretariat of the National Security and Intelligence Committee of Parliamentarians*	Le leader du gouvernement à la Chambre des communes
Service administratif des tribunaux judiciaires *Courts Administration Service*	Le ministre de la Justice
Service canadien d'appui aux tribunaux administratifs *Administrative Tribunals Support Service of Canada*	Le ministre de la Justice
Service canadien du renseignement de sécurité *Canadian Security Intelligence Service*	Le ministre de la Sécurité publique et de la Protection civile
Service correctionnel du Canada *Correctional Service of Canada*	Le ministre de la Sécurité publique et de la Protection civile
Services partagés Canada *Shared Services Canada*	Le ministre d'État (Gouvernement numérique)
Statistique Canada *Statistics Canada*	Le ministre de l'Industrie
Tribunal des anciens combattants (révision et appel) *Veterans Review and Appeal Board*	Le ministre des Anciens Combattants

1992, ch. 1, art. 72; 1993, ch. 3, art. 14; DORS/93-84, 298, 359, 536, 537, 538; TR/93-104, 114, 115, 118, 119, 120, 205, 207, 208; 1994, ch. 31, art. 17, ch. 38, art. 17, ch. 41, art. 25; DORS/94-272, 585; 1995, ch. 1, art. 42 et 43, ch. 5, art. 18 et 19(F), ch. 29, art. 14, 17 et 30; DORS/95-594; 1996, ch. 8, art. 23, ch. 10, art. 229.1 et 229.2, ch. 11, art. 56 à 57.1; DORS/96-101, 102, 355, 386, 452, 537; 1998, ch. 9, art. 42 et 43, ch. 26, art. 74 et 75, ch. 35, art. 122; DORS/98-99, 118, 147; DORS/98-318, art. 1; DORS/98-329, 564; 1999, ch. 31, art. 119 à 121; DORS/99-66, 152; DORS/2000-286; 2001, ch. 9, art. 588, ch. 29, art. 53 et 54, ch. 34, art. 47 et 48; DORS/2001-141, art. 1; DORS/2001-198, 332; 2002, ch. 8, art. 142 et 143; DORS/2002-46, 69, 289, 293; 2003, ch. 22, art. 168, 224(A) et 247; DORS/2003-145, 146, 419, 420, 424, 425, 431, 433, 436, 437, 441, 442, 443, 444, 445; 2004, ch. 11, art. 29 et 30; DORS/2004-21, 161, 162, 163, 164, 204, 224; 2005, ch. 10, art. 34, ch. 26, art. 24, ch. 34, art. 67, ch. 38, art. 114, ch. 46, art. 56.2 et 56.3; 2006, ch. 9, art. 92, 93, 138 et 222; DORS/2006-26, 30, 31, 35, 37, 38, 39, 42, 48, 68, 97, 101; 2008, ch. 22, art. 47; DORS/2008-127, 132; DORS/2009-35; DORS/2009-171, art. 1 à 3; DORS/2009-240, 245, 273, 274; 2010, ch. 12, art. 1779; DORS/2011-159, 252; TR/2011-51, 53; 2012, ch. 1, art. 160, ch. 19, art. 470 et 573, ch. 31, art. 291; 2013, ch. 18, art. 47 et 48, ch. 24, art. 118 et 119, ch. 33, art. 180, ch. 40, art. 450 et 451; TR/2013-88, 91, 92; 2014, ch. 20, art. 394 à 399; 2015, ch. 3, art. 96; DORS/2015-233, 234, 235, 236; DORS/2016-209; 2017, ch. 15, art. 37; DORS/2017-254; 2018, ch. 18, art. 5, ch. 27, art. 666; DORS/2018-161, 162, 192, 242; 2019, ch. 13, art. 27; 2019, ch. 13, art. 28; 2019, ch. 13, art. 63; 2019, ch. 13, art. 64; 2019, ch. 28, art. 103; 2019, ch. 28, art. 104; 2019, ch. 28, art. 105; 2019, ch. 29, art. 352; DORS/2019-341; DORS/2019-342; DORS/2019-350; DORS/2019-351; DORS/2019-352; TR/2020-66.

Appendix B

No. 39266

December 23, 2020

BETWEEN:

Air Passenger Rights

Applicant

- and -

Canadian Transportation Agency

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-102-20, 2020 FCA 92, dated May 22, 2020, is dismissed without costs.

Le 23 décembre 2020

ENTRE :

Air Passenger Rights

Demanderesse

- et -

Office des transports du Canada

Intimé

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel fédérale, numéro A-102-20, 2020 CAF 92, daté du 22 mai 2020, est rejetée sans dépens.

J.S.C.C.
J.C.S.C.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2020.

REASONS FOR ORDER BY: MACTAVISH J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

MACTAVISH J.A.

[1] As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

[2] In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

[3] Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

[4] For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

[5] In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on

Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

[6] The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

[7] The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time". The Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

[8] Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

[9] These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

[10] APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

[11] According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

[12] APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

[13] The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[14] That is, the Court must consider three questions:

1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;

2) Whether irreparable harm will result if the injunction is not granted; and

3) Whether the balance of convenience favours the granting of the injunction.

[15] The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14.

4. Has APR Raised a Serious Issue?

[16] The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

[17] With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[18] However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

[19] A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: ***R. v.*** ***Canadian Broadcasting Corp.***, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a strong likelihood that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

[20] As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

[21] APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

[22] Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[23] For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al*., 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's

statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[24] I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

[25] Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

[26] As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the

current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

[28] A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

[29] APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

[30] As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Manitoba (Attorney General) v.*

Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 at paras. 33-34; *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

[31] I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

[32] Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

[33] Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R.

(3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).

[34] As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

[35] There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 FC 225,189 D.L.R. (4th) 131 at para. 49 (C.A.); *E.A. Manning Ltd.*, above at para. 24.

[36] Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

[37] APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

[38] In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[40] APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed

five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGERS RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MACTAVISH J.A.
DATED:	MAY 22, 2020

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPLICANT
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20201002

Docket: A-102-20

Citation: 2020 FCA 155

Present: **WEBB J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 2, 2020.

REASONS FOR ORDER BY: WEBB J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20201002

Docket: A-102-20

Citation: 2020 FCA 155

Present: **WEBB J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

WEBB J.A.

[1] The Canadian Transportation Agency (CTA) has brought a motion to strike the judicial review application filed by Air Passenger Rights (APR). The judicial review application relates to two statements that were published on the website of the CTA that were prompted by the COVID-19 pandemic. The "Statement on Vouchers" addresses the situation arising when flights are cancelled. It includes the following:

> [w]hile any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

[2] The second statement that is the subject of the judicial review application is one which references the Statement on Vouchers.

[3] Following the filing of its application for judicial review, APR brought a motion seeking an interlocutory order that would require the removal of the statements from the CTA's website. It was also seeking "to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the [CTA]'s public statements" (*Air Passenger Rights v. Canadian Transportation Agency*, 2020 FCA 92, at para. 3).

[4] In dismissing the motion, Justice Mactavish applied the test for interlocutory injunctive relief as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[5] In paragraph 16 of the reasons related to the dismissal of this motion, Justice Mactavish noted that there is a low threshold for establishing the existence of a serious issue to be tried. In paragraph 17 she stated:

> With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable

> apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[6] Justice Mactavish also noted that a higher threshold is involved when a person is seeking a mandatory interlocutory injunction to compel another person to take action prior to the determination of the underlying application on its merits. In that case, she found that the party who is seeking an injunction would need to establish a strong *prima facie* case (paragraph 19).

[7] In addressing whether APR had established a strong *prima facie* case, Justice Mactavish stated:

> 22 Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.
>
> 23 For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al.*, 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's statements "purport [t]o provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[8] In paragraph 27 of her reasons, Justice Mactavish concluded:

> 27 It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

[9] As a result, APR had failed to establish, with respect to its request for mandatory relief that the statements be removed from the CTA's website, that these statements "affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers".

[10] Following this finding, Justice Mactavish noted:

> 39 Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[11] Prompted by this notation that there was no motion before the Court to dismiss the application for judicial review, the CTA brought the current motion to strike this application.

[12] In *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, (*JP Morgan*) this Court noted that the threshold for striking an application for judicial review is high:

> 47 The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [footnote omitted]: *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.), at page 600. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117, at

> paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286, at paragraph 6; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
>
> 48 There are two justifications for such a high threshold. First, the Federal Courts' jurisdiction to strike a notice of application is founded not in the rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, above, at page 600; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 18 C.C.L.I. (5th) 263. Second, applications for judicial review must be brought quickly and must proceed "without delay" and "in a summary way": *Federal Courts Act*, above, subsection 18.1(2) and section 18.4. An unmeritorious motion — one that raises matters that should be advanced at the hearing on the merits — frustrates that objective.

[13] APR's main argument in its memorandum filed in relation to this motion is that the test for the availability of judicial review has changed. APR submits that the test based on whether the conduct of the administrative body affects legal rights, imposes legal obligations, or causes prejudicial effects is no longer applicable. Therefore, APR submits that Justice Mactavish erred in basing her decision on her finding that the impugned statements did not affect legal rights, impose legal obligations, or cause prejudicial effects.

[14] APR notes that this Court in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, (*AC v. TPA*) stated:

> 28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.
>
> 29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488; *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[15] However, APR, in paragraph 49 of its memorandum, submits that the Supreme Court of Canada changed the test that is to be applied to determine if judicial review is available:

> [i]n 2018, in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26] the Supreme Court recast the test for availability of judicial review as simply whether the administrative bodies' action is an exercise of state authority that is of a sufficiently public character [***Wall*-test**].
>
> (emphasis in original)

[16] Although APR does not explicitly state that, in its view, the Supreme Court indirectly overturned the decision of this Court in *AC v. TPA*, it appears that this is implicit in its argument which culminates in the following statement in paragraph 63 of its memorandum:

> Therefore, the panels of this Honourable Court in *Oceanex* [*Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250] and *Guérin* [*Guérin c. Canada (Procureur général)*, 2019 CAF 272] correctly concluded that availability of judicial review of acts of federal administrative bodies is to be determined based on the *Wall*-test.

[17] The position of the CTA is that the principle, as set out in *AC v. TPA*, that there is no right to judicial review "where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" is still good law and it has not been overturned by the Supreme Court. Therefore, since the statements at issue in this judicial review application do not affect legal rights, impose legal obligations or cause prejudicial effects, the application for judicial review should be struck.

[18] It is important to examine exactly what each court said. The relevant paragraph in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (*Wall*), is paragraph 14:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature – such as renting premises and hiring staff – and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[19] There is nothing in this paragraph that indicates that the Supreme Court is overturning the decision of this Court in *AC v. TPA*. Rather, the Supreme Court specifically refers to this decision in the above quoted paragraph, albeit for a different principle referenced in that case. If the Supreme Court had intended that *AC v. TPA* should no longer be followed for the principle that judicial review will not be available if the conduct does not affect legal rights, impose legal obligations or cause prejudicial effects, it presumably would have explicitly stated it was overturning this decision.

[20] Furthermore, it is important to review the context in which this statement was made by the Supreme Court. The issue in *Wall*, was described by the Supreme Court in the first paragraph of that decision:

> 1. The central question in this appeal is when, if ever, courts have jurisdiction to review the decisions of religious organizations where there are concerns about procedural fairness. In 2014, the appellant, the Judicial Committee

> of the Highwood Congregation of Jehovah's Witnesses, disfellowshipped the respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him before the Alberta Court of Queen's Bench. The court first dealt with the issue of whether it had jurisdiction to decide the matter. Both the chambers judge and a majority of the Court of Appeal concluded that the courts had jurisdiction and could proceed to consider the merits of Mr. Wall's application.

[21] The issue was, therefore, whether the decision that had been reached by the Judicial Committee could be the subject of a judicial review. The conclusion of the Supreme Court was that this decision was not justiciable. The Supreme Court did not decide that a particular conduct which did not affect legal rights, impose legal obligations or cause prejudicial effects, could nevertheless be subject to judicial review. In *Wall*, Mr. Wall had been disfellowshipped by the Judicial Committee and therefore his rights were affected.

[22] APR submitted that two decisions of this Court applied the test as set out in *Wall*. In *Oceanex Inc. v. Canada (Transport)*, 2019 FCA 250, this Court simply noted that the Supreme Court had recently revisited the law governing the availability of judicial review and that it had emphasized:

> […] that judicial review is available only where two conditions are met – "where there is an exercise of state authority and where that exercise is of a sufficiently public character" […]
>
> (emphasis in original)

[23] This Court did not decide that judicial review would be available where these two conditions are met regardless of whether the particular decision or conduct affects legal rights, imposes legal obligations or causes prejudicial effects.

[24] In *Guérin c. Canada (Procureur général)*, 2019 CAF 272, the reference to the Supreme Court's decision in *Wall*, is in paragraph 65: « Ce principe a récemment été réitéré par la Cour suprême dans *Highwood Congregation of Jehovah's Witnesses* (*Judicial Committee*) *c. Wall* […] ». The principle to which this Court was referring was stated in the immediately preceding paragraph: « Dans l'arrêt *Dunsmuir*, la Cour suprême a clairement réaffirmé le principe selon lequel la relation de la Couronne avec ses employés est régie par le droit des contrats. » The principle to which this Court was referring was not the principle that related to the availability of judicial review but rather that the relationship between the Crown and its employees is governed by the law of contract.

[25] As a result, none of these cases support the proposition advanced by APR. APR also refers to the decision of this Court in *Wenham v. Canada (Attorney General)*, 2018 FCA 199. In that case, this Court noted:

> 36 An application can be doomed to fail at any of the three stages:
>
> I. Preliminary objections. An application not authorized under the *Federal Courts Act*, R.S.C., 1985, c. F-7 or not aimed at public law matters may be quashed at the outset: *JP Morgan* at para. 68; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

[26] This Court referred to both the Supreme Court's decision in *Wall* and the decision of this Court in *AC v. TPA* as providing a basis on which a judicial review application could fail. Therefore, an application for judicial review could fail if the test as set out in *Wall* is not satisfied, or if the particular decision or conduct did not affect legal rights, impose legal obligations or cause prejudicial effects.

[27] As a result, there is no support for the proposition as advocated by APR that "where there is an exercise of state authority and where that exercise is of a sufficiently public character" that exercise of public authority can be subject to judicial review even though no legal rights are affected, no legal obligations are imposed and there are no prejudicial effects.

[28] However, the finding by Justice Mactavish that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects were made in relation to the part of the judicial review application with respect to the request for an order compelling the CTA to remove these statements from its website.

[29] As noted above, Justice Mactavish stated that she was assuming "that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part". APR lost its motion for an interlocutory injunction in relation to this aspect at the irreparable harm stage, not the serious issue to be tried stage. CTA did not address this distinction in its memorandum of fact and law that it included with its motion record.

Instead, the CTA only focused on Justice Mactavish's conclusion that the impugned statements did not affect legal rights, impose legal obligations or cause prejudicial effects.

[30] Following the receipt of APR's motion record, CTA addressed the reasonable apprehension of bias argument in its reply submissions, which were longer than its original submissions.

[31] CTA, in its reply submissions, stated:

> 13. [APR] wants this Court to review facts which [APR] says create a reasonable apprehension of bias in future cases. There is no precedent for this. The proper course is to raise the issue in those cases where the decision of the [CTA] would affect the legal rights of the parties.
>
> 14. The decision of Mactavish J.A. on the motion for an interlocutory injunction brings home this very point. Mactavish J.A. pointed out that allegations of bias could be raised in actual proceedings affecting the rights of individuals, as was done in *E.A. Manning* [*E.A. Manning Ltd. v. Ontario Securities Commission*, 18 O.R. (3d) 97, [1994] O.J. No. 1026];
>
> > "Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing."

[32] However, these comments of Justice Mactavish were made in paragraph 36 of her reasons in relation to the irreparable harm component of the *RJR-MacDonald* test, not whether there was a serious issue that was raised in the judicial review application in relation to this matter. The absence of a precedent should not also necessarily lead to the conclusion that an application for judicial review should be struck. CTA was also unable to identify any precedent

that clearly supported its position that this part of the judicial review application was “so clearly improper as to be bereft of any possibility of success” (*David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, at page 600 (C.A.), 58 C.P.R. (3d) 209).

[33] The arguments related to the reasonable apprehension of bias should be made at the hearing of the judicial review application, not in reply submissions in relation to a motion to strike the judicial review application. APR should not be deprived of its argument simply because there is no precedent.

[34] As a result, I would dismiss the motion to strike the application for judicial review. The costs of this motion shall be in the cause.

"Wyman W. Webb"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGER RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	WEBB J.A.
DATED:	OCTOBER 2, 2020

WRITTEN REPRESENTATIONS BY:

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Allan Matte	FOR THE RESPONDENT

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20200428

Docket: A-406-18

Citation: 2020 FCA 81

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ALLAN BRADLEY ZALYS

Respondent

Heard at Vancouver, British Columbia, on January 15, 2020.

Judgment delivered at Ottawa, Ontario, on April 28, 2020.

REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	RIVOALEN J.A.
DISSENTING REASONS BY:	GLEASON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200428

Docket: A-406-18

Citation: 2020 FCA 81

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ALLAN BRADLEY ZALYS

Respondent

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] I have had the benefit of reading the reasons drafted by my colleague, Gleason J.A. I agree with the facts as she has set out, as well as her conclusion that the style of cause should be amended as the appellant requests. However, and with respect, I am unable to agree with her that the appeal should be allowed only in part with costs to the respondent.

[2] The appellant appeals from the judgment of the Federal Court in *Zalys v. Canada (Royal Mounted Police)*, 2018 FC 1122, 298 A.C.W.S. (3d) 863, which granted the respondent's application for judicial review of the June 8, 2017 decision of a Level II Adjudicator (the Adjudicator) appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014). The Adjudicator denied the respondent's grievance in which he sought to have service pay included in the lump sum payout of annual leave he received when he retired from the RCMP. The respondent then sought judicial review before the Federal Court. The Federal Court found that the Adjudicator's decision was unreasonable and remitted the matter back with directions for the Adjudicator to "adopt an interpretation upholding the [respondent's] position" (Federal Court's Reasons at paras. 26, 69-70).

[3] For the following reasons, I would allow the appeal with costs, set aside the judgment of the Federal Court, dismiss the application for judicial review, and restore the decision of the Adjudicator.

[4] On an appeal of a judicial review decision, as stated by my colleague, our Court must determine whether the Federal Court appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212 at paragraph 18. The standard of review in this application for judicial review is reasonableness. Our Court must therefore focus on the decision of the Adjudicator and determine whether, in reviewing it, the Federal Court identified reasonableness as the standard of review and applied it correctly.

[5] In assessing the Adjudicator's decision, I am guided by the Supreme Court's teachings in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]. When the Court determines that the applicable standard is reasonableness, the Court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para. 15). While the majority reasons in *Vavilov* describe reasonableness review as "robust", they also reiterate that it involves deference. Reasonableness review "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" and is "meant to ensure that courts intervene in administrative matters only where it is truly necessary […] to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at paras. 12-13). The reasons themselves need "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov* at para. 91, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16). What distinguishes reasonableness review from correctness review is the court's focus on the administrative decision and the justification offered for it, "not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov* at paras. 15, 83). It is, furthermore, only appropriate to quash a decision on the reasonableness standard where "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para. 100).

[6] Turning to the substance of the Adjudicator's decision before us, I am of the view that it is reasonable. Although it would have been preferable for the Adjudicator to acknowledge the

definition of "allowance" in finding that service pay was an "allowance" that is excluded from the definition of "salary", this alleged shortcoming, on its own, does not justify finding that the decision is unreasonable as a whole. Not only does the record demonstrate that the definition of "allowance" was not central to the respondent's submissions at the administrative stage, but it is, more importantly, not determinative of the matter. Whether service pay is considered to be an "allowance" that is excluded from the definition of "salary" or not, the Adjudicator was still required to address the effect of the term "substantive" in section 7.1 of the RCMP's Administration Manual. The Adjudicator did just that, making other findings that are independent from the notion that service pay is an "allowance" and that justify her ultimate conclusion that the respondent did not demonstrate that the payout he received was inconsistent with the relevant legislation and policies.

[7] Indeed, on the basis of the record that was before her, the Adjudicator appropriately observed that "[t]he crux of the dispute" concerned the definition of "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and signalled her focus on this chapter, which pertains to annual leave (Adjudicator's Reasons at paras. 38, 55, 61). Instead of relying on her finding that service pay was an "allowance", the Adjudicator went on to address the impact of the word "substantive" in section 7.1. In circumstances where "substantive salary" was not defined in the applicable policy manuals or enabling legislation at the relevant time, she reasonably concluded that the term "substantive" had a restrictive connotation and "denote[d] a basic salary void of any other form of compensation" (Adjudicator's Reasons at paras. 62, 64-65; Appeal Book, vol. II at pp. 345, 471, 489).

[8] The Adjudicator was also responsive to the respondent's argument that excluding service pay from "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual created an inequity. She disagreed with his contention for two reasons. First, she found that retiring members could choose to receive service pay by taking their remaining leave as vacation prior to retiring, or they could choose to receive their annual leave in a lump sum payout without service pay (Adjudicator's Reasons at paras. 66, 68-69, 73). Second, she considered how members in the officer cadre of the RCMP receive payouts of annual leave when their annual leave exceeds their carry-over entitlement, according to the RCMP's Administration Manual. She noted that in the provisions she consulted, "substantive" denoted "that the payout must be based on the member's base salary, void of any allowances or other forms of compensation" and suggested that excluding service pay from "substantive salary" in section 7.1 would allow for a consistent application of annual leave payout policy for serving and retiring members (Adjudicator's Reasons at paras. 70-71, 73).

[9] Furthermore, the Adjudicator provided a coherent and intelligible explanation for why service pay is not tied to annual leave, but to a member's bi-weekly salary instead, which a discharged member no longer receives (Adjudicator's Reasons at paras. 67-68).

[10] None of these additional findings depend on the notion that service pay is an "allowance". Instead, they demonstrate an appropriate analysis of section 7.1 of the RCMP's Administration Manual in context, leading to a transparent, intelligible, and justifiable conclusion that the payout of annual leave the respondent received was appropriately calculated to exclude service pay in accordance with the relevant legislation and policies.

[11] Unlike my colleague, I also remain unconvinced that the Adjudicator was required to explicitly address, in her reasons, an amendment to the RCMP's National Compensation Manual subsequent to the respondent's retirement regarding service pay. This omission is relatively insignificant because the amendment does not clearly militate in favour of the respondent's position, any assertion regarding the motivation for this amendment, on the basis of the record, is speculative, and the amendment does not detract from the soundness of the Adjudicator's analysis of section 7.1 of the RCMP's Administration Manual that led her to conclude that service pay was excluded from "substantive salary" at the relevant time. In my opinion, finding that the Adjudicator was required to explicitly address the amendment in her reasons runs counter to the observation of the majority in *Vavilov* at paragraph 128 that:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. […]

[12] In addition, I find that the record does not support the contention that the respondent noted the difference in wording between section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and sections 6.1.1 and 6.2.2, which address payout of annual leave to RCMP members in the officer cadre, at the administrative stage of this matter. While the respondent raised arguments about the difference in wording between these provisions before this Court, there was no reference to sections 6.1.1 and 6.2.2 in the respondent's submissions at the administrative stage. By raising this argument before this Court, the respondent is in fact attempting to reargue his case.

[13] Finally, the Adjudicator's finding that the respondent bore the burden of establishing his claim was reasonable. It accords with past practice of RCMP adjudicators and the record does not suggest that the appellant failed to provide information to which only it had access (See e.g. *Marsh v. Zaccardelli*, 2006 FC 1466, 305 F.T.R. 303 at para. 59).

[14] Applying the teachings of *Vavilov* to the present case, the Adjudicator's decision is reasonable and her reasons demonstrate as much. More specifically, her reasons explain that the term "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual, undefined in the relevant RCMP policies, does not include service pay because: the word "substantive" denotes the "essential part of the salary", not a salary that includes allowances or other forms of compensation; service pay is tied to the receipt of a member's salary, not to annual leave; retiring members can choose the option upon retiring that allows them to receive service pay if they want it; and compensation in addition to base salary, such as service pay, is not paid out to active members when they receive a lump sum payout of annual leave that exceeds their carry-over entitlement (Adjudicator's Reasons at paras. 63-64, 67-68, 71).

[15] For its part, the Federal Court correctly identified the applicable standard of review as reasonableness (Federal Court's Reasons at para. 13). However, it conducted its own analysis of how the relevant provisions of the RCMP's Administration Manual and National Compensation Manual should be interpreted (Federal Court's Reasons at paras. 27-37, 39, 45-50). Consequently, it was insufficiently deferential and clearly engaged in a disguised correctness review, erroneously focused on its own interpretation of the RCMP's policy manuals, and compared that interpretation to that of the Adjudicator, using its own interpretation as a

"yardstick to measure what the [Adjudicator] did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; See also *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, [2019] 3 F.C.R. 81at para. 49).

[16] For the foregoing reasons, I would allow the appeal in full, set aside the judgment of the Federal Court dated November 8, 2018 in file T-1635-17 (2018 FC 1122), dismiss the respondent's application for judicial review, and restore the decision of the Adjudicator dated June 8, 2017. I would grant costs to the appellant in the agreed-upon amount of $5,300.00, and I would also amend the style of cause in the manner the appellant has requested. The style of cause on this document and on the judgment of this Court in file A-406-18 reflect this proposed amendment.

"Richard Boivin"

J.A.

"I agree.
Marianne Rivoalen J.A."

GLEASON J.A. (Dissenting)

[17] The appellant appeals from the judgment of the Federal Court in *Zalys v. The Royal Canadian Mounted Police et al.*, 2018 FC 1122, in which the Federal Court (*per* Annis, J.) granted an application for judicial review of the June 8, 2017 decision of a Level II Adjudicator appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014) (the RCMP Act). In that decision, the Adjudicator denied the respondent's grievance seeking service pay on the accrued annual leave that the Royal Canadian Mounted Police (RCMP) paid out to him as a lump sum when he retired from the Force. The appellant also requests that the style of cause in this appeal be amended to name as the appellant the Attorney General of Canada, as opposed to the RCMP, P. Lebrun and Supt. Jennie Latham.

[18] For the reasons that follow, I would amend the style of cause in the way the appellant requests and would allow the appeal, but only to the extent of varying a portion of the order made by the Federal Court. As I would accordingly conclude that the respondent has been substantially successful in this appeal, I would grant him costs, fixed in the all-inclusive agreed-upon amount of $4,700.00.

I. The Proper Appellant

[19] Turning first to the request to amend the style of cause, in an application for judicial review seeking to set aside a decision of an adjudicator under the RCMP Act, the proper respondent is the Attorney General of Canada. Thus, the Attorney General of Canada should be substituted as the appellant in this appeal.

[20] Rules 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106, provide as follows regarding respondents to judicial review applications:

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	*a*) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(*b*) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	*b*) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

[21] P. Lebrun was the RCMP's National Compensation Services representative, who made submissions to the Adjudicator, and Supt. Jennie Latham was the Adjudicator, who rendered the decision under review, acting as the delegate of the Commissioner of the RCMP pursuant to subsections 5(2) and 32(1) of the RCMP Act. Neither are proper respondents to an application for judicial review.

[22] Rule 303(1)(*a*) prohibits naming the decision-maker whose decision is being reviewed as a respondent to a judicial review application, and an individual who made representations before the Adjudicator or who acted on behalf of an employer in the grievance process is not directly

affected by an order sought in a judicial review application and thus should not be named as a respondent under Rule 303(1)(*a*). Thus, neither P. Lebrun nor Supt. Jennie Latham should have been named as respondents and should therefore be removed as appellants.

[23] The propriety of naming the RCMP as a respondent is perhaps less clear-cut. There are many cases where the RCMP has been named as a respondent in judicial review applications seeking to challenge a decision made by an adjudicator under the RCMP Act (see, for example, *Marsh v. Zaccardelli*, 2006 FC 1466, 305 F.T.R. 303 (naming RCMP Commissioner Zaccardelli, the RCMP, and the Attorney General of Canada as respondents); *Smiley v. Royal Canadian Mounted Police*, 2007 FC 29, 155 A.C.W.S. (3d) 202 (naming the RCMP as respondent); *Lee v. Canada (Royal Canadian Mounted Police)* (2000), 184 F.T.R. 74, [2000] F.C.J. No. 887 (QL) (F.C.T.D.) (naming Her Majesty the Queen (Royal Canadian Mounted Police) and RCMP Commissioner Murray as respondents)). However, the issue of how the respondent should be named appears not to have been raised in these cases and, accordingly, the style of cause was set by the parties in their pleadings and not questioned before the Court.

[24] While the RCMP is undoubtedly affected by the order sought in this application, subsection 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, Part II prohibits naming the RCMP as the respondent. That subsection provides:

Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in	Les poursuites visant l'État peuvent être exercées contre le procureur général du Canada ou, lorsqu'elles visent un organisme mandataire de l'État, contre cet organisme si la législation fédérale le permet.

> the name of the agency, in the name of that agency.

[25] There is nothing in the RCMP Act or other legislation that authorizes the taking of proceedings like the present against the RCMP in its name. As this Court noted at paragraph 38 in *Gingras v. Canada* (1994), 113 D.L.R. (4th) 295, 165 N.R. 101 (Fed. C.A.), the RCMP is a division of the federal public administration and is a "department" within the meaning of section 2 and Schedule I.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. This Court has held that government departments do not have legal personalities separate from the Crown (*Canada (Office of the Information Commissioner) v. Calian Ltd*., 2017 FCA 135, 414 D.L.R. (4th) 165, at para. 63). It follows that as departments are not separate legal entities, they are not appropriately named as respondents in a judicial review application, unless legislation directs otherwise (see for example, *Enniss v. Canada (Human Rights Commission)*, [1995] F.C.J. No. 1593 (QL), 104 F.T.R. 145 (F.C.T.D.) at paras. 7-9; and *Gravel v. Canada (Attorney General)*, 2011 FC 832, 393 F.T.R. 219 at para. 6). Similar reasoning applies to the RCMP.

[26] Because the RCMP ought not have been named as a respondent, Rule 303(2) of the *Federal Courts Rules* provides that the Attorney General of Canada should have been named as the respondent in the Federal Court. The style of cause should therefore be amended to substitute the Attorney General of Canada as the appellant before this Court.

II. Background

[27] Turning to the merits of this appeal, it is useful to next briefly review the relevant background to the respondent's grievance. The respondent was a regular member of the RCMP.

At the time of his retirement, he had 37 years of service with the Force and held the rank of staff sergeant, a non-commissioned officer rank within the RCMP.

[28] When employed, the respondent was entitled to paid annual leave and to service pay. The latter is an amount paid to entitled RCMP members on each bi-weekly pay cheque and is based on their length of service. At the time of his retirement, the respondent was receiving service pay at the maximum rate of 10.5% of his staff sergeant's salary.

[29] When the respondent decided to retire in 2012, he had accumulated 1,398 hours of annual leave that he had not been able to use during his career. The RCMP offered the respondent the option of either taking the leave and postponing his retirement date until after his leave credits were exhausted or retiring and electing to be paid out the unused annual leave in a lump sum. The respondent elected the latter option. Had the respondent instead chosen to remain on the payroll, the RCMP would have paid him service pay for each hour of annual leave he took.

[30] Following the respondent's retirement and discharge from the Force, the RCMP paid him the value of his accumulated annual leave credits, but did not add an amount for service pay on the annual leave. Had it done so, the gross amount of the lump sum payment would have been increased by $7,257.01.

[31] The RCMP's Administration and National Compensation Manuals set out the terms and conditions of service for RCMP members. The key provision in this appeal is section 7.1 in chapter 19.1 of the Administration Manual, which provided as follows at the relevant time:

> 7. Payout of Annual Leave on Discharge/Death
>
> 7.1 When a member is discharged from the RCMP or dies, the member or his/her estate will be paid an amount equal to the number of days of earned but unused annual leave to the member's credit, **calculated at his/her substantive salary** on the date of discharge or death.
>
> [emphasis added]

[32] The terms "substantive salary" and "substantive" are not defined in either Manual. However, as the respondent notes, the term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was noted by this Court in *Sinclair v. Canada (Treasury Board)* (1991), 137 N.R. 345, 92 C.L.L.C. 14,008 (Fed. C.A.) [*Sinclair*] and *Attorney General of Canada v. Dupuis* (1991), 137 N.R. 349, 30 A.C.W.S. (3d) 1009 (Fed. C.A.) [*Dupuis*].

[33] The RCMP's National Compensation Manual, at the relevant time, provided in the "Definitions" section that the term "salary" means "an annual **rate of pay; not an allowance** or any other compensation […]" [emphasis added].

[34] In addition, the National Compensation Manual, at the time of the respondent's retirement, contained the following definitions within the "Definitions" section which are of relevance to this appeal:

> Allowance – the remuneration payable in respect of a position, **by reason of duties of a special nature, or for duties that the employee is required to perform** in addition to his/her regular duties.
>
> [emphasis added]

> Compensation – the pay and non-pay remuneration provided to an employee for services rendered, and includes, but is not limited to: salary and other compensation, e.g. performance awards; pension and insurance benefits; paid time off; **various allowances, e.g.** senior constable provisional allowance, **service pay**, bilingual bonus; and, compensation for the costs of serving in difficult environments […]
>
> [emphasis added]
>
> Daily rate of pay – a salary divided by 260.88, which is the average number of working days in a year […]
>
> Premium pay – a non-pensionable sum of money paid in addition to salary.
>
> Remuneration – pay and/or allowances.

[35] The RCMP's Administration Manual at the relevant time also contained provisions governing the payout of annual leave to commissioned officers prior to retirement. The relevant portions of these provisions in chapter 19.1 stated:

> 6.1 On Mar. 31, a member in the officer cadre whose annual leave bank exceeds his/her yearly annual leave entitlement will be automatically paid the excess leave credits to a maximum of one year's entitlement.
>
> 6.1.1 The payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the current leave year. This does **not include** performance awards or **allowances**.
>
> 6.2 With the approval of his/her supervisor, a member in the officer cadre can cash out his/her earned but unused annual leave credits at any time during the leave year.
>
> […]
>
> 6.2.2 The voluntary payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the previous leave year. This does **not include** performance awards or **allowances**.
>
> [emphasis added]

[36] Finally, section 7.2 of chapter 19.1 of the RCMP's Administration Manual provided at the relevant time:

> 7.2 If the termination of employment is for reasons other than a medical discharge or death, when unearned annual leave credits have already been used by the member, the employer will recover an amount equivalent to the unearned annual leave credits from any monies owed to the member, calculated at the member's substantive salary on the date of discharge.

[37] The respondent filed a grievance in which he sought, among other things, payment of the disputed service pay. At the time, the RCMP Act and the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181 (CSO (Grievances)) provided for a two-level grievance process, where second level hearings were conducted on a *de novo* basis, pursuant to subsections 31(1) and 32(1) of the RCMP Act and sections 13 and 17 of the CSO (Grievances). As is more fully discussed below, the respondent advanced before the grievance adjudicators some – but not all – of the arguments he made before this Court regarding the import of the foregoing provisions in the two RCMP Manuals.

III. The Decision of the Level II Adjudicator

[38] As the Level II Adjudicator proceeded on a *de novo* basis, albeit based on the written submissions made at both levels of the grievance procedure, it is only necessary to review the Level II Adjudicator's decision. Before her, the respondent pursued only the request for service pay on the payout of his annual leave credits. (His original grievance had sought additional relief.) The Adjudicator denied the grievance, finding that the RCMP's decision to exclude

service pay on the lump sum payout was not inconsistent with legislation or applicable RCMP and Treasury Board policies.

[39] The Adjudicator commenced her analysis at paragraph 54 by noting that, pursuant to Part III of the RCMP Act, a grievor "is required to present evidence capable of supporting the facts alleged in order to satisfy the Adjudicator, on a balance of probabilities, of the merit of the grievance".

[40] She continued by stating that the crux of the dispute related to the definition of "substantive salary" as used in section 7.1 of the RCMP's Administration Manual and centred on whether that term includes allowances. The Adjudicator noted that the definitions of "salary" and "compensation", contained in the RCMP's National Compensation Manual, were helpful. She stated that the definition of "salary" excludes allowances and that the "compensation" definition makes it clear that service pay is a form of allowance. From this, she reasoned that service pay was not salary.

[41] She then queried whether this conclusion was impacted by the use of the word "substantive" in section 7.1 of the Administration Manual. In answering this query, the Adjudicator turned to the Oxford Dictionary definition of "substantive" and relied on the meaning of "having separate and independent existence". She reasoned that, when so used as an adjective, the term "substantive" suggests a restrictive connotation, rather than a broadening of the noun it describes. She went on to give the example of the term's being used to describe a rank or position, where it relates to a permanent as opposed to a temporary position, akin to an

acting role. She continued by stating at paragraph 64 that the term relates to one's basic right and, if "assigned the same relationship to salary, substantive can only denote the essential part of the salary or the base salary, rather than one that is dependent on the amount of allowances attributed to each individual employee".

[42] The Adjudicator went on to dismiss the respondent's argument that this interpretation resulted in inequitable treatment as compared to the treatment offered to those who elect to take their accrued leave as vacation, stating at paragraph 73 that, "[t]he choices provided are not offered as equitable options, but rather as options for individual consideration".

[43] The Adjudicator finally noted that her interpretation was consistent with the treatment afforded to members in the officer cadre under articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual, which expressly provide that payouts of accrued annual leave are based on the individual's base salary and therefore exclude service pay.

[44] As a consequence, the Adjudicator denied the respondent's grievance.

IV. The Federal Court's Decision

[45] The Federal Court intervened, finding the Adjudicator's decision unreasonable, and remitted the grievance for redetermination in accordance with prescriptive directions regarding the meaning to be attributed to the relevant provisions in the RCMP's Manuals. The Federal Court found that the Adjudicator's decision was unreasonable for several reasons.

[46] First, the Federal Court held that the Adjudicator unreasonably placed the onus on the respondent to demonstrate that the impugned payment violated the applicable legislation or policies. The Federal Court found that it was rather the RCMP that bore the burden of clearly explaining to members how the relevant policies operated.

[47] Second, the Federal Court held that the Adjudicator's contextual interpretation of "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual was unreasonable as the Adjudicator failed to consider and reconcile articles 6.1.1 and 6.2.2 of that same chapter, which used the term "base substantive salary". The absence of the word "base" in section 7.1 was a matter that, according to the Federal Court, the Adjudicator was required to address as the provisions, when read together, more reasonably support a conclusion opposite to the one reached by the Adjudicator.

[48] Third, the Federal Court held that the Adjudicator unreasonably relied on a dictionary definition of the term "substantive" and failed to consider what that term means in the context of the public service and statutes governing the RCMP, where the term "substantive" denotes a member's permanent, as opposed to a temporary, position.

[49] Fourth, the Federal Court found the Adjudicator's interpretation unreasonable as it results in an unfair disparity of treatment, that was especially troubling for members who died and who could not elect to use their accrued annual leave and were thus were denied the opportunity of electing to be paid service pay on the annual leave.

[50] Finally, the Federal Court held that the RCMP had failed in its duty to inform members that they would not be paid service pay if they elected the lump sum payout option and this failure meant that the grievance had to be allowed.

[51] The Federal Court accordingly set aside the Adjudicator's decision and remitted the respondent's grievance to the Level II Adjudicator, with a direction at paragraph 70 that the Adjudicator was:

> […] to declare that the term 'substantive salary' in section 7.1 of Chapter 19.1 of the [National Compensation Manual] or [Administration Manual] includes the accumulated service pay allowance, based on the permanent position rather than any temporary position of the member payable on the date of member's death or discharge.

V. Issues

[52] With this background in mind, I turn now to the various arguments made by the parties.

[53] Both agree that the applicable standard of review is reasonableness. They also concur that the approach to be taken by this Court on appeal of a judicial review decision of the Federal Court is as set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*). They more specifically agree that *Agraira* remains undisturbed by the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), where that Court set out a somewhat revamped paradigm for review of administrative decisions.

[54] In accordance with *Agraira*, an appellate court in an application for judicial review is required to step into the shoes of the court below and determine whether it selected the appropriate standard of review and whether it applied that standard correctly. Thus, in effect, on appeal, the appellate court is required to re-conduct the judicial review analysis.

[55] The parties part company on how the Federal Court applied the reasonableness analysis.

[56] The appellant asserts that the Federal Court was far too interventionist and, in effect, engaged in correctness as opposed to reasonableness review, which is inappropriate as the Supreme Court of Canada recently underscored in *Vavilov* at paragraph 83.

[57] The appellant more specifically submits that the Adjudicator's decision is reasonable because it offers a logically coherent and reasonable interpretation of the relevant provisions in the RCMP's Manuals. The appellant says in this regard that the Adjudicator reasonably (and indeed correctly) determined that service pay was an "allowance" due to its being listed as an example of an "allowance" in the definition of "compensation" contained in the National Compensation Manual. And, as "salary" is defined in that same Manual as including "pay", but as excluding "allowances", it was open to the Adjudicator to conclude that service pay does not form part of salary and therefore is not to be paid out under section 7.1 of chapter 19.1 of the Administration Manual.

[58] The appellant continues by submitting that, in the absence of a definition of "substantive" in either Manual, it was reasonable for the Adjudicator to look to dictionary definitions and that

the dictionary meaning selected by the Adjudicator is reasonable and provides support for her conclusion.

[59] The appellant further contends that there is nothing unfair in the manner in which the RCMP approached these issues as those who elect to take their accrued annual leave may be called in to work and thus are entitled to service pay whereas those who elect to be paid a lump sum, or who die while in service, are not so available. Likewise, according to the appellant, there is nothing untoward in those who have borrowed leave credits and who leave the Force before earning them not being required to repay their service pay under section 7.2.2 of chapter 19.1 of the Administration Manual as such individuals were on call and thus entitled to service pay when they took time off before they earned the entitlement to vacation pay. In short, according to the appellant, service pay in all instances is tied to being in service and on call.

[60] Finally, the appellant says that the Adjudicator's reliance on the articles 6.1.1 and 6.2.2 in chapter 19.1 of the Administration Manual was reasonable as similar treatment is afforded to commissioned officers who take payouts of their accrued leave. The appellant adds that it was not necessary for the Adjudicator to have commented on the use of the term "base substantive salary" in these paragraphs.

[61] The respondent, on the other hand, asserts that the Adjudicator's decision was unreasonable, although for somewhat different reasons from those offered by the Federal Court.

[62] According to the respondent, the Supreme Court of Canada in *Vavilov* has invited a more invasive approach to reasonableness review than has previously been applied, directing that such review should be "robust" *(Vavilov* at paragraphs 12-13, 67, 72). The respondent further says that the Supreme Court in *Vavilov* outlines two ways in which a decision, for which reasons are offered by the administrative decision-maker, might be unreasonable. As the majority of the Supreme Court noted at paragraph 101 of *Vavilov*, on one hand, there might be "a failure of rationality internal to the reasoning process". On the other hand, the decision might be "in some respect untenable in light of the relevant factual and legal constraints that bear on it".

[63] The respondent says that the Adjudicator's decision in the instant case runs afoul of the second of the two as it ignores the relevant case law and interpretive principles that the Adjudicator was bound to apply. On the latter point, the respondent asserts that principles of contractual interpretation are akin to rules of statutory interpretation and submits that, in *Vavilov*, at paragraph 120, the Supreme Court of Canada directs reviewing courts to determine whether the administrative decision-maker's interpretation is "consistent with the text, context and purpose of the provision". The respondent also points to paragraph 111 in *Vavilov*, where the Supreme Court stated that, "[w]here a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship". From the foregoing, the respondent says that this Court, in reviewing the Adjudicator's decision post-*Vavilov*, must determine whether she appropriately applied the relevant rules of contractual interpretation in considering the meaning of section 7.1 of chapter 19.1 of the RCMP's Administration Manual. This, in effect, invites us to engage in something akin to correctness review.

[64] The respondent submits that the Adjudicator did not appropriately apply the relevant rules of contractual interpretation for several reasons.

[65] First, according to the respondent, the Adjudicator failed to follow the applicable case law and ignored the relevant context in turning to dictionary definitions for the term "substantive". The respondent submits that, under a proper interpretation, the term "substantive" means merely the salary applicable to a member's full-time position and that the term is irrelevant to the inquiry concerning whether the term "salary" as used in section 7.1 includes service pay.

[66] Second, according to the respondent, the Adjudicator failed to apply the rule against redundancy. The respondent says that such rule required the Adjudicator to look to the difference in wording between articles 6.1.1 and 6.2.2 versus section 7.1 of chapter 19.1 of the Administration Manual. The respondent further submits that the absence of the word "base" in section 7.1 meant that "substantive salary" for payout purposes is something other than a former member's base substantive salary, *i.e.*, it must include his or her base salary plus service pay.

[67] Third, the respondent says that the Adjudicator failed to apply the rule of contractual interpretation that mandates that a more specific provision should take precedence over a more general one. Had this rule been applied, according to the respondent, the Adjudicator would have been required to find that the definition of "allowance" in the National Compensation Manual governed how that term is defined, not the mention of what may constitute an allowance in the definition of "compensation" in the National Compensation Manual. And, the definition of

"allowance", according to the respondent, makes it clear that service pay cannot be an allowance as service pay is unrelated to the duties that a member performs and is instead solely based on length of service. Because it is not an allowance, according to the respondent, service pay must be viewed as being included in salary. The respondent also notes the inclusion of an additional provision in section 2.8.7.1.4.3 of the National Compensation Manual, inserted after his retirement, which provides that service pay does not form part of salary. The respondent argues that the absence of such a provision in the Manuals at the times relevant to his grievance favours his interpretation of the provisions then in force.

[68] Fourth, the respondent says that the Adjudicator erred in failing to consider the principle of *contra proferentem*, which would require the Adjudicator to resolve any ambiguity in the RCMP's policies in favour of the respondent as the RCMP unilaterally promulgated the policies.

[69] Fifth, the respondent says that the Adjudicator failed to consider the interpretive principle that provides that an interpretation that leads to absurdities or unfair results should be avoided. The respondent contends that the Adjudicator's interpretation leads to two absurdities or inequities. First, it is unfair that deceased members cannot ever be paid service pay on their accumulated leave credits as they cannot opt to take their unused vacation credits in time off. Second, it is absurd to think that members who borrow leave credits and cease employment before they have earned the entitlement to the leave would not be required to pay back both the service pay and leave credits they were not entitled to receive. Under section 7.2 of chapter 19.1 of the RCMP's Administration Manual, the RCMP is entitled to recover "unearned annual leave credits [...] calculated at the member's substantive salary on the date of discharge". The

respondent contends that the terms “substantive salary” must be given the same meaning in sections 7.1 and 7.2 and that the Adjudicator’s interpretation leads to an absurd result of allowing discharged members to keep a windfall.

[70] Finally, the respondent contends that, under an appropriate application of the relevant interpretive principles, there can be only one outcome, namely, that the respondent was entitled to service pay on his accumulated leave payout. The respondent therefore asks that the appeal be dismissed.

[71] As noted, the respondent, who was not represented by counsel at either level of the adjudication, advanced some, but not all, of the foregoing arguments that his counsel made to this Court. More particularly, the respondent made submissions regarding the impact of the definition of “allowance” in force at the date of his retirement in the National Compensation Manual in the materials he filed with the Level I Adjudicator. He submitted that under that definition “service pay” was not an “allowance” and therefore was not excluded from the definition of “salary” or “substantive salary”. He also noted that the subsequent amendment to the provisions, mentioned above, was not in force when his release became effective. These submissions were put before the Level II Adjudicator, who proceeded on a *de novo* basis, and who had before her all the materials that were before the Level I Adjudicator as well as the additional submissions made at Level II.

[72] As is more fully explained below, I conclude that the fact that the Level II Adjudicator did not consider these arguments renders her decision unreasonable under the principles recently enunciated by the Supreme Court of Canada in *Vavilov*.

VI. Analysis

[73] In *Vavilov*, the Supreme Court undertook a certain recalibration of the law concerning the judicial review of the substantive merits of administrative decision-making. It is necessary in this appeal to consider only three issues arising from *Vavilov*, namely: whether the decision mandates the more invasive form of review the respondent urges; second, whether the Adjudicator's failure to consider some of the respondent's arguments renders the Adjudicator's decision unreasonable, and, finally, what remedy is appropriate.

A. *Does Vavilov mandate the type of more invasive review the respondent urges?*

[74] While the Supreme Court's decision in *Vavilov* may well require more invasive review than had previously been required by some of the previous jurisprudence, it does not require this Court to engage in what in effect amounts to correctness review in the way the respondent urges. In my view, the respondent's reliance on the Supreme Court's characterization of reasonableness review as being "robust" for the assertion that henceforth such review requires reviewing courts to consider if administrative decision-makers have correctly interpreted employer policies is misplaced.

[75] When the majority of the Supreme Court utilized the term “robust” in paragraphs 12 and 13 of its reasons, it did not use the term in isolation. The majority rather indicated that reasonableness review is *both* appropriately deferential to administrative decisions *and* robust. The latter comment was offered to address the concern expressed by some of the interveners before the Court that reasonableness review results in lesser justice for those whose rights are governed by administrative regimes. The majority of the Court put the matter this way at paragraphs 11 to 15 of the reasons:

> [11] […] The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between “good enough” and “not quite wrong”. […]
>
> [12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature’s choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*’s promise to protect “the legality, the reasonableness and the fairness of the administrative process and its outcomes”, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
>
> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness”: the Rt. Hon. B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at p. 174

> (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.
>
> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that **the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place**.
>
> [emphasis added]

[76] The foregoing, as well as the comments made by the majority in subsequent paragraphs of the reasons in *Vavilov*, make it clear that the Supreme Court has not mandated a wholesale jettisoning of deference in the way the respondent submits and has not abandoned the notion that grievance adjudicators are entitled to considerable deference in respect of their contractual interpretations. Far from it.

[77] For example, at paragraph 75 of *Vavilov*, the majority wrote:

> [75] We pause to note that our colleagues' approach [*i.e.*, Justices Abella and Karakatsanis in their concurring reasons] to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. […]

[78] The majority continued in similar vein at paragraph 83 of *Vavilov*:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. **Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.** The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> [emphasis added]

[79] In fact, the Supreme Court emphasized that where the evidence before an administrative decision-maker permits a number of outcomes, the administrative decision-maker draws upon expertise, such as knowledge, experience and familiarity with the dynamic of labour relations, and there is relatively little in the way of constraining legislative language, the administrative decision-maker will have a large permissible space for acceptable decision-making: see *Vavilov* at paragraphs 31, 111-114 and 125-126. Many decisions by labour adjudicators, including the one here, will fall into this category.

[80] It therefore follows that it is not for this Court to re-conduct the interpretation of the relevant provisions in the RCMP's Administration and National Compensation Manuals based on the arguments advanced to us regarding how those provisions ought to be interpreted. Thus, the issue is not how the Manuals should be interpreted but, rather, whether the interpretation

offered by the Adjudicator was reasonable. Accordingly, our focus must be on the Adjudicator's decision, which is to be considered in light of the relevant factors outlined in *Vavilov*.

[81] Depending on the context, those may include the content of relevant statutes governing the decision and decision-maker, the relevant common law, international law, the evidence before the decision-maker, the submissions made to the decision-maker, relevant administrative precedents and the impact of the decision on the individual.

[82] Contrary to what the respondent asserts, I do not read the Supreme Court's invocation of relevant common law principles and statutory provisions in *Vavilov* as an open invitation to a reviewing court to re-conduct the required contractual analysis based upon arguments that were not even advanced to the administrative decision-maker, especially where, as here, the contractual provisions at issue are ambiguous. Re-conducting the contractual analysis is delving into the merits of the decision, something that Parliament has given to the Adjudicator, not this Court, which is restricted to only a review function: *Vavilov* at paragraph 83.

[83] On one hand, the definitions of "salary" and "compensation" contained in the National Compensation Manual support the Adjudicator's interpretation. On the other hand, the definition of "allowance" contained in the National Compensation Manual and articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual lead to an opposite conclusion as do the other arguments advanced by the respondent before this Court.

[84] It is simply not open to this Court, in the context of reasonableness review of a decision such as this, to decide on the meaning to be given to these provisions, particularly in the absence of any previously-decided case law interpreting these provisions. Were we to do so, we would be engaging in correctness review and departing from firmly-established precedent that recognizes that grievance arbitrators are entitled to considerable deference in their contractual interpretations (see, for example *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 26 N.R. 341 at pp. 235-236; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, 226 N.R. 319 at paras. 26-29; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 68; *Canada (Attorney General) v. Gillis*, 2007 FCA 112, 361 N.R. 301 at paras. 24-30; *Laurentian Pilotage Authority v. Pilotes du Saint-Laurent Central Inc.*, 2018 FCA 117, 299 A.C.W.S. (3d) 235 at para. 45). Indeed, the majority in *Vavilov*, itself, citing from that Court's earlier decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at para. 113 of the majority reasons, recognized that grievance arbitrators are not "necessarily […] required to apply equitable and common law principles in the same manner as courts for their decisions to be reasonable".

[85] Thus, as opposed to adopting the approach urged by the respondent before us, we must instead assess whether the interpretation offered by the Adjudicator was reasonable in light of those of the factors listed in *Vavilov* that pertain in the instant case.

B. *Does the Adjudicator's failure to consider some of the respondent's arguments render the Adjudicator's decision unreasonable?*

[86] Key among these factors is the degree to which the Adjudicator's decision responds to arguments made to her. In *Vavilov*, the Supreme Court heightened the role an administrative decision-maker's reasons play in reasonableness review and held that a decision-maker's failure to address key arguments of the parties may often render a decision unreasonable. The majority wrote as follows at paragraphs 127-128:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, **a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it**. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> [emphasis added]

[87] Earlier in its reasons, the majority stated that the failure to address a key issue raised by the parties, where it is impossible from the record to ascertain how the decision-maker might

have decided that issue, is sufficient to render an administrative decision unreasonable. The majority wrote as follows at paragraphs 96-98 of *Vavilov*:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record**, they contain a fundamental gap** or reveal that the decision is based on an unreasonable chain of analysis**, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision**. **Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome:** *Delta Air Lines*, at paras. 26-28. **To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.**
>
> [97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration*), 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn . . . .
>
> [98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider

> a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. **Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility**.
>
> [emphasis added]

[88] Here, as noted, the respondent raised the implications of the definition of "allowance" in the National Compensation Manual and the subsequent amendment to the relevant provisions in his submissions that were placed before the Adjudicators. He argued that the definition of "allowance" in force at the times relevant to his grievance did not include service pay and therefore asserted that service pay was included in "substantive salary" payable under section 7.1 of chapter 19.1 of the Administration Manual, thereby entitling him to the payment he sought. He also noted the need for the subsequent amendment to relevant provisions. Neither the Level I nor the Level II Adjudicator addressed these arguments in their decisions.

[89] Moreover, and crucially, the Level II Adjudicator premised her decision in large part on the conclusion that service pay is an "allowance" and therefore excluded from "salary" and "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual. A key point in her chain of reasoning was the determination that service pay is an allowance, based on its mention as an allowance in the "compensation" definition. However, in reaching this conclusion she failed to address the "allowance" definition, highlighted by the respondent, which leads to an opposite conclusion. She also failed to consider the need for the clarifying amendment to the provisions made after the respondent's retirement from the Force, which highlight the ambiguity inherent in these provisions and the need to reconcile the definition of "allowance" with that of "salary". There is therefore a meaningful gap in the Level II Adjudicator's reasons as these arguments wholly undercut her chain of analysis.

[90] This is not an instance of a decision-maker simply deciding not to address an argument of limited or no consequence: an analysis of this matter was key and may well have resulted in a favourable interpretation for the respondent under the Adjudicator's own reasoning. This is what makes the failure to address the issue important – the respondent's unaddressed arguments undercut one of the essential building blocks in the Adjudicator's chain of analysis.

[91] In my view, the Adjudicator's failure to grapple with the foregoing arguments advanced by the respondent in the circumstances of the present case "call[s] into question whether the decision maker was actually alert and sensitive to [these particular issues]" (*Vavilov* at paragraph 128). The failure of the Level II Adjudicator to address these issues therefore, in my view, renders her decision unreasonable as, to use the wording of the majority of the Supreme

Court of Canada in *Vavilov*, it constitutes a "fundamental gap" in the reasons as the issues' determination could well have led to an opposite conclusion and, given the wording in the relevant policies, there is no way to infer from the rest of the Adjudicator's reasons or from the record how the Adjudicator would have reconciled the conflicting provisions in the RCMP's National Compensation and Administration Manuals. Thus, I believe that the failure to address these arguments, as mandated by *Vavilov*, means that the Adjudicator's decision must be set aside.

[92] I have had the opportunity to read the reasons of my colleague, Boivin J.A., in draft and, with respect, disagree that the impact of a failure to address an argument made to an administrative decision-maker turns only on the vigour and clarity with which that argument was made to the decision-maker. Rather, it seems to me that an equally important consideration must be the relevance of the argument to the outcome reached by the administrative decision-maker. This is especially so where, as here, a party is not represented by counsel before the decision-maker and therefore lacks the ability to make legal arguments in as crisp a fashion as a lawyer would.

[93] Thus, for me, in determining whether the failure to address an argument renders a decision unreasonable, it is as much the relevance and potential merit of an unaddressed argument as the way it was made that is relevant.

[94] Indeed, the majority in *Vavilov*, at paragraph 128, after making the comments my colleague refers to in paragraph 11 of his draft reasons, noted that "a decision maker's failure to

meaningfully grapple with key issues **or** central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (emphasis added).

[95] In drawing a distinction between key issues and central arguments, I read this passage as indicating that it is *both* the relevance and potential merit of the unaddressed argument *as well as* the force and clarity with which unaddressed arguments were made to the administrative decision-maker that may mean that the failure to address them renders an administrative decision unreasonable.

[96] Here, counsel for the respondent made the unaddressed arguments more clearly to the Court than they were made by his client to the Adjudicators. This is not surprising. The fact remains, though, that these arguments were advanced, were made in a clear enough fashion to the Adjudicators so as to be understandable and wholly contradict the Level II Adjudicator's reasoning.

[97] Contrary to the views of Boivin J.A., the Level II Adjudicator's consideration of the meaning to be given to the term "substantive" and consideration of dictionary definitions of that term are entirely irrelevant to the issues the Adjudicator was called upon to decide. The term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was held by this Court in *Sinclair* and *Dupuis* (cited at paragraph, 32, above). Given this, the term "substantive" can have no other reasonable meaning and has no bearing whatsoever on whether

the salary attributable to a retiring RCMP member's substantive position includes service pay or not. All the term "substantive" means in the context of the relevant provisions in the RCMP Manuals is that the salary to be paid out on retirement is that applicable to the retiring member's permanent or substantive position. This leaves unanswered the question that was the crux of the issue before the Adjudicator, namely, whether salary for such position includes service pay or not.

[98] Central to this key issue are the questions the Adjudicator failed to grapple with, namely, how you go about reconciling the conflicting definitions in the Manuals of "salary" and "allowance", one of which would include service pay in substantive salary, and the other of which would not. The failure to grapple with this conflict – which was raised by the respondent – renders the Level II Adjudicator's decision unreasonable. In short, it is simply not open to a reviewing court, post-*Vavilov*, to uphold an administrative decision where the decision-maker fails to grapple with a key issue raised by a party where, as here, such issue required determination and the record provides no guidance on how that issue would have been settled by the decision-maker.

[99] It therefore follows that the Adjudicator's decision must be set aside.

C. *What remedy is appropriate?*

[100] Which brings me to the issue of remedy.

[101] For much the same reasons as it is inappropriate for this Court to uphold the Adjudicator's decision in light of the ambiguity contained in the Manuals, it is similarly inappropriate for this Court to issue directions on how the Manuals are to be interpreted. Contrary to the approach taken by the Federal Court, I am of the view that there is not a single way in which the relevant provisions can be read because they are inherently ambiguous. The issue of their interpretation must therefore be remitted to an adjudicator for reconsideration.

[102] Although the RCMP's internal grievance procedure has been amended in the time since this grievance was heard, section 68 of the *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18 provides that the former grievance process applies to any grievance presented prior to November 28, 2014. Therefore, the grievance may be remitted to a Level II Adjudicator for redetermination.

[103] While conceding that redetermination is usually the appropriate remedy in a successful judicial review application – and that the Supreme Court of Canada endorsed this as the typical approach in *Vavilov* – the respondent nonetheless submits that this is an exceptional situation and that the delay that has transpired since the grievance was filed should lead this Court to exercise its discretion and instead settle how the Manuals are to be interpreted.

[104] I decline to do so for three reasons. First, the threshold for declining to remit an issue to an administrative decision-maker where there is an issue to be resolved is high, as this Court noted in *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55,

444 N.R. 93 and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at paras. 14-17. Such threshold has not been reached in this case.

[105] Second, while there has been considerable delay in the determination of these issues in the RCMP's grievance process, this Court can ensure there is limited unnecessary additional delay by placing a time limit on the redetermination. I would accordingly afford the Level II Adjudicator, to whom the grievance is remitted, 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada within which to render a decision on the redetermination.

[106] Finally, to a certain extent, *Vavilov* has altered how judicial review is to be conducted through its greater emphasis on the importance of reasons. In light of this, it is best to allow a Level II Adjudicator an opportunity to re-examine these issues, this time through the lens that reasons must adequately address all key issues, as mandated by *Vavilov*.

[107] Given the additional issues raised by counsel for the respondent before this Court and their potential impact on the outcome of the grievance, all the key arguments advanced by the respondent, as reflected in these reasons, should be addressed by the Adjudicator in the redetermination decision. In addressing them, it may be that the Adjudicator need not say much, as *Vavilov* emphasized at paragraphs 91-98, and 127-128. However, failure to address these issues at all would render the decision liable to being set aside a second time, under the principles in *Vavilov*. As some of these arguments were not previously made before the Adjudicator, the parties should be afforded the opportunity to make additional submissions to the

Level II Adjudicator to whom the grievance is remitted, the timing and length of which I leave to the Adjudicator to determine.

[108] Finally, as to the issue of costs, they should follow the event. As the respondent was largely successful in this appeal, he should be awarded costs. The parties concurred that, if the Court were to award the respondent his costs, they should be fixed in the all-inclusive amount of $4,700.00. I concur that this amount is appropriate and thus would so award.

VII. Proposed Disposition

[109] In conclusion, I would substitute the Attorney General of Canada as the appellant in this appeal. I would also allow this appeal in part, set aside the judgment of the Federal Court, and, rendering the decision that it ought to have made, would allow the respondent's application for judicial review and remit the respondent's grievance to a Level II Adjudicator for redetermination, in accordance with the reasons of this Court, on the basis that the redetermination decision must be rendered within 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada. As I would find the respondent to have been largely successful in this appeal, I would grant him costs in the all-inclusive agreed-upon amount of $4,700.00.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	RIVOALEN J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	APRIL 28, 2020

APPEARANCES:

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Ellis-Don Limited *Appellant*

v.

The Ontario Labour Relations Board and the International Brotherhood of Electrical Workers, Local 894 *Respondents*

INDEXED AS: ELLIS-DON LTD. *v.* ONTARIO (LABOUR RELATIONS BOARD)

Neutral citation: 2001 SCC 4.

File No.: 26709.

2000: February 15; 2001: January 26.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Natural justice — Institutional consultations — Union filing grievance with labour relations board against contractor for violation of provincial collective agreement — First draft of panel's decision dismissing grievance — Full board meeting discussing draft decision — Panel's final decision upholding grievance — Whether rules of natural justice breached — Whether principles governing institutional consultations violated — Whether contractor's failure to ask for reconsideration of decision constitutes bar to judicial review — Nature of evidentiary burden on party applying for judicial review because of alleged breach of natural justice.

Administrative law — Judicial review — Audi alteram partem — Union filing grievance with labour relations board against contractor for violation of provincial collective agreement — First draft of panel's decision dismissing grievance — Full board meeting discussing draft decision — Panel's final decision upholding grievance — Contractor alleging breach of audi alteram partem rule — Whether apprehension of breach sufficient to trigger judicial review.

Ellis-Don Limited *Appelante*

c.

La Commission des relations de travail de l'Ontario et la Fraternité internationale des ouvriers en électricité, section locale 894 *Intimées*

RÉPERTORIÉ : ELLIS-DON LTD. *c.* ONTARIO (COMMISSION DES RELATIONS DE TRAVAIL)

Référence neutre : 2001 CSC 4.

N° du greffe : 26709.

2000 : 15 février; 2001 : 26 janvier.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Justice naturelle — Consultations institutionnelles — Grief déposé par un syndicat auprès d'une commission des relations de travail pour violation d'une convention collective provinciale — Grief rejeté dans le projet de décision de la formation — Discussion du projet de décision en réunion plénière de la commission — Grief accueilli dans la décision définitive de la formation — Les règles de justice naturelle ont-elles été violées? — Les principes régissant les consultations institutionnelles ont-ils été violés? — L'omission de l'entrepreneur de demander un nouvel examen de la décision rend-elle irrecevable sa demande de contrôle judiciaire? — Nature du fardeau de présentation de la partie qui demande un contrôle judiciaire en raison d'une présumée violation des règles de justice naturelle.

Droit administratif — Contrôle judiciaire — Règle audi alteram partem — Grief déposé par un syndicat auprès d'une commission des relations de travail pour violation d'une convention collective provinciale — Grief rejeté dans le projet de décision de la formation — Discussion du projet de décision en réunion plénière de la commission — Grief accueilli dans la décision définitive de la formation — Allégation de violation de la règle audi alteram partem formulée par l'entrepreneur — Une crainte de violation suffit-elle pour donner lieu au contrôle judiciaire?

In 1962, the appellant entered into a collective bargaining agreement to contract or subcontract only to individuals or companies whose employees were members of the affiliated unions of the Toronto Building and Construction Trades Council. In 1971, the Electrical Contractors Association of Toronto applied to the respondent Board to be certified as a bargaining agent for the electrical contractors of Toronto. In that accreditation process, the IBEW, Local 353 filed a required document listing all employers for which it claimed bargaining rights but it did not include the appellant's name. In 1978, when province-wide bargaining was introduced, the bargaining rights of Local 353 were extended to Local 894. In 1990, Local 894 filed a grievance with the Board alleging that the appellant had subcontracted electrical construction work to non-union subcontractors contrary to the provincial collective agreement. A three-member panel of the Board heard the grievance. The appellant argued that Local 353 had abandoned its bargaining rights in part because it omitted the appellant's name from the document filed in the 1971 accreditation proceedings and Local 894 offered no explanation for the omission. A first draft of the panel's decision would have dismissed the grievance based on the abandonment of bargaining rights. However, after a full Board meeting discussed the draft, a majority of the panel found that there had been no abandonment of bargaining rights and upheld the grievance. The appellant applied for judicial review. It alleged that the change between the draft and the final decision was of a factual nature as opposed to a legal or policy change, and claimed that there was a breach of natural justice and a violation of the rules governing institutional consultations. Prior to the hearing of the application for judicial review, the appellant obtained an order compelling the Chair of the Board, the Vice-Chair who presided over the panel, and the Registrar of the Board to give evidence with respect to the procedures implemented by the Board in arriving at its final decision. This order was reversed on appeal based upon a finding of statutory testimonial immunity. The Divisional Court later dismissed the application for judicial review and the Court of Appeal affirmed the decision.

En 1962, l'appelante a conclu une convention collective où elle s'engageait à n'accorder des contrats ou des contrats de sous-traitance qu'aux personnes et aux sociétés dont les employés étaient membres du Toronto Building and Construction Trades Council. En 1971, l'Electrical Contractors Association of Toronto a déposé auprès de la Commission intimée une demande d'accréditation en tant qu'agent négociateur pour les entrepreneurs électriciens de Toronto. Dans le cadre de ce processus d'accréditation, la section locale 353 de la FIOE a déposé un document requis énumérant les employeurs à l'égard desquels elle prétendait détenir des droits de négociation mais n'y a pas inscrit le nom de l'appelante. En 1978, lorsqu'un régime de négociation à l'échelle de la province a été introduit, les droits de négociation de la section locale 353 ont été accordés à la section locale 894. En 1990, la section locale 894 a déposé un grief auprès de la Commission, alléguant que l'appelante avait donné en sous-traitance des travaux de construction en électricité à des entrepreneurs dont les employés n'étaient pas syndiqués, contrevenant ainsi à la convention collective provinciale. Une formation de trois membres de la Commission a entendu le grief. L'appelante a prétendu que la section locale 353 avait renoncé à ses droits de négociation en partie parce qu'elle avait omis d'inscrire son nom dans le document déposé dans le cadre du processus d'accréditation en 1971, et la section locale 894 n'a fourni aucune explication pour l'omission. Un projet de décision de la formation proposait de rejeter le grief en raison d'une renonciation aux droits de négociation. Toutefois, après discussion du projet en réunion plénière de la Commission, les membres majoritaires de la formation ont conclu à l'absence de renonciation aux droits de négociation et ont accueilli le grief. L'appelante a présenté une demande de contrôle judiciaire. Elle a prétendu que la modification survenue entre le projet de décision et la décision définitive était de nature factuelle, par opposition à une modification de nature juridique ou de principe, et qu'il y avait eu violation des règles de justice naturelle et des règles régissant les consultations institutionnelles. Avant l'audition de la demande de contrôle judiciaire, l'appelante a obtenu une ordonnance obligeant le président de la Commission, la vice-présidente qui a présidé la formation et le registrateur de la Commission à témoigner relativement à la procédure mise en œuvre par la Commission pour en arriver à sa décision définitive. Cette ordonnance a été infirmée en appel sur le fondement de l'exonération de témoigner prévue par la loi. La Cour divisionnaire a par la suite rejeté la demande de contrôle judiciaire et la Cour d'appel a confirmé cette décision.

Held (Major and Binnie JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour and LeBel JJ.: Institutional consultation ensures consistency in the decisions of an administrative body and does not create an apprehension of bias or lack of independence if the following rules are respected: (1) the consultation proceeding cannot be imposed by a superior level authority within the administrative hierarchy; (2) the consultation must be limited to questions of policy and law; and (3) even on questions of law and policy, the decision-makers must remain free to make their own decision. The mere fact that litigated issues are discussed by a full board does not amount to a breach of the *audi alteram partem* rule. Any risk of breaching this rule can be addressed by notifying the parties of any new issue addressed in the board meeting and allowing an opportunity to respond. If these rules are met, then adjudicators may modify a draft decision and a presumption of regularity applies such that a change between a draft and final reasons will not of itself create a presumption that something improper occurred during institutional consultations.

In this case, there is no direct evidence of improper tampering with the decision of the panel. The only information available is that discussions took place at the full Board meeting and that a change was made in the draft decision. The final decision discarded the idea that the failure to list the appellant created a rebuttable presumption of abandonment of bargaining rights and stated that the omission merely constituted a factor to be considered in deciding the issue of abandonment. The change consists in a different conclusion as to the legal consequences to be derived from the facts, which is a pure question of law. Moreover, it does not constitute the application of an entirely new policy since the change brought the final decision more in line with a number of cases decided by the Board that made it very difficult to establish an abandonment of bargaining rights. It would be speculative to argue that the change was prompted by a re-assessment of the particular facts. Furthermore, a change from a favourable to an unfavourable decision by itself does not demonstrate an apparent failure of natural justice sufficient to justify judicial review. In the case of an alleged violation of the *audi alteram partem* rule, the applicant must establish an actual breach; an apprehended breach is not sufficient to trigger judicial review. Here, the record does not indi-

Arrêt (les juges Major et Binnie sont dissidents) : Le pourvoi est rejeté.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour et LeBel : La consultation institutionnelle assure la cohérence des décisions d'un organisme administratif et ne crée pas de crainte raisonnable de partialité ou de manque d'indépendance si les règles suivantes sont respectées : (1) la procédure de consultation ne peut pas être imposée par un niveau d'autorité supérieur dans la hiérarchie administrative; (2) la consultation doit se limiter aux questions de principe et de droit; (3) même relativement aux questions de droit et de principe, les arbitres doivent demeurer libres de prendre leur propre décision. Le simple fait que des questions ayant déjà été débattues soient discutées de nouveau au cours d'une réunion plénière ne constitue pas une violation de la règle *audi alteram partem*. Tout risque de violation de cette règle peut être éliminé si on avise les parties de toute nouvelle question soulevée pendant la réunion de la commission et qu'on leur donne la possibilité de répondre. Si ces règles sont respectées, les arbitres peuvent modifier un projet de décision et la présomption de régularité fait en sorte qu'une modification entre un projet de motifs et les motifs définitifs ne donne pas lieu en soi à la présomption que quelque chose d'inapproprié s'est produit pendant les consultations institutionnelles.

En l'espèce, il n'existe aucune preuve directe de manipulation de la décision de la formation. Les seuls renseignements disponibles sont que des discussions ont eu lieu à la réunion plénière et qu'une modification a été apportée dans le projet de décision. La décision définitive a écarté l'idée que l'omission d'inscrire l'appelante avait donné lieu à une présomption réfutable de renonciation aux droits de négociation et a indiqué que l'omission n'était qu'un des facteurs qui devaient être examinés pour trancher la question de la renonciation. La modification consiste en une conclusion différente quant aux effets juridiques découlant des faits, ce qui constitue une pure question de droit. De plus, elle ne constitue pas l'application d'un principe entièrement nouveau étant donné qu'elle a rendu la décision définitive plus compatible avec de nombreuses affaires tranchées par la Commission qui ont fait en sorte qu'il est devenu très difficile de faire la preuve de la renonciation à des droits de négociation. Il serait hypothétique de prétendre que la modification a été causée par une réévaluation des faits en cause. En outre, modifier une décision favorable en une décision défavorable n'établit pas en soi une apparence d'absence de justice naturelle suffisante pour justifier le contrôle judiciaire. Dans le cas d'une présumée violation de la règle *audi alteram*

cate an actual breach of the *audi alteram partem* rule. There is no indication of a change on the facts, of impropriety or of a violation of the principles governing institutional consultation. The change in the decision of the panel concerned a matter of law and policy.

This case reveals a tension between the fairness of the process and the principle of deliberative secrecy which plays an important role in safeguarding the independence of administrative adjudicators. Deliberative secrecy also favours administrative consistency by granting protection to a consultative process. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency. Consistency and independence come at the price of a less open process and difficulty in building the evidentiary foundation to prove alleged breaches of natural justice. However, a court cannot reverse the presumption of regularity simply because of a change in reasons for a decision in the absence of any further evidence.

Although the appellant failed to ask for reconsideration, reconsideration did not constitute an absolute prerequisite to judicial review.

Per Major and Binnie JJ. (dissenting): This appeal tests the limits of the rule that panel members can consult a full board on matters of law or policy but not of fact. The concept of "policy" has been stretched beyond its breaking point in this appeal and the principle that "he who hears must decide" should be vindicated. *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, should not be interpreted to authorize a full board to micro-manage the output of particular panels to the extent evident in this case. Compliance with the rules of natural justice raises a legal issue and the standard of review is correctness.

The procedure in this case violated the requirement that a full board can only discuss policy and law. Although the issue of "abandonment", when considered in the abstract, has a policy component, the change in

partem, le demandeur doit démontrer l'existence d'une violation réelle; une crainte de violation ne suffit pas pour donner lieu au contrôle judiciaire. En l'espèce, le dossier n'indique aucune violation réelle de la règle *audi alteram partem*. Il n'y a aucune indication d'une modification quant aux faits, d'une irrégularité ou d'une violation des principes régissant la consultation institutionnelle. La modification de la décision de la formation portait sur une question de droit et de principe.

La présente affaire révèle l'existence d'une tension entre le caractère équitable du processus et le principe du secret du délibéré, qui joue un rôle important dans la protection de l'indépendance des arbitres administratifs. Le secret du délibéré favorise également la cohérence administrative au moyen de la protection qu'il confère à un processus consultatif. Sans cette protection, il risque d'y avoir un effet paralysant sur les consultations institutionnelles, ce qui priverait les tribunaux administratifs d'un moyen essentiel d'assurer la cohérence. La cohérence et l'indépendance sont assorties du prix que constituent un processus moins ouvert et la difficulté de bâtir le fondement probatoire visant à démontrer les présumées violations des règles de justice naturelle. Toutefois, une cour ne peut pas écarter la présomption de régularité simplement en raison d'une modification dans les motifs de la décision en l'absence de toute preuve additionnelle.

Même si l'appelante a omis de demander un nouvel examen, une telle mesure ne constituait pas un préalable obligatoire au contrôle judiciaire.

Les juges Major et Binnie (dissidents) : Le présent pourvoi porte sur les limites de la règle selon laquelle les membres d'une formation peuvent consulter une commission dans son ensemble sur des questions de principe, par opposition à des questions de fait. La notion de « principe » a été démesurément étendue dans le présent pourvoi et le principe voulant que « celui qui entend doit trancher » doit être défendu. L'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, ne doit pas être interprété comme permettant à une commission dans son ensemble de faire la microgestion des conclusions tirées par des formations particulières d'une façon aussi évidente que dans la présente affaire. La conformité aux règles de justice naturelle est une question de droit et la norme de contrôle est celle de la décision correcte.

La procédure adoptée dans la présente affaire a violé l'exigence qu'une commission dans son ensemble doit se limiter aux questions de principe et de droit. Même si, lorsqu'elle est examinée de façon abstraite, la ques-

the panel's reasons was a re-assessment of fact. The Board's jurisprudence has developed the legal and policy content of the concept of abandonment of bargaining rights in terms of active promotion of rights and it was for the panel to determine in the factual context of this particular case whether this standard was met. The panel made it clear that it considered abandonment to be an issue of fact. The Board's policy was never in doubt and was defined in the same language in the initial and final decisions.

The undisputed evidence is that the initial decision held as a fact that the union had abandoned its bargaining rights, the final decision held as a fact that it had not, and the intervening event was the full Board meeting. The reasonable inference is that factual matters were referred for discussion at the full Board meeting.

While the finding of testimonial immunity prevents determining the Board's decision-making process, it does not prevent the appellant from establishing a basis for judicial review. The Board cannot rely on legislation to deny all legitimate access to relevant information and then rely on the absence of the information as a conclusive answer to the complaint. The difficulties of proof presented in this case should be factored into the evidentiary burden of proof placed on the appellant.

The Ontario Court of Appeal considered the Board's proceedings to be protected by the "presumption of regularity". The strength of the evidence necessary to displace this presumption depends on the nature of the case and, having regard to the difficulties of obtaining evidence, the appellant should be held to have discharged its evidentiary onus. The Board has to live with the reasonable inference that the full Board meeting influenced a reversal of fact-driven issues. There is a public interest in the integrity of decision-making at stake and the appellant has made out a *prima facie* case for judicial review. As the Board's procedure violated the principles of natural justice, the resulting order was made without

tion de la « renonciation » comporte un aspect principe, la modification des motifs de la formation constituait une réévaluation des faits. La jurisprudence de la Commission a élaboré le contenu juridique et de principe de la notion de renonciation aux droits de négociation relativement à la promotion active des droits, et il incombait à la formation de déterminer dans le contexte factuel de la présente affaire si cette norme était respectée. La formation a indiqué clairement qu'elle considérait la renonciation comme une question de fait. La politique de la Commission n'a jamais été mise en doute et a été décrite dans les mêmes termes dans la décision définitive et dans la décision initiale.

La preuve non contestée révèle que, dans sa décision initiale, la formation a tiré la conclusion de fait que le syndicat avait renoncé à ses droits de négociation et que, dans sa décision définitive, elle a tiré la conclusion de fait que le syndicat n'avait pas renoncé à ses droits, et l'événement qui s'est produit entre ces deux décisions est la réunion plénière de la Commission. Cela mène à la conclusion raisonnable que des questions de fait ont été renvoyées pour fin de discussion à la réunion plénière de la Commission.

Même si la conclusion qu'il y a exonération de l'obligation de témoigner empêche que le processus décisionnel de la Commission soit déterminé, elle n'empêche pas l'appelante d'établir le fondement d'un contrôle judiciaire. La Commission ne peut pas, avec l'aide du législateur, priver une personne de tout accès légitime aux renseignements pertinents, pour ensuite invoquer l'absence de ces mêmes renseignements en tant que réponse déterminante à la plainte. Les difficultés en matière de preuve qui se présentent en l'espèce doivent être considérées comme faisant partie du fardeau de présentation de la preuve reposant sur l'appelante.

La Cour d'appel de l'Ontario a estimé que la procédure de la Commission était protégée par la « présomption de régularité ». La force de la preuve nécessaire pour réfuter cette présomption varie selon la nature de l'affaire et, compte tenu des difficultés qu'a éprouvées l'appelante à obtenir des éléments de preuve, elle doit être jugée s'être acquittée de sa charge de présentation. La Commission doit vivre avec la conclusion raisonnable que la réunion plénière a eu une influence sur le changement d'opinion relatif à des questions reposant sur les faits. Il y a un intérêt public dans l'intégrité du processus décisionnel en cause et l'appelante a établi une preuve *prima facie* pour les fins du contrôle judiciaire. Étant donné que la procédure suivie par la Commission contrevenait aux principes de justice naturelle, l'ordonnance en ayant découlé a été rendue en l'absence

jurisdiction and should be set aside despite the existence of privative clauses.

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de compétence et doit être annulée malgré l'existence de clauses privatives.

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APPEAL from a judgment of the Ontario Court of Appeal (1998), 38 O.R. (3d) 737, 108 O.A.C. 301, 6 Admin. L.R. (3d) 187, affirming a decision of the Divisional Court (1995), 89 O.A.C. 45, [1995] O.J. No. 3924 (QL), dismissing the appellant's application for judicial review. Appeal dismissed, Major and Binnie JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1998), 38 O.R. (3d) 737, 108 O.A.C. 301, 6 Admin. L.R. (3d) 187, qui a confirmé une décision de la Cour divisionnaire de l'Ontario (1995), 89 O.A.C. 45, [1995] O.J. No. 3924 (QL), qui avait rejeté la requête en révision judiciaire de l'appelante. Pourvoi rejeté, les juges Major et Binnie sont dissidents.

Earl A. Cherniak, Q.C., and *Kirk F. Stevens*, for the appellant.

Earl A. Cherniak, c.r., et *Kirk F. Stevens*, pour l'appelante.

Sheila R. Block and *Andrew E. Bernstein*, for the respondent Ontario Labour Relations Board.

Sheila R. Block et *Andrew E. Bernstein*, pour l'intimée la Commission des relations de travail de l'Ontario.

Alan M. Minsky, *Q.C.*, and *Susan Philpott*, for the respondent International Brotherhood of Electrical Workers, Local 894.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour and LeBel JJ. was delivered by

LEBEL J. —

I. Introduction

1 The main issue raised by this appeal is whether the rules of natural justice were breached by the Ontario Labour Relations Board ("OLRB" or "Board") when a three-member panel of the Board upheld a grievance filed by the respondent International Brotherhood of Electrical Workers, Local 894 ("Union" or "IBEW, Local 894") against the appellant Ellis-Don Limited. The question of the breach of the rules of natural justice arose when the appellant learned that a first draft of the decision would have dismissed the grievance and that a full Board meeting had been held during which this draft was discussed. The appellant suggests that the differences between the draft and the final decision that allowed the grievance are the result of a change in the assessment of the facts. Ellis-Don alleges that this constitutes sufficient evidence that factual matters were discussed at the full Board meeting, in violation of the rules established by this Court in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282.

II. The Facts

2 This matter has a long history and is closely tied to the evolution of the labour relations system in the Ontario construction industry and to its move towards a more centralized collective bargaining system. In 1962, Ellis-Don was a very active general contractor, but was entering the Toronto market for the first time. A system of local collective bargaining prevailed in the construction industry at this time. Ellis-Don entered into a "Working Agreement" with the Toronto Building and Con-

Alan M. Minsky, *c.r.*, et *Susan Philpott*, pour l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894.

Version française du jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Arbour et LeBel rendu par

LE JUGE LEBEL —

I. Introduction

La principale question en litige dans le présent pourvoi est de savoir si la Commission des relations de travail de l'Ontario (la « CRTO » ou la « Commission ») a violé les règles de justice naturelle lorsqu'une formation de trois commissaires a accueilli un grief déposé contre l'appelante, Ellis-Don Limited, par l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894 (le « syndicat » ou la « section locale 894 de la FIOE »). La question de la violation des règles de justice naturelle s'est posée lorsque l'appelante a appris que le grief aurait été rejeté dans un projet de décision initial et que ce projet avait été discuté au cours d'une réunion plénière de la Commission. L'appelante affirme que les différences entre le projet et la décision définitive qui a accueilli le grief découlent d'un changement dans l'évaluation des faits. Ellis-Don allègue qu'il s'agit là d'une preuve suffisante que des questions de fait ont été discutées à la réunion plénière de la Commission, ce qui contrevient aux règles établies par notre Cour dans l'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282.

II. Les faits

L'affaire remonte loin et elle est étroitement liée à l'évolution du système de relations du travail dans l'industrie de la construction en Ontario ainsi qu'à son orientation vers un système de négociation collective plus centralisé. En 1962, Ellis-Don était un entrepreneur général très actif, mais elle s'attaquait au marché de Toronto pour la première fois. À cette époque, il existait un système de négociations collectives locales dans l'industrie de la construction. Ellis-Don a conclu avec le Toronto

struction Trades Council ("Council"), in which Ellis-Don agreed to employ only members of the unions affiliated with the Council and to contract or subcontract only to individuals or companies whose employees were members in good standing in the unions affiliated with the Council. The Working Agreement provided for automatic renewals unless notice of termination was given (such notice was never given).

Building and Construction Trades Council (le « Conseil ») une « convention de travail ». Elle s'y engageait à n'employer que les membres des syndicats affiliés au Conseil et à n'accorder des contrats ou des contrats de sous-traitance qu'aux personnes et aux sociétés dont les employés étaient membres en règle de ces syndicats. La convention de travail prévoyait son renouvellement automatique sauf avis de résiliation (cet avis n'a jamais été donné).

Local 353 of the International Brotherhood of Electrical Workers ("IBEW, Local 353") was affiliated with the Council. It was and still is the IBEW local with jurisdiction in the Toronto area (the respondent Union, Local 894, was not yet a member of the Council in 1962).

3 La section locale 353 de la Fraternité internationale des ouvriers en électricité (la « section locale 353 de la FIOE ») était affiliée au Conseil. Elle avait et a toujours compétence exclusive dans la région de Toronto (le syndicat intimé, section locale 894, n'était pas encore membre du conseil en 1962).

In 1971, the Electrical Contractors Association of Toronto applied to the OLRB to be certified as a bargaining agent for the electrical contractors of Toronto. According to the regulations then in force, upon filing of that application by the employers' association, the IBEW, Local 353 had to list the employers in respect of which they claimed to hold bargaining rights on a form known as Schedule F.

4 En 1971, l'Electrical Contractors Association of Toronto déposa auprès de la CRTO une demande d'accréditation en tant qu'agent négociateur pour les entrepreneurs électriciens de Toronto. Conformément à la réglementation alors en vigueur, à la suite du dépôt de cette demande par l'association d'employeurs, la section locale 353 de la FIOE devait fournir, sur un formulaire connu comme l'annexe F, une liste des employeurs à l'égard desquels elle prétendait détenir des droits de négociation.

IBEW, Local 353 failed to list Ellis-Don as an employer in the form it filed in response to the application of the Electrical Contractors Association of Toronto.

5 La section locale 353 de la FIOE omit d'inscrire Ellis-Don en tant qu'employeur dans le formulaire qu'elle a déposé en réponse à la demande de l'Electrical Contractors Association of Toronto.

In 1978, there was a move towards a province-wide bargaining scheme in the industry. The jurisdiction of the Council was extended to include Central Ontario in 1979. Local 894 of the IBEW became affiliated with the Council. By amending legislation, the bargaining rights of the IBEW, Local 353 in respect of Ellis-Don's employees were to be extended to Local 894, provided those bargaining rights had not been abandoned by Local 353 prior to the introduction of the province-wide bargaining scheme.

6 En 1978, le régime de négociation dans l'industrie a commencé à s'appliquer à l'échelle de la province. La compétence du Conseil s'est étendue au centre de l'Ontario en 1979. La section locale 894 de la FIOE est devenue affiliée au Conseil. Des modifications législatives ont fait en sorte que les droits de négociation de la section locale 353 de la FIOE relativement aux employés de Ellis-Don ont été accordés à la section locale 894, dans la mesure où la section locale 353 n'avait pas renoncé à ces droits avant la mise en œuvre du régime de négociation à l'échelle de la province.

7 On January 12, 1990, the Union filed a grievance with the Board, alleging that the appellant had subcontracted electrical construction work to non-union electrical subcontractors, contrary to the provisions of the provincial collective agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, the IBEW, and the IBEW Construction Council of Ontario representing its affiliated local unions.

Le 12 janvier 1990, le syndicat déposa un grief auprès de la Commission, alléguant que l'appelante avait donné en sous-traitance des travaux de construction en électricité à des entrepreneurs dont les employés n'étaient pas syndiqués, contrevenant ainsi aux dispositions de la convention collective provinciale conclue entre l'Electrical Trade Bargaining Agency de l'Electrical Contractors Association of Ontario, la FIOE et le conseil de l'Ontario de la FIOE, représentant ses syndicats locaux affiliés.

8 A three-member panel of the OLRB presided over by Vice-Chair Susan Tacon heard the grievance. The appellant did not dispute that it had subcontracted some work to non-union electrical contractors. However, it argued that it was not bound by the provincial agreement because the IBEW, Local 353 had abandoned its bargaining rights prior to the introduction of the province-wide bargaining scheme, when it failed to include the name of Ellis-Don in Schedule F of the accreditation proceedings of the Electrical Contractors Association of Toronto. According to Ellis-Don, this omission and the IBEW, Local 894's failure to call evidence to explain it, demonstrated either that the IBEW, Local 894 in fact recognized that it did not hold bargaining rights on behalf of the appellant's employees or that these bargaining rights had been abandoned.

Une formation de trois membres de la CRTO présidée par la vice-présidente Susan Tacon entendit le grief. L'appelante ne nia pas avoir accordé des contrats de sous-traitance à des entrepreneurs électriciens dont les employés n'étaient pas syndiqués. Elle prétendit toutefois ne pas être liée par la convention provinciale parce que la section locale 353 de la FIOE avait renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province lorsqu'elle avait omis d'inscrire son nom à l'annexe F de la demande d'accréditation de l'Electrical Contractors Association of Toronto. Selon Ellis-Don, cette omission et le fait que la section locale 894 de la FIOE n'avait pas présenté d'éléments de preuve pour l'expliquer démontrait que la section locale 894 de la FIOE reconnaissait dans les faits qu'elle ne possédait pas de droits de négociation au nom des employés de l'appelante ou qu'elle y avait renoncé.

9 After the hearing of the grievance, a draft decision was prepared by Vice-Chair Tacon. This draft proposed to dismiss the grievance on the ground that the IBEW, Local 353 had failed to list Ellis-Don on Schedule F at the time of the certification proceedings of the Electrical Contractors Association of Toronto and was thus deemed to have abandoned its bargaining rights with respect to the appellant:

Après l'audition du grief, la vice-présidente Tacon rédigea un projet de décision. Ce dernier proposait de rejeter le grief pour le motif que la section locale 353 de la FIOE avait omis d'inscrire le nom de Ellis-Don à l'annexe F au moment de la demande d'accréditation de l'Electrical Contractors Association of Toronto et qu'elle était donc réputée avoir renoncé à ses droits de négociation relativement à l'appelante :

Local [8]94, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F, as would be expected if the union in the accreditation application thought it possessed bargaining rights vis-à-vis Ellis-Don. Absent an explanation, the most reasonable inference is that the union in the

[TRADUCTION] La section locale [8]94, la demanderesse en l'espèce, n'a présenté aucun élément de preuve pour expliquer l'omission de la section locale 353 d'inclure Ellis-Don à l'annexe F, ce à quoi on s'attendrait si le syndicat visé par la demande d'accréditation croyait avoir des droits de négociation vis-à-vis Ellis-Don.

accreditation application assumed it did not possess such bargaining rights in 1971, when the accreditation application was filed. In effect, the union was asserting it did not have bargaining rights for Ellis-Don. The respondent union in the accreditation application must be taken to have abandoned whatever bargaining rights it possessed as against Ellis-Don at the latest by that point. The mere use by Ellis-Don of union electrical subcontractors is not tantamount to granting voluntary recognition anew once the bargaining rights created by the working agreement were extinguished.

The consequences of the Board's finding that bargaining rights had been abandoned by Local 353 IBEW prior to 1978 is that that trade union cannot "plug into" the province-wide scheme so that the issue of abandonment post 1978 does not arise. Local [8]94, the applicant in the instant grievance referral, relies on that province-wide scheme to acquire the bargaining rights which it seeks to enforce against Ellis-Don. In the Board's view, no such rights were held by Local 353 in 1978 so that the legislation in 1978 and the subsequent amendments could not extend any bargaining rights to Local [8]94. [Emphasis added.]

Faute d'explication, la conclusion la plus raisonnable à tirer est que le syndicat visé par la demande d'accréditation a tenu pour acquis qu'il n'avait pas de droits de négociation en 1971, au moment du dépôt de la demande d'accréditation. Dans les faits, le syndicat affirmait ne pas avoir de droits de négociation concernant Ellis-Don. Le syndicat intimé visé par la demande d'accréditation doit être considéré comme ayant renoncé à tout droit de négociation qu'il pouvait avoir relativement à Ellis-Don au plus tard à ce moment-là. Le simple recours par Ellis-Don à des sous-traitants dont les employés étaient syndiqués n'équivaut pas à une nouvelle reconnaissance volontaire une fois éteints les droits de négociation créés par la convention de travail.

La conclusion de la Commission que la section locale 353 de la FIOE avait renoncé aux droits de négociation avant 1978 a comme conséquence que le syndicat ne peut pas « s'intégrer » au régime provincial, de sorte que la question de la renonciation après 1978 ne se pose pas. La section locale [8]94, la demanderesse dans le cadre du présent grief, invoque ce régime provincial en vue d'acquérir les droits de négociation qu'elle entend faire respecter par Ellis-Don. La Commission est d'avis que la section locale 353 n'avait aucun droit de négociation en 1978, de sorte que les dispositions législatives de 1978 et les modifications subséquentes n'ont pas pu conférer un tel droit à la section locale [8]94. [Je souligne.]

The draft decision was circulated among all the members of the OLRB and Vice-Chair Tacon called a full Board meeting to discuss its implications. It appears that this meeting was held on January 27, 1992.

10 Le projet de décision fut transmis à tous les membres de la CRTO et la vice-présidente Tacon convoqua une réunion plénière de la Commission pour discuter de ses effets. Cette réunion aurait eu lieu le 27 janvier 1992.

On February 28, 1992, the Board released its final decision, upholding the grievance (Board member Trim dissenting): [1992] OLRB Rep. 147. The majority found that there had been no abandonment of bargaining rights by the Union in spite of the omission of Ellis-Don from schedule F (at para. 54):

11 Le 28 février 1992, la Commission rendit sa décision définitive, qui accueillait le grief (le membre Trim étant dissident) : [1992] OLRB Rep. 147. Les membres majoritaires conclurent, au par. 54, que le syndicat n'avait pas renoncé à ses droits de négociation malgré l'omission du nom de Ellis-Don à l'annexe F :

The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, IBEW in the accreditation application is of concern to the Board. The question for the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 had abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is

[TRADUCTION] L'absence de preuve expliquant l'omission du nom de Ellis-Don à l'annexe F déposée par la section locale 353 de la FIOE dans le cadre de la demande d'accréditation préoccupe la Commission, qui estime qu'il s'agit de savoir si cette omission est suffisante en soi, dans le contexte de l'ensemble des autres circonstances, pour lui permettre de conclure que la section locale 353 avait renoncé aux droits de négociation

not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the Local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the Local held bargaining rights but who had had employees in the past (albeit not within the previous year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented specialty electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted, in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement, to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. As well, the context of a consistent pattern of Ellis-Don's subletting electrical work to "union" contractors prior to the accreditation application, although not necessarily conclusive proof of the existence of bargaining rights (see paragraph 46 above), cannot be ignored. Given the Board's finding that the working agreement was duly executed by the parties and constituted a series of voluntary recognition agreements, including the voluntary recognition of Local 353, and given that the working agreement was never terminated but, rather, that at least with respect to the subcontracting of electrical work, Ellis-Don fully complied with that agreement for many years with Ellis-Don receiving the advantages of the working agreement during that period, the Board is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F. In short, considering all the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining. [Emphasis added.]

qu'elle avait obtenus auparavant. L'omission du nom de Ellis-Don n'est pas incompatible avec une renonciation et peut donc signifier ce que l'avocat de l'intimée affirme. Cependant, cette omission est compatible également avec le fait que la section locale aurait tenu pour acquis que la demande d'accréditation ne touchait que les entrepreneurs spécialisés ou que l'annexe F ne s'appliquait qu'aux employeurs relativement auxquels la section locale avait des droits de négociation mais qui avaient eu des employés dans le passé (quoique pas dans l'année précédente). Il semble (et il n'y a aucune preuve convaincante du contraire) que l'association d'employeurs représentait les entrepreneurs électriciens spécialisés, et non pas les entrepreneurs généraux. Dans ce contexte, le nom de Ellis-Don peut avoir été omis dans la réponse du syndicat intimé, comme l'ont apparemment été les noms d'autres entrepreneurs généraux qui avaient signé la convention de travail, compte tenu du cadre de la demande initiale. La question n'est pas de savoir quelle est la conclusion la plus raisonnable ou quelle serait une conclusion raisonnable à tirer de l'omission du nom de Ellis-Don, mais bien de savoir si cette omission équivaut à une renonciation. La Commission est d'avis qu'il est plus probable que l'omission du nom de Ellis-Don à l'annexe F n'indiquait pas une renonciation aux droits de négociation. De même, bien qu'elle ne constitue pas nécessairement une preuve concluante de l'existence de droits de négociation (voir le paragraphe 46 ci-dessus), il ne faut pas faire abstraction de la pratique constante de Ellis-Don de donner en sous-traitance des travaux en électricité à des entrepreneurs dont les employés sont syndiqués. Étant donné la conclusion de la Commission que la convention de travail a été dûment signée par les parties et qu'elle constituait un ensemble d'ententes de reconnaissance volontaire, notamment la reconnaissance volontaire de la section locale 353, et étant donné que la convention de travail n'a jamais été résiliée, mais plutôt que, au moins en ce qui concerne la sous-traitance de travaux d'électricité, Ellis-Don s'est entièrement conformée pendant de nombreuses années à cette convention et qu'elle en a bénéficié pendant cette période, la Commission n'est pas convaincue que, en tant que question de fait, la section locale 353 a renoncé aux droits de négociation en raison de l'omission du nom de Ellis-Don à l'annexe F. En résumé, vu l'ensemble des circonstances, la Commission estime que la section locale 353 n'a pas renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province. [Je souligne.]

A few weeks later, in March 1992, a retired member of the OLRB handed over to Ellis-Don a copy of the draft that had been circulated to all members of the Board. From the same source, Ellis-Don also learned that a full Board meeting had been held at the request of Vice-Chair Tacon to consider the draft decision.

Ellis-Don claimed that there was a breach of natural justice and that jurisprudential rules governing institutional consultations had been violated. Without asking for reconsideration of the decision, it applied for judicial review. According to the appellant, the change between the draft decision and the arbitration award ultimately released by the Board was of a factual nature as opposed to a legal or policy change. This indicated that facts had been discussed at the full board meeting, contrary to the principles established by this Court in *Consolidated-Bathurst, supra*.

Prior to the hearing of the application for judicial review, the appellant sought an interlocutory order to stay the decision of the OLRB; it also requested that several members of the Board be summoned for examination before an official examiner and that certain documents be produced. In July 1992, Steele J., of the Ontario Divisional Court, granted an order compelling members of the Board to appear before an official examiner, but refused to stay the decision and to order the production of documents: (1992), 95 D.L.R. (4th) 56. In January 1994, a three-judge panel of the Divisional Court reversed the decision of Steele J. and decided that the members of the Board could not be compelled to appear before an official examiner: (1994), 16 O.R. (3d) 698. The Divisional Court based its decision on the common law rule respecting the compellability of administrative tribunal members and on s. 111 of the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2 (now S.O. 1995, c. 1, s. 117). Leave to appeal this decision was denied by the Ontario Court of Appeal in

Quelques semaines plus tard, en mars 1992, un membre à la retraite de la CRTO remit à Ellis-Don une copie du projet qui avait été envoyé à tous les membres de la Commission. De la même source, Ellis-Don apprit également qu'une réunion plénière de la Commission avait été tenue à la demande de la vice-présidente Tacon pour examiner le projet de décision. 12

Ellis-Don prétendit qu'il y avait eu violation des règles de justice naturelle et que les règles jurisprudentielles régissant les consultations institutionnelles n'avaient pas été respectées. Sans solliciter un nouvel examen de la décision, elle présenta une demande de contrôle judiciaire. Selon l'appelante, la modification survenue entre le projet de décision et la décision arbitrale rendue par la suite par la Commission était de nature factuelle, par opposition à une modification de nature juridique ou de principe. Cela indiquait que les faits avaient été discutés à la réunion plénière de la Commission, en contravention des principes établis par notre Cour dans l'arrêt *Consolidated-Bathurst*, précité. 13

Avant l'audition de la demande de contrôle judiciaire, l'appelante demanda que soit rendue une ordonnance interlocutoire suspendant la décision de la CRTO; elle requit aussi l'assignation à comparaître pour fins d'interrogatoire de plusieurs membres de la Commission devant un auditeur officiel ainsi que la production de certains documents. En juillet 1992, le juge Steele, de la Cour divisionnaire de l'Ontario, ordonna aux membres de la Commission de comparaître devant un auditeur officiel mais refusa de suspendre la décision et d'ordonner la production des documents : (1992), 95 D.L.R. (4th) 56. En janvier 1994, une formation de trois juges de la Cour divisionnaire infirma la décision du juge Steele et affirma que les membres de la Commission ne pouvaient pas être contraints à comparaître devant un auditeur officiel : (1994), 16 O.R. (3d) 698. La Cour divisionnaire fonda sa décision sur la règle de common law relative à la contraignabilité des membres des tribunaux administratifs et sur l'art. 111 de la *Loi sur les relations de travail* de l'Ontario, L.R.O. 1990, ch. L.2 (maintenant L.O. 1995, ch. 1, art. 117). L'autorisation d'interjeter appel de cette décision fut refusée 14

June 1994 and by the Supreme Court of Canada in January 1995, [1995] 1 S.C.R. vii.

15 On December 20, 1995, the Divisional Court dismissed the appellant's application for judicial review. A unanimous Court of Appeal confirmed this judgment in April 1998

III. Relevant Statutory Provisions

16 *Labour Relations Act, 1995*, S.O. 1995, c. 1

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling. [Previously s. 108 of the *Labour Relations Act*, R.S.O. 1990, c. L.2.]

117. Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil proceeding or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

IV. Judicial History

A. *Divisional Court (Decision on the Application for Judicial Review)* (1995), 89 O.A.C. 45

17 The court dismissed the application for judicial review. Adams J., writing for the panel, found that the difference between the draft and the final decisions reflected a change in the applicable policy or legal standard, but not a new determination of the facts. Adams J. noted that the fact that IBEW, Local 353 had omitted Ellis-Don's name from Schedule F of the accreditation proceedings of the Electrical Contractors Association of Toronto and the fact that this association represented specialty electrical contractors, not general contractors,

par la Cour d'appel de l'Ontario en juin 1994 et par la Cour suprême du Canada en janvier 1995, [1995] 1 R.C.S. vii.

Le 20 décembre 1995, la Cour divisionnaire rejeta la demande de contrôle judiciaire de l'appelante. La Cour d'appel, à l'unanimité, confirma ce jugement en avril 1998.

III. Les dispositions législatives pertinentes

Loi de 1995 sur les relations de travail, L.O. 1995, ch. 1

114. (1) La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations. [Auparavant l'art. 108 de la *Loi sur les relations de travail*, L.R.O. 1990, ch. L.2.]

117. Sauf si la Commission y consent, ses membres, son registrateur, et les autres membres de son personnel sont exemptés de l'obligation de témoigner dans une instance civile ou dans une instance devant la Commission ou devant toute autre commission, en ce qui concerne des renseignements obtenus dans le cadre de leurs fonctions ou en rapport avec celles-ci dans le cadre de la présente loi.

IV. Historique des procédures judiciaires

A. *La Cour divisionnaire (Décision relative à la demande de contrôle judiciaire)* (1995), 89 O.A.C. 45

La cour rejeta la demande de contrôle judiciaire. Le juge Adams, s'exprimant au nom de la formation, conclut que la différence entre le projet et la décision définitive constituait une modification des principes ou de la norme juridique applicables, mais non pas une nouvelle détermination des faits. Il souligna que le fait que la section locale 353 de la FIOE avait omis d'inscrire le nom de Ellis-Don à l'annexe F de la demande d'accréditation de l'Electrical Contractors Association of Toronto et le fait que cette association représentait les entre-

remained unchanged between the draft decision and the final award. For Adams J., the Board simply had to decide whether the omission, in and of itself, dictated the conclusion of abandonment. He wrote (at p. 55):

> This determination had a substantial and obvious policy component, notwithstanding the particular manner in which the panel expressed itself. In this sense, it involved a matter which could be addressed at a level of principle without offending the requirements of natural justice.

Adams J. listed several policy options open to the Board: (i) the omission could constitute *per se* evidence of abandonment; (ii) the omission could give rise to a rebuttable presumption of abandonment (thus requiring an explanation from the IBEW, Local 894); (iii) the omission could constitute a factor to be considered along with the rest of the evidence before the Board; or (iv) the omission could be irrelevant to the issue of abandonment. Adams J. concluded that the Board had determined that the omission was a factor to be considered, without being determinative in the circumstances, even in the absence of an explanation from the IBEW, Local 894.

Adams J. noted that the conclusion of the arbitration award was consistent with the unlikelihood that the Union intended to abandon its bargaining rights and with the case law and policy of the Board which required unequivocal evidence that a trade union has "slept on its rights" (p. 56). Accordingly, Adams J. found that there was no basis to infer that members of the Board who were not on the hearing panel might have participated in the panel's fact-finding. Adams J. referred to the decision of the Ontario Court of Appeal in *Khan v. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, to support the idea that modern decision-making cannot be made in complete isolation. Adams J. explained that, if the appellant suspected that there had been a discussion of factual issues at the full Board meeting, it

preneurs électriciens spécialisés, et non pas les entrepreneurs généraux, n'avaient pas changé entre le projet de décision et la décision définitive. Selon le juge Adams, la Commission devait simplement déterminer si l'omission en soi menait nécessairement à la conclusion qu'il y avait eu renonciation. Il a écrit, à la p. 55 :

> [TRADUCTION] Cette détermination comportait un élément de principe important et manifeste, malgré la manière particulière dont le la formation s'est exprimée. Dans ce sens, elle comportait une question qui pouvait être tranchée au niveau des principes sans contrevenir aux exigences de la justice naturelle.

18 Le juge Adams énuméra plusieurs choix de principe qui s'offraient à la Commission : (i) l'omission pouvait constituer en soi la preuve de la renonciation; (ii) l'omission pouvait donner lieu à une présomption réfutable de renonciation (ce qui aurait donc obligé la section locale 894 de la FIOE à fournir une explication); (iii) l'omission pouvait constituer un facteur à examiner au même titre que les autres éléments de preuve soumis à la Commission; ou (iv) l'omission pouvait n'avoir aucune pertinence quant à la question de la renonciation. Il conclut que la Commission avait décidé que l'omission était un facteur à prendre en considération, sans qu'elle ne soit déterminante dans les circonstances, même en l'absence d'explication de la part de la section locale 894 de la FIOE.

19 Le juge Adams fit remarquer que la conclusion de la décision arbitrale était compatible avec l'improbabilité d'une intention du syndicat de renoncer à ses droits de négociation ainsi qu'avec la jurisprudence et la politique de la Commission, qui exigeait la preuve sans équivoque qu'un syndicat avait [TRADUCTION] « négligé de faire valoir ses droits » (p. 56). Par conséquent, à son avis, rien ne permettait de déduire que les membres de la Commission qui ne faisaient pas partie de la formation ayant entendu l'affaire auraient peut-être participé à l'appréciation des faits. Il cita la décision rendue par la Cour d'appel de l'Ontario dans *Khan c. College of Physicians & Surgeons of Ontario* (1992), 94 D.L.R. (4th) 193, à l'appui de l'idée que, de nos jours, la prise de décision ne peut pas avoir lieu dans un isolement complet. Il expliqua que, si l'ap-

should, at least as a matter of courtesy, have given the Board an opportunity to explain itself by seeking reconsideration. Finally, in the opinion of Adams J., the decision of the Board was not patently unreasonable.

pelante estimait que des questions de fait avaient été discutées à la réunion plénière de la Commission, elle aurait dû, au moins par courtoisie, donner à la Commission la possibilité de s'expliquer en demandant un nouvel examen. Enfin, le juge Adams était d'avis que la décision de la Commission n'était pas manifestement déraisonnable.

B. *Court of Appeal* (1998), 38 O.R. (3d) 737

B. *La Cour d'appel* (1998), 38 O.R. (3d) 737

20 A unanimous Court of Appeal dismissed the appeal. It held that the appellant had not established that the change in the panel's decision was the consequence of interference by the full Board in the panel's fact-finding process. A review of the record revealed that the possibility of interference by the full Board on factual matters amounted to little more than speculation. The court was satisfied that the change was the result of the application of a different legal standard to the facts introduced in evidence before the panel.

La Cour d'appel rejeta l'appel à l'unanimité. Elle a considéré que l'appelante n'avait pas démontré que la modification de la décision de la formation avait été causée par l'ingérence de l'ensemble des membres de la Commission dans le processus d'appréciation des faits de la formation. L'examen du dossier avait révélé que la possibilité d'ingérence de la part de l'ensemble des membres de la Commission relativement aux questions de fait constituait tout au plus une hypothèse. La cour était convaincue que la modification découlait de l'application d'une norme juridique différente aux faits présentés en preuve devant la formation.

21 The court held, at p. 740, that the panel had not speculated on the intention of the IBEW, Local 353 in omitting the appellant's name from Schedule F:

> The fact of the omission, that the employer association involved in the application represented special electrical contractors, not general contractors, that Ellis-Don is a general contractor who had signed the provincial working agreement, that other general contractors who had signed the agreement were also omitted from Schedule F, that Ellis-Don obtained the benefit of the agreement and that it had used only unionized electrical contractors until the grievance gave rise to this dispute, were all in evidence and were not speculation.

La cour conclut, à la p. 740, que la formation n'avait pas émis d'hypothèses sur les intentions de la section locale 353 de la FIOE, lorsqu'elle a omis d'inscrire le nom de l'appelante à l'annexe F :

> [TRADUCTION] Les faits selon lesquels il y a eu omission, que l'association d'employeurs visée par la demande représentait des entrepreneurs électriciens spécialisés, et non pas des entrepreneurs généraux, que Ellis-Don est un entrepreneur général qui avait signé la convention de travail provinciale, que le nom d'autres entrepreneurs généraux ayant signé la convention a également été omis à l'annexe F, que Ellis-Don a bénéficié de la convention et qu'elle n'avait fait appel qu'à des entrepreneurs électriciens dont les employés étaient syndiqués jusqu'au grief ayant donné lieu au présent litige, ont tous été présentés en preuve et n'étaient pas des hypothèses.

22 The Court of Appeal also found that the Divisional Court had correctly refused to draw an adverse inference from the Board's refusal to disclose the internal deliberations which took place at the full Board meeting. According to the Court of Appeal, a presumption of regularity applied, as there was no evidence that the procedure at the full

La Cour d'appel décida également que la Cour divisionnaire avait refusé avec raison de tirer une conclusion défavorable du refus de la Commission de révéler le contenu des délibérations internes qui avaient eu lieu à sa réunion plénière. À son avis, une présomption de régularité s'appliquait puisqu'il n'y avait aucune preuve que la procédure sui-

Board meeting in question departed from its usual practice, whereby discussion was limited to the policy implications of a draft decision. The mere fact that the construction panel had changed its conclusion could not give rise to an inference that the Board had acted improperly during the consultation process.

vie à la réunion plénière en question était différente de la pratique habituelle, en vertu de laquelle la discussion était limitée aux répercussions de principe d'un projet de décision. Le simple fait que la formation du secteur de la construction avait modifié sa conclusion ne pouvait pas entraîner la déduction que la Commission avait agi de façon inappropriée au cours du processus de consultation.

V. The Issues

This appeal does not challenge the legality of an institutional consultation process within administrative bodies like the OLRB. Moreover, there has been no suggestion that the Court should revisit the rules established in *Consolidated-Bathurst*, *supra*, and *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952. At issue in this appeal is whether the Board complied with these rules when it held the full Board meeting and discussed the grievance against Ellis-Don. This requires us to discuss the nature of the evidentiary burden on a party applying for judicial review because of an alleged breach of natural justice.

The appellant submits several closely linked propositions. First, it asserts that the change in the final decision was of a factual nature and that this is sufficient to prove that factual matters were discussed at the full Board meeting. The appellant also contends that the Court should intervene as the change raises a reasonable apprehension of a breach of natural justice. It suggests that the refusal of the Board to offer evidence about its internal decision proceedings gave rise to the application of a presumption of irregularity that would permit courts to imply that there has been improper tampering with the evidence during the full Board conference.

The Court also has to decide whether the appellant's failure to ask for reconsideration of the Board's decision constitutes a bar to judicial review.

V. Les questions en litige

23 Le présent pourvoi ne conteste pas la légalité du processus de consultation institutionnelle des organismes administratifs comme la CRTO. De plus, on n'a pas prétendu que notre Cour devait réexaminer les règles établies dans les arrêts *Consolidated-Bathurst*, précité, et *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952. Est en litige dans le présent pourvoi la question de savoir si la Commission s'est conformée à ces règles lorsqu'elle a tenu sa réunion plénière pour discuter du grief déposé contre Ellis-Don. Nous devons donc examiner la nature du fardeau de présentation de la partie qui demande un contrôle judiciaire en raison d'une présumée violation des règles de justice naturelle.

24 L'appelante présente plusieurs arguments étroitement liés. Premièrement, elle affirme que la modification apportée dans la décision définitive était de nature factuelle et que cela suffit pour prouver que des questions de fait ont été abordées à la réunion plénière de la Commission. L'appelante soutient également que notre Cour doit intervenir puisque la modification soulève une crainte raisonnable de violation des règles de justice naturelle. Elle avance que le refus de la Commission de présenter des éléments de preuve relativement à son processus décisionnel interne entraîne l'application d'une présomption d'irrégularité qui permettrait aux tribunaux de déduire qu'il y a eu manipulation de la preuve au cours de la réunion plénière de la Commission.

25 Notre Cour doit également déterminer si l'omission de l'appelante de demander un nouvel examen de la décision de la Commission rend irrecevable sa demande de contrôle judiciaire.

VI. Analysis

A. *The Rules Concerning Institutional Consultation*

26 The problems relating to procedures of institutional consultation within administrative bodies have been thoroughly canvassed in the reasons of Gonthier J. in *Consolidated-Bathurst*, *supra*, and *Tremblay*, *supra*. A mere reminder of the principles set out in these decisions will suffice here to deal with the main legal issues presented by this case.

27 In the *Consolidated-Bathurst* case, the legality of institutional consultation procedures within administrative bodies had been put in doubt for two reasons. First, it was argued that these procedures created a reasonable apprehension of bias and lack of independence on the part of the adjudicators. The members of an administrative body hearing a case might be subject to undue pressure from other colleagues or from their hierarchical superiors. These pressures would come from persons who would not have heard the evidence nor the arguments of the parties, and would nevertheless be in a position to influence the final decision. Second, it was suggested that these consultations also breached the *audi alteram partem* rule, as new arguments might be raised during the full Board discussion without being communicated to the parties.

28 Writing for the majority, Gonthier J. recognized the legitimacy of institutional consultations to ensure consistency between decisions of different adjudicators or panels within an administrative body. Indeed, the critical nature of this procedure was underlined later by the judgment of this Court in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756. Writing for a unanimous Court, L'Heureux-Dubé J. observed that ensuring the consistency of decisions of administrative bodies or tribunals was not a proper function of judicial review by superior courts. Inconsistencies or conflicts between different decisions of the same tribu-

VI. Analyse

A. *Les règles relatives à la consultation institutionnelle*

Les problèmes relatifs aux procédures de consultation institutionnelle des organismes administratifs ont été exposés de façon exhaustive dans les motifs du juge Gonthier dans les arrêts *Consolidated-Bathurst* et *Tremblay*, précités. Un simple rappel des principes établis dans ces décisions suffit pour les fins de l'examen des principales questions en litige soulevées par la présente affaire.

Dans l'affaire *Consolidated-Bathurst*, la légalité des procédures de consultation institutionnelle des organismes administratifs avait été mise en doute pour deux motifs. En premier lieu, on a prétendu que ces procédures créaient une crainte raisonnable de partialité et d'un manque d'indépendance de la part des arbitres. Les membres d'un organisme administratif qui entendent une affaire sont susceptibles de faire l'objet de pressions indues de la part de leurs collègues ou de leurs supérieurs hiérarchiques. Ces pressions proviendraient de personnes qui n'auraient pas entendu la preuve ni les arguments des parties et qui seraient néanmoins bien placées pour influencer la décision définitive. En second lieu, on a prétendu que ces consultations contrevenaient également à la règle *audi alteram partem*, puisque de nouveaux arguments pouvaient être soulevés pendant les discussions de la réunion plénière de la Commission sans être communiqués aux parties.

S'exprimant au nom des juges majoritaires, le juge Gonthier a reconnu la légitimité des consultations institutionnelles en tant que moyen d'assurer la cohérence des décisions rendues par différents arbitres ou différentes formations au sein d'un organisme administratif. D'ailleurs, l'importance vitale de cette procédure a par la suite été soulignée par notre Cour dans l'arrêt *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756. S'exprimant au nom de notre Cour à l'unanimité, le juge L'Heureux-Dubé a fait remarquer qu'il n'appartient pas aux cours de juridiction supérieure d'assurer la cohérence des décisions des organismes et

nal would not be reason to intervene, provided the decisions themselves remained within the core jurisdiction of the administrative tribunals and within the bounds of rationality. It lay on the shoulders of the administrative bodies themselves to develop the procedures needed to ensure a modicum of consistency between its adjudicators or divisions (*Domtar*, *supra*, at p. 798).

1. Apprehension of Bias or Lack of Independence

In *Consolidated-Bathurst*, *supra*, Gonthier J. examined whether the existence of this kind of institutional consultation procedure in itself created an apprehension of bias or lack of independence as Sopinka J. feared in his dissent. According to Gonthier J., such a procedure would not of itself raise such an apprehension, provided it was designed to safeguard the ability of the decision-maker to decide independently both on facts and law in the matter. Gonthier J. laid down a set of basic principles to ensure compliance with the rules of natural justice. First, the consultation proceeding could not be imposed by a superior level of authority within the administrative hierarchy, but could be requested only by the adjudicators themselves. Second, the consultation had to be limited to questions of policy and law. The members of the organization who had not heard the evidence could not be allowed to re-assess it. The consultation had to proceed on the basis of the facts as stated by the members who had actually heard the evidence. Finally, even on questions of law and policy, the decision-makers had to remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. Provided these rules were respected, institutional consultation would not be a reason to intervene.

des tribunaux administratifs dans le cadre de leur fonction de contrôle judiciaire. Des incohérences ou des contradictions entre les différentes décisions du même tribunal ne constitueraient pas un motif d'intervention, pourvu que les décisions elles-mêmes relèvent de la compétence fondamentale du tribunal administratif et qu'elles soient raisonnables. Il incombait aux organismes administratifs eux-mêmes d'élaborer les procédures requises pour assurer un minimum de cohérence entre ses arbitres ou ses divisions (*Domtar*, précité, p. 798).

1. Crainte de partialité ou de manque d'indépendance

29 Dans l'arrêt *Consolidated-Bathurst*, précité, le juge Gonthier a examiné la question de savoir si l'existence de ce genre de procédure de consultation institutionnelle créait en soi une crainte de partialité ou de manque d'indépendance, comme le redoutait le juge Sopinka dans sa dissidence. Selon le juge Gonthier, une telle procédure ne soulevait pas en soi cette crainte, pourvu qu'elle soit conçue de manière à protéger la capacité de l'arbitre de se prononcer de façon indépendante tant sur les faits que sur le droit dans l'affaire en cause. Il a formulé un ensemble de principes essentiels visant à assurer le respect des règles de justice naturelle. Premièrement, la procédure de consultation ne pouvait pas être imposée par un niveau d'autorité supérieur dans la hiérarchie administrative, mais ne pouvait être demandée que par les arbitres eux-mêmes. Deuxièmement, la consultation devait se limiter aux questions de principe et de droit. On ne pouvait pas permettre aux membres de l'organisation qui n'avaient pas entendu les témoignages de les réévaluer. La consultation devait reposer sur les faits énoncés par les membres qui avaient entendu les témoignages. Enfin, même relativement aux questions de droit et de principe, les arbitres devaient demeurer libres de prendre la décision qu'ils jugeaient juste selon leur conscience et selon leur compréhension des faits et du droit, et ne pas être forcés d'adopter les opinions exprimées par d'autres membres du tribunal administratif. Dans la mesure où ces règles étaient respectées, la consultation institutionnelle ne créait pas de crainte

tutional consultation would not create a reasonable apprehension of bias or lack of independence.

30 It is noteworthy that also at issue in the *Consolidated-Bathurst* case were the consultation proceedings followed within the OLRB. The majority decided that such procedures did not create a reasonable apprehension of bias or lack of independence.

31 The principles developed in *Consolidated-Bathurst* were also applied in the later case of *Tremblay*, *supra*. In the *Tremblay* case, the Supreme Court of Canada considered that the consultation procedures were imposed from above on the decision-makers and that they were so formalized that they became binding on the triers of facts, therefore compromising their independence.

2. *Audi Alteram Partem*

32 The other issue in *Consolidated-Bathurst* concerned the impact of the consultation proceeding on the application of the *audi alteram partem* rule. The reasons of Gonthier J. conceded that there existed risks in that regard, but held that they could be addressed by ensuring that the parties be notified of any new issue raised during the discussion and allowed an opportunity to respond in an effective manner. The mere fact that issues already litigated between the parties were to be discussed again by the full Board would not amount to a breach of the *audi alteram partem* rule.

33 Provided these rules were complied with, the adjudicators retained the right to change their minds and to modify a first draft of a decision. Such changes would not create a presumption that something improper had occurred during the consultation process. In the absence of other evidence to the contrary, the presumption of regularity of administrative procedures would apply.

raisonnable de partialité ou de manque d'indépendance.

Il importe de signaler que l'affaire *Consolidated-Bathurst* portait aussi sur la procédure de consultation suivie par la CTRO. Notre Cour a décidé à la majorité que les procédures de cette nature ne créaient pas de crainte raisonnable de partialité ou de manque d'indépendance.

Les principes élaborés dans *Consolidated-Bathurst* ont également été appliqués dans l'arrêt ultérieur *Tremblay*, précité. Dans *Tremblay*, notre Cour a jugé que les procédures de consultation étaient imposées aux décideurs par les autorités supérieures et qu'elles étaient si rigides qu'elles liaient les juges des faits et compromettaient donc leur indépendance.

2. La règle *audi alteram partem*

L'autre question en litige dans *Consolidated-Bathurst* portait sur l'effet de la procédure de consultation sur l'application de la règle *audi alteram partem*. Dans ses motifs, le juge Gonthier a admis qu'il existait des risques à cet égard, mais il était d'avis que ces risques pouvaient être éliminés si on veillait à ce que les parties soient avisées de toute nouvelle question soulevée pendant la discussion et qu'elles aient la possibilité de répondre de manière efficace. Le simple fait que des questions ayant déjà été débattues par les parties soient discutées de nouveau au cours d'une réunion plénière de la Commission ne constituait pas une violation de la règle *audi alteram partem*.

Dans la mesure où ces règles étaient respectées, les arbitres conservaient le droit de changer d'idée et de modifier un projet de décision initial. Une modification de cette nature ne donnait pas lieu à la présomption que quelque chose d'inapproprié s'était produit pendant le processus de consultation. En l'absence d'éléments de preuve contraires, la présomption de régularité des procédures administratives s'appliquait.

B. *Application to the Case at Hand*

These principles, as set out in *Consolidated-Bathurst*, *supra*, and applied in *Tremblay*, *supra*, govern the present case. As the appellant bears the burden of establishing that the rules of natural justice have been breached, so it must demonstrate that there was inappropriate tampering with the assessment of evidence.

1. Evidentiary Problems

The appellant faced difficult evidentiary problems when it launched its application for judicial review. The only facts it knew were that a draft decision dismissing the grievance had been circulated, that a full meeting of the OLRB had been called at the request of Vice-Chair Susan Tacon, that such a meeting had indeed been held and that the final arbitration award upheld the grievance.

The final decision was silent as to what had happened during the full Board meeting. As stated above, there has been no request for reconsideration, and thus, perhaps, an opportunity was lost to obtain information on the consultation process within the OLRB. From these facts, there is no direct evidence of improper tampering with the decision of the panel. Ellis-Don sought to strengthen its case by obtaining evidence of what had happened during the consultation process. The appellant tried to get this evidence through an interlocutory motion to examine certain members and officers of the OLRB. After the dismissal of its motion by the Divisional Court, Ellis-Don found itself in an impasse, as it could not obtain evidence of the process followed in the particular case from the OLRB through the interrogation of its members or officers.

The appellant then tried a new tack during the hearing of its application for judicial review. The purpose of its argument remained the same: to establish an improper interference by the full Board in the decision of the panel. Thus, it sought to convince the courts that the change in the deci-

B. *Application à la présente affaire*

34 Ces principes, énoncés dans *Consolidated-Bathurst*, précité, et appliqués dans *Tremblay*, précité, régissent la présente affaire. De la même manière que l'appelante a le fardeau de démontrer que les règles de justice naturelle n'ont pas été respectées, elle doit également démontrer que l'évaluation de la preuve a fait l'objet de manipulation.

1. Les problèmes de preuve

35 L'appelante faisait face à de difficiles problèmes de preuve lorsqu'elle a institué sa demande de contrôle judiciaire. Les seuls faits qu'elle connaissait étaient qu'un projet de décision rejetant le grief avait été diffusé, qu'une réunion plénière de la CRTO avait été convoquée à la demande de la vice-présidente Susan Tacon, que cette réunion avait effectivement eu lieu et que la décision arbitrale définitive avait confirmé le grief.

36 La décision définitive ne faisait pas état de ce qui s'était passé à la réunion plénière de la Commission. Comme je l'ai mentionné précédemment, aucune demande de nouvel examen n'a été présentée, de sorte que la possibilité d'obtenir des renseignements sur le processus de consultation de la CRTO a peut-être été perdue. À la lumière de ces faits, il n'existe aucune preuve directe de manipulation de la décision de la formation. Ellis-Don a tenté de renforcer sa preuve en obtenant des éléments de preuve sur ce qui s'était passé pendant le processus de consultation. Elle a cherché à obtenir ces éléments de preuve au moyen d'une requête interlocutoire pour interrogatoire de certains membres et de certains dirigeants de la CRTO. Sa requête ayant été rejetée par la Cour divisionnaire, Ellis-Don s'est trouvée dans une impasse, ne pouvant pas obtenir de la CRTO d'éléments de preuve sur le processus suivi dans son cas en interrogeant ses membres ou ses dirigeants.

37 L'appelante a alors emprunté une nouvelle avenue au cours de l'audition de sa demande de contrôle judiciaire. Le but de son argument est resté le même : démontrer l'ingérence inappropriée de l'ensemble des membres de la Commission dans la décision de la formation. Elle a donc cherché à

sion was of a factual nature and that it could properly be implied that a discussion of the facts had occurred at the full Board meeting. It also suggested that the threshold for judicial review in such a case was an apprehension of breach of natural justice and that there was no need to establish an actual breach of the *audi alteram partem* rule. It argued that such an apprehended breach of natural justice had been established through a displacement of the presumption of regularity of the administrative proceedings of the Board. According to the appellant, it fell to the respondents to establish that the proceedings had not been tainted by any breach of natural justice. Absent evidence to this effect, the Court should find that there was a breach of natural justice, that the Board had been biased and that the *audi alteram partem* rule had been violated. This unrebutted presumption would justify granting the application for judicial review and quashing the decision of the Board.

convaincre les cours que la modification de la décision était de nature factuelle et qu'on pouvait à bon droit déduire que les faits avaient été abordés à la réunion plénière de la Commission. Elle a également avancé que le seuil permettant le contrôle judiciaire dans un tel cas était la crainte de violation des règles de justice naturelle et qu'il n'était pas nécessaire de démontrer l'existence de violation de la règle *audi alteram partem*. Elle a prétendu que cette crainte de violation des règles de justice naturelle avait été établie au moyen du déplacement de la présomption de régularité des procédures administratives de la Commission. Selon l'appelante, il incombait aux intimées de démontrer que les procédures n'avaient été viciées par aucune violation des règles de justice naturelle. Faute de preuve en ce sens, notre Cour devait statuer qu'il y avait eu violation des règles de justice naturelle, que la Commission avait fait preuve de partialité et que la règle *audi alteram partem* n'avait pas été respectée. Cette présomption non réfutée devait justifier l'accueil de la demande de contrôle judiciaire et l'annulation de la décision de la Commission.

2. The Nature of the Change

2. La nature de la modification

38 The appeal rests on the argument that there was a change in the assessment of facts. It stressed that the only explanation for the change was the Board's acceptance of the factual theory advanced by the Union that had originally been rejected in the draft. Starting from that premise, Ellis-Don argued that in the circumstances, there were enough elements to reverse the presumption of regularity of the proceedings of the Board and to conclude that factual matters had been discussed at the full Board meeting. Thus, we first have to examine the nature of the change in question.

Le pourvoi repose sur l'argument qu'une modification de l'évaluation des faits a eu lieu. L'appelante a soutenu que cette modification ne s'expliquait que par l'acceptation par la Commission de la théorie factuelle avancée par le syndicat, qui avait initialement été rejetée dans le projet. À partir de cette prémisse, Ellis-Don a fait valoir que, dans les circonstances, il se trouvait assez d'éléments pour écarter la présomption de régularité de la procédure suivie par la Commission et conclure que des questions de fait avaient été discutées à sa réunion plénière. Par conséquent, nous devons en premier lieu examiner la nature de la modification en question.

39 From the outset, it must be conceded that the distinction between mixed questions of fact and law as opposed to pure questions of law is difficult and that the lines between them are often blurred. Moreover, a consultation procedure will not take place in a purely abstract manner. Even if the factual background is accepted, it will be considered

D'entrée de jeu, il faut admettre que la distinction entre les questions de fait et de droit et les questions de droit pur est difficile à faire et que la frontière entre elles est souvent floue. De plus, une procédure de consultation ne se déroule pas d'une manière purement abstraite. Même si les faits sont acceptés, ils sont examinés et la discussion porte

and the discussion will take place in relation to it. Sometimes intricate questions may arise. There may be discussions of the legal characterization of facts or of fact selection itself. These are especially likely when a critical part of the evidence has been disregarded and when this error might change the whole appreciation of the law applicable to the case.

In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, an administrative law case, Iacobucci J. examined the difficulty of drawing distinctions between questions of law and fact and attempted to define them as follows (at paras. 35-37):

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa.*

For example, the majority of the British Columbia Court of Appeal in *Pezim*, *supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue

sur ces faits. Des questions complexes peuvent parfois surgir. La qualification juridique des faits et le choix même des faits peuvent être abordés. Cela est particulièrement probable lorsqu'une partie essentielle de la preuve n'a pas été prise en considération et que cette erreur est susceptible de modifier toute l'appréciation du droit applicable à l'affaire.

Dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, une affaire de droit administratif, le juge Iacobucci a examiné la difficulté de distinguer entre les questions de droit et les questions de fait et il a tenté de les définir ainsi, aux par. 35-37 :

En résumé, les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties; et, enfin, les questions de droit et de fait consistent à déterminer si les faits satisfont au critère juridique. Un exemple simple permettra d'illustrer ces concepts. En droit de la responsabilité civile délictuelle, la question de savoir en quoi consiste la «négligence» est une question de droit. Celle de savoir si le défendeur a fait ceci ou cela est une question de fait. Une fois qu'il a été décidé que la norme applicable est la négligence, la question de savoir si le défendeur a respecté la norme de diligence appropriée est une question de droit et de fait. Toutefois, je reconnais que la distinction entre les questions de droit, d'une part, et celles de droit et de fait, d'autre part, est difficile à faire. Parfois, ce qui semble être une question de droit et de fait se révèle une question de droit, ou vice versa.

Par exemple, dans *Pezim*, précité, la Cour d'appel de la Colombie-Britannique à la majorité a conclu que constituait une erreur de droit le fait de considérer que de nouveaux renseignements sur la valeur d'éléments d'actif étaient un «changement important» dans les affaires d'une société. Tous étaient d'accord pour dire, dans cette affaire, que le critère approprié était de déterminer si les renseignements constituaient un changement important; le débat portait sur la question de savoir si l'obtention d'un certain type de renseignements pouvait être qualifiée de changement de cette nature. Dans une certaine mesure, donc, la question ressemblait à une question de droit et de fait. Il s'agissait cependant d'une question de droit, en partie parce que les mots en cause se trouvaient dans une disposition législative et que les questions d'interprétation des lois sont généralement des questions de droit, mais aussi parce que le point liti-

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in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.

gieux était susceptible de se présenter à nouveau dans bon nombre de cas dans le futur: le débat concernait les types de renseignements et non simplement les renseignements particuliers visés par l'instance. La règle sur laquelle la British Columbia Securities Commission semblait s'être appuyée — le fait que de nouveaux renseignements sur la valeur d'éléments d'actif peuvent constituer un changement important — était une question de droit, parce qu'elle était susceptible de s'appliquer à un grand nombre de cas.

By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [Emphasis added.]

À l'opposé, il arrive que les faits dans certaines affaires soient si particuliers, de fait qu'ils soient si uniques, que les décisions concernant la question de savoir s'ils satisfont aux critères juridiques n'ont pas une grande valeur comme précédents. Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [Je souligne.]

(See also, in a criminal law context, the remarks of Arbour J. in *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15, at paras. 21-22.)

(Voir également, dans le contexte du droit criminel, les observations du juge Arbour dans l'arrêt *R. c. Biniaris*, [2000] 1 R.C.S. 381, 2000 CSC 15, par. 21-22.)

41 In the case at hand, it appears the change in the decision of the panel concerned a matter of law and policy. The general question in issue was the problem of abandonment of bargaining rights. The factual situation as such was well established. It was not disputed that when requested to list the employers for whose employees it held bargaining rights, the IBEW, Local 353 omitted the name of Ellis-Don. It was also conceded that the Union had

En l'espèce, il appert que la modification de la décision de la formation portait sur une question de droit et de principe. La question générale en litige était le problème de la renonciation aux droits de négociation. Les faits en soi étaient bien établis. Il n'était pas contesté que lorsqu'elle a dû énumérer les employeurs relativement auxquels elle avait des droits de négociation, la section locale 353 de la FIOE a omis d'inscrire le nom de Ellis-Don. Il était également admis que le syndicat n'avait présenté aucune preuve à l'audience devant

not offered any evidence at the hearing before the panel as to the reasons for this failure.

The position taken in the first draft was that the failure to list Ellis-Don in Schedule F created a rebuttable presumption of abandonment. The final decision discarded the idea that there was such a presumption and stated that the omission of Ellis-Don's name from the schedule merely constituted one of the factors to be considered in deciding the issue of abandonment. The change consists in a different conclusion as to the legal consequences to be derived from the facts, which is a pure question of law. Moreover, it does not constitute the application of an entirely new policy: the change in the final decision brought it more in line with a number of cases decided by the OLRB that made it very difficult to establish an abandonment of bargaining rights. (See, for example, *Lorne's Electric*, [1987] O.L.R.B. Rep. 1405, at pp. 1408-10).

The appellant also argued that the change was prompted by a re-assessment of the particular facts and that it did not really concern a matter of policy and law. On the record before us, this amounts to little more than speculation.

3. The Standard for Judicial Review

The appellant relies heavily on the following statement of Gonthier J. in *Tremblay*, *supra*, at pp. 980-81:

A litigant who sees a "decision" favourable to him changed to an unfavourable one shall not think that there has been a normal consultation process. . . .

This comment is quoted out of context. It would be useful to quote at length the paragraph from which it was excerpted.

Finally, I would note that the procedure of early signature of draft decisions by members and assessors followed in the case at bar seems to me unadvisable. Although this procedure may be practical, it only adds to the appearance of bias when a decision maker decides to alter his opinion after free consultation with his col-

la formation du secteur de la construction relativement aux motifs de cette omission.

42 La position adoptée dans le projet initial était que l'omission d'inscrire Ellis-Don à l'annexe F avait donné naissance à une présomption réfutable de renonciation. La décision définitive a écarté l'idée d'une présomption de cette nature et a indiqué que l'absence du nom de Ellis-Don de l'annexe n'était qu'un des facteurs qui devaient être examinés pour trancher la question de la renonciation. La modification consiste en une conclusion différente quant aux effets juridiques découlant des faits, ce qui constitue une pure question de droit. De plus, elle ne constitue pas l'application d'un principe entièrement nouveau : la modification dans la décision définitive a rendu cette dernière plus compatible avec de nombreuses affaires tranchées par la CRTO qui ont fait en sorte qu'il est devenu très difficile de faire la preuve de la renonciation à des droits de négociation. (Voir, par exemple, *Lorne's Electric*, [1987] O.L.R.B. Rep. 1405, p. 1408 à 1410.)

43 L'appelante a également prétendu que la modification avait été causée par une réévaluation des faits en cause et qu'elle ne portait pas vraiment sur une question de principe et de droit. Le dossier dont nous sommes saisis indique que cet argument relève tout au plus d'une hypothèse.

3. La norme de contrôle judiciaire

44 L'appelante insiste beaucoup sur la déclaration suivante faite par le juge Gonthier dans l'arrêt *Tremblay*, précité, p. 980-981 :

Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation . . .

45 Comme ce commentaire est cité hors contexte, il serait bon de le replacer dans son contexte :

Je souligne finalement que la procédure de signature anticipée des projets de décisions par les membres et assesseurs suivie en l'espèce m'apparaît être à déconseiller. Même si cette procédure s'avère pratique, elle ne fait qu'ajouter à l'apparence de partialité lorsqu'un décideur décide de modifier son opinion après libre consul-

leagues. A litigant who sees a "decision" favourable to him changed to an unfavourable one will not think that there has been a normal consultation process; rather, he will have the impression that external pressure has definitely led persons who were initially favourable to his case to change their minds.

tation avec ses collègues. Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation; il aura plutôt l'impression qu'une pression extérieure a bel et bien fait changer d'avis les personnes d'abord favorables à sa cause.

In this paragraph, it appears that Gonthier J. did not state a principle of law, but merely commented on the effect of an administrative practice that required the signature of draft reasons.

Dans ce paragraphe, le juge Gonthier ne semble pas avoir énoncé un principe de droit, mais plutôt avoir simplement fait un commentaire sur l'effet d'une pratique administrative exigeant la signature d'un projet de motifs.

46 According to the appellant, a change from a favourable to an unfavourable result demonstrates an apparent failure of natural justice. The appellant asserts that its burden is limited to the demonstration of an apparent failure of natural justice and that this should suffice to justify the judicial review of the decision of the Board. The appellant would not have to establish an actual breach.

Selon l'appelante, modifier une décision favorable en une décision défavorable établit une apparence d'absence de justice naturelle. L'appelante affirme qu'elle ne doit démontrer que l'apparence d'absence de justice naturelle et que cela devrait suffire pour justifier le contrôle judiciaire de la décision de la Commission. Elle n'aurait pas à établir l'existence d'une violation réelle des règles de justice naturelle.

47 Such a test was never adopted by the law. Breaches of natural justice are grounds for judicial review, but this complex notion covers a number of very diverse situations, particularly bias and lack of independence of the adjudicator and the *audi alteram partem* rule in all its variations.

Le droit n'a jamais adopté ce critère. La violation des règles de justice naturelle constitue un motif de contrôle judiciaire, mais cette notion complexe s'applique à diverses situations très différentes, tout particulièrement la partialité et le manque d'indépendance de l'arbitre ainsi que la règle *audi alteram partem* sous toutes ses formes.

48 The appellant tries to extend to every case of breach of natural justice an approach limited to the problem of bias and lack of independence. The test of appearance of a breach was developed for the application of the concept of bias mainly in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. This test was reaffirmed in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689, which dealt with reasonable apprehension of lack of independence. In the case of bias, the courts faced the problem of establishing the state of mind of the decision-maker, evidence of which is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle,

L'appelante tente de rendre applicable à tous les cas de violation des règles de justice naturelle une démarche limitée au problème de la partialité et du manque d'indépendance. Le critère de l'apparence de violation a été élaboré en vue de l'application du concept de la partialité principalement dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, p. 394. Ce critère a été confirmé de nouveau dans l'arrêt *Valente c. La Reine*, [1985] 2 R.C.S. 673, p. 689, qui portait sur la crainte raisonnable de manque d'indépendance. Dans le cas de la partialité, les tribunaux étaient placés devant le problème d'établir l'état d'esprit de l'arbitre, preuve souvent difficile à saisir directement. Par conséquent, le critère adopté devait généralement se limiter à la preuve d'une crainte raisonnable que l'esprit de l'arbitre était susceptible d'être biaisé. Si l'on avait adopté

judicial review for bias would have been a rare event indeed.

In the case of an alleged violation of the *audi alteram partem* rule, even if it can be difficult to obtain evidence to that effect in certain cases, the applicant for judicial review must establish an actual breach. There is no authority for the proposition put forward by the appellant that an "apprehended" breach is sufficient to trigger judicial review. In *Consolidated-Bathurst*, *supra*, the reasons of Gonthier J. clearly distinguished the two problems: bias and *audi alteram partem*. On the one hand, Gonthier J. examined whether the process of institutional consultation created an apprehension of bias. While reviewing the application of the *audi alteram partem* rule, he never indicated that an apprehension of breach was sufficient to justify intervention. Indeed, he found that the record before the Court revealed no evidence that any other issues or arguments had been discussed at the full Board meeting. Therefore, he held that the appellant had failed to prove a breach of the *audi alteram partem* rule: see *Consolidated-Bathurst*, at pp. 339-40. Thus, one has to look at the nature of the natural justice problem involved to determine the threshold for judicial review. *Consolidated-Bathurst* does not stand as authority for the assertion that the threshold for judicial review in every case of alleged breach of natural justice is merely an apprehended breach of natural justice.

In support of its argument, the appellant also invoked the ruling of this Court in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, where Dickson J. (as he then was) wrote at p. 1116:

We [i.e., the Court] are not concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

comme principe général l'obligation de prouver l'existence d'une partialité réelle, le contrôle judiciaire pour motif de partialité aurait vraiment été un événement rare.

49 Dans le cas d'une présumée violation de la règle *audi alteram partem*, même s'il peut s'avérer difficile de prouver ce fait dans certains cas, celui qui demande le contrôle judiciaire doit démontrer l'existence d'une violation réelle. Aucune décision n'appuie la proposition avancée par l'appelante, selon laquelle une « crainte » de violation suffit pour donner lieu au contrôle judiciaire. Dans *Consolidated-Bathurst*, précité, le juge Gonthier a fait une distinction claire entre les deux problèmes : la partialité et la règle *audi alteram partem*. D'une part, il a examiné la question de savoir si le processus de consultation institutionnelle avait donné lieu à une crainte de partialité. En étudiant l'application de la règle *audi alteram partem*, il n'a jamais indiqué qu'une crainte de violation suffisait pour justifier une intervention. En fait, il était d'avis que le dossier dont notre Cour était saisie ne révélait aucune preuve que d'autres questions ou arguments avaient été abordés à la réunion plénière de la Commission. Il a donc conclu que l'appelant n'avait pas réussi à démontrer l'existence d'une violation de la règle *audi alteram partem* : voir *Consolidated-Bathurst*, p. 339-340. Par conséquent, il faut examiner la nature du problème de justice naturelle en cause pour déterminer le seuil justifiant le contrôle judiciaire. L'arrêt *Consolidated-Bathurst* n'appuie pas l'affirmation que le seuil justifiant le contrôle judiciaire dans tous les cas de présumée violation des règles de justice naturelle est simplement la crainte de violation de ces règles.

50 À l'appui de son argument, l'appelante a également invoqué la décision rendue par notre Cour dans *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, où le juge Dickson (plus tard Juge en chef) a écrit à la p. 1116 :

Nous [c.-à-d., notre Cour] ne sommes pas concernés ici par la preuve de l'existence d'un préjudice réel mais plutôt par la possibilité ou la probabilité qu'aux yeux des gens raisonnables, il existe un préjudice.

However, this excerpt does not have the meaning ascribed to it by the appellant. In *Kane*, the applicant had established an actual breach of the *audi alteram partem* rule: during the deliberations of the Board of Governors of UBC on a disciplinary matter, the President of the University had provided the decision-makers with supplementary facts in the absence of the parties. Dickson J., writing for the majority, simply said that once a breach of the *audi alteram partem* rule had been made out, it was not necessary to prove that this breach had caused an actual prejudice to the litigant, but only the likelihood of it.

Cet extrait n'a toutefois pas la signification que lui attribue l'appelante. Dans *Kane*, le demandeur avait démontré l'existence d'une violation réelle de la règle *audi alteram partem* : au cours des délibérations du Conseil d'administration de l'U.C.-B. dans une affaire disciplinaire, le président de l'université avait fait part aux arbitres de faits supplémentaires en l'absence des parties. S'exprimant au nom des juges majoritaires, le juge Dickson a simplement affirmé qu'une fois la violation de la règle *audi alteram partem* établie, il n'était pas nécessaire de prouver que cette violation avait causé un préjudice réel au justiciable, mais seulement de démontrer la probabilité de préjudice.

51 In the present case, the Court must apply the normal standards of judicial review in matters involving the *audi alteram partem* rule. In support of its allegation of a breach of the *audi alteram partem* rule, Ellis-Don had to demonstrate an actual breach. As stated above, it could not get directly at the evidence after the dismissal of its interlocutory motion. The record as such does not indicate any breach of this nature. The only information available is that discussions took place at the full Board meeting and that a change was made on a question of law and policy in the draft decision. This is not sufficient to warrant judicial review.

Dans la présente affaire, notre Cour doit appliquer les normes de contrôle judiciaire habituelles dans les questions portant sur la règle *audi alteram partem*. Pour étayer son allégation de violation de la règle *audi alteram partem*, Ellis-Don devait démontrer l'existence d'une violation réelle. Comme je l'ai mentionné précédemment, elle n'a pas pu obtenir de preuve directe à la suite du rejet de sa requête interlocutoire. À sa face même, le dossier n'indique aucune violation de cette nature. Les seuls renseignements disponibles sont que des discussions ont eu lieu à la réunion plénière de la Commission et qu'une modification a été apportée relativement à une question de droit et de principe qui figurait dans le projet de décision. Cela n'est pas suffisant pour justifier un contrôle judiciaire.

52 The case reveals a tension between the fairness of the process and the principle of deliberative secrecy. The existence of this tension was conceded by Gonthier J. in *Tremblay*, *supra*, at pp. 965-66. Undoubtedly, the principle of deliberative secrecy creates serious difficulties for parties who fear that they may have been the victims of inappropriate tampering with the decision of the adjudicators who actually heard them. Even if this Court has refused to grant the same level of protection to the deliberations of administrative tribunals as to those of the civil and criminal courts, and would allow interrogation and discovery as to the process followed, Gonthier J. recognized that this principle of deliberative secrecy played an impor-

La présente affaire révèle l'existence d'une tension entre le caractère équitable du processus et le principe du secret du délibéré. L'existence de cette tension a été admise par le juge Gonthier dans *Tremblay*, précité, p. 965-966. Il ne fait aucun doute que le principe du secret du délibéré crée de graves difficultés aux parties qui craignent avoir été victimes de manipulation de la décision des arbitres qui les ont entendues. Bien que notre Cour ait refusé d'accorder le même niveau de protection aux délibérations des tribunaux administratifs qu'à celles des cours de justice civile et criminelle et qu'elle n'ait pas permis l'interrogatoire et l'interrogatoire préalable relativement au processus suivi, le juge Gonthier a reconnu que ce principe du

tant role in safeguarding the independence of administrative adjudicators.

Deliberative secrecy also favours administrative consistency by granting protection to a consultative process that involves interaction between the adjudicators who have heard the case and the members who have not, within the rules set down in *Consolidated-Bathurst*, *supra*. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency.

Satisfying those requirements of consistency and independence comes undoubtedly at a price, this price being that the process becomes less open and that litigants face tough hurdles when attempting to build the evidentiary foundation for a successful challenge based on alleged breaches of natural justice (see, e.g., H. N. Janisch, "Consistency, Rulemaking and *Consolidated-Bathurst*" (1991), 16 *Queen's L.J.* 95; D. Lemieux, "L'équilibre nécessaire entre la cohérence institutionnelle et l'indépendance des membres d'un tribunal administratif: *Tremblay* c. *Québec (Commission des affaires sociales)*" (1992), 71 *Can. Bar Rev.* 734). The present case provides an excellent example of those difficulties.

After the dismissal of its interlocutory motion, the appellant could not examine the officers of the Board on the process that had been followed. In the absence of any further evidence, this Court cannot reverse the presumption of regularity of the administrative process simply because of a change in the reasons for the decision, especially when the change is limited on its face to questions of law and policy, as discussed above. A contrary approach to the presumption would deprive administrative tribunals of the independence that the principle of deliberative secrecy assures them in their decision-making process. It could also jeopardize institutionalized consultation proceedings that have become more necessary than ever to

secret du délibéré jouait un rôle important dans la protection de l'indépendance des arbitres administratifs.

53 Le secret du délibéré favorise également la cohérence administrative au moyen de la protection qu'il confère à un processus consultatif qui comporte une interaction entre les arbitres qui ont entendu l'affaire et les membres qui ne l'ont pas entendue, dans le cadre des règles établies dans *Consolidated-Bathurst*, précité. Sans cette protection, il risque d'y avoir un effet paralysant sur les consultations institutionnelles, ce qui priverait les tribunaux administratifs d'un moyen essentiel d'assurer la cohérence.

54 Il ne fait aucun doute que le respect de ces exigences de cohérence et d'indépendance est assorti d'un prix, ce prix étant que le processus devient moins ouvert et que les justiciables font face à de grands obstacles lorsqu'ils tentent de bâtir le fondement probatoire permettant d'avoir gain de cause dans une contestation fondée sur de présumées violations des règles de justice naturelle (voir, p. ex., H. N. Janisch, « Consistency, Rulemaking and *Consolidated-Bathurst* » (1991), 16 *Queen's L.J.* 95; D. Lemieux, « L'équilibre nécessaire entre la cohérence institutionnelle et l'indépendance des membres d'un tribunal administratif : *Tremblay* c. *Québec (Commission des affaires sociales)* » (1992), 71 *R. du B. can.* 734). La présente affaire fournit un excellent exemple de ces difficultés.

55 Après le rejet de sa requête interlocutoire, l'appelante n'a pu interroger les responsables de la Commission au sujet du processus suivi. En l'absence de toute preuve additionnelle, notre Cour ne peut pas écarter la présomption de régularité du processus administratif simplement en raison d'une modification dans les motifs de la décision, surtout lorsque la modification est limitée à sa face même à des questions de droit et de principe, comme je l'ai mentionné précédemment. Une méthode contraire relative à la présomption priverait les tribunaux administratifs de l'indépendance que le principe du secret du délibéré leur confère dans le cadre de leur processus décisionnel. Cela pourrait également compromettre des procédures

ensure the consistency and predictability of the decisions of administrative tribunals.

4. Conclusion on the Grounds for Judicial Review

56 The record shows no indication of a change on the facts, of impropriety or of a violation of the principles governing institutional consultation. Any intervention would have to be based on mere speculation about what might have happened during the consultation with the full Board. The judicial review of a decision of an administrative body may not rest on speculative grounds. Thus, the Divisional Court and the Court of Appeal of Ontario correctly applied the rules governing judicial review when they dismissed the appellant's application.

5. Failure to Ask for Reconsideration

57 There was also some discussion in this Court about the failure of the appellant to ask for reconsideration. However, even the Board conceded that in the circumstances, reconsideration did not constitute an absolute prerequisite to judicial review. In the present case, it might have been a good tactical move that would perhaps have elicited some information from the Board about its consultation process, but the principles of judicial review did not require the use or exhaustion of this particular remedy. Of course, in some cases, failure to seek reconsideration might be a factor to be weighed by superior courts when determining whether to grant a remedy in an application for judicial review.

VII. Conclusion

58 For these reasons, I would dismiss the appeal with costs.

de consultation institutionnelle, devenues plus nécessaires que jamais pour assurer la cohérence et la prévisibilité des décisions des tribunaux administratifs.

4. Conclusion relative aux motifs de contrôle judiciaire

Le dossier ne donne aucune indication d'une modification quant aux faits, d'une irrégularité ou d'une violation des principes régissant la consultation institutionnelle. Toute intervention serait nécessairement fondée sur de simples hypothèses au sujet de ce qui a pu se passer pendant la consultation à la réunion plénière de la Commission. Le contrôle judiciaire de la décision d'un organisme administratif ne peut pas reposer sur des motifs hypothétiques. Par conséquent, la Cour divisionnaire et la Cour d'appel de l'Ontario ont correctement appliqué les règles régissant le contrôle judiciaire lorsqu'elles ont rejeté la demande de l'appelante.

5. L'omission de demander un nouvel examen

L'omission de l'appelante de demander un nouvel examen a également été abordée devant notre Cour. Toutefois, même la Commission a admis que, dans les circonstances, un nouvel examen ne constituait pas un préalable obligatoire au contrôle judiciaire. En l'espèce, cela aurait pu constituer une bonne tactique qui aurait peut-être permis de tirer des renseignements de la Commission au sujet de son processus de consultation, mais les principes applicables au contrôle judiciaire n'exigeaient pas l'usage ou l'épuisement de ce recours particulier. Il va sans dire que, dans certains cas, l'omission de demander un nouvel examen pourrait constituer un facteur qu'une cour de juridiction supérieure devrait prendre en considération pour déterminer s'il y a lieu d'accorder un redressement dans le cadre d'une demande de contrôle judiciaire.

VII. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

The reasons of Major and Binnie JJ. were delivered by

BINNIE J. (dissenting) — It is occasionally observed that the most important person in the hearing room is the party that has just lost a case. Whatever may be the loser's bitterness or incredulity at the outcome, the overriding imperative is that the outcome was — and was seen to be — reached impartially under a fair procedure. That is the overriding issue in this appeal.

The appellant, a general contractor in the Ontario construction industry, claims that 30 years ago the respondent union abandoned whatever bargaining rights it held for the employees of the appellant and its subcontractors. It complains that a panel of the Ontario Labour Relations Board that had heard weeks of evidence and argument and which reached an initial decision in the appellant's favour, subsequently abdicated its adjudicative responsibilities in favour of a full Board meeting. The Chair of the Board, the Alternate Chair, the 20 Vice-Chairs and about 40 other members were invited to the meeting to discuss the decision before its release in the absence of the parties whose interests were directly at stake. The appellant was given no opportunity to address evidence or argument to this wider audience.

The appellant's complaint is thus that a decision in its favour, based on what the Board itself characterized as an issue of fact, was changed to one against it immediately following a full Board meeting called specifically to consider the reasons for decision in this specific case. It further complains that the Board resisted every legal avenue for the appellant to shed further light on how or why that change occurred. The appellant says it has been unfairly dealt with.

Version française des motifs des juges Major et Binnie rendus par

LE JUGE BINNIE (dissident) — On fait parfois remarquer que la personne la plus importante dans la salle d'audience est la partie qui vient tout juste de perdre une cause. Malgré l'amertume ou l'incrédulité du perdant face à l'issue de l'affaire, l'exigence prédominante est que la conclusion ait été, et ait paru être, tirée de façon impartiale dans le cadre d'une procédure équitable. Il s'agit de la question prédominante dans le présent pourvoi. 59

L'appelante, un entrepreneur général œuvrant dans l'industrie de la construction en Ontario, prétend qu'il y a 30 ans le syndicat intimé a renoncé aux droits de négociation qu'il pouvait détenir relativement à ses employés et à ses sous-traitants. Elle se plaint qu'une formation de la Commission des relations de travail de l'Ontario, qui a examiné des éléments de preuve et entendu des arguments pendant des semaines et a rendu une décision initiale en faveur de l'appelante, a ensuite abandonné ses responsabilités décisionnelles en faveur de la Commission en réunion plénière. Le président de la Commission, le président suppléant, les 20 vice-présidents et quelque 40 autres membres ont été invités à la réunion, avant que la décision ne soit rendue publique, pour en discuter en l'absence des parties dont les intérêts étaient directement touchés. Aucune possibilité n'a été offerte à l'appelante de présenter des éléments de preuve ou des arguments à cet auditoire plus nombreux. 60

La plainte de l'appelante réside donc dans le fait qu'une décision avait été rendue en sa faveur, à la lumière de ce que la Commission elle-même qualifiait de question de fait, pour ensuite être modifiée à son désavantage suivant immédiatement une réunion plénière de la Commission convoquée précisément en vue de l'examen des motifs de la décision rendue dans cette affaire. L'appelante se plaint également du fait que la Commission a contesté tous les moyens légaux qui lui auraient permis d'en connaître davantage sur la façon dont ce changement s'est produit ou sur les raisons pour lesquelles il s'est produit. L'appelante dit avoir été traitée inéquitablement. 61

62 When this Court decided in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, that panel members could consult with the full Board on matters of policy as opposed to issues of fact, it was feared in some quarters that the integrity of administrative decision-making could appear to be compromised without effective redress. This appeal tests the limits of the *Consolidated-Bathurst* rule. It also tests the availability of effective redress for non-observance of those limits.

Lorsque notre Cour a décidé dans l'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, que les membres d'une formation pouvaient consulter la Commission dans son ensemble sur des questions de principe, par opposition à des questions de fait, certains craignaient que l'intégrité du processus de décision administrative puisse paraître compromise sans qu'il n'y ait de redressement efficace. Le présent pourvoi amène la Cour à se pencher sur les limites de la règle établie dans l'arrêt *Consolidated-Bathurst*. Il l'amène également à examiner la possibilité de redressement efficace en cas de non-respect de ces limites.

63 The Board has long treated abandonment of bargaining rights as a question of fact. In its initial decision prepared by the Vice-Chair, which the Board acknowledged to be authentic, the panel wrote that it "has found unequivocal evidence of abandonment by the applicant [union] of its bargaining rights prior to 1978" (para. 55), being the date when the Ontario construction industry went to province-wide bargaining. In its revised decision, the Vice-Chair wrote that "considering all the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining" ([1992] OLRB Rep. 147, at para. 54). The evidence discloses no explanation for the change other than the full Board meeting. In my view, *Consolidated-Bathurst* should not be interpreted to authorize the full Board to micro-manage the output of particular panels to the extent evident in this case. The concept of "policy" has been stretched beyond its breaking point. The principle that "he who hears must decide" should be vindicated. I would therefore allow the appeal and return the issue to be addressed by a different panel of the Board.

La Commission a longtemps considéré la renonciation aux droits de négociation comme une question de fait. Dans sa décision initiale préparée par la vice-présidente et dont la Commission a reconnu l'authenticité, la formation a écrit qu'elle [TRADUCTION] « a conclu à l'existence d'une preuve sans équivoque que la demanderesse [la FIOE] a renoncé à ses droits de négociation avant 1978 » (par. 55), soit la date à laquelle l'industrie de la construction en Ontario est passée à un régime de négociation à l'échelle de la province. Dans la décision révisée de la formation, la vice-présidente a écrit que [TRADUCTION] « vu l'ensemble des circonstances, la Commission estime que la section locale 353 n'a pas renoncé à ses droits de négociation avant la mise en œuvre du régime de négociation à l'échelle de la province » ([1992] OLRB Rep. 147, par. 54). Aucune explication pour le changement ne ressort de la preuve autre que la tenue de la réunion plénière de la Commission. Je suis d'avis que l'arrêt *Consolidated-Bathurst* ne doit pas être interprété comme permettant à la Commission dans son ensemble de faire la microgestion des conclusions tirées par des formations particulières d'une façon aussi évidente que dans la présente affaire. La notion de « principe » a été démesurément étendue. Le principe voulant que « celui qui entend doit trancher » doit être défendu. Je suis donc d'avis d'accueillir le pourvoi et de renvoyer la question pour qu'elle soit examinée par une formation différente de la Commission.

I have had the benefit of reading the reasons of my colleague LeBel J. and will not duplicate his description of the events leading to the present controversy or his review of the leading authorities. I will elaborate only as may be necessary to identify my points of disagreement.

J'ai eu l'avantage de lire les motifs de mon collègue le juge LeBel, et je ne reprendrai pas sa description des événements qui ont mené au présent litige ni son examen des précédents. J'apporterai des précisions seulement dans la mesure où cela m'est nécessaire pour indiquer les points sur lesquels je suis en désaccord. 64

Standard of Review

La norme de contrôle

The respondent union argues that the Board's decision should be set aside only if it is "patently unreasonable". This presupposes that the error was made within the Board's jurisdiction. The appellant contends that the panel of the Board lost jurisdiction when it called for a full Board meeting to discuss what it regards as a question of fact. Compliance with the rules of natural justice is a legal issue. The standard of review is correctness as noted in D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf), vol. 2, at para. 14:2300, pp. 14-14 and 14-15: 65

Le syndicat intimé prétend que la décision de la Commission ne doit être écartée que si elle est « manifestement déraisonnable ». Cela suppose que l'erreur a été commise dans le cadre de la compétence de la Commission. L'appelante soutient que la formation a perdu compétence lorsqu'elle a demandé la tenue d'une réunion plénière de la Commission pour discuter de ce qu'elle considère comme une question de fait. La conformité aux règles de justice naturelle est une question de droit. La norme de contrôle est celle de la décision correcte, comme l'ont souligné D. J. M. Brown et J. M. Evans dans *Judicial Review of Administrative Action in Canada* (feuilles mobiles), vol. 2, par. 14:2300, p. 14-14 et 14-15 :

> . . . whether the administrative decision-maker has breached the rules of natural justice or the duty of procedural fairness by failing to permit any, or adequate, participation by the person concerned will usually be assessed on the basis of "correctness." And the presence of a privative clause will be of no consequence in this regard.

> [TRADUCTION] . . . la question de savoir si le décideur administratif a contrevenu aux règles de justice naturelle ou à l'obligation d'équité procédurale en ne permettant pas à la personne concernée d'apporter sa participation ou une participation adéquate est généralement évaluée selon la norme de la « décision correcte ». Et la présence d'une clause privative n'a aucune conséquence à cet égard.

I think this is a correct statement of the law.

J'estime qu'il s'agit d'un énoncé correct du droit.

He Who Hears Must Decide

Celui qui entend doit trancher

Nothing is more fundamental to administrative law than the principle that he who hears must decide. *Consolidated-Bathurst*, *supra*, affirmed the vigour of this general rule while recognizing an exception for a full board meeting to give "quality and coherence" in matters of Board policy (p. 324). Policy issues were thought to be different from fact finding, and the latter was ruled off- 66

Rien n'est plus fondamental en droit administratif que le principe voulant que celui qui entend doit décider. L'arrêt *Consolidated-Bathurst*, précité, a confirmé l'importance de cette règle générale tout en reconnaissant l'existence d'une exception s'appliquant aux réunions plénières de la Commission et visant à donner de la « qualité et de [la] cohérence » à ses politiques (p. 324). Les questions de principe ont été jugées différentes de l'appréciation des faits, qui, a-t-on estimé, ne pouvait même pas

limits even for discussion at the full Board meeting, *per* Gonthier J., at p. 335:

> Full board meetings held on an *ex parte* basis do entail some disadvantages from the point of view of the *audi alteram partem* rule because the parties are not aware of what is said at those meetings and do not have an opportunity to reply to new arguments made by the persons present at the meeting. In addition, there is always the danger that the persons present at the meeting may discuss the evidence. [Emphasis added.]

At p. 339, Gonthier J. stressed that the *Consolidated-Bathurst* principle is limited to "legal or policy arguments *not* raising issues of fact" (emphasis added):

> It is true that on factual matters the parties must be given a "fair opportunity . . . for correcting or contradicting any relevant statement prejudicial to their view". . . . However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. [Emphasis added.]

67 It appears more probable than not that at the full Board meeting in this case there was a discussion about factual matters which likely included "statement[s] prejudicial to [the appellant's] view" because the panel subsequently reversed itself on the appropriateness of an adverse inference against the union for its failure to lead relevant evidence, reversed itself on the issue of abandonment, and thus reversed itself on the outcome of the hearing.

The Issue of Abandonment

68 The Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1 ("the Act") does not speak of abandonment of bargaining rights. The concept was developed in the Board's jurisprudence to allow termination of the bargaining rights of a union that fails to "actively promote those rights". These principles were adopted by the panel, citing earlier cases,

être abordée à la réunion plénière de la Commission, le juge Gonthier, à la p. 335 :

> Les réunions plénières de la Commission tenues *ex parte* comportent certains inconvénients sur le plan de la règle *audi alteram partem* parce que les parties ne savent pas ce qui a été dit à ces réunions et n'ont pas la possibilité de répliquer aux nouveaux arguments soumis par les personnes qui y ont assisté. De plus, il y a toujours le risque que les personnes présentes à la réunion discutent de la preuve. [Je souligne.]

À la p. 339, le juge Gonthier a souligné que le principe établi dans l'arrêt *Consolidated-Bathurst* se limitait aux « arguments juridiques ou de politique qui *ne* soulèvent *pas* de questions de fait » (italiques ajoutés) :

> Il est vrai que relativement aux questions de fait, les parties doivent obtenir une [TRADUCTION] «possibilité raisonnable [. . .] de corriger ou de contredire tout énoncé pertinent qui nuit à leur point de vue» [. . .] Cependant, la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause adéquatement et de répondre aux arguments qui leur sont défavorables. [Je souligne.]

Il paraît plus probable que des questions factuelles comprenant vraisemblablement des « énoncé[s] [. . .] qui nui[sent au] point de vue [de l'appelante] » ont été abordées à la réunion plénière de la Commission en l'espèce, parce que la formation a par la suite renversé sa propre décision sur l'opportunité d'une conclusion défavorable au syndicat en raison de son omission de produire une preuve pertinente et qu'elle l'a renversée sur la question de la renonciation et quant à l'issue de l'audience.

La question de la renonciation

La *Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, ch. 1 (« la Loi ») ne traite pas de la renonciation aux droits de négociation. Cette notion a été élaborée dans la jurisprudence de la Commission en vue de permettre l'abolition des droits de négociation d'un syndicat qui fait défaut de faire la [TRADUCTION] « promotion active de ces droits ». Citant des décisions antérieures, la formation a adopté ces principes en utilisant des termes

in identical terms in para. 43 of its initial decision and para. 43 of its final decision:

> Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act. . . . [Emphasis added.]

The issue for the panel, therefore, was whether the respondent union had "actively promote[d]" its bargaining rights with the appellant, or had lost them "through disuse".

The Initial Decision

I take the following events from the initial decision prepared for the panel dated December 1991. (It seems to be more than a draft. It appears from the "true copy" in the record that the original was signed by the presiding Vice-Chair.)

On January 12, 1990, IBEW Local 894 grieved the appellant's subcontract of electrical work to a non-union contractor. It claimed that the appellant was bound by the current province-wide agreement between the Electrical Contractors Association of Ontario and the IBEW Construction Council of Ontario. The appellant took the position that it was not party to that agreement. In response, the union reached back almost 30 years to a "working agreement" the IBEW, Local 353 had signed with the appellant in 1962. The appellant's position was that if there was voluntary recognition of IBEW bargaining rights at that time (which it denied), such bargaining rights had been abandoned no later than the early 1970s when the Electrical Contractors Association of Toronto sought accreditation as bargaining agent for employers with whom

identiques au par. 43 de sa décision initiale et au par. 43 de sa décision définitive :

> [TRADUCTION] Au cours des 20 dernières années, le principe de la renonciation s'est profondément enraciné dans la jurisprudence de la Commission. Une fois qu'un syndicat a obtenu des droits de négociation par voie d'accréditation ou de reconnaissance volontaire, on s'attend à ce qu'il fasse la promotion active de ces droits. Si un syndicat néglige d'exercer des droits de négociation, il peut les perdre par inaction. La question de savoir si un syndicat a renoncé à ses droits de négociation doit être examinée à la lumière des faits de chaque affaire particulière, mais une fois que la Commission est convaincue qu'un syndicat a omis de préserver ses droits, le syndicat ne peut plus les invoquer pour demander la nomination du conciliateur prévu par l'article 15 de la Loi. . . [Je souligne.]

La question que devait donc trancher la formation était de savoir si le syndicat intimé avait fait la « promotion active » de ses droits de négociation envers l'appelante ou s'il les avait perdus « par inaction ».

La décision initiale

69 Je tire les événements suivants de la décision initiale préparée pour la formation et datée de décembre 1991. (Il semble s'agir de plus qu'une ébauche. Il ressort de la « copie certifiée conforme » figurant au dossier que l'original a été signé par la vice-présidente.)

70 Le 12 janvier 1990, la section locale 894 de la FIOE a déposé un grief visant le marché de sous-traitance de travaux d'électricité conclu par l'appelante avec un entrepreneur dont les employés n'étaient pas syndiqués. Elle a prétendu que l'appelante était liée par la convention en cours à l'échelle de la province entre l'Electrical Contractors Association of Ontario et le conseil des métiers de la construction de la FIOE pour l'Ontario. L'appelante a soutenu ne pas être partie à cette convention. En réponse, le syndicat a fait un recul de 30 ans environ dans le passé pour invoquer une [TRADUCTION] « convention de travail » que la section locale 353 de la FIOE avait signée avec l'appelante en 1962. L'appelante a avancé que s'il y avait eu reconnaissance volontaire des droits de négociation de la FIOE à cette époque (ce qu'elle a

the IBEW, Local 353 asserted bargaining rights. The statutory form ("schedule F") and regulations required the union to list "all employers" in the unit with whom the respondent union "is entitled to bargain as a result of a collective agreement, a recognition agreement or a certificate of The Labour Relations Board that has not yet resulted in a collective agreement" but who had not directly employed electricians in the year prior to the application. The IBEW, Local 353 had filed such a list. It did not include the name of the appellant. The appellant argued that if any bargaining rights had been acquired under what the Board regarded as the 1962 "recognition agreement", such rights had been abandoned by the time the union filed the accreditation documents in 1971. The accreditation exercise was subsequently extended to province-wide bargaining.

nié), ces droits avaient fait l'objet d'une renonciation au plus tard au début des années 70, lorsque l'Electrical Contractors Association of Toronto a sollicité l'accréditation en tant qu'agent de négociation envers les employeurs au sujet desquels la section locale 353 de la FIOE faisait valoir des droits de négociation. Le formulaire prévu par la loi (« l'annexe F ») ainsi que le règlement exigeaient que le syndicat dresse la liste de [TRADUCTION] « tous les employeurs » de l'unité avec laquelle le syndicat intimé [TRADUCTION] « a le droit de négocier en vertu d'une convention collective, d'une entente de reconnaissance ou d'un certificat de la Commission des relations de travail qui n'a pas encore donné lieu à une convention collective », mais qui n'avaient pas directement employé d'électriciens dans l'année précédant la demande. La section locale 353 de la FIOE avait déposé une telle liste. Le nom de l'appelante n'y figurait pas. L'appelante a prétendu que si des droits de négociation avaient été acquis en vertu de ce que la Commission considérait comme l'« entente de reconnaissance » de 1962, ces droits avaient fait l'objet d'une renonciation au moment où le syndicat avait déposé les documents d'accréditation en 1971. L'exercice d'accréditation a ensuite été étendu à la négociation à l'échelle de la province.

71 The initial decision included a description of the 1971 accreditation process:

> What is important is that, as part of an accreditation application, the respondent trade union files with the Board a "schedule F" wherein the union lists those employers with whom it asserts it has bargaining rights but who did not have employees within one year prior to the accreditation application date. In reviewing Board File 1469-71-R, wherein an accreditation order was issued on January 9, 1975, it is apparent that Ellis-Don's name does not appear on the final schedule F. Nor was Ellis-Don's name struck off an initial schedule F as were other employers who challenged their inclusion on schedule F by the respondent trade union. Quite simply, it appears that Local 353 did not include Ellis-Don's name on schedule F which the union filed with the Board.

La décision initiale comportait une description du processus d'accréditation de 1971 :

> [TRADUCTION] Ce qui compte, c'est que dans le cadre de sa demande d'accréditation, le syndicat intimé dépose auprès de la Commission une « annexe F », dans laquelle il énumère les employeurs au sujet desquels il affirme avoir des droits de négociation mais qui n'avaient aucun employé dans l'année précédant la date de la demande d'accréditation. Il ressort du dossier 1469-71-R de la Commission, dans lequel une ordonnance d'accréditation a été rendue le 9 janvier 1975, que le nom de Ellis-Don ne figure pas à l'annexe F finale. Le nom de Ellis-Don n'avait pas non plus été radié d'une annexe F initiale comme l'avait été celui d'autres employeurs ayant contesté leur inclusion dans cette annexe par le syndicat intimé. Il semble tout simplement que la section locale 353 n'a pas inscrit le nom de Ellis-Don à l'annexe F que le syndicat a déposée auprès de la Commission.

An accreditation order was made on January 9, 1975. It is important to emphasize that the union's grievance in this case is based on its view that the appellant is bound by the subcontracting clause in the provincial agreement between the Electrical Contractors Association of Ontario and the IBEW Construction Council of Ontario, which is the present version of the agreement which grew out of the accreditation process in the 1970s, in which the union failed to assert bargaining rights against the appellant.

Une ordonnance d'accréditation a été rendue le 9 janvier 1975. Il est important de souligner que le grief du syndicat en l'espèce est fondé sur son opinion que l'appelante est liée par la clause de sous-traitance figurant dans la convention provinciale conclue entre l'Electrical Contractors Association of Ontario et le conseil des métiers de la construction de la FIOE pour l'Ontario, la version actuelle de la convention qui a découlé du processus d'accréditation des années 70, où le syndicat a omis de faire valoir l'existence de droits de négociation à l'égard de l'appelante. 72

The appellant raised a variety of objections and arguments against the union's contention, most of which were rejected. In particular, in its initial decision the panel refused to draw any adverse inference from the failure of various unions (apart from the "civil trades") to attempt to enforce the province-wide agreements against the appellant prior to 1990, despite evidence of limited subcontracting of work to non-union firms over the years. The respondent union explained that if it did not appear to be "actively promot[ing]" its rights, it was because there was no need to. The appellant invariably gave work to electrical subcontractors who were unionized. The only point on which the panel concluded that union action may have been called for was the accreditation process which led to the predecessor agreement to the agreement it now sues upon:

L'appelante a soulevé un éventail d'oppositions et d'arguments contre la prétention du syndicat, dont la plupart ont été rejetés. En particulier, dans sa décision initiale, la formation a refusé de tirer une conclusion défavorable du fait que différents syndicats (à l'exception de ceux des « métiers ») n'avaient pas tenté de faire appliquer les conventions provinciales à l'appelante avant 1990, malgré la preuve que, au fil des ans, quelques marchés de sous-traitance avaient été conclus avec des entreprises dont les employés n'étaient pas syndiqués. Le syndicat intimé a expliqué qu'il n'avait pas paru faire la « promotion active » de ses droits parce que cela n'était pas nécessaire. L'appelante confiait continuellement des travaux à des sous-traitants en électricité dont les employés étaient syndiqués. Le seul point sur lequel la formation a conclu que le syndicat aurait pu devoir agir était le processus d'accréditation qui a mené à la convention précédant celle sur laquelle il s'appuie maintenant pour poursuivre : 73

> Local [8]94, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F, as would be expected if the union in the accreditation application thought it possessed bargaining rights vis-a-vis Ellis-Don. Absent an explanation, the most reasonable inference is that the union in the accreditation application assumed it did not possess such bargaining rights in 1971, when the accreditation application was filed. [Emphasis added.]

> [TRADUCTION] La section locale [8]94, la demanderesse en l'espèce, n'a présenté aucun élément de preuve pour expliquer l'omission de la section locale 353 d'inclure Ellis-Don à l'annexe F, ce à quoi on s'attendrait si le syndicat visé par la demande d'accréditation croyait avoir des droits de négociation vis-à-vis Ellis-Don. Faute d'explication, la conclusion la plus raisonnable à tirer est que le syndicat visé par la demande d'accréditation a tenu pour acquis qu'il n'avait pas de droits de négociation en 1971, au moment du dépôt de la demande d'accréditation. [Je souligne.]

Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts. The union, though

La question de savoir si une conclusion défavorable est justifiée ou non par les faits particuliers est inextricablement liée à la détermination des faits.

challenged to do so, declined to call any witness with knowledge of the events of 1971. "Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it", J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29, at para. 28.

74 In sum, the panel, in its initial decision, reasoned as follows:

> 1. A union that was actively pursuing bargaining rights against the appellant under the predecessor agreement to the one now sued upon was required by the Act and Regulations to list the appellant on schedule F.
>
> 2. Unless explained away by the union, the failure afforded *some* evidence of abandonment.
>
> 3. The union called witnesses, but nobody who could speak to its failure to include the appellant in schedule "F".
>
> 4. There was no other evidence of "active" assertion of bargaining rights by the union that could tilt the panel's conclusion in the union's favour.

75 In the result, having regard to the union's failure to "actively promote" its bargaining rights, the panel in its initial decision found "unequivocal evidence of abandonment by the applicant [IBEW] of its bargaining rights prior to 1978".

76 My colleague LeBel J. concludes at para. 42 that this initial decision turns on a "rebuttable presumption" which was subsequently discarded, as a matter of policy, by the full Board. It is therefore necessary to examine in some detail what changes to the decision were made following the full Board meeting.

Même si on l'a mis au défi de le faire, le syndicat n'a cité aucun témoin connaissant les événements de 1971. [TRADUCTION] « Une telle omission équivaut à l'aveu implicite que la déposition du témoin absent serait défavorable à la cause de la partie ou, du moins, qu'elle ne l'appuierait pas », J. Sopinka, S. N. Lederman et A. W. Bryant, *The Law of Evidence in Canada* (2e éd. 1999), p. 297; *R. c. Jolivet*, [2000] 1 R.C.S. 751, 2000 CSC 29, par. 28.

En bref, la formation a suivi le raisonnement suivant dans sa décision initiale :

> 1. Un syndicat faisant activement valoir des droits de négociation contre l'appelante en vertu de la convention antérieure à celle qui fait maintenant l'objet de la poursuite était tenu par la Loi et le Règlement d'inscrire l'appelante à l'annexe F.
>
> 2. Cette omission constituait une *certaine* preuve de renonciation, sauf si elle avait fait l'objet d'une explication de la part du syndicat.
>
> 3. Le syndicat a fait entendre des témoins, mais aucun n'a pu expliquer son omission d'inscrire l'appelante à l'annexe F.
>
> 4. Il n'y avait aucune autre preuve d'affirmation « active » de droits de négociation par le syndicat, qui pourrait faire pencher la conclusion de la formation en faveur du syndicat.

Par conséquent, compte tenu de l'omission du syndicat de faire la « promotion active » de ses droits de négociation, la formation a conclu dans sa décision initiale à l'existence d'une [TRADUCTION] « preuve sans équivoque que la demanderesse [la FIOE] a renoncé à ses droits de négociation avant 1978 ».

Mon collègue le juge LeBel conclut au par. 42 que cette décision initiale repose sur une « présomption réfutable » qui a ensuite été écartée pour des raisons de principe par l'ensemble des membres de la Commission. Il est donc nécessaire d'examiner plus en détail les modifications qui ont été apportées à la décision à la suite de la réunion plénière de la Commission.

The Full Board Meeting

For reasons which are not explained, the Vice-Chair requested a full Board meeting to discuss the panel's initial decision. The Vice-Chair did not formulate a policy issue or notify colleagues that there would be a general review of the policy implications of abandonment. The Vice-Chair just referenced this particular pending decision as the topic for full Board discussion.

Consolidated-Bathurst holds that convening a full board meeting while a particular case is pending is permissible so long as (i) the question for discussion is one of policy rather than fact, (ii) that in the end the panel is free to make its own decision, and (iii) that if the discussion at the full board raises matters not addressed by the parties, that the parties be put on notice and permitted to make representations before a decision is made.

In my view, the procedure adopted in the present case violates only the first of these limitations. There is no evidence that the second limitation was not observed, and as to the third limitation, the appellant had the opportunity to address the panel on every aspect of the abandonment issue. Its proper complaint is that the initial decision ought not to have been referred to the full Board meeting at all.

Fact *versus* Policy

I agree with my colleague LeBel J. that one of the conditions precedent to the validity of a full board meeting is that "the consultation had to be limited to questions of policy and law. The members of the organization who had not heard the evidence could not be allowed to re-assess it. The consultation had to proceed on the basis of the facts as stated by the members who had actually heard the evidence" (para. 29). This limitation is based on what was said by Gonthier J. for the majority in *Consolidated-Bathurst*, *supra*, at

La réunion plénière de la Commission

77 Pour des motifs qui ne sont pas expliqués, la vice-présidente a demandé la tenue d'une réunion plénière de la Commission pour discuter de la décision initiale de la formation. La vice-présidente n'a formulé aucune question de principe ni avisé ses collègues qu'il y aurait un examen général des conséquences de la renonciation sur le plan des principes. Elle s'est contentée d'indiquer que cette décision à venir serait le sujet de discussion de la réunion plénière.

78 L'arrêt *Consolidated-Bathurst* conclut qu'il est permis de convoquer une réunion plénière de la Commission pendant qu'une affaire particulière est en cours dans la mesure où (i) la question à discuter est une question de politique plutôt qu'une question de fait, (ii) la formation est libre en bout de ligne de rendre sa propre décision, et (iii) si la discussion ayant lieu à la réunion plénière soulève des questions non abordées par les parties, celles-ci sont avisées et peuvent faire des observations avant qu'une décision ne soit prise.

79 Je suis d'avis que la procédure adoptée dans la présente affaire ne viole que la première de ces restrictions. Il n'y a aucune preuve indiquant que la deuxième restriction n'a pas été respectée et, quant à la troisième, l'appelante a eu la possibilité de présenter ses arguments à la formation relativement à toutes les facettes de la question de la renonciation. L'appelante prétend à bon droit que la décision initiale n'aurait jamais dû être renvoyée à la réunion plénière de la Commission.

Les faits par opposition aux principes

80 Je conviens avec mon collègue le juge LeBel que l'une des conditions préalables à la validité d'une réunion plénière de la Commission veut que « la consultation devait se limiter aux questions de principe et de droit. On ne pouvait pas permettre aux membres de l'organisation qui n'avaient pas entendu les témoignages de les réévaluer. La consultation devait reposer sur les faits énoncés par les membres qui avaient entendu les témoignages » (par. 29). Cette restriction est fondée sur ce qu'a dit le juge Gonthier, au nom de la majorité, dans

pp. 335-36. In that case, the issue was the scope of the employer's duty to bargain in good faith imposed by what is now s. 17 of the Ontario *Labour Relations Act*. More specifically, the question was whether the duty to bargain in good faith included a duty of candour to disclose without being asked future plans of the employer that would have a significant impact on the economic lives of bargaining unit employees (*Consolidated-Bathurst*, *supra*, at p. 311). A discussion about the relationship between the obligation to bargain in good faith and a duty of candour raised an abstract policy issue that *could* be segregated from the facts of that case. Here, the Board's policy had been authoritatively established, i.e., the "active promotion" test. It was for the panel to determine in the factual context of this particular case whether or not this standard was met.

Consolidated-Bathurst, précité, p. 335-336. Dans cette affaire, la question était de savoir quelle était la portée de l'obligation de négocier de bonne foi imposée à l'employeur par ce qui est maintenant l'art. 17 de la *Loi sur les relations de travail* de l'Ontario. Plus particulièrement, la question était de savoir si l'obligation de négocier de bonne foi comprenait l'obligation de franchise relativement à la divulgation des projets de l'employeur qui auraient des conséquences importantes sur la situation économique des employés de l'unité de négociation (*Consolidated-Bathurst*, précité, p. 311). Une analyse de la relation entre l'obligation de négocier de bonne foi et une obligation de franchise a soulevé une question de principe abstraite qui *pouvait* être dissociée des faits de cette affaire. En l'espèce, la politique de la Commission avait été établie par les précédents, c.-à-d., le critère de la [TRADUCTION] « promotion active ». Il incombait à la formation de déterminer dans le contexte factuel de la présente affaire si cette norme était respectée ou non.

81 I agree with my colleague LeBel J. that the issue of "abandonment", when considered in the abstract, has a policy component. As I will attempt to demonstrate, however, what happened following the full Board meeting was not a change in policy but a re-assessment of the facts.

Je conviens avec mon collègue le juge LeBel que, si elle est examinée de façon abstraite, la question de la « renonciation » comporte un aspect principe. Comme je tente de le démontrer, cependant, ce qui s'est produit à la suite de la réunion plénière de la Commission ne constituait pas un changement de principe, mais une réévaluation des faits.

Mixed Questions of Policy and Fact

Les questions de principe et de fait

82 Counsel for the Board argues that *primary* facts are those "observed by the witnesses and proved by testimony. Whether established primary facts satisfy some legal definition or requirement is a question of law, which is an entirely proper subject for a full board meeting". There is, of course, an intermediate category between "primary facts" and "law" which is that of mixed law (or policy) and fact. Within this intermediate category there are gradations from the factual end of the spectrum, where the legal content may be uncontroversial or minimal, to the legal end, where the facts may be of little consequence and, as the Board's counsel notes, a decision will have "an impact which goes beyond the resolution of the dispute between the

L'avocate de la Commission prétend que les faits *essentiels* sont ceux qui [TRADUCTION] « sont observés par les témoins et prouvés par les témoignages. La question de savoir si les faits essentiels établis satisfont à une définition ou à une exigence légales est une question de droit, qui peut parfaitement faire l'objet d'une réunion plénière de la Commission ». Il y a évidemment une catégorie intermédiaire entre les « faits essentiels » et le « droit », soit la catégorie des questions de droit (ou de principe) et de fait. Dans cette catégorie intermédiaire se trouvent des échelons qui partent de l'extrémité factuelle de l'échelle, où le contenu juridique est non contesté ou minime, pour se rendre à l'extrémité juridique, où les faits ont peu

parties". This spectrum was recognized by the Court in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, *per* Iacobucci J., at paras. 35-38. In the present case, the legal or policy content of "abandonment" was defined in a portion of the decision that was unchanged from the initial decision to the final rewrite, as mentioned above. The test was not whether the union intended to throw away rights (which, as the Divisional Court noted, is an unlikely scenario), but whether it *actively* promoted those rights in circumstances where it would reasonably be expected to do so.

d'importance et, comme l'avocate de la Commission le souligne, où la décision a [TRADUCTION] « un effet allant au-delà du règlement du litige entre les parties ». Cette échelle a été reconnue par notre Cour dans l'arrêt *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, le juge Iacobucci, par. 35-38. Dans la présente affaire, l'aspect juridique ou de principe de la « renonciation » a été décrit dans une partie de la décision qui n'a fait l'objet d'aucune modification entre la décision initiale et la révision définitive, comme je l'ai mentionné précédemment. Le critère ne consistait pas à déterminer si le syndicat avait l'intention d'abandonner des droits (ce qui est un scénario improbable, comme la Cour divisionnaire l'a souligné), mais plutôt à savoir s'il avait fait la promotion *active* de ces droits dans des circonstances où on s'attendrait raisonnablement à ce qu'il le fasse.

In my view, the question here is not whether a policy issue can be teased out of the adjudicative facts. The question is whether, taking the law (or policy) as the Board has defined it, the reference to the full Board descends so far into the adjudicative process as to violate the principle that he who hears must decide and he who decides must hear. This depends, I think, on whether the policy issue can be *segregated* sufficiently from the facts of the particular dispute to avoid interfering with fact adjudication, as indeed Gonthier J. contemplated in *Consolidated-Bathurst* at p. 337:

83

J'estime que la question qui se pose en l'espèce n'est pas de savoir si l'on peut extirper une question de principe des faits en litige. Il s'agit de savoir si, à la lumière de l'interprétation par la Commission du droit (ou du principe), le renvoi à la Commission dans son ensemble s'insère dans le processus décisionnel au point de violer le principe voulant que celui qui entend doit trancher et que celui qui tranche doit entendre. J'estime que cela dépend de la question de savoir si la question de principe peut être suffisamment *dissociée* des faits du litige particulier pour qu'elle n'intervienne pas dans la décision sur les faits, comme l'envisageait d'ailleurs le juge Gonthier dans *Consolidated-Bathurst*, p. 337 :

> These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. [Emphasis added.]

> Il est possible de dissocier ces discussions des décisions sur les faits qui déterminent l'issue du litige après que le banc a adopté un critère. [Je souligne.]

Where no such segregation can safely be made, the reference to the full Board of a decision before its release risks putting at risk the integrity of its decision-making process, as noted by Professor H. N. Janisch in his commentary, "Consistency, Rulemaking and *Consolidated Bathurst*" (1991), 16 *Queen's L.J.* 95, at p. 104.

Lorsqu'il est impossible de faire cette dissociation avec certitude, le renvoi d'une décision à la Commission dans son ensemble avant qu'elle ne soit rendue risque de menacer l'intégrité du processus décisionnel, comme l'a fait remarquer le professeur H. N. Janisch dans son article intitulé « Consistency, Rulemaking and *Consolidated Bathurst* » (1991), 16 *Queen's L.J.* 95, p. 104.

84 The implications of the Court's acceptance of what was done in this case are extensive. Under s. 9(1) of the Act, for example, the Board is required to determine an appropriate bargaining unit. Over the years, the Board has developed extensive policies on the topic which individual panels are expected to apply to the facts: see J. Sack, C. M. Mitchell and S. Price, *Ontario Labour Relations Board Law and Practice* (3rd ed. (loose-leaf)), vol. 1, at p. 3.121. Frequently, the evidence on this issue is extensive. Generally speaking, I think it would be inappropriate for a panel to refer a particular case for *ad hoc* policy making by the full board in relation to the specific facts in the absence of the parties. Equally, s. 76 prohibits the use of "intimidation or coercion to compel any person" to belong or not to belong to collective bargaining organizations, etc. This requires a definition of "intimidation or coercion", but whether or not a particular situation meets the definition should be determined by the panel charged with the decision. Similarly, s. 69 regulates successor rights on the "sale of a business". One test of this is whether "the business continues to function": *Marvel Jewellery Ltd.*, [1975] OLRB Rep. 733, at p. 735, and this too is considered by the Board to be a question of fact: *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. 281. It is evident that all of these determinations, and many others, are predicated on a legal or policy interpretation of a concept or statutory provision, as the case may be. *Consolidated-Bathurst* did not licence wholesale full board consultations on those fact-dependent adjudications. This is especially the case where the Board's jurisprudence on the policy point is already well established. In this case, as stated, the Board's policy on abandonment in terms of active promotion of rights was never in doubt and was defined in the same language in the final decision as it had been in the initial decision.

L'acceptation par notre Cour de ce qui a été fait dans la présente affaire a des conséquences importantes. En vertu du par. 9(1) de la Loi, par exemple, la Commission est tenue de déterminer l'unité de négociation appropriée. Au fil des ans, la Commission a élaboré des politiques détaillées sur le sujet pour que chaque formation les applique aux faits : voir J. Sack, C. M. Mitchell et S. Price, *Ontario Labour Relations Board Law and Practice* (3e éd. (feuilles mobiles)), vol. 1, p. 3.121. Il arrive fréquemment que la preuve relative à cette question soit considérable. De façon générale, j'estime qu'il serait inapproprié de la part d'une formation de renvoyer une affaire à la Commission dans son ensemble pour que celle-ci prenne, en l'absence des parties, une décision *ad hoc* relativement aux faits en cause. En outre, l'art. 76 interdit l'usage de « la menace de contraindre quiconque » à appartenir ou à ne pas appartenir à des organisations de négociation collective, etc. Cela exige que l'on définisse la « menace », mais la question de savoir si une situation donnée est visée ou non par la définition doit être tranchée par la formation chargée de rendre la décision. De la même manière, l'art. 69 régit les droits de succession afférents à la vente d'une entreprise. L'un des critères applicables à cet égard consiste à savoir si [TRADUCTION] « l'entreprise continue de fonctionner » : *Marvel Jewellery Ltd.*, [1975] OLRB Rep. 733, p. 735, et il s'agit là également, selon la Commission, d'une question de fait : *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. 281. Il est évident que toutes ces décisions ainsi que de nombreuses autres reposent sur une interprétation juridique ou de principe d'une notion ou d'une disposition législative, selon le cas. L'arrêt *Consolidated-Bathurst* n'a pas permis la tenue de consultations générales en réunion plénière relativement aux décisions reposant sur les faits. Cela est particulièrement vrai lorsque la jurisprudence de la Commission sur la politique en question est déjà bien établie. Dans la présente affaire, comme je l'ai mentionné précédemment, la politique de la Commission sur la renonciation, qui repose sur la promotion active des droits, n'a jamais été mise en doute et a été décrite dans les mêmes termes tant dans la décision définitive que dans la décision initiale.

Reversal of a Finding of Fact

The panel made it clear both in its initial decision and in the rewrite that it considered abandonment to be an issue of fact. It explained in both at para. 43:

> Prior to the introduction of province-wide bargaining in the ICI sector, the Board has on several occasions determined, as a matter of fact, that a trade union has abandoned its bargaining rights through inaction. . . . A useful summary of the caselaw and the factors influencing the Board's assessment is found in *R. Reusse Co. Ltd.* . . . [Emphasis added.]

In the case cited, *R. Reusse Co.*, [1988] OLRB Rep. 523, the Board set out its policy as follows at paras. 13 and 15:

> It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case. . . .
>
> . . .
>
> What is most striking about this application is that, having attained bargaining rights in 1965, Local 397 did *nothing* for almost *15 years* (just to the advent of province-wide bargaining) to negotiate renewals of the collective agreement, administer those "existing" agreements or otherwise contact the respondent. Given such an extended passage of time, the Board must carefully scrutinize the reasons proffered by the union as explanation for its inactivity in order to avoid the reasonable inference that the union has abandoned its bargaining rights. [Emphasis in original.]

The Board's decision in the present case (both initial and final) simply repeated the language in *Reusse*, *supra*:

> It was not disputed that the question of abandonment is a matter of fact to be resolved by the Board in the circumstances of each case: *J. S. Mechanical*, *supra*; *Inducon Construction (Northern) Inc.*, *supra*; *John Entwistle Construction Limited*, *supra*; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al.*, *Re Labourers' International Union of*

L'infirmation d'une conclusion de fait

La formation a indiqué clairement, tant dans sa décision initiale que dans sa version révisée, qu'elle considérait la renonciation comme une question de fait. Elle a expliqué dans les deux décisions, au par. 43 : 85

> [TRADUCTION] Avant l'introduction de la négociation à l'échelle de la province dans le secteur de la construction industrielle, commerciale et institutionnelle, la Commission avait conclu à plusieurs reprises que, dans les faits, un syndicat avait renoncé à ses droits de négociation par inaction. [. . .] Un résumé utile de la jurisprudence et des facteurs influençant l'évaluation de la Commission est fait dans *R. Reusse Co. Ltd.*. . . [Je souligne.]

Dans la décision citée *R. Reusse Co.*, [1988] OLRB Rep. 523, la Commission a énoncé ainsi sa politique, aux par. 13 et 15 :

> [TRADUCTION] Il n'a pas été contesté que la question de la renonciation est une question de fait que la Commission doit résoudre selon les circonstances de chaque affaire . . .
>
> . . .
>
> Ce qui est le plus frappant au sujet de la présente demande, c'est que, ayant obtenu des droits de négociation en 1965, la section locale 397 n'a *rien* fait pendant presque *15 ans* (jusqu'à l'arrivée de la négociation collective à l'échelle de la province) en vue de négocier des renouvellements de la convention collective, d'appliquer les conventions « existantes » ou de communiquer de quelque autre façon avec l'intimée. Étant donné l'écoulement d'une aussi longue période, la Commission doit examiner avec soin les raisons fournies par le syndicat à titre d'explication pour son inaction afin d'éviter la conclusion raisonnable que le syndicat a renoncé à ses droits de négociation. [Italiques dans l'original.]

La décision de la Commission en l'espèce (tant initiale que définitive) n'a fait que reprendre les termes utilisés dans *Reusse*, précité :

> [TRADUCTION] Il n'a pas été contesté que la question de la renonciation est une question de fait que la Commission doit résoudre selon les circonstances de chaque affaire : *J. S. Mechanical*, précité; *Inducon Construction (Northern) Inc.*, précité; *John Entwistle Construction Limited*, précité; *Re Carpenters' District Council of Lake Ontario and Hugh Murray (1974) et al.*, *Re*

North America, Local 527 et al. and *John Entwistle Construction Ltd. et al.*, *supra*; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. [Emphasis added.]

and then continued (at para. 44):

It is in the above jurisprudential context that the Board must analyse the evidence in the instant case.

86 Indeed, the panel concluded in its final version of the decision in this case at para. 54 that "[it] is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F" (emphasis added). We are not bound by the characterization placed on its own decision by the panel, but in this respect I think the panel was correct.

The Controlling Issue Was Whether the Union had "Actively Promoted" its Bargaining Rights

87 The initial decision accepted the respondent union's position that it could hardly be faulted for lack of "active promotion" when its intervention proved not to be necessary to ensure that electrical work was subcontracted to union subcontractors, albeit the Board also found that the appellant did not consider itself under any obligation to do so. The important exception was the panel's expectation that a union that was "actively" promoting its bargaining rights would have included the appellant on schedule F in the accreditation process that led to the predecessor to the one now invoked by the union. The panel noted that the union might well have had a plausible explanation for its lack of "active" promotion in the accreditation process but had not put any such evidence forward. In its initial decision the panel was not prepared to act on the unsupported hypotheses offered up by counsel for the respondent union. In its final decision, however, the panel seemingly accepted the same

Labourers' International Union of North America, Local 527 et al. et *John Entwistle Construction Ltd. et al.*, précité; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631. [Je souligne.]

Et elle a poursuivi au par. 44 :

[TRADUCTION] C'est dans le contexte jurisprudentiel ci-dessus que la Commission doit analyser la preuve en l'espèce.

D'ailleurs, la formation a conclu dans la version définitive de la décision en l'espèce, au par. 54, qu'elle [TRADUCTION] « n'est pas convaincue que, en tant que question de fait, la section locale 353 a renoncé aux droits de négociation en raison de l'omission du nom de Ellis-Don à l'annexe F » (je souligne). Nous ne sommes pas liés par la façon dont la formation a qualifié sa propre décision, mais j'estime qu'elle avait raison à cet égard.

La question dominante était de savoir si le syndicat avait fait la « promotion active » de ses droits de négociation

La décision initiale acceptait la position du syndicat intimé selon laquelle on pouvait difficilement le blâmer pour l'absence de « promotion active » alors qu'il s'était avéré non nécessaire qu'il intervienne pour veiller à ce que les travaux d'électricité soient confiés à des sous-traitants dont les employés sont syndiqués, quoique la Commission a également conclu que l'appelante ne considérait pas avoir l'obligation de le faire. L'exception importante était le fait que la formation s'attendait à ce qu'un syndicat qui faisait la promotion « active » de ses droits de négociation ait inscrit l'appelante à l'annexe F lors du processus d'accréditation qui a mené à la convention antérieure à celle maintenant invoquée par le syndicat. La formation a fait remarquer que le syndicat pouvait fort bien avoir une explication plausible pour son manque de promotion « active » dans le cadre du processus d'accréditation, mais qu'il n'en avait présentée aucune en preuve. Dans sa décision initiale, la formation n'était pas prête à agir en s'appuyant sur les hypothèses non étayées faites par l'avocat du syndicat intimé. Dans sa décision définitive, toutefois, la formation a semblé considérer les mêmes hypothèses non étayées comme l'expli-

unsupported speculation to be the adequate explanation that it had earlier found not to exist.

cation adéquate qu'elle avait auparavant jugée inexistante.

The panel initially concluded that in the particular circumstances of the case an adverse inference *should* be drawn against the union for its decision not to call the evidence. I do not say that the panel was obliged to draw an adverse inference. The fact is that following a lengthy hearing, it did so. The correctness of that determination was bound up with the evidence:

88 La formation a initialement estimé qu'à la lumière des faits particuliers de l'affaire, une conclusion défavorable au syndicat *devrait* être tirée en raison de sa décision de ne présenter aucune preuve à cet égard. Je ne dis pas que la formation était obligée de tirer une conclusion défavorable. Il n'en demeure pas moins que c'est ce qu'elle a fait à la suite d'une longue audience. Le bien-fondé de cette décision était lié à la preuve :

It is perfectly appropriate for a jury to infer, although they are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to the Vieczoreks was an indication that such evidence would not have been favourable to them. It is a common sense conclusion that may be reached by any trier of fact. There are no authorities which cast any doubt upon the proposition. [Emphasis added.]

[TRADUCTION] Il est parfaitement approprié qu'un jury déduise, même s'il n'est pas obligé de le faire, que l'omission de produire des éléments de preuve substantielle dont seuls les Vieczorek disposaient était une indication que ces éléments de preuve ne leur auraient pas été favorables. Il s'agit d'une conclusion fondée sur le bon sens qui peut être tirée par tout juge des faits. Aucune décision ne met en doute cette proposition. [Je souligne.]

(*Vieczorek v. Piersma* (1987), 36 D.L.R. (4th) 136 (Ont. C.A.), *per* Cory J.A., at pp. 140-41)

(*Vieczorek c. Piersma* (1987), 36 D.L.R. (4th) 136 (C.A. Ont.), le juge Cory, p. 140 et 141)

To the same effect is the statement found in Sopinka, Lederman and Bryant, *supra*, at p. 97:

Voir dans le même sens l'énoncé figurant dans Sopinka, Lederman et Bryant, *op. cit.*, à la p. 97 :

A presumption of fact is a deduction of fact that may logically and reasonably be drawn from a fact or group of facts found or otherwise established. Put differently, it is a common sense logical inference that is drawn from proven facts. [Emphasis added.]

[TRADUCTION] Une présomption de fait est une déduction de fait qui peut logiquement et raisonnablement être tirée à partir d'un fait ou d'un groupe de faits dont on a conclu à l'existence ou qui ont été autrement établis. Autrement dit, il s'agit d'une conclusion logique fondée sur le bon sens qui est tirée à partir de faits prouvés. [Je souligne.]

To characterise this "common sense conclusion . . . by [a] trier of fact" as a "rebuttable presumption" does not, in my view, transform this issue of factual adjudication into a question of law, as my colleague LeBel J. concludes at para. 42. In any event, with respect, a debate about labels should not detract us from the more fundamental inquiry about whether in this case the full board consultation intruded into adjudicative matters of fact the panel itself was required to decide.

89 Qualifier cette « conclusion fondée sur le bon sens [. . .] tirée par [un] juge des faits » de « présomption réfutable » ne change pas selon moi cette question de conclusion factuelle en question de droit, comme mon collègue le juge LeBel le conclut au par. 42. Quoi qu'il en soit, j'estime, en toute déférence, que nous ne devrions pas laisser un débat terminologique nous écarter de l'examen plus fondamental de la question de savoir si, en l'espèce, la consultation de l'ensemble des membres de la Commission a empiété sur des faits sur lesquels la formation elle-même était tenue de se prononcer.

90 The Vice-Chair's reasons, rewritten after the full Board meeting, now said, at para. 54:

> The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, IBEW in the accreditation application is of concern to the Board. The question for the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 has abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the Local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the Local held bargaining rights but who had had employees in the past (albeit not within the previous year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented specialty electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted, in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement, to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. [Emphasis added.]

Les motifs de la vice-présidente, réécrits après la réunion plénière de la Commission, se lisaient ainsi, au par. 54 :

> [TRADUCTION] L'absence de preuve expliquant l'omission du nom de Ellis-Don à l'annexe F déposée par la section locale 353 de la FIOE dans le cadre de la demande d'accréditation préoccupe la Commission, qui estime qu'il s'agit de savoir si cette omission est suffisante en soi, dans le contexte de l'ensemble des autres circonstances, pour lui permettre de conclure que la section locale 353 avait renoncé aux droits de négociation qu'elle avait obtenus auparavant. L'omission du nom de Ellis-Don n'est pas incompatible avec une renonciation et peut donc signifier ce que l'avocat de l'intimée affirme. Cependant, cette omission est compatible également avec le fait que la section locale aurait tenu pour acquis que la demande d'accréditation ne touchait que les entrepreneurs spécialisés ou que l'annexe F ne s'appliquait qu'aux employeurs relativement auxquels la section locale avait des droits de négociation mais qui avaient eu des employés dans le passé (quoique pas dans l'année précédente). Il semble (et il n'y a aucune preuve convaincante du contraire) que l'association d'employeurs représentait les entrepreneurs électriciens spécialisés, et non pas les entrepreneurs généraux. Dans ce contexte, le nom de Ellis-Don peut avoir été omis dans la réponse du syndicat intimé, comme l'ont apparemment été les noms d'autres entrepreneurs généraux qui avaient signé la convention de travail, compte tenu du cadre de la demande initiale. La question n'est pas de savoir quelle est la conclusion la plus raisonnable ou quelle serait une conclusion raisonnable à tirer de l'omission du nom de Ellis-Don, mais bien de savoir si cette omission équivaut à une renonciation. La Commission est d'avis qu'il est plus probable que l'omission du nom de Ellis-Don à l'annexe F n'indiquait pas une renonciation aux droits de négociation. [Je souligne.]

The test applied by the panel ("it is more probable than not that the omission . . . did not reflect an abandonment of bargaining rights") is typical for a finding of fact. The rewrite does not reflect any change in policy or legal principle governing the weight to be given to the evidence. It simply multiplies speculation about why the union might (or might not) have acted as it did. The Board thus chose to put less weight on the union's failure to list the appellant on schedule F and more weight on speculative factors. In other words, the evidence was reweighed or re-assessed, apparently as

Le critère appliqué par la formation (« il est plus probable que l'omission [. . .] n'indiquait pas une renonciation aux droits de négociation ») est typique d'une conclusion de fait. La révision ne révèle aucune modification de la question de principe ou du principe juridique régissant le poids à accorder à la preuve. Elle multiplie simplement les hypothèses au sujet des raisons pour lesquelles le syndicat aurait (ou n'aurait pas) agi comme il l'a fait. La Commission a donc choisi d'accorder moins d'importance à l'omission du syndicat d'inscrire l'appelante à l'annexe F et davantage

a result of the full Board meeting. This is contrary to *Consolidated-Bathurst*.

d'importance à des facteurs hypothétiques. En d'autres termes, la preuve a été réévaluée apparemment par suite de la réunion plénière de la Commission. Cela est contraire à l'arrêt *Consolidated-Bathurst*.

The Divisional Court's Rationalization of the Board's Decision

La justification de la décision de la Commission par la Cour divisionnaire

It was left to Adams J. in the Ontario Divisional Court ((1995), 89 O.A.C. 45) to offer a suggestion about how to rationalize the panel's initial decision with its ultimate decision, at para. 31:

91 Il revenait au juge Adams, de la Cour divisionnaire de l'Ontario ((1995), 89 O.A.C. 45), de suggérer une manière de justifier la décision définitive de la formation par rapport à sa décision initiale, au par. 31 :

The Board had several policy options open to it on the facts as found: (i) the absence of Ellis-Don on Schedule F constituted per se evidence of bargaining right abandonment; (ii) the omission gave rise to a rebuttable presumption of abandonment, thus requiring an explanation from Local 353; (iii) the omission was a factor to be considered along with all the other evidence before the Board; or, finally, (iv) the failure of Local 353 to place Ellis-Don's name on Schedule F was irrelevant, in the circumstances, to the issue of abandonment. Ultimately, the Board concluded the failure of Local 353 to include Ellis-Don on Schedule F was a factor to be considered and was not determinative in the circumstances.

[TRADUCTION] Plusieurs choix de principe s'offraient à la Commission quant aux faits tenus pour avérés: (i) l'absence de Ellis-Don à l'annexe F constituait en soi la preuve de la renonciation aux droits de négociation; (ii) l'omission a donné lieu à une présomption réfutable de renonciation, ce qui obligeait la section locale 353 à fournir une explication; (iii) l'omission constituait un facteur à examiner au même titre que tous les autres éléments de preuve soumis à la Commission; ou enfin, (iv) l'omission de la section locale 353 d'inscrire le nom de Ellis-Don à l'annexe F n'avait aucune pertinence, dans les circonstances, quant à la question de la renonciation. En fin de compte, la Commission a déterminé que l'omission de la part de la section locale 353 d'inscrire Ellis-Don à l'annexe F constituait un facteur à prendre en considération et n'était pas déterminante dans les circonstances.

92 The options are presented as a menu of policy choices, but the passage does no more than describe transition stages from a strong inference to a weak inference to no inference at all. The question of what weight should be attached to the union's conduct in light of all the evidence heard over several weeks seems to me, quintessentially, for the trier of fact. The appellant was not dealing with the Ministry of Labour, where departmental procedures are not expected to conform to a judicial or quasi-judicial method of making decisions. The Ontario *Labour Relations Act* holds out the promise of a quasi-judicial tribunal where union and management are eyeball-to-eyeball with the decision-makers. So long as the legislative promise

92 Les options sont présentées comme un menu de choix de principes, mais l'extrait ne fait rien de plus que décrire les étapes de transition, à partir d'une forte conclusion, en passant par une faible conclusion, jusqu'à l'absence de conclusion. La question de savoir quelle importance devrait être accordée à la conduite du syndicat à la lumière de l'ensemble de la preuve entendue pendant plusieurs semaines me semble, de par sa nature même, relever du juge des faits. L'appelante n'avait pas affaire au ministère du Travail, où l'on ne s'attend pas à ce que les procédures ministérielles soient conformes à une méthode judiciaire ou quasi judiciaire de prise de décisions. La *Loi sur les relations de travail* de l'Ontario renferme la promesse d'un tribunal quasi judiciaire où syndicats et patrons font face aux décideurs. Tant que la promesse

is there the relevant constraints should be observed in factual adjudications.

93 The panel's initial decision, as I read it, did not suggest that the absence of the appellant on schedule F *per se* constituted abandonment. The initial decision concluded that the union's decision not to include the appellant on schedule F "was a factor to be considered along with all the other evidence" but that in the absence of any explanation, or contrary evidence from the union that bargaining rights had in fact been actively asserted at some point between 1962 and 1971, there was nothing opposable to the common sense inference of abandonment.

94 The Divisional Court also faulted the appellant for its failure to seek a reconsideration by the Board under s. 114(1) of the Act. Apparently the court was not pleased with appellant counsel's somewhat triumphal rejoinder that the Board had been "caught . . . with [its] hand in the cookie jar" and he was not disposed to give it an opportunity to extricate itself. While a motion for reconsideration was an option, it was not equivalent to an internal appeal for purposes of an "exhaustion of administrative remedies" argument. The Board's position advanced with ingenuity and vigour in these proceedings no doubt reflects what the panel would have said on a reconsideration, namely the assertion that *Consolidated-Bathurst* sanctioned the procedure adopted in this case.

Failure to Obtain Evidence from Board Witnesses

95 The appellant obtained an order from Steele J. of the Ontario Court (General Division) ((1992), 95 D.L.R. (4th) 56) compelling the attendance of the Chair of the Board, the Vice-Chair who presided over the panel, and the Registrar of the Board "to obtain information with respect to the procedures implemented by the O.L.R.B. in arriv-

législative existe, les contraintes pertinentes en matière de conclusions relatives aux faits doivent être respectées.

La décision initiale de la formation, selon mon interprétation, ne donnait pas à entendre que l'absence de l'appelante à l'annexe F constituait en soi une renonciation. Il a été conclu dans la décision initiale que la décision du syndicat de ne pas inscrire l'appelante à l'annexe F [TRADUCTION] « constituait un facteur à examiner au même titre que tous les autres éléments de preuve », mais que, en l'absence d'explication ou de preuve contraire de la part du syndicat selon laquelle les droits de négociation avaient en fait été affirmés activement à un certain moment entre 1962 et 1971, rien ne pouvait être opposé à la conclusion fondée sur le bon sens selon laquelle il y avait eu renonciation.

La Cour divisionnaire a également blâmé l'appelante d'avoir omis de demander un nouvel examen par la Commission aux termes du par. 114(1) de la Loi. Apparemment, la cour n'a pas aimé la réplique quelque peu triomphale de l'avocat de l'appelante selon laquelle la Commission avait été [TRADUCTION] « pris[e] la main dans le sac », ni le fait qu'il n'était pas prêt à lui donner la possibilité de se sortir de cet embarras. Même si la requête en nouvel examen constituait une option, elle n'équivalait pas à un appel interne pour les fins de l'argument fondé sur [TRADUCTION] « l'épuisement des recours administratifs ». La position que la Commission a fait valoir avec ingéniosité et insistance en l'espèce reflète sans aucun doute ce que la formation aurait dit lors d'un nouvel examen, à savoir l'affirmation que *Consolidated-Bathurst* a sanctionné la procédure adoptée dans la présente affaire.

L'omission d'obtenir la déposition de témoins membres de la Commission

L'appelante a obtenu une ordonnance du juge Steele, de la Cour de l'Ontario (Division générale) ((1992), 95 D.L.R. (4th) 56), qui obligeait le président de la Commission, la vice-présidente qui a présidé la formation, et le registrateur de la Commission à comparaître [TRADUCTION] « afin d'obtenir des renseignements sur la procédure mise en

ing at its final decisions" (p. 58). The motions judge was reversed by the Ontario Divisional Court ((1994), 16 O.R. (3d) 698) on the basis of s. 111 of the *Labour Relations Act*, R.S.O. 1990, c. L.2 (now s. 117), which grants testimonial immunity in the following terms:

Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil proceeding or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

The Ontario Court of Appeal and subsequently this Court ([1995] 1 S.C.R. vii), denied leave to appeal from this interlocutory decision.

The legislative grant of testimonial immunity in s. 111 may be justified on various policy grounds, as pointed out by my colleague LeBel J. at paras. 52-53. However, it creates the following problem in the present context:

Safeguards are of no use if they cannot be enforced. How can judicial review be used to police the safeguards built into the decision-making process if the operation of that process is veiled behind a cloak of deliberative secrecy? Just as at the substantive level, there exists a need for safeguards to reconcile natural justice with institutional decision-making; at an operational level some mechanism must be found to reconcile the need for judicial review with the privilege of deliberative secrecy.

(R. E. Hawkins, "Behind Closed Doors II: The Operational Problem — Deliberative Secrecy, Statutory Immunity and Testimonial Privilege" (1996), 10 *C.J.A.L.P.* 39, at p. 40)

This Court in *Consolidated-Bathurst* contemplated meaningful redress when full board meetings exceed their proper role. This was demonstrated in *Tremblay v. Quebec (Commission des*

œuvre par la CRTO pour en arriver à ses décisions définitives » (p. 58). La décision du juge des requêtes a été infirmée par la Cour divisionnaire de l'Ontario ((1994), 16 O.R. (3d) 698) sur le fondement de l'art. 111 de la *Loi sur les relations de travail*, L.R.O. 1990, ch. L.2 (maintenant l'art. 117), qui accorde l'exonération de l'obligation de témoigner dans les termes suivants :

Sauf si la Commission y consent, ses membres, son registrateur, et les autres membres de son personnel sont exemptés de l'obligation de témoigner dans une instance civile ou dans une instance devant la Commission ou devant toute autre commission, en ce qui concerne des renseignements obtenus dans le cadre de leurs fonctions ou en rapport avec celles-ci dans le cadre de la présente loi.

96 La Cour d'appel de l'Ontario et, par la suite, notre Cour ([1995] 1 R.C.S. vii) ont refusé la permission d'interjeter appel de cette décision interlocutoire.

97 Le fait que l'art. 111 accorde l'exonération de l'obligation de témoigner peut se justifier par différentes raisons de principe, comme l'a souligné mon collègue le juge LeBel aux par. 52-53. Cela crée toutefois le problème suivant dans le contexte actuel :

[TRADUCTION] Les mesures de protection ne sont d'aucune utilité si elles ne peuvent pas être appliquées. Comment peut-on utiliser le contrôle judiciaire pour vérifier les mesures de protection intégrées au processus décisionnel si le fonctionnement de ce processus se cache derrière le voile du secret du délibéré? Tout comme il y a au niveau du fond la nécessité de mesures de protection pour concilier la justice naturelle et la prise de décision institutionnelle, il faut trouver au niveau opérationnel un mécanisme conciliant la nécessité du contrôle judiciaire et le privilège du secret du délibéré.

(R. E. Hawkins, « Behind Closed Doors II : The Operational Problem — Deliberative Secrecy, Statutory Immunity and Testimonial Privilege » (1996), 10 *C.J.A.L.P.* 39, p. 40)

98 Dans l'arrêt *Consolidated-Bathurst* notre Cour a examiné la possibilité de redressement significatif lorsque les réunions plénières vont au-delà du rôle qui leur revient. Cela a été démontré dans l'arrêt

affaires sociales), [1992] 1 S.C.R. 952, in which Gonthier J. wrote, at p. 965:

> The institutionalization of the decisions of administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of natural justice . . . . Paradoxically, it is the public nature of these rules which, while highly desirable, may open the door to an action in nullity or an evocation. It may be questioned whether justice is seen to be done. Accordingly, the very special way in which the practice of administrative tribunals has developed requires the Court to become involved in areas into which, if a judicial tribunal were in question, it would probably refuse to venture. . . . [Emphasis added.]

and at p. 966:

> . . . by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals.

99 Here the undisputed evidence is that the initial decision of the panel held as a fact that the union had abandoned its bargaining rights. The final decision held as a fact that it had not, and the intervening event was the full Board meeting. In *Tremblay*, Gonthier J. observed at p. 980:

> . . . the procedure of early signature of draft decisions by members and assessors followed in the case at bar seems to me unadvisable. Although this procedure may be practical, it only adds to the appearance of bias when a decision maker decides to alter his opinion after free consultation with his colleagues.

(While, as stated, an original signed copy of the initial decision in the present case is not in the Court record, the "true copy" that was filed indicates that the original was signed.) Gonthier J. continued at pp. 980-81:

> A litigant who sees a "decision" favourable to him changed to an unfavourable one will not think that there has been a normal consultation process; rather, he will have the impression that external pressure has definitely

Tremblay c. Québec (Commission des affaires sociales), [1992] 1 R.C.S. 952, dans lequel le juge Gonthier a écrit, à la p. 965 :

> L'institutionnalisation des décisions des tribunaux administratifs crée une tension entre, d'une part, le traditionnel concept du secret du délibéré et, d'autre part, le droit fondamental d'une partie de savoir que la décision a été rendue en conformité avec les principes de justice naturelle. [. . .] Le caractère public de ces règles, par ailleurs fort souhaitable, est paradoxalement ce qui peut donner prise à une action en nullité ou à une évocation. L'apparence de justice peut être mise en cause. L'évolution bien particulière de la pratique des tribunaux administratifs oblige donc la Cour à s'immiscer dans des domaines où, s'il s'agissait d'un tribunal judiciaire, elle refuserait probablement de s'aventurer . . . [Je souligne.]

et à la p. 966 :

> . . . de par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne [peuvent] invoquer le secret du délibéré au même degré que les tribunaux judiciaires.

En l'espèce, la preuve non contestée révèle que dans sa décision initiale, la formation a tiré la conclusion de fait que le syndicat avait renoncé à ses droits de négociation. Dans sa décision définitive, elle a tiré la conclusion de fait que le syndicat n'avait pas renoncé à ses droits, et l'événement qui s'est produit entre ces deux décisions est la réunion plénière de la Commission. Dans l'arrêt *Tremblay*, le juge Gonthier a fait remarquer à la p. 980 :

> . . . la procédure de signature anticipée des projets de décisions par les membres et assesseurs suivie en l'espèce m'apparaît être à déconseiller. Même si cette procédure s'avère pratique, elle ne fait qu'ajouter à l'apparence de partialité lorsqu'un décideur décide de modifier son opinion après libre consultation avec ses collègues.

(Même si, comme je l'ai mentionné, le dossier de notre Cour ne contient aucun exemplaire original signé de la décision initiale en l'espèce, la « copie certifiée conforme » qui a été déposée indique que l'original a été signé.) Le juge Gonthier a poursuivi aux p. 980-981 :

> Le justiciable qui voit une «décision» qui lui était favorable se changer en décision défavorable ne pensera pas qu'il s'agit du processus normal de consultation; il aura plutôt l'impression qu'une pression extérieure a bel et

led persons who were initially favourable to his case to change their minds.

The appellant does not need to establish "external pressure" in this case. It merely has to establish a basis for a reasonable inference that factual matters were referred for discussion at the full Board meeting that ought to have been left to the undisturbed deliberations of the panel.

Section 111 prevented the appellant from getting to the bottom of the Board's decision-making process in this case. The result, in my view, is not that the appellant is thereby prevented from establishing a basis for judicial review. The Court ought not to be blind to the difficulties of proof in determining whether the appellant has made out its case. Otherwise the limitation imposed by *Consolidated-Bathurst* becomes a pious sentiment rather than an enforceable rule of law, which indeed is a question raised by Professor David J. Mullan in his case comment:

> . . . it is possible to see the judgment as simply drawing the attention of members to their responsibilities without any real expectation that there will be consistent monitoring of behaviour.

(D. J. Mullan, "Policing the *Consolidated-Bathurst* Limits — Of Whistleblowers and Other Assorted Characters" (1993), 10 Admin. L.R. (2d) 241, at p. 242)

I think *Tremblay* showed that the Court *did* have a "real expectation" that the limits on the scope of full board meetings would be enforceable. In that case, the Court quashed the decision of the Quebec *Commission des affaires sociales* because its equivalent of the full board meeting procedure compromised the ability of individual panels to reach their own decision free of constraints imposed by colleagues.

The Board is responsible for maintaining its deliberative secrecy, and it will generally be assisted by the courts in that regard. However,

bien fait changer d'avis les personnes d'abord favorables à sa cause.

100 L'appelante n'a pas à établir l'existence d'une « pression extérieure » en l'espèce. Il suffit qu'elle établisse le fondement d'une conclusion raisonnable que des questions factuelles ont été renvoyées pour fins de discussions à la réunion plénière de la Commission et qu'il aurait fallu que ces questions soient laissées à la formation pour qu'elle délibère en toute quiétude à leur sujet.

101 Vu l'article 111 l'appelante n'a pu aller au fond du processus décisionnel de la Commission en l'espèce. J'estime que cela n'empêche pas l'appelante d'établir le fondement d'un contrôle judiciaire. Notre Cour ne devrait pas fermer les yeux sur la difficulté de déterminer si l'appelante a établi sa preuve. Autrement, la restriction imposée par l'arrêt *Consolidated-Bathurst* devient un vœu pieux plutôt qu'une règle de droit exécutoire, question que soulève d'ailleurs le professeur David J. Mullan dans son commentaire d'arrêt :

> [TRADUCTION] . . . il est possible de considérer que le jugement ne fait qu'attirer l'attention des membres sur leurs responsabilités sans qu'il n'y ait d'attente réelle que leur conduite fasse l'objet d'une surveillance continue.

(D. J. Mullan, « Policing the *Consolidated-Bathurst* Limits — Of Whistleblowers and Other Assorted Characters » (1993), 10 Admin. L.R. (2d) 241, p. 242)

102 J'estime que l'arrêt *Tremblay* a montré que notre Cour avait *effectivement* l'« attente réelle » que les limites imposées à la portée des réunions plénières soient exécutoires. Dans cette affaire, notre Cour a annulé la décision de la Commission des affaires sociales du Québec parce que son équivalent de la procédure de la réunion plénière compromettait la capacité de chaque formation de rendre sa propre décision à l'abri des contraintes imposées par des collègues.

103 La Commission est responsable du maintien du secret de ses délibérations et les tribunaux l'appuieront généralement à cet égard. Toutefois, lors-

where there is a breach of that secrecy from within the Board itself, whether by reason of a whistleblower or otherwise, the inconvenient information cannot be wished out of existence. The appellant is not to be faulted for coming into possession of information volunteered by a retired member of the Board.

qu'une violation de ce secret provient de la Commission elle-même, que ce soit en raison de la présence d'un dénonciateur ou pour d'autres raisons, les renseignements embarrassants ne peuvent pas disparaître comme par enchantement. On ne peut pas blâmer l'appelante d'avoir obtenu des renseignements qu'un membre retraité de la Commission a pris l'initiative de lui fournir.

104 The Board in its submissions cautions the Court against "lowering the bar" for judicial review, and worries that once "an allegation of wrongdoing was made, an administrative tribunal would have no choice but to reveal its deliberations so as to rebut the 'reasonable apprehension'". The Board construes "deliberations" broadly to include process as well as substance, and says that it embraces not only the decision makers (the panel) but all attendees at the full board meeting as well. However, it is in the nature of judicial review that the secrecy as to the process may have to be relaxed by the Board to dispel legitimate concerns about the integrity of its decision-making process. The alternative for the Board in a case where an applicant has met the threshold evidentiary onus (as here) is to allow the decision to be vacated as the price of preserving intact the secrecy surrounding its formation.

Dans ses arguments, la Commission met notre Cour en garde contre le fait [TRADUCTION] « [d']abaisser la barre » en matière de contrôle judiciaire et elle craint que dès [TRADUCTION] « qu'une allégation de faute serait faite, un tribunal administratif n'aurait pas d'autre choix que de révéler ses délibérations pour réfuter la "crainte raisonnable" ». La Commission interprète largement le mot « délibérations », qui comporte selon elle le processus de même que le fond, et elle dit que ce mot vise non seulement les décideurs (la formation), mais aussi tous ceux qui ont participé à la réunion plénière. Toutefois, la nature du contrôle judiciaire fait en sorte qu'il se peut que la Commission ait à lever le secret afin de dissiper des craintes légitimes au sujet de l'intégrité de son processus décisionnel. Dans un cas où le demandeur s'est acquitté de la charge initiale de présentation (comme en l'espèce), la solution de rechange pour la Commission consiste à permettre que la décision soit annulée pour que soit préservé le secret entourant son élaboration.

105 In my view, the Board cannot have it both ways. It cannot, with the assistance of the legislature, deny a person in the position of the appellant all legitimate access to relevant information, then rely on the absence of this same information as a conclusive answer to the appellant's complaint. We are not in the business of playing Catch 22. The record discloses a change of position by the panel on an issue of fact. This runs counter to *Consolidated-Bathurst* and has to be dealt with properly if confidence in the integrity of the Board's decision making is to be maintained. The exigencies of

À mon avis, la Commission ne peut pas jouer sur les deux plans. Elle ne peut pas, avec l'aide du législateur, priver une personne dans la position de l'appelante de tout accès légitime aux renseignements pertinents, pour ensuite invoquer l'absence de ces mêmes renseignements en tant que réponse déterminante à la plainte de l'appelante. Nous ne sommes pas ici devant une situation sans issue. Le dossier révèle que la formation a modifié sa position sur une question de fait. Cela va à l'encontre de l'arrêt *Consolidated-Bathurst* et il faut prendre les mesures appropriées pour que la confiance dans l'intégrité du processus décisionnel de la Commission soit préservée. Les exigences applicables en matière de contrôle judiciaire ont été expressément

judicial review were specifically affirmed by Gonthier J. in *Tremblay* at pp. 965-66:

> . . . when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to examine *inter alia* the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.
>
> Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. [Emphasis added.]

In *Tremblay*, of course, the Court was not confronted with a testimonial immunity provision comparable to s. 111 of the Ontario *Labour Relations Act*. Nevertheless, it could not have been intended by the Court to make a distinction between fact and policy, only to have its enforcement rendered impracticable. Where such difficulties of proof are presented, as here, they will have to be factored into the evidentiary burden of proof placed on the appellant.

The Presumption of Regularity

The Ontario Court of Appeal considered the Board's proceedings to be protected by the "presumption of regularity" ((1998), 38 O.R. (3d) 737, at p. 740). This presumption, like any rebuttable presumption, yields to contrary evidence. Here again the Board relies on its successful denial of access to relevant information to feed the presumption and defeat the appellant's complaint. Not only were subpoenas set aside, as mentioned, but attempts by the appellant to obtain relevant information through the provincial *Freedom of Infor-*

énoncées par le juge Gonthier dans *Tremblay*, p. 965-966 :

> . . . lorsque les décisions d'un tribunal administratif sont sans appel, comme c'est le cas à la Commission, il n'existe qu'une seule façon de réviser celles-ci: le contrôle de la légalité. Or, il relève de la nature même du contrôle judiciaire d'examiner, entre autres, le processus décisionnel du décideur. Certains des motifs pour lesquels une décision peut être attaquée portent même sur l'aspect interne de ce processus décisionnel: par exemple, la décision a-t-elle été prise sous la dictée d'un tiers? Résulte-t-elle de l'application aveugle d'une directive ou d'une politique pré-établie? Tous ces événements sont concomitants au délibéré ou en font partie.
>
> Il me semble donc que, de par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne puissent invoquer le secret du délibéré au même degré que les tribunaux judiciaires. Le secret demeure bien sûr la règle, mais il pourra néanmoins être levé lorsque le justiciable peut faire état de raisons sérieuses de croire que le processus suivi n'a pas respecté les règles de justice naturelle. [Je souligne.]

106 Il est évident que dans *Tremblay* notre Cour ne faisait pas face à une disposition d'exonération de l'obligation de témoigner comparable à l'art. 111 de la *Loi sur les relations de travail* de l'Ontario. Néanmoins, notre Cour n'a pas pu avoir l'intention de faire une distinction entre fait et principe, pour voir ensuite l'application de cette distinction rendue impossible. Lorsque de telles difficultés en matière de preuve se présentent, comme en l'espèce, elles doivent être considérées comme faisant partie du fardeau de présentation de la preuve reposant sur l'appelante.

La présomption de régularité

107 La Cour d'appel de l'Ontario a estimé que la procédure de la Commission était protégée par la « présomption de régularité » ((1998), 38 O.R. (3d) 737, p. 740). Comme toute présomption réfutable, cette présomption s'efface devant une preuve contraire. Encore une fois en l'espèce, la Commission s'appuie sur le fait qu'elle a réussi à interdire à l'appelante l'accès aux renseignements pertinents pour renforcer la présomption et faire rejeter la plainte de l'appelante. Non seulement des assignations de témoins ont été annulées, mais la Com-

mation and Protection of Privacy Act, R.S.O. 1990, c. F.31, were successfully resisted. Building on this success, the Board relies upon the statement of Gonthier J. in *Consolidated-Bathurst* at p. 336:

> The appellant does not claim that new evidence was adduced at the meeting and the record does not disclose any such breach of the *audi alteram partem* rule. The defined practice of the Board at full board meetings is to discuss policy issues on the basis of the facts as they were determined by the panel. The benefits to be derived from the proper use of this consultation process must not be denied because of the mere concern that this established practice might be disregarded, in the absence of any evidence that this has occurred. In this case, the record contains no evidence that factual issues were discussed by the Board at the September 23, 1983 meeting. [Emphasis added.]

mission a résisté avec succès aux tentatives de l'appelante d'obtenir des renseignements pertinents au moyen de la *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.O. 1990, ch. F.31, de la province. Partant de ce succès, la Commission se fonde sur l'énoncé du juge Gonthier dans *Consolidated-Bathurst*, p. 336 :

> L'appelante ne soutient pas que de nouveaux éléments de preuve ont été soumis à la réunion et le dossier ne révèle aucune violation de la règle *audi alteram partem* pour ce motif. La pratique définie par la Commission lors de ces réunions plénières consiste précisément à discuter des questions de politique en tenant pour avérés les faits établis par le banc. Il ne faut pas refuser les avantages que l'utilisation valable de ce processus de consultation peut procurer, uniquement à cause de la simple crainte que cette pratique établie ne soit pas respectée, en l'absence de toute preuve que la chose s'est produite. En l'espèce, le dossier ne contient aucune preuve que des questions de fait ont été discutées par la Commission lors de la réunion du 23 septembre 1983. [Je souligne.]

108 Where, as here, a serious question is raised on material emanating from the Board itself as to whether the *Consolidated-Bathurst* limits were respected, I do not think it is for the Board to claim that the failure of the party to obtain the additional evidence that the Board itself has fought to withhold is a complete answer to the claim. The strength of the evidence necessary to displace the presumption of regularity depends on the nature of the case: W. Wade and C. Forsyth, *Administrative Law* (7th ed. 1994), at p. 334. Having regard to the difficulties put in the way of the appellant to obtain evidence to which at common law it would have been entitled (*Tremblay*, at pp. 965-66), I think the appellant discharged its evidentiary onus to displace the "presumption" of regularity.

Lorsque, comme en l'espèce, une question sérieuse est soulevée à partir de documents émanant de la Commission même quant à savoir si les limites imposées par l'arrêt *Consolidated-Bathurst* ont été respectées, je ne crois pas que la Commission puisse prétendre que l'omission de la partie d'obtenir la preuve supplémentaire que la Commission elle-même a cherché à ne pas communiquer constitue une réponse complète à la plainte. La force de la preuve nécessaire pour réfuter la présomption de régularité varie selon la nature de l'affaire : W. Wade et C. Forsyth, *Administrative Law* (7e éd. 1994), p. 334. Quant aux difficultés qu'a éprouvées l'appelante à obtenir des éléments de preuve auxquels elle aurait eu droit en common law (*Tremblay*, p. 965-966), j'estime qu'elle s'est acquittée de sa charge de présentation consistant à déplacer la « présomption » de régularité.

109 The Board relies on the public interest in the effective operation of its docket, but that is not the only public interest at stake here. Public confidence in the integrity of decision making by courts and adjudicative tribunals is of the highest importance. Parties coming before the Board should not

La Commission se fonde sur l'intérêt public relatif à la gestion efficace de ses dossiers, mais il ne s'agit pas du seul intérêt public en jeu en l'espèce. La confiance du public dans l'intégrité du processus décisionnel des cours de justice et des tribunaux administratifs est de la plus haute impor-

come away with a *reasonable* apprehension that they were subject to a rogue process. Once it was determined here that the change between the initial decision and the final decision related to an issue that was almost entirely factual, and was nevertheless put up for discussion at a full Board meeting, I think the appellant has made out a *prima facie* basis for judicial review which in this case the Board chose not to rebut. To hold otherwise would suggest that the Court in *Consolidated-Bathurst* affirmed procedural limitations on full board meetings for breach of which there is no effective remedy.

tance. Les parties comparaissant devant la Commission ne doivent pas repartir avec la crainte *raisonnable* d'avoir été soumise à un processus irrégulier. Une fois qu'il a été déterminé en l'espèce que le changement intervenu entre la décision initiale et la décision définitive portait sur une question qui était presque entièrement factuelle et qui a néanmoins été soulevée à une réunion plénière de la Commission, j'estime que l'appelante a établi à première vue un fondement pour le contrôle judiciaire, que la Commission a décidé de ne pas réfuter en l'espèce. Conclure autrement indiquerait que notre Cour a confirmé, dans *Consolidated-Bathurst*, l'existence de restrictions procédurales relatives aux réunions plénières sans qu'il n'y ait une réparation efficace pour la violation de ces restrictions.

I do not think it is necessary in this case to address the possibility of relief against an "apparent" breach of fair hearing rights. I note, however, that many of the justifications my colleague, LeBel J. lists, at para. 48, for resort to "appearances" in bias cases apply here, principally the difficulty of proof and the need to vindicate the integrity of the adjudicative process. In the normal case it will be apparent whether someone has received the sort of hearing to which he or she is entitled. Did he or she know the case to meet? Was there proper disclosure? Was there a hearing? Were reasons given? Were those reasons adequate? Generally, unlike cases of bias, a participant has enough information in the ordinary course to determine the content of procedural fairness in a particular case and to assess whether it was received. For the most part, it will be "seen" by all whether fair hearing rights have been respected. This type of case is different. The statute bars access to the information relevant to a determination whether the full Board meeting was contrary to natural justice. The problems of information and proof inherent in bias cases, which contributed to the creation of the "appearances" standard, are present here.

110

Je ne pense pas qu'il soit nécessaire en l'espèce d'examiner la possibilité de réparation en matière de violation « apparente » du droit à une audience équitable. Je souligne toutefois que plusieurs des justifications que mon collègue le juge LeBel énumère, au par. 48, pour le recours aux « apparences » dans les affaires de partialité s'appliquent en l'espèce, tout particulièrement la difficulté de la preuve et la nécessité de défendre l'intégrité du processus décisionnel. Il sera généralement apparent qu'une personne a reçu ou non le genre d'audience à laquelle elle a droit. Connaissait-elle la preuve invoquée contre elle? Y a-t-il eu communication appropriée? Y a-t-il eu une audience? Des motifs ont-ils été fournis? Ces motifs étaient-ils adéquats? Généralement et contrairement aux affaires de partialité, un participant a suffisamment de renseignements pour déterminer le contenu de l'équité procédurale dans une affaire particulière et s'il en a bénéficié. En majeure partie, tous « verront » si le droit à une audience équitable a été respecté. Il s'agit en l'espèce d'une affaire différente. La loi interdit l'accès aux renseignements pertinents pour déterminer si la réunion plénière de la Commission était contraire à la justice naturelle. Les problèmes de renseignements et de preuve inhérents aux affaires de partialité, qui ont contribué à la création de la norme des « apparences », sont présents en l'espèce.

111 However, it is not necessary in this case to step into such controversial jurisprudential waters. The evidence shows a reference of the case to the full Board, and a change in the factual adjudication. This brings the appellant within the principle enunciated by Gonthier J. in *Consolidated-Bathurst* at pp. 335-36:

> The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence. [Emphasis added.]

On this point, there seems to have been no disagreement between Gonthier J. and Sopinka J., dissenting in the result, who wrote at p. 296:

> . . . in matters affecting the integrity of the decision-making process, it is sufficient if there is an appearance of injustice. The tribunal will not be heard to deny what appears as a plausible objective conclusion. [Emphasis added.]

Once the likelihood is established that the full Board meeting trespassed on adjudicative matters properly left to the panel, the further question of prejudice is properly dealt with in accordance with the observation of Dickson J. in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1116: "We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons."

112 In my view, subject to the privative clause issue, the appellant is entitled to a new hearing before a different panel of the Board. This is not an easy

Il n'est cependant pas nécessaire en l'espèce de pénétrer sur ce territoire jurisprudentiel controversé. La preuve indique l'existence d'un renvoi de l'affaire à la réunion plénière et d'un changement de décision quant aux faits. Cela fait en sorte que l'appelante est visée par le principe énoncé par le juge Gonthier dans *Consolidated-Bathurst*, p. 335-336 :

> La détermination et l'évaluation des faits sont des tâches délicates qui dépendent de la crédibilité des témoins et de l'évaluation globale de la pertinence de tous les renseignements présentés en preuve. En général, les personnes qui n'ont pas entendu toute la preuve ne sont pas à même de bien remplir cette tâche et les règles de justice naturelle ne permettent pas à ces personnes de voter sur l'issue du litige. Leur participation aux discussions portant sur ces questions de fait pose moins de problèmes quand elles ne participent pas à la décision définitive. Cependant, j'estime que ces discussions violent généralement les règles de justice naturelle parce qu'elles permettent à des personnes qui ne sont pas parties au litige de faire des observations sur des questions de fait alors qu'elles n'ont pas entendu la preuve. [Je souligne.]

Sur ce point, il ne semble y avoir eu aucun désaccord entre le juge Gonthier et le juge Sopinka, dissident quant à l'issue, qui a écrit à la p. 296 :

> . . . en matière d'atteinte à l'intégrité du processus décisionnel, il suffit qu'il y ait apparence d'injustice. On ne peut accepter que le tribunal nie ce qui paraît être une conclusion objective plausible. [Je souligne.]

Dès que l'on démontre la probabilité que la réunion plénière de la Commission ait empiété sur des questions décisionnelles devant être laissées à la formation, la question suivante du préjudice doit être examinée conformément à l'observation faite par le juge Dickson dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, p. 1116 : « Nous ne sommes pas concernés ici par la preuve de l'existence d'un préjudice réel mais plutôt par la possibilité ou la probabilité qu'aux yeux des gens raisonnables, il existe un préjudice. »

À mon avis, sous réserve de la question de la clause privative, l'appelante a droit à une nouvelle audience devant une formation différente de la

order to make given the fact that this case has been before the Board and the courts for many years. However, the courts in Ontario refused to stay the Board's original order upholding the respondent union's bargaining rights, and the union and its members have not on that account been prejudiced by the delay.

Commission. Il ne s'agit pas d'une ordonnance facile à rendre compte tenu du fait que la présente affaire est devant la Commission et les tribunaux depuis de nombreuses années. Toutefois, les tribunaux ontariens ont refusé de suspendre l'ordonnance originale de la Commission confirmant les droits de négociation du syndicat intimé, de sorte que le délai n'a causé aucun préjudice au syndicat et à ses membres.

The Privative Clauses

Les clauses privatives

Decisions of the Board are protected by a considerable armoury of statutory provisions including a "finality clause" and a "privative clause": 113

Les décisions de la Commission sont protégées par une armée de dispositions législatives qui comprennent une « clause d'irrévocabilité » et une « clause privative » :

114. (1) [Jurisdiction] The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

116. [Board's orders not subject to review] No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

114. (1) [Compétence exclusive] La Commission a compétence exclusive pour exercer les pouvoirs que lui confère la présente loi ou qui lui sont conférés en vertu de celle-ci et trancher toutes les questions de fait ou de droit soulevées à l'occasion d'une affaire qui lui est soumise. Ses décisions ont force de chose jugée. Toutefois, la Commission peut à l'occasion, si elle estime que la mesure est opportune, réviser, modifier ou annuler ses propres décisions, ordonnances, directives ou déclarations.

116. [La décision de la Commission n'est pas susceptible de révision] Sont irrecevables devant un tribunal les demandes en contestation ou en révision des décisions, ordonnances, directives ou déclarations de la Commission ou les instances visant la contestation, la révision, la limitation ou l'interdiction de ses activités, par voie notamment d'injonctions, de jugement déclaratoire, de brefs de *certiorari*, *mandamus*, prohibition ou *quo warranto*.

The effect of such clauses was explained by Dickson J. (as he then was), speaking for the Court in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382, at p. 389: 114

L'effet de ces dispositions a été expliqué par le juge Dickson (plus tard Juge en chef), s'exprimant au nom de notre Cour dans l'arrêt *Union internationale des employés des services, local nº 333 c. Nipawin District Staff Nurses Association*, [1975] 1 R.C.S. 382, p. 389 :

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include acting in bad faith, basing the decision on extraneous matters, failing to take relevant

Un tribunal peut, d'une part, avoir compétence dans le sens strict du pouvoir de procéder à une enquête mais, au cours de cette enquête, faire quelque chose qui retire l'exercice de ce pouvoir de la sauvegarde de la clause privative ou limitative de recours. Des exemples de ce genre d'erreur seraient le fait d'agir de mauvaise foi, de fonder la décision sur des données étrangères à la ques-

factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it. [Emphasis added.]

To the same effect see *Université du Québec à Trois-Rivières v. Laroque*, [1993] 1 S.C.R. 471, at pp. 491 and 494; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, at p. 435; Brown and Evans, *Judicial Review of Administrative Action in Canada*, *supra*, at para. 13:5440, p. 13-78; G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at para. 4.100, p. 4-6. The Board lies at the judicial end of the spectrum of administrative tribunals discussed in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at pp. 628-29. Where, as here, the Board upholds a grievance and orders the payment of damages under a procedure that violated the principles of natural justice, the order is made without jurisdiction and will be set aside despite the privative clause.

Disposition

115 I would allow the appeal with costs and remit the union's application to the Ontario Labour Relations Board for a rehearing before a different panel. The appellant should have its costs on a party and party basis here and in the courts below.

Appeal dismissed with costs, MAJOR and BINNIE JJ. *dissenting.*

Solicitors for the appellant: Lerner & Associates, Toronto.

Solicitors for the respondent Ontario Labour Relations Board: Tory Tory DesLauriers & Binnington, Toronto.

Solicitors for the respondent International Brotherhood of Electrical Workers, Local 894: Koskie Minsky, Toronto.

tion, d'omettre de tenir compte de facteurs pertinents, d'enfreindre les règles de la justice naturelle ou d'interpréter erronément les dispositions du texte législatif de façon à entreprendre une enquête ou répondre à une question dont il n'est pas saisi. [Je souligne.]

Dans le même sens, voir *Université du Québec à Trois-Rivières c. Laroque*, [1993] 1 R.C.S. 471, p. 491 et 494; *Metropolitan Life Insurance Co. c. Internatinal Union of Operating Engineers, Local 796*, [1970] R.C.S. 425, p. 435; Brown et Evans, *Judicial Review of Administrative Action in Canada, op. cit.*, par. 13:5440, p. 13-78; G. W. Adams, *Canadian Labour Law* (2e éd. (feuilles mobiles)), par. 4.100, p. 4-6. La Commission se situe à l'extrémité judiciaire de l'échelle des tribunaux administratifs mentionnée dans l'arrêt *Martineau c. Comité de discipline de l'Institution de Matsqui*, [1980] 1 R.C.S. 602, p. 628-629. Lorsque, comme en l'espèce, la Commission accueille un grief et ordonne le versement de dommages-intérêts en vertu d'une procédure qui a contrevenu aux principes de justice naturelle, l'ordonnance est rendue en l'absence de compétence et sera annulée malgré la clause privative.

Dispositif

Je suis d'avis d'accueillir le pourvoi avec dépens et de renvoyer la demande du syndicat à la Commission des relations de travail de l'Ontario pour une nouvelle audience devant une formation différente. L'appelante a droit aux dépens sur une base de frais entre parties en notre Cour et dans les tribunaux d'instance inférieure.

Pourvoi rejeté avec dépens, les juges MAJOR *et* BINNIE *sont dissidents.*

Procureurs de l'appelante : Lerner & Associates, Toronto.

Procureurs de l'intimée la Commission des relations de travail de l'Ontario : Tory Tory DesLauriers & Binnington, Toronto.

Procureurs de l'intimée la Fraternité internationale des ouvriers en électricité, section locale 894 : Koskie Minsky, Toronto.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20141103

Docket: A-301-12

Citation: 2014 FCA 251

CORAM: **NOËL C.J.**
GAUTHIER J.A.
NEAR J.A.

BETWEEN:

RACHEL EXETER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 10, 2014.

Judgment delivered at Ottawa, Ontario, on November 3, 2014.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: NOËL C.J.
NEAR J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

GAUTHIER J.A.

I. Introduction

[1] Rachel Exeter (the applicant) seeks judicial review of the decision of the Chairperson of the Public Service Labour Relations Board (the Board) refusing to appoint an adjudicator other than the adjudicator already seized with the applicant's nine grievances to deal with the

applicant's allegations that the memorandum of agreement (MOA) meant to settle those grievances should be declared null and void.

[2] The applicant and her former employer, Statistics Canada (the employer) settled the applicant's nine grievances with the assistance of adjudicator Pineau (the Adjudicator) without prejudice to her power to continue the adjudication with respect to unresolved issues (see subsection 226(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22., s. 2 (the Act)). Both parties were represented by counsel during the lengthy mediation session which ended with the signature of a MOA setting out the terms of their settlement. Thus, the hearing of the grievances scheduled to resume the next day was cancelled.

[3] In her motion dated August 17, 2011 brought before the Board, the applicant sought an order:

> (i) Preventing the Adjudicator from scheduling, hearing, and making any order as they relate to the MOA, and
>
> (ii) Appointing an independent adjudicator to look into the validity of the MOA.

[4] In support of her motion, the applicant essentially argued that the Adjudicator could not retain jurisdiction over the matter because she was biased and had a conflict of interest within the meaning of subsection 224(2) of the Act. This conflict arose from her direct involvement in the process that led to the MOA, which was allegedly signed by the applicant under duress and only after pressure had been exerted by the Adjudicator, who had also dismissed the applicant's request(s) for an adjournment. In her view, the Board had the power to intervene pursuant to

section 36 of the Act and should do so to prevent a violation of her constitutional right to a fair process.

[5] On February 24, 2012, in its decision reported as 2012 PSLRB 24, the Board dismissed the applicant's motion on two bases. First, it held that it had no power under the Act to remove an adjudicator already seized with a grievance. Among other things, the Board noted that in its view, its interference in matters otherwise properly before an adjudicator would run contrary to the objective of fair, credible and efficient adjudication proceedings (paragraphs 12 and 13 of the decision).

[6] Second, the Board found that even if it had jurisdiction under section 36 of the Act to remove the Adjudicator, as argued by the applicant, "it would be inappropriate for the Board to exercise that power" as "it is more appropriate to let the [A]djudicator seized with Ms. Exeter's grievances decide the request for recusal" (paragraph 15 of the decision). In that respect, it noted that there was no doubt that an adjudicator has jurisdiction to decide a request for his or her recusal, and that any adjudicator seized with a grievance is bound by the rules of natural justice and procedural fairness. Also, the Board specified that any failure in that respect would be subject to judicial review by the Federal Court (paragraphs 12 and 14 of the decision).

[7] For the reasons that follow, in my opinion, the Board's conclusion that it was more appropriate to let the Adjudicator decide whether or not she should recuse herself is reasonable. I also conclude that there was no breach of procedural fairness by the Board in the process leading to this decision. I thus propose that the application be dismissed.

II. Background

[8] Although not strictly necessary to determine the issues before us, it is nevertheless useful to briefly describe the sequence of events leading to the present application in order to provide context for the issues raised by the applicant. In assembling these facts, I relied primarily on the material in the applicant's record, which included, *inter alia*, the Adjudicator's decision.

[9] First, the applicant states that she was unprepared for the long mediation session that started in the afternoon of February 11, 2009 and lasted almost twelve hours. Despite the presence of her counsel, she says that she did not really have the benefit of advice.

[10] According to her, she developed migraines, was sick, tired and hungry. She felt compelled to sign the MOA because of pressure exerted on her by the Adjudicator who, among other things, was insisting that the hearing of the grievances would resume the next day, unless the matter settled.

[11] She also alleges that she contacted her counsel around 8:15 a.m. on February 12, 2009 to discuss "negating" the MOA, but that the said counsel was unhelpful, stating that nothing could be done and the matter was out of her hands.

[12] Still, the parties did take steps to give effect to the MOA. For example, the employer remitted a settlement cheque in the agreed amount to the applicant who cashed it shortly

thereafter. But, according to the applicant, the employer was not complying with other provisions of the MOA as she understood them.

[13] On May 28, 2009, the applicant informed the Board that she would no longer be represented by counsel and that, as explained in an earlier letter dated April 30, 2009, the "Adjudicator Ms. Pineau who is seized with this matter" should intervene, as the employer was unwilling to properly comply with the MOA. On June 19, 2009, the employer replied that it was in fact the applicant who was not complying with the MOA. On July 17, 2009, the employer asked that the Adjudicator remain seized with the matter.

[14] By a letter dated February 2, 2010, the Adjudicator informed the applicant that her grievances would be held in abeyance pending the outcome of a separate application then before the Federal Court of Appeal, in which the Court considered whether an adjudicator appointed to hear grievances under the Act maintains jurisdiction over disputes relating to a settlement agreement entered into by the parties in respect of those grievances. As in the present application, in that case, Mr. Amos's grievance had been settled through mediation with the assistance of the adjudicator seized with his grievance and a MOA was signed. Like the applicant, Mr. Amos had not withdrawn his grievance when the dispute relating to the MOA arose.

[15] For reasons not explained in her letter, the applicant wrote to the Board on March 26, 2010 to withdraw her request that the Adjudicator intervene further in her matter. However, the employer did not withdraw its request for such intervention.

[16] The applicant was advised on May 6, 2010, that "your grievance matters will continue to be held in abeyance pending the outcome of Amos matter [sic]. Once, and only after, the Federal Court of Appeal has made its decision, Adjudicator Pineau will provide directions on how we are to proceed with your files…".

[17] On February 3, 2011, the Federal Court of Appeal issued its decision in *Andrew Donnie Amos v. The Attorney General of Canada*, 2011 FCA 38, [2012] 4 F.C.R. 67 [*Amos*]. This decision confirmed the adjudicator's determination that he had jurisdiction to consider an allegation that a party is in non-compliance with a final and binding settlement, where the dispute underlying the settlement agreement is linked to the original grievance and where the grievor has not withdrawn his grievance.

[18] On May 18, 2011, a pre-hearing teleconference was scheduled to discuss all outstanding issues in the applicant's grievance files.

[19] On May 24 and May 26, 2011, the applicant wrote to the Chairperson of the Board requesting that "prior to determining whether there has been compliance with the MOA", the Board should void the MOA, "as it was signed under intimidation, duress, undue influence, medical and physical incapacities, coercion and it is unconscionable". She also asked the Board for "an investigation into the Adjudicator's conduct on the account of procedural fairness".

[20] The applicant participated in a teleconference on June 6, 2011, in which she raised the conflict of interest she perceived with respect to the determination of the validity of the MOA by the Adjudicator because of her claims against the latter (page 32 of the applicant's record).

[21] Having been denied her informal requests to the Chairperson of the Board for the appointment of another adjudicator to determine the validity of the MOA, the applicant filed, on August 17, 2011, the motion which resulted in the issuance of the decision under review on February 24, 2012 (2012 PSLRB 24).

[22] Later on the same day, the Adjudicator issued her own decision (reported as 2012 PSLRB 25) on all outstanding matters in the applicant's grievance files, including her request for recusal. After analysing the arguments and the evidence submitted by the applicant in support of her August 17, 2011 motion, the Adjudicator dismissed the applicant's request, declared the MOA final and binding and made findings with respect to the parties' compliance with the MOA. She also ordered that the nine grievance files be closed.

[23] The self-represented applicant had difficulty determining in which forum she should file her applications for judicial review of the foregoing decisions. After some confusion, it was confirmed that the decision of the Board was to be reviewed by the Federal Court of Appeal, while the decision of the Adjudicator was to be reviewed by the Federal Court. The Federal Court has yet to hear her application for judicial review of the Adjudicator's decision in (file number T-943-12).

III. Issues

[24] The applicant lists several errors allegedly made by the Board on page 2 of her memorandum of fact and law. Having considered the subject of her detailed submissions made in writing and at the hearing, I believe that the questions for determination can be regrouped as follows:

(i) Did the Board err in its interpretation of its powers under section 36 of the Act?

(ii) Did the Board err in concluding that, in any event, even if it had the power to grant the Applicant's request, it would still dismiss it on the basis that it was more appropriate that the Adjudicator deal with the said request?

(iii) Did the Board breach procedural fairness by failing to solicit reply submissions from the applicant?

IV. Legislation

[25] The most relevant provision in the Act is section 36. It reads as follows:

Powers and Functions of the Board	Pouvoirs et fonctions de la Commission
36. The Board administers this Act and it may exercise the powers and perform the functions that are conferred or imposed on it by this Act, or as are incidental to the attainment of the objects of this Act, including the making of orders requiring compliance with this Act, regulations made under it or decisions made in respect of a matter coming before the Board.	36. La Commission met en œuvre la présente loi et exerce les pouvoirs et fonctions que celle-ci lui confère ou qu'implique la réalisation de ses objets, notamment en rendant des ordonnances qui exigent l'observation de la présente loi, des règlements pris sous le régime de celle-ci ou des décisions qu'elle rend sur les questions qui lui sont soumises.

[26] Two other provisions of the Act are reproduced in Annex "A" to these reasons. Section 224(2), on which the applicant relied, but does not apply to an adjudicator as well as subsection 226(2).

V. Analysis

A. *Standard of review*

[27] The applicant argues that the first issue raises a jurisdictional question, whereas the second one constitutes a refusal to exercise one's jurisdiction. She submits that both should be reviewed on a correctness standard. I disagree with the applicant's characterisation of these issues.

[28] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 35, the Supreme Court of Canada warns courts against simply branding issues as involving jurisdictional questions in order to subject them to broader curial review (see also, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraph 34). In my opinion, whether the Board has the power to recuse an adjudicator seized with a grievance is no more a true jurisdictional question than the issue before this Court in *Amos* (see *Amos* at paragraph 24).

[29] The applicant does not dispute that the Board has the power to construe the Act. In fact, it is quite apparent from section 36 of the Act that to do so is at the core of its mandate. Although it was done in a somewhat different context, I adopt the analysis of Evans J.A. in *Bernard v.*

Canada (Attorney General), 2012 FCA 92, [2012] 4 F.C.R. 370 at paragraphs 32 to 38 (aff'd 2014 SCC 13). In my view, the deferential standard of reasonableness is also appropriate here in view of the Board's expertise in interpreting its home statute and the strong privative clause in subsection 51(1) of the Act.

[30] This standard also applies to mixed questions of fact and law and more particularly in this case, to the Board's conclusion as to how it would exercise its power, if, as argued, it had the authority to recuse the Adjudicator.

[31] As to the question of procedural fairness, it is trite law that the correctness standard applies *(Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R.339 at paragraph 43; *Exeter v. Canada (Attorney General)*, 2011 FC 86 at paragraphs 16-17, aff'd on this point 2012 FCA 119 at paragraph 6).

B. *Did the Board err in its interpretation of section 36 of the Act?*

[32] The applicant argues that the Board misunderstood the purpose of her motion. In her view, this led to an erroneous interpretation of the Act because the Board focused on its powers with respect to "grievances" instead of its power to recuse the Adjudicator solely in respect of the determination of the validity of the MOA on the basis of procedural fairness (applicant's memorandum of fact and law, page 1, paragraphs 6, 20-23 and 33).

[33] The applicant attempts to dissociate the authority of the Adjudicator to deal with the validity of the MOA from her authority over the applicant's grievances. But the fact remains

that, in *Amos*, this Court made it clear that the adjudicator's power to deal with the enforceability and implementation of a MOA arises from being seized with the grievances.

[34] Thus, although it may have been preferable for the Board to more precisely describe the applicant's request, I am satisfied that the Board knew exactly what she was seeking. I agree with the Board when it states that: "[b]asically, Ms. Exeter's request is for the recusal of the [A]djudicator who is seized with her grievances" (see paragraph 14 of the decision).

[35] That said, I am also satisfied that the reasoning of the Board is cogent and sufficient to dispose of the request as formulated by the applicant. The Board considered not only its power with respect to "grievances", as alleged by the applicant, but also the objectives of the Act and the applicant's argument regarding procedural fairness. The Board's decision that it does not have the power to recuse an adjudicator seized with a matter is reasonable, whether the request to recuse applies to all or part of the outstanding matters in the grievance files.

[36] I will not dwell further on the interpretation of section 36, in light of the Board's conclusion that even if it had the power to do what was requested by the applicant, it would still dismiss her motion. This finding would be sufficient to support the Board's decision regardless of its interpretation of section 36. Thus, I will now consider the reasonableness of this conclusion.

C. *Was it reasonable for the Board to conclude that, in any event, even if it had the power to grant the Applicant's request, it would still dismiss it on the basis that it was more appropriate that the Adjudicator deal with the said request?*

[37] The applicant did not address the Board's reasoning on this issue, other than to say that to leave the matter of her recusal to the Adjudicator constitutes a refusal by the Board to exercise its power and, as such, constitutes an error justifying our intervention. I disagree.

[38] If the Board indeed has the power to deal with the applicant's request, it also has the discretion to refuse to exercise that power when it is satisfied that there is an appropriate alternative remedy, as in this case.

[39] I agree with the Board that requests for recusal are more appropriately dealt with by the decision-maker seized with the matter in respect of which a reasonable apprehension of bias or conflict of interest is claimed. This is exactly how requests for recusal are dealt with in other forums, including courts: see for example, *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*, 2012 FCA 73, 430 N.R. 190; *Canada (Attorney General) v. Khawaja*, 2007 FC 533 (Mosley J.); *Ihasz v. Ontario*, 2013 HRTO 233, [2013] O.H.R.T.D. No. 326; *Ng v. Bank of Montreal*, [2008] C.L.A.D. No. 221.

[40] In our system, one cannot presume that a decision maker cannot deal fairly with such requests simply because it is alleged that he or she is biased or has a conflict of interest. The Board's decision does not violate the applicant's constitutional rights or the Board's duty to act fairly, for the applicant was entitled, and she is currently exercising this right, to a review of the decision of the Adjudicator on a correctness standard. That standard ensures the full respect of all the applicant's rights to a fair and impartial adjudication of her recusal motion. In fact, all the applicant's concerns will be addressed by the judge who will hear her application in T-943-12.

D. *Procedural Fairness*

[41] The applicant submits that the Board denied her participatory rights, thereby breaching its duty to act fairly, by failing to contact her or provide her with an opportunity to file a reply to the employer's submissions. In her view, this also shows that the Board's action was discriminatory and in bad faith, given that it did write to the employer to ask for its submissions (paragraph 46 of the appellant's memorandum).

[42] In a letter to the employer and applicant dated September 22, 2011, the Board transmitted a copy of the applicant's motion to the employer, who was not included as respondent in the motion and did not appear to have received a copy of the motion. The Board also set a short delay for the employer to submit its representations, if any.

[43] Although the employer did file brief submissions, which were copied to the applicant on September 29, 2012, it basically objected to the motion and responded to the arguments already made by the applicant in her written representations to the Board. In fact, in its decision, the Board summarizes the employer's position as follows: "Statistics Canada opposes the request alleging that it is "… trivial, frivolous, vexatious, and made in bad faith …" The deputy head denies that the Adjudicator has an interest in the outcome of Ms. Exeter's grievances."

[44] These issues are not new. On reply, normally one is entitled to rebut new issues. In any event, it is difficult to understand on what basis the applicant believed that she needed an invitation to reply to those submissions if she had anything new and important to add. As noted

by the respondent in its memorandum, there was absolutely nothing precluding the applicant from filing a reply if she so wished during the five month period between the filing of those submissions and the issuance of the decision.

[45] In fact, as the applicant does not deal at all with this issue in her affidavit, there is no evidence before us that, at the relevant time, the applicant understood that she had no right to file a reply. She does not give any detail either as to what else she would have added to the detailed submissions included in her motion material filed before the Board.

[46] In the circumstances, although it might have been preferable for the Board to indicate to the self-represented grievor that she could file reply submissions if necessary, I cannot conclude that its failure to do so amounts to breach of procedural fairness.

VI. Conclusion

[47] In light of the foregoing, the application for judicial review should be dismissed.

[48] There remains the issue of costs in respect of which the applicant argued forcefully at the hearing. Among other things, she submits that the respondent withdrew paragraphs 18 to 20 of its submissions, which alleged that several paragraphs in her affidavit in support of the application should be struck, just two days before the hearing. This caused her prejudice as she had already prepared to deal with this argument at the hearing. She says that in another procedure before this Court (*Rachel Exeter v. Attorney General of Canada*, 2014 FCA 105 at

paragraph 22) the lateness of the respondent's argument that the application was moot was sufficient to justify awarding no costs to him.

[49] Each case must be decided on its own facts. In my view, disputing paragraphs in an affidavit on the basis that they are purely argumentative or based on hearsay is quite different from raising a substantive argument like mootness. That said, I believe that the respondent's costs should be limited. Thus, I would propose to fix them at an amount of $500.00 (all inclusive).

"Johanne Gauthier"

J.A.

"I agree
Marc Noël C.J."

"I agree
D.G. Near J.A."

Annex "A"

Public Service Labour Relations Act (S.C. 2003, c. 22, s. 2)	Loi sur les relations de travail dans la fonction publique (L.C. 2003, ch. 22, art. 2)
Board of Adjudication	Conseil d'arbitrage de grief
Constitution	Composition
Ineligibility	Incompatibilité
224. (2) A person is not eligible to be a member of a board of adjudication if the person has any direct interest in or connection with the grievance referred to the board of adjudication, its handling or its disposition.	224. (2) L'appartenance au conseil est incompatible avec tout intérêt, direct ou indirect, à l'égard du grief renvoyé à l'arbitrage, de son instruction ou de son règlement.
Power to mediate	Médiation
226. (2) At any stage of a proceeding before an adjudicator, the adjudicator may, if the parties agree, assist the parties in resolving the difference at issue without prejudice to the power of the adjudicator to continue the adjudication with respect to the issues that have not been resolved.	226. (2) En tout état de cause, l'arbitre de grief peut, avec le consentement des parties, les aider à régler tout désaccord entre elles, sans qu'il soit porté atteinte à sa compétence à titre d'arbitre chargé de trancher les questions qui n'auront pas été réglées.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-301-12
STYLE OF CAUSE:	RACHEL EXETER v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 10, 2014
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	NOËL C.J. NEAR J.A.
DATED:	NOVEMBER 3, 2014

APPEARANCES:

Rachel Exeter	FOR THE APPELLANT (ON HER OWN BEHALF)
Ms. Léa Bou Karam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160615

Docket: A-215-14

Citation: 2016 FCA 180

CORAM: **TRUDEL J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

GARY HENNESSEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at St. John's, Newfoundland and Labrador, on June 7, 2016.

Judgment delivered at Ottawa, Ontario on June 15, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.
BOIVIN J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160615

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Citation: 2016 FCA 180

CORAM: **TRUDEL J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

GARY HENNESSEY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellant appeals from the judgment dated March 24, 2014 of the Federal Court (*per* Barnes J.): 2014 FC 286. In lengthy, detailed and careful reasons, the Federal Court dismissed the appellant's action for damages arising from the alleged conduct of certain officials employed by the Canada Revenue Agency.

[2] After a fourteen day trial, the Federal Court found on the evidence that none of the causes of action put to it were established. In particular, the Federal Court found that the Canada Revenue Agency officials did not act maliciously and unlawfully or violate the appellant's Charter rights when they tried to collect payroll remittance arrears from him.

[3] Just after the appeal hearing began, we acquainted the appellant, who was representing himself, with the law concerning the appellate standard of review. We encouraged him to identify errors of law or palpable and overriding errors in the reasons of the Federal Court.

[4] The appellant failed to do so. For the most part, he urged us to reweigh the evidence and come to findings different from those made by the Federal Court. This, as an appeal court, we cannot do: see, *e.g.*, *AstraZeneca Canada Inc. v. Apotex Inc.*, 2011 FCA 211, 425 N.R. 133 at para. 8; *Hershkovitz v. Tyco Safety Products Canada Ltd.*, 2010 FCA 190, 405 N.R. 185 at para. 39.

[5] As is well-known, absent an error of law or an error in principle at the root of a finding of mixed law and fact, a judgment of the Federal Court dismissing an action can be set aside only if palpable and overriding error is shown: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Palpable and overriding error is a difficult, rarely-met standard:

> "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

(Canada v. South Yukon Forest Corporation, 2012 FCA 165, 431 N.R. 286 at para. 46.)

[6] The appellant did not identify any errors of law or any extricable errors in principle underlying a finding of mixed law and fact made by the Federal Court. In my view, the reasoning of the Federal Court contains no such errors. The Federal Court did not misstate or misapply the law or any legal principles.

[7] Further, the Federal Court did not commit any palpable and overriding errors. All of its factual findings and findings on factually-suffused questions of mixed fact and law were supportable on the evidence before it.

[8] Before us, the appellant seemed to suggest that the Federal Court ignored some of the evidence before it or gave inadequate reasons for the findings it made. I disagree.

[9] Unless persuaded otherwise, an appellate court, such as this Court, must presume that a first-instance court has considered all of the evidence placed before it: *Housen*, above at para. 46. In the case before us, the appellant has not rebutted this presumption.

[10] Further, reasons for judgment need only be adequate, not an encyclopedic description of every last morsel of evidence offered by the parties. This is especially true in long trials, such as this one. I adopt the reasoning in the following passage from *South Yukon* (at paras. 49-51) and find it wholly apposite to the case before us:

> Immersed from day-to-day and week-to-week in a long and complex trial such as this, trial judges occupy a privileged and unique position. Armed with the tools of logic and reason, they study and observe all of the witnesses and the exhibits. Over time, factual assessments develop, evolve, and ultimately solidify into a factual narrative, full of complex interconnections, nuances and flavour.

> When it comes time to draft reasons in a complex case, trial judges are not trying to draft an encyclopedia memorializing every last morsel of factual minutiae, nor can they. They distill and synthesize masses of information, separating the wheat from the chaff and, in the end, expressing only the most important factual findings and justifications for them.
>
> Sometimes appellants attack as palpable and overriding error the non-mention or scanty mention of matters they consider to be important. In assessing this, care must be taken to distinguish true palpable and overriding error on the one hand, from the legitimate by-product of distillation and synthesis or innocent inadequacies of expression on the other.

[11] In another case, this Court put it this way:

> We are not to insist that courts explicitly address every last issue, set out the obvious or show how they arrived at their conclusion in a "watch me think" fashion: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paragraphs 17 and 43-44; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at paragraph 25; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 at paragraph 27. Instead, we are to adopt a very practical and functional approach to the adequacy of reasons: see, *e.g.*, *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 at paragraph 55; *R.E.M.*, above at paragraph 35; *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 at paragraph 101. Reasons must be read as a whole in their overall context, including the evidentiary record before the court, the submissions made, the issues that were live before the court and the fact that judges are presumed to know the law on basic points: *R.E.M.*, above at paragraphs 35 and 45. The main concern is whether the reasons, short as they may be, are intelligible or capable of being made out and permit meaningful appellate review: *Sheppard*, above at paragraph 25; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R.E.M.*, above at paragraph 35.

(*Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at para. 143.)

[12] The reasons of the Federal Court easily satisfy these tests. Far from being deficient, they are a model of clarity, containing clear factual findings, including firm findings concerning the credibility of the appellant as a witness. It supported these findings with plenty of detail and ample explanation.

[13] The appellant also alleges that the Federal Court was biased. He bases this allegation in part upon evidence he unsuccessfully sought to introduce into this appeal by way of interlocutory motion earlier this year. That evidence consisted of certain words allegedly spoken by the Federal Court during the hearing and a suggestion that the audio tape of the hearing was edited to remove the words. This Court dismissed the motion. The appellant has not sought leave to appeal that motion. Thus, as matters stand, the appellant's allegation of bias cannot rely upon that evidence.

[14] However, even if the interlocutory motion had been allowed and we considered the evidence the appellant proffers, I would still dismiss his allegation of bias.

[15] The test for bias is what a reasonable, right-minded, "informed person, viewing the matter realistically and practically—and having thought the matter through—conclude": *Committee for Justice and Liberty v. National Energy Board* (1976), [1978] 1 S.C.R. 369 at page 394, 68 D.L.R. (3d) 716; *Trevor Nicholas Construction Co. v. Canada (Minister for Public Works)*, 2003 FCA 277, 242 F.T.R. 317 at para. 8. Here, that test is not met.

[16] The appellant says (at para. 35 of his Memorandum of Fact and Law) that on the first day of trial the Federal Court pointedly asked his counsel where the evidence supporting a "big conspiracy" was. Assuming the Federal Court said those words, they must be seen in context.

[17] The Federal Court—mindful of the need under Rule 3 of the *Federal Courts Rules*, S.O.R./98-106 for proceedings to be prosecuted expeditiously and efficiently—had every right to

ask that sort of question. The reasonable, right-minded, informed person would not view those words as expressing pre-judgment of the appellant's case. Rather, that person would see them as an intervention aimed at encouraging the appellant to get to the real issues in dispute. Assuming the Federal Court said the words alleged, they were an instance of good trial management, not bias.

[18] The appellant also suggests (again at para. 35 of his Memorandum of Fact and Law) that the Federal Court showed bias in expressing its frustration after several days of evidence that it had not seen any evidence supporting the appellant's case. Again, viewed from the perspective of the reasonable, right-minded, informed person, this was a comment directed at encouraging the appellant to adduce relevant evidence and get to the point if there was a point to be made. This too was an instance of good trial management, not bias.

[19] The appellant also says that the Federal Court was biased because it did not assist it in getting contact information for an officer with the Canada Revenue Agency. This is a ruling against a specific request made by the appellant, not an instance of bias against his case.

[20] All these allegations of bias and unfairness fail for another reason. It is well-known that allegations of bias and procedural unfairness in a first-instance forum cannot be raised on appeal or judicial review if they could reasonably have been the subject of timely objection in the first-instance forum, here the Federal Court: *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 F.C. 85; *In Re Human Rights Tribunal and Atomic Energy*

of Canada, [1986] 1 F.C. 103 (C.A.) at page 113; *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at paras. 67-68.

[21] A party must object when it is aware of a procedural problem in the first-instance forum. It must give the first-instance decision-maker a chance to address the matter before any harm is done, to try to repair any harm or to explain itself. A party, knowing of a procedural problem at first instance, cannot stay still in the weeds and then, once the matter is in the appellate court, pounce.

[22] If there were instances of bias or unfairness in the Federal Court, the appellant's counsel should have objected. The transcript shows no objection to anything the appellant now raises on appeal.

[23] At the outset of the appeal hearing, the appellant sought an adjournment. The appellant said he needed an adjournment in order to apply for leave to appeal to the Supreme Court of Canada from the decision on the interlocutory motion. He placed before us a copy of an email suggesting that he had made inquiries of a legal assistance group to assist him in that application.

[24] This Court refused to exercise its discretion in favour of adjourning the hearing. Where possible, appeals are to be prosecuted expeditiously: *Federal Courts Rules*, above, Rule 3. Early last autumn, at the appellant's request, the appeal hearing had been adjourned several months. Recently, the appellant sought an adjournment. It was refused. To some extent, the latest adjournment request is an instance of impermissible re-litigation.

[25] Further, the specific reason offered by the appellant for this particular adjournment request—the need to appeal the interlocutory motion to the Supreme Court and the possible assistance of a legal assistance group—does not bear scrutiny. The interlocutory motion should have been brought months earlier, namely at the time the appellant prepared the appeal book. Further, the time for applying for leave to appeal from this Court's dismissal of the motion has expired. The legal assistance group has not committed to assist the appellant. Finally, as can be seen from paragraphs 14-17 and 20-22, above, even if the interlocutory motion had succeeded and the Federal Court's words were admitted before us, the allegation of bias based on those words would still have been rejected and the result of this appeal would still be the same.

[26] The appellant also submits that the Federal Court's costs award should be set aside. In exercising its discretion on costs, the Federal Court applied proper legal principle and made an award supportable on the facts of the case. There are no grounds to set it aside.

[27] Overall, I conclude that there are no grounds for interfering with the Federal Court's judgment. Therefore, I would dismiss the appeal with costs.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-215-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BARNES DATED MARCH 24, 2014, NO. T-953-10	
STYLE OF CAUSE:	GARY HENNESSEY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	JUNE 7, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. BOIVIN J.A.
DATED:	JUNE 15, 2016

APPEARANCES:

Gary Hennessey	ON HIS OWN BEHALF
Caitlin Ward Maeve Baird	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT

Date: 20090615

Docket: A-174-09

Citation: 2009 FCA 204

Present: **TRUDEL J.A.**

BETWEEN:

MAAX BATH INC.

Applicant

and

ALMAG ALUMINUM INC., APEL EXTRUSIONS LIMITED, CAN ART ALUMINUM EXTRUSION INC., METRA ALUMINUM INC., SIGNATURE ALUMINUM CANADA INC., SPECTRA ALUMINUM PRODUCTS LTD., SPECTRA ANODIZING INC., EXTRUDEX ALUMINUM, ARTOPEX INC., ASIA ALUMINUM HOLDINGS LTD., BLINDS TO GO INC., EXTRUDE-A-TRIM INC., GARAVENTA (CANADA) LTD., KAM KIU ALUMINIUM PRODUCTS (NA) LTD., KAM KIU ALUMINIUM PRODUCTS SDN. BHD., KROMET INTERNATIONAL INC., LOXCREEN CANADA, MALLORY INDUSTRIES, PANASIA ALUMINIUM (CHINA) LIMITED, PANASIA ALUMINUM (CALGARY) LIMITED, PANASIA ALUMINUM (MACAO COMMERCIAL OFFSHORE) LIMITED, PANASIA ALUMINUM (TORONTO) LIMITED, PINGGUO ASIA ALUMINUM CO. LTD., R-THETA THERMAL SOLUTIONS INC., RAILCRAFT INTERNATIONAL INC., REGAL ALUMINUM PRODUCTS INC., SHINING METAL TRADING INC., SINOBEC TRADING INC., TAG HARDWARE SYSTEMS LTD., TAISHAN CITY KAM KIUM ALUMINIUM EXTRUSION CO. LTD., VITRE-ART C.A.B. (1988) INC., ZMC METAL COATING INC., ALFA MEGA INC., ALUMINART PRODUCTS LIMITED, ALUMINUM CURTAINWALL SYSTEMS INC., C.R. LAWRENCE CO. OF CANADA, CHINA SQUARE INDUSTRIAL LTD., CONCORD WEST DISTRIBUTION LTD., DIGI-KEY CORPORATION, HOME-RAIL LTD., HUNTER-DOUGLAS CANADA, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION OF BRITISH COLUMBIA, KNOLL NORTH AMERICA CORP., LEVELOR/KIRSCH WINDOW FASHIONS (A DIVISION OF NEWELL RUBBERMAID/NEWELL WINDOW FURNISHINGS INC.), MILWARD ALLOYS INC., MORSE INDUSTRIES, NEW ZHONGYA ALUMINUM FACTORY LTD., NEWELL INDUSTRIES CANADA INC., NEWELL WINDOW FURNISHINGS INC., OPUS FRAMING LTD., PACIFIC SHOWER DOORS (1995) LTD., PROFORMA INTERIORS LTD. DBA ALUGLASS, RAHUL GLASS LTD., RUHLAMAT NORTH AMERICA LTD.,

RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC., VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC., ZHAOQING CHINA SQUARE INDUSTRY LIMITED, CANADIAN INTERNATIONAL TRADE TRIBUNAL and ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 15, 2009.

REASONS FOR ORDER BY: TRUDEL J.A.

Date: 20090615

Docket: A-174-09

Citation: 2009 FCA 204

Present: **TRUDEL J.A.**

BETWEEN:

MAAX BATH INC.

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RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC., VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC., ZHAOQING CHINA SQUARE INDUSTRY LIMITED, CANADIAN INTERNATIONAL TRADE TRIBUNAL and ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

TRUDEL J.A.

[1] This motion was made by the applicant for orders pursuant to Rule 318(4) of the *Federal Courts* Rules, SOR/98-106:

1. Directing the Canadian International Trade Tribunal (CITT or Tribunal) to provide a copy of the material in the possession of the Tribunal prepared by the Tribunal's non-legal staff for use by the Tribunal members in making their determinations in Aluminum Extrusions from China, NQ-2008-003;

2. Dispensing with the Tribunal's objections to disclosure of these materials to the applicant for use in the judicial review through a supplementary affidavit;

3. Granting the applicant 30 days from the date that the Tribunal provide these materials to review these materials and to file a supplementary affidavit with the Court; and

4. Setting out such other directions and making such other orders concerning the production of these documents by the Tribunal as this Honourable Court considers appropriate.

[2] Upon reading the written submissions of the parties and the material contained in the applicant's motion record and the response record of the Tribunal, I am of the view that the within motion should be dismissed.

[3] On March 17, 2009, the Tribunal issued its determination regarding aluminum extrusions originating in or exported from the People's Republic of China. In its statement of reasons issued on April 1, 2009, the Tribunal determined that the dumping and subsidizing in Canada of aluminium extrusions (subject goods) from China have caused injury to domestic producers of like products in Canada and denied the exclusion request made by the applicant (NQ-2008-003).

[4] By notice of application dated April 15, 2009, the applicant sought judicial review of the Tribunal's determination of injury, its determination of the scope of aluminium products included within the definition of subject goods, its determination of the scope of the domestic industry producing like goods and its decision to deny the exclusion request made by the applicant.

[5] By notice of motion dated May 11, 2009, the applicant sought the release of the internal reports, memoranda and other materials prepared by the Tribunal's non-legal staff for use by the

Tribunal members as they considered their determination in the case, alleging the documents to be relevant and necessary (applicant's motion record, tab 3 at paragraph 4; tab 1 at paragraph 1).

[6] In its written representations, the applicant relies on the orders of this Court in *Telus Communications Inc. v. Attorney General of Canada*, 2004 FCA 317 [*Telus*] and *Canada (Human Rights Commission) v. Pathak*, [1995] F.C.J. No. 555 (C.A.) [*Pathak*] as supporting the conclusion that the materials at issue are properly part of the Tribunal record and should be disclosed. According to the applicant, the materials are clearly relevant because they may have affected the outcome of the Tribunal's inquiry. Further, regardless of how the materials are described, they are akin to the staff memorandum ordered to be disclosed in *Telus* (applicant's motion record, tab 4 at paragraph 18).

[7] The respondent submits that the applicant has not established the relevance of the requested documents, that the decision in *Telus* is not an applicable precedent, that the applicant's request is general and vague and that the documents requested are subject to the deliberative secrecy privilege (respondent's motion record, tab 3 at paragraphs 30-46).

[8] Rules 317 and 318 provide:

Material from tribunal	**Matériel en la possession de l'office fédéral**
317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request,	**317.** (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande,

identifying the material requested.

…

Material to be transmitted

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(*a*) a certified copy of the requested material to the Registry and to the party making the request; or

(*b*) where the material cannot be reproduced, the original material to the Registry.

Objection by tribunal

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

…

Order

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

[…]

Documents à transmettre

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

Opposition de l'office fédéral

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

[…]

Ordonnance

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

[9] The relevant documents for the purposes of Rules 317-318 are those documents that may have affected the decision of the Tribunal or that may affect the decision that this Court will make on the application for judicial review (*Telus, supra* at paragraph 5; *Pathak, supra* at paragraph 10).

[10] The applicant has failed to persuade me that the documents sought to be produced are relevant and necessary. The request made under Rule 317 lacks proper specificity (*Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1156 (T.D.) at paragraph 10 [*Atlantic Prudence Fund Corp.*]). Here, the applicant requests "… a copy of the material in the possession of the CITT prepared by the CITT's non-legal staff for use by the CITT members in making their determinations" without reference to any specific documents (applicant's memorandum, tab 4 at paragraph 1).

[11] This noticeable lack of specificity alone is sufficient to dispose of the motion. In any event, I note that in its 69-page decision, the Tribunal relied on a plethora of documents to support its reasoning. All public exhibits in the Tribunal's voluminous record were made available by the Tribunal to the parties. Protected exhibits were made available only to counsel who, as the applicant, had made a declaration and confidentiality undertaking with the Tribunal in respect of that protected information (respondent's motion record, tab 4B at paragraph 15; applicant's affidavit, vol. 1, affidavit of Jeannette Cowan at paragraph 3).

[12] In its reply to the response of the Tribunal, the applicant refers to the "summaries and /or compilations of the information contained in the record and … advice and /or analyses of market, financial or economic questions" in the Tribunal's internal documents (*ibid.* at paragraph 10). On the record, as it stands, and in the absence of any reference, by the applicant, to specific passages in the Tribunal's reasons from which it could reasonably be inferred that the Tribunal grounded its decision on material not available to the parties, or that inappropriate tampering with the decision

occurred, one cannot assume that such information has been adopted by the Tribunal in its reasons, thereby making it relevant to the decision made by the Tribunal or to the decision that this Court will make (*Trans Québec & Maritime Pipeline v. Office National de l'Énergie*, [1984] F.C. 432 (C.A.); *Telus, supra* at paragraph 3).

[13] For these reasons, I agree with the respondent that the decision in *Telus*, where the material sought to be produced related to sufficiency of reasons and consideration of relevant matters by the decision-maker, is not applicable to the present case as no such grounds are raised by the applicant.

[14] There can be little question here that the applicant is seeking access to documents consulted by or prepared for the Tribunal members as they were engaged in their deliberative role to determine how and why the members reached the impugned conclusions. I agree with the respondent that this is a matter of privilege going to judicial impartiality in adjudication (*Mackeigan v. Hickman*, [1989] 2 S.C.R. 797).

[15] In the words of this Court, the applicant's request "betrays a misunderstanding of the purpose of section 317 … [S]ection 317 does not serve the same purpose as documentary discovery in an action" (*Access to Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224 at paragraph 17; *Atlantic Prudence Fund Corp., supra* at paragraph 11). It should not be open to the applicant to engage in a fishing expedition.

THEREFORE, IT IS ORDERED THAT:

1. the motion directing the Tribunal to provide a copy of the material in the possession of the Tribunal prepared by the Tribunal's non-legal staff for use by the Tribunal members in making their determinations in Aluminum Extrusions from China, NQ-2008-003 be dismissed; and
2. upon consent the Tribunal's name as a respondent party be struck and be removed in the style of cause;

3. the style of cause shall now be shown as:

MAAX BATH INC.

Applicant

and

ALMAG ALUMINUM INC., APEL EXTRUSIONS LIMITED, CAN ART ALUMINUM EXTRUSION INC., METRA ALUMINUM INC., SIGNATURE ALUMINUM CANADA INC., SPECTRA ALUMINUM PRODUCTS LTD., SPECTRA ANODIZING INC., EXTRUDEX ALUMINUM, ARTOPEX INC., ASIA ALUMINUM HOLDINGS LTD., BLINDS TO GO INC., EXTRUDE-A-TRIM INC., GARAVENTA (CANADA) LTD., KAM KIU ALUMINIUM PRODUCTS (NA) LTD., KAM KIU ALUMINIUM PRODUCTS SDN. BHD., KROMET INTERNATIONAL INC., LOXCREEN CANADA, MALLORY INDUSTRIES, PANASIA ALUMINIUM (CHINA) LIMITED, PANASIA ALUMINUM (CALGARY) LIMITED, PANASIA ALUMINUM (MACAO COMMERCIAL OFFSHORE) LIMITED, PANASIA ALUMINUM (TORONTO) LIMITED, PINGGUO ASIA ALUMINUM CO. LTD., R-THETA THERMAL SOLUTIONS INC., RAILCRAFT INTERNATIONAL INC., REGAL ALUMINUM PRODUCTS INC., SHINING METAL TRADING INC., SINOBEC TRADING INC., TAG HARDWARE SYSTEMS LTD., TAISHAN CITY KAM KIUM ALUMINIUM EXTRUSION CO. LTD., VITRE-ART C.A.B. (1988) INC., ZMC METAL COATING INC., ALFA MEGA INC., ALUMINART PRODUCTS LIMITED, ALUMINUM CURTAINWALL SYSTEMS INC., C.R. LAWRENCE CO. OF CANADA, CHINA SQUARE INDUSTRIAL LTD., CONCORD WEST DISTRIBUTION LTD., DIGI-KEY CORPORATION, HOME-RAIL LTD.,

HUNTER-DOUGLAS CANADA, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION OF BRITISH COLUMBIA, KNOLL NORTH AMERICA CORP., LEVELOR/KIRSCH WINDOW FASHIONS (A DIVISION OF NEWELL RUBBERMAID/NEWELL WINDOW FURNISHINGS INC.), MILWARD ALLOYS INC., MORSE INDUSTRIES, NEW ZHONGYA ALUMINUM FACTORY LTD., NEWELL INDUSTRIES CANADA INC., NEWELL WINDOW FURNISHINGS INC., OPUS FRAMING LTD., PACIFIC SHOWER DOORS (1995) LTD., PROFORMA INTERIORS LTD. DBA ALUGLASS, RAHUL GLASS LTD., RUHLAMAT NORTH AMERICA LTD., RYERSON CANADA, SILVIA ROSE INDUSTRIES, SONIPLASTICS INC., VANCOUVER FRAMER CASH & CARRY LTD., VAP GLOBAL INDUSTRIES INC., ZHAOQING CHINA SQUARE INDUSTRY LIMITED and ATTORNEY GENERAL OF CANADA

Respondents

Johanne Trudel

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-09
STYLE OF CAUSE:	Maax Bath Inc. v. Almag Aluminum Inc. & als

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	TRUDEL J.A.
DATED:	June 15, 2009

WRITTEN REPRESENTATIONS BY:

Gordon LaFortune	FOR THE APPLICANT
Georges Bujold	FOR THE Canadian International Trade Tribunal

SOLICITORS OF RECORD:

Gordon LaFortune Ottawa, Ontario	FOR THE APPLICANT
Georges Bujold Ottawa, Ontario	FOR THE Canadian International Trade Tribunal
Osler, Hoskin & Harcourt Ottawa, Ontario	FOR THE RESPONDENTS Almag Aluminum Inc., Apel Extrusions Limited, Can Art Aluminum Extrusion Inc., Metra Aluminum Inc., Signature Aluminum Canada Inc., Spectra Aluminum Products Ltd., Spectra Anodizing Inc. and Extrudex Aluminum
Baldwin, Anka, Sennecke, Halman LLP Toronto, Ontario	FOR THE RESPONDENT Ruhlamat North Anerica Ltd.

Federal Court Cour fédérale

Date: 20200724

Docket: T-1353-19

Citation: 2020 FC 788

Ottawa, Ontario, July 24, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

NATCO PHARMA (CANADA) INC.

Applicant

and

MINISTER OF HEALTH AND ATTORNEY GENERAL OF CANADA AND GILEAD SCIENCES CANADA INC.

Respondents

JUDGMENT AND REASONS

I. Overview

[1] Health Canada refused to accept Natco Pharma (Canada) Inc's abbreviated new drug submission (ANDS) for a drug that contains two medicinal ingredients, tenofovir alafenamide hemifumarate (TAF) and emtricitabine. Health Canada concluded that Natco's ANDS was prohibited by the data protection provisions of the *Food and Drug Regulations*, CRC, c 870.

Under those provisions, a manufacturer may not file an ANDS for a new drug "on the basis of a direct or indirect comparison between the new drug and an innovative drug" for a defined period.

[2] TAF and emtricitabine are antiretroviral agents used in the treatment of HIV/AIDS. Both TAF and emtricitabine are found in two products marketed by Gilead Sciences Canada Inc: DESCOVY, which contains just those two medicinal ingredients; and GENVOYA, which also contains two other antiretroviral agents. Health Canada considers GENVOYA an "innovative drug" under the data protection provisions because TAF had not been previously approved in a drug when GENVOYA was approved. DESCOVY, approved subsequently, is not an innovative drug. Natco's ANDS compared its drug to DESCOVY. It therefore argues it did not make a comparison to an innovative drug, and the data protection provisions do not prevent it from filing its ANDS.

[3] Health Canada's reasons for refusing Natco's ANDS under the data protection provisions considered their intent, which is to implement certain trade agreements. Health Canada found that those agreements required the protection of TAF during the data protection term, such that DESCOVY is "protected" under the GENVOYA period of data protection because it also contains TAF. Health Canada also noted that Gilead's submission for DESCOVY relied on comparative bioavailability studies for DESCOVY compared to GENVOYA. Health Canada found this reliance "further support[ed] the position" that DESCOVY is protected under the same data protection term as GENVOYA.

[4] I conclude that Health Canada's decision was reasonable. I agree with the Attorney General of Canada that Health Canada effectively concluded that Natco's ANDS indirectly compared its drug to the innovative drug GENVOYA by comparing its drug to DESCOVY. Although it could have been expressed more clearly, a review of Health Canada's decision as a whole makes clear that this is the nature of its conclusion. In my view, this conclusion is a reasonable, and indeed inevitable, one in the circumstances.

[5] I agree with Natco that some of Health Canada's reasoning unduly privileges the intent of the *Food and Drug Regulations* and the underlying trade agreements over the language of the provisions. Nevertheless, when reviewed as a whole and in its administrative context, I am satisfied that Health Canada's decision establishes a line of analysis that reasonably justifies the refusal to accept the application, namely that Natco's ANDS indirectly compares its drug to an innovative drug.

[6] The application for judicial review is therefore dismissed without costs.

II. Issue and Standard of Review

[7] The issue raised on this application for judicial review is whether Health Canada's conclusion that Natco's submission could not be accepted for filing until the expiry of the data protection term for GENVOYA was reasonable.

[8] As this formulation of the issue suggests, the applicable standard for reviewing the decision is that of reasonableness. The parties agree this standard is dictated by the Supreme

Court of Canada's recent decision in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. No party suggested that any legislative indicator of intent or any rule of law requirement rebutted the general presumption of reasonableness established by *Vavilov*.

III. Analysis

A. *The Regulatory Framework of the Data Protection Provisions*

[9] I begin with the relevant provisions in the *Food and Drug Regulations* and the treaty provisions underlying them. I do this before turning to Health Canada's decision, both because the regulatory framework is necessary to understand the decision, and because the governing statutory scheme, the treaty obligations they implement, and the cases interpreting them act as "constraints" on Health Canada's decision making: *Vavilov* at paras 108–114.

(1) Section C.08.004.1 of the *Food and Drug Regulations*

[10] At issue in this application is section C.08.004.1 of the *Food and Drug Regulations*, known as the "data protection" provisions. The relevant parts of this section are set out in full in Appendix A. The operational heart of the section is subsection C.08.004.1(3), which sets out two main time periods:

- a "no file" period of six years, during which a manufacturer may not file an ANDS or other submission for a notice of compliance (paragraph C.08.004.1(3)(*a*)); and

- a “data protection” or “market exclusivity” period of eight years, during which the Minister may not approve a submission or issue a notice of compliance (paragraph C.08.004.1(3)(*b*)), which is lengthened to eight years and six months if certain conditions are met regarding clinical trials involving pediatric populations (subsection C.08.004.1(4)).

[11] Each of these periods is triggered in the following circumstances:

(3) If a manufacturer seeks a notice of compliance for a new drug on the basis of a direct or indirect comparison between the new drug and an innovative drug,	**(3)** Lorsque le fabricant demande la délivrance d’un avis de conformité pour une drogue nouvelle sur la base d’une comparaison directe ou indirecte entre celle-ci et la drogue innovante :
[Emphasis added.]	[Je souligne.]

[12] As this language sets out the trigger for the “no file” and “market exclusivity” periods, the central question in deciding whether the provisions apply is whether the manufacturer sought “a notice of compliance for a new drug on the basis of a direct or indirect comparison between the new drug and an innovative drug.” In the present case, there is no issue Natco sought a notice of compliance for a new drug. I therefore agree with the Attorney General that the key question for Health Canada was whether Natco did so “on the basis of a direct or indirect comparison” between its new drug and an “innovative drug.”

[13] The term “new drug” is used throughout Part C of the *Food and Drug Regulations*. The term “innovative drug,” however, is particular to the data protection provisions and is defined in subsection C.08.004.1(1):

innovative drug means a drug that contains a medicinal ingredient not previously approved in a drug by the Minister and that is not a variation of a previously approved medicinal ingredient such as a salt, ester, enantiomer, solvate or polymorph.	***drogue innovante*** S'entend de toute drogue qui contient un ingrédient médicinal non déjà approuvé dans une drogue par le ministre et qui ne constitue pas une variante d'un ingrédient médicinal déjà approuvé tel un changement de sel, d'ester, d'énantiomère, de solvate ou de polymorphe.
[Emphasis added.]	[Je souligne.]

[14] In this case, the "medicinal ingredient" at issue is TAF. GENVOYA is the first drug approved by the Minister that contains TAF. Health Canada recognizes GENVOYA as an innovative drug. While Natco does not agree, it does not contest this issue on this application.

[15] The definition of "innovative drug" has been the subject of prior judicial consideration in a number of cases raised by the parties. In particular:

- in *Epicept*, Justice Near, then of this Court, held that the second reference to "drug" in the definition includes not just new drugs, but drugs issued by a Drug Identification Number (DIN) or a natural health product: *Epicept Corporation v Canada (Health)*, 2010 FC 956 at paras 62, 65, 78, appeal dismissed as moot, 2011 FCA 209;

- in *Teva*, Justice Stratas concluded that "previously approved" meant prior market approval and did not include approval under a Special Access Programme: *Teva Canada Limited v Canada (Health)*, 2012 FCA 106 at para 42;

- in *Celgene*, Justice Gauthier found that "previously approved" included prior market approval that had subsequently been withdrawn: *Celgene v Canada*, 2013 FCA 43 at paras 41–46; and

- in *Takeda*, Justice Dawson, for the majority of the Court of Appeal, held that an enantiomer of a previously approved medicinal ingredient was a "variation," even if it took considerable effort to create data showing its safety and effectiveness: *Takeda Canada Inc v Canada (Health)*, 2013 FCA 13 at paras 122–131.

[16] While these cases determined different issues than that raised on this application, they each include discussion relevant to the questions raised here, and they are referenced further below. Also valuable is the decision of the Court of Appeal in *Apotex*, in which Justice Nadon concluded the data protection provisions were within the regulation-making authority of the Governor in Council under the *Food and Drugs Act* and within federal legislative competence: *Apotex v Canada (Health)*, 2010 FCA 334 at paras 55, 94, 118, 132.

[17] The data protection provisions contain an express purpose clause in subsection C.08.004.1(2). It states that the purpose of section C.08.004.1 is to implement provisions in two trade agreements: the North American Free Trade Agreement (NAFTA) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). In particular, the section implements paragraphs 5 to 7 of Article 1711 of NAFTA and paragraph 3 of Article 39 of TRIPS, so as to encourage the development of new drugs: *Apotex* at paras 71–72, 76, 85, 117; *Teva* at para 35. Consideration of the context of the data protection provisions therefore requires consideration of these provisions of NAFTA and TRIPS, which are set out in full in Appendix B.

(2) Data protection obligations in NAFTA and TRIPS

[18] Paragraph 5 of Article 1711 of NAFTA and paragraph 3 of Article 39 of TRIPS contain similar language. Each says that if the state, as a condition of approving the marketing of pharmaceutical products that "utilize new chemical entities," requires the submission of "undisclosed test or other data" that is the product of "considerable effort," then the state shall protect such data against disclosure or unfair commercial use.

[19] It is important to distinguish between three concepts referred to in the trade agreements: the *new chemical entity*; the *pharmaceutical product* that utilizes the new chemical entity; and the *data* filed to obtain approval of the pharmaceutical product. The concept of a "new chemical entity" in the agreements is reflected in section C.08.004.1 in the phrase "medicinal ingredient not previously approved in a drug" in the definition of "innovative drug", as well as in the related language regarding "variations" in that definition: *Celgene* at paras 48–49; *Takeda* at paras 129–131. The term "pharmaceutical product" used in the trade agreements is replaced by "drug" in the regulation, in keeping with the terminology defined in the *Food and Drugs Act*, RSC 1985, c F-27 and used in the *Food and Drug Regulations*. As Justice Gauthier noted in *Celgene*, "[i]t is quite usual for the words of a treaty to be harmonized with the language used in one's own regulatory scheme": *Celgene* at para 48.

[20] The term "data" is not used in section C.08.004.1. Rather, the submission of data is recognized as implicit in the approval of a new drug, and reliance on that data is implicit in a generic manufacturer's comparison to that drug: *Apotex* at paras 77, 91; *Teva* at paras 18–20.

This raises another important distinction, namely the difference between the obligations set out in the trade agreements and the manner in which the Governor in Council chose to meet those obligations in the regulations. The obligation in the trade agreements is to protect certain data from disclosure or unfair commercial use. The Governor in Council chose to meet that obligation by conferring market exclusivity based on the trigger set out in subsection C.08.004.1(3): *Apotex* at paras 76, 85–88. In the words of the Attorney General, the approved innovative drug is the "vehicle" through which the regulations protect the data filed to support the marketing approval of a pharmaceutical product containing a new chemical entity. As a result, the test under the regulations "is not reliance on an innovator's data, either by the Minister or by the generic manufacturer, but rather whether there has been a comparison, direct or indirect, between the generic manufacturer's new drug and an innovative drug" [emphasis in original]: *Apotex* at para 88.

[21] At the same time, since the regulations are the means chosen to implement the obligations in the trade agreements, the context of the trade agreements' obligation to protect data remains relevant to, though not determinative of, the interpretation of the data protection provisions: *Teva* at paras 35–39; *Apotex* at paras 75–77, 90–91; *Takeda* at paras 129–131.

(3) Regulatory Impact Analysis Statement

[22] Health Canada in its decision, and each party in their submissions, referred to the Regulatory Impact Analysis Statement (RIAS) that accompanied the current data protection provisions when they were promulgated in 2006 as an amendment to the prior provisions: RIAS, SOR/2006-241, *Canada Gazette Part II*, Vol 140, No 21 at p 1495 (*Regulations Amending the*

Food and Drug Regulations (Data Protection)) [RIAS (2006-241)]. While not part of the regulations, the RIAS has been recognized as a useful tool to understand how regulations work, and as "useful contextual information" relevant to interpretation: *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at para 113; *Bristol-Myers Squibb Co v Canada (Attorney General)*, 2005 SCC 26 [*Biolyse*] at paras 156–157 (*per* Bastarache J (dissenting, but not on this point)); *Takeda* at para 124; *Apotex* at paras 22, 86–91; *Celgene* at paras 38, 49.

[23] The RIAS confirms that the amendments to section C.08.004.1 were intended to "clarify and effectively implement Canada's [NAFTA] and [TRIPS] obligations with respect to the protection of undisclosed test or other data necessary to determine the safety and effectiveness of a pharmaceutical or agricultural product which utilizes a new chemical entity": RIAS (2006-241) at p 1495. The RIAS notes that the definition of "innovative drug" specifically prohibits innovators from "obtaining additional terms of data protection for variations of medicinal ingredients": RIAS (2006-241) at p 1496. With respect to the triggering mechanism, the RIAS states the provisions are "intended to capture generic and second entrant manufacturers that are seeking to rely on direct or indirect comparison between their drug and the innovative drug": RIAS (2006-241) at p 1497.

[24] The RIAS also refers to combination products that include previously approved medicinal ingredients, stating they "are not eligible for an additional data protection period": RIAS (2006-241) at p 1496. It gives a specific example of a combination of an innovative drug and another medicinal ingredient not covered by data protection, indicating that a generic

manufacturer would not be able to file or obtain approval in respect of the combination "until expiry of the original data protection period of the innovative drug": RIAS (2006-241) at pp 1496–1497. Drug products that contain the same medicinal ingredient as an innovative drug, but vary in certain respects (such as additional medicinal ingredients or different formulations), are sometimes referred to as "product line extensions."

[25] It is in the context of this regulatory framework that Natco sought to file its ANDS and Health Canada made its decision refusing to accept it for filing.

B. *Health Canada's Decision*

(1) Natco's abbreviated new drug submission and its submissions to Health Canada

[26] Natco filed an ANDS seeking a notice of compliance for its NAT-EMTRICITABINE-TENOFOVIR tablets. This product would be a generic version of DESCOVY, containing TAF and emtricitabine. Natco's ANDS identified DESCOVY as the Canadian reference product (CRP), as defined in section C.08.001.1 of the *Food and Drug Regulations*, and sought approval in accordance with section C.08.002.1.

[27] Health Canada sent an initial letter to Natco indicating that, subject to any further representations from Natco, the ANDS could not be accepted because TAF was listed on the Register of Innovative Drugs in respect of the innovative drug GENVOYA. The Register of Innovative Drugs contains information relating to innovative drugs and data protection periods and is maintained by the Minister pursuant to subsection C.08.004.1(9). Health Canada stated

that "[c]onsistent with the intent of section C.08.004.1 to protect new chemical entities, drugs containing [TAF], such as DESCOVY, benefit from the same period of data protection" [emphasis added].

[28] Natco responded with submissions to Health Canada that GENVOYA was not an "innovative drug." It argued that TAF was not a "medicinal ingredient not previously approved in a drug," since it was a "variation" of a form of tenofovir contained in previously approved drugs. In accordance with Health Canada's guideline on the provisions, "Guidance Document: Data Protection under C.08.004.1 of the *Food and Drug Regulations*" [the Guideline], a challenge to the status of an innovative drug is sent to the manufacturer of the innovative drug. Health Canada did so, and subsequently wrote to both Natco and Gilead, indicating it remained of the preliminary view that GENVOYA was properly granted data protection in respect of TAF, and invited further submissions before making a final decision.

[29] On June 3, 2019, Natco filed a further submission. That submission briefly disagreed that GENVOYA was properly granted data protection. However, Natco primarily set out a new argument, namely that even if GENVOYA was an "innovative drug," DESCOVY was not. Natco argued its ANDS sought an NOC "on the basis of a direct comparison to DESCOVY," and made "no comparison to GENVOYA as a reference product," so it was not precluded by the data protection provisions. Natco noted the product monograph for DESCOVY indicated there were no independent safety studies in respect of DESCOVY. Rather, Gilead sought to reduce the study requirements for DESCOVY "by relying on similarity to the previously approved drug GENVOYA."

(2) Health Canada's final decision

[30] In its decision issued July 26, 2019, Health Canada confirmed its view that GENVOYA was an "innovative drug" that was properly granted data protection for the medicinal ingredient TAF. It also repeated its view that "consistent with the intent of section C.08.004.1 to protect new chemical entities, other drugs containing [TAF], such as DESCOVY, also benefit from the same period of data protection."

[31] Health Canada's reasons begin with a review of the applicable regulatory framework, setting out the definition of "innovative drug" from subsection C.08.004.1(1) of the *Food and Drug Regulations*, and paraphrasing the prohibitions set out in subsections C.08.004.1(3) and (4).

[32] Health Canada then described the nature of GENVOYA and DESCOVY and the conclusion that GENVOYA was eligible for data protection. It reproduced the entry for GENVOYA on the Register of Innovative Drugs, which lists TAF as the medicinal ingredient and includes DESCOVY among other drugs that contain that ingredient. Health Canada noted both TAF and emtricitabine had been approved in a drug at the time DESCOVY was approved, so it was not eligible for a separate term of data protection. However, "DESCOVY was protected under the data protection term for GENVOYA with respect to [TAF] because DESCOVY also contains this medicinal ingredient."

[33] Health Canada addressed Natco's submission that its ANDS was filed based on a direct comparison to DESCOVY and made no comparison to GENVOYA in three sections of its decision. The first, entitled "Intent of Section C.08.004.1 of the *Regulations*" referred to the intent to implement the treaty obligations and cited the NAFTA and TRIPS provisions, which it then discussed in the following language:

> The presence of a new chemical entity in a drug is central to the obligations under the above-noted treaty provisions. The concept of the new chemical entity is incorporated into the definition of "innovative drug" […] as a "medicinal ingredient not previously approved in a drug by the Minister and that is not a variation of a previously approved medicinal ingredient such as a salt, ester, enantiomer, solvate or polymorph. The obligations to protect the new chemical entity exist for the entire duration of the data protection term granted by section C.08.004.1.
>
> [Emphasis added.]

[34] In a second section, entitled "Drugs Containing the Same Medicinal Ingredient," Health Canada considered product line extensions. Health Canada concluded the treaty obligations to protect data "necessarily extend to these additional products also containing the same new chemical entity during the data protection term for the original innovative drug."

[35] After referring to portions of the RIAS discussing combination products, as well as the discussion of product line extensions in its Guideline, Health Canada reached the following conclusion:

> Therefore, a combination drug containing a medicinal ingredient that was the basis for a previous "innovative" drug designation, i.e. a new chemical entity, will also benefit from any term of the data protection for the innovative drug that is still in effect. This position is consistent with the regulatory intent in view of Canada's treaty obligations for pharmaceutical products containing new chemical entities. If the protection was not maintained, a

> subsequent manufacturer would be able to obtain approval for a product containing the new chemical entity by comparing to another drug containing that new chemical entity, despite the data protection in place in respect of the new chemical entity in the original innovative drug. Such an outcome would circumvent Canada's obligations under NAFTA, TRIPS, and CETA [the Comprehensive and Economic Trade Agreement] to protect the undisclosed test or other data regarding the new chemical entity from unfair commercial use, where the origination of the test or other data involved a considerable effort.
>
> [Emphasis added.]

[36] In a third section, entitled "Natco's Submissions on DESCOVY," Health Canada addressed Natco's argument that Gilead had sought to reduce study requirements by relying on similarity to GENVOYA. Health Canada confirmed that its Regulatory Decision Summary for DESCOVY acknowledged that the data to support DESCOVY were based on comparative bioavailability studies for DESCOVY compared to GENVOYA. After reproducing a portion of that Regulatory Decision Summary, Health Canada stated the following:

> In the view of the OSIP, however, the reliance on the data for GENVOYA in the approval of DESCOVY further supports the position that DESCOVY is properly protected under the same data protection term.
>
> [Emphasis added.]

[37] Finally, Health Canada addressed Natco's argument distinguishing its situation from examples given in the Guideline, again relying on the intent of section C.08.004.1 and the definition of "innovative drug".

[38] On these grounds, Health Canada concluded that "DESCOVY was properly protected under the data protection term for GENVOYA on the basis that it also contains [TAF]." Its reasons end with the following summary:

> In accordance with paragraph C.08.004.1(3)(a) of the *Regulations*, a subsequent manufacturer that seeks an NOC for a new drug on the basis of a direct or indirect comparison between the new drug and an innovative drug may not file a submission before the end of a period of six years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug. Natco's ANDS […] makes comparisons to DESCOVY, which benefits from the data protection term for GENVOYA, an innovative drug. As such, Natco's ANDS […] cannot be accepted for filing until after the expiration of the six-year "No File" period on November 27, 2021.

C. *Health Canada's Decision is Reasonable*

[39] As set out above, Health Canada's conclusion that the data protection provisions barred Natco's ANDS was based on (i) its assessment of the intent of the *Food and Drug Regulations* and the obligations set out in NAFTA and TRIPS, as described in paragraphs [32] to [35] above, and (ii) its assessment that the fact that the DESCOVY approval relied on data for GENVOYA "further supports" the position, as described in paragraph [36] above.

[40] I will address these two aspects of Health Canada's analysis, and Natco's arguments with respect to them, in turn.

(1) Health Canada's interpretation of the data protection provisions

[41] The applicable principles of statutory interpretation are not in dispute. The Supreme Court in *Vavilov* confirmed that the "modern principle" of interpretation applies to statutory

interpretation by an administrative tribunal, and that a reasonable statutory interpretation is one that is consistent with the text, context and purpose of the provision: *Vavilov* at paras 117–120, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21. Reasonable reasons should demonstrate that the decision maker was "alive" to these elements: *Vavilov* at para 120.

[42] Also not in dispute is that the innovative drug at issue is GENVOYA, and that DESCOVY is not an innovative drug. Health Canada nonetheless found the data protection provisions were triggered by Natco's comparison to DESCOVY.

[43] The initial part of Health Canada's analysis considered the intent of the regulations and the obligations under the trade agreements. This is entirely reasonable. The Federal Court of Appeal has confirmed that the obligations of NAFTA and TRIPS, and the stated intent to implement those obligations, are an appropriate guide to interpretation of section C.08.004.1: *Teva* at paras 34–42; *Takeda* at paras 129–131. The "modern principle" requires such a contextual consideration: *Takeda* at paras 40, 43–44, 109; *Vavilov* at paras 114, 117–120.

[44] Health Canada noted the obligation under the trade agreements to protect data filed to obtain approval of a pharmaceutical product that utilizes a new chemical entity. It underscored the importance of the new chemical entity and the incorporation of that concept into the definition of "innovative drug" in subsection C.08.004.1(1).

[45] Natco argues that in doing so, Health Canada effectively broadened the definition of "innovative drug" to include other drugs with the same medicinal ingredient. I agree with Gilead

and the Attorney General that Health Canada's decision to extend data protection to DESCOVY does not in itself mean Health Canada concluded DESCOVY is an innovative drug or treated it as one. To the contrary, Health Canada agreed DESCOVY was "not eligible for its own separate term of data protection," which it would have been if it were an innovative drug. Health Canada instead concluded that DESCOVY was "protected under" or "benefited from" the term of data protection granted to GENVOYA as an innovative drug.

[46] While the mechanism used in the data protection provisions is that of "market exclusivity" and is based on the existence of an "innovative drug," I cannot agree with Natco that the only product that can trigger the market exclusivity protection is a generic version of the innovative drug. If this were the Governor in Council's intent, the regulations could and no doubt would express this.

[47] Relevant in this regard is the RIAS for the data protection provisions, which expressly recognizes a generic manufacturer may be prevented from filing a submission, or obtaining a notice of compliance, for a generic version of a drug other than the innovative drug during the "no file" and "market exclusivity" periods, respectively. As Health Canada noted, the RIAS discusses the following scenario at pages 1496–1497:

> Combinations of previously approved medicinal ingredients are not eligible for an additional data protection period. Where a combination consists of an innovative drug and another medicinal ingredient not covered by data protection, a generic manufacturer will not be allowed to file or receive a notice of compliance, as the case may be, in respect of the combination until expiry of the original data protection period of the innovative drug.
>
> [Emphasis added.]

[48] Natco points out that the combination drug scenario described in the RIAS is not the same as the current situation. DESCOVY does not contain all of the medicinal ingredients in GENVOYA plus others; it contains a subset of the medicinal ingredients in GENVOYA. However, this does not change the fact that the passage expressly refers to a generic version of a drug other than the innovative drug being precluded by the data protection provisions.

[49] The language used by Health Canada in its decision (and in its Guideline) may confuse the issue to some degree. Even if comparison to DESCOVY triggers the data protection provisions, it is not DESCOVY itself that is being protected or receiving benefit, although it may appear that way or have that effect. Rather, it remains GENVOYA, and in particular the data underlying the approval of GENVOYA, that is being protected. It may be, as the Attorney General argued, Health Canada's reference to DESCOVY as "protected under the data protection term for GENVOYA" was intended as a shorthand way of saying the protection of the data filed in support of GENVOYA is triggered by a comparison to DESCOVY. Regardless of terminology, though, the question remains the same: whether an ANDS that compares a new drug to DESCOVY triggers the data protection for GENVOYA.

[50] In my view, Health Canada's assessment of the obligation in the trade agreements that section C.08.004.1 is intended to implement was reasonable, as far as it went.

[51] However, Health Canada's analysis then jumped directly from its assessment of intent and the obligations under the trade agreements to the conclusion that drugs containing the same medicinal ingredient must benefit from the same period of data protection. It did so without first

assessing whether the circumstances it described involved a direct or indirect comparison to an innovative drug. In Natco's words, it "skips a step," namely the step of considering not only the regulatory intent and other contextual factors, but also the actual text of the triggering mechanism in subsection C.08.004.1(3).

[52] I agree with Natco that interpreting and applying the *Food and Drug Regulations* requires interpreting and applying the text of the regulations and not simply carrying out their intent: *Takeda* at paras 43–44, 117–123; *Teva* at paras 36–39; *Vavilov* at paras 120–121. In other words, while the intent of the regulations and the context of the trade agreements are relevant and important, the manner in which the Governor in Council has chosen to implement that intent, and the words used to do so, are critical. As Natco points out, the Federal Court of Appeal has emphasized that an international treaty cannot be used to override the clear words of a statutory provision: *Baker Petrolite Corp v Canwell Enviro-Industries Ltd*, 2002 FCA 158 at para 25; *Fraser v Janes Family Foods Ltd*, 2012 FCA 99 at para 19. For the same reasons, treaty obligations cannot be considered independently of the words of the regulatory provision that implements them.

[53] As set out by the Court of Appeal, the test under the regulations "is not reliance on an innovator's data, either by the Minister or by the generic manufacturer, but rather whether there has been a comparison, direct or indirect, between the generic manufacturer's new drug and an innovative drug" [emphasis in original]: *Apotex* at para 88. Health Canada set out the language of the triggering mechanism in its paraphrase of subsection C.08.004.1(3) at the outset of its reasons and again in its conclusion. However, it did not address this triggering question at all in

these two sections of its analysis before reaching a conclusion that the data protection provisions applied.

[54] I recognize that administrative statutory analyses may not engage in a formalistic interpretation exercise and may in some cases even omit pertinent aspects of the analysis without being unreasonable: *Vavilov* at paras 119, 122. However, I do not believe the administrative context can justify an analysis that assesses an outcome on the basis of whether it achieves a regulatory intent without consideration of how that regulatory intent is reflected in the statutory language. The statutory language is not "a minor aspect of the interpretive context": *Vavilov* at para 122.

[55] I am also sensible of the reminder in *Vavilov* that the expertise of an administrative decision maker may explain why a given issue is "treated in less detail": *Vavilov* at paras 93, 119. It may be that, in the application of its significant expertise in the area, Health Canada considers the question of comparison to be implicit in the existence of a product line extension. A company developing a product line extension or other product containing the same medicinal ingredient will presumably undertake comparative studies, reference data files, or otherwise make comparison to the innovative drug. In this manner, a comparison to the product line extension or other product may indirectly reference the innovative drug. While this may well be the case in a large majority of cases, it is not clear that it would invariably be so. In any event, I do not believe that reliance on Health Canada's expertise can go so far as to allow for the sole triggering mechanism in the regulations to be treated implicitly.

[56] The jump from intent to outcome causes Health Canada to make general conclusions that are not dependent on the trigger mechanism through which the trade agreements are implemented. This is seen most clearly in the following statement in the decision:

> Following the approval of an innovative drug, a company may develop product line extensions and other drugs containing the same medicinal ingredient that was the basis for the "innovative drug" designation, i.e. containing the new chemical entity. The obligations under NAFTA, TRIPS and CETA to protect the undisclosed test or other data of a pharmaceutical product that utilizes a new chemical entity necessarily extend to these additional products also containing the new chemical entity during the data protection term for the original innovative drug.
>
> [Emphasis added.]

[57] The only trigger for the "no-file" prohibition is a direct or indirect comparison to the innovative drug. To conclude that a product line extension or other drug containing the same new medicinal ingredient "necessarily" invokes data protection, regardless of whether it entails such a comparison, divorces the analysis from the regulatory scheme as promulgated. While Gilead argues that an indirect comparison is automatically triggered by the presence of the new chemical entity, the language of the data protection provisions does not support this position. The mere presence of the chemical entity does not mean there has been a "direct or indirect comparison" to the innovative drug that contains it. Health Canada's own Guideline recognizes that a new drug submission may contain the new chemical entity and not trigger the data protection provisions where the new drug is based on independent clinical trials.

[58] In this regard, the Guideline is consistent with the description of the triggering mechanism contained in the RIAS for the data protection provisions (at page 1497):

> Triggering mechanism
>
> The triggering mechanism is intended to capture generic and second entrant manufacturers that are seeking to rely on direct or indirect comparison between their drug and the innovative drug. As was observed by the Supreme Court of Canada in [*Biolyse*], such direct or indirect comparisons would exclude submissions in which the submission sponsor does not rely on another manufacturer's safety and efficacy data in seeking approval under the *Food and Drug Regulations*. This is consistent with Article 1711 of NAFTA and paragraph 3, Article 39 of TRIPS, since there would be no unfair commercial use of data or the reliance on such data for the approval of the product. The mechanism is intended to capture both submissions that fall under the abbreviated new drug submission provisions and submissions that are filed under the new drug submission provisions, so long as there is a direct or indirect comparison with the innovative drug.
>
> [Emphasis added.]

[59] DESCOVY, too, could theoretically have been approved based on independently filed studies and not comparison to, or reliance on, the data that underlay the GENVOYA approval. In such a case, comparison to DESCOVY would not entail any comparison at all to GENVOYA, despite the presence of the new chemical entity. An approach that assumes data protection applies based on the presence of the new chemical entity alone does not reflect the regulatory scheme.

[60] Had Health Canada stopped there and based its conclusion that comparison to DESCOVY triggered the data protection provisions solely on the fact that DESCOVY contained TAF, without assessing whether Natco's submission directly or indirectly compared its drug to the innovative drug GENVOYA, the decision would have been unreasonable. However, Health Canada went on to address a matter that it considered to "further support" the position, but that I consider determinative: reliance on the data for GENVOYA in the approval of DESCOVY.

[61] Before turning to that question, I will address one further argument regarding Health Canada's analysis of the trade agreements and the regulatory intent. Natco takes issue with Health Canada's description of the obligations in NAFTA and TRIPS, and the intent of section C.08.004.1, as being "to protect the new chemical entity." Natco argues this description shows Health Canada improperly conflated the term "innovative drug" with "new chemical entity." Gilead, on the other hand, submitted the purpose of the trade agreements was to protect new chemical entities.

[62] I agree it is a mischaracterization to describe the obligations in the trade agreements, or the intent of section C.08.004.1, as being to "protect the new chemical entity." The trade agreements provide for an obligation to protect the *data* filed to obtain approval of a drug that contains a new chemical entity, rather than for the protection of the new chemical entity itself: NAFTA, art 1711(5)–(7); TRIPS, art 39(3); *Apotex* at paras 72, 83–84, 110.

[63] It appears that the "protect new chemical entities" language may come from the decision of Justice Near in *Epicept*. At paragraph 63 of that decision, he stated:

> The Applicant's position is based on the argument that the data protection regulations are to protect the extensive clinical data performed to gain approval for a "new drug". However, as set out in the relevant NAFTA and TRIPS provisions, the *Regulations* are to protect "new chemical entities". Not all "new drugs" are "new chemical entities".

[64] This statement must be considered in context. Justice Near was responding to Epicept's argument that its drug was still an "innovative drug," even though previously approved drugs contained the medicinal ingredient, since the approved drugs were not "new drugs" but natural

health products or drugs approved under a DIN. His point was that the trade agreements protect data specifically associated with "new chemical entities" and not data associated with any new pharmaceutical product: *Epicept* at paras 62–66, 72. Elsewhere, Justice Near confirmed the intent of section C.08.004.1 was to "implement NAFTA and TRIPS for the protection of undisclosed test or other data necessary to determine the safety and effectiveness of a pharmaceutical or agricultural product which utilizes a new chemical entity" [emphasis added]: *Epicept* at para 48(ii).

[65] I therefore do not consider Justice Near to have been suggesting in paragraph 63 that the intent of section C.08.004.1 was to "protect new chemical entities," in the sense of ensuring that those chemical entities are protected independently of either the drug that contains that chemical entity, or the data filed to support the approval to market that drug. I similarly do not take Justice Dawson's statement that NAFTA and TRIPS require parties "to protect pharmaceutical products that utilize 'new chemical entities'" to have changed the Court of Appeal's assessment of the trade agreements, which expressly require the protection of data rather than either drug products, or chemical entities: *Takeda* at para 130; *Apotex* at paras 76, 85, 110.

[66] I do not view this as a merely semantic matter. Considering the trade agreements to oblige states to "protect new chemical entities" gives a different context and focus to the interpretation and application of the regulations than if they oblige states to "protect data"—particularly when the regulations expressly implement the trade agreements.

[67] However, I do not believe using this language renders Health Canada's decision unreasonable. Health Canada elsewhere in its decision, including in the passage reproduced at paragraph [56], appropriately refers to the obligations under the treaties as being "to protect undisclosed test or other data of a pharmaceutical product that utilizes a new chemical entity." On an overall review of the decision, I do not understand Health Canada to have misunderstood the nature of the treaty obligations or the intent of the regulations.

(2) Health Canada's conclusion that Natco indirectly compared to GENVOYA

[68] In its Regulatory Decision Summary for DESCOVY, Health Canada stated, "[t]he data to support Descovy was based on comparative bioavailability studies for Descovy as compared to Genvoya." Natco itself submitted that Gilead sought to reduce study requirements for DESCOVY by relying on similarity to the previously approved drug GENVOYA.

[69] As set out above, Health Canada in its decision noted these facts, saying the Regulatory Decision Summary for DESCOVY "specifically acknowledges that the data to support DESCOVY were based on comparative bioavailability studies for DESCOVY compared to GENVOYA" [emphasis added]. After quoting the summary, Health Canada briefly stated its view that "the reliance on the data for GENVOYA in the approval of DESCOVY further supports the position that DESCOVY is properly protected under the same data protection term" [emphasis added]

[70] The Attorney General argues this statement represents Health Canada's finding that a comparison to DESCOVY constitutes an indirect comparison to GENVOYA, which is

prohibited by subsection C.08.004.1(3). In other words, in the Attorney General's submission, supported by Gilead, Health Canada in this passage assesses the key question: is Natco's ANDS based on a direct or indirect comparison to an innovative drug, GENVOYA?

[71] Natco argues this passage cannot be read as Health Canada making a determination of indirect comparison, that the Minister and the Attorney General should not be able to raise such an argument on this application, and that in any case, such a determination would be unreasonable.

[72] I agree that Health Canada's statement is not clear. Certainly, given that the "key question" (in the Attorney General's language) or the "test" (in the Federal Court of Appeal's language) is whether there has been a direct or indirect comparison to GENVOYA, one might expect to see that regulatory language used in assessing the question. Health Canada did not state clearly, as it might have, that it concluded from the fact that DESCOVY made comparisons to GENVOYA that Natco's comparison to DESCOVY constituted an indirect comparison to GENVOYA. Indeed, even the Attorney General conceded that in an "ideal world," Health Canada would have made a more express finding with respect to the existence of a direct or indirect comparison.

[73] Nonetheless, I am satisfied this passage is fairly read as Health Canada making the determination that Natco's ANDS indirectly compared its drug to GENVOYA. I say this for three reasons.

[74] First, the only basis on which "reliance on the data for GENVOYA in the approval of DESCOVY" might possibly be taken to support the position that the data protection provisions apply is because it shows an indirect comparison between Natco's ANDS and GENVOYA. I can see no other basis for Health Canada's statement except to make the link between the comparison to DESCOVY in Natco's ANDS and the comparison to GENVOYA as an innovative drug.

[75] Second, as the Supreme Court has recently reiterated, reasonableness review involves examining reasons with respectful attention and "seeking to understand the reasoning process": *Vavilov* at para 84. The reasons are to be read with sensitivity to the administrative context in which they are given, recognizing that an administrative decision may not always look like a legal or judicial decision: *Vavilov* at paras 91–92. Applying these principles, I do not believe I should disregard a portion of Health Canada's reasons that appear to speak to the central question just because they do not use the regulatory language that a lawyer or Court might expect to see. I say this notwithstanding the fact that other portions of Health Canada's reasons include discussion of regulatory intent and treaty provisions that might be seen in a more formal legal analysis.

[76] Finally, the reasons are also to be read "holistically and contextually" to understand the basis for the decision in the relevant context, including the evidence and submissions before the decision maker: *Vavilov* at paras 94, 97. The absence of specific discussion of the "direct or indirect comparison" language in the decision may be due in part to the fact that neither Natco, nor Gilead addressed this question in their submissions. Natco focused its final submission on

DESCOVY not being an innovative drug, and to the specific examples of product line extensions in the Guideline, while Gilead focused on the appropriateness of GENVOYA being recognized as an innovative drug based on TAF being a new medicinal ingredient. This is not to say that Health Canada did not need to address the central question before it—whether Natco's ANDS made a comparison to an innovative drug—but this provides context for the absence of specific language in the discussion of the comparison that was made.

[77] While Health Canada described this conclusion simply as being "further support" for its conclusion that the data protection provisions apply, in my view it was essential to it. As noted above, had Health Canada not made this determination, it would not have answered the central question of whether Natco's ANDS made a direct or indirect comparison to an innovative drug. The fact that Health Canada does not describe it as the central basis for its reasoning does not affect its reasonableness. *Vavilov* recognizes there may be multiple lines of analysis within reasons, one of which may support a reasonable outcome. A reviewing court must be satisfied "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" [emphasis added]: *Vavilov* at para 102 [emphasis added; modification in original]. This reference to "a line of analysis" adopts the Supreme Court's earlier statement that a decision "will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" [emphasis added]: *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 55; *Vavilov* at para 102.

[78] Natco also argues that the Minister and the Attorney General, who were jointly represented on this application, should not be permitted to effectively supplement the reasons by characterizing this passage as a finding that there was an indirect comparison to GENVOYA. As this characterization was raised for the first time on this application, Natco submits it should be viewed "with deep suspicion": see *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41. I agree a decision maker should not be permitted to "bootstrap" by adding arguments on judicial review that are not contained in its decision: *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 63–69. For this reason among others, decision makers are not typically party to applications for judicial review in this Court: *Federal Courts Rules*, SOR/98-106, Rule 303(1)(*a*). However, in my view, the Attorney General's argument is one of characterization of the existing words of an administrative decision, rather than an attempt to bootstrap reasons by adding arguments that are not there: see *Ontario (Energy Board)* at para 68. While the distinction may admittedly be fine at times, I am satisfied Health Canada's reasons are fairly characterized as the Attorney General proposed.

[79] I therefore conclude that Health Canada found on the facts of the case before it that the new drug submission for DESCOVY made comparison to the new drug submission for GENVOYA, and that Natco's submission comparing its drug to DESCOVY thereby made a "direct or indirect comparison" to GENVOYA, an innovative drug. This conclusion was reasonable in light of the record, the history and context of the proceeding, and the relevant factual and legal constraints on the decision: *Vavilov* at paras 91–101. While Health Canada's reasoning may not contain "all the arguments, statutory provisions, jurisprudence or other details

the reviewing judge would have preferred," this is not the standard on which the Court must assess the decision, nor is this a basis for setting the decision aside: *Vavilov* at para 91.

[80] I also note that Health Canada's factual finding, that "the data to support DESCOVY were based on comparative bioavailability studies for DESCOVY compared to GENVOYA," which Natco does not challenge, was amply supported by the record. This included the Regulatory Decision Summary for DESCOVY, referred to by Health Canada, and the Preliminary Data Protection Eligibility Assessment for DESCOVY, which refers to the various clinical studies relating to the four-ingredient product now named GENVOYA. Given this factual finding, the conclusion that comparison to DESCOVY involves a "direct or indirect comparison" to GENVOYA flows from the test set out in subsection C.08.004.1(3), read in light of its context.

[81] In this case, the underlying data in question was apparently submitted in both the DESCOVY and GENVOYA files, and there was at some point a question whether GENVOYA or DESCOVY would be approved first and become the "innovative drug." Natco concedes, and I agree, that this does not affect the outcome. An interpretation of subsection C.08.004.1(3) that depended on the particular form of comparison or reliance—whether by way of cross-reference or by way of filing additional copies of the same data—is not sustainable. Keeping in mind the relationship between the obligation under the trade agreements to protect data, the intent of section C.08.004.1 to implement those agreements, and the mechanism by which that implementation was done (market exclusivity triggered by direct or indirect comparison),

reliance on the same TAF studies is sufficient to mean that comparison to DESCOVY constitutes direct or indirect comparison to GENVOYA.

(3) Natco's additional arguments on interpretation

[82] Natco argues that even if Health Canada did conclude that its comparison to DESCOVY was an indirect comparison to GENVOYA, it was unreasonable for it to do so. It argues the term "direct or indirect comparison" to an innovative drug does not capture comparison to a line extension drug, even if that line extension drug was approved based on a comparison to the innovative drug.

[83] As the Attorney General and Gilead argue, and Natco concedes, these arguments were not raised before Health Canada. Indeed, many of them were not raised until oral argument, as Natco's written submissions focused on whether Health Canada conferred protection on a non-innovative drug, DESCOVY, and had overly relied on the treaty obligations and regulatory intent. Generally speaking, parties are not entitled to raise arguments before this Court that were not raised before the administrative decision maker: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–26.

[84] Natco argues it raises these issues now because Health Canada's preliminary decisions never stated Natco's submission made an "indirect comparison" to GENVOYA. While this is true, this was likely because Natco's submissions to that point were directed to GENVOYA not being an innovative drug. It was not until its final submission that Natco argued that even if GENVOYA was an innovative drug, DESCOVY was not, and so comparison to DESCOVY was

not comparison to an innovative drug. Regardless, given that the only trigger for data protection under section C.08.004.1 is a "direct or indirect comparison" to an innovative drug, I believe the question whether there was "indirect" comparison to GENVOYA was in play, even if not expressly raised by Health Canada, and even if Natco argued it made no direct comparison to GENVOYA.

[85] Nonetheless, I believe it is appropriate to consider and address Natco's arguments on this issue, even though Health Canada did not have the opportunity to do so. I say this in part because I agree with Natco that Health Canada's expression of its conclusions regarding indirect comparison to GENVOYA are not entirely clear, even in its final decision, and its consideration of the text of the regulations and how the regulatory context affects the interpretation of that text is at best implicit. I also say this because the data protection provisions and the issues raised have potential impact beyond these parties, and it is more efficient to address these arguments now that they have been raised with the Court and responded to by the Attorney General and Gilead.

[86] Natco's strongest argument on this issue is that the same language of "direct or indirect comparison" appears in contemporaneous amendments to the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [*PM(NOC) Regulations*]. The Governor in Council introduced amendments to the *PM(NOC) Regulations* at the same time as the amendments to the *Food and Drug Regulations* that amended the data protection provisions, and indeed, as the regulation immediately following: *Regulations Amending the Patented Medicines (Notice of Compliance) Regulations*, SOR/2006-242. These 2006 amendments introduced the following language into subsection 5(1) of the *PM(NOC) Regulations*:

5. (1) If a second person files a submission for a notice of compliance in respect of a drug and the submission directly or indirectly compares the drug with, or makes reference to, another drug marketed in Canada under a notice of compliance issued to a first person and in respect of which a patent list has been submitted, the second person shall, in the submission, with respect to each patent on the register in respect of the other drug, […]	**5.** (1) Dans le cas où la seconde personne dépose une présentation pour un avis de conformité à l'égard d'une drogue, laquelle présentation, directement ou indirectement, compare celle-ci à une autre drogue commercialisée sur le marché canadien aux termes d'un avis de conformité délivré à la première personne et à l'égard de laquelle une liste de brevets a été présentée — ou y fait renvoi —, cette seconde personne doit, à l'égard de chaque brevet ajouté au registre pour cette autre drogue, inclure dans sa présentation : […]
[Emphasis added.]	[Je souligne.]

[87] The *PM(NOC) Regulations* have been subsequently amended, but the "directly or indirectly compares" language remains in the current version. Under the *PM(NOC) Regulations*, a manufacturer (the "second person") that seeks to make a generic version of a drug (the "other drug") must address the patents listed on the Patent Register in respect of the other drug in the manner specified in the regulations.

[88] The RIAS for the data protection amendments refers to the 2006 amendments to the *PM(NOC) Regulations*, and vice versa: RIAS (2006-241) at 1498–1499; RIAS, SOR/2006-242, *Canada Gazette Part II*, Vol 140, No 21, p 1510 [RIAS (2006-242)] at pp 1519, 1521. It is clear the two amending regulations were part of a program of amendments promulgated to address issues that had arisen in the operation of the two regulatory schemes, each of which operate in the context of the approval of generic drugs. The two are also meant to work together. For

example, the two-year difference between the “no file” period and the “market exclusivity” period was designed to reflect the time required for the generic manufacturer to meet its requirements under the *PM(NOC) Regulations*: RIAS (2006-241) at p 1496.

[89] Natco argues the similar language in the two coordinated regulations must be given the same interpretation. Since the phrase “directly or indirectly compares” in the *PM(NOC) Regulations* covers comparison only to the drug of which the generic version is being sought, the phrase “direct or indirect comparison” in the data protection provisions ought to similarly cover only that same drug. Conversely, Natco argues, if a manufacturer making a generic version of a product line extension makes a “direct or indirectly comparison” to the underlying innovative drug for purposes of the data protection provisions, applying the same interpretation to the *PM(NOC) Regulations* would lead to impractical results. That is, a company making a generic version of a line extension drug would have to address not only the patents listed on the Patent Register for the line extension drug, but also those listed in respect of the underlying innovative drug, and any other drugs to which the submission for the line extension made reference.

[90] While there is attraction to Natco’s arguments based on the presumption of consistent expression, in my view, the presumption is rebutted in this case, and the phrase “direct or indirect comparison” in section C.08.004.1 of the *Food and Drug Regulations* must be read differently than the phrase “directly or indirectly compares” in the *PM(NOC) Regulations*.

[91] The presumption of consistent expression presumes the same language appearing in different places in a statute is intended to mean the same thing: *Merck & Co Inc v Apotex Inc*,

2010 FC 1265 at paras 147–150, aff'd 2011 FCA 363. However, while the presumption may apply across related statutes, different statutory or regulatory contexts may dictate that different meanings be given to the same language: *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at paras 69–74, aff'g 2009 FCA 175 and 2009 FCA 181, aff'g in part and rev'g in part 2008 FC 766 at paras 47(3), 76.

[92] In the present case, while the data protection provisions and the *PM(NOC) Regulations* arise in similar contexts (the approval of generic medications), they have different purposes, different regulatory language, and different regulatory and jurisprudential contexts.

[93] The data protection regulations are promulgated under the *Food and Drugs Act* to implement Canada's treaty obligations to protect data associated with the approval of certain pharmaceutical products, so as to encourage the development of new drugs: *Apotex* at paras 71–72, 76, 85, 117. The *PM(NOC) Regulations*, on the other hand, are promulgated under section 55.2 of the *Patent Act*, as part of the balance between the early-working exception and the prevention of patent infringement: *Biolyse* at paras 50–54. This different purpose informs the interpretation of the language of the provisions in the two regulations.

[94] Significantly, the *PM(NOC) Regulations* refer to a submission that "directly or indirectly compares the drug with, or makes reference to, another drug marketed in Canada […] and in respect of which a patent list has been submitted" [emphasis added]: *PM(NOC) Regulations*, s 5(1). A patent list may be submitted in respect to each new drug: *PM(NOC) Regulations*, s 4. The *PM(NOC) Regulations* also require the second person to address the patents on the Patent

Register only with respect to the "other drug," that is, the drug of which a generic version is being made. This language originally appeared in the amendments to subsection 5(1) of the *PM(NOC) Regulations* promulgated in 2006; it now appears in subsection 5(2.1). Thus the structure of the *PM(NOC) Regulations* supports the interpretation that the direct or indirect comparison in question refers only to the "other drug," even if that other drug is a product line extension that obtained approval through reference to another drug submission.

[95] The data protection regulations, on the other hand, do not have these contextual indicators that suggest inherent limits on the word "indirectly." To the contrary, the context of section C.08.004.1 suggests the very use of "direct or indirect comparison" is designed to deal with any comparison to the "innovative drug," even if that comparison may be a step or more removed.

[96] In this regard, the obligations of the trade agreements and the intent of the regulations are instructive. If the phrase "direct or indirect comparison" was limited to the comparison with the CRP, as Natco suggests, the generic manufacturer would be able to take advantage of the data submitted to obtain approval of the innovative drug. This loophole would be contrary to the intent of the trade agreements. It is possible for the Governor in Council to promulgate regulations that do not in fact meet the obligations of the trade agreements, despite the stated intention to do so: *Takeda* at paras 129–131; *Nova Tube Inc/Nova Steel Inc v Conares Metal Supply Ltd.*, 2019 FCA 52 at paras 57-58. However, the presumption is that they have not done so: R Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada, 2014) at §§18.4–18.6, 18.47–18.49; *Teva* at paras 37–41. As described above, this potential

loophole was one of the primary factors Health Canada considered in its decision, but it considered this factor as the basis for a particular outcome, rather than as a clue to interpreting the given regulatory language.

[97] The RIAS for the two different regulations are also relevant context. As set out in the passage reproduced at paragraph [47], the RIAS for the data protection provisions shows an intent that the phrase "direct or indirect comparison" in that legislation not be limited to the CRP for the generic drug: RIAS (2006-241) at pp 1496–1497. The RIAS for the 2006 amendments to the *PM(NOC) Regulations*, on the other hand, confirms a more limited reading of the phrase "directly or indirectly compares" when used in those regulations, covering only the patents listed on the register for the drug. At pages 1510 and 1519, the RIAS (2006-242) states the following:

> The PM(NOC) Regulations [ensure the early working exception is not abused] by linking Health Canada's ability to approve a generic drug to the patent status of the equivalent innovative product the generic seeks to copy. Under the current scheme, a generic drug company which compares its product directly or indirectly with a patented, innovative drug in order to establish the former's safety and efficacy and secure marketing approval from Health Canada (which comes in the form of a "notice of compliance" or "NOC") must make one of two choices. It can either agree to await patent expiry before obtaining its NOC or make an allegation justifying immediate market entry that is either accepted by the innovator or upheld by the court.
>
> […]
>
> Under the amendments to section 5, a generic manufacturer that files a submission or supplement for a NOC in respect of a generic version of an innovative drug is only required to address the patents on the register in respect of the innovative drug as of that filing date. Patents added to the register thereafter will not give rise to any such requirement.
>
> [Emphasis added.]

[98] These passages confirm what is clear from the regulatory structure of the *PM(NOC) Regulations*, namely "directly or indirectly compares" triggers only an obligation to address patents in respect of the "equivalent innovative product the generic seeks to copy." This different regulatory structure gives the words a different meaning than that found in the data protection provisions. It is also perhaps worth noting that the passages directly above even use the term "innovative drug" in a manner different from its definition in the data protection provisions.

[99] Finally, the jurisprudential background to the amendments to the data protection provisions and the *PM(NOC) Regulations* is relevant to the differences in meaning given to similar language in the two regulations. The amendments to the data protection provisions were promulgated subsequent to the Federal Court of Appeal's decision in *Bayer Inc v Canada (Attorney General)*, 1999 CanLII 8099, 87 CPR (3d) 293 (FCA). That case assessed an earlier version of section C.08.004.1, which was also designed to implement the same sections of the NAFTA. The trigger mechanism in that version required the Minister to "examine" information or material filed with the Minister and "rely on data" contained in the information or material. The Court of Appeal found that since the Minister did not actually "examine" and "rely on" data in the original submission when approving a generic product, the section was not triggered every time that a generic made a comparison to a CRP: *Bayer* at paras 6–8. Significantly, the Court of Appeal made the following statement at paragraph 9 of its reasons:

> As Evans, J. pointed out, the appellant's argument would require that the Court read into the regulation the word "indirectly" or some other modifier to capture the idea that whenever a generic manufacturer files an ANDS comparing its product to an innovator's product, that there is implicit examination and reliance on the confidential information previously submitted by the innovator in its NDS. The Court cannot read words into the regulation.

[100] The trigger mechanism in the amended data protection provisions no longer refers to examination or reliance on data. It refers to direct or indirect comparison to the innovative drug, comparison to the drug entailing implicit reliance on the data that was filed for its approval. The RIAS for the amendments to the data protection provisions make clear that they respond to this ruling: RIAS (2006-241) at pp 1495–1496. After referring to *Bayer*, the RIAS states the following:

> While the comparison necessary to demonstrate bioequivalence rarely involves an examination of the innovator's data, it does involve reliance on the innovator's product. Therefore, these amendments are being introduced to clarify that the aforementioned reliance will give rise to an exclusivity period.

This passage, particularly when read together with that reproduced in paragraph [47] regarding combination products, shows the Governor in Council's intent to promulgate regulations that protected the underlying data, even where the reliance on the innovative drug was an indirect one.

[101] The jurisprudential background to the amendments to the *PM(NOC) Regulations* was quite different. Efforts to avoid the obligation to address the patents on the register had included generic companies seeking to refer to approved generic drugs, rather than to the original product. A new subsection 5(1.1) had been introduced to deal with this issue, but ultimately the Federal Court of Appeal determined that section 5(1) captured the situation: *Merck & Co, Inc v Canada (Attorney General)*, 2000 CanLII 15094, 5 CPR (4th) 138 (FCA) at paras 30–37. Notably, the Court distinguished the analysis in *Bayer* based on the differences in the legislative scheme: *Merck* at paras 34, 36–37. Nonetheless, the amended subsection 5(1) included the "directly or indirectly" language, presumably to avoid doubt: RIAS (2006-242) at pp 1519–1520.

[102] I therefore conclude that even though similar language appears in the data protection provisions and the *PM(NOC) Regulations*, different meaning must be given to them to reflect their respective regulatory contexts.

[103] Similarly, I agree with Gilead and the Attorney General that Natco's reference to the "comparison" described in subsection C.08.002.1(1) of the *Food and Drug Regulations* does not assist. Natco notes the comparison in that section is between a generic product and the CRP it seeks to copy and argues the same comparison must be intended in subsection C.08.004.1(3). However, subsection C.08.004.1(3) has both a different comparator (an "innovative drug" rather than a CRP) and the additional "direct or indirect" language not seen in subsection C.08.002.1(1). I cannot draw any conclusions on the scope of subsection C.08.004.1(3) from the use of the word "comparison" in the two provisions.

[104] Natco's other arguments suggesting a narrower reading of "direct or indirect comparison" in subsection C.08.004.1(3) are less persuasive.

[105] Natco argues that even if the triggering mechanism were to be limited to comparison to the innovative drug, the word "indirect" still has meaning. It points to the observation in *Apotex* that "generic manufacturers […] are in effect relying, at least indirectly, on the information and data provided by innovators" [emphasis added]: *Apotex* at para 108. However, there is an important distinction between indirect reliance on *data*, to which Justice Nadon was referring, and indirect comparison to an *innovative drug*. The Governor in Council chose the latter as the triggering mechanism for the amended data protection provisions: *Apotex* at paras 87–88.

Nothing in the statement in *Apotex* suggests a narrower reading of the provision. Natco also argues that "indirectly" would also retain meaning by referring to other contexts such as biologics or non-Canadian drugs. Be that as it may, the fact that an "indirect" comparison could refer to other sorts of comparisons does not mean it excludes comparisons to a line extension drug whose approval involved comparison to an innovator drug.

[106] Natco also relies on a passage in the RIAS for the data protection provisions that describes comments received during the public consultation period on the proposed regulations. At page 1501, the RIAS summarized submissions from the innovative drug industry:

> [The innovative drug industry] also noted that the current language inadequately reflects the intent of providing protection to the original medicinal ingredient, and all products incorporating that medicinal ingredient, including combination products, different formulations and polymorphs.
>
> [Emphasis added.]

[107] Natco argues the Governor in Council did not amend the draft regulations in response to these submissions, which indicates its intention not to provide protection to products incorporating the medicinal ingredient, such as line extension products. In *Takeda*, Justice Dawson adopted such an approach in respect of another passage in the same paragraph of the RIAS: *Takeda* at paras 127–128. Nevertheless, I cannot accept Natco's argument with respect to the underlined passage above. Unlike the passage at issue in *Takeda*, both the nature of the submission and the reason for not making amendments to the draft regulations in consequence are far from clear. It may be that the innovative industry advocated for protecting such line extension products by granting them a full term of protection—that is, giving them the same treatment as "innovative drugs." If so, that contention may have been rejected, as these

products are clearly treated differently in the regulations as promulgated. It may also be that the Governor in Council did not amend the draft regulations in response to those submissions because it did not agree the language "inadequately reflects the intent" described. I therefore do not believe the foregoing passage supports Natco's position on the meaning of "direct or indirect comparison" in section C.08.004.1 as promulgated.

[108] I conclude that none of Natco's additional arguments suggest the interpretation of subsection C.08.004.1(3) that Health Canada implicitly adopted is unreasonable. To the contrary, having considered both the contextual issues raised by Health Canada, and the additional arguments raised by Natco and the parties, it becomes clear to me that the "interplay of text, context and purpose leaves room for a single reasonable interpretation" of the regulation: *Vavilov* at para 124. That is, the "direct or indirect comparison" to an innovative drug that forms the trigger for data protection provisions may include a manufacturer's comparison to a drug product that in turn was compared to the innovator product for approval. Given Health Canada's finding that Natco compared its product to DESCOVY, and the approval of DESCOVY was based on comparison to GENVOYA and the very data supporting its innovative drug status, the outcome that Natco's ANDS could not be accepted for filing was inevitable.

IV. Conclusion

[109] The application for judicial review is therefore dismissed.

[110] The parties have advised the Court that they have conferred and have agreed that no party is seeking costs, regardless of the outcome.

JUDGMENT IN T-1353-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed, without costs.

"Nicholas McHaffie"
Judge

APPENDIX A – DATA PROTECTION PROVISIONS

***Food and Drug Regulations*, CRC c 870**	***Règlement sur les aliments et drogues*, CRC ch 870**
C.08.004.1 (1) The following definitions apply in this section.	**C.08.004.1 (1)** Les définitions qui suivent s'appliquent au présent article.
[…]	[…]
innovative drug means a drug that contains a medicinal ingredient not previously approved in a drug by the Minister and that is not a variation of a previously approved medicinal ingredient such as a salt, ester, enantiomer, solvate or polymorph. (*drogue innovante*)	***drogue innovante*** S'entend de toute drogue qui contient un ingrédient médicinal non déjà approuvé dans une drogue par le ministre et qui ne constitue pas une variante d'un ingrédient médicinal déjà approuvé tel un changement de sel, d'ester, d'énantiomère, de solvate ou de polymorphe. (*innovative drug*)
(2) The purpose of this section is to implement Article 1711 of the North American Free Trade Agreement, as defined in the definition ***Agreement*** in subsection 2(1) of the *North American Free Trade Agreement Implementation Act*, and paragraph 3 of Article 39 of the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the Agreement Establishing the World Trade Organization, as defined in the definition ***Agreement*** in subsection 2(1) of the *World Trade Organization Agreement Implementation Act.*	**(2)** L'objet du présent article est de mettre en œuvre l'article 1711 de l'Accord de libre-échange nord-américain, au sens du terme ***Accord*** au paragraphe 2(1) de la *Loi de mise en œuvre de l'Accord de libre-échange nord-américain*, et le paragraphe 3 de l'article 39 de l'Accord sur les aspects des droits de propriété intellectuelle qui touchent au commerce figurant à l'annexe 1C de l'Accord instituant l'Organisation mondiale du commerce, au sens du terme ***Accord*** au paragraphe 2(1) de la *Loi de mise en œuvre de l'Accord sur l'Organisation mondiale du commerce*.
(3) If a manufacturer seeks a notice of compliance for a new drug on the basis of a direct or indirect comparison between the new drug and an innovative drug,	**(3)** Lorsque le fabricant demande la délivrance d'un avis de conformité pour une drogue nouvelle sur la base d'une comparaison directe ou indirecte entre celle-ci et la drogue innovante :
(*a*) the manufacturer may not file a new drug submission, a supplement to a new drug submission, an abbreviated new drug submission or a supplement to an abbreviated new drug submission in respect of the new drug before the end of a period of six years after the day on	***a*)** le fabricant ne peut déposer pour cette drogue nouvelle de présentation de drogue nouvelle, de présentation abrégée de drogue nouvelle ou de supplément à l'une de ces présentations avant l'expiration d'un délai de six ans suivant la date à laquelle le premier avis

which the first notice of compliance was issued to the innovator in respect of the innovative drug; and

de conformité a été délivré à l'innovateur pour la drogue innovante;

(*b*) the Minister shall not approve that submission or supplement and shall not issue a notice of compliance in respect of the new drug before the end of a period of eight years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug.

***b*)** le ministre ne peut approuver une telle présentation ou un tel supplément et ne peut délivrer d'avis de conformité pour cette nouvelle drogue avant l'expiration d'un délai de huit ans suivant la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante.

(3) The period specified in paragraph (3)(*b*) is lengthened to eight years and six months if

(3) Le délai prévu à l'alinéa (3)*b*) est porté à huit ans et six mois si, à la fois :

(*a*) the innovator provides the Minister with the description and results of clinical trials relating to the use of the innovative drug in relevant pediatric populations in its first new drug submission for the innovative drug or in any supplement to that submission that is filed within five years after the issuance of the first notice of compliance for that innovative drug; and

***a*)** l'innovateur fournit au ministre la description et les résultats des essais cliniques concernant l'utilisation de la drogue innovante dans les populations pédiatriques concernées dans sa première présentation de drogue nouvelle à l'égard de la drogue innovante ou dans tout supplément à une telle présentation déposé au cours des cinq années suivant la délivrance du premier avis de conformité à l'égard de cette drogue innovante;

(*b*) before the end of a period of six years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug, the Minister determines that the clinical trials were designed and conducted for the purpose of increasing knowledge of the use of the innovative drug in those pediatric populations and this knowledge would thereby provide a health benefit to members of those populations.

***b*)** le ministre conclut, avant l'expiration du délai de six ans qui suit la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante, que les essais cliniques ont été conçus et menés en vue d'élargir les connaissances sur l'utilisation de cette drogue dans les populations pédiatriques visées et que ces connaissances se traduiraient par des avantages pour la santé des membres de celles-ci.

(4) The period specified in paragraph (3)(*b*) is lengthened to eight years and six months if

(4) Le délai prévu à l'alinéa (3)*b*) est porté à huit ans et six mois si, à la fois :

(*a*) the innovator provides the Minister with the description and results of clinical trials relating to the use of the innovative drug in relevant pediatric populations in its first new drug submission for the innovative drug or in any supplement to that submission that is filed within five years after the issuance of the first notice of compliance for that innovative drug; and

***a*)** l'innovateur fournit au ministre la description et les résultats des essais cliniques concernant l'utilisation de la drogue innovante dans les populations pédiatriques concernées dans sa première présentation de drogue nouvelle à l'égard de la drogue innovante ou dans tout supplément à une telle présentation déposé au cours des cinq années suivant la délivrance du premier avis de conformité à l'égard de cette drogue innovante;

(*b*) before the end of a period of six years after the day on which the first notice of compliance was issued to the innovator in respect of the innovative drug, the Minister determines that the clinical trials were designed and conducted for the purpose of increasing knowledge of the use of the innovative drug in those pediatric populations and this knowledge would there-by provide a health benefit to members of those populations.

***b*)** le ministre conclut, avant l'expiration du délai de six ans qui suit la date à laquelle le premier avis de conformité a été délivré à l'innovateur pour la drogue innovante, que les essais cliniques ont été conçus et menés en vue d'élargir les connaissances sur l'utilisation de cette drogue dans les populations pédiatriques visées et que ces connaissances se traduiraient par des avantages pour la santé des membres de celles-ci.

[…]

[…]

(9) The Minister shall maintain a register of innovative drugs that includes information relating to the matters specified in subsections (3) and (4).

(9) Le ministre tient un registre des drogues innovantes, lequel contient les renseignements relatifs à l'application des paragraphes (3) et (4).

APPENDIX B – TREATY PROVISIONS

NORTH AMERICAN FREE TRADE AGREEMENT	ACCORD DE LIBRE-ÉCHANGE NORD-AMÉRICAIN
Part VI: Intellectual Property	**Partie VI : Propriété intellectuelle**
Chapter 17: Intellectual Property	**Chapitre 17 : Propriété intellectuelle**
Article 1711: Trade Secrets	**Article 1711 : Secrets commerciaux**
[…]	[…]
5. If a Party requires, as a condition for approving the marketing of pharmaceutical or agricultural chemical products that utilize new chemical entities, the submission of undisclosed test or other data necessary to determine whether the use of such products is safe and effective, the Party shall protect against disclosure of the data of persons making such submissions, where the origination of such data involves considerable effort, except where the disclosure is necessary to protect the public or unless steps are taken to ensure that the data is protected against unfair commercial use.	**5.** Lorsqu'une Partie subordonne l'approbation de la commercialisation de produits pharmaceutiques ou de produits chimiques pour l'agriculture qui comportent des éléments chimiques nouveaux, à la communication de données non divulguées résultant d'essais ou d'autres données non divulguées nécessaires pour déterminer si l'utilisation de ces produits est sans danger et efficace, cette Partie protégera ces données contre toute divulgation, lorsque l'établissement de ces données demande un effort considérable, sauf si la divulgation est nécessaire pour protéger le public, ou à moins que des mesures ne soient prises pour s'assurer que les données sont protégées contre toute exploitation déloyale dans le commerce.
6. Each Party shall provide that for data subject to paragraph 5 that are submitted to the Party after the date of entry into force of this Agreement, no person other than the person that submitted them may, without the latter's permission, rely on such data in support of an application for product approval during a reasonable period of time after their submission. For this purpose, a reasonable period shall normally mean not less than five years from the date on which the Party granted approval to the person that produced the data for approval to market its product, taking account of the nature of the data and the person's efforts and	**6.** Chacune des Parties prévoira, en ce qui concerne les données visées au paragraphe 5 qui lui sont communiquées après la date d'entrée en vigueur du présent accord, que seule la personne qui les a communiquées peut, sans autorisation de cette dernière à autrui, utiliser ces données à l'appui d'une demande d'approbation de produit au cours d'une période de temps raisonnable suivant la date de leur communication. On entend généralement par période de temps raisonnable, une période d'au moins cinq années à compter de la date à laquelle la Partie en cause a donné son autorisation à la personne ayant produit les données

expenditures in producing them. Subject to this provision, there shall be no limitation on any Party to implement abbreviated approval procedures for such products on the basis of bioequivalence and bioavailability studies.

destinées à faire approuver la commercialisation de son produit, compte tenu de la nature des données, ainsi que des efforts et des frais consentis par cette personne pour les produire. Sous réserve de cette disposition, rien n'empêchera une Partie d'adopter à l'égard de ces produits des procédures d'homologation abrégées fondées sur des études de bioéquivalence et de biodisponibilité.

7. Where a Party relies on a marketing approval granted by another Party, the reasonable period of exclusive use of the data submitted in connection with obtaining the approval relied on shall begin with the date of the first marketing approval relied on.

7. Lorsqu'une Partie se fie à une approbation de commerciali-sation accordée par une autre Partie, la période raisonnable d'utilisation exclusive des données présentées en vue d'obtenir l'approbation en question commencera à la date de la première approbation de commercialisation.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Section 7: protection of undisclosed information

Article 39

[…]

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

ACCORD SUR LES ASPECTS DES DROITS DE PROPRIÉTÉ INTELLECTUELLE QUI TOUCHENT AU COMMERCE

Section 7: Protection des renseignements non divulgués

Article 39

[…]

3. Lorsqu'ils subordonnent l'approbation de la commercialisation de produits pharmaceutiques ou de produits chimiques pour l'agriculture qui comportent des entités chimiques nouvelles à la communication de données non divulguées résultant d'essais ou d'autres données non divulguées, dont l'établissement demande un effort considérable, les Membres protégeront ces données contre l'exploitation déloyale dans le commerce. En outre, les Membres protégeront ces données contre la divulgation, sauf si cela est nécessaire pour protéger le public, ou à moins que des mesures ne soient prises pour s'assurer que les données sont protégées contre l'exploitation déloyale dans le commerce.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1353-19
STYLE OF CAUSE:	NATCO PHARMA (CANADA) INC v MINISTER OF HEALTH ET AL

HEARING HELD BY VIDEOCONFERENCE ON JUNE 22, 2020 FROM OTTAWA, ONTARIO AND TORONTO, ONTARIO

JUDGMENT AND REASONS:	MCHAFFIE J.
DATED:	JULY 24, 2020

APPEARANCES:

Lesley Caswell Bryan Norrie	FOR THE APPLICANT
J. Sanderson Graham Charles Maher	FOR THE RESPONDENTS MINISTER OF HEALTH AND ATTORNEY GENERAL OF CANADA
Kristin Wall Jordana Sanft William Chalmers	FOR THE RESPONDENT GILEAD SCIENCES CANADA INC.

SOLICITORS OF RECORD:

Aitken Klee LLP Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS MINISTER OF HEALTH AND ATTORNEY GENERAL OF CANADA

Norton Rose Fulbright LLP Toronto, Ontario	FOR THE RESPONDENT GILEAD SCIENCES CANADA INC.

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

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

c.

Ontario Power Generation Inc., Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 et Society of Energy Professionals *Intimés*

et

Corporation des services en éducation de l'Ontario *Intervenante*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether

Répertorié : Ontario (Commission de l'énergie) *c.* Ontario Power Generation Inc.

2015 CSC 44

N° du greffe : 35506.

2014 : 3 décembre; 2015 : 25 septembre.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Services publics — Électricité — Décision d'un organisme de réglementation des services publics relativement à l'établissement de tarifs — Demande d'un service public en vue d'obtenir le recouvrement de dépenses de rémunération faites ou convenues grâce aux tarifs établis par la Commission de l'énergie de l'Ontario — La Commission avait-elle l'obligation d'employer une méthode particulière axée sur la prudence pour apprécier les dépenses du service public? — Le refus de la Commission d'approuver 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public était-il raisonnable? — Loi de 1998 sur la Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, art. 78.1(5), (6).

Droit administratif — Organismes et tribunaux administratifs — Appels — Qualité pour agir — La Commission de l'énergie de l'Ontario a-t-elle agi de manière inappropriée en se pourvoyant en appel et en faisant valoir

Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

le caractère raisonnable de sa propre décision? — A-t-elle tenté de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale?

En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que le service public touche des paiements qui correspondent à ses dépenses. La Commission a refusé certains paiements sollicités par Ontario Power Generation (« OPG ») dans sa décision sur la demande d'établissement des tarifs pour la période 2011-2012. Elle a en fait refusé à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération liées aux installations nucléaires du service public au motif que ces dépenses étaient en rupture avec celles d'organismes comparables dans le secteur réglementé de la production d'énergie. Les juges majoritaires de la Cour divisionnaire de l'Ontario ont rejeté l'appel d'OPG et confirmé la décision de la Commission. La Cour d'appel a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs.

La thèse d'OPG en l'espèce veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence doit s'appliquer à son bénéfice. La Commission prétend pour sa part que la loi ne l'oblige pas à employer quelque méthode fondée sur le principe de la prudence et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses convenues, mais bien des dépenses prévues.

OPG exprime en outre des préoccupations sur la participation de la Commission à l'appel de sa propre décision et fait valoir que la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée et que l'organisme a tenté de se servir de l'appel pour s'auto-justifier en formulant de nouveaux arguments à l'appui de sa décision initiale. La Commission soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising

Arrêt (la juge Abella est dissidente) : Le pourvoi est accueilli. La décision de la Cour d'appel est annulée et celle de la Commission est rétablie.

La juge en chef McLachlin et les juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon : Se pose en premier lieu la question du caractère approprié de la participation de la Commission au pourvoi. Les préoccupations relatives à la participation d'un tribunal administratif à l'appel de sa propre décision ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes. Vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Qui plus est, dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige. Les considérations suivantes permettent de délimiter l'exercice du pouvoir discrétionnaire de la cour de révision : les dispositions législatives portant sur la structure, le fonctionnement et la mission du tribunal en cause et le mandat du tribunal, à savoir si sa fonction consiste soit à trancher des différends individuels opposant plusieurs parties, soit à élaborer des politiques, à réglementer ou à enquêter, ou à défendre l'intérêt public. L'importance de l'équité, réelle et perçue, milite davantage contre la reconnaissance de la qualité pour agir du tribunal administratif qui a exercé une fonction juridictionnelle dans l'instance. Il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

L'application de ces principes à la situation considérée en l'espèce mène à la conclusion qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. La Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait d'autre choix que de prendre part à l'instance pour que sa décision

a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and

soit défendue au fond. Aussi, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Sa participation au pourvoi n'avait rien d'inapproprié en l'espèce.

La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir, alors que l'autojustification touche à la teneur des prétentions. Un tribunal s'autojustifie lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire. Un tribunal ne peut défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle. Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire, un tribunal ne puisse profiter d'un contrôle judiciaire pour modifier, changer, nuancer ou compléter ses motifs. Même s'il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, la cour de révision étant alors saisie des arguments les plus convaincants à l'appui de chacune des thèses, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Dans la présente affaire, la Commission n'a pas indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant la Cour. Les arguments qu'elle a invoqués en appel n'équivalent pas à une autojustification inadmissible.

La question de fond est celle de savoir si la Commission a employé une méthode appropriée pour refuser à OPG le recouvrement de 145 millions de dollars au titre des dépenses de rémunération. L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins. Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en

utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood

capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prescrit pas la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et du consommateur lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Suivant cette loi, il incombe cependant au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables. Il semble donc contraire au régime législatif de présumer que la décision du service public de faire les dépenses était prudente. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter la méthode à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

La question à trancher est celle de savoir si la Commission était tenue à l'application d'un critère excluant le recul et présumant la prudence pour décider si les dépenses de rémunération du personnel étaient justes et raisonnables. Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Toutefois, aucun élément du régime législatif n'appuie l'idée que la Commission devrait être tenue en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence de sorte que la seule décision de ne pas l'appliquer pour apprécier des dépenses convenues rendrait déraisonnable sa décision sur les paiements. Lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements.

Lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue. Dans la présente affaire, il convient mieux de voir dans

as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable

les dépenses de rémunération dont le recouvrement a été refusé à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux de ses syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conservait une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Cependant, la Commission n'était pas tenue d'appliquer un principe de prudence donné pour apprécier ces dépenses. Il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Présumer la prudence aurait été incompatible avec le fardeau de la preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses.

Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG de ces dépenses et en refusant le recouvrement de celles-ci. Puisque les dépenses en cause sont des dépenses d'exploitation, il est peu probable que le refus essuyé dissuade OPG de faire de telles dépenses à l'avenir, car les dépenses de la nature de celles dont le recouvrement a été refusé sont inhérentes à l'exploitation d'un service public. Aussi, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de

for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a "prudence review". The application of a prudence review does not shield

rémunération d'un service public. La Commission n'entend aucunement, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés syndiqués. Il n'était pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre de ces catégories.

Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il visait à signifier clairement à OPG qu'il lui incombe d'accroître sa performance. L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

La juge Abella (dissidente) : La Commission a rendu une décision déraisonnable en ce qu'elle n'a pas appliqué la méthode qu'elle avait elle-même établie pour déterminer le montant de paiements justes et raisonnables. Elle a à la fois méconnu le caractère contraignant en droit des conventions collectives liant Ontario Power Generation et les syndicats et omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles.

Dans ses motifs, la Commission a dit recourir à deux examens pour arrêter le montant de paiements justes et raisonnables. En ce qui concerne les « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter, la Commission a expliqué qu'elle examinait ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombait au service public d'en démontrer le caractère raisonnable. Cependant, une démarche différente était suivie pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission a expliqué

these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

qu'elle appréciait ces dépenses en se livrant à un « contrôle de la prudence ». L'application du principe de la prudence ne soustrait pas ces dépenses à tout examen, mais elle présume que les dépenses ont été faites de manière prudente.

Toutefois, au lieu d'appliquer la méthode qu'elle avait elle-même établie, la Commission a considéré *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables sans se demander s'il s'agissait en partie de dépenses pour lesquelles la société ne pouvait prendre de mesures de réduction. Par son omission d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission a méconnu à la fois son propre cadre méthodologique et le droit du travail.

Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire. Ces conventions ne laissaient pas seulement au service public peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

Or, en appliquant la méthode qu'elle avait dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission a en fait obligé Ontario Power Generation à prouver le caractère raisonnable de toutes ses dépenses de rémunération et a conclu que l'entreprise n'avait présenté ni preuve convaincante, ni documents ou analyses qui justifiaient les barèmes de rémunération. Si elle avait eu recours à l'approche qu'elle avait dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

donc être assimilées à juste titre à des dépenses prévues. La Commission n'a toutefois tiré aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation étaient fixes et dans quelle proportion elles demeuraient assujetties au pouvoir discrétionnaire du service public. Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce sens.

En choisissant un critère éminemment susceptible de confirmer l'hypothèse de la Commission selon laquelle les dépenses issues de négociations collectives sont excessives, on se méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas. Même si la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont justes et raisonnables et, à l'intérieur de certaines limites, de définir la méthode utilisée pour établir le montant de ces paiements, dès lors qu'elle a établi une telle méthode, elle doit à tout le moins l'appliquer avec constance.

En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation ne peut savoir comment déterminer les dépenses et les investissements à faire et de quelle manière les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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By Rothstein J.

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Je serais donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et de renvoyer l'affaire à la Commission pour réexamen.

Jurisprudence

Citée par le juge Rothstein

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Glenn Zacher, *Patrick Duffy* and *James Wilson*, for the appellant.

John B. Laskin, *Crawford Smith*, *Myriam Seers* and *Carlton Mathias*, for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence*, for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach*, for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

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POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Rosenberg, Goudge et Blair), 2013 ONCA 359, 116 O.R. (3d) 793, 365 D.L.R. (4th) 247, 307 O.A.C. 109, [2013] O.J. No. 3917 (QL), 2013 CarswellOnt 9792 (WL Can.), qui a infirmé une décision de la Cour divisionnaire (les juges Aitken, Swinton et Hoy), 2012 ONSC 729, 109 O.R. (3d) 576, 347 D.L.R. (4th) 355, [2012] O.J. No. 862 (QL), 2012 CarswellOnt 2710 (WL Can.), et une décision de la Commission de l'énergie de l'Ontario, EB-2010-0008, 10 mars 2011 (en ligne : http://www.ontarioenergyboard.ca/), 2011 LNONOEB 57 (QL), 2011 CarswellOnt 3723 (WL Can.). Pourvoi accueilli, la juge Abella est dissidente.

Glenn Zacher, *Patrick Duffy* et *James Wilson*, pour l'appelante.

John B. Laskin, *Crawford Smith*, *Myriam Seers* et *Carlton Mathias*, pour l'intimée Ontario Power Generation Inc.

Richard P. Stephenson et *Emily Lawrence*, pour l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000.

Paul J. J. Cavalluzzo et *Amanda Darrach*, pour l'intimée Society of Energy Professionals.

Mark Rubenstein, pour l'intervenante.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ. was delivered by

[1] ROTHSTEIN J. — In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence

Version française du jugement de la juge en chef McLachlin et des juges Rothstein, Cromwell, Moldaver, Karakatsanis et Gascon rendu par

[1] LE JUGE ROTHSTEIN — En Ontario, la tarification d'un service public est réglementée, de sorte que ce dernier doit obtenir de la Commission de l'énergie de l'Ontario (« Commission ») l'approbation des dépenses qu'il a faites ou qu'il prévoit faire pendant une période donnée. Lorsque cette approbation est obtenue, les tarifs sont rajustés de manière que l'entreprise touche des paiements qui correspondent à ses dépenses. Le présent pourvoi vise la décision de la Commission de refuser certains paiements à Ontario Power Generation Inc. (« OPG ») par suite de sa demande d'approbation de tarifs pour la période 2011-2012. Plus particulièrement, la Commission a refusé d'approuver des dépenses de 145 millions de dollars au titre de la rémunération du personnel affecté aux installations nucléaires au motif que le coût de la main-d'œuvre d'OPG était en rupture avec celui d'organismes comparables dans le secteur réglementé de la production d'énergie.

[2] OPG en a appelé devant la Cour divisionnaire de l'Ontario, dont les juges majoritaires ont rejeté l'appel et confirmé la décision de la Commission. OPG s'est alors adressée à la Cour d'appel de l'Ontario, qui a annulé les décisions de la Cour divisionnaire et de la Commission, puis renvoyé le dossier à la Commission afin qu'elle rende une nouvelle décision conforme à ses motifs. La Commission interjette aujourd'hui appel devant notre Cour.

[3] OPG soutient que le refus de la Commission d'approuver ces dépenses de rémunération de ses employés est déraisonnable. Sa thèse veut essentiellement que la Commission soit légalement tenue de l'indemniser de la totalité des dépenses faites ou convenues avec prudence. OPG prétend que, dans ce contexte, la prudence se définit selon une méthode particulière qui exige de la Commission qu'elle détermine si, au moment où elles ont été prises, les décisions de faire les dépenses ou de convenir des dépenses étaient raisonnables. Elle soutient en outre qu'une présomption de prudence

methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility

doit s'appliquer à son bénéfice. La Commission n'ayant pas eu recours à pareille méthode pour se prononcer sur la prudence d'OPG, sa décision serait déraisonnable.

[4] La Commission rétorque que la loi ne l'oblige pas à employer quelque méthode pour appliquer le « principe de la prudence » et que, de toute manière, les dépenses de rémunération des employés du secteur nucléaire refusées en l'espèce n'étaient pas des dépenses « convenues », mais bien des dépenses prévues.

[5] OPG déplore par ailleurs que la Commission soit partie à l'appel de sa propre décision. Selon elle, la manière agressive et conflictuelle dont la Commission a défendu sa décision initiale n'était pas justifiée, et la Commission tente de se servir de l'appel pour « s'auto-justifier » en formulant de nouveaux arguments à l'appui de sa décision initiale.

[6] La Commission fait valoir que la Cour a circonscrit la faculté qu'elle avait de plaider en appel lorsqu'elle lui a reconnu tous les droits d'une partie au moment d'autoriser le pourvoi. Subsidiairement, elle soutient que la manière dont les services publics sont réglementés en Ontario fait en sorte qu'il est nécessaire et important qu'elle défende la justesse de ses décisions portées en appel.

[7] Il convient mieux, à mon sens, de voir dans les dépenses de rémunération qui ont été refusées à raison de 145 millions de dollars en partie des dépenses convenues et en partie des dépenses relevant du pouvoir discrétionnaire de la direction. Elles sont en partie convenues parce qu'elles résultent de conventions collectives intervenues entre OPG et deux syndicats, et elles relèvent en partie de la discrétion de la direction parce qu'OPG conserve une certaine marge de manœuvre dans la gestion des niveaux de dotation globale compte tenu, entre autres, de l'attrition projetée de l'effectif. Il est déraisonnable de considérer qu'il s'agit en totalité de dépenses prévues. Je ne crois cependant pas, malgré ce qu'affirme OPG, que la Commission était tenue d'appliquer un principe de prudence donné pour apprécier les dépenses. La *Loi de 1998 sur la*

costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

1. (1) . . .

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the

Commission de l'énergie de l'Ontario, L.O. 1998, c. 15, ann. B, et ses règlements connexes accordent à la Commission une grande latitude dans le choix d'une méthode pour apprécier les dépenses d'un service public, sous réserve de l'obligation de faire en sorte que, au final, les paiements qu'elle ordonne soient justes et raisonnables vis-à-vis à la fois du service public et du consommateur.

[8] Dans la présente affaire, la nature des dépenses litigieuses et le contexte dans lequel elles ont vu le jour permettent de conclure que la Commission n'a pas agi de manière déraisonnable en refusant de les approuver.

[9] En ce qui concerne la participation de la Commission au pourvoi, je ne crois pas qu'il soit inapproprié qu'elle défende la justesse de sa décision, ni que les arguments qu'elle invoque en appel équivalent à une « autojustification » inadmissible.

[10] Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir la décision de la Commission.

I. Cadre réglementaire

[11] La *Loi de 1998 sur la Commission de l'énergie de l'Ontario* fait de la Commission un organisme de réglementation investi du pouvoir de surveiller, entre autres choses, la production d'électricité en Ontario. Son article premier énonce les objectifs de la Commission dans la réglementation de l'électricité, dont les suivants :

1. (1) . . .

1. Protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité.

2. Promouvoir l'efficacité économique et la rentabilité dans les domaines de la production, du transport, de la distribution et de la vente d'électricité ainsi que de la gestion de la demande d'électricité et faciliter le maintien d'une industrie de l'électricité financièrement viable.

La Commission doit donc s'acquitter de sa fonction de réglementation dans le souci d'établir un équilibre entre l'intérêt du consommateur, d'une part,

electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that the amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on

et l'efficacité et la viabilité financière du secteur de l'électricité, d'autre part. On lui attribue aussi un rôle de « substitut du marché » (2012 ONSC 729, 109 O.R. (3d) 576, par. 54; 2013 ONCA 359, 116 O.R. (3d) 793, par. 38). Sa fonction consiste alors à reproduire au mieux les forces auxquelles serait soumis un service public dans un contexte concurrentiel (*Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, par. 48).

[12] L'un des leviers les plus puissants dont dispose la Commission pour atteindre ses objectifs réside dans son pouvoir de fixer le montant des paiements que touche l'entreprise pour la prestation du service. Voici l'extrait pertinent du par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* :

(5) La Commission peut fixer les autres paiements qu'elle estime justes et raisonnables :

a) dans le cadre d'une requête en vue d'obtenir une ordonnance prévue au présent article, si elle n'est pas convaincue que le montant du paiement qui fait l'objet de la requête est juste et raisonnable; . . .

[13] Le paragraphe 78.1(6) dispose pour sa part : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du présent article ».

[14] Suivant mon interprétation de ces dispositions, le service public demande des paiements pour une période à venir (appelée « période de référence »). La Commission fait droit à la demande, sauf lorsqu'elle n'est pas convaincue que les paiements demandés sont justes et raisonnables. Lorsqu'elle n'en est pas convaincue, le par. 78.1(5) lui permet de déterminer les paiements qui lui paraissent justes et raisonnables.

[15] Dans l'arrêt *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, la Cour a eu l'occasion de se prononcer sur le sens d'un libellé législatif semblable. Elle a alors statué que la tarification « juste et raisonnable » était celle [TRADUCTION] « qui, dans les circonstances, était juste pour le

the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

consommateur, d'une part, et qui permettait à l'entreprise d'obtenir un juste rendement sur les capitaux investis, d'autre part » (p. 192-193).

[16] Dès lors, le service public doit pouvoir à long terme recouvrer, grâce à la tarification approuvée, ses dépenses d'exploitation et ses coûts en capital, ces derniers s'entendant alors de tous les coûts liés aux capitaux investis par le service public. Le pourvoi vise principalement les dépenses d'exploitation. Si leur recouvrement n'est pas autorisé, le service public n'obtient pas l'équivalent du coût du capital, soit le rendement exigé par les investisseurs pour investir dans le service public. Le rendement exigé équivaut à celui qu'ils pourraient réaliser sur un investissement comportant un risque comparable. À long terme, à moins que le service public réglementé ne puisse obtenir l'équivalent du coût du capital, les nouveaux investissements seront découragés et l'entreprise ne pourra accroître ses activités, ni même les poursuivre. Ce sont non seulement ses actionnaires, mais aussi ses clients, qui en souffriront (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149).

[17] Évidemment, la Commission n'est pas tenue pour autant d'accepter toute dépense avancée par le service public, et le rendement obtenu par les actionnaires n'est pas non plus garanti. À court terme, ce rendement peut fluctuer, notamment lorsque la consommation d'électricité est supérieure ou inférieure à celle prévue. De même, le refus d'approuver des dépenses d'exploitation dont le service public a convenu aura un effet défavorable sur le rendement des actions. Je n'entends pas me livrer à une analyse détaillée de la manière dont le coût du capital-actions devrait être considéré par les organismes qui réglementent les services publics, mais seulement faire observer que tout refus d'approuver une dépense dont un service public a convenu a un effet sur le rendement des actions. Cet effet justifie une grande attention au vu de la nécessité qu'un service public attire les investissements à long terme et réinvestisse ses bénéfices afin de survivre et de fonctionner de manière efficace et rentable, conformément aux objectifs légaux de la Commission applicables à la réglementation de l'électricité en Ontario.

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated

[18] Rappelons qu'il incombe au service public de convaincre la Commission du caractère juste et raisonnable des paiements qu'il sollicite. S'il n'y parvient pas, la Commission peut rejeter la demande en partie à raison du montant qui, selon elle, n'est pas juste et raisonnable.

[19] En cas de refus d'approbation, le service public peut renoncer, si cela lui est possible, aux dépenses d'exploitation en cause. S'il ne peut y renoncer, ses actionnaires absorbent le déficit en touchant un rendement inférieur à celui prévu, c'est-à-dire le coût du capital-actions pour le service public. Il appartient dès lors à la direction de ce dernier de faire en sorte que ses dépenses correspondent à celles que la Commission tient pour justes et raisonnables.

[20] Lorsqu'il s'agit d'assurer l'équilibre entre les intérêts du service public et ceux du consommateur, la tarification juste et raisonnable est celle qui fait en sorte que le consommateur paie ce que la Commission prévoit qu'il en coûtera pour la prestation efficace du service, compte tenu à la fois des dépenses d'exploitation et des coûts en capital. Ainsi, le consommateur a l'assurance que, globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service, et le service public a l'assurance de pouvoir toucher une juste contrepartie pour la prestation du service.

II. Faits

[21] OPG est le plus grand producteur d'énergie de l'Ontario, et sa tarification est réglementée par la Commission. Elle a vu le jour en 1999 et fait partie des entreprises qui ont succédé à Ontario Hydro. Elle exploite des installations nucléaires et hydroélectriques soumises à la réglementation de la Commission qui produisent environ la moitié de l'électricité consommée dans la province. Son unique actionnaire est la province d'Ontario.

[22] Son effectif se compose d'environ 10 000 personnes pour ses activités réglementées, dont 95 p. 100 travaillent dans le secteur nucléaire. Environ 90 p. 100 des employés affectés à ses activités

businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

> OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 ("Board 2008-2009 Decision") (online), at pp. 5-6.

réglementées sont syndiqués, dont approximativement les deux tiers sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 (« STTSE »), et le tiers par Society of Energy Professionals (« Society »).

[23] Dès ses débuts en tant que service public indépendant, OPG a eu conscience de l'importance d'accroître sa performance d'entreprise. Dans le cadre de mesures générales prises à cette fin, elle a entrepris de comparer le rendement de son secteur nucléaire à celui de centrales comparables dans le monde. Dans un protocole d'accord intervenu avec la province d'Ontario le 17 août 2005, OPG a pris l'engagement suivant :

> [TRADUCTION] OPG visera l'amélioration constante de son secteur nucléaire et de ses services internes. Elle comparera sa performance dans ces domaines à celle de l'exploitation des réacteurs CANDU à travers le monde ainsi qu'à celle des producteurs privés et publics d'électricité d'origine nucléaire appartenant au quartile supérieur en Amérique du Nord. Sa priorité première sera d'améliorer l'exploitation de son parc nucléaire actuel.

(d.a., vol. III, p. 215)

[24] Dans la toute première demande qu'elle a présentée à la Commission en 2007 pour la période de référence 2008-2009, OPG a sollicité l'approbation de « recettes nécessaires » se chiffrant à 6,4 milliards de dollars; ce poste correspond [TRADUCTION] « aux recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors », dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521). Il s'agissait d'une majoration d'un milliard de dollars par rapport à ce qu'OPG avait demandé et obtenu en application du régime de réglementation en vigueur avant que la Commission ne soit investie de son pouvoir de réglementation vis-à-vis d'elle (EB-2007-0905, décision motivée, 3 novembre 2008 (« décision 2008-2009 de la Commission ») (en ligne), p. 5-6).

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. ("Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[25] La Commission a estimé qu'OPG ne satisfaisait pas aux attentes de son unique actionnaire quant à la performance de son secteur nucléaire et qu'elle avait peu fait pour comparer sa performance à celle de ses pairs, alors qu'elle s'y était engagée dès 2005. De fait, la seule preuve d'une démarche en ce sens présentée par OPG dans le cadre de sa demande d'approbation de tarifs était un rapport établi par Navigant Consulting Inc. en 2006 (« rapport Navigant ») et selon lequel l'effectif d'OPG dépassait de 12 p. 100 celui de ses pairs. La Commission a conclu qu'OPG n'avait pas donné suite aux recommandations du rapport Navigant, ni commandé d'études comparatives ultérieures pour évaluer sa performance (décision 2008-2009 de la Commission, p. 27 et 30). Elle a aussi jugé les coûts d'exploitation d'OPG aux installations nucléaires de Pickering [TRADUCTION] « bien supérieurs à la moyenne du secteur » (p. 29). Elle a donc refusé d'approuver 35 millions de dollars au chapitre des recettes nécessaires et enjoint à OPG de réaliser des études comparatives pour étayer ses demandes ultérieures (p. 31).

[26] Pour expliquer l'importance de la comparaison, la Commission dit ce qui suit : [TRADUCTION] « La raison pour laquelle le protocole d'accord insiste sur la conduite d'une étude comparative est qu'une telle étude peut faire et fait ressortir toute inefficacité ou absence d'accroissement de la productivité » (décision 2008-2009 de la Commission, p. 30).

[27] Le 5 mai 2010, peu avant qu'OPG ne dépose sa deuxième demande d'approbation de tarifs — qui est l'objet du pourvoi —, le ministre de l'Énergie et de l'Infrastructure de l'Ontario a écrit au président-directeur général du service public afin que ce dernier fasse état, dans sa demande, [TRADUCTION] « d'efforts concertés pour trouver des moyens de réaliser des économies et mette l'accent sur les postes de dépense qui sont essentiels à l'exploitation sûre et fiable de ses actifs existants et de ses installations projetées déjà en cours de réalisation » (d.a., vol. IV, p. 38).

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses was fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

[28] Le 26 mai 2010, OPG a déposé sa demande de paiements pour la période de référence 2011-2012. Elle a présenté à l'appui deux rapports de ScottMadden Inc., un cabinet-conseil en gestion générale spécialisé dans la comparaison et la planification opérationnelle d'installations nucléaires. Le rapport de la phase 1 compare la performance opérationnelle et financière d'OPG à celle d'autres entreprises à partir de mesures de la performance dans le secteur d'activité. Le rapport final de la phase 2 porte sur les objectifs d'accroissement de la performance dans l'optique d'une amélioration de l'exploitation du secteur nucléaire. OPG a collaboré avec ScottMadden pour l'établissement des rapports des phases 1 et 2, qui ont respectivement été publiés les 2 juillet et 11 septembre 2009.

[29] La demande visait la période allant du 1er janvier 2011 au 31 décembre 2012. OPG y demandait l'approbation de recettes nécessaires de 6,9 milliards de dollars, soit une augmentation de 6,2 p. 100 par rapport aux recettes d'alors compte tenu des tarifs approuvés pour la période précédente. Des 6,9 milliards de dollars sollicités au titre des recettes nécessaires, 2,8 milliards auraient été affectés à la rémunération, dont environ 2,4 milliards dans le secteur nucléaire.

[30] Une grande partie des dépenses d'OPG au chapitre des salaires et de la rémunération était déterminée par des conventions collectives intervenues avec les syndicats (STTSE et Society). Lors du dépôt de la demande, OPG était liée par une convention collective conclue avec le STTSE en vigueur d'avril 2009 à mars 2012, alors que la convention collective qui la liait à Society avait expiré le 31 décembre 2010. Ces conventions collectives prévoyaient des augmentations annuelles de salaires se situant entre 2 et 3 p. 100, auxquelles s'ajoutait 1 p. 100 pour les changements d'échelon et l'avancement. Après l'audition de la demande par la Commission dans la présente affaire, un arbitre a ordonné l'application d'une nouvelle convention collective liant OPG et Society à compter du 3 février 2011. La convention collective prévoyait des augmentations de salaires de 1 à 3 p. 100.

III. Judicial History

A. *Ontario Energy Board: 2011 LNONOEB 57 (QL) ("Board Decision")*

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (para. 73). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (para. 350). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of

III. Historique judiciaire

A. *Commission de l'énergie de l'Ontario (2011 LNONOEB 57 (QL) (« décision de la Commission »))*

[31] Dans sa décision relative à la demande d'approbation de tarifs d'OPG pour la période de référence 2011-2012, la Commission dit que le règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 ») et l'art. 78.1 de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* lui confèrent un vaste pouvoir discrétionnaire quant [TRADUCTION] « au choix d'une méthode indiquée pour fixer des tarifs justes et raisonnables » (para. 73). Elle reconnaît que différents principes peuvent s'appliquer selon qu'il s'agit du recouvrement de dépenses prévues ou de l'examen après coup de dépenses déjà faites. Pour statuer sur la demande dont elle était saisie, il convenait de tenir compte de tout élément de preuve que la Commission jugeait pertinent pour apprécier le caractère raisonnable des recettes nécessaires d'OPG.

[32] La Commission refuse d'approuver les 6,9 milliards de dollars demandés par OPG au titre des recettes nécessaires, les réduisant de 145 millions de dollars pour la période référence [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (par. 350). Cette décision défavorable tient surtout à l'opinion de la Commission selon laquelle OPG compte trop d'employés et ses niveaux de rémunération sont excessifs.

[33] Au sujet de la taille de l'effectif, la Commission relève que, selon une étude comparative qu'OPG a elle-même commandée (le rapport final de la phase 2 de ScottMadden), la dotation de certains postes peut être réduite, voire supprimée. Elle recommande à OPG de revoir sa structure organisationnelle et de réaffecter du personnel ou de supprimer des postes au cours des années suivantes. Vingt à vingt-cinq pour cent du personnel d'OPG devait en effet partir à la retraite entre 2010 et 2014 et il était possible de recourir davantage à la sous-traitance. Au chapitre de la rémunération, elle estime qu'OPG n'a pas présenté d'éléments convaincants pour justifier que les salaires de son personnel opérationnel

industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. *Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576*

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test — that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

> The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms

se situent au 75e percentile des salaires versés dans le secteur selon une étude de Towers Perrin. Selon la Commission, ils devraient se situer au 50e percentile, soit le même que pour le personnel de direction. Pour décider de la réduction qui s'impose, elle reconnaît qu'OPG pourrait ne pas être en mesure, pendant la période de référence, de réaliser des économies de 145 millions de dollars par la réduction de sa seule masse salariale à cause des conventions collectives en vigueur.

B. *Cour supérieure de Justice de l'Ontario, Cour divisionnaire (2012 ONSC 729, 109 O.R. (3d) 576)*

[34] OPG a fait appel de la décision au motif que celle-ci était déraisonnable et mal motivée. Elle a soutenu que la Commission aurait dû appliquer le principe de l'investissement prudent, c'est-à-dire que, dans son examen des dépenses de rémunération, elle aurait dû seulement s'interroger sur la prudence de conclure, à l'époque, les conventions collectives qui commandaient ces dépenses. Elle a ajouté que la Commission aurait dû présumer que les dépenses étaient prudentes.

[35] La décision de la formation de trois juges de la Cour divisionnaire est partagée. Au nom des juges majoritaires, la juge Hoy (aujourd'hui Juge en chef adjointe de l'Ontario) conclut que la décision de la Commission est raisonnable, car il était possible à la direction d'OPG de réduire ultérieurement ses dépenses globales de rémunération dans le respect des conventions collectives. L'application stricte du principe de l'investissement prudent n'aurait pas permis à la Commission d'atteindre son objectif, d'origine législative, de favoriser la rentabilité de la production d'électricité. Vu la présence de « deux monopoles », il importait particulièrement que la Commission exerce son pouvoir de fixer des tarifs justes et raisonnables :

> [TRADUCTION] Les conventions collectives sont intervenues entre un monopole réglementé qui refile ses coûts au consommateur et qui n'est pas soumis à la concurrence, et deux syndicats qui représentent environ 90 p. 100 des salariés et qui constituent presque un second monopole

inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. *Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793*

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

étant donné les conditions héritées d'Ontario Hydro et le fait qu'il serait extrêmement difficile d'exploiter des installations nucléaires sans les salariés. [par. 54]

[36] Dissidente, la juge Aitken opine que,

[TRADUCTION] dans la mesure où les coûts [de rémunération des employés du secteur nucléaire] étaient déterminés à l'avance, c'est-à-dire qu'ils étaient arrêtés par des conventions collectives conclues avant la demande et la période de référence, OPG devait seulement prouver la prudence ou le caractère raisonnable de la décision de conclure ces conventions au vu des circonstances connues ou qui auraient pu raisonnablement être prévues au moment de prendre la décision. [par. 83]

Elle aurait statué que l'omission de la Commission d'appliquer séparément et expressément le principe de la prudence à la partie des dépenses de rémunération du secteur nucléaire dont elle avait convenu, jumelée à son appréciation avec le recul du caractère raisonnable de ces dépenses, a rendu la décision de la Commission déraisonnable.

C. *Cour d'appel de l'Ontario (2013 ONCA 359, 116 O.R. (3d) 793)*

[37] La Cour d'appel de l'Ontario infirme le jugement de la Cour divisionnaire et renvoie le dossier à la Commission. Elle établit une distinction entre les dépenses prévues et les dépenses convenues, ces dernières correspondant à celles que le service public [TRADUCTION] « a convenu d'acquitter pendant [la période de référence] » et qu'il « ne peut modifier ou réduire pendant cette période, généralement à cause d'obligations contractuelles » (par. 29). Même si les dépenses n'ont pas à être acquittées dans l'immédiat, comme en l'espèce, celles qui, « par contrat, doivent être acquittées pendant la période de référence constituent néanmoins des dépenses convenues, même si elles n'ont pas encore été acquittées » (par. 29). La Cour d'appel statue que la Commission doit, dans son examen de ces dépenses, appliquer le principe de la prudence énoncé dans *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4 (par. 15-16). En ne respectant pas ce précédent et en obligeant OPG à « modifier des dépenses qu'elle ne peut juridiquement modifier », la Commission a agi déraisonnablement (par. 37).

IV. Issues

[38] The Board raises two issues on appeal:

1. What is the appropriate standard of review?

2. Was the Board's decision to disallow $145 million of OPG's revenue requirement reasonable?

[39] Before this Court, OPG has argued that the Board stepped beyond the appropriate role of a tribunal in an appeal from its own decision, which raises the following additional issue:

3. Did the Board act impermissibly in pursuing its appeal in this case?

V. Analysis

[40] It is logical to begin by considering the appropriateness of the Board's participation in the appeal. I will next consider the appropriate standard of review, and then the merits issue of whether the Board's decision in this case was reasonable.

A. *The Appropriate Role of the Board in This Appeal*

(1) Tribunal Standing

[41] In *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684 ("*Northwestern Utilities*"), per Estey J., this Court first discussed how an administrative decision-maker's participation in the appeal or review of its own decisions may give rise to concerns over tribunal impartiality. Estey J. noted that "active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and

IV. Questions en litige

[38] La Commission soulève deux questions dans le cadre du pourvoi :

1. Quelle est la norme de contrôle applicable?

2. Sa décision de retrancher 145 millions de dollars des recettes nécessaires d'OPG est-elle raisonnable?

[39] Devant notre Cour, OPG fait valoir que la Commission outrepasse le rôle qui sied à un tribunal administratif dans le cadre d'un appel de sa propre décision, ce qui soulève la question supplémentaire suivante :

3. La Commission a-t-elle agi de manière inacceptable en se pourvoyant en tant que partie à l'appel en l'espèce?

V. Analyse

[40] Il convient en toute logique d'examiner d'abord le caractère approprié de la participation de la Commission au pourvoi. J'examinerai ensuite la norme de contrôle applicable, puis la question de fond de savoir si la décision de la Commission est raisonnable.

A. *Le rôle qui sied à la Commission dans le cadre du pourvoi*

(1) La qualité pour agir d'un tribunal administratif

[41] Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern Utilities* »), sous la plume du juge Estey, notre Cour se demande pour la première fois en quoi la participation d'un décideur administratif à l'appel ou au contrôle de sa propre décision peut soulever des doutes sur son impartialité. Pour reprendre les propos du juge Estey, « [u]ne participation aussi active ne peut que jeter le discrédit sur l'impartialité d'un tribunal administratif lorsque l'affaire lui est renvoyée ou lorsqu'il est saisi d'autres procédures

issues or the same parties" (p. 709). He further observed that tribunals already receive an opportunity to make their views clear in their original decisions: ". . . it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court" (p. 709).

[42] The Court in *Northwestern Utilities* ultimately held that the Alberta Public Utilities Board — which, like the Ontario Energy Board, had a statutory right to be heard on judicial appeal (see *Ontario Energy Board Act, 1998*, s. 33(3)) — was limited in the scope of the submissions it could make. Specifically, Estey J. observed that

> [i]t has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [p. 709]

[43] This Court further considered the issue of agency standing in *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983, which involved judicial review of a British Columbia Labour Relations Board decision. Though a majority of the judges hearing the case did not endorse a particular approach to the issue, La Forest J., Dickson C.J. concurring, accepted that a tribunal had standing to explain the record and advance its view of the appropriate standard of review and, additionally, to argue that its decision was reasonable.

[44] This finding was supported by the need to make sure the Court's decision on review of the tribunal's decision was fully informed. La Forest J. cited *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), at p. 153, for the proposition that the tribunal is the party best equipped to draw the Court's attention to

concernant des intérêts et des questions semblables ou impliquant les mêmes parties » (p. 709). Il ajoute que le tribunal administratif avait déjà le loisir de s'expliquer clairement dans sa décision initiale et « [qu'il] enfreint de façon inacceptable la réserve dont [il doit] faire preuve lorsqu'[il] particip[e] aux procédures comme partie à part entière » (p. 709).

[42] Dans *Northwestern Utilities*, notre Cour statue finalement que la portée des observations que pouvait présenter l'Alberta Public Utilities Board — qui, à l'instar de la Commission de l'énergie de l'Ontario, jouissait légalement du droit d'être entendue en appel devant une cour de justice (voir la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 33(3)) — était limitée. Le juge Estey fait remarquer ce qui suit :

> Cette Cour, à cet égard, a toujours voulu limiter le rôle du tribunal administratif dont la décision est contestée à la présentation d'explications sur le dossier dont il était saisi et d'observations sur la question de sa compétence, même lorsque la loi lui confère le droit de comparaître. [p. 709]

[43] Dans *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983, qui porte sur le contrôle judiciaire d'une décision de la commission des relations de travail de la Colombie-Britannique, notre Cour approfondit la question de la qualité pour agir d'un organisme administratif. Même si les juges majoritaires qui ont entendu le pourvoi n'adoptent pas d'approche particulière pour se prononcer, le juge La Forest, avec l'appui du juge en chef Dickson, reconnaît qu'un tribunal administratif a qualité non seulement pour expliquer le dossier et faire valoir son point de vue sur la norme de contrôle applicable, mais aussi pour soutenir que sa décision est raisonnable.

[44] Cette conclusion repose sur la nécessité de faire en sorte que la cour de révision rende un jugement parfaitement éclairé sur la décision du tribunal administratif. Le juge La Forest invoque l'arrêt *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145 (C.A.), p. 153, pour avancer que le tribunal administratif est le mieux placé pour attirer l'attention de la cour

those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area.

(*Paccar*, at p. 1016)

La Forest J. found, however, that the tribunal could not go so far as to argue that its decision was correct (p. 1017). Though La Forest J. did not command a majority, L'Heureux-Dubé J. also commented on tribunal standing in her dissent, and agreed with the substance of La Forest J.'s analysis (p. 1026).

[45] Trial and appellate courts have struggled to reconcile this Court's statements in *Northwestern Utilities* and *Paccar*. Indeed, while this Court has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment: see, e.g., *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; see also *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) ("*Goodis*"), at para. 24.

[46] A number of appellate decisions have grappled with this issue and "for the most part now display a more relaxed attitude in allowing tribunals to participate in judicial review proceedings or statutory appeals in which their decisions were subject to attack": D. Mullan, "Administrative Law and Energy Regulation", in G. Kaiser and B. Heggie, 35, at p. 51. A review of three appellate decisions suffices to establish the rationale behind this shift.

[47] In *Goodis*, the Children's Lawyer urged the court to refuse or limit the standing of the Information and Privacy Commissioner, whose decision

sur les considérations, enracinées dans la compétence ou les connaissances spécialisées du tribunal, qui peuvent rendre raisonnable ce qui autrement paraîtrait déraisonnable à quelqu'un qui n'est pas versé dans les complexités de ce domaine spécialisé.

(*Paccar*, p. 1016)

Toutefois, le juge La Forest conclut que le tribunal administratif ne peut aller jusqu'à défendre le bien-fondé de sa décision (p. 1017). Sa thèse ne convainc pas une majorité de ses collègues, mais la juge L'Heureux-Dubé, dissidente, qui se prononce elle aussi sur la qualité pour agir du tribunal administratif, souscrit à son analyse sur le fond (p. 1026).

[45] Juridictions de première instance et d'appel ont tenté tant bien que mal de concilier les opinions exprimées par les juges de la Cour dans les arrêts *Northwestern Utilities* et *Paccar*. De fait, même si notre Cour n'est jamais expressément revenue sur *Northwestern Utilities*, elle a parfois autorisé un tribunal administratif à participer à l'instance à titre de partie à part entière sans expliquer sa décision (voir p. ex. *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Ellis-Don Ltd. c. Ontario (Commission des relations de travail)*, 2001 CSC 4, [2001] 1 R.C.S. 221; *Tremblay c. Québec (Commission des affaires sociales)*, [1992] 1 R.C.S. 952; voir également *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309 (C.A.) (« *Goodis* »), par. 24).

[46] Dans un certain nombre de décisions, les cours d'appel se sont attaquées à la question et, [TRADUCTION] « pour la plupart, elles sont désormais plus enclines à autoriser un tribunal administratif à participer au contrôle judiciaire ou à l'appel, prévu par la loi, de sa propre décision » (D. Mullan, « Administrative Law and Energy Regulation », dans G. Kaiser et B. Heggie, 35, p. 51). Le survol de trois arrêts de juridictions d'appel suffit à établir la raison d'être de ce revirement.

[47] Dans *Goodis*, le Bureau de l'avocate des enfants demandait à la cour de ne pas reconnaître ou de restreindre la qualité pour agir du Commissaire

was under review. The Ontario Court of Appeal declined to apply any formal, fixed rule that would limit the tribunal to certain categories of submissions and instead adopted a contextual, discretionary approach: *Goodis*, at paras. 32-34. The court found no principled basis for the categorical approach, and observed that such an approach may lead to undesirable consequences:

> For example, a categorical rule denying standing if the attack asserts a denial of natural justice could deprive the court of vital submissions if the attack is based on alleged deficiencies in the structure or operation of the tribunal, since these are submissions that the tribunal is uniquely placed to make. Similarly, a rule that would permit a tribunal standing to defend its decision against the standard of reasonableness but not against one of correctness, would allow unnecessary and prevent useful argument. Because the best argument that a decision is reasonable may be that it is correct, a rule based on this distinction seems tenuously founded at best as Robertson J.A. said in *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, [2002] N.B.J. No. 114, 249 N.B.R. (2d) 93 (C.A.), at para. 32.

(*Goodis*, at para. 34)

[48] The court held that *Northwestern Utilities* and *Paccar* should be read as the source of "fundamental considerations" that should guide the court's exercise of discretion in the context of the case: *Goodis*, at para. 35. The two most important considerations, drawn from those cases, were the "importance of having a fully informed adjudication of the issues before the court" (para. 37), and "the importance of maintaining tribunal impartiality": para. 38. The court should limit tribunal participation if it will undermine future confidence in its objectivity. The court identified a list of factors, discussed further below, that may aid in determining whether and

à l'information et à la protection de la vie privée dont la décision faisait l'objet d'une demande de contrôle. La Cour d'appel de l'Ontario a refusé de se montrer formaliste et d'appliquer une règle fixe qui aurait obligé le tribunal administratif à s'en tenir à des observations d'un certain type et elle a adopté plutôt une approche contextuelle et discrétionnaire (*Goodis*, par. 32-34). Elle a conclu que l'approche catégorique n'avait pas de fondement rationnel et a fait remarquer qu'une telle approche pouvait avoir des conséquences fâcheuses :

> [TRADUCTION] Par exemple, la règle catégorique qui refuse au tribunal administratif la qualité pour agir lorsque la contestation allègue le déni de justice naturelle peut priver la cour d'observations capitales lorsque la contestation se fonde des défaillances alléguées de la structure ou du fonctionnement du tribunal administratif, car ce sont des sujets sur lesquels ce dernier est particulièrement bien placé pour formuler des observations. De même, la règle qui reconnaît à un tribunal administratif la qualité pour défendre sa décision au regard du critère de la raisonnabilité, mais non du critère de la décision correcte, permet le débat inutile et empêche le débat utile. Parce que le meilleur moyen d'établir la raisonnabilité d'une décision peut être de démontrer qu'elle est correcte, une règle fondée sur cette distinction semble au mieux ténue, comme l'affirme le juge Robertson dans *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 1386 c. Bransen Construction Ltd.*, [2002] A.N.-B. nº 114, 249 R.N.-B. (2e) 93 (C.A.), par. 32.

(*Goodis*, par. 34)

[48] La Cour d'appel statue qu'il faut voir dans les arrêts *Northwestern Utilities* et *Paccar* la source de [TRADUCTION] « considérations fondamentales » qui doivent guider l'exercice de son pouvoir discrétionnaire eu égard au contexte de l'affaire (*Goodis*, par. 35). Les deux considérations les plus importantes, selon ces arrêts, sont « la nécessité de faire en sorte que la cour rende une décision parfaitement éclairée sur les questions en litige » (par. 37) et « celle d'assurer l'impartialité du tribunal administratif » (par. 38). La cour doit limiter la participation du tribunal administratif lorsque cette participation est de nature à miner la confiance

to what extent the tribunal should be permitted to make submissions: paras. 36-38.

[49] In *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, Stratas J.A. identified two common law restrictions that, in his view, restricted the scope of a tribunal's participation on appeal from its own decision: finality and impartiality. Finality, the principle whereby a tribunal may not speak on a matter again once it has decided upon it and provided reasons for its decision, is discussed in greater detail below, as it is more directly related to concerns surrounding "bootstrapping" rather than agency standing itself.

[50] The principle of impartiality is implicated by tribunal argument on appeal, because decisions may in some cases be remitted to the tribunal for further consideration. Stratas J.A. found that "[s]ubmissions by the tribunal in a judicial review proceeding that descend too far, too intensely, or too aggressively into the merits of the matter before the tribunal may disable the tribunal from conducting an impartial redetermination of the merits later": *Quadrini*, at para. 16. However, he ultimately found that these principles did not mandate "hard and fast rules", and endorsed the discretionary approach set out by the Ontario Court of Appeal in *Goodis*: *Quadrini*, at paras. 19-20.

[51] A third example of recent judicial consideration of this issue may be found in *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110. In this case, Leon's Furniture challenged the Commissioner's standing to make submissions on the merits of the appeal (para. 16). The Alberta Court of Appeal, too, adopted the position that the law should respond to the fundamental concerns raised in *Northwestern*

ultérieure des citoyens dans son objectivité. La Cour d'appel énumère les considérations — sur lesquelles je reviendrai — qui jouent dans la décision d'autoriser ou non le tribunal administratif à présenter des observations et dans la détermination de la mesure dans laquelle il lui est permis de le faire, le cas échéant (par. 36-38).

[49] Dans *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3, le juge Stratas relève deux considérations qui, en common law, limitent selon lui la participation éventuelle d'un tribunal administratif à l'appel de sa propre décision : le caractère définitif et l'impartialité. Le principe du caractère définitif veut qu'un tribunal ne puisse se prononcer de nouveau dans une affaire une fois qu'il a rendu sa décision, motifs à l'appui. J'y reviendrai plus en détail, car j'estime que ce principe se rapporte plus directement à l'« autojustification » de sa décision par le tribunal administratif qu'à sa qualité pour agir comme telle.

[50] Le principe de l'impartialité entre en jeu lorsque le tribunal administratif défend une thèse en appel car, dans certains cas, sa décision peut lui être renvoyée pour réexamen. Le juge Stratas conclut que « [l]es observations que le tribunal administratif présente dans une instance en contrôle judiciaire et qui plongent trop loin, trop intensément ou trop énergiquement dans le bien-fondé de l'affaire soumise au tribunal administratif risquent d'empêcher celui-ci de procéder par la suite à un réexamen impartial du bien-fondé de l'affaire » (*Quadrini*, par. 16). Il conclut toutefois au final que les principes applicables n'imposaient pas de « règles absolues », et il souscrit à l'approche discrétionnaire de la Cour d'appel de l'Ontario dans *Goodis* (*Quadrini*, par. 19-20).

[51] L'arrêt *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110, constitue un troisième exemple récent où une cour de justice est appelée à se pencher sur le sujet. Leon's Furniture a contesté la qualité du commissaire intimé de plaider sur le fond en appel (par. 16). La Cour d'appel de l'Alberta estime elle aussi que le droit applicable doit donner suite aux considérations fondamentales soulevées dans

Utilities but should nonetheless approach the question of tribunal standing with discretion, to be exercised in view of relevant contextual considerations: paras. 28-29.

[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini*, provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis: see N. Semple, "The Case for Tribunal Standing in Canada" (2007), 20 *C.J.A.L.P.* 305; L. A. Jacobs and T. S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing Before the Courts" (2002), 81 *Can. Bar Rev.* 616; F. A. V. Falzon, "Tribunal Standing on Judicial Review" (2008), 21 *C.J.A.L.P.* 21.

[53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present.

[54] Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court

l'arrêt *Northwestern Utilities*, mais que la question de la qualité pour agir d'un tribunal administratif relève néanmoins d'un pouvoir discrétionnaire qu'il faut exercer eu égard aux éléments contextuels applicables (par. 28-29).

[52] Les considérations énoncées par notre Cour dans *Northwestern Utilities* témoignent de préoccupations fondamentales quant à la participation d'un tribunal administratif à l'appel de sa propre décision. Or, ces préoccupations ne sauraient fonder l'interdiction absolue d'une telle participation. La démarche discrétionnaire préconisée dans *Goodis*, *Leon's Furniture* et *Quadrini* offre le meilleur moyen d'assurer le caractère définitif de la décision et l'impartialité du décideur sans que la cour de révision ne soit alors privée de données et d'analyses à la fois utiles et importantes (voir N. Semple, « The Case for Tribunal Standing in Canada » (2007), 20 *R.C.D.A.P.* 305; L. A. Jacobs et T. S. Kuttner, « Discovering What Tribunals Do : Tribunal Standing Before the Courts » (2002), 81 *R. du B. can*. 616; F. A. V. Falzon, « Tribunal Standing on Judicial Review » (2008), 21 *R.C.D.A.P.* 21).

[53] Plusieurs considérations militent en faveur d'une démarche discrétionnaire. En particulier, vu ses compétences spécialisées et sa connaissance approfondie du régime administratif en cause, le tribunal administratif peut, dans bien des cas, être bien placé pour aider la cour de révision à rendre une juste décision. Par exemple, il peut être en mesure d'expliquer en quoi une certaine interprétation de la disposition législative en cause peut avoir une incidence sur d'autres dispositions du régime de réglementation ou sur les réalités factuelles et juridiques de son domaine de spécialisation. Il pourrait être plus difficile d'obtenir de tels éléments d'information d'autres parties.

[54] Dans certains cas, il n'y a tout simplement personne pour s'opposer à la partie qui conteste la décision du tribunal administratif. Le contrôle judiciaire se révèle optimal lorsque les deux facettes du litige sont vigoureusement défendues devant la cour de révision. Lorsqu'aucune autre partie bien au fait des enjeux ne fait valoir le point de vue opposé, la participation du tribunal administratif à titre de

ensure it has heard the best of both sides of a dispute.

[55] Canadian tribunals occupy many different roles in the various contexts in which they operate. This variation means that concerns regarding tribunal partiality may be more or less salient depending on the case at issue and the tribunal's structure and statutory mandate. As such, statutory provisions addressing the structure, processes and role of the particular tribunal are key aspects of the analysis.

[56] The mandate of the Board, and similarly situated regulatory tribunals, sets them apart from those tribunals whose function it is to adjudicate individual conflicts between two or more parties. For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing: *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, at para. 42.

[57] I am thus of the opinion that tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

[58] In this case, as an initial matter, the *Ontario Energy Board Act, 1998* expressly provides that "[t]he Board is entitled to be heard by counsel upon the argument of an appeal" to the Divisional Court: s. 33(3). This provision neither expressly grants the Board standing to argue the merits of the decision on appeal, nor does it expressly limit the Board to jurisdictional or standard-of-review arguments as was the case for the relevant statutory provision in *Quadrini*: see para. 2.

partie adverse peut contribuer à faire en sorte que la cour statue après avoir entendu les arguments les plus convaincants de chacune des deux parties au litige.

[55] Les tribunaux administratifs canadiens tiennent nombre de rôles différents dans les contextes variés où ils évoluent, de sorte que la crainte d'une partialité de leur part peut être plus ou moins grande selon l'affaire en cause, ainsi que la structure du tribunal et son mandat légal. Dès lors, les dispositions législatives portant sur la structure, le fonctionnement et la mission d'un tribunal en particulier sont cruciales aux fins de l'analyse.

[56] Le mandat de la Commission, comme celui des tribunaux administratifs qui lui sont apparentés, la différencie des tribunaux administratifs appelés à trancher des différends individuels opposant plusieurs parties. Dans le cas de ces derniers, [TRADUCTION] « l'importance de l'équité, réelle et perçue, milite davantage » contre la reconnaissance de leur qualité pour agir (*Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292, par. 42).

[57] Par conséquent, je suis d'avis qu'il appartient à la cour de première instance chargée du contrôle judiciaire de décider de la qualité pour agir d'un tribunal administratif en exerçant son pouvoir discrétionnaire de manière raisonnée. Dans l'exercice de son pouvoir discrétionnaire, la cour doit établir un équilibre entre la nécessité d'une décision bien éclairée et l'importance d'assurer l'impartialité du tribunal administratif.

[58] Dans la présente affaire, le par. 33(3) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit à titre préliminaire que « [l]a Commission a le droit d'être représentée par un avocat lors de l'audition de l'appel » devant la Cour divisionnaire. Cette disposition ne confère pas expressément à la Commission une qualité pour agir qui permet de faire valoir le bien-fondé de sa décision en appel, ni ne limite expressément la thèse qu'elle peut défendre à la présentation d'arguments relatifs à la compétence ou à la norme de contrôle comme le fait la disposition en cause dans l'affaire *Quadrini* (voir par. 2).

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[60] Consideration of these factors in the context of this case leads me to conclude that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. First, the Board was the only respondent in the initial review of its decision. Thus, it had no alternative but to step in if the decision was to be defended on the merits. Unlike some other provinces, Ontario has no designated utility consumer advocate, which left the Board — tasked by statute

[59] Au vu de cette analyse de la qualité pour agir d'un tribunal administratif, lorsque le texte législatif applicable n'est pas clair sur ce point, la cour de révision s'en remet à son pouvoir discrétionnaire pour délimiter les attributs du tribunal administratif en appel. Voici quelles sont, entre autres, les considérations — relevées par les juridictions et les auteurs précités — qui délimitent l'exercice de ce pouvoir discrétionnaire :

(1) lorsque, autrement, l'appel ou la demande de contrôle serait non contesté, il peut être avantageux que la cour de révision exerce le pouvoir discrétionnaire qui lui permet de reconnaître la qualité pour agir du tribunal administratif;

(2) lorsque d'autres parties sont susceptibles de contester l'appel ou la demande de contrôle et qu'elles ont les connaissances et les compétences spécialisées nécessaires pour bien avancer une thèse ou la réfuter, la qualité pour agir du tribunal administratif peut revêtir une importance moindre pour l'obtention d'une issue juste;

(3) le fait que la fonction du tribunal administratif consiste soit à trancher des différends individuels opposant deux parties, soit à élaborer des politiques, à réglementer ou enquêter ou à défendre l'intérêt public influe sur la mesure dans laquelle l'impartialité soulève des craintes ou non. Ces craintes peuvent jouer davantage lorsque le tribunal a exercé une fonction juridictionnelle dans l'instance visée par l'appel, et moins lorsque son rôle s'est révélé d'ordre plutôt réglementaire.

[60] Au vu de ces considérations, je conclus qu'il n'était pas inapproprié que la Commission participe à l'appel pour défendre le caractère raisonnable de sa décision. Premièrement, la Commission était la seule partie intimée lors du contrôle judiciaire initial de sa décision. Elle n'avait donc d'autre choix que de prendre part à l'instance pour que sa décision soit défendue au fond. Contrairement à d'autres provinces, l'Ontario n'a nommé aucun défenseur des droits des clients des services publics,

with acting to safeguard the public interest — with few alternatives but to participate as a party.

[61] Second, the Board is tasked with regulating the activities of utilities, including those in the electricity market. Its regulatory mandate is broad. Among its many roles: it licenses market participants, approves the development of new transmission and distribution facilities, and authorizes rates to be charged to consumers. In this case, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. This is unlike situations in which a tribunal may adjudicate disputes between two parties, in which case the interests of impartiality may weigh more heavily against full party standing.

[62] The nature of utilities regulation further argues in favour of full party status for the Board here, as concerns about the appearance of partiality are muted in this context. As noted by Doherty J.A., "[l]ike all regulated bodies, I am sure Enbridge wins some and loses some before the [Board]. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the [Board]": *Enbridge*, at para. 28. Accordingly, I do not find that the Board's participation in the instant appeal was improper. It remains to consider whether the content of the Board's arguments was appropriate.

(2) Bootstrapping

[63] The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns what types of argument a tribunal may make, i.e.

si bien que la Commission — qui est légalement garante de l'intérêt public — n'avait pas vraiment d'autre avenue que celle de se constituer partie à l'instance.

[61] Deuxièmement, la Commission a pour mandat de réglementer les activités de services publics, y compris ceux qui appartiennent au domaine de l'électricité. Son mandat de réglementation est large. Au nombre de ses nombreuses fonctions, mentionnons l'octroi de permis aux participants du marché, l'approbation de nouvelles installations de transport et de distribution et l'autorisation des tarifs exigés des consommateurs. Dans la présente affaire, la Commission a exercé sa fonction de réglementation en établissant les paiements justes et raisonnables auxquels un service public avait droit. Il s'agit d'une situation différente de celle où le tribunal administratif est habilité à trancher un différend entre deux parties, le souci d'impartialité pouvant alors militer davantage contre la qualité d'agir comme partie à part entière.

[62] L'objet de la réglementation est un autre élément qui milite en faveur de la pleine reconnaissance de la qualité pour agir de la Commission, puisque la crainte d'apparence de partialité est faible en l'espèce. Pour reprendre les propos du juge Doherty dans *Enbridge*, par. 28, [TRADUCTION] « [à] l'instar de tout organisme réglementé, je suis certain que [la Commission] donne parfois raison à Enbridge et lui donne parfois tort. J'ose croire qu'Enbridge comprend parfaitement le rôle de l'organisme de réglementation et sait que [la Commission] statue sur chaque demande en fonction des faits qui lui sont propres ». Je conclus donc que la participation de la Commission au pourvoi n'a rien d'inapproprié. Reste à savoir si les arguments de la Commission sont appropriés.

(2) L'autojustification

[63] La question de l'« autojustification » est étroitement liée à celle de savoir à quelles conditions le tribunal administratif (ci-après le « tribunal ») est en droit d'agir comme partie à l'appel ou au contrôle judiciaire de sa décision. Statuer sur la

jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments.

[64] As the term has been understood by the courts who have considered it in the context of tribunal standing, a tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal: see, e.g., *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93. Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review": *Goodis*, at para. 42.

[65] The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter and its job is done": *Quadrini*, at para. 16, citing *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Under this principle, the court found that tribunals could not use judicial review as a chance to "amend, vary, qualify or supplement its reasons": *Quadrini*, at para. 16. In *Leon's Furniture*, Slatter J.A. reasoned that a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record": para. 29.

[66] By contrast, in *Goodis*, Goudge J.A. found on behalf of a unanimous court that while the Commissioner had relied on an argument not expressly set out in her original decision, this argument was available for the Commissioner to make on appeal. Though he recognized that "[t]he importance of reasoned decision making may be undermined if, when attacked in court, a tribunal can simply offer different, better, or even contrary reasons to

qualité pour agir d'un tribunal c'est décider de ce qu'il peut faire valoir (p. ex. des prétentions relatives à sa compétence ou à la justesse de sa décision), alors que l'« autojustification » touche à la teneur des prétentions.

[64] Suivant le sens attribué à cette notion par les cours de justice qui l'ont examinée dans le contexte de la qualité pour agir, un tribunal « s'autojustifie » lorsqu'il cherche, par la présentation de nouveaux arguments en appel, à étoffer une décision qui, sinon, serait lacunaire (voir p. ex. *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93). Autrement dit, un tribunal ne pourrait [TRADUCTION] « défendre sa décision en invoquant un motif qui n'a pas été soulevé dans la décision faisant l'objet du contrôle » (*Goodis*, par. 42).

[65] Le caractère définitif de la décision veut que, dès lors qu'il a tranché les questions dont il était saisi et qu'il a motivé sa décision, le tribunal ait statué définitivement et que son travail soit terminé, « à moins qu'il ne soit investi du pouvoir de modifier sa décision ou d'entendre à nouveau l'affaire » (*Quadrini*, par. 16, citant *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848). Partant, la cour a conclu qu'un tribunal ne peut profiter d'un contrôle judiciaire pour « modifier, changer, nuancer ou compléter ses motifs » (*Quadrini*, par. 16). Dans l'arrêt *Leon's Furniture*, le juge Slatter affirme qu'un tribunal peut [TRADUCTION] « offrir différentes interprétations de ses motifs ou de sa conclusion, [mais] non tenter de remanier ses motifs, invoquer de nouveaux arguments ou se prononcer sur des questions de fait que ne soulève pas déjà le dossier » (par. 29).

[66] En revanche, le juge Goudge conclut, dans l'arrêt *Goodis*, avec l'accord de tous ses collègues, que même si la commissaire invoque un argument qui ne figure pas expressément dans sa décision initiale, elle peut le soulever en appel. Il reconnaît que [TRADUCTION] « [l']importance de décisions bien étayées pourrait être compromise si un tribunal pouvait simplement offrir, à l'appui de sa décision attaquée devant une cour de justice,

support its decision" (para. 42), Goudge J.A. ultimately found that the Commissioner was permitted to raise a new argument on judicial review. The new argument presented was "not inconsistent with the reason offered in the decision. Indeed it could be said to be implicit in it": para. 55. "It was therefore proper for the Commissioner to be permitted to raise this argument before the Divisional Court and equally proper for the court to decide on that basis": para. 58.

[67] There is merit in both positions on the issue of bootstrapping. On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides: Semple, at p. 315. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is "ganging up" on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal.

[68] I am not persuaded that the introduction of arguments by a tribunal on appeal that interpret or were implicit but not expressly articulated in its original decision offends the principle of finality. Similarly, it does not offend finality to permit a tribunal to explain its established policies and practices to the reviewing court, even if those were not described in the reasons under review. Tribunals need not repeat explanations of such practices in every decision merely to guard against charges of bootstrapping should they be called upon to explain them on appeal or review. A tribunal may also

des motifs différents, plus convaincants, voire opposés » (par. 42), mais il conclut finalement que la commissaire peut présenter un nouvel argument dans le cadre d'un contrôle judiciaire. Le nouvel argument n'est toutefois « pas incompatible avec les motifs formulés dans la décision, car on peut en effet affirmer qu'il en fait implicitement partie » (par. 55). « La commissaire pouvait donc soulever l'argument devant la Cour divisionnaire, et celle-ci pouvait en tenir compte pour se prononcer » (par. 58).

[67] Les deux thèses avancées sur l'autojustification se défendent. D'une part, il est dans l'intérêt de la justice de permettre au tribunal de présenter de nouveaux arguments en appel, car la cour de révision est alors saisie des arguments les plus convaincants à l'appui de chacune des thèses (Semple, p. 315). Cela demeure vrai même si ces arguments ne figurent pas dans la décision initiale. D'autre part, autoriser l'autojustification risque de compromettre l'importance de décisions bien étayées et bien rédigées au départ. Permettre au tribunal de présenter de nouveaux arguments en appel ou dans le cadre du contrôle judiciaire de sa décision initiale peut aussi amener les parties à conclure que le processus n'est pas équitable. Il peut surtout en être ainsi lorsque le tribunal est appelé à trancher des différends opposant deux personnes privées, puisque la présentation de nouveaux arguments en appel peut donner l'impression que le tribunal « se ligue » contre l'une des parties. Or, je le rappelle, il ne convient généralement pas que le tribunal doté d'un tel mandat participe en tant que partie à l'appel.

[68] Je ne suis pas convaincu que la formulation en appel de nouveaux arguments qui interprètent la décision initiale ou qui l'étayaient implicitement, mais non expressément, va à l'encontre du principe du caractère définitif. De même, il n'est pas contraire à ce principe de permettre au tribunal d'expliquer à la cour de révision quelles sont ses politiques et pratiques établies, même lorsque les motifs contestés n'en font pas mention. Le tribunal n'a pas à les expliquer systématiquement dans chaque décision à la seule fin de se prémunir contre une allégation d'autojustification advenant qu'il

respond to arguments raised by a counterparty. A tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision.

[69] I am not, however, of the opinion that tribunals should have the unfettered ability to raise entirely new arguments on judicial review. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance. I would find that the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments in favour of each side of a dispute is struck when tribunals do retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons: see *Leon's Furniture*, at para. 29; *Goodis*, at para. 55.

[70] In this case, I do not find that the Board impermissibly stepped beyond the bounds of its original decision in its arguments before this Court. In its reply factum, the Board pointed out — correctly, in my view — that its submissions before this Court simply highlight what is apparent on the face of the record, or respond to arguments raised by the respondents.

[71] I would, however, urge the Board, and tribunal parties in general, to be cognizant of the tone they adopt on review of their decisions. As Goudge J.A. noted in *Goodis*:

> . . . if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone

soit appelé à les préciser en appel ou en contrôle judiciaire. Il peut aussi répondre aux arguments de la partie adverse dans le cadre du contrôle judiciaire de sa décision car il le fait dans le but de faire confirmer sa décision initiale, non de rouvrir le dossier et de rendre une nouvelle décision ou de modifier la décision initiale. L'effet de la décision initiale demeure inchangé même lorsque le tribunal demande sa confirmation en offrant une interprétation de cette décision ou en invoquant des motifs qui la sous-tendent implicitement.

[69] Cependant, je ne crois pas qu'un tribunal devrait avoir la possibilité inconditionnelle de présenter une thèse entièrement nouvelle dans le cadre d'un contrôle judiciaire, car lui reconnaître cette faculté pourrait l'exposer à des allégations d'iniquité et nuire au prononcé de décisions bien motivées au départ. Je suis d'avis qu'il y a un juste équilibre entre ces considérations et celles voulant que la cour de révision entende les arguments les plus convaincants de chacune des parties lorsqu'il est permis au tribunal d'offrir différentes interprétations de ses motifs ou de ses conclusions ou de présenter des arguments qui sous-tendent implicitement ses motifs initiaux (voir *Leon's Furniture*, par. 29; *Goodis*, par. 55).

[70] Je ne crois pas que, dans la présente affaire, la Commission a indûment outrepassé les limites de sa décision initiale lorsqu'elle a présenté ses arguments devant notre Cour. Dans son mémoire en réplique, la Commission signale — à juste titre, selon moi — que ses observations mettent simplement en évidence ce qui ressort du dossier ou répondent aux arguments des intimées.

[71] J'exhorte toutefois la Commission et, de façon générale, tout tribunal qui se constitue partie à une instance à se soucier du ton qu'il adopte lors du contrôle judiciaire de sa décision. Comme le fait remarquer le juge Goudge dans l'arrêt *Goodis*,

> [TRADUCTION] le tribunal administratif qui veut faire valoir son point de vue lors du contrôle judiciaire de sa décision [doit] porte[r] une attention particulière au ton qu'il adopte. Bien qu'il ne s'agisse pas d'un motif précis pour lequel sa qualité pourrait être restreinte, il ne

of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary. [para. 61]

[72] In this case, the Board generally acted in such a way as to present helpful argument in an adversarial but respectful manner. However, I would sound a note of caution about the Board's assertion that the imposition of the prudent investment test "would in all likelihood not change the result" if the decision were remitted for reconsideration (A.F., at para. 99). This type of statement may, if carried too far, raise concerns about the principle of impartiality such that a court would be justified in exercising its discretion to limit tribunal standing so as to safeguard this principle.

B. *Standard of Review*

[73] The parties do not dispute that reasonableness is the appropriate standard of review for the Board's actions in applying its expertise to set rates and approve payment amounts under the *Ontario Energy Board Act, 1998*. I agree. In addition, to the extent that the resolution of this appeal turns on the interpretation of the *Ontario Energy Board Act, 1998*, the Board's home statute, a standard of reasonableness presumptively applies: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at para. 35. Nothing in this case suggests the presumption should be rebutted.

[74] This appeal involves two distinct uses of the term "reasonable". One concerns the standard of review: on appeal, this Court is charged with evaluating the "justification, transparency and intelligibility" of the Board's reasoning, and "whether the

fait aucun doute que le ton des observations proposées offre une toile de fond à cet égard. Le tribunal qui désire contester une demande de contrôle judiciaire sera utile à la cour dans la mesure où ses observations permettront d'éclaircir les questions et où elles seront fondées sur ses connaissances spécialisées, au lieu d'être empreintes d'un parti pris agressif contre la partie adverse. [par. 61]

[72] En l'espèce, la Commission a généralement présenté des arguments utiles dans le cadre d'un débat contradictoire, mais respectueux. Une mise en garde s'impose toutefois selon moi en ce qui concerne l'affirmation de la Commission selon laquelle l'application du critère de l'investissement prudent [TRADUCTION] « ne changerait vraisemblablement pas l'issue de l'affaire » si la décision lui était renvoyée pour réexamen (m.a., par. 99). Une telle affirmation peut, si elle est poussée trop loin, faire douter de l'impartialité du tribunal au point où une cour de justice serait justifiée d'exercer son pouvoir discrétionnaire et de limiter la qualité pour agir du tribunal de manière à préserver son impartialité.

B. *Norme de contrôle*

[73] Les parties conviennent que la norme de contrôle qui s'applique aux actes de la Commission lorsqu'elle fait appel à son expertise pour fixer les tarifs et approuver des paiements sur le fondement de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* est celle de la décision raisonnable. Je suis d'accord. En outre, dans la mesure où l'issue du pourvoi repose sur l'interprétation de cette loi — la loi constitutive de la Commission —, l'application de la norme de la décision raisonnable doit être présumée (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 30; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161, par. 35). Rien ne donne à penser en l'espèce que la présomption soit réfutée.

[74] Le pourvoi fait intervenir deux notions distinctes de ce qui est « raisonnable ». L'une est liée à la norme de contrôle : en appel, la Cour doit apprécier la « justification [. . .], [. . .] la transparence et [. . .] l'intelligibilité » du raisonnement de la

decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. *Choice of Methodology Under the Ontario Energy Board Act, 1998*

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts for the purpose of section 78.1 of the Act".

Commission et se demander si la décision appartient « aux issues possibles acceptables pouvant se justifier au regard des faits et du droit » (*Dunsmuir*, par. 47). L'autre est d'origine législative : la Commission doit utiliser son pouvoir de fixation des tarifs de manière à établir un équilibre qu'elle considère juste et raisonnable entre les intérêts du service public et ceux des consommateurs. Je m'efforce ci-après de respecter cette distinction.

C. *Choix de la méthode suivant la Loi de 1998 sur la Commission de l'énergie de l'Ontario*

[75] La question de savoir si le refus de la Commission d'approuver le recouvrement de certaines dépenses est raisonnable ou non dépend du lien de ce refus avec les pouvoirs légaux et réglementaires de la Commission d'approuver des paiements au service public et de répercuter ces paiements sur les tarifs exigés des consommateurs. Les pouvoirs généraux de la Commission en matière de fixation des tarifs et des paiements sont énoncés précédemment à la rubrique « Cadre réglementaire ».

[76] L'approche fondée sur le caractère juste et raisonnable des dépenses qu'un service public peut recouvrer rend compte de l'équilibre essentiel recherché dans la réglementation des services publics : pour encourager l'investissement dans une infrastructure robuste et protéger l'intérêt des consommateurs, un service public doit pouvoir, à long terme, toucher l'équivalent du coût du capital, ni plus, ni moins.

[77] Or, la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ne prévoit ni à l'art. 78.1 ni à quelque autre article la méthode que doit utiliser la Commission pour soupeser les intérêts respectifs du service public et des consommateurs lorsqu'elle décide ce qui constitue des paiements justes et raisonnables. Certes, sous réserve de certaines exceptions prévues au par. 6(2), le par. 6(1) du règlement 53/05 permet expressément à la Commission de [TRADUCTION] « définir la forme, la méthode, les hypothèses et les calculs utilisés pour rendre une ordonnance qui établit le montant du paiement aux fins de l'article 78.1 de la Loi ».

[78] As a contrasting example, para. 4.1 of s. 6(2) of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": para. 4.1 of s. 6(2). The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[78] En revanche, la disposition 4.1 du par. 6(2) du règlement 53/05 prescrit le recours à une méthode particulière lorsque la Commission examine [TRADUCTION] « les dépenses faites et les engagements financiers fermes pris dans le cadre de la planification et de la préparation relatives à la réalisation d'installations nucléaires projetées ». La Commission doit être convaincue que « les dépenses ont été faites de manière prudente » et que « les engagements financiers ont été pris de manière prudente » (la disposition 4.1 du par. 6(2)). La disposition établit donc un cadre précis où l'analyse de la Commission est axée sur la prudence de la décision de faire certaines dépenses ou de convenir de certaines dépenses. L'absence d'un libellé en ce sens dans la disposition générale qu'est le par. 6(1) constitue un autre motif de considérer que le règlement confère à la Commission un large pouvoir discrétionnaire quant à la méthode à employer pour ordonner un paiement lorsque les dispositions particulières du par. 6(2) ne s'appliquent pas.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[79] Pour ce qui concerne la question de savoir si la présomption de prudence doit s'appliquer aux décisions d'OPG de faire des dépenses, ni la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, ni le règlement 53/05 n'établissent expressément une telle présomption. D'ailleurs, suivant cette loi, il incombe au service public requérant d'établir que les paiements qu'il demande à la Commission d'approuver sont justes et raisonnables (par. 78.1(6) et (7)). Il semble donc contraire au régime législatif de présumer que la décision de faire des dépenses est prudente.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998*: ". . . the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just

[80] La juge Abella conclut que l'examen des dépenses d'OPG par la Commission aurait dû consister à « contrôl[er] la prudence des dépenses après coup et [à] appliqu[er] la présomption réfutable selon laquelle elles étaient raisonnables » (par. 150). Or, une telle approche est contraire au régime législatif. La Commission jouit certes d'une grande marge de manœuvre quant au choix d'une méthode, mais elle n'a pas la faculté d'inverser le fardeau de la preuve établi au par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* : « . . . le fardeau de la preuve incombe au requérant dans une requête présentée en vertu du

and reasonable. The Board has broad discretion to determine the methods it may use to examine costs — it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. *Characterization of Costs at Issue*

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be

présent article ». Il ne s'ensuit pas, bien sûr, que le requérant doit systématiquement prouver le caractère juste et raisonnable de chacune de ses dépenses, individuellement. La Commission jouit d'un grand pouvoir discrétionnaire qui lui permet d'arrêter les méthodes à employer dans l'examen des dépenses, mais elle ne peut tout simplement pas inverser le fardeau de la preuve qu'établit le régime législatif.

[81] La cour de justice appelée à contrôler la décision de la Commission d'approuver ou non des paiements à un service public doit se demander si la conclusion de la Commission selon laquelle un paiement d'un certain montant est « juste et raisonnable » tant pour le service public que pour le consommateur est raisonnable ou non. Cette approche concorde avec les décisions de notre Cour sur l'établissement de tarifs dans d'autres secteurs réglementés où l'organisme de réglementation dispose d'un pouvoir discrétionnaire qui lui permet de recourir à une méthode ou à une autre. Dans ces décisions, la Cour signale que « [l]'obligation d'agir est une question de droit, mais le choix de la méthode est une question relevant de l'exercice du pouvoir discrétionnaire et à l'égard de laquelle, selon le texte de loi, aucun tribunal judiciaire ne peut intervenir » (*Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764, par. 40 (tarification des télécommunications), citant *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (C.S.C.), p. 13 (tarification du transport ferroviaire des marchandises)). Certes, de nos jours, il faut voir dans ces propos la reconnaissance du pouvoir d'une cour de justice d'intervenir lorsqu'elle estime que l'exercice du pouvoir discrétionnaire a débouché sur une décision déraisonnable. Reste donc à décider si la méthode d'analyse retenue par la Commission pour refuser d'approuver les dépenses en l'espèce a rendu sa décision déraisonnable selon la norme du paiement « juste et raisonnable ».

D. *Qualification des dépenses en cause*

[82] Les dépenses prévues sont celles que le service public n'a pas encore acquittées et qu'un pouvoir discrétionnaire lui permet de renoncer à faire.

made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

Lorsque leur approbation est refusée, le service public peut soit modifier ses plans et renoncer aux dépenses, soit les faire malgré le refus étant entendu qu'elles seront assumées par les actionnaires plutôt que par les consommateurs. À l'opposé, les dépenses convenues sont celles que ses actionnaires et lui n'auront d'autre choix que d'assumer si l'organisme de réglementation refuse de permettre leur recouvrement et d'approuver les paiements sollicités. Cela peut advenir lorsque le service public a déjà déboursé la somme en cause ou qu'il a pris un engagement contraignant ou était assujetti à d'autres obligations qui écartent tout pouvoir discrétionnaire lui permettant de ne pas acquitter la somme ultérieurement.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[83] Les parties ne s'entendent pas sur la qualification des dépenses que la Commission a refusé d'approuver. Selon cette dernière, les dépenses de rémunération pour la période de référence sont des dépenses prévues dans la mesure où elles n'ont pas encore été acquittées. OPG soutient plutôt qu'il s'agit de dépenses convenues puisqu'elle est tenue par contrat de verser les sommes en cause au moment où elles deviennent exigibles. Ce désaccord est important car le contrôle de la prudence « sans recul », sur lequel je reviendrai plus en détail, a vu le jour dans le contexte de dépenses « convenues ». Il est en effet absurde d'appliquer ce critère lorsque le service public peut encore décider, en fin de compte, de faire ou non les dépenses; la décision de convenir de ces dépenses n'a pas encore été prise. Par conséquent, lorsque l'organisme de réglementation possède un pouvoir discrétionnaire quant à la méthode à employer, la qualification des dépenses — « prévues » ou « convenues » — peut constituer une étape importante pour statuer sur le caractère raisonnable de la méthode retenue.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility

[84] En l'espèce, au moins une partie des dépenses de rémunération jugées excessives par la Commission était imputable à des conventions collectives qu'OPG avait conclues avant la présentation de sa demande et qui faisaient en sorte que sa masse salariale globale dépasse le 75e percentile pour des emplois comparables dans d'autres services publics. Les conventions collectives laissaient

regarding overall compensation rates or staffing levels — OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements — and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. *The Prudent Investment Test*

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has

peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble, OPG devait respecter ceux établis par les conventions collectives et elle ne jouissait d'une marge de manœuvre que pour les conditions qui n'étaient pas ainsi régies. Par conséquent, les dépenses liées aux barèmes de rémunération et aux niveaux de dotation imposés par les conventions collectives étaient des dépenses convenues.

[85] La Commission conclut cependant que les dépenses de rémunération pour la période de référence ne sont pas toutes déterminées par les conventions collectives et qu'elles ne sont donc pas toutes convenues, car OPG dispose d'une certaine marge de manœuvre pour gérer globalement les niveaux de dotation en fonction du départ prévu d'employés d'âge mûr. Toutefois, la décision de la Commission ne précise pas quel pourcentage exact des 145 millions de dollars refusés au chapitre de la rémunération pourrait être recouvré grâce à la réduction naturelle du nombre d'employés ou à d'autres ajustements, ni quel pourcentage serait nécessairement assumé par le service public et son actionnaire. Par conséquent, les dépenses refusées en l'espèce doivent être considérées comme des dépenses convenues, du moins en partie. Il est déraisonnable d'y voir en totalité des dépenses prévues étant donné l'effet contraignant des conventions collectives sur OPG.

[86] Après avoir établi que les dépenses refusées sont, du moins partiellement, des dépenses convenues, il faut déterminer si la Commission a agi de façon raisonnable en appliquant le critère de l'investissement prudent sans exclure le recul. J'examine donc maintenant l'historique jurisprudentiel du critère de l'investissement prudent et les données méthodologiques y afférentes.

E. *Le critère de l'investissement prudent*

[87] Décider si la méthode de la Commission était raisonnable en l'espèce exige de se pencher sur l'historique du critère de l'investissement prudent (parfois appelé « contrôle de la prudence » ou « critère de la prudence ») pour déterminer ses origines, le situer dans le contexte et savoir quelle portée lui

been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

ont attribué les services publics, les organismes de réglementation et les rédacteurs législatifs.

(1) Jurisprudence américaine

[88] La jurisprudence américaine a joué un rôle important dans l'application du critère de l'investissement prudent aux services publics réglementés. Rappelons d'abord l'observation de notre Cour selon laquelle, « [b]ien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question » (*ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140, par. 54).

[89] L'application du critère de l'investissement prudent aux services publics réglementés s'origine de l'opinion concordante du juge Brandeis, de la Cour suprême des États-Unis, datant de 1923 et selon laquelle les services publics ont droit à la déférence lorsqu'ils cherchent à recouvrer [TRADUCTION] « un investissement qui, normalement, serait considéré comme raisonnable » (*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1).

[90] Dans les décennies qui ont suivi, les organismes de réglementation américains chargés de l'examen de dépenses déjà faites par les services publics ont généralement appliqué soit le critère axé sur [TRADUCTION] « l'emploi et l'utilité », soit le critère de « l'investissement prudent » (J. Kahn, « Keep *Hope* Alive : Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs » (2010), 22 *Fordham Envtl. L. Rev.* 43, p. 49). À chacun de ces critères correspond une approche différente pour déterminer quelles dépenses peuvent équitablement et raisonnablement être refilées aux consommateurs. Le critère de l'emploi et de l'utilité permet au service public d'obtenir un rendement, mais seulement sur l'investissement qui est réellement employé et qui se révèle utile à l'exploitation de l'entreprise, étant entendu que les consommateurs ne doivent pas être tenus de payer pour un investissement dont ils ne bénéficient pas.

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test — a test that allows for payments related to investments that may not be used or useful — it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[91] Au critère de l'investissement prudent correspond l'approche retenue par le juge Brandeis et selon laquelle des dépenses peuvent être recouvrées si elles ne sont pas imprudentes compte tenu de ce qu'on sait au moment où est fait l'investissement ou la dépense (Kahn, p. 49-50). Bien qu'il puisse sembler problématique du point de vue de la protection des intérêts des consommateurs d'adopter le critère de l'investissement prudent — dans la mesure où il autorise un paiement pour un investissement qui n'a été ni employé ni utile —, ce critère permet aux organismes de réglementation d'atténuer les possibles effets draconiens du critère de l'emploi et de l'utilité, lequel impose un lourd fardeau au service public. Par exemple, refuser le recouvrement d'un mauvais investissement qui paraissait raisonnable au moment où il a été fait risque de compromettre la santé financière du service public et d'avoir un effet dissuasif sur l'investissement ultérieur de capitaux par ce dernier. Pareil résultat peut ensuite entraîner des conséquences négatives pour les consommateurs, dont les intérêts à long terme sont mieux servis si le secteur de l'électricité est à la fois dynamique, efficace et viable. Par conséquent, un organisme de réglementation peut recourir au critère de l'investissement prudent afin d'établir un juste équilibre entre les intérêts des consommateurs et ceux du service public (voir Kahn, p. 53-54).

[92] Les États ont eu recours à des approches différentes pour établir le fondement légal de la réglementation des services publics. Certains ont permis aux organismes de réglementation d'appliquer le critère de l'investissement prudent, alors que d'autres ont légiféré pour écarter le recouvrement de capitaux investis qui n'étaient [TRADUCTION] « ni employés ni utiles au public » (*Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), p. 302). Fait à signaler, dans cette affaire où on lui demandait si des paiements « justes et raisonnables » à un service public nécessitaient, sur le plan constitutionnel, que le critère de l'investissement prudent s'applique aux dépenses déjà faites, la Cour suprême des É.-U. a conclu que « [l']élévation d'une seule méthode de tarification au rang de norme constitutionnelle écarterait inutilement d'autres avenues dont pourraient bénéficier à la fois consommateurs et investisseurs » (p. 316).

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

> . . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), at p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

[93] Les cours de justice américaines ont aussi reconnu que, dans certains contextes, des aspects du critère de l'investissement prudent peuvent se révéler moins justifiables. Par exemple, saisie du contrôle judiciaire de coûts transférés à un service public par une entreprise affiliée non réglementée, la Cour suprême de l'Utah s'est demandé s'il était justifié de présumer que les coûts étaient raisonnables et elle a conclu par la négative :

> [TRADUCTION] . . . nous ne pensons pas que les dépenses de l'affiliée devraient être présumées raisonnables. Bien que la pression exercée par un marché concurrentiel puisse nous permettre de présumer, faute d'une preuve contraire, que les dépenses d'une entreprise non affiliée sont raisonnables, on ne peut en dire autant des dépenses d'une affiliée qui ne sont pas faites dans le cadre d'une opération sans lien de dépendance.

(*U.S. West Communications, Inc. c. Public Service Commission of Utah*, 901 P.2d 270 (Utah 1995), p. 274)

[94] Il appert donc de la jurisprudence américaine que le critère de l'investissement prudent s'est révélé utile pour arriver à un résultat juste et raisonnable, mais qu'il ne saurait constituer un élément obligatoire de la réglementation des services publics dont l'application s'impose même lorsqu'aucune disposition législative ne le prévoit.

(2) Jurisprudence canadienne

[95] Sous l'impulsion de la jurisprudence américaine, plusieurs organismes de réglementation et cours de justice du Canada se sont aussi penchés sur le rôle du contrôle de la prudence et ont parfois appliqué une variante du critère de l'investissement prudent. Je passerai en revue certaines de leurs décisions dans le but non pas de répertorier toutes les applications du critère, mais bien de faire état de la manière dont on l'a appliqué dans différents contextes.

[96] Dans l'arrêt *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960] R.C.S. 837, le juge Martland relève que, suivant la loi en cause, l'organisme de réglementation est tenu à ce qui suit lorsqu'il fixe des tarifs :

(*a*) . . . shall consider all matters which it deems proper as affecting the rate: [and]

(*b*) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, c. 277, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is

[TRADUCTION]

(*a*) . . . considérer tout élément qu'il juge susceptible d'influer sur les tarifs; [et]

(*b*) . . . tenir dûment compte, notamment, de la protection du public contre les tarifs excessifs qui excèdent ce qui est juste et raisonnable en contrepartie du service de la nature et de la qualité de celui fourni et de l'obtention par le service public d'un rendement juste et raisonnable sur les biens qu'il affecte à la prestation du service ou qu'il acquiert à cette fin de manière prudente et raisonnable, selon leur valeur d'expertise. [p. 852]

(Citant *Public Utilities Act*, R.S.B.C. 1948, c. 227, al. 16(1)*b*) (abrogé S.B.C. 1973, c. 29, art. 187).)

Le juge Martland conclut de ce libellé que l'organisme de réglementation [TRADUCTION] « appelé à se prononcer sur la fixation de tarifs jouit d'un pouvoir discrétionnaire absolu quant aux éléments qu'il juge susceptibles d'influer sur les tarifs, mais qu'il doit, lorsqu'il établit la tarification, satisfaire aux deux exigences expressément prévues à l'al. (*b*) » (p. 856). Ainsi, l'organisme de réglementation est tenu par cette loi de faire en sorte que le public ne paie que ce qui est juste et raisonnable et que le service public obtienne un rendement juste et raisonnable sur la valeur des biens qu'il a utilisés *ou acquis de manière prudente et raisonnable*. Cette protection légale expresse du recouvrement du coût des biens acquis avec prudence offre un exemple de libellé législatif sur le fondement duquel notre Cour a conclu à l'existence d'une obligation non discrétionnaire d'assurer au service public un rendement juste sur les immobilisations qu'il a utilisées ou acquises avec prudence.

[97] En 2005, la Nova Scotia Utility and Review Board (« NSUARB ») a examiné puis adopté la définition du critère de l'investissement prudent proposée par l'Illinois Commerce Commission :

[TRADUCTION] . . . la prudence est la norme de diligence qu'une personne raisonnable aurait respectée dans la situation rencontrée par la direction du service public au moment où elle a dû prendre les décisions. [. . .] Le recul est exclu lorsqu'il s'agit d'apprécier la prudence. [. . .]

prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

– Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

La décision du service public est prudente si elle fait partie des décisions qu'une personne raisonnable aurait pu prendre. [. . .] La norme de la prudence reconnaît que des personnes raisonnables peuvent sincèrement différer d'opinions sans pour autant que l'une ou l'autre soit imprudente.

(*Nova Scotia Power Inc., Re*, 2005 NSUARB 27 (« *Nova Scotia Power 2005* »), par. 84 (CanLII))

La NSUARB conclut alors que, [TRADUCTION] « [a]près examen de la jurisprudence, [. . .] la définition d'imprudence proposée par l'Illinois Commerce Commission constitue un critère raisonnable susceptible d'application en Nouvelle-Écosse » (par. 90). Elle se demande notamment si la stratégie récente d'achat de carburant du service public a été prudente, et elle répond par la négative (par. 94). Elle ne se dit cependant pas tenue d'appliquer le critère de l'investissement prudent.

[98] En 2012, la NSUARB a renouvelé son adhésion au critère de l'investissement prudent (*Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 (« *Nova Scotia Power 2012* »), par. 143-146 (CanLII)). Dans cette affaire, le service public dont les arguments faisaient l'objet de l'examen [TRADUCTION] « a confirmé que, selon lui, il s'agit du critère que la commission devrait appliquer » (par. 146). La NSUARB a ensuite appliqué le critère de la prudence pour décider si plusieurs décisions opérationnelles du service public avaient été prudentes ou non, et elle a conclu que certaines d'entre elles ne l'avaient pas été (par. 188).

[99] En 2006, dans l'arrêt *Enbridge*, la Cour d'appel de l'Ontario se penche sur la teneur du critère de l'investissement prudent. Cet arrêt revêt un intérêt particulier pour deux raisons. Premièrement, la Cour d'appel y circonscrit précisément l'application du critère :

[TRADUCTION]

– La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.

– To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

– Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

– Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether

– Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.

– Le recul est exclu de l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.

– La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision. [par. 10]

[100] Deuxièmement, elle donne plusieurs fois à entendre que le recours au critère de l'investissement prudent est nécessaire pour se prononcer sur les dépenses convenues. Plus précisément, elle signale que pour décider du caractère juste et raisonnable de l'augmentation des tarifs demandée par Enbridge,

[TRADUCTION] la [Commission] était tenue de soupeser les intérêts opposés d'Enbridge et des consommateurs. Pour ce faire, elle devait appliquer ce qu'on appelle dans le domaine de la réglementation des tarifs des services publics le critère de la « prudence ». Enbridge était en droit de recouvrer ses coûts au moyen d'une augmentation de ses tarifs, mais seulement si la décision derrière ces coûts était « prudente ». [par. 8]

La Cour d'appel ajoute que la Commission a appliqué le [TRADUCTION] « bon critère » (par. 18). Ces affirmations tendent à indiquer que, selon la Cour d'appel, le contrôle de la prudence est fondamental et nécessaire afin que les paiements soient justes et raisonnables.

[101] Or, dans cette affaire, la Cour d'appel n'était pas directement saisie de la question de savoir si, dans ce contexte, l'application du critère de la prudence était nécessaire à l'appréciation du caractère juste et raisonnable des paiements. En fait, les parties s'entendaient [TRADUCTION] « pour l'essentiel sur la démarche qui devait être celle de la Commission pour apprécier la prudence d'une décision d'un

the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exist different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment

service public » (par. 10). La question en litige était celle de savoir si la Commission avait eu recours à cette démarche de manière raisonnable. En ce sens, l'affaire *Enbridge* s'apparente à *Nova Scotia Power 2012* : les deux concernent l'application du critère de la prudence lorsqu'aucune des parties ne soutient qu'une autre démarche aurait pu raisonnablement s'appliquer.

(3) Conclusion sur le critère de l'investissement prudent

[102] Le critère de l'investissement prudent — ou contrôle de la prudence — offre aux organismes de réglementation un moyen valable et largement reconnu d'apprécier le caractère juste et raisonnable des paiements sollicités par un service public. Il existe certes des formulations différentes du contrôle de la prudence, mais l'arrêt *Enbridge* précise en détail quelle peut être la démarche d'un organisme de réglementation appelé à décider si, au moment où le service public les a faites ou en a convenu, les dépenses étaient prudentes ou non. Le plus souvent, le contrôle de la prudence excluant le recul s'applique aux coûts en capital, mais l'arrêt *Enbridge* et les décisions *Nova Scotia Power* (*2005* et *2012*) montrent qu'il s'applique aussi aux dépenses d'exploitation. Je ne vois aucune raison de principe d'interdire à un organisme de réglementation d'appliquer le critère de la prudence aux dépenses d'exploitation.

[103] Toutefois, aucun élément du régime législatif ou de la jurisprudence applicable ne me paraît appuyer l'idée que la Commission devrait être *tenue* en droit, suivant la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, d'appliquer le critère de la prudence énoncé dans l'arrêt *Enbridge*, de sorte que la seule décision de ne pas l'appliquer pour apprécier la prudence de dépenses convenues rendrait déraisonnable sa décision sur les paiements. Notre Cour n'est pas non plus justifiée de créer pareille obligation. Je le répète, lorsqu'un texte législatif — telle la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* en Ontario — exige seulement qu'il fixe des paiements « justes et raisonnables », l'organisme de réglementation peut avoir recours à divers

amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

moyens d'analyse pour apprécier le caractère juste et raisonnable des paiements sollicités par le service public. Cela est particulièrement vrai lorsque, comme en l'espèce, l'organisme de réglementation se voit accorder expressément un pouvoir discrétionnaire quant à la méthode à appliquer pour fixer les paiements (règlement 53/05, par. 6(1)).

[104] En résumé, il n'est pas nécessairement déraisonnable, à la lumière du cadre réglementaire établi par la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, que la Commission se prononce sur les dépenses convenues en employant une autre méthode que l'application d'un critère de prudence qui exclut le recul. Comme nous l'avons vu, présumer la prudence serait incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* et, de ce fait, déraisonnable. Qu'il soit raisonnable ou non d'apprécier certaines dépenses avec le recul devrait plutôt dépendre des circonstances de la décision dont s'originent ces dépenses. Je précise toutefois que la présente décision ne doit pas être interprétée de façon à permettre aux organismes de réglementation de refuser à leur guise d'approuver des dépenses convenues. Le contrôle de la prudence de dépenses convenues peut, dans bien des cas, constituer un bon moyen de faire en sorte que les services publics soient traités équitablement et demeurent aptes à obtenir les investissements de capitaux requis. Comme je l'explique plus loin, en ce qui a trait plus particulièrement aux coûts en capital convenus, le contrôle de la prudence offre le plus souvent un moyen raisonnable d'établir un équilibre entre les intérêts du consommateur et ceux du service public.

[105] Cette conclusion sur le pouvoir de la Commission de décider de sa démarche découle du régime législatif qui régit son fonctionnement. D'autres régimes législatifs prévoient expressément que l'organisme de réglementation en cause est tenu d'indemniser le service public de certaines dépenses découlant de décisions prudentes (voir l'arrêt *British Columbia Electric Railway Co.*). Selon ces autres cadres législatifs, le pouvoir discrétionnaire qui permet à l'organisme de réglementation de décider de sa démarche peut être plus restreint.

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

(4) Application à la décision de la Commission

[106] En l'espèce, la Commission refuse à OPG le recouvrement au total de 145 millions de dollars au titre des dépenses de rémunération dans le secteur nucléaire, sur deux ans. Rappelons qu'il faut considérer que ces dépenses constituent, du moins en partie, des dépenses convenues. Compte tenu de la nature de ces dépenses en particulier et des circonstances dans lesquelles le service public en a convenu, je ne saurais conclure que la Commission a agi déraisonnablement en n'appliquant pas le critère de l'investissement prudent pour décider s'il était juste et raisonnable d'indemniser OPG à leur égard.

[107] Premièrement, il s'agit de dépenses d'exploitation, et non de coûts en capital. Les coûts en capital, en particulier ceux qui se rapportent par exemple à l'accroissement de la capacité ou à l'amélioration des installations actuelles, comportent souvent un risque et peuvent ne pas être nécessaires, à strictement parler, à la production à court terme du service public. Ces coûts peuvent néanmoins constituer un investissement judicieux pour le bon fonctionnement et la viabilité ultérieurs de ce dernier. Dès lors, le contrôle de la prudence, qui exclut le recul (et présume ou non la prudence, selon les dispositions législatives applicables), peut jouer un rôle particulièrement important pour faire en sorte que le service public ne soit pas dissuadé d'investir de manière optimale dans le développement de ses installations.

[108] Les dépenses d'exploitation, comme celles visées en l'espèce, diffèrent des coûts en capital. Il est peu probable que le refus de les approuver dissuade OPG d'en faire à l'avenir, car les dépenses de la nature de celles qui ont été refusées sont inhérentes à l'exploitation d'un service public. Certes, une décision comme celle rendue par la Commission en l'espèce peut faire hésiter OPG à convenir de dépenses relativement élevées au chapitre de la rémunération, mais tel était précisément l'effet voulu par la Commission.

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[109] Deuxièmement, les dépenses en cause découlent d'une relation continue entre OPG et ses employés. Le contrôle de la prudence tire son origine de l'examen de décisions d'effectuer certains investissements, notamment pour accroître la capacité; il s'agit souvent de décisions isolées prises à la lumière d'un ensemble de données alors connues ou supposées.

[110] À l'opposé de celles issues de telles décisions, les dépenses de rémunération convenues d'OPG découlent d'une relation continue dans le cadre de laquelle OPG devra négocier ultérieurement les barèmes de rémunération avec les mêmes parties. Pareil contexte milite en faveur du caractère raisonnable de la décision de l'organisme de réglementation de soupeser toute preuve qu'il juge pertinente aux fins d'établir un équilibre juste et raisonnable entre le service public et les consommateurs, au lieu de s'en tenir à une approche excluant le recul. Le contrôle de la prudence se révèle tout simplement moins indiqué lorsque la Commission n'entend pas seulement indemniser le service public des engagements déjà pris, mais aussi réguler les dépenses qui seront faites dans l'avenir. En fin de compte, le refus de la Commission ne vise pas que des dépenses convenues, mais bien la totalité des dépenses de rémunération considérées globalement. Même si la Commission reconnaît qu'OPG n'avait peut-être pas de pouvoir discrétionnaire lui permettant de réduire ses dépenses à raison du montant total refusé, le refus de la Commission vise à inciter OPG à la maîtrise constante de ses dépenses de rémunération.

[111] Après que la Commission eut signifié à OPG que ses dépenses d'exploitation lui paraissaient préoccupantes (voir la décision 2008-2009 de la Commission, p. 28-32), il n'était pas déraisonnable qu'elle se montre plus stricte dans l'examen des dépenses de rémunération du service public afin d'en assurer la régulation réelle à l'avenir. Le fait que la Commission dit refuser l'approbation [TRADUCTION] « afin de signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350) montre qu'elle a bel et bien conscience des répercussions actuelles de son refus.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at para. 350. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[112] Le caractère raisonnable du refus de la Commission d'approuver des dépenses de 145 millions de dollars au titre de la rémunération tient à ce qu'elle reconnaît qu'OPG était liée dans une certaine mesure par les conventions collectives dans sa prise de décisions en matière de personnel et dans la fixation des barèmes de rémunération, et à ce qu'elle en tient compte pour déterminer la somme totale refusée (décision de la Commission, par. 350). La souplesse méthodologique dont bénéficie la Commission lui permet d'éviter les extrêmes. Lorsque le service public ne peut réduire ses dépenses, la prise en charge de celles-ci peut, si le dossier s'y prête, être modérée ou répartie entre les actionnaires du service public et les consommateurs. La modération opérée par la Commission en l'espèce montre que, en refusant d'approuver les dépenses sans recourir formellement à un contrôle de la prudence excluant le recul, elle ne perd pas de vue la nécessité de veiller à ce que tout refus ne soit pas injuste envers OPG ni, assurément, à ce qu'il ne nuise pas à sa viabilité.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[113] Dans ses motifs de dissidence, la juge Abella reconnaît que, lors du contrôle de la prudence, la Commission peut, du moins dans certaines circonstances, refuser des dépenses convenues (par. 152). Elle dit toutefois craindre qu'un tel refus puisse « mettre en péril la garantie d'un service d'électricité fiable » (par. 156). Le refus d'une somme importante ou opposé sans discernement pourrait exposer à un tel risque, mais il se peut aussi que l'organisme de réglementation fasse ce que la Commission fait en l'espèce, c'est-à-dire modérer son refus en tenant compte des réalités auxquelles fait face le service public.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its

[114] Nul ne conteste que les conventions collectives intervenues entre le service public et ses employés sont « immuables ». Toutefois, si le législateur avait voulu que les dépenses qui en sont issues se répercutent inévitablement sur les consommateurs, il n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public. La coexistence du droit à la négociation collective des employés du service public et du pouvoir de la Commission de fixer le montant des paiements pour les dépenses de rémunération indique que ni l'un ni l'autre n'a

obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

préséance. La Commission ne peut empiéter sur les conventions collectives en ordonnant au service public de manquer aux obligations qu'elles lui imposent, mais les conventions collectives ne priment pas l'obligation de la Commission d'assurer un équilibre juste et raisonnable entre le service public et les consommateurs.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at para. 75. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[115] La juge Abella affirme que l'examen des dépenses convenues auquel se livre la Commission à partir d'éléments de recul paraît contredire ce que l'organisme affirme précédemment dans sa décision. La Commission écrit en effet qu'elle prendra en compte tout élément de preuve pertinent pour apprécier les dépenses prévues, mais qu'elle s'en tiendra à un examen sans recul pour ce qui concerne les dépenses à l'égard desquelles OPG [TRADUCTION] « ne pouvait prendre de mesures de réduction » (décision de la Commission, par. 75). À mon sens, on peut en conclure qu'elle recourt à une démarche raisonnable pour l'analyse de dépenses que l'on peut assimiler avec assurance soit à des dépenses prévues, soit à des dépenses convenues. Cependant, toutes les dépenses ne sont pas susceptibles d'une distinction aussi nette par la Commission lorsqu'il s'agit d'apprécier le montant des paiements pour une période de référence.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

[116] En ce qui a trait aux dépenses de rémunération en cause, la Commission refuse de préciser quelle partie de la somme totale refusée correspond à des dépenses prévues et quelle partie correspond à des dépenses convenues pour les besoins de son analyse. Le juge Hoy fait observer que, [TRADUCTION] « [v]u la complexité de l'activité d'OPG et l'autonomie de gestion dont elle jouit, [la Commission] n'a pas tenté de déterminer avec précision le montant dont les dépenses de rémunération prévues d'OPG auraient pu être réduites dans le contexte des conventions collectives en vigueur » (motifs de la C. div., par. 53). En somme, la Commission ne départage pas les dépenses de rémunération totales entre celles qui sont « prévues » et celles qui sont « convenues ». Elle considère plutôt que les dépenses de rémunération refusées se composent à la fois de dépenses prévues et de dépenses convenues sur lesquelles la direction conservait une certaine maîtrise, mais non une maîtrise totale.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at paras. 73-75, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at

[117] Il n'est pas déraisonnable que la Commission considère que la prévision du taux d'attrition du personnel constitue en soi une entreprise incertaine et qu'elle n'est pas en mesure de microgérer les décisions d'affaires qui relèvent des dirigeants d'OPG. Dès lors, toute tentative de prédire la mesure exacte dans laquelle OPG pourrait abaisser ses dépenses de rémunération (autrement dit, quelle partie de ces dépenses est prévue) serait empreinte d'incertitude. Il n'est donc pas déraisonnable que la Commission opte pour une démarche hybride qui ne se fonde pas sur la répartition exacte des dépenses de rémunération entre celles qui sont prévues et celles qui sont convenues. Pareille démarche est compatible avec l'analyse de la Commission figurant aux par. 73-75 de sa décision et correspond à un exercice du pouvoir discrétionnaire de la Commission sur le plan méthodologique lorsqu'elle est appelée à se prononcer sur une question épineuse et que les dépenses en cause ne sont pas aisément assimilables à l'une ou l'autre des catégories mentionnées dans cette analyse.

[118] Tout au long de ses motifs, la juge Abella rappelle que les dépenses découlant des conventions collectives ne peuvent être rajustées. Je n'en disconviens pas. Cependant, lorsqu'elle opine que les conventions collectives « rend[ent] *illégale* la modification par le service public [. . .] des barèmes de rémunération et des niveaux de dotation » à l'égard de son personnel syndiqué (par. 149 (en italique dans l'original)), d'aucuns pourraient en conclure que la Commission tente de quelque manière de s'immiscer dans l'exécution des obligations d'OPG suivant les conventions collectives. Il importe de ne pas oublier que la Commission n'entend pas, par sa décision, contraindre OPG à se soustraire à ses engagements contractuels envers ses employés.

[119] Enfin, la remarque de ma collègue selon laquelle la Commission canadienne de sûreté nucléaire (« CCSN ») « [a] impos[é] [. . .] des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires » (par. 127) importe peu quant aux questions soulevées en l'espèce. Bien que le régime établi par la CCSN impose sûrement des conditions

pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at para. 350). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

[122] Abella J. (dissenting) — The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned

d'exploitation et de dotation aux installations nucléaires (voir dossier OPG, p. 43-46), nul élément des motifs de la Commission et nulle plaidoirie devant notre Cour n'indiquent que le refus de la Commission entraînera le non-respect des dispositions de la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9.

[120] Je rappelle qu'il est essentiel qu'un service public obtienne à long terme l'équivalent du coût du capital. Le refus de la Commission a pu nuire à la possibilité qu'OPG obtienne à court terme l'équivalent de son coût du capital. Toutefois, il vise à [TRADUCTION] « signifier clairement à OPG qu'il lui incombe d'accroître sa performance » (décision de la Commission, par. 350). L'envoi d'un tel message peut, à court terme, donner à OPG l'impulsion nécessaire pour rapprocher ses dépenses de rémunération de ce que, selon la Commission, les consommateurs devraient à bon droit s'attendre à payer pour la prestation efficace du service. L'envoi d'un tel message est conforme au rôle de substitut du marché de la Commission et à ses objectifs selon l'article premier de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*.

VI. Conclusion

[121] Je conclus que la Commission n'a pas agi de manière inappropriée en se pourvoyant en tant que partie en appel; elle n'a pas non plus agi déraisonnablement en refusant d'approuver les dépenses de rémunération en cause. Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel et de rétablir celle de la Commission.

Version française des motifs rendus par

[122] La juge Abella (dissidente) — La Commission de l'énergie de l'Ontario a été mise sur pied en 1960. Son mandat était alors d'établir les tarifs applicables à la vente et au stockage de gaz naturel et d'autoriser les projets de construction de pipelines. Au fil du temps, ses compétences et ses fonctions ont évolué. En 1973, le législateur lui a confié la responsabilité d'examiner les tarifs d'électricité puis de faire rapport au ministre de l'Énergie. Pendant cette

Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a commercial corporation with one shareholder — the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, paras. 1 and 2 of s. 1(1).

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in

période, en Ontario, le marché de l'électricité était peu réglementé. Il était dominé par la société d'État Ontario Hydro, qui possédait des installations de production d'énergie fournissant plus de 90 p. 100 de l'électricité dans la province (Ron W. Clark, Scott A. Stoll et Fred D. Cass, *Ontario Energy Law : Electricity* (2012), p. 134; *Rapport annuel 2011*, Bureau du vérificateur général de l'Ontario, p. 1 et 72).

[123] À la fin des années 1990, une série de mesures législatives a été adoptée en vue d'axer le secteur de l'électricité sur le marché et de le soumettre à la concurrence. Ontario Hydro a été scindée en cinq entités. L'une d'elles, Ontario Power Generation Inc., s'est vu confier l'actif de production d'électricité de l'ancienne société Ontario Hydro. Elle a été constituée en société commerciale dont le seul actionnaire est la province d'Ontario (Clark, Stoll et Cass, p. 5-7 et 134).

[124] Depuis le 1er avril 2008, la Commission est légalement investie du pouvoir de fixer les paiements pour l'électricité produite par les installations prescrites que possède Ontario Power Generation (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, L.O. 1998, c. 15, ann. B, par. 78.1(2); règlement 53/05 de l'Ontario (*Payments Under Section 78.1 of the Act*) (« règlement 53/05 », art. 3). Suivant le régime législatif, Ontario Power Generation est tenue de faire une demande à la Commission pour obtenir l'approbation de paiements « justes et raisonnables » (*Loi de 1998 sur la Commission de l'énergie de l'Ontario*, par. 78.1(5)). La Commission établit sa propre méthode pour déterminer ce qui constitue des paiements « justes et raisonnables » au regard des objectifs législatifs qui consistent à maintenir une « industrie de l'électricité financièrement viable » et à « protéger les intérêts des consommateurs en ce qui concerne les prix, ainsi que la suffisance, la fiabilité et la qualité du service d'électricité » (règlement 53/05, par. 6(1); *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, dispositions 1 et 2 du par. 1(1).

[125] Ontario Power Generation demeure le plus grand producteur d'électricité de la province. L'Ontario Hydro Employees' Union (auquel a succédé le Syndicat des travailleurs et travailleuses du secteur

the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs — wages, benefits, pension servicing, and annual incentives — to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs — costs that the utility has estimated for

énergétique) a été accrédité comme agent négociateur auprès de l'entreprise dans les années 1950, alors que Society of Energy Professionals l'a été à son tour en 1992 (Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (en ligne), art. 6.2). Le personnel d'Ontario Power Generation affecté à ses activités réglementées se compose aujourd'hui d'environ 10 000 personnes, dont 90 p. 100 sont syndiquées. Deux tiers de ces employés syndiqués sont représentés par le Syndicat des travailleurs et travailleuses du secteur énergétique, un tiers par Society of Energy Professionals.

[126] Le syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals avaient tous deux conclu des conventions collectives avec Ontario Hydro avant la création d'Ontario Power Generation. Lorsqu'elle a succédé à Ontario Hydro, Ontario Power Generation a hérité de la totalité des obligations issues de ces conventions (*Loi de 1995 sur les relations de travail* de l'Ontario, L.O. 1995, c. 1, ann. A, art. 69), qui la lient et l'empêchent de réduire unilatéralement les niveaux de dotation ou les barèmes de rémunération.

[127] La Commission canadienne de sûreté nucléaire, un organisme fédéral indépendant chargé de faire respecter la *Loi sur la sûreté et la réglementation nucléaires*, L.C. 1997, c. 9, impose également des niveaux de dotation à Ontario Power Generation afin de garantir l'exploitation sûre et fiable de ses installations nucléaires.

[128] Le 26 mai 2010, Ontario Power Generation a demandé à la Commission d'approuver des recettes nécessaires se chiffrant à 6 909,6 millions de dollars pour la période allant du 1er janvier 2011 au 31 décembre 2012, dont 2 783,9 millions devaient être affectés à la rémunération du personnel — salaires, avantages sociaux, prestations de retraite et incitatifs annuels (EB-2010-0008, p. 8, 49 et 80).

[129] Dans sa décision, la Commission dit soumettre à [TRADUCTION] « deux types d'examen » les dépenses du service public. En ce qui concerne les dépenses prévues — par le service public, pour une

a future period and which can still be reduced or avoided — the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and

période ultérieure et qu'il est toujours possible de réduire ou d'éviter —, la Commission soutient qu'il incombe à Ontario Power Generation de démontrer leur caractère raisonnable. En revanche, pour ce qui est des dépenses à l'égard desquelles « [l]a société ne pouvait prendre de mesures de réduction », à savoir les dépenses convenues, la Commission dit qu'elle effectuera « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence », c'est-à-dire une présomption selon laquelle les dépenses du service public sont raisonnables (p. 19).

[130] La Commission ne fait aucune distinction entre les dépenses de rémunération qui sont réductibles et celles qui ne le sont pas. Elle soumet plutôt toutes les dépenses de rémunération à l'appréciation qu'elle réserve aux dépenses prévues réductibles et elle refuse d'approuver les paiements demandés à raison de 145 millions de dollars au motif que les barèmes de rémunération et les niveaux de dotation sont trop élevés.

[131] En appel, les juges majoritaires de la Cour divisionnaire confirment l'ordonnance de la Commission. Dans ses motifs dissidents, la juge Aitken conclut que la décision de la Commission est déraisonnable, car elle n'applique pas la bonne approche aux dépenses de rémunération, lesquelles constituent, par l'effet de conventions collectives contraignantes en droit, des dépenses fixes et non ajustables. Selon elle, la Commission [TRADUCTION] « regroupe » plutôt toutes les dépenses de rémunération et ne fait aucune distinction entre celles qui découlent d'obligations contractuelles obligatoires et celles qui n'en découlent pas. Comme elle l'affirme :

[TRADUCTION] Premièrement, j'estime que les dépenses de rémunération du secteur nucléaire [d'Ontario Power Generation], pour une période ultérieure, assujetties à une contrainte en raison de conventions collectives qui s'appliquaient avant la demande et la période de référence, constituent des dépenses déjà faites qui doivent faire l'objet d'un contrôle de la prudence après coup, en deux étapes. Deuxièmement, dans l'analyse (mais pas nécessairement dans l'appréciation finale) des dépenses de rémunération du secteur nucléaire dont fait état la demande, la [Commission] était tenue de faire une distinction entre les dépenses déjà effectuées et d'autres

not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

réellement prévues, mais non préétablies. Troisièmement, à mon avis, la [Commission] devait soumettre à un contrôle de la prudence la partie des dépenses de rémunération du secteur nucléaire qui découlait de contrats obligatoires conclus avant la demande et la période de référence. Pour ce qui est des autres facteurs présidant à la rémunération globale du secteur nucléaire, la [Commission] pouvait, en se fondant sur toute la preuve disponible, décider s'ils étaient raisonnables ou non. Quatrièmement, si un contrôle de la prudence avait été effectué, des éléments de preuve auraient pu raisonnablement permettre à la [Commission] de conclure à la réfutation de la présomption de prudence en ce qui a trait aux éléments issus des conventions collectives qui influaient sur les dépenses. Malheureusement, je constate que nulle part dans sa décision la [Commission] ne se livre à une telle analyse. Elle regroupe sans distinctions toutes les dépenses de rémunération du secteur nucléaire. Elle considère qu'elles ont toutes la même origine et qu'aucune ne découle d'obligations contractuelles auxquelles [Ontario Power Generation] était tenue par une convention collective conclue avant la demande et la période de référence. Enfin, j'estime que, lorsqu'elle se penche sur le caractère raisonnable de la rémunération globale du secteur nucléaire, la [Commission] commet l'erreur de tenir compte d'éléments de preuve ayant vu le jour après la conclusion des conventions collectives pour apprécier le caractère raisonnable des barèmes de rémunération et d'autres dispositions contraignantes des conventions collectives. [par. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[132] La Cour d'appel souscrit à l'unanimité à la conclusion de la juge Aitken et statue que [TRADUCTION] « les dépenses de rémunération en cause devant la [Commission] étaient des dépenses convenues » qu'il aurait donc fallu apprécier en présumant leur prudence. Elles reconnaissent toutes deux qu'il était loisible à la Commission de conclure que la présomption était réfutée en ce qui concerne les obligations contractuelles obligatoires, mais qu'elle a agi déraisonnablement en ne tenant pas compte de la nature immuable des coûts fixes.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs

[133] Je suis d'accord. Les dépenses de rémunération visant environ 90 p. 100 de l'effectif obligatoire d'Ontario Power Generation étaient établies par des conventions collectives contraignantes en droit qui imposaient des barèmes de rémunération fixes, qui déterminaient les niveaux de dotation et qui garantissaient la sécurité d'emploi des employés syndiqués. Les dépenses de rémunération

were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": para. 75.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being

d'Ontario Power Generation étaient donc en très grande partie préétablies et ne pouvaient être rajustées par l'entreprise au cours de la période considérée. Il s'agit précisément du type de dépenses que la Commission qualifie, dans sa décision, de dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » et qui doivent faire l'objet d'un « contrôle de la prudence comportant l'application d'une présomption de prudence » (par. 75).

[134] Soit dit tout en respect, la Commission rend une décision déraisonnable en ne reconnaissant pas le caractère contraignant en droit et non réductible des dépenses auxquelles le service public s'était engagé lors de la signature des conventions collectives et en omettant de soumettre ces dépenses au contrôle qui s'imposait pourtant selon elle à leur égard.

Analyse

[135] Conformément au par. 78.1(5) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario*, sur demande d'Ontario Power Generation, la Commission fixe le montant des paiements « justes et raisonnables » auxquels a droit le service public. Dans le contexte de la réglementation des services publics, l'expression « justes et raisonnables » traduit l'objectif qui consiste à [TRADUCTION] « naviguer entre les récifs » que sont, d'une part, les tarifs excessifs imposés au consommateur et, d'autre part, la rétribution insuffisante du service public (*Verizon Communications Inc. c. Federal Communications Commission*, 535 U.S. 467 (2002), p. 481; voir aussi *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186, p. 192-193).

[136] La méthode retenue par la Commission pour déterminer le montant des paiements « justes et raisonnables » auxquels a droit Ontario Power Generation prend en partie appui sur la notion de « prudence ». En droit réglementaire, la prudence offre un [TRADUCTION] « fondement juridique pour se prononcer sur le respect des obligations des services publics liées à l'intérêt public, plus particulièrement en ce qui concerne le processus de tarification » (Robert E. Burns et autres, *The Prudent Investment Test in the 1980s*, rapport NRRI-84-16, The National Regulatory Research Institute, avril 1985, p. 20). Apparue

used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

> The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting)

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

- Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be

au début du 20e siècle, cette notion jurisprudentielle visait à remédier à la [TRADUCTION] « complexité paralysante » des approches différentes utilisées par les organismes de réglementation pour arrêter des montants « justes et raisonnables », et elle présumait que le service public réglementé avait agi raisonnablement (*Verizon Communications*, p. 482). Ainsi, comme l'explique le juge Brandeis dans un extrait bien connu datant de 1923 :

> [TRADUCTION] L'emploi de l'expression « investissement prudent » n'est pas décisif. L'établissement de la base de tarification ne devrait pas exclure les investissements qui, dans des circonstances ordinaires, seraient considérés raisonnables. Cet emploi vise plutôt à exclure les dépenses qui pourraient être jugées malhonnêtes ou manifestement excessives ou imprudentes. On peut supposer que tout investissement considéré a été fait dans l'exercice d'un jugement raisonnable, sauf preuve du contraire. [Je souligne.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923), p. 289, note 1, le juge Brandeis (dissident))

[137] La présomption de prudence constitue le point de départ de l'examen que la Commission appelle [TRADUCTION] « contrôle de la prudence ». Lorsqu'elle entreprend ce contrôle de la prudence, la Commission applique un « ensemble bien établi de principes » :

[TRADUCTION]

- La décision de la direction du service public est généralement présumée prudente, sauf contestation pour motifs valables.
- Pour qu'elle soit prudente, la décision doit être raisonnable eu égard aux circonstances que connaissait ou qu'aurait dû connaître le service public au moment où il l'a prise.
- Le recul est exclu dans l'appréciation de la prudence, même lorsque les conséquences de la décision peuvent légitimement servir à réfuter la présomption de prudence.
- La prudence est appréciée dans le cadre d'une analyse factuelle rétrospective en ce que la preuve doit porter sur le moment où la décision a été prise et

based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2.)

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence — and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.

reposer sur des faits quant aux éléments qui ont pu entrer en ligne de compte ou qui sont effectivement entrés en ligne de compte dans la décision.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), par. 55, citant *Enbridge Gas Distribution Inc. (Re)*, 2002 LNONOEB 4 (QL), par. 3.12.2.)

[138] Dans *Enbridge Gas Distribution Inc. (Re)*, par. 3.12.1 à 3.12.5, conf. par *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4, par. 8 et 10-12, la Commission et la Cour d'appel de l'Ontario considèrent ce contrôle — qui comporte l'application d'une présomption de prudence et exclut le recul — comme la méthode appropriée pour fixer des tarifs « justes et raisonnables ».

[139] Toutefois, dans la présente affaire, la Commission choisit de ne pas soumettre toutes les dépenses à un contrôle de la prudence. Elle dit plutôt recourir à deux examens. Le premier s'appliquerait aux « dépenses prévues », soit celles à l'égard desquelles le service public conserve un pouvoir discrétionnaire et qu'il peut toujours réduire ou éviter. Dans ses motifs, la Commission explique qu'elle examine ces dépenses au regard d'une vaste gamme d'éléments de preuve et qu'il incombe au service public de démontrer le caractère raisonnable de ses dépenses :

[TRADUCTION] Lors de l'examen des dépenses prévues, il incombe à la société d'établir le bien-fondé de sa demande et d'étayer son allégation selon laquelle ces dépenses sont raisonnables. Elle doit fournir un large éventail d'éléments de preuve en ce sens, notamment des analyses de rentabilité et de tendances, des données de référence, etc. Le critère applicable n'est pas celui de la malhonnêteté, de la négligence ou de la perte menant au gaspillage, mais bien celui du caractère raisonnable. Et dans l'appréciation du caractère raisonnable, la Commission n'est pas tenue d'examiner uniquement les données qui intéressent [Ontario Power Generation]. Elle a le pouvoir discrétionnaire de conclure que les dépenses prévues sont déraisonnables au vu de la preuve, laquelle peut se rapporter à l'analyse coût/bénéfice, à l'incidence sur les consommateurs, aux comparaisons avec d'autres entités ou à autre chose.

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [paras. 74-75]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [para. 75]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket

L'avantage d'une période de référence ultérieure est qu'elle permet à la société de connaître à l'avance la décision de la Commission concernant le recouvrement de dépenses prévues. Par exemple, lorsque des dépenses sont refusées, la société peut modifier ses plans en conséquence. Autrement dit, l'actionnaire n'a pas nécessairement à assumer un coût (à moins que la société ne décide, en tout état de cause, de maintenir les dépenses jugées excessives). [par. 74-75]

[140] Selon la Commission, une démarche différente serait suivie pour les dépenses à l'égard desquelles la société ne pouvait [TRADUCTION] « prendre de mesures de réduction ». Ces dépenses, parfois appelées « dépenses convenues », résultent d'obligations contractuelles qui excluent tout pouvoir discrétionnaire permettant au service public de ne pas les acquitter. La Commission explique qu'elle jauge ces dépenses en se livrant à un « contrôle de la prudence » qui comporte l'application d'une présomption selon laquelle les dépenses ont été faites de manière prudente :

[TRADUCTION] Des considérations quelque peu différentes entreront en jeu lors d'un contrôle de la prudence après coup. La dépense que la Commission refusera alors d'approuver sera nécessairement assumée par l'actionnaire. La société ne pourra plus prendre de mesures de réduction à son égard. C'est pourquoi la Commission estime qu'il existe une différence entre les deux types d'examen, le contrôle après coup constituant un contrôle de la prudence assorti d'une présomption de prudence. [par. 75]

[141] À titre d'exemple, dans *Enersource Hydro Mississauga Inc. (Re)*, la Commission conclut qu'elle doit effectuer un contrôle de la prudence pour apprécier les dépenses qu'Enersource a déjà faites :

[TRADUCTION] Le présent dossier porte sur des dépenses que la société a déjà faites en grande partie. [. . .] Comme il est question de dépenses antérieures qui sont aujourd'hui contestées, la Commission doit effectuer un contrôle de la prudence. [par. 55]

[142] Comme le dit la Commission dans ses motifs, il est logique de soumettre à un contrôle de la prudence des dépenses convenues, car refuser d'approuver des dépenses auxquelles Ontario

for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce" (para. 75). The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (paras. 346 and 352), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

Power Generation ne peut se soustraire oblige le service public à acquitter sur ses propres deniers des dépenses déjà faites. Cela pourrait nuire au bon fonctionnement d'Ontario Power Generation et l'amener à restructurer ses liens avec les milieux financiers et ses fournisseurs de services, voire à faire faillite (voir Burns et autres, p. 129-165). Dès lors, [TRADUCTION] « les coûts en capital et les tarifs seraient supérieurs à ce qu'ils auraient été si une sanction modérée avait résulté de l'application du principe de prudence », de sorte que le consommateur ontarien serait contraint de payer des tarifs d'électricité plus élevés (Burns et autres, p. vi).

[143] Le présent pourvoi a donc pour objet la décision de la Commission de considérer *toutes* les dépenses de rémunération issues des conventions collectives d'Ontario Power Generation comme des dépenses prévues ajustables, sans se demander s'il s'agit en partie de dépenses pour lesquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » (par. 75). La Commission ne les qualifie pas à proprement parler de dépenses prévues, mais lorsqu'elle affirme que « les conventions collectives peuvent rendre ardue l'élimination rapide de certains postes » et que « modifier des conventions collectives [. . .] prend du temps » (par. 346 et 352), elle considère clairement qu'il s'agit de dépenses théoriquement compressibles. De plus, l'omission de soumettre celles-ci au contrôle de la prudence qu'elle dit pourtant s'appliquer aux dépenses non réductibles confirme l'assimilation des obligations issues de négociations collectives à des obligations ajustables.

[144] La Commission ne dit pas pourquoi elle estime que les dépenses de rémunération issues des conventions collectives constituent des dépenses prévues ajustables, mais par l'adoption de son approche, elle empêche Ontario Power Generation de bénéficier de l'application de sa méthode d'appréciation qui considère différemment les dépenses convenues. À mon humble avis, en omettant d'apprécier les dépenses de rémunération issues des conventions collectives séparément des autres dépenses de rémunération, la Commission méconnaît à la fois son propre cadre méthodologique et le droit du travail.

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and

[145] Ontario Power Generation était partie à des conventions collectives obligatoires qui étaient intervenues avec le Syndicat des travailleurs et travailleuses du secteur énergétique et Society of Energy Professionals et qui s'appliquaient pendant la plus grande partie de la période considérée. À l'époque de la demande, elle avait déjà conclu une convention collective avec le Syndicat des travailleurs et travailleuses du secteur énergétique pour la période comprise entre le 1er avril 2009 et le 31 mars 2012.

[146] La convention collective intervenue avec Society of Energy Professionals et imposant la médiation-arbitrage pour le règlement des différends pendant des négociations collectives a expiré le 31 décembre 2010. Par suite d'une impasse dans les négociations, les conditions d'une nouvelle convention collective pour la période du 1er janvier 2011 au 31 décembre 2012 ont été imposées par voie d'arbitrage obligatoire (*Ontario Power Generation c. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL)).

[147] Les conventions collectives conclues avec les deux syndicats prescrivaient les barèmes de rémunération des employés syndiqués, réglementaient rigoureusement les niveaux de dotation aux installations d'Ontario Power Generation et limitaient le pouvoir du service public de réduire unilatéralement ses barèmes de rémunération et ses niveaux de dotation. Par exemple, la convention collective conclue avec le Syndicat des travailleurs et travailleuses du secteur énergétique prévoyait qu'il n'y aurait aucun licenciement pendant la durée de son application. Bien au contraire, Ontario Power Generation serait contrainte soit de réaffecter tout employé excédentaire, soit de lui offrir une indemnité de départ selon les barèmes établis au préalable par le service public et le syndicat (« Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union », 1er avril 2009 au 31 mars 2012, art. 11).

[148] De même, la convention collective conclue avec Society of Energy Professionals limitait grandement le pouvoir du service public de négocier et de déterminer les barèmes de rémunération. À l'expiration de cette convention le 31 décembre 2010,

the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of 3 per cent on January 1, 2011, 2 per cent on January 1, 2012, and a further 1 per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: para. 347. Had the Board used the approach it said it would use for costs the company had "no opportunity . . . to reduce", it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

le service public défendait la position de son unique actionnaire, la province d'Ontario, à savoir l'exclusion de toute augmentation nette des salaires pendant les deux années suivantes. Les parties n'ont pu parvenir à un accord, de sorte que le dossier a été renvoyé à l'arbitrage obligatoire comme convenu lors de négociations précédentes. Dans sa décision, l'arbitre Kevin M. Burkett a ordonné une augmentation générale des salaires de 3 p. 100 le 1er janvier 2011, de 2 p. 100 le 1er janvier 2012 et, en sus, de 1 p. 100 le 1er avril 2012 (*Ontario Power Generation c. Society of Energy Professionals*, par. 1, 9 et 28).

[149] Les obligations contractées dans ces conventions collectives constituaient des engagements immuables ayant force obligatoire (*Loi de 1995 sur les relations de travail*, art. 56). Il était donc interdit à Ontario Power Generation de réduire unilatéralement les niveaux de dotation, les salaires ou les avantages sociaux de ses employés syndiqués. Contrairement à ce qu'affirment les juges majoritaires (par. 84), ces conventions ne laissaient pas seulement « peu de marge de manœuvre quant aux barèmes de rémunération et aux niveaux de dotation dans leur ensemble », elles rendaient *illégale* la modification par le service public — d'une manière incompatible avec les engagements qu'il y prenait — des barèmes de rémunération et des niveaux de dotation quant à 90 p. 100 de son effectif obligatoire.

[150] En appliquant la méthode qu'elle a dit qu'elle utiliserait à l'égard des dépenses prévues du service public, la Commission oblige en fait Ontario Power Generation à prouver le caractère raisonnable de ses dépenses et conclut que l'entreprise n'a présenté ni [TRADUCTION] « preuve convaincante », ni « documents ou analyses » qui justifient les barèmes de rémunération (par. 347). Si elle avait eu recours à l'approche qu'elle a dit qu'elle utiliserait pour les dépenses à l'égard desquelles la société ne pouvait « prendre de mesures de réduction », la Commission aurait contrôlé la prudence des dépenses après coup et appliqué la présomption réfutable selon laquelle elles étaient raisonnables.

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act, 1998* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[151] Contrairement à ce que soutiennent les juges majoritaires, appliquer le contrôle de la prudence à ces dépenses de rémunération serait difficilement « incompatible avec le fardeau de preuve que prévoit la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* ». Considérer que le par. 78.1(6) de la *Loi de 1998 sur la Commission de l'énergie de l'Ontario* prévoit un fardeau de preuve aussi strict a essentiellement pour effet d'empêcher totalement la Commission d'effectuer des contrôles de la prudence, alors qu'elle en a effectués sans difficulté dans le passé et qu'elle a affirmé — comme dans ses motifs en l'espèce — qu'il y a lieu de soumettre les dépenses convenues à « un contrôle de la prudence après coup, [. . .] comportant l'application d'une présomption de prudence ». Or, suivant le raisonnement des juges majoritaires, comme le contrôle de la prudence présume toujours la prudence, la Commission ne verrait pas seulement sa marge de manœuvre réduite sur le plan méthodologique, mais elle contreviendrait aussi à la Loi.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

> does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation's] unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its customers. [para. 38]

[152] L'application du principe de la prudence ne soustrait pas les dépenses de rémunération du service public à tout examen. Comme le fait remarquer la Cour d'appel, le contrôle de la prudence

> [TRADUCTION] n'écarte pas la possibilité que la [Commission] puisse contrôler les barèmes de rémunération applicables aux employés syndiqués d'[Ontario Power Generation] ou le nombre de leurs postes. Lors d'un tel contrôle, il peut ressortir de la preuve, d'une part, que la présomption selon laquelle les dépenses ont été faites de manière prudente doit être écartée et, d'autre part, que les barèmes de rémunération et les niveaux de dotation convenus ne sont pas raisonnables; cependant, la [Commission] ne peut se prononcer avec le recul, mais doit tenir compte de ce qui était connu ou qui aurait dû l'être à l'époque. Le contrôle de la prudence admet un tel résultat et permet à la [Commission] de s'acquitter de son mandat légal et de jouer son rôle de substitut du marché tout en assurant un juste équilibre entre les intérêts d'[Ontario Power Generation] et ceux de ses clients. [par. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant

[153] L'affirmation des juges majoritaires selon laquelle, « si le législateur avait voulu que les dépenses [. . .] issues [de conventions collectives] se répercutent inévitablement sur les consommateurs, il

the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's

n'aurait pas jugé opportun d'investir la Commission du pouvoir de surveiller les dépenses de rémunération d'un service public » (par. 114), laisse perplexe. Le législateur ne voulait pas que *toute* dépense se répercute « inévitablement » sur les consommateurs. Son intention était de donner à la Commission le pouvoir d'arrêter des paiements justes et raisonnables en fonction des engagements actuels et projetés d'Ontario Power Generation. Ni les conventions collectives ni aucune autre obligation contractuelle ne devaient « inévitablement » se répercuter sur qui que ce soit. Cependant, elles devaient inévitablement peser dans la balance. Or, c'est précisément la nature unique des engagements contraignants qu'a invoquée la Commission lorsqu'elle a affirmé qu'elle soumettrait ces dépenses à un contrôle différent.

[154] Il se peut fort bien qu'Ontario Power Generation puisse modifier certains niveaux de dotation par voie d'attrition ou grâce à d'autres mécanismes qui ne vont pas à l'encontre de ses obligations suivant les conventions collectives. Il se peut fort bien aussi que les dépenses puissent donc être assimilées à juste titre à des dépenses prévues. La Commission ne tire toutefois aucune conclusion de fait sur l'étendue d'une telle marge de manœuvre. En fait, aucun élément du dossier ou de la preuve invoquée par la Commission n'indique dans quelle proportion les dépenses de rémunération d'Ontario Power Generation sont fixes et dans quelle proportion elles demeurent assujetties au pouvoir discrétionnaire du service public. La Commission ne tire pour ainsi dire aucune conclusion de fait quant à savoir dans quelle mesure l'entreprise pouvait réduire ses dépenses de rémunération issues des conventions collectives. Au contraire, comme le souligne la juge Aitken, la Commission [TRADUCTION] « regroupe » sans distinctions toutes les dépenses liées à la rémunération, reconnaît que la réduction de celles issues des conventions collectives « prend[rait] du temps » et « [serait] ardue », et considère qu'elles sont globalement ajustables.

[155] Comme les conventions collectives sont contraignantes en droit, il était déraisonnable que la Commission présume qu'Ontario Power Generation pouvait réduire les dépenses déterminées par ces contrats en l'absence de toute preuve en ce

words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": para. 75.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine

sens. Pour reprendre les propos des juges majoritaires, ces dépenses correspondent à des « obligations qui écartent tout pouvoir discrétionnaire [. . .] permettant [au service public] de ne pas acquitter la somme ultérieurement » (par. 82). Selon la propre méthode de la Commission, les dépenses à l'égard desquelles [TRADUCTION] « [l]a société ne pouvait prendre de mesures de réduction » bénéficient d'une « présomption de prudence » (par. 75).

[156] Refuser d'approuver des dépenses qu'Ontario Power Generation est juridiquement tenue d'acquitter en raison de ses conventions collectives obligerait le service public et son seul actionnaire, la province d'Ontario, à combler la différence en puisant ailleurs. Ontario Power Generation pourrait notamment être forcée de réduire ses investissements dans l'accroissement de sa capacité et dans l'amélioration de ses installations. Et, comme il s'agit du plus grand producteur d'électricité de l'Ontario, un tel refus pourrait non seulement nuire à la « viabilité financière » du secteur de l'électricité de la province, mais également mettre en péril la garantie d'un service d'électricité fiable.

[157] Les juges majoritaires tiennent cependant pour acquis que la relation continue entre Ontario Power Generation et les syndicats devrait conférer à la Commission, relativement aux dépenses de rémunération issues de négociations collectives, un pouvoir de refus plus grand que celui dont elle bénéficie dans le cadre d'une analyse qui exclut le recul et présume la prudence. Ils font droit également à la conclusion de la Commission selon laquelle les dépenses de rémunération issues de négociations collectives auxquelles Ontario Power Generation a participé pourraient être [TRADUCTION] « excessives » et concluent donc que la Commission a agi raisonnablement en écartant le principe de la « prudence » pour arriver à sa conclusion. Leur approche ne trouve aucun appui, pas même dans la méthode que la Commission établit elle-même pour déterminer le montant de paiements justes et raisonnables.

[158] En tout respect pour l'opinion contraire, en choisissant un critère éminemment susceptible de confirmer l'hypothèse que les dépenses issues de négociations collectives sont excessives, on se

whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004), 319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements

méprend sur l'objectif de la démarche, qui est de déterminer si ces dépenses étaient bel et bien excessives. Imputer à la négociation collective ce que l'on *suppose* constituer des dépenses excessives revient, soit dit tout en respect, à substituer ce qui a l'apparence d'une conclusion idéologique à ce qui est censé résulter d'une méthode d'analyse raisonnée qui distingue entre les dépenses convenues et les dépenses prévues, non entre les dépenses issues de négociations collectives et celles qui ne le sont pas.

[159] Je reconnais que la Commission jouit d'un vaste pouvoir discrétionnaire lui permettant de déterminer les paiements qui sont « justes et raisonnables » et, à l'intérieur de certaines limites, de [TRADUCTION] « définir la [. . .] méthode » utilisée pour établir le montant de ces paiements (règlement 53/05, art. 6; *Loi de 1998 sur la Commission de l'Énergie de l'Ontario*, art. 78.1). Cela dit, dès lors qu'elle a établi une méthode pour déterminer ce qui est juste et raisonnable, la Commission doit à tout le moins l'appliquer avec constance (*TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149 (CanLII), par. 30-32, le juge Rothstein). Pour autant, les conventions collectives ne « priment » pas le pouvoir de la Commission de fixer les paiements, mais une fois que la Commission a choisi une méthode pour exercer son pouvoir discrétionnaire, elle doit s'y tenir. En l'absence de clarté et de prévisibilité quant à la méthode à appliquer, Ontario Power Generation serait vouée à l'incertitude quant à la démarche à suivre pour déterminer les dépenses et les investissements à faire et quant à la manière de les soumettre à l'examen de la Commission. Passer sporadiquement d'une approche à une autre ou ne pas appliquer la méthode que l'on prétend appliquer crée de l'incertitude et mène inévitablement au gaspillage inutile du temps et des ressources publics en ce qu'il faut constamment anticiper un objectif réglementaire fluctuant et s'y ajuster.

[160] En refusant d'approuver des dépenses de 145 millions de dollars au motif qu'Ontario Power Generation pouvait réduire ses barèmes de rémunération et ses niveaux de dotation, la Commission a méconnu le caractère contraignant en droit des

and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, ABELLA J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

conventions collectives et a omis de distinguer les dépenses de rémunération convenues de celles qui étaient réductibles. On peut reprocher ou non à la Commission de ne pas avoir appliqué une certaine méthode, mais on peut assurément lui reprocher, sur le plan analytique, d'avoir considéré toutes les dépenses de rémunération déterminées par des conventions collectives comme des dépenses ajustables. Voir dans ces dépenses des dépenses réductibles est à mon sens déraisonnable.

[161] Je suis donc d'avis de rejeter le pourvoi, d'annuler la décision de la Commission et, à l'instar de la Cour d'appel, de renvoyer l'affaire à la Commission pour qu'elle la réexamine à la lumière des présents motifs.

Pourvoi accueilli, la juge ABELLA *est dissidente.*

Procureurs de l'appelante : Stikeman Elliott, Toronto.

Procureurs de l'intimée Ontario Power Generation Inc. : Torys, Toronto; Ontario Power Generation Inc., Toronto.

Procureurs de l'intimé le Syndicat des travailleurs et travailleuses du secteur énergétique, Syndicat canadien de la fonction publique, section locale 1000 : Paliare Roland Rosenberg Rothstein, Toronto.

Procureurs de l'intimée Society of Energy Professionals : Cavalluzzo Shilton McIntyre Cornish, Toronto.

Procureurs de l'intervenante : Jay Shepherd Professional Corporation, Toronto.

Commission des affaires sociales *Appellant*

v.

Noémie Tremblay *Respondent*

and

Minister of Manpower and Income Security *Mis en cause*

INDEXED AS: TREMBLAY *v.* QUEBEC (COMMISSION DES AFFAIRES SOCIALES)

File No.: 21651.

1992: February 27*.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier and Stevenson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Natural justice — Independence of members of Quebec Commission des affaires sociales — Institutionalized consultation procedure — Draft decisions systematically sent to Commission's legal counsel for verification and consultation — Plenary meeting requested in certain cases by commissioners responsible for making decision or by president of Commission to discuss a given question — Meetings held so as to arrive at a consensus: voting, taking of attendance and keeping of minutes — Whether consultation process created by Commission consistent with rules of natural justice — An Act respecting the Commission des affaires sociales, R.S.Q., c. C-34, s. 10.

Administrative law — Natural justice — Appearance of bias — Audi alteram partem — Quebec Commission des affaires sociales — Unanimous draft decision prepared by two commissioners present at hearing reviewed by Commission president who proposed a contrary opinion — Convening of plenary meeting of Commission to discuss question of law raised — Disagreement among commissioners responsible for making decision following meeting — Question decided by president — Whether active role played by president violates rules of

* Reasons delivered April 16, 1992.

Commission des affaires sociales *Appelante*

c.

Noémie Tremblay *Intimée*

et

Le ministre de la Main-d'œuvre et de la Sécurité du revenu *Mis en cause*

RÉPERTORIÉ: TREMBLAY *c.* QUÉBEC (COMMISSION DES AFFAIRES SOCIALES)

N° du greffe: 21651.

1992: 27 février*.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier et Stevenson.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Justice naturelle — Indépendance des membres de la Commission des affaires sociales du Québec — Procédure de consultation institutionnalisée — Projet de décision envoyé systématiquement au conseiller juridique de la Commission pour vérification et consultation — Réunion plénière convoquée dans certains cas par les commissaires chargés de rendre la décision ou par le président de la Commission pour discuter d'une question donnée — Réunions menées de façon à dégager un consensus: vote, prise des présences et rédaction d'un procès-verbal — Le mécanisme de consultation mis en place par la Commission est-il conforme aux principes de justice naturelle? — Loi sur la Commission des affaires sociales, L.R.Q., ch. C-34, art. 10.

Droit administratif — Justice naturelle — Apparence de partialité — Droit d'être entendu — Commission des affaires sociales du Québec — Projet de décision unanime préparé par les deux commissaires présents à l'audience examiné par le président de la Commission qui propose une opinion contraire — Convocation d'une réunion plénière de la Commission pour discuter de la question de droit en litige — Désaccord entre les commissaires chargés de rendre la décision suite à cette réunion — Question en litige tranchée par le président

* Motifs déposés le 16 avril 1992.

natural justice — An Act respecting the Commission des affaires sociales, R.S.Q., c. C-34, s. 10.

Courts — Administrative tribunals — Confidentiality of deliberations — Objections by Quebec Commission des affaires sociales to questions from social aid recipient concerning formal consultation process set up by Commission — Whether objections to evidence based on deliberative secrecy should be dismissed.

Following the refusal of the Ministère de la Main-d'œuvre et de la Sécurité du revenu of Quebec to reimburse the cost of certain dressings and bandages, the respondent, who was receiving social aid, appealed this decision to the Commission des affaires sociales. The issue was whether the dressings and bandages came within the definition of "medical equipment" within the meaning of s. 10.04 of the *Regulation on Social Aid.* The appeal was heard by two commissioners and the parties argued in writing. At the close of the hearing, a draft decision favourable to the respondent was signed by the commissioners and sent to the Commission's legal counsel for verification and consultation in accordance with established practice at the Commission. As the legal counsel was on vacation, it was the president of the Commission who reviewed the draft. He then sent the two commissioners a memorandum in which he explained his contrary position. Further to this memorandum, and at the request of a commissioner, the point of law raised was submitted to the "consensus table" machinery of the Commission. At that meeting, a majority of members present expressed their disagreement with the position adopted in the draft decision and, shortly afterwards, one of the commissioners changed her mind and wrote an opinion unfavourable to the respondent. The commissioners were then divided on the question and the matter was submitted to the president of the Commission pursuant to s. 10 of the *Act respecting the Commission des affaires sociales.* The president decided the matter in the way he had already indicated to the commissioners in his memorandum. The respondent's appeal was accordingly dismissed. Alleging a breach of the rules of natural justice, the respondent challenged the Commission's decision by an action in nullity and asked that the "first draft decision" be declared the Commission's true decision. The Superior Court concluded that the Commission's decision contravened the rules of natural justice and allowed the action, but it refused to regard the first draft of the decision as the Commission's true decision. The Court of Appeal, in a majority decision, upheld the trial judgment.

— Le rôle actif joué par le président viole-t-il les principes de justice naturelle? — Loi sur la Commission des affaires sociales, L.R.Q., ch. C-34, art. 10.

Tribunaux — Tribunaux administratifs — Caractère confidentiel du délibéré — Objections de la Commission des affaires sociales du Québec aux questions du bénéficiaire portant sur le processus de consultation formel mis sur pied par la Commission — Les objections à la preuve basées sur le secret du délibéré doivent-elles être rejetées?

À la suite du refus du ministère de la Main-d'œuvre et de la Sécurité du revenu du Québec de rembourser le coût de certains pansements et bandages, l'intimée, bénéficiaire de l'aide sociale, interjette un appel de cette décision devant la Commission des affaires sociales. La question en litige consiste à déterminer si les pansements et bandages entrent dans la définition d'«équipement médical» au sens de l'art. 10.04 du *Règlement de l'aide sociale.* L'appel est entendu par deux commissaires et les parties plaident par écrit. Au terme de l'audition, un projet de décision favorable à l'intimée est signé par les commissaires et expédié au conseiller juridique de la Commission pour vérification et consultation comme le veut la pratique établie à la Commission. Le conseiller juridique étant en vacances, c'est le président de la Commission qui examine ce projet. Il envoie alors aux deux commissaires une note de service dans laquelle il leur expose sa position contraire. Suite à cette note, et à la demande d'un commissaire, la question en litige est soumise au mécanisme de la «table des consensus» de la Commission. Lors de cette réunion, la majorité des membres présents exprime leur désaccord avec la position adoptée dans le projet de décision et, peu de temps après, l'un des commissaires change d'avis et rédige une opinion défavorable à l'intimée. Les commissaires se trouvent alors divisés sur la question et l'affaire est soumise au président de la Commission conformément à l'art. 10 de la *Loi sur la Commission des affaires sociales.* Le président tranche la question dans le sens qu'il avait déjà indiqué aux commissaires dans sa note de service. L'appel de l'intimée est donc rejeté. Invoquant la violation des règles de justice naturelle, l'intimée attaque la décision de la Commission par action en nullité et demande que le «premier projet de décision» soit déclaré la décision réelle de la Commission. La Cour supérieure conclut que la décision de la Commission contrevient aux principes de justice naturelle et accueille l'action, mais elle refuse de considérer le premier projet de décision comme la véritable décision de la Commission. La Cour d'appel à la majorité confirme le jugement de première instance.

Held: The principal appeal and the incidental appeal should be dismissed.

By the very nature of the control exercised over their decisions, administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. In this case, the objections by the Commission to the questions raised by the respondent concerning the process for dealing with draft decisions within the Commission should be dismissed. These questions did not touch on matters of substance or the decision makers' thinking on such matters. They were directed instead at the formal process established by the Commission to ensure consistency in its decisions. The questions were concerned first with the institutional setting in which the decision was made and how it functioned, and second with its actual or apparent influence on the intellectual freedom of the decision makers.

The consultation machinery created by the Commission is not consistent with the rules of natural justice. While a consultation process by plenary meeting designed to promote adjudicative coherence may prove acceptable for an administrative tribunal, such a process must not however impede the ability or freedom of the members of the tribunal to decide according to their consciences and opinions, or create an appearance of bias in the minds of litigants. Here, the evidence depicts a system in which constraint seems to have outweighed influence. The "consensus tables" held by the Commission, although optional in theory, are in practice compulsory when the legal counsel determines that the proposed decision is contrary to previous decisions. Moreover, the rules for holding plenary meetings of the Commission disclose a number of points which taken together could create an appearance of bias. In particular, a plenary meeting may be requested not only by the commissioners responsible for making the decision but also by the president of the Commission. The mere fact that the president can of his own motion refer a matter for plenary discussion may in itself be a constraint on decision makers. Since the statute clearly provides that it is the decision makers who must decide a matter, they must retain the right to initiate consultation; if they do not wish to consult, they must be free not to do so. Compulsory consultation creates an appearance of a lack of independence, if not actual constraint. In cases of new subject-matter, compulsory consultation circumvents the will of the legislature by seeking to establish a prior consensus by persons not responsible for deciding the

Arrêt: Le pourvoi principal et le pourvoi incident sont rejetés.

De par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne peuvent invoquer le secret du délibéré au même degré que les tribunaux judiciaires. Le secret demeure la règle, mais il pourra néanmoins être levé lorsque le justiciable peut faire état de raisons sérieuses de croire que le processus suivi n'a pas respecté les règles de justice naturelle. En l'espèce, les objections formulées par la Commission aux questions posées par l'intimée relativement au cheminement que doivent suivre les projets de décisions au sein de la Commission doivent être rejetées. Ces questions ne touchaient pas les motifs au fond ou leur élaboration dans la pensée des décideurs. Elles visaient plutôt le processus formel mis sur pied par la Commission pour assurer la cohérence de sa jurisprudence. Les questions portaient, d'une part, sur le cadre institutionnel dans lequel la décision est rendue et son fonctionnement et, d'autre part, sur son influence réelle ou apparente sur la liberté d'esprit des décideurs.

Le mécanisme de consultation mis sur pied par la Commission n'est pas conforme aux principes de justice naturelle. Bien qu'un processus de consultation par réunion plénière visant à favoriser la cohérence de la jurisprudence puisse s'avérer acceptable pour un tribunal administratif, un tel processus ne doit cependant pas entraver la capacité ou la liberté des membres du tribunal de décider selon leurs conscience et opinions, ni créer une apparence de partialité dans l'esprit des justiciables. En l'espèce, la preuve dépeint un système où la contrainte semble l'emporter sur l'influence. Les «tables de consensus» tenues par la Commission, bien qu'en principe facultatives, sont, en pratique, imposées lorsque le conseiller juridique détermine que la décision proposée va à l'encontre de la jurisprudence antérieure. De plus, les règles relatives au fonctionnement des réunions plénières de la Commission révèlent un ensemble d'éléments susceptibles de créer une apparence de partialité. En particulier, la réunion plénière peut être convoquée non seulement par les commissaires chargés de rendre la décision mais également par le président de la Commission. La simple possibilité que le président réfère, de son propre chef, une question pour discussion en plénière peut en soi constituer une contrainte pour les décideurs. Puisque la loi prévoit clairement que ce sont les décideurs qui doivent trancher la question, ils doivent garder l'initiative de la consultation; s'ils ne souhaitent pas consulter, ils doivent être libres de ne pas le faire. Une consultation imposée crée une apparence de manque d'indépendance, sinon une contrainte réelle. Dans les cas de matières nouvelles, une consultation

case. There are other facts which support this conclusion of an apparent lack of independence. Plenary meetings of the Commission are held so as to arrive at a consensus: the members present vote by a show of hands, attendance is taken and minutes are kept. These mechanisms may exert undue pressure on decision makers and are not to be recommended. The Commission's decision, as a product of this system of internal consultation, thus seems to have been made in breach of the rules of natural justice. Certain aspects of the system established by the Commission create an appearance of "systemic pressure".

Even if the formal consultation machinery had been in keeping with the rules of natural justice, the fact that the president of the Commission expressed his opinion to the commissioners responsible for making the decision, inviting them to reconsider it, and then became a decision maker is hardly consistent with these rules. The *Act respecting the Commission des affaires sociales* gives the president the power to settle disputes but, in view of the active part he took in the discussion, he should have delegated this task to one of his vice-presidents, pursuant to s. 10 of the Act. The active part played by the president in this matter is likely to create a reasonable apprehension of bias in an informed observer. Although the president had not heard the parties when he finally decided the matter, however, the procedure used in this case does not infringe the *audi alteram partem* rule. The question on which the Commission had to rule was a point of law and the parties pleaded in writing. There is nothing to indicate that new arguments of law were raised at the "consensus table" or that the president considered new points at the decision-making stage. Since he in fact decided on the basis of the written file as prepared by the commissioners present at the hearing, there was no breach of the *audi alteram partem* rule.

The first "decision" rendered by the commissioners was in their minds only a draft, a provisional opinion, and cannot be regarded as the Commission's true decision. The intent of the decision makers must be analyzed in terms of the institutionalized consultation process that existed at the time the decision was made, even though that process now proves to have contravened the rules of

imposée contourne la volonté du législateur en cherchant à établir un consensus préalable par des personnes non saisies de la question. D'autres éléments factuels supportent ce constat d'apparence de manque d'indépendance. Les réunions plénières de la Commission sont menées de façon à dégager un consensus: les membres présents votent à main levée, les présences sont prises et un procès-verbal est rédigé. Ces mécanismes peuvent exercer une pression indue sur les décideurs et sont à déconseiller. La décision de la Commission, en tant que produit de ce système de consultation interne, semble donc avoir été rendue en violation des règles de justice naturelle. Certains des éléments du système mis en place par la Commission créent une apparence de «pression systémique».

Même si les mécanismes formels de consultation avaient été conformes aux principes de justice naturelle, le fait que le président de la Commission ait exprimé son opinion aux commissaires chargés de rendre la décision, les invitant à la reconsidérer, pour ensuite se retrouver décideur, est peu compatible avec ces principes. La *Loi sur la Commission des affaires sociales* donne au président le pouvoir de trancher les désaccords mais, étant donné la part active qu'il avait prise au débat, il aurait dû, conformément à l'art. 10 de la Loi, confier cette tâche à un de ses vice-présidents. Le rôle actif joué par le président dans cette affaire est de nature à susciter une crainte raisonnable de partialité chez un observateur informé. Toutefois, bien que le président n'ait pas entendu les parties lorsqu'il a finalement tranché la question, la procédure suivie en l'espèce ne viole pas la règle *audi alteram partem*. La question sur laquelle la Commission devait se prononcer était une question de droit et les parties ont plaidé par écrit. Rien n'indique que des arguments de droit nouveaux aient été soulevés à la «table des consensus» ou que le président ait considéré de nouveaux arguments à l'étape de la décision. Puisqu'il a, en fait, décidé sur la base du dossier écrit tel que constitué par les commissaires présents à l'audience, il n'y a donc pas eu violation de la règle *audi alteram partem*.

La première «décision» rendue par les commissaires n'était dans leur esprit qu'un projet, qu'une opinion provisoire, et elle ne peut être considérée comme étant la décision véritable de la Commission. L'intention des décideurs doit s'analyser en tenant compte du processus de consultation institutionnalisé qui existait au moment où la décision a été rendue, même si ce processus

natural justice. It is therefore the second "decision" which is the Commission's true decision.

Cases Cited

Applied: *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; **referred to:** *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796.

Statutes and Regulations Cited

Act respecting the Commission des affaires sociales, R.S.Q., c. C-34, s. 10 [am. 1980, c. 33, s. 4].
Regulation on Social Aid, (1975) 107 O.G. II 6455, s. 10.04.
Social Aid Act, R.S.Q. 1977, c. A-16.

Authors Cited

De Smith, S. A. *Judicial Review of Administrative Action*, 4th ed. By J. M. Evans. London: Stevens & Sons Ltd., 1980.

APPEALS from a judgment of the Quebec Court of Appeal, [1989] R.J.Q. 2053, 25 Q.A.C. 169, 42 Admin. L.R. 234, affirming a judgment of the Superior Court, [1985] C.S. 490, [1985] C.A.S. 153, quashing a decision of the Commission des affaires sociales, [1983] C.A.S. 713 (*sub nom. Aide sociale — 86*). Principal and incidental appeals dismissed.

William J. Atkinson, *Chantal Masse* and *Murielle Lahaye*, for the appellant.

Paul Faribault and *André Collard*, for the respondent.

English version of the judgment of the Court delivered by

GONTHIER J.—The case at bar provides an opportunity for the Court to apply the rules already stated by it in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, on so-called "institutional" decisions. The Court must accordingly decide whether the decision of the appellant, the Commission des affaires sociales ("the Commission"), which refused to reimburse the respondent Noémie Tremblay for certain dressings and

s'avère aujourd'hui contrevenir aux règles de justice naturelle. C'est donc la deuxième «décision» qui constitue la décision véritable de la Commission.

Jurisprudence

Arrêt appliqué: *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282; **arrêt mentionné:** *MacKeigan c. Hickman*, [1989] 2 R.C.S. 796.

Lois et règlements cités

Loi sur l'aide sociale, L.R.Q. 1977, ch. A-16.
Loi sur la Commission des affaires sociales, L.R.Q., ch. C-34, art. 10 [mod. 1980, ch. 33, art. 4].
Règlement de l'aide sociale, (1975) 107 G.O. II 6455, art. 10.04.

Doctrine citée

De Smith, S. A. *Judicial Review of Administrative Action*, 4th ed. By J. M. Evans. London: Stevens & Sons Ltd., 1980.

POURVOIS contre un arrêt de la Cour d'appel du Québec, [1989] R.J.Q. 2053, 25 Q.A.C. 169, 42 Admin. L.R. 234, qui a confirmé un jugement de la Cour supérieure, [1985] C.S. 490, [1985] C.A.S. 153, qui avait annulé une décision de la Commission des affaires sociales, [1983] C.A.S. 713 (*sub nom. Aide sociale — 86*). Pourvois principal et incident rejetés.

William J. Atkinson, *Chantal Masse* et *Murielle Lahaye*, pour l'appelante.

Paul Faribault et *André Collard*, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE GONTHIER—La présente affaire donne l'occasion à la Cour de mettre en application les règles qu'elle a déjà formulées dans l'arrêt *SITBA c. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 R.C.S. 282, au sujet des décisions dites «institutionnelles». La Cour doit ainsi décider si la décision de l'appelante, la Commission des affaires sociales (la «Commission»), qui refuse à l'intimée Noémie Tremblay le remboursement de certains

bandages was made contrary to the rules of natural justice. This decision of the Commission was the end result of an internal consultation process established by the Commission to ensure consistency in its decisions.

At the hearing, the Court dismissed the principal and incidental appeals from the bench with costs. The reasons that follow are in support of that disposition.

I—Statement of Facts

At the relevant time, the respondent Noémie Tremblay was receiving social aid. The Ministère de la Main-d'œuvre et de la Sécurité du revenu denied her claim to be reimbursed for the cost of certain dressings and bandages. The respondent appealed this decision to the Commission in accordance with the *Social Aid Act*, R.S.Q. 1977, c. A-16. This appeal is governed by the *Act respecting the Commission des affaires sociales*, R.S.Q., c. C-34.

On January 20, 1983 the appeal was heard in the social aid and allowances division by a "quorum" consisting of a member of the Commission, Mr. Claude Pothier, and an assessor, Mrs. Dolorès Landry. The point at issue was whether the dressings and bandages came within the definition of "medical equipment" within the meaning of s. 10.04 of the *Regulation on Social Aid* then in effect. As this point was purely one of law, the parties proceeded by admissions and argued in writing. No witnesses were heard.

At the close of the hearing, Mr. Pothier undertook to draft a decision which he then sent to Mrs. Landry for comments and approval. This draft decision was favourable to the respondent. Mrs. Landry signed the draft, which was then sent to the Commission's legal counsel for verification and consultation in accordance with established practice at the Commission. As the legal counsel was on vacation, it was the president of the Commission, Hon. Gilles Poirier, who reviewed the draft. He then sent the decision makers a memo-

pansements et bandages a été rendue en contravention des principes de justice naturelle. Cette décision de la Commission était l'aboutissement d'un processus de consultation interne mis sur pied par la Commission pour assurer la cohérence de sa jurisprudence.

À l'audition, la Cour a, sur le banc, rejeté les appels principal et incident avec dépens. Les motifs qui suivent sont au soutien de ce dispositif.

I—Exposé des faits

L'intimée Noémie Tremblay est, à l'époque pertinente, bénéficiaire de l'aide sociale. Le ministère de la Main-d'œuvre et de la Sécurité du revenu refuse sa demande de remboursement du coût de certains pansements et bandages. L'intimée appelle de cette décision devant la Commission, conformément à la *Loi sur l'aide sociale*, L.R.Q. 1977, ch. A-16. Cet appel est régi par la *Loi sur la Commission des affaires sociales*, L.R.Q., ch. C-34.

Le 20 janvier 1983, l'appel est entendu en division de l'aide et des allocations sociales par un «quorum» composé d'un membre de la Commission, Me Claude Pothier, et d'un assesseur, Mme Dolorès Landry. La question en litige consistait à déterminer si les pansements et bandages entraient dans la définition d'«équipement médical» au sens de l'art. 10.04 du *Règlement de l'aide sociale* alors en vigueur. Cette question étant une pure question de droit, les parties procèdent par admissions et plaident par écrit. Aucun témoin n'est entendu.

Au terme de l'audition, Me Pothier se charge de rédiger un projet de décision qu'il fait ensuite parvenir à Mme Landry pour commentaires et approbation. Ce projet de décision est favorable à l'intimée. Madame Landry signe le projet, qui est ensuite expédié au conseiller juridique de la Commission pour vérification et consultation comme le veut la pratique établie à la Commission. Le conseiller juridique étant en vacances, c'est le président de la Commission, l'honorable Gilles Poirier, qui examine ce projet. Il envoie alors aux déci-

randum dated March 8, 1983 in which he explained his position, which was contrary to their own. On receiving this memorandum, Mr. Pothier asked that the point of law raised by the case be submitted to the "consensus table" machinery of the Commission. The respondent's case was accordingly placed on the agenda for the next plenary meeting of the Commission.

At that meeting, a majority of members present supported the viewpoint opposed to that originally taken by Mr. Pothier and Mrs. Landry. Shortly after this meeting, Mrs. Landry changed her mind and decided to write an opinion unfavourable to the respondent. As the quorum was thereby in disagreement, the matter was submitted to the president of the Commission, Judge Poirier, as required by the *Act respecting the Commission des affaires sociales*. Judge Poirier then decided the matter in the way he had already indicated to the decision makers in his memorandum of March 8, 1983. The Commission accordingly dismissed the respondent's appeal: [1983] C.A.S. 713 (*sub nom. Aide sociale — 86*).

The respondent then challenged the Commission's decision by an action in nullity: she alleged a breach of the rules of natural justice. The respondent further asked that the first draft decision written by the members of the Commission who heard her appeal be declared the Commission's true decision. In the Superior Court, Dugas J. concluded that the Commission's decision contravened the rules of natural justice, but he refused to regard the first draft of the decision as the Commission's true decision: [1985] C.S. 490, [1985] C.A.S. 153. The Court of Appeal upheld the trial judgment: [1989] R.J.Q. 2053, 25 Q.A.C. 169, 42 Admin. L.R. 234. On the principal appeal, Jacques and Mailhot JJ.A. concluded that the Commission's decision was made in breach of the rules of natural justice, Monet J.A. dissenting; on the incidental appeal, Monet and Mailhot JJ.A. refused to regard the first version of the Commission's decision as the true one. Jacques J.A. differed on this point.

deurs une note datée du 8 mars 1983 dans laquelle il leur expose sa position, qui est opposée à la leur. Suite à cette note, Me Pothier demande que la question de droit soulevée par cette affaire soit soumise au mécanisme de la «table des consensus» de la Commission. Le dossier de l'intimée est donc mis à l'ordre du jour de la prochaine réunion plénière de la Commission.

Lors de cette réunion, la majorité des membres présents se prononce en faveur du point de vue opposé à celui pris à l'origine par Me Pothier et Mme Landry. Peu de temps après cette réunion, Mme Landry change d'avis et décide de rédiger une opinion défavorable à l'intimée. Le quorum se trouvant par le même fait en désaccord, l'affaire est soumise au président de la Commission, le juge Poirier, comme le veut la *Loi sur la Commission des affaires sociales*. Le juge Poirier tranche alors la question dans le sens qu'il avait déjà indiqué aux décideurs dans sa note de service du 8 mars 1983. La Commission rejette donc l'appel de l'intimée: [1983] C.A.S. 713 (*sub nom. Aide sociale — 86*).

L'intimée attaque alors la décision de la Commission par action en nullité; elle invoque violation des règles de justice naturelle. L'intimée demande de plus que le premier projet de décision rédigé par les membres de la Commission qui ont entendu son appel soit déclaré la décision réelle de la Commission. En Cour supérieure, le juge Dugas conclut que la décision de la Commission contrevient aux principes de justice naturelle, mais il refuse de considérer le premier projet de décision comme la véritable décision de la Commission: [1985] C.S. 490, [1985] C.A.S. 153. La Cour d'appel confirme le jugement de première instance: [1989] R.J.Q. 2053, 25 Q.A.C. 169, 42 Admin. L.R. 234. En appel principal, les juges Jacques et Mailhot concluent que la décision de la Commission a été rendue en violation des principes de justice naturelle, le juge Monet étant dissident; en appel incident, les juges Monet et Mailhot refusent par contre de considérer la première version de la décision de la Commission comme étant la décision véritable. Le juge Jacques est d'avis contraire sur ce point.

II—Relevant Legislation

An Act respecting the Commission des affaires sociales, R.S.Q., c. C-34

10. A matter shall be decided by the majority of the members and assessors having heard it.

When opinions are equally divided on a question, it shall be decided by the president or the vice-president he designates.

III—Judgments of Courts Below

Superior Court, [1985] C.S. 490

In the Superior Court, Dugas J. agreed with the respondent that there had been a breach of natural justice. He described the function of the legal counsel to whom the draft decision was sent as follows, at p. 494:

[TRANSLATION] The legal counsel thus has a critical part to play in the verification process. He is asked to verify not only drafting errors, the accuracy of references to legislation and to regulations and of citations—as to which little need be said—but also whether the decision is in accordance with other decisions of the Commission. If the question is a new one, he attempts to determine whether a consensus can be arrived at based on the proposed rule.

. . .

The guidance given to the decision makers by the legal counsel gives cause for reflection. The fact that the decision maker is free to object to the legal counsel's suggestions does not take away the procedure's chilling effect. The same is true of the fact that the decision maker may ask for the matter to be brought before a general meeting.

The trial judge then made the following observations, at pp. 495-96, regarding the "consensus table" procedure established by the Commission:

[TRANSLATION] The reference to the general meeting is no less constraining because the decision maker does not necessarily have to accept it.

. . .

The question the decision makers had to decide was submitted to the other members of the Commission for

II—Disposition législative pertinente

Loi sur la Commission des affaires sociales, L.R.Q., ch. C-34

10. Les décisions sont prises à la majorité des membres et des assesseurs ayant entendu une affaire.

Lorsque les opinions se partagent également sur une question, celle-ci est tranchée par le président ou le vice-président que celui-ci désigne.

III—Jugements des instances inférieures

Cour supérieure, [1985] C.S. 490

En Cour supérieure, le juge Dugas donne raison à l'intimée quant à la violation de la justice naturelle. Il décrit ainsi, à la p. 494, le rôle du conseiller juridique à qui le projet de décision a été transmis:

Dans le processus de vérification, le conseiller juridique joue donc un rôle capital. On lui demande de vérifier non seulement les erreurs de rédaction, l'exactitude des renvois aux lois et aux règlemens (*sic*) et des citations—sur quoi, il n'y aurait que peu à dire—mais aussi la conformité de l'opinion à la jurisprudence de la Commission. S'il s'agit d'une question nouvelle, il cherche à vérifier si un consensus peut être établi autour de la norme proposée.

. . .

L'encadrement des décideurs par le conseiller juridique laisse songeur. Ce n'est pas qu'on reconnaisse au décideur la liberté de résister aux suggestions du conseiller juridique qui enlève au procédé son effet de contrainte. Ce n'est pas non plus que le décideur peut exiger que la question soit amenée devant l'assemblée générale.

Le premier juge fait ensuite les remarques suivantes, aux pp. 495 et 496, en ce qui concerne la procédure de «table des consensus» mise sur pied par la Commission:

Le renvoi à la réunion générale ne cesse pas d'être contraignant parce qu'il n'est pas imposé au décideur de se rallier.

. . .

La question que devaient trancher les décideurs fut soumise à l'appréciation des autres membres de la Com-

their consideration. Of the 21 persons eligible to vote, three approved the decision makers' joint opinion, 13 rejected it and five abstained from voting. Faced with a majority like this, "clearly, the quorum may be somewhat more strongly influenced", as the president recognized.

Dugas J. concluded, at p. 496:

[TRANSLATION] To the extent that the established procedure requires the decision makers to submit their opinions to systematic review by the legal counsel, and in some cases to their colleagues for approval, the procedure followed creates systemic pressure on the decision makers and interferes with their independence.

It cannot be argued that this is simply an internal consultation procedure: it is a compulsory consultation.

Accordingly, the court cannot find that the disagreement between the decision makers, which was necessary for the president to exercise his deciding powers, was the result of a valid decision-making process.

At page 497 the judge acknowledged that the objective of this consultation procedure, that of ensuring adjudicative coherence, was valid but objected to the particular features of the system set up here:

[TRANSLATION] This judgment should not be read as a condemnation of any internal consultation procedure in collegiate bodies. On the contrary, it is desirable that such consultations should take place freely whenever a decision maker feels the need to sound out a colleague's view. It should not be taken as suggesting that it is not possible for the members of a collegiate body to reach a consensus.

. . .

However, the court is of the view that to the extent that the consultations are compulsory and that they are meant to control the decision, the system imposing them does not provide a litigant with a "public and fair hearing by an independent and impartial tribunal" as guaranteed by s. 23 of the *Charter of Human Rights and Freedoms*.

He further noted, at pp. 496-97, the fact that when the president of the Commission was called on to resolve the disagreement between the parties

mission. Sur les 21 personnes admises à voter, 3 approuvèrent l'opinion commune des décideurs, 13 la condamnèrent et 5 s'abstinrent de voter. Devant une telle majorité, «évidemment, le quorum est peut-être un peu plus influencé», comme l'a reconnu le président.

Le juge Dugas conclut, à la p. 496:

Dans la mesure où la pratique établie impose aux décideurs de soumettre leurs opinions à l'examen systématique du conseiller juridique et, dans certains cas, à l'approbation de leurs collègues, la procédure suivie établit une pression systémique sur les décideurs et porte atteinte à leur indépendance.

On ne saurait prétendre qu'il s'agit d'une simple procédure de consultation interne: il s'agit d'une consultation imposée.

La Cour ne peut donc reconnaître que le désaccord des décideurs, nécessaire à l'exercice par le président de son pouvoir de trancher, soit le résultat d'un processus décisionnel valable.

Le juge reconnaît, à la p. 497, la validité de l'objectif visé par cette procédure de consultation, soit d'assurer une jurisprudence cohérente, mais s'objecte aux caractéristiques particulières du système mis en place en l'espèce:

Il ne faudrait pas que ce jugement soit interprété comme la condamnation de toute procédure de consultation interne dans les organismes collégiaux. Il est au contraire souhaitable que de telles consultations puissent se dérouler librement chaque fois qu'un décideur sent le besoin de connaître l'opinion d'un collègue. Il ne faudrait pas conclure qu'il n'est pas possible aux membres d'un organisme collégial d'établir un consensus.

. . .

Mais la Cour est d'avis que, dans la mesure où les consultations sont imposées et visent à contrôler la décision, le système qui les impose ne permet pas à un justiciable d'avoir «une audition publique et impartiale de sa cause par un tribunal indépendant» que l'article 23 de la *Charte des droits et libertés de la personne* lui garantit.

Il souligne par ailleurs, aux pp. 496 et 497, le fait que le président de la Commission, appelé à trancher le désaccord entre les parties, s'était déjà

he had already ruled on the point in his letter to the decision makers:

[TRANSLATION] The plaintiff, who has a right not only that justice shall be done but also that it shall be seen to be done, might well believe that the president had already decided the matter before assuming jurisdiction over it again so as to resolve the decision makers' disagreement.

The judge refused to recognize the first document as the Commission's true decision, noting at p. 497 that the decision makers [TRANSLATION] "never regarded the joint opinion as their final decision".

Court of Appeal, [1989] R.J.Q. 2053

The Court of Appeal dismissed the principal appeal brought by the Commission and the incidental appeal brought by the respondent Noémie Tremblay.

Jacques J.A.—dissenting on the incidental appeal

Jacques J.A. concurred with the trial judge, at p. 2075, in his analysis of the internal consultation and verification process:

[TRANSLATION] This procedure is more than a merely optional consultation, one which is purely voluntary and solely in the discretion of the decision maker, like that existing between judges of the same jurisdiction or between judges of different jurisdictions. It is compulsory. Each person must observe it when it is sought.

Although the vote is not binding on the decision makers, it is unwarranted pressure which deprives them of their intellectual independence and gives litigants the feeling that their case is being decided by persons other than their judges and for unknown reasons. It institutionalizes pressure. Clearly, any pressure is suspect from the outset.

As to the objection to the evidence on grounds of deliberative secrecy, taken under reserve at the hearing in the Superior Court, Jacques J.A. wrote that the trial judge was implicitly of the view that it was without basis. However, he went on, at pp. 2074-75:

prononcé sur la question dans sa lettre aux décideurs:

La demanderesse, qui a droit non seulement à ce que justice soit faite, mais aussi à la transparence de l'acte judiciaire, pourra toujours croire que le président avait déjà jugé de la question avant de s'en saisir de nouveau pour trancher le désaccord des décideurs.

Le juge refuse de reconnaître le premier document comme la décision véritable de la Commission, constatant à la p. 497 que les décideurs «n'ont jamais considéré l'opinion commune comme constituant leur décision définitive».

Cour d'appel, [1989] R.J.Q. 2053

La Cour d'appel rejette l'appel principal interjeté par la Commission et l'appel incident interjeté par l'intimée Noémie Tremblay.

Le juge Jacques—dissident sur l'appel incident

Le juge Jacques partage l'avis du premier juge, à la p. 2075, en ce qui concerne l'analyse du processus de consultation et vérification interne:

Cette procédure est plus qu'une simple consultation facultative, purement volontaire et au seul gré du décideur, comme il en existe entre les juges d'une même juridiction, ou même entre les juges de différentes juridictions. Elle est imposée. Chacun a l'obligation de s'y soumettre lorsqu'elle est recherchée.

Quoique le vote ne lie pas les décideurs, il constitue une pression indue de nature à les priver de leur indépendance intellectuelle et à créer chez les justiciables le sentiment que leur affaire est décidée par d'autres que leurs juges et pour des motifs inconnus. Elle institutionnalise une pression. Or, toute pression est suspecte dès le départ.

Quant à l'objection à la preuve basée sur le secret du délibéré, qui avait été prise sous réserve lors de l'audition en Cour supérieure, le juge Jacques écrit que le juge du procès a implicitement considéré qu'elle était mal fondée. Il poursuit cependant, aux pp. 2074 et 2075:

[TRANSLATION] I consider that the deliberations of a judicial or quasi-judicial tribunal or of a collegiate court are confidential. Research and discussion with colleagues on points of law are preliminary steps. This process, just as it may lead to a decision, may not lead anywhere. If it leads to a decision it is explained in that decision; if not, it is only preparatory. The process is part of the intellectual route taken to arrive at the decision: various rules of law are studied and rejected as not relevant, or adopted and applied with or without modifications to the problem under consideration. What is crucial in this process is that the judge or decision maker should act with intellectual freedom. This freedom is one aspect of impartiality, just like the absence of any interest in the outcome.

However, this confidentiality yields to application of the rules of natural justice, as observance of these rules is the bedrock of any legal system.

In exceptional cases, therefore, the confidentiality requirement may be lifted when good grounds for doing so are first submitted to the tribunal.

On the incidental appeal, Jacques J.A. would have regarded the first "decision" as that of the Commission, since this was the only one arrived at by a process consistent with the rules of natural justice.

Mailhot J.A.

Like Jacques J.A., Mailhot J.A. considered that the institutionalized consultation process imposed in the case at bar interfered with the independence of the decision makers. In particular, she noted at p. 2077 the part played by the president of the Commission:

[TRANSLATION] Because of the special function conferred by the statute on the president of the body in the event of a disagreement between two members, I feel that he could not place himself in a situation where he was on his own initiative and by direct intervention raising a point that could create a disagreement between two previously unanimous decision makers. The reason is that, because of the function conferred on him by s. 10 of the statute as final decision maker responsible for resolving the impasse, the president would then be likely to decide the point raised at the final level (in the absence of extraordinary remedies, of course).

Je suis d'avis que le délibéré d'un tribunal judiciaire ou quasi judiciaire ou d'une cour collégiale est confidentiel. Les recherches et les discussions entre collègues sur des points de droit sont des démarches préliminaires. Ce processus peut ne mener à rien, tout comme il peut mener à une décision. Dans ce dernier cas, il est exposé dans la décision; dans le cas contraire, il n'est que préparatoire. Ce processus fait partie du cheminement intellectuel suivi pour arriver à une décision; diverses règles de droit sont étudiées, puis rejetées comme non pertinentes ou retenues et appliquées avec ou sans modification au problème sous étude. Ce qui est primordial dans ce processus, c'est la liberté intellectuelle dont doit jouir le juge, ou le décideur. Cette liberté est l'un des aspects de l'impartialité, tout comme l'absence d'intérêt dans le litige en est un autre.

Cette confidentialité cède cependant devant l'application des règles de la justice naturelle, car le respect de ces règles constitue la première assise de tout système judiciaire.

La confidentialité peut donc être exceptionnellement levée lorsque des motifs sérieux de le faire sont préalablement soumis au tribunal.

En appel incident, le juge Jacques aurait reconnu la première «décision» comme étant celle de la Commission, puisqu'il s'agit de la seule dont le cheminement ait suivi les règles de justice naturelle.

Le juge Mailhot

Comme le juge Jacques, le juge Mailhot considère que le processus de consultation institutionnalisé imposé en l'espèce porte atteinte à l'indépendance des décideurs. Elle souligne en particulier, à la p. 2077, le rôle joué par le président de la Commission:

À cause du rôle particulier dévolu par la loi au président de l'organisme en matière de désaccord entre deux membres, je suis d'avis que celui-ci ne pouvait pas se placer dans une situation où il soulevait de lui-même et par intervention directe un point qui était susceptible d'amener un désaccord entre les deux décideurs préalablement unanimes. Ceci parce qu'ensuite le président, à cause du rôle de décideur ultime pour trancher l'impasse que lui confie l'article 10 de la loi, était susceptible de décider en dernier ressort de la question soulevée (sauf les recours extraordinaires, évidemment).

This is where the decision-making process taken together with the "consensus table" does not comply with the rules of natural justice. When a litigant learns of such a situation he will, in my opinion rightly, feel that his case was decided by persons other than those who heard it and will have the impression that he was not treated in accordance with generally accepted rules of fairness.

Mailhot J.A. refused to regard the first "decision" as being that of the Commission. She would have referred the matter back to the Commission for the question to be decided again.

Monet J.A.—dissenting on the principal appeal

Monet J.A. dealt first with the objections to the evidence made by the Commission at the trial. He considered that deliberative secrecy could only be lifted in exceptional circumstances. Looking at the statement of claim, he concluded at p. 2061 that none of its allegations justified admitting evidence of the facts relating to the deliberative process, and that the objection to the evidence should therefore have been allowed as soon as it was made.

On Dugas J.'s finding that the consultation procedure exerted "systemic pressure" on the decision makers, Monet J.A. felt there was no support for this in the evidence presented at the trial. [TRANSLATION] "It is quite clear", he wrote, "that the consultation was not compulsory and that the vote did not constitute undue pressure" (p. 2065). After examining the testimony, Monet J.A. concluded at p. 2067 that he was:

[TRANSLATION] ... quite unable to conclude that the decision was invalid ... on account of undue pressure, constraint or influence on the decision makers that would be likely to interfere with the independence which in our law they must enjoy.

Monet J.A. therefore considered that the Commission's decision did not conflict with the rules of natural justice and there was accordingly no need to decide on the nature of the first "decision". If he had had to do so, however, he would not have regarded the first draft as the Commission's true decision.

C'est là où le processus décisionnel joint à la «table de consensus» ne respecte pas les règles de justice naturelle. Car le justiciable, informé d'une telle situation, se sentira, avec raison à mon avis, jugé par d'autres que les personnes qui ont entendu son litige et aura alors l'impression de ne pas être traité selon les règles de justice généralement acceptées.

Le juge Mailhot refuse de considérer la première «décision» comme étant celle de la Commission. Elle aurait renvoyé le dossier à la Commission pour que la question soit tranchée de nouveau.

Le juge Monet—dissident sur l'appel principal

Le juge Monet traite tout d'abord des objections à la preuve faites par la Commission au procès. Il considère que le secret du délibéré ne pourra être levé qu'en cas de circonstances exceptionnelles. Examinant la déclaration, il conclut à la p. 2061 qu'aucune des allégations de la déclaration ne justifie de déclarer recevable la preuve des faits qui se rattachent au processus du délibéré, et que l'opposition à la preuve aurait donc dû être accueillie dès le moment où elle a été formulée.

Quant à la conclusion du juge Dugas à l'effet que la procédure de consultation établit une «pression systémique» sur les décideurs, le juge Monet estime qu'elle ne trouve pas d'appui dans la preuve faite au procès. «Il est patent, écrit-il, que la consultation n'est pas imposée et que le vote ne constitue pas une pression indue» (p. 2065). Après avoir examiné les témoignages, le juge Monet conclut, à la p. 2067, qu'il est:

... tout à fait incapable de conclure à la nullité de la décision [...] en raison de pression, contrainte ou influence indue sur les décideurs, de nature à porter atteinte à l'indépendance dont ils doivent jouir selon notre droit.

Le juge Monet considère donc que la décision de la Commission n'a pas été rendue en violation des principes de justice naturelle et qu'il n'y a par conséquent pas lieu de se prononcer sur la nature de la première «décision». S'il avait eu à le faire, il n'aurait cependant pas reconnu le premier projet comme la véritable décision de la Commission.

IV—Points at Issue

Principal Appeal

1. Should the Superior Court have allowed the objection to the evidence made by counsel for the Commission and based on deliberative secrecy?

2. Does the machinery established by the Commission to ensure adjudicative coherence give rise to a reasonable apprehension of bias?

3. Is the part played by the president in the case at bar a breach of the rules of natural justice?

Incidental Appeal

4. Should document P-10 (the first "decision") be regarded as the Commission's true decision?

V—Analysis

I will deal with these four questions in order.

1. *Confidentiality of Deliberations*

At the trial, counsel for the Commission made several objections to the evidence based on the principle of deliberative secrecy. The Commission objected in particular to the Commission secretary answering the questions of counsel for the respondent on the process for dealing with draft decisions within the Commission (approval by legal counsel, discussion at plenary meeting, and so on). In his judgment, Dugas J. did not expressly deal with these objections; however, he dismissed them implicitly by ruling on the internal consultation procedure followed by the Commission.

In my opinion, the objections made by the Commission should be dismissed. The questions raised by the respondent did not touch on matters of substance or the decision makers' thinking on such matters. These questions were directed instead at the formal process established by the Commission to ensure consistency in its decisions. They were concerned first with the institutional setting in which the decision was made and how it functioned, and second with its actual or apparent

IV—Questions en litige

Appel principal

1. La Cour supérieure aurait-elle dû maintenir l'objection à la preuve faite par le procureur de la Commission et basée sur le secret du délibéré?

2. Les mécanismes mis en place par la Commission pour assurer la cohérence de sa jurisprudence donnent-ils lieu à une crainte raisonnable de partialité?

3. Le rôle joué par le président, en l'espèce, viole-t-il les règles de justice naturelle?

Appel incident

4. Le document P-10 (la première «décision») doit-il être considéré comme étant la décision véritable de la Commission?

V—Analyse

Je traiterai de ces quatre questions dans l'ordre.

1. *Le caractère confidentiel du délibéré*

Lors du procès, le procureur de la Commission fait plusieurs objections à la preuve sur la base du principe du secret du délibéré. La Commission s'objectait en particulier à ce que le secrétaire de la Commission réponde aux questions du procureur de l'intimée sur le cheminement que doivent suivre les projets de décisions au sein de la Commission (approbation par le conseiller juridique, discussion en réunion plénière, etc.). Dans son jugement, le juge Dugas ne traite pas expressément de ces objections; mais il les rejette implicitement en se prononçant sur la procédure de consultation interne suivie par la Commission.

À mon avis, les objections formulées par la Commission doivent être rejetées. Les questions posées par l'intimée ne touchaient pas les motifs au fond ou leur élaboration dans la pensée des décideurs. Ces questions visaient plutôt le processus formel mis sur pied par la Commission pour assurer la cohérence de sa jurisprudence. Elles portaient d'une part sur le cadre institutionnel dans lequel la décision est rendue et son fonctionnement et, d'autre part, sur son influence réelle ou appa-

influence on the intellectual freedom of the decision makers. This distinction was noted by Dugas J. during the interrogatories themselves.

In the case of administrative tribunals, the difficulty of distinguishing between facts relating to an aspect of the deliberations which can be entered in evidence and those which cannot is quite understandable. The institutionalization of the decisions of administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rules of natural justice. The institutionalized consultation process involving deliberation is the subject of rules of procedure designed to regulate the "consensus tables" process. Paradoxically, it is the public nature of these rules which, while highly desirable, may open the door to an action in nullity or an evocation. It may be questioned whether justice is seen to be done. Accordingly, the very special way in which the practice of administrative tribunals has developed requires the Court to become involved in areas into which, if a judicial tribunal were in question, it would probably refuse to venture:

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v. The Queen*, *supra*; *Beauregard v. Canada*.... To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how or why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence. [Emphasis added.]

(*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796, at pp. 830-31.)

Additionally, when there is no appeal from the decision of an administrative tribunal, as is the case with the Commission, that decision can only be reviewed in one way: as to legality by judicial review. It is of the very nature of judicial review to

rente sur la liberté d'esprit des décideurs. Cette distinction avait été soulignée par le juge Dugas durant les interrogatoires mêmes.

Dans le cas des tribunaux administratifs, la difficulté de distinguer entre les faits portant sur un aspect du délibéré qui pourront être mis en preuve et ceux qui ne le pourront pas est particulièrement compréhensible. L'institutionnalisation des décisions des tribunaux administratifs crée une tension entre, d'une part, le traditionnel concept du secret du délibéré et, d'autre part, le droit fondamental d'une partie de savoir que la décision a été rendue en conformité avec les principes de justice naturelle. En effet, le processus de consultation institutionnalisé mis en œuvre dans le cadre de délibérés fait l'objet de règles de procédure visant à régir le processus des «tables de consensus». Le caractère public de ces règles, par ailleurs fort souhaitable, est paradoxalement ce qui peut donner prise à une action en nullité ou à une évocation. L'apparence de justice peut être mise en cause. L'évolution bien particulière de la pratique des tribunaux administratifs oblige donc la Cour à s'immiscer dans des domaines où, s'il s'agissait d'un tribunal judiciaire, elle refuserait probablement de s'aventurer:

> Le droit du juge de refuser de répondre aux organes exécutif ou législatif du gouvernement ou à leurs représentants quant à savoir comment et pourquoi il est arrivé à une conclusion judiciaire donnée, est essentiel à l'indépendance personnelle de ce juge, qui constitue l'un des deux aspects principaux de l'indépendance judiciaire: *Valente c. La Reine* et *Beauregard c. Canada* [...] Donner suite à l'exigence qu'un juge témoigne devant un organisme civil, émanant du pouvoir législatif ou du pouvoir exécutif, quant à savoir comment et pourquoi il a rendu sa décision, serait attaquer l'élément le plus sacro-saint de l'indépendance judiciaire. [Je souligne.]

(*MacKeigan c. Hickman*, [1989] 2 R.C.S. 796, aux pp. 830 et 831.)

Par ailleurs, lorsque les décisions d'un tribunal administratif sont sans appel, comme c'est le cas à la Commission, il n'existe qu'une seule façon de réviser celle-ci: le contrôle de la légalité. Or, il relève de la nature même du contrôle judiciaire

examine *inter alia* the decision maker's decision-making process. Some of the grounds on which a decision may be challenged even concern the internal aspect of that process: for example, was the decision made at the dictate of a third party? Is it the result of the blind application of a previously established directive or policy? All these events accompany the deliberations or are part of them.

Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice. This is indeed the conclusion at which the majority of the Court of Appeal arrived, at pp. 2074-75:

[TRANSLATION] However, this confidentiality yields to application of the rules of natural justice, as observance of these rules is the bedrock of any legal system.

In exceptional cases, therefore, the confidentiality requirement may be lifted when good grounds for doing so are first submitted to the tribunal.

I would therefore dismiss this first ground of appeal.

2. *Legality of the "Institutionalized" Decision-making Process Established by the Commission*

Of the four questions raised by this appeal, the second is clearly the central one. The Commission is arguing that the consultation machinery which it has created is consistent with the rules of natural justice. It describes this consultation machinery not as a compulsory process of consultation but rather as an "automated" process, the purpose of which is not to impose any particular viewpoint but to assist the decision maker by informing him of the existence of precedents.

The following internal directives are significant. They are taken from the *Directives concernant le fonctionnement des réunions générales et la con-*

d'examiner, entre autres, le processus décisionnel du décideur. Certains des motifs pour lesquels une décision peut être attaquée portent même sur l'aspect interne de ce processus décisionnel: par exemple, la décision a-t-elle été prise sous la dictée d'un tiers? Résulte-t-elle de l'application aveugle d'une directive ou d'une politique pré-établie? Tous ces événements sont concomitants au délibéré ou en font partie.

Il me semble donc que, de par la nature du contrôle qui est exercé sur leurs décisions, les tribunaux administratifs ne puissent invoquer le secret du délibéré au même degré que les tribunaux judiciaires. Le secret demeure bien sûr la règle, mais il pourra néanmoins être levé lorsque le justiciable peut faire état de raisons sérieuses de croire que le processus suivi n'a pas respecté les règles de justice naturelle. C'est d'ailleurs la conclusion à laquelle en vient la majorité en Cour d'appel, aux pp. 2074 et 2075:

Cette confidentialité cède cependant devant l'application des règles de la justice naturelle, car le respect de ces règles constitue la première assise de tout système judiciaire.

La confidentialité peut donc être exceptionnellement levée lorsque des motifs sérieux de le faire sont préalablement soumis au tribunal.

Je rejetterais donc ce premier motif d'appel.

2. *La légalité du processus décisionnel dit «institutionnalisé» mis sur pied par la Commission*

Des quatre questions soulevées par ce pourvoi, la question centrale est évidemment la deuxième. La Commission soutient que le mécanisme de consultation qu'elle a mis en place est conforme aux principes de justice naturelle. Elle qualifie ce mécanisme de consultation non pas de processus de consultation imposé mais plutôt de processus «automatisé», qui n'a pas pour but d'imposer quelque vue que ce soit, mais d'aider le décideur en l'informant de l'existence de précédents.

Les directives internes suivantes sont pertinentes. Elles sont tirées des *Directives concernant le fonctionnement des réunions générales et la*

stitution du comité de lecture ([TRANSLATION] "Directives on the holding of general meetings and creation of a reading committee") adopted by the Commission in September 1984:

[TRANSLATION]

4. A unanimous quorum may also suggest that a given problem be discussed at a general meeting, whether the decision has already been issued or not.

5. The president may suggest discussion at a general meeting of a unanimous decision, in cases where:

(a) the principles stated in that decision or its application contravene or depart from a consensus or precedent decided on by the Commission;

(b) the decision is a ruling in principle on a new point, or develops a new interpretation which sets an important precedent for the Commission.

34. Discussions will generally develop as follows:

—presentation by the persons concerned (members of the quorum or, if applicable, the legal counsel, a member of the reading committee, the president and so on) of the problem and arguments on either side, and this presentation shall be made without becoming involved in arguments on either side of the issue;

—questions by the meeting to the authors;

—additional comments by members and assessors on the point;

—(possible roundtable of views);

—brief final comments by the persons concerned;

—ensuring that the meeting fully understands the question;

—re-reading of the question by the president;

—vote by the meeting (show of hands).

35. A vote is not regarded as the necessary outcome of a discussion: it is only required if the points for consideration have validly emerged from the discussion and a sufficient number of those present feel well enough informed to make a decision.

constitution du comité de lecture adoptées par la Commission en septembre 1984:

4. Un quorum unanime peut également suggérer qu'il y ait discussion en réunion générale d'un problème donné, et ce, que la décision ait déjà été expédiée ou non.

5. Le président peut suggérer qu'il y ait discussion en réunion générale d'une décision unanime, dans les cas où:

a) les principes énoncés dans cette décision ou sa portée contreviennent ou s'écartent d'un consensus ou d'une jurisprudence établie de la Commission.

b) la décision en cause se prononce en principe sur un point nouveau, ou développe une interprétation nouvelle d'une portée jurisprudentielle importante pour la Commission.

34. Les discussions suivent généralement le cheminement suivant:

—exposé par les personnes impliquées (les membres du quorum ou, selon le cas, le conseiller juridique, un membre du comité de lecture, le président, etc. . .) du problème et des arguments retenus de part et d'autre, cet exposé étant livré en évitant de s'engager dans un débat contradictoire;

—questions de l'assemblée aux auteurs;

—commentaires additionnels des membres et assesseurs sur la question;

—(tour de table possible);

—brefs commentaires finals des personnes impliquées;

—vérification avec l'assemblée de la clarté de la question;

—relecture de la question par le président;

—vote (à main levée) de l'assemblée.

35. Le vote n'est pas considéré comme l'aboutissement nécessaire d'une discussion, il n'est tenu que si la discussion a permis de ressortir, de façon valable, les éléments à considérer et si un nombre suffisant de participants s'estiment assez éclairés pour se prononcer.

39. A formal voting process or vote by show of hands is used in place of the "roundtable" process.

41. The president may decide, when he considers that the matter discussed is of great importance, to extend the consultation to members and assessors absent from the general meeting.

44. Any vote taken at a general meeting must be compiled and its result announced at the meeting and entered in the minutes.

45. Consensus is intended to ensure greater consistency in Commission decisions. It will be obtained following thorough discussion and by means of an unambiguous vote; but in the last analysis the quorum retains control of its decision.

46. The consensus is entered in the minutes of the general meeting, with reference to the decision it will be reflected in and the breakdown of the number of votes.

39. La formule de vote formel ou de vote à main levée est utilisée à la place du «tour de table».

41. Le président peut décider, lorsqu'il estime que la question discutée revêt une grande importance, d'étendre la consultation aux membres et assesseurs absents lors de la réunion générale.

44. Tout vote pris en réunion générale doit être compilé et son résultat doit être annoncé en assemblée et consigné au procès-verbal.

45. Le consensus vise à assurer une plus grande cohérence dans les décisions de la Commission. Il doit être obtenu au terme d'une discussion sérieuse et au moyen d'un vote non équivoque. Mais en définitive, le quorum demeure maître de sa décision.

46. Le consensus est consigné au procès-verbal de la réunion générale, avec la référence à la décision qui l'exprimera et la ventilation du nombre des votes.

It is true that the system for verifying decisions established in the case at bar was created at the request of the decision makers themselves. In view of the large number of decisions made by the Commission (on the evidence, 2,871 decisions for 1983), members and assessors very soon felt the need to consult their colleagues to ensure consistent and carefully reasoned decisions. As the Commission noted, the objective of consistency responds to litigants' need for stability but also to the dictates of justice. As the Commission's decisions are not subject to appeal, it is the Commission itself which has the duty of preventing inconsistent decision-making.

Il est vrai que le système de vérification des décisions mis en place en l'espèce l'a été à la demande même des décideurs. Étant donné le grand nombre de décisions rendues par la Commission (d'après la preuve, 2 871 décisions pour l'année 1983), les membres et assesseurs ressentirent en effet très tôt le besoin de consulter leurs collègues pour s'assurer d'une jurisprudence stable et rigoureuse. Comme le souligne la Commission, cet objectif de cohérence répond à un besoin de sécurité des justiciables, mais également à un impératif de justice. Les décisions de la Commission étant sans appel, c'est à la Commission elle-même qu'il revient de prévenir les incohérences décisionnelles.

However, that does not mean that the actual structure of the machinery created to promote collegiality is unimportant. Clearly, by its very nature administrative law encompasses a wide variety of types of decision-making. Nonetheless, these must be in keeping with natural justice: accordingly, they should not impede the ability of the members of an administrative tribunal to decide as they see fit nor should they create an appearance of bias in the minds of litigants.

Cela ne signifie cependant pas que les modalités du mécanisme mis en place pour favoriser la collégialité soient sans importance. De par sa nature, le droit administratif connaît évidemment une grande variété de structures décisionnelles. Celles-ci doivent cependant être conformes à la justice naturelle; elles ne doivent par conséquent ni entraver la capacité des membres d'un tribunal administratif de décider selon leurs opinions, ni créer une apparence de partialité dans l'esprit des justiciables.

In *IWA v. Consolidated-Bathurst Packaging Ltd.*, *supra*, the Court has already had occasion to

La Cour a déjà eu, dans *SITBA c. Consolidated-Bathurst Packaging Ltd.*, précité, l'occasion d'ex-

state the guidelines for creating an "institutionalized" consultation process in administrative tribunals. In *IWA*, the Court examined the consultation process established by the Ontario Labour Relations Board ("OLRB") to promote consistency and quality in its decisions. In response to the immense task it faced (3,189 decisions in 1982-83), the OLRB adopted a practice consisting of holding plenary meetings on important questions of policy. The process created was described as follows by the Chairman of the OLRB at pp. 316-17:

> After deliberating over a draft decision, any panel of the Board contemplating a major policy issue may, through the Chairman, cause a meeting of all Board members and vice-chairmen to be held to acquaint them with this issue and the decision the panel is inclined to make. These "Full Board" meetings have been institutionalized to facilitate a maximum understanding and appreciation throughout the Board of policy developments and to evaluate fully the practical consequences of proposed policy initiatives on labour relations and the economy in the Province. But this institutional purpose is subject to the clear understanding that it is for the panel hearing the case to make the ultimate decision and that discussion at a "Full Board" meeting is limited to the policy implications of a draft decision. The draft decision of a panel is placed before those attending the meeting by the panel and is explained by the panel members. The facts set out in the draft are taken as given and do not become the subject of discussion. No vote is taken at these meetings nor is any other procedure employed to identify a consensus. The meetings invariably conclude with the Chairman thanking the members of the panel for outlining their problem to the entire Board and indicating that all Board members look forward to that panel's final decision whatever it might be. No minutes are kept of such meetings nor is actual attendance recorded. [Emphasis in original.]

Relying on this description, the Court weighed the advantages and disadvantages of the OLRB practice in holding such full Board meetings. Since any process of consultation may have the effect of "influencing" decision-makers, the Court concluded at p. 333 that what should be looked at

poser les principes directeurs en matière de processus de consultation «institutionnalisé» au sein des tribunaux administratifs. Dans *SITBA*, la Cour examine le processus de consultation mis en place par la Commission des relations de travail de l'Ontario («CRTO») pour favoriser la cohérence et la qualité de ses décisions. Face à l'ampleur de la tâche qui lui était assignée (3 189 décisions en 1982-1983), la CRTO avait adopté une pratique consistant à tenir des réunions plénières sur des questions de politique importantes. Le processus mis en place est décrit de la façon suivante par le président de la CRTO, aux pp. 316 et 317:

> [TRADUCTION] Après avoir délibéré sur un avant-projet de décision, un banc qui envisage de trancher une question importante de politique peut faire convoquer, par l'intermédiaire du président, une réunion plénière des membres et des vice-présidents pour leur faire part de la question soulevée et de la décision que le banc favorise. Ces réunions plénières ont été institutionnalisées pour mieux faire comprendre et apprécier par l'ensemble des commissaires l'évolution des politiques et pour examiner à fond les conséquences pratiques que les politiques envisagées pourraient avoir sur les relations de travail et sur l'économie de la province. Cependant, cet objet institutionnel est assujetti au principe accepté de tous qu'il appartient au banc qui entend l'affaire de prendre la décision ultime et que les débats à la réunion plénière de la Commission se limitent aux conséquences en matière de politique d'un avant-projet de décision. L'avant-projet de décision d'un banc est soumis à la réunion par le banc lui-même et expliqué par les commissaires qui le composent. Les faits mentionnés dans l'avant-projet de décision sont tenus pour avérés et ne font pas l'objet de discussions. Aucun vote n'est pris lors de ces réunions et aucune autre procédure n'est utilisée pour vérifier s'il y a consensus. Le président clôt toujours ces réunions en remerciant les commissaires composant le banc d'avoir exposé leur problème à toute la Commission et en disant que tous les commissaires attendront avec impatience la décision du banc quelle qu'elle puisse être. Il n'y a pas de procès-verbal de ces réunions ni de prise de présences. [Souligné dans l'original.]

S'appuyant sur cette description, la Cour soupèse les avantages et inconvénients qu'emporte la pratique de la CRTO de tenir de telles réunions plénières. Puisque tout processus de consultation peut avoir pour effet «d'influencer» les décideurs, la Cour conclut, à la p. 333, que ce n'est pas le

is not the question of influence but that of constraint:

> . . . the relevant issue in this case is not whether the practice of holding full board meetings can cause panel members to change their minds but whether this practice impinges on the ability of panel members to decide according to their opinions. There is nothing in the *Labour Relations Act* which gives either the chairman, the vice-chairmen or other Board members the power to impose his [*sic*] opinion on any other Board member. However, this *de jure* situation must not be thwarted by procedures which may effectively compel or induce panel members to decide against their own conscience and opinions.

Taking the position of an informed person, the Court held that the OLRB practice contained an adequate number of safeguards of the judicial independence of members of the Board responsible for making the decision. Accordingly, the system established was not likely to cause the litigant to entertain a reasonable apprehension of bias (at p. 334):

> A full board meeting set up in accordance with the procedure described by Chairman Adams is not imposed: it is called at the request of the hearing panel or any of its members. It is carefully designed to foster discussion without trying to verify whether a consensus has been reached: no minutes are kept, no votes are taken, attendance is voluntary and presence at the full board meeting is not recorded. The decision is left entirely to the hearing panel. . . . On the other hand, it is true that a consensus can be measured without a vote and that this institutionalization of the consultation process carries with it a potential for greater influence on the panel members. However, the criteria [*sic*] for independence is not absence of influence but rather the freedom to decide according to one's own conscience and opinions.

In *IWA*, the Court further noted at p. 326 the frequent policy nature of the decisions of the OLRB and the tripartite makeup of the panels of that board as factors justifying an institutionalized consultation procedure. These factors are not conclusive, but are additional indications. A plenary meeting may perhaps be the only practical means of gathering members from various backgrounds;

critère de l'influence qu'il faut retenir, mais plutôt l'élément de contrainte:

> . . . la question qu'il faut se poser en l'espèce est non pas de savoir si la pratique des réunions plénières de la Commission peut amener les membres d'un banc à changer d'avis, mais plutôt de savoir si cette pratique entrave la capacité des membres de ce banc de statuer selon leurs opinions. Il n'y a rien dans la *Loi sur les relations de travail* qui autorise le président, les vice-présidents ou les autres commissaires à imposer leur avis à quelque autre commissaire. Cependant, cette situation de droit ne doit pas être contrecarrée par des procédures qui peuvent avoir pour effet de forcer ou d'inciter des membres d'un banc à statuer à l'encontre de leurs propres conscience et opinions.

Se plaçant dans la position d'une personne informée, la Cour décide que la pratique de la CRTO contient suffisamment de mécanismes susceptibles de protéger l'indépendance judiciaire des membres du banc chargés de rendre la décision. Par conséquent, le système mis en place n'est pas susceptible de causer de crainte raisonnable de partialité chez le justiciable (à la p. 334):

> La réunion plénière de la Commission tenue conformément à la procédure décrite par le président Adams n'est pas imposée, elle est convoquée à la demande du banc qui a entendu l'affaire ou par l'un de ses membres. Elle est soigneusement organisée pour favoriser la discussion sans qu'il y ait tentative de vérifier s'il y a consensus; il n'est pas dressé de procès-verbal, le vote n'y est pas pris, la présence à la réunion est facultative et les présences n'y sont pas prises. La décision revient entièrement au banc qui a entendu l'affaire. [. . .] Par ailleurs, il est vrai qu'il est possible de vérifier s'il y a consensus sans recourir à un vote et que cette institutionnalisation du processus de consultation comporte un risque d'influence plus prononcée sur les membres du banc. Cependant, le critère de l'indépendance est non pas l'absence d'influence, mais plutôt la liberté de décider selon ses propres conscience et opinions.

Dans *SITBA*, la Cour souligne par ailleurs à la p. 326 la nature souvent politique des décisions de la CRTO et la composition tripartite des bancs de cette commission comme des éléments qui justifient une procédure de consultation institutionnalisée. Ces éléments ne sont cependant pas déterminants, mais constituent des indices additionnels. Une réunion plénière s'avérera peut-être le seul

clearly, it does not mean that only tripartite agencies may set up such consultation machinery. We have seen that the justification for institutionalizing decisions lies primarily in the need to ensure consistency in decisions rendered by administrative tribunals. Whether the latter make decisions with a high policy component or not, those decisions must be consistent with the requirements of justice. A consultation process by plenary meeting designed to promote adjudicative coherence may thus prove acceptable and even desirable for a body like the Commission, provided this process does not involve an interference with the freedom of decision makers to decide according to their consciences and opinions. The process must also, even if it does not interfere with the actual freedom of the decision makers, not be designed so as to create an appearance of bias or lack of independence.

moyen pratique de regrouper des membres provenant de divers milieux; cela ne signifie évidemment pas que seuls les organismes tripartites pourront établir de tels mécanismes de consultation. Nous avons vu que la justification de l'institutionnalisation des décisions réside principalement dans l'impératif de cohérence des décisions rendues par les tribunaux administratifs. Que ceux-ci rendent des décisions à haut coefficient politique ou non, ces décisions doivent être compatibles par souci de justice. Le processus de consultation par réunion plénière visant à favoriser la cohérence de la jurisprudence pourrait donc s'avérer acceptable et même désirable pour un organisme comme la Commission, à condition que ce processus ne constitue pas une entrave à la liberté des décideurs de trancher selon leurs conscience et opinions. Il ne faut pas non plus que ce processus, même s'il n'entrave pas la liberté réelle des décideurs, soit conçu de façon telle qu'il suscite une apparence de partialité ou de manque d'indépendance.

The institutionalized decision-making process in the case at bar is rather different from that considered by the Court in *IWA*. Although the "consensus tables" held by the Commission are optional in theory, it appeared from the testimony of the member Claude Pothier that these collegiate discussions are in practice compulsory when the legal counsel determines that the proposed decision is contrary to previous decisions:

Le processus de décision institutionnalisé est en l'espèce assez différent de celui examiné par la Cour dans *SITBA*. En effet, bien que les «tables de consensus» tenues par la Commission soient en principe facultatives, il ressort du témoignage du membre Claude Pothier que ces discussions collégiales sont, en pratique, imposées lorsque le conseiller juridique détermine que la décision proposée va à l'encontre de la jurisprudence antérieure:

[TRANSLATION]

A. . . . So this time, literally in order not to hold up the case, we sent—it was the only way—sent the Noémie Tremblay file to the discussion table.

R. . . . Alors cette fois-là pour littéralement pas bloquer le dossier, on a envoyé, c'était la seule façon, envoyé à la table de discussion le dossier de Noémie Tremblay.

Q. When you say —in order not to hold up the case?

Q. Quand vous dites pour ne pas bloquer le dossier?

A. Well, listen, it is difficult because we were—at least I for one was in a difficult situation in which the quorum had disposed of a matter which was not contrary to principle or the previous decisions of the Commission, because there were none, I think there was one and it was more favourable to the decision being taken than the other possibility. There was Judge Poirier's memo, which was in the file, so we could hardly not take it into account. The only way

R. Ben, écoutez, c'est difficile parce qu'on était pris, moi en tout cas pour un j'étais pris dans une situation pénible où le quorum avait disposé d'une affaire qui n'allait pas à l'encontre de la doctrine ou des décisions antérieures de la commission, parce qu'il n'y en avait pas, il y en avait une je pense et elle était plus favorable à la décision qu'on prenait que l'autre. Il y avait le mémo du Juge Poirier qui était au dossier. Donc, on pouvait difficilement ne pas en

was to have a general discussion around the table to get the file moving, to move it forward.

Q. Could you have sent the original of document P-10 to the Commission's secretary?

A. Listen, the administrative procedure did not authorize us to do that. I think I would have been squarely blamed if I had gone over their heads, especially the administrative office, and rendered a decision directly from my office; the discussion took place in my office at the time, and we decided to make this decision for a very good reason.

Q. I did not ask you whether you could have sent it directly to the parties; my question was whether you could have sent the decision to the Commission's secretary for it to be issued?

A. I could not do that either, because the procedure set up was compulsory, all files of whatever kind had to go through the legal counsel. So the only route was to send my file to my secretary who sent it on to the legal counsel's office, and then it went from there to be issued. If anything held it up, such as the legal counsel finding an inadvertent error in the citation of a regulation . . . the file was sent back to us . . .

Additionally, in other cases where the decision was contrary to earlier decisions of the Commission . . . or contrary to the consensus established around the table by my colleagues together, the legal counsel still held up the file, to my personal knowledge of the matter, and if the quorum did not change its opinion, the file to my personal knowledge — in which I was involved in any case — the files went either to the office of the president or the vice-president and eventually came back to the general discussion table. That is the procedure in the Commission as I have known it for nine (9) years. [Emphasis added.]

Dugas J., who heard the parties and was therefore in a better position to assess the specific concrete aspects of the case, concluded from the testimony that there was undeniable "compulsory consultation" and "systemic pressure". In such circumstances, the fact that at the end of his testimony Mr. Pothier admitted that the vote taken at the plenary meeting had not prevented him from

tenir compte. La seule façon c'était d'en venir à une discussion globale autour de la table pour débloquer le dossier, pour le faire avancer.

Q. Est-ce que vous auriez pu expédier l'original du document P-10 au secrétariat?

R. Écoutez, la procédure administrative ne nous permettait pas de faire ça. Je pense que j'aurais été carrément blâmé si j'avais passé par-dessus la tête, surtout le bureau administratif et de rendre une décision directement de mon bureau, la discussion avait été faite à mon bureau à l'époque et on avait décidé de prendre cette décision pour une raison très louable.

Q. Je vous ai pas demandé, est-ce que vous auriez pu envoyer directement aux parties, ma question est est-ce que vous auriez pu envoyer au secrétaire de la commission la décision pour qu'elle soit expédiée?

R. Non plus, parce que la procédure installée était obligatoire, tous les dossiers quels qu'ils soient devaient passer par le conseiller juridique. Alors le cheminement unique était de faire parvenir mon dossier à ma secrétaire qui elle l'achemine vers le bureau du conseiller juridique, ensuite il s'en va pour fins d'expédition. S'il y a quelque chose qui bloque, soit que le conseiller juridique remarque une erreur qui s'est glissée dans la citation d'un règlement, [. . .] le dossier nous est retourné . . .

Par ailleurs dans d'autres cas où la décision va soit à l'encontre de décisions antérieures de la commission [. . .], ou encore à l'encontre de consensus établis autour de la table par l'ensemble des collègues, là le conseiller juridique encore «stoppe» le dossier à ma connaissance personnelle que j'en ai, et si le quorum ne change pas d'opinion, le dossier à ma connaissance personnelle, dans lesquels j'ai été impliqué en tout cas, les dossiers vont soit au bureau du président ou du vice-président et éventuellement reviennent à la table des discussions globales. C'est la procédure que j'ai vécue à la commission depuis neuf (9) ans. [Je souligne.]

Le juge Dugas, qui a entendu les parties et était donc en meilleure position pour apprécier la situation concrète particulière à cette affaire, conclut d'ailleurs des témoignages qu'il y a «consultation imposée» et une «pression systémique» indéniable. Dans ce contexte, le fait que Me Pothier ait, à la fin de son témoignage, reconnu que le vote pris à la réunion plénière ne l'avait pas empêché de mainte-

abiding by his decision in no way shows absence of constraint.

The Commission argued that under directive 45, the quorum still retains full control of its decision. As the Court observed in *IWA*, mere "influence" is to be distinguished from "constraint"; but what is crucial is to determine the actual situation prevailing in the body in question. In the case at bar on the facts do

> [t]he methods used at those meetings to discuss policy issues reflect the need to maintain an atmosphere wherein each attending Board member retains the freedom to make up his mind on any given issue and to preserve the panel members' ultimate responsibility for the outcome of the final decision [?]

(*IWA*, *supra*, at p. 316.)

I do not think so. The testimony of the member Claude Pothier depicts a system in which in actual fact constraint seems to have outweighed influence, regardless of any internal directive to the contrary.

Additionally, reading the rules for holding plenary meetings of the Commission discloses a number of points which taken together could create an appearance of bias. In my opinion, the key indicator in this regard is to be found in directive 5, which provides that a plenary meeting may be requested not only by the quorum responsible for making the decision but also by the president of the Commission.

The fact that under directive 5 the president of the Commission can raise a question at a plenary meeting without the approval of the quorum responsible for deciding the matter presents a particular problem in light of the following passage from the judgment in *IWA*, *supra*, at p. 332:

> It is obvious that no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision.

nir sa décision ne démontre aucunement absence de contrainte.

La Commission soutient qu'en vertu de la directive 45, le quorum demeure toujours maître de sa décision. Comme l'a souligné la Cour dans *SITBA*, il faut distinguer la simple «influence» de la «contrainte». Mais ce qui est crucial, c'est de déterminer quelle est la situation véritable qui prévaut au sein de l'organisme concerné. En l'espèce, vu les faits,

> [l]es méthodes utilisées à ces réunions pour débattre des questions de politique traduisent[-elles] la nécessité de préserver une ambiance où chaque commissaire présent garde la liberté de se former une opinion sur une question précise et de sauvegarder la responsabilité ultime des membres de chaque banc à l'égard de la décision finale[?]

(*SITBA*, précité, à la p. 316.)

Je ne le crois pas. Le témoignage du membre Claude Pothier dépeint un système où la contrainte semble effectivement l'emporter sur l'influence, nonobstant toute directive interne à l'effet contraire.

Par ailleurs, la lecture des règles de fonctionnement des réunions plénières de la Commission révèle un ensemble d'éléments susceptibles de créer une apparence de partialité. À mon avis, l'élément indicateur le plus important de ce point de vue se retrouve à la directive 5, qui prévoit que la réunion plénière pourra être demandée non seulement par le quorum chargé de rendre la décision, mais également par le président de la Commission.

Le fait que le président de la Commission, en vertu de la directive 5, puisse soulever une question en réunion plénière sans l'accord du quorum saisi de l'affaire pose un problème particulier en regard du passage suivant de la décision dans *SITBA*, précitée, à la p. 332:

> Il est évident qu'aucune ingérence extérieure ne peut être pratiquée pour forcer ou contraindre un décideur à participer à des discussions au sujet de questions de politique soulevées par une affaire sur laquelle il doit statuer.

In my view, the mere fact that the president can of his own motion refer a matter for plenary discussion may in itself be a constraint on decision makers. In such circumstances, they may not feel free to refuse to submit a question to the "consensus table" when the president suggests this. Further, the statute clearly provides that it is the decision makers who must decide a matter. Accordingly, it is those decision makers who must retain the right to initiate consultation; imposing it on them amounts to an act of compulsion towards them and a denial of the choice expressly made by the legislature.

The Commission apparently wishes by this machinery to make the expertise of the Commission as a whole available to its members and to inform them of existing precedents. This is a praiseworthy motive. If the quorum has the advantage of the experience and opinions of its colleagues it may be in a position to render a more thoughtful decision. However, it is the quorum, and only the quorum, which has the responsibility of rendering the decision. If it does not wish to consult, it must be truly free not to do so. This constraint, which is subjective for the decision makers, may also cause litigants to have an impression of objective bias. Compulsory consultation creates at the very least an appearance of a lack of independence, if not actual constraint.

The referral process mentioned in directive 5 in cases of new subject-matter also circumvents the will of the legislature by seeking to establish a prior consensus by persons not responsible for deciding the case. Ordinarily, precedent is developed by the actual decision makers over a series of decisions. The tribunal hearing a new question may thus render a number of contradictory judgments before a consensus naturally emerges. This of course is a longer process; but there is no indication that the legislature intended it to be otherwise. Bearing this in mind, I consider it is particularly important for the persons responsible for hearing a case to be the ones to decide it.

À mon avis, la simple possibilité que le président réfère, de son propre chef, une question pour discussion en plénière peut en soi constituer une contrainte pour les décideurs. Dans un tel contexte, ceux-ci ne se sentiront peut-être pas libres de refuser de soumettre une question à la «table des consensus» lorsque le président le suggère. De plus, la loi prévoit clairement que ce sont les décideurs qui doivent trancher la question. Ce sont donc ces décideurs qui doivent garder l'initiative de la consultation; la leur imposer équivaut à agir d'autorité envers eux et nier le choix exprès du législateur.

La Commission souhaite de toute évidence, par ce mécanisme, mettre à la disposition de ses membres l'ensemble de l'expertise de la Commission et les informer de la jurisprudence existante. Il s'agit là d'un but louable. Le quorum, fort de l'expérience et des opinions de ses collègues, sera peut-être en mesure de rendre une décision plus mûrie. C'est cependant le quorum, et le quorum seul, qui a la responsabilité de rendre la décision. S'il ne souhaite pas consulter, il doit être vraiment libre de ne pas le faire. Cette contrainte, subjective pour les décideurs, pourra également donner lieu à une apparence de partialité objective du point de vue du justiciable. Une consultation imposée crée à tout le moins une apparence de manque d'indépendance, sinon une contrainte réelle.

Le processus de référé prévu à la directive 5 dans les cas de matières nouvelles contourne également la volonté du législateur en cherchant à établir un consensus préalable par des personnes non saisies de la question. Normalement, l'élaboration d'un courant jurisprudentiel se fait par les décideurs effectifs suite à un ensemble de décisions. Le tribunal saisi d'une question nouvelle peut ainsi rendre un certain nombre de jugements contradictoires avant qu'un consensus ne se dégage naturellement. Il s'agit évidemment d'un processus plus long; rien n'indique cependant que le législateur ait voulu qu'il en soit ici autrement. Dans cette optique, je suis d'avis qu'il est particulièrement important que les personnes saisies d'une affaire soient celles qui décident.

There are other facts which support this conclusion of an apparent lack of independence. For example, plenary meetings of the Commission are held so as to arrive at a consensus: a vote by a show of hands is generally taken, as well as attendance; minutes are kept (directives 34, 35, 39, 44 and 46). The process created by the Commission thus contains very few of the protective devices which led this Court to conclude that the practice of the OLRB was in keeping with natural justice. Such protective devices are important when, as here, what is at issue is also to determine whether there was an appearance of bias or lack of independence. Certain aspects of the system established by the Commission create at the very least an appearance of "systemic pressure", to use the words of Dugas J.

Accordingly the Commission's decision, as a product of this system of internal consultation, seems to me to have been made in breach of the rules of natural justice. The present practice of the Commission of holding plenary meetings without members of a quorum having requested them, as well as the voting procedure and the keeping of minutes, may exert undue pressure on decision makers. Such pressure may be an infringement of a litigant's right to a decision by an independent tribunal. I consider that the institutionalized consultation process currently being used by the Commission may also give rise to a reasonable apprehension of bias in an informed litigant.

I would accordingly dismiss the principal appeal for this reason.

It should not be concluded from all this that the Court does not regard the objective sought by the Commission, of ensuring adjudicative coherence, as important. On the contrary, it has already recognized the manifest benefits which may be obtained from an institutionalized consultation process. The Court is also aware of the breadth of the task which has been entrusted to the Commission by the legislature and of the difficulties which the Commission may face in performing these quasi-judicial duties.

D'autres éléments factuels supportent ce constat d'apparence de manque d'indépendance. Par exemple, les réunions plénières de la Commission sont menées de façon à dégager un consensus: le vote à main levée est généralement pris, de même que les présences; un procès-verbal est dressé (directives 34, 35, 39, 44 et 46). Le processus mis en place par la Commission contient donc fort peu de ces mécanismes de protection qui avaient permis à la Cour de conclure que la pratique de la CRTO était conforme à la justice naturelle. Or, ces mécanismes de protection sont importants lorsqu'il s'agit également, comme en l'espèce, de déterminer s'il y a apparence de partialité ou de manque d'indépendance. Certains des éléments du système mis en place par la Commission créent à tout le moins une apparence de «pression systémique», pour reprendre les paroles du juge Dugas.

La décision de la Commission, en tant que produit de ce système de consultation interne, me semble donc avoir été rendue en violation des règles de justice naturelle. La pratique actuelle de la Commission de tenir des réunions plénières sans que les membres du quorum l'aient demandé, de même que les mécanismes de vote et de rédaction d'un procès-verbal, peuvent exercer une pression indue sur les décideurs. Une telle pression peut constituer une atteinte au droit du justiciable d'obtenir une décision d'un tribunal indépendant. Je suis d'avis que le processus institutionnalisé de consultation actuellement utilisé par la Commission peut également susciter une crainte raisonnable de partialité chez le justiciable informé.

Je rejetterais donc l'appel principal pour ce motif.

Il ne faut pas conclure de tout ceci que la Cour ne considère pas comme important l'objectif visé par la Commission, soit d'assurer la cohérence de sa jurisprudence. Nous avons au contraire déjà reconnu les avantages manifestes que pouvait procurer un processus de consultation institutionnalisé. La Cour est par ailleurs consciente de l'ampleur de la tâche qui a été dévolue à la Commission par le législateur, et des difficultés auxquelles peut faire face la Commission dans l'exécution de ces fonctions quasi judiciaires.

As it said earlier in *IWA*, *supra*, plenary meetings may be a consultation tool which is entirely in keeping with the rules of natural justice. However, they should not be imposed on decision makers and should be held in such a way as to leave decision makers free to decide according to their own consciences and opinions. Voting, the taking of attendance and the keeping of minutes are therefore not to be recommended. There are in any case a number of other methods which can be used to inform members of the Commission of applicable adjudicative trends or to prompt discussion on points of importance; the task of devising these may be left to the Commission.

Comme nous l'avons déjà dit dans *SITBA*, précité, les réunions plénières peuvent constituer un instrument de consultation tout à fait conforme aux principes de justice naturelle. Elles ne doivent cependant pas être imposées aux décideurs, et doivent être menées de façon à laisser les décideurs libres de trancher selon leurs conscience et opinions. Le vote, la prise des présences et la rédaction d'un procès-verbal sont donc à déconseiller. Il existe par ailleurs bon nombre d'autres méthodes qui pourraient être utilisées pour informer les membres de la Commission des courants de jurisprudence pertinents ou pour susciter des discussions sur des questions d'importance; je laisse à la Commission le soin de les concevoir.

3. *Part Played by the President in the Case at Bar and Appearance of Bias*

3. *Le rôle joué par le président en l'espèce et l'apparence de partialité*

Though this question does not have to be decided in order to dispose of the principal appeal, I will still make certain observations on the part played by Judge Poirier in the case at bar.

Bien qu'il ne soit pas nécessaire de traiter de cette question aux fins de disposer de l'appel principal, je ferai quand même quelques observations sur le rôle joué par le juge Poirier en l'espèce.

The *Act respecting the Commission des affaires sociales* gives the president of the Commission the power to settle disputes that may arise within a quorum:

La *Loi sur la Commission des affaires sociales* donne au président de la Commission le pouvoir de trancher les désaccords qui peuvent survenir au sein d'un quorum:

10. A matter shall be decided by the majority of the members and assessors having heard it.

When opinions are equally divided on a question, it shall be decided by the president or the vice-president he designates.

10. Les décisions sont prises à la majorité des membres et des assesseurs ayant entendu une affaire.

Lorsque les opinions se partagent également sur une question, celle-ci est tranchée par le président ou le vice-président que celui-ci désigne.

What part did the president of the Commission play here? In the case at bar, it is the president who raised the question by sending the quorum a memorandum in which he indicated the interpretation he would have given to the regulation at issue. This led to engaging the consultation process which eventually led to the disagreement between the two previously unanimous decision makers. Once the disagreement emerged, it was the president again who resolved the matter in the way he had indicated in his first intervention.

Quel a ici été le rôle du président de la Commission? En l'espèce, c'est le président qui a soulevé la question en envoyant une note au quorum où il exposait l'interprétation qu'il aurait donnée au règlement en litige. Ceci a mené à la mise en branle du processus de consultation qui a éventuellement mené au désaccord entre les deux décideurs préalablement unanimes. Une fois le désaccord constaté, c'est encore le président qui a tranché la question dans le sens qu'il avait indiqué dès sa première intervention.

I should stress first of all that the Court is not in any way questioning the good faith or impartiality of the Commission's president in the case at bar;

Soulignons tout d'abord que la Cour ne remet nullement en question la bonne foi ou l'impartialité du président de la Commission en l'espèce; la

the question which concerns it here is one of an appearance of bias, not of actual bias.

I will leave aside for discussion purposes the question of the formal consultation machinery already considered above. Even if that machinery had been in keeping with natural justice, I feel that the fact that the president expressed his opinion to members of the quorum, inviting them to reconsider the decision, and then became a decision maker is hardly consistent with the rules of natural justice. The case is comparable to the typical "prior commitment" situation which de Smith describes as follows:

> Disqualification for bias may exist where a member of a tribunal has an interest in the issue by virtue of his identification with one of the parties, or has otherwise indicated partisanship in relation to the issue.
>
> . . .
>
> Most of the cases are concerned with magistrates who have adjudicated after having substantially committed themselves by actively opposing or supporting the cause of a party or applicant before them.

(De Smith, *Judicial Review of Administrative Action* (4th ed. 1980), at pp. 270-71.)

De Smith recognizes that by the very nature of their duties certain members of administrative tribunals may have to combine various roles. This is what he says at p. 271 about the function of members of boards who issue licences:

> In certain respects, however, licensing justices stand in a peculiar position. They are entitled to adopt a general policy, based on their own investigations and private knowledge and their assessment of local requirements, with regard to the granting and renewal of public-house licences in their area; they are sometimes members of the local authority, which may have adopted town planning policies that will affect the future location of public-houses; they may themselves initiate an objection to the renewal of a licence and then proceed to sit and vote on the application as members of the compensation authority. But they are disqualified if they have already taken such active steps to oppose the renewal as to give rise to a real likelihood that they will

question qui nous préoccupe ici en est une d'apparence de partialité, et non pas de partialité réelle.

Je mettrai de côté pour les fins de la discussion la question des mécanismes formels de consultation déjà examinée plus haut. Même si ces mécanismes avaient été conformes à la justice naturelle, je suis d'avis que le fait que le président ait exprimé son opinion aux membres du quorum, les invitant à reconsidérer leur décision, pour ensuite se retrouver décideur, est peu compatible avec les principes de justice naturelle. Il s'agit d'un cas assimilable au cas-type de la «prise de position antérieure» que de Smith décrit ainsi:

> [TRADUCTION] Il peut y avoir récusation pour motif de partialité lorsqu'un membre d'un tribunal administratif a un intérêt dans la question en raison de son identification à l'une des parties ou lorsqu'il a, d'une autre façon, fait preuve de partialité relativement à la question.
>
> . . .
>
> Dans la plupart des cas, il s'agit de magistrats qui ont tranché une question après avoir fermement pris parti en s'opposant ou en se montrant favorable de façon concrète à la cause d'une partie ou d'un requérant devant eux.

(De Smith, *Judicial Review of Administrative Action* (4e éd. 1980), aux pp. 270 et 271.)

De Smith reconnaît que, de par la nature de leurs fonctions, certains membres de tribunaux administratifs peuvent devoir cumuler divers rôles. Voici ainsi ce qu'il écrit à la p. 271 au sujet du rôle des membres de commissions chargés de délivrer des permis:

> [TRADUCTION] À certains égards, toutefois, les juges chargés de délivrer des permis se trouvent dans une situation particulière. En ce qui concerne l'octroi et le renouvellement des permis de débits de boissons dans leur ressort, ces juges ont le droit d'adopter une politique générale, fondée sur leurs propres enquêtes et leurs connaissances personnelles ainsi que sur leur évaluation des exigences locales; ils sont parfois membres de l'administration locale, qui peut avoir adopté des politiques de planification urbaine susceptibles d'influer sur l'emplacement futur des débits de boissons; ils peuvent s'opposer personnellement au renouvellement d'un permis et faire partie par la suite de la commission de contrôle et y voter. Toutefois, ils sont inhabiles s'ils ont pris des

not be capable of hearing and determining the application in a judicial spirit. [Emphasis added.]

The justices to whom de Smith refers combine these various duties as a result of the legislation giving them their powers. The demands of natural justice must therefore be reconciled with the deliberate intent of the legislature to give an administrative tribunal several overlapping duties. In the case at bar, the internal consultation procedure used by the Commission was not created by the legislature; and even if it had been, it does not contemplate the president taking control of cases in place of the legal counsel. There is accordingly less reason to tolerate the president playing several parts within the decision-making process.

Moreover, s. 10 of the *Act respecting the Commission des affaires sociales* expressly authorizes the president to designate a vice-president to resolve disputes between the members of a quorum. In view of the active part he took in the discussion, the president should have delegated the decision to one of his vice-presidents. He did not do so. The active part played by Mr. Poirier in this matter thus seems to me likely to create a reasonable apprehension of bias in an informed observer.

The respondent further argued that the procedure used infringes the *audi alteram partem* rule in that the president did not hear the parties when he finally decided the matter. The Court has already considered this point in *IWA*. At pages 335 to 338 it emphasized the importance of distinguishing between discussions bearing on questions of fact and those relating to questions of law:

The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally

mesures concrètes pour s'opposer au renouvellement de façon à soulever une véritable probabilité qu'ils ne seront pas en mesure d'entendre et de trancher la demande dans un esprit judiciaire. [Je souligne.]

Les magistrats auxquels de Smith fait référence cumulent ces diverses fonctions par l'effet de la loi qui leur attribue leurs pouvoirs. Les impératifs de justice naturelle doivent donc composer avec la volonté arrêtée du législateur de confier au tribunal administratif plusieurs fonctions qui se chevauchent. Or, en l'espèce, la procédure de consultation interne utilisée par la Commission n'est pas créée par le législateur; et même si elle l'était, elle ne prévoit pas que le président se saisisse des dossiers à la place du conseiller juridique. Il y a donc moins de raisons de tolérer que le président joue plusieurs rôles au sein même du processus décisionnel.

En outre, l'art. 10 de la *Loi sur la Commission des affaires sociales* permet expressément au président de désigner un vice-président pour trancher les désaccords entre les membres d'un quorum. Étant donné la part active qu'il avait prise au débat, le président aurait dû confier la décision à un de ses vice-présidents. Il ne l'a pas fait. Le rôle actif joué par le président Poirier dans cette affaire me semble donc de nature à susciter une crainte raisonnable de partialité chez l'observateur informé.

L'intimée a également plaidé que la procédure suivie viole la règle *audi alteram partem* en ce que le président n'avait pas entendu les parties lorsqu'il a finalement tranché la question. La Cour a déjà examiné cette question dans *SITBA*. Elle souligne aux pp. 335 à 338 l'importance de distinguer entre les discussions portant sur des questions de fait et celles portant sur des questions de droit:

La détermination et l'évaluation des faits sont des tâches délicates qui dépendent de la crédibilité des témoins et de l'évaluation globale de la pertinence de tous les renseignements présentés en preuve. En général, les personnes qui n'ont pas entendu toute la preuve ne sont pas à même de bien remplir cette tâche et les règles de justice naturelle ne permettent pas à ces personnes de voter sur l'issue du litige. Leur participation aux discussions portant sur ces questions de fait pose moins de problèmes quand elles ne participent pas à la décision

such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

. . .

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principle or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.

It is now necessary to consider the conditions under which full board meetings must be held in order to abide by the *audi alteram partem* rule. In this respect, the only possible breach of this rule arises where a new policy or a new argument is proposed at a full board meeting and a decision is rendered on the basis of this policy or argument without giving the parties an opportunity to respond.

The question on which the Commission had to rule was clearly a point of law, namely whether "dressings and bandages were included in the definition of medical equipment" within the meaning of s. 10.04 of the *Regulation on Social Aid* then in effect. Furthermore, the parties chose to plead in writing and so far as one can tell made no representations at the hearing.

In the case at bar, there is no evidence that new arguments of law were raised at the "consensus table". The consultation process therefore did not infringe the *audi alteram partem* rule. Turning to the next stage, it also seems that no new points were considered by the president at the decision-making stage. He in fact decided on the basis of the written file as prepared by the quorum. As the Court observed in *IWA*, *supra*, at p. 339:

finale. Cependant, j'estime que ces discussions violent généralement les règles de justice naturelle parce qu'elles permettent à des personnes qui ne sont pas parties au litige de faire des observations sur des questions de fait alors qu'elles n'ont pas entendu la preuve.

. . .

Il faut aborder les questions de politique de manière différente parce qu'elles ont, par définition, des conséquences qui vont au-delà du règlement du litige particulier entre les parties. Bien qu'elles découlent de faits précis, elles constituent l'expression d'un principe ou de normes apparentées au droit. Puisque ces questions font appel à l'analyse des lois, des décisions antérieures et des besoins sociaux qui sont perçus, les conséquences d'une décision de politique prise par la Commission ne dépendent pas, dans une certaine mesure, de l'intérêt immédiat des parties, même si elles peuvent avoir un effet sur l'issue de la plainte.

Il faut maintenant examiner les conditions dans lesquelles les réunions plénières de la Commission doivent être tenues afin de respecter la règle *audi alteram partem*. À cet égard, la seule violation possible de la règle a lieu quand on propose une nouvelle politique ou un nouvel argument à une réunion plénière de la Commission et qu'une décision fondée sur cette politique ou cet argument est rendue sans qu'on accorde aux parties la possibilité de répliquer.

La question sur laquelle la Commission devait se prononcer était clairement une question de droit, à savoir si les «pansements et bandages entraient dans la définition d'équipement médical» au sens de l'art. 10.04 du *Règlement de l'aide sociale* alors en vigueur. Les parties avaient d'ailleurs choisi de plaider par écrit et n'ont, de toute évidence, pas fait de représentation à l'audition.

En l'espèce, il n'y a aucune preuve que des arguments de droit nouveaux aient été soulevés à la «table des consensus». Le processus de consultation n'a donc pas violé la règle *audi alteram partem*. Passant à l'étape suivante, il ne semble pas non plus que de nouveaux éléments aient été considérés par le président à l'étape de la décision. Celui-ci a, en fait, décidé sur la base du dossier écrit tel que constitué par le quorum. Comme le souligne la Cour dans *SITBA*, précité, à la p. 339:

. . . the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments. This right does not encompass the right to repeat arguments every time the panel convenes to discuss the case.

I therefore do not feel the facts of the instant case established a breach of the *audi alteram partem* rule. The Court moreover notes that the Commission has subsequently altered its practice and has taken the sensible step of giving parties an opportunity to be heard by the president or vice-president responsible for resolving a disagreement. In the case at bar, the only blame which can attach to the president is thus of having resolved the disagreement between the decision makers when he had already spoken on the matter.

4. *Nature of First "Decision"*

I concur on this point with the disposition chosen by Dugas J., namely that the only decision in the case at bar is that contained in document P-9 (the "second" decision, [1983] C.A.S. 713). Like Dugas J., I consider that the first "decision" rendered by the members of the quorum was in their minds only a draft, a provisional opinion.

In this regard, the intent of the decision makers must be analysed in terms of the institutionalized consultation process that existed at the time the decision was made, even though that process now proves to have contravened the rules of natural justice. The Court cannot disregard the setting in which the decision was made in deciding whether it was conclusive.

Finally, I would note that the procedure of early signature of draft decisions by members and assessors followed in the case at bar seems to me unadvisable. Although this procedure may be practical, it only adds to the appearance of bias when a decision maker decides to alter his opinion after free consultation with his colleagues. A litigant who sees a "decision" favourable to him changed to an unfavourable one will not think that there has

. . . la règle relative aux arguments juridiques ou de politique qui ne soulèvent pas des questions de fait est un peu moins sévère puisque les parties n'ont que le droit de présenter leur cause adéquatement et de répondre aux arguments qui leur sont défavorables. Ce droit n'inclut pas celui de reprendre les plaidoiries chaque fois que le banc se réunit pour débattre l'affaire.

Je ne crois donc pas que les faits de cette affaire font voir une violation de la règle *audi alteram partem*. La Cour note d'ailleurs que la Commission a depuis modifié sa pratique et qu'elle a pris l'heureuse initiative de donner aux parties l'occasion de se faire entendre par le président ou vice-président chargé de trancher un désaccord. En l'espèce, le seul reproche que l'on peut adresser au président est donc d'avoir tranché le désaccord entre les décideurs alors qu'il s'était déjà exprimé sur la question.

4. *La nature de la première «décision»*

Je suis d'accord sur ce point avec le dispositif choisi par le juge Dugas, soit que la seule décision en l'espèce est celle consignée au document P-9 (la «deuxième» décision, [1983] C.A.S. 713). Comme le juge Dugas, je suis d'avis que la première «décision» rendue par les membres du quorum n'était dans leur esprit qu'un projet, qu'une opinion provisoire.

À cet égard, l'analyse de l'intention des décideurs doit se faire en tenant compte du processus de consultation institutionnalisé qui existait au moment où la décision a été rendue, même si ce processus s'avère aujourd'hui contrevenir aux règles de justice naturelle. La Cour ne peut pas faire abstraction du cadre dans lequel la décision a été rendue pour décider du caractère définitif ou non de celle-ci.

Je souligne finalement que la procédure de signature anticipée des projets de décisions par les membres et assesseurs suivie en l'espèce m'apparaît être à déconseiller. Même si cette procédure s'avère pratique, elle ne fait qu'ajouter à l'apparence de partialité lorsqu'un décideur décide de modifier son opinion après libre consultation avec ses collègues. Le justiciable qui voit une «décision» qui lui était favorable se changer en décision

been a normal consultation process; rather, he will have the impression that external pressure has definitely led persons who were initially favourable to his case to change their minds.

VI—Conclusions

For these reasons, I would dismiss the principal and incidental appeals with costs.

Principal and incidental appeals dismissed with costs.

Solicitors for the appellant: McCarthy, Tétrault, Québec.

Solicitors for the respondent: Gauthier, Bergeron & Faribault, Magog.

défavorable ne pensera pas qu'il s'agit du processus normal de consultation; il aura plutôt l'impression qu'une pression extérieure a bel et bien fait changer d'avis les personnes d'abord favorables à sa cause.

VI—Conclusions

Pour ces motifs, je suis d'avis de rejeter les pourvois principal et incident avec dépens.

Pourvois principal et incident rejetés avec dépens.

Procureurs de l'appelante: McCarthy, Tétrault, Québec.

Procureurs de l'intimée: Gauthier, Bergeron & Faribault, Magog.

Warnaco Inc. v. Canada (Attorney General)

Federal Court Judgments

Federal Court of Canada - Trial Division

Ottawa, Ontario

Heneghan J.

Heard: March 15, 2000.

Judgment: April 7, 2000.

Court File No. T-854-99

[2000] F.C.J. No. 463 | *[2000] A.C.F. no 463* | *190 F.T.R. 133* | *21 Admin. L.R. (3d) 300* | *5 C.P.R. (4th) 129* | *96 A.C.W.S. (3d) 659*

Between Warnaco Inc., applicant, and The Attorney General of Canada, respondent

(32 paras.)

Case Summary

Trademarks, names and designs — Trademarks — Practice — What trademarks registrable — Prohibition, marks which are deceptively misdescriptive — Prohibition, marks which are descriptive of the product.

This was an appeal by Warnaco from dismissal of an application for a trade-mark registration. Warnaco also sought a determination as to whether the registrar of trade-marks was the proper respondent in the appeal. The registrar had refused Warnaco's registration of the name Satin and Stripes for intimate apparel, on grounds that the name was descriptive. Warnaco produced additional affidavit evidence including expert opinion from a linguist, as to the common everyday meaning of the words satin and stripes. Other affidavits contained extracts from records maintained by the registrar evidencing registered names similar to that proposed by Warnaco.

HELD: Appeal dismissed.

There was no person directly affected by the decision, nor was there any person required to be named as a party. Therefore, the proper respondent was the Attorney General. Warnaco's additional evidence was not such that it would have materially affected the registrar's conclusion in relation to the proposed name. The appropriate standard of review was reasonableness simpliciter. The registrar addressed the evidence and arguments and reached a reasonable conclusion. The mark was clearly descriptive or deceptively misdescriptive of the character or quality of wares with which it was proposed to be used.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rules 300, 303.

Trade-marks Act, *R.S.C. 1985, c. T-13, ss. 12*(1)(b), 56.

Counsel

Diane E. Cornish and Darlene H. Carreau, for the applicant. Catharine Moore, for the respondent.

HENEGHAN J. (Reasons for Order)

1 This is a matter being appealed from a decision of the Registrar of Trade-marks. It was heard on March 15, 2000. There was a preliminary issue concerning the status of the Registrar of Trade-marks, whether he was the proper Respondent in this matter having regard to Rules 300 and 303 of the Federal Court Rules, 1998. Rules 300(d) and 303 provide as follows:

> 300. This Part applies to...
>
> (d) appeals under section 56 of the Trade-marks Act...
>
> 303.(1) Subject to subsection (2), an Appellant shall name as a respondent every person
>
> (a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or
>
> (b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.
>
> (2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.
>
> (3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.
>
> * * *
>
> 300. La présente partie s'applique...
>
> d) aux appels interjetés en vertu de l'article 56 de la Loi sur les marques de commerce...
>
> 303.(1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur:
>
> a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

b) toute autre personne qui doit être désignée à titre de partie aux termesde la loi fédérale ou de ses textesd'application qui prévoient ou autorisent la présentation de la demande

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

2 Counsel for the Applicant advised that the Registrar had been named as the Respondent and submitted that his role was to clarify the issues and referred to the decision of this Court in Molson Companies Ltd. v. Moosehead Breweries Ltd. *(1989), 24 C.P.R. (3d) 217*. In that case, which also dealt with an appeal from a decision of the Registrar of Trade-marks, MacKay J. said at p. 218:

> On behalf of the Attorney General counsel submitted that he was not appearing to represent the Registrar of Trade-marks, a respondent in the matter, since there were no issues apparent relating to a need for clarification of the record or relating to the jurisdiction of the registrar, the recognized scope for representation by the registrar as the tribunal issuing the decision which was subject to appeal: per Estey J. for the court in Re: Worthwestern Utilities Ltd. and City of Edmonton *(1978), 89 D.L.R. (3d) 161*, *[1979] 12 A.R. 449* (S.C.C.).

3 Furthermore, counsel for the Applicant submitted that Rule 303 was applicable only to applications for judicial review and not to statutory appeals, notwithstanding Rule 300(d) which provides that Part V of the Federal Court Rules, 1998, applies to an appeal pursuant to the Trade-marks Act, *R.S.C. 1985, c. T-13*.

4 Counsel for the Respondent acknowledged that Part V of the Rules deals with applications and submitted that the combined effect of Rules 303(1)(a) and 303(2) is that the Attorney General of Canada be named as the Respondent, having regard to the fact that the within proceeding is an adversarial process and some party must be present who can argue in support of the decision of the Registrar and that it is inappropriate for the Registrar to assume this role.

5 I do not accept the submissions of counsel for the Applicant that this appeal under section 56 of the Trade-marks Act is not governed by Part V of the Federal Court Rules, 1998. I do not accept the implied argument of the Applicant that Part V applies only to the manner in which an appeal under the Trade-marks Act is instituted, that is by way of application for judicial review rather than by the filing of a notice of appeal. The wording of Rule 300(d) is clear. There is nothing to limit the manner in which the rules set out in Part V apply to appeals under the Trade-marks Act and consequently, Rule 303 applies to the conduct of the within appeal.

6 Since there is no person directly affected by the decision of the Registrar which is the subject of this appeal nor any person who is required to be named as a party to the appeal pursuant to the Trade-marks Act, Rule 303(2) of the Federal Court Rules must come into play. This rule is clear and provides that where there is no person directly affected by the decision in question, nor any person required to be named as a party pursuant to the Act under which the appeal is brought, it follows that the proper respondent is the Attorney General of Canada.

7 In my view, the Attorney General of Canada should have been named as the Respondent in the beginning. Rule 303(3) provides a mechanism by which the Attorney General can make submissions to the Court as to why she should not be the Respondent. Upon receipt of such submissions, the Court may substitute another person or body including the Tribunal whose decision is the subject of the application for judicial review.

8 The reason that the Registrar of Trade-marks should not be a party is to avoid a situation where the decision-maker is participating in a review of his or her own decision.

9 The issue of the right of a Tribunal whose decision is under review to appear as a party in a hearing was considered by this Court in Canada (Attorney General) v. Bernard *(1993), 69 F.T.R. 239* (T.D.). In Bernard, Madam Justice McGillis dealt with a request by the Canadian Human Rights Commission to obtain status as a respondent in a review of a decision made by that Commission. She refused the request, but without prejudice to the right of the Commission to seek intervener status.

10 An appeal by the Canadian Human Rights Commission to the Federal Court of Appeal was dismissed, on the grounds that absent a provision in the Canadian Human Rights Act there is no right for the Tribunal whose decision is under review to enjoy party status in the subsequent proceeding; see Canada (Human Rights Commission) v. Canada (Attorney General), *[1994] 2 F.C. 447* (C.A.).

11 In light of the submissions and in view of the plain wording of the current rules of the Federal Court, I granted an order substituting the Attorney General of Canada for the Registrar of Trade-marks as the Respondent in the within appeal.

12 With the preliminary issue surrounding the Registrar resolved it is necessary to consider the substance of this application.

13 This is an appeal from a decision of the Registrar of Trade-marks made pursuant to section 56 of the Trade-marks Act, which provides as follows:

> 56.(1) An appeal lies to the Federal Court from any decision of the Registrar under this Act within two months from the date on which notice of the decision was dispatched by the Registrar or within such further time as the Court may allow, either before or after the expiration of the two months.
>
> * * *
>
> 56.(1) Appel de toute décision rendue par le registraire, sous le régime de la présente loi, peut être interjeté à la Cour fédérale dans les deux mois qui suivent la date où le registraire a expédié l'avis de la décision ou dans tel délai supplémentaire accordé par le tribunal, soit avant, soit après l'expiration des deux mois.

14 The Applicant is appealing against the decision of the Registrar dated March 16, 1999, in which the Registrar refused registration of "SATIN STRIPES" as a proposed trademark on the grounds that the name was descriptive. In his decision, the Registrar found that the proposed name was suggestive of the

materials used in the composition of the wares, that is bras and panties. The Registrar made the following conclusion:

> I have carefully reviewed the Appellant's submissions and I consider that the average or everyday consumer when faced with this trade-mark used in association with bras and panties would immediately conclude as a matter of first impression, that the wares are striped with satin.

15 The sole ground of appeal advanced in the Notice of Application is as follows:

> (a) the Registrar erred in concluding that the mark SATIN STRIPES ("the Mark") is not registrable by reason of section 12(1)(b) of the Trade-marks Act that is, that the Mark is clearly descriptive or deceptively misdescriptive of the character or quality of wares with which it is proposed to be used, namely, intimate apparel, namely bras and panties.

16 The Applicant filed further evidence in relation to this appeal as permitted by section 56(5) of the Trade-marks Act. The new evidence consisted of the Affidavit of Peter A. Reich and the Affidavits of Jennifer Leah Stecyk. While the Trade-marks Act allows the introduction of additional evidence upon an appeal pursuant to section 56 and permits the Court to exercise any discretion vested in the Registrar in responding to such evidence, the mere fact that new evidence is introduced upon an appeal does not turn the proceedings into a new trial.

17 That question was addressed by this Court in Garbo Group Inc. v. Harriet Brown & Co. *(1999), 3 C.P.R. (4th) 224* (F.C.T.D.). Mr. Justice Evans looked at the question in the context of the appropriate standard of review to be applied to a decision of the Registrar of Trade-marks and said at p. 232:

> Indeed, even when additional evidence is admitted on appeal, it still may be appropriate to ask whether the Registrar's decision was wrong in the light of that evidence, rather than how the appellate court would have decided the question if it had been before the court de novo. Of course, the more significant the additional evidence the greater the scope for the court to exercise its own independent judgment on the finding of fact in question.

18 The present case also requires consideration of the appropriate standard of review. In Garbo, Mr. Justice Evans referred to the historic view at p. 230, as follows:

> It is generally said that the standard of review applicable to the Registrar's decision is that of correctness, although in view of the expertise of the Registrar, and of those to whom the Registrar has delegated decision-making powers under subsection 63(3), their decisions should not lightly be set aside on findings of fact that are central to their specialized jurisdiction, such as whether confusion is likely to be caused by the proposed mark. However, when significant evidence is adduced on the appeal that was not before the Registrar, less weight should be given to the Registrar's findings: Molson Companies Ltd. v. John Labatt Ltd. *(1984), 1 C.P.R. (3d) 494* (F.C.T.D.); United States Polo Association v. Ralph Lauren Corporation, *[1999] F.C.J. No. 318*, (F.C.T.D.; T-1881-93; T-193-95, T-189-96; March 8, 1999).

19 Mr. Justice Evans went on to say that the standard of review needs to be reformulated in light of

current developments in administrative law:

> In my opinion the standard of review applied to the Registrar's findings of confusion needs to be reformulated to take account of the pragmatic and functional analysis developed in contemporary administrative law jurisprudence for selecting the standard of review appropriate for the issue in dispute. In undertaking this exercise I am following the path already indicated by Lutfy J. in Young Drivers of Canada v. Chan, *[1999] F.C.J. No. 1321*, (F.C.T.D.; T-636-97; August, 30, 1999). However, the end result of the analysis may differ relatively little from the Court's established practice. Ibid. at 230-231.

20 In Molson Breweries v. John Labatt Ltd., *[2000] F.C.J. No. 159*, (A-428-98, February 3, 2000), the Federal Court of Appeal addressed the question of the nature of an appeal under section 56 of the Trade-marks Act and the applicable standard of review. Mr. Justice Rothstein, speaking for the majority, said as follows:

> Because of the opportunity to adduce additional evidence, section 56 is not a customary appeal provision in which an appellate court decides the appeal on the basis of the record before the court whose decision is being appealed. A customary appeal is not precluded if no additional evidence is adduced, but it is not restricted in that manner. Nor is the appeal a "trial de novo" in the strict sense of that term. The normal use of that term is in reference to a trial in which an entirely new record is created, as if there had been no trial in the first instance. [12] Indeed, in a trial de novo, the case is to be decided only on the new record and without regard to the evidence adduced in prior proceedings. [13] Ibid. at para. 46.

21 The first question to be considered in this appeal is the applicable standard of review. In Molson Breweries v. John Labatt Ltd., supra, Mr. Justice Rothstein commented on the appropriate standard to be applied in appeals under the Trade-marks Act and said:

> ...even though there is an express appeal provision in the Trade-marks Act to the Federal Court, expertise on the part of the Registrar has been recognized as requiring some deference. Having regard to the Registrar's expertise, in the absence of additional evidence adduced in the Trial Division, I am of the opinion that decisions of the Registrar, whether of fact, law or discretion, within his area of expertise, are to be reviewed on a standard of reasonableness simpliciter. However, where additional evidence is adduced in the Trial Division that would have materially affected the Registrar's findings of fact or the exercise of his discretion, the Trial Division judge must come to his or her own conclusion as to the correctness of the Registrar's decision. Ibid. at para. 50.

22 However, additional evidence was introduced by the Applicant and it is necessary to examine this evidence and ask whether this evidence would have "materially affected" the Registrar's finding and consequently the appropriate standard of review.

23 The additional evidence consists of one affidavit for Peter Reich and two affidavits from Jennifer Stecyk. The affidavit of Mr. Reich was tendered as expert evidence by a linguist as to the common, everyday Canadian meaning of the words "satin stripes". The affidavits of Jennifer Stecyk contained

extracts from the records maintained by the Registrar of Trade-marks going to the state of the register relative to names similar to that proposed by the Applicant, which names were accepted for registration.

24 I find that the new evidence tendered by the Applicant is not such that it would have materially affected the Registrar's conclusion in relation to the proposed name "SATIN STRIPES".

25 Given that there is no new evidence which "materially affects "the findings of the Registrar, the appropriate standard of review to apply is that of reasonableness simpliciter.

26 In Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., *[1997] 1 S.C.R. 748* the Court addressed the meaning of reasonableness simpliciter and said at p. 778:

> The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), *[1976] 2 S.C.R. 802*, at p. 806, Ritchie J. described the standard in the following terms:
>
> > ...the accepted approach of a court of appeal is to test the findings [if fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]
>
> Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter.
>
> Putting all of the foregoing considerations into the balance and taking my cue from this Court's decisions on the subject, including particularly relatively recent decisions, I am of the view that decisions of the Tribunal should be subject to review on a reasonableness standard. That this standard is appropriate and sensible becomes clear when one considers the complexity of economic life being regulated. It bears noting, however, that the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Tribunal has been shown to have acted unreasonably.
>
> In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin. In this respect, I agree with Kerans, supra, at p. 17, who has described deference to expertise in the following way:

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated.
>
> Ibid. at 778-780

27 The standard to be applied to the Registrar's decision is reasonableness simpliciter. This means that I must ask if the Registrar's decision is reasonable on the basis of the material before him and whether he applied the appropriate principles in reaching his conclusion.

28 The Registrar concluded that the proposed name "SATIN STRIPES" was descriptive of the wares, that is bras and panties. He rejected the submissions that the word "stripes" is suggestive of a collateral feature of the goods.

29 The Registrar applied the test of first impression which is the accepted test in assessing the registerability of a proposed name; see: Drackett Co. of Canada Ltd. v. America Home Products Ltd. *(1968), 55 C.P.R. 29* (Ex.Ct.); John Labatt Ltd. v. Carling Breweries Ltd. *(1975), 18 C.P.R. (2d) 15* (F.C.T.D.) and Molson Cos. v. Carling O'Keefe Breweries of Canada Ltd. *(1981), 55 C.P.R. (2d) 15* (F.C.T.D.). In Molson Cos. Ltd. v. Carling O'Keefe Breweries of Canada Ltd., supra, Mr. Justice Cattanach said at p. 20: I accept the premise that the decision that a trade mark is clearly descriptive is one of first impression from which it follows that it is not the proper approach to critically analyse the words of a mark but rather to ascertain the immediate impression created by the mark in association with the product. The mark must be considered in conjunction with the wares and not in isolation.

30 The Registrar also considered arguments relating to alleged errors in the state of the register of trade-marks. Without deciding whether such errors existed, he cited appropriate and applicable authority to the effect that even if the Registrar had erred on previous occasions in accepting similar names for registration he was not bound to perpetuate past mistakes; see Sherwin Williams Company of Canada Limited v. The Commissioner of Patents *[1937] Ex. C.R. 205* (Ex.Ct.).

31 Having regard to these factors, it appears that the Registrar assessed the evidence and arguments before him and reached a conclusion which is reasonable. Therefore, the Registrar did not err in concluding that the mark SATIN STRIPES ("the Mark") is not registerable by reason of section 12(1)(b) of the Trade-marks Act that is, that the Mark is clearly descriptive or deceptively misdescriptive of the character or quality of wares with which it is proposed to be used, namely, intimate apparel, namely bras and panties.

32 For these reasons, the appeal is dismissed with costs.

HENEGHAN J.

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