In the matter of a Review by

the Natural Resources Conservation Board

under section 25 of the *Agricultural Operation Practices Act*, RSA 2000, c A-7

of a decision by an Approval Officer set out in Decision Summary LA21053

REPLY OF

THE APPROVAL OFFICER

On behalf of the Approval Officer:

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I. INTRODUCTION

1. Because approval officers do not take a position on Board reviews, they do not often make reply submissions. In this Review, the Approval Officer continues to not take a position on the outcome. However, a reply submission from the Approval Officer is warranted to assist the Board with relevant and accurate information.

2. This submission provides a limited reply to new arguments raised by John Schooten and Sons Custom Feedyard Ltd. ("the Schootens") in their May 11, 2022 submission. That submission included a written argument (7 pages), and a letter from law firm Davidson & Williams LLP (2 pages).

II. ISSUES

3. This submission will

   a. identify the parameters of the Approval Officer's reply;

   b. respond to the jurisdictional argument raised in the Schootens' submission;

   c. respond to allegations of procedural unfairness made in the Schootens' submission; and

   d. provide additional clarification where required.

4. The Approval Officer offers no reply to the Schootens' submission at

   a. "Permit Condition 3", items 2), 3) and 4);

   b. "Conflicting NRCB and Municipality Policy" items 1)b., 3)a. and b., and 4)a. and b.;

   c. "Discussion with Alberta Transportation";

   d. "Partnering with Vulcan County"; and

   e. "Modify the reporting month in Condition 8."

III. SUBMISSION ON ISSUES

a. Parameters of this submission

5. The principles of finality and impartiality prevent the Approval Officer from taking a position on the outcome of the review.

- *Ontario (Energy Board) v Ontario Power Generation Inc.,* 2015 SCC 44, **Tab 1** at para 49

6. The Approval Officer has no intention to bootstrap the reasons set out in Decision Summary LA21053 and in Technical Document LA21053. An administrative decision maker such as an approval officer must recognize that the body reviewing their decision "is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality."

> [52] …. 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: [*citations omitted*]

- *Ontario (Energy Board) v Ontario Power Generation Inc.,* 2015 SCC 44, **Tab 1** at paras 57 and 52 respectively. See also paras 53-54 for further considerations that "argue in favour of a discretionary approach"

7. The Approval Officer does not take a position on the merits of the Review – i.e. whether the Board upholds, varies, or removes condition 3. It appears likely there will be no other party adverse to the Schootens in this Review who will speak to the Approval Officer's process. Because of that, and due to the nature of the Schootens' submission, the Approval Officer feels compelled to respond to challenges to her jurisdiction (b. next) and to the integrity of her decision making process (c.), and to clarify some statements (d.).

b. Response to jurisdictional argument

8. Under heading “Permit Condition 3” at page 2, item 1), the Schootens submit that inclusion of a traffic impact assessment “is not legislation found in” the *Agricultural Operation Practices Act*.

9. The authority of the approval officer to require a traffic impact assessment (“TIA”) is found in section 20(1)(b)(i) of the *Agricultural Operation Practices Act* (“AOPA”). That provision requires an approval officer to “consider matters that would normally be considered if a development permit were being issued.”

10. Part 8.4 (page 27) of the NRCB Approvals Policy addresses “Municipal permitting matters.” The Schootens quote from the last sentence of part 8.4 (under “Conflicting NRCB and Municipality Policy” at item 1)a., page 4 of their submission). It may be helpful to review part 8.4 more fully to appreciate the context around the NRCB’s approach:

> The NRCB interprets the word “normally” in section 20(1)(b)(i) to limit the scope of municipal permitting matters to those that a municipality could address under the *Municipal Government Act*, the municipality’s own land use bylaw, and other permitting rules adopted by the municipal council. Sections 22(1)(b) and (2)(b) imply the same limitation.
>
> Because consistency with the municipal land use provisions is directly addressed by AOPA, these sections of the act allow approval officers to consider other conditions that the municipality could reasonably require. Approval officers will consider the municipality’s response to the application and conditions the municipality indicates it would like to have included with the permit. Approval officers have discretion to decide which conditions it will include, but must justify their decision in the written reasons issued with their permit decision.

- Operational Policy 2016-7: Approvals, **Tab 2** at part 8.4, page 27

11. In Decision Summary LA21053, the Approval Officer wrote:

> AOPA requires me to consider matters that would normally be considered if a development permit were being issued. The NRCB interprets this to include aspects such as property line and road setbacks related to the site of the CFO. (Grow North, RFR 2011-01 at page 2). Approval officers are limited to what matters they can consider though as their regulatory authority is limited.

> In addition, a traffic impact assessment is a matter that might normally be considered if a development permit were being issued by the municipality.

- Decision Summary LA21053 at page 6. See also top of p 16 for mention of section 20(1)(b)(i)

12. It may be helpful to review the Approval Officer's recap of her discussions with Alberta Transportation:

> As mentioned in section 3 above, in a follow up email, Ms. Olsen had no further comments. In a phone call to clarify who would conduct a traffic impact assessment, Ms. Olson stated that the developer would retain a qualified engineering firm to do the assessment. This would typically be the result of a condition in a development permit issued by the responsible approving authority. In case the assessment identifies that changes to the current traffic situation needed to be made, any arising cost would be borne by the developer.

- Decision Summary LA21053 at page 6

c. Response to allegations of procedural unfairness

13. The Schootens' submission does not use the term "procedural unfairness," but this is what they are alleging when they argue:

a. that the Approval Officer was bound to follow policy and precedent; and

b. that the Approval Officer did not provide justification for departure from policy and precedent.

Was the Approval Officer bound to follow policy and precedent?

14. The Schootens suggest that the Approval Officer, by imposing condition 3, has not followed the NRCB's Approvals Policy or previous application decisions. This suggestion appears under the heading "Inconsistent approach to feedlot permits" (page 3), as well as under the heading "Conflicting NRCB and Municipality Policy" (pages 4-5),

15. As an administrative decision maker, an approval officer is not strictly bound by their previous decisions or by previous decisions of other approval officers.

- *Altus Group Limited v Calgary (City)*, 2015 ABCA 86, **Tab 3** at para 16

16. Rather, she is required to pay attention to previous similar decisions and, where departing from those, provide an explanation for the basis for the departure.

> Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable.
>
> - *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, **Tab 4** at para 131

(a discussion about the Approval Officer's justification for condition 3 is set out below).

17. However, at the same time, an approval officer must be careful not to allow written policy and previous decisions to fetter her decision. The Federal Court of Appeal found that an administrative decision was unreasonable because the decision maker only considered three factors listed in an information circular, and no other:

> For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decisionmaking: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.
> …
> However, as explained in paragraphs 20-25 above [*of this court decision*], decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: [*citations omitted*]. An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.
>
> - *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299, **Tab 5** at paras 22 and 60

18. The outcomes and conditions of given applications will necessarily differ – and should differ – because the facts to which the Approval Officer applies her "decision

process" will differ from application to application, and land location to land location. As stated in the NRCB Approvals Policy:

> In exercising their discretion, approval officers are expected to promote consistent delivery of AOPA throughout the province. The internal review discussed in the introduction to part 2, above, and the policies in this document are meant to help promote consistency. However, consistent use of policies cannot ensure consistent outcomes among all permit applications, because of the regional and site-specific factors that must be considered by approval officers. These factors include the specific wording of municipal development plans (MDPs), site-specific soil characteristics, climatic constraints, distance to and number of neighbours, regional hydrology and hydrogeology, land use patterns, and water supplies and sources. Additionally, operators often propose specific or unique solutions to address their specific site conditions.

- Operational Policy 2016-7: Approvals, **Tab 2** at part 2.3, page 4

19. If this were not the case, an approval officer would have no role. The value of an approval officer is her authority to exercise discretion in a reasonable manner within the authority and constraints of the legislation.

20. The Approvals Policy recognizes the balance between consistent decision making and independent, context-specific decision making:

> The act and its regulations prescribe many aspects of the NRCB's permitting processes, but also afford discretion to NRCB approval officers. Operational Policy 2016-7: Approvals provides policies to guide approval officers' exercise of this discretion, and to clarify the intent of AOPA and the regulations where those laws are unclear. Many of the policies below address the merits or substance of approval officers' permitting decisions, while other policies address the processes for making those decisions. All of the policies are meant to promote consistent and efficient permitting decisions.
> ….
> Approval officers are to exercise their discretion, and apply this policy and the requirements in the act, in the spirit of this legislative purpose. The directions provided by this policy are to be generally applied, but remain subordinate to the act and regulations. In addition, approval officers have discretion to modify this policy when its strict application would be manifestly unfair, or in other necessary and appropriate circumstances.

- Operational Policy 2016-7: Approvals, **Tab 2** at part 1, page 1

Did the Approval Officer provide justification for departure from policy and precedent?

21. The Schootens submit, under "Conflicting NRCB and Municipality Policy" at 1, that the Approval Officer did not "justify" her decision.

22. The Approval Officer draws the Board's attention in particular to pages 15-16 of Decision Summary LA21053, under the heading "Road use (safety, maintenance, volume, dust, and costs)."

23. At page 15, the Approval Officer acknowledges that "typically" the NRCB would not "initiate or request an applicant to conduct a traffic impact assessment." She writes that "Ordinarily traffic impact assessments are managed by the municipality or Alberta Transportation, or both." In Decision Summary LA21053 at pages 15-16, she goes on to say:

> Having said that, there seems to be some confusion about who is to initiate the traffic impact assessment in the context of a CFO application under AOPA. To resolve this apparent dilemma, I determined that it will be necessary, under section 20(1)(b)(i) of AOPA, to include a condition for this approval, requiring the applicant to conduct a traffic impact assessment relating to risk at the HW 547 – RR244 intersection and to provide the document to Vulcan County. The consequences of the assessment will be moved forward by Vulcan County. In part, this is because municipalities "have autonomy for land use decisions and development approvals and have the ability to undertake improvements and recover the costs of growth from developers through agreements (i.e., development agreements and off-site levies for new or expanded transportation infrastructure)" (from Alberta, Traffic Impact Assessment Guidelines, February 2021).

d. Additional clarification where required

24. The Schootens suggest that, because they and Vulcan County (now) feel a road use agreement better meets their needs, condition 3 could be removed (Schooten submission at page 7). For the Schootens, Davidson & Williams LLP (at page 2) suggest that a road use agreement is a preferable tool to a traffic impact assessment. For clarity,

a. a traffic impact assessment is not the same as a road use agreement. Condition 3 requires a traffic impact assessment; and

b. nothing in condition 3 prevents the County and the Schootens from entering into a road use agreement.

25. It is worth observing that permits issued under AOPA are not the result of a negotiation between two parties. The approval officer has a statutory task to do. In this case, the Approval Officer noted that condition 3 was in response to concerns expressed by Vulcan County, Alberta Transportation, and neighbours such as Brent Gateman, Nate Gardner and Family, and Ruth Ann Sherstabetoff.

- See Decision Summary LA21053 pages 11-14 for a point-form summary of each party's concerns

26. The Schootens, at item 2)c. of their submission, hold out that the Vulcan County Council letter confirms that the TIA should not be a permit condition. For clarity:

a. Vulcan County wrote two letters. The letter dated February 2, 2022 was from the manager of development services. The letter dated April 6, 2022 is from the Reeve.

b. The Approval Officer did not have the letter dated April 6, 2022 before her when she came to her decision on this application. She had only the letter dated February 2, 2022.

- February 2, 2022 letter: Appendix "A," Approval Officer Submission (May 4, 2022)
- April 6, 2022 letter: pdf page 5 of RFR #1 from Schootens (April 7, 2022)

27. The Schootens submit, at part 3)c. of their submission, that the Approval Officer "chose to ignore" the MDP requirement relating to water supply. As clarification:

a. An approval officer is required under AOPA only to assess consistency of an application against the MDP's "land use provisions."

b. Water licensing is regulated and managed by Alberta Environment and Parks (or sometimes by an irrigation district) under the *Water Act*.

c. In contrast, either Alberta Transportation (within the highway control zone) or the municipality (outside the highway control zone) are responsible to ensure the impacts of a "development" are addressed prior to issuing permits. In this case, there is no provincial highway or municipally permitted development.

- See Decision Summary at pages 17-18
- See also TIA Guidelines, Appendix "C" to the Approval Officer's Submission dated May 4, 2022, at PDF page 4/34
- Note that 618(2.1) of the *Municipal Government Act* exempts confined feeding operations under AOPA from Part 17 of the MGA.

28. The Schootens submit, at part 4)c. of their submission, that the Approval Officer "chose to ignore" the "open house requirement" from the municipality. For clarity:

a. Under section 20(1)(b)(iv), the Approval Officer "<u>may</u> hold meetings and other proceedings with respect to" an approval application (underlining added); and

b. The Approval Officer addressed the request from the County:

Townhall meetings and public notice

Section 20(1)(b)(iv) states that the NRCB may hold meetings and other proceedings with respect to an application. The NRCB does not convene these meetings on its own accord, since without the applicant present, the discussion would be restricted to only discussing the AOPA application process, not the merits of an individual application.

- Decision Summary LA21053 at page 14 and following

29. The Schootens suggest, under "In Conclusion" of their submission, that in RFR 2021-07 *JBC Cattle Inc*. the Board "confirmed that it was not appropriate for the AO to address traffic concerns with AOPA legislation." For clarity, the Board in *JBC Cattle* found the lack of a traffic-related condition did not merit a review under the circumstances.

- For the full discussion, see RFR 2021-07 *JBC Cattle Inc.* **Tab 6** at page 2

IV. CONCLUSION

30. The Approval Officer takes no position on the outcome of this Review.

31. The Approval Officer has endeavoured to provide sufficient information to the Board to assist in a fulsome consideration of the merits, within permissible bounds.

RESPECTFULLY SUBMITTED THIS 18th DAY OF May, 2022

Fiona N. Vance

Chief Legal Officer – Operations

Natural Resources Conservation Board

REPLY SUBMISSION ON BEHALF OF THE APPROVAL OFFICER

V. TABLE OF AUTHORITIES

Note: excerpts include a court decision's headnote (where there is one) as well as the full discussion around the paragraph(s) quoted and highlighted

TAB	AUTHORITY
1	*Ontario (Energy Board) v Ontario Power Generation Inc.,* 2015 SCC 44, at paras 49, 52-57 https://www.canlii.org/en/ca/scc/doc/2015/2015scc44/2015scc44.html?autocompleteStr=2015%20scc%2044&autocompletePos=1
2	NRCB Operational Policy 2016-7: Approvals, at parts 1.0, 2.3, and 8.4 (policy accessible at https://www.nrcb.ca/public/download/files/97525)
3	*Altus Group Limited v Calgary (City)*, 2015 ABCA 86, at para 16 https://www.canlii.org/en/ab/abca/doc/2015/2015abca86/2015abca86.html?autocompleteStr=altus&autocompletePos=1
4	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 131 https://www.canlii.org/en/ca/scc/doc/2019/2019scc65/2019scc65.html?autocompleteStr=2019%20SCC%2065&autocompletePos=1
5	*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299, at paras 22 and 60 https://www.canlii.org/en/ca/fca/doc/2011/2011fca299/2011fca299.html?autocompleteStr=2011%20FCA%20299&autocompletePos=1
6	NRCB Decision RFR 2021-07 *JBC Cattle Inc.* at page 2 (accessible at https://www.nrcb.ca/download_document/1/441/11271/nrcb-decision-rfr-2021-07-jbc-cattle-inc-la21018)

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.

Cases Cited

By Rothstein J.

Considered: *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4; *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; **referred to:** *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481; *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186; *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171; *Ontario Power Generation Inc. (Re)*, EB-2007-0905, November 3, 2008 (online: http://www.ontarioenergyboard.ca/); *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *B.C.G.E.U. v. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145; *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; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309; *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3; *Leon's Furniture Ltd. v. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110; *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292; *United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27, 249 N.B.R. (2d) 93; *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923); *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989); *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 901 P.2d 270 (1995); *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R.

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

Arrêts examinés : *Enbridge Gas Distribution Inc. c. Ontario Energy Board* (2006), 210 O.A.C. 4; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; **arrêts mentionnés :** *Toronto Hydro-Electric System Ltd. c. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *TransCanada Pipelines Ltd. c. Office national de l'Énergie*, 2004 CAF 149; *Ontario Power Generation Inc. (Re)*, EB-2007-0905, November 3, 2008 (en ligne : http://www.ontarioenergyboard.ca/); *CAIMAW c. Paccar of Canada Ltd.*, [1989] 2 R.C.S. 983; *B.C.G.E.U. c. Indust. Rel. Council* (1988), 26 B.C.L.R. (2d) 145; *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; *Ontario (Children's Lawyer) c. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309; *Canada (Procureur général) c. Quadrini*, 2010 CAF 246, [2012] 2 R.C.F. 3; *Leon's Furniture Ltd. c. Information and Privacy Commissioner (Alta.)*, 2011 ABCA 94, 502 A.R. 110; *Henthorne c. British Columbia Ferry Services Inc.*, 2011 BCCA 476, 344 D.L.R. (4th) 292; *United Brotherhood of Carpenters and Joiners of America, Local 1386 c. Bransen Construction Ltd.*, 2002 NBCA 27, 249 R.N.-B. (2e) 93; *Chandler c. Alberta Association of Architects*, [1989] 2 R.C.S. 848; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654; *Tervita Corp. c. Canada (Commissaire de la concurrence)*, 2015 CSC 3, [2015] 1 R.C.S. 161; *Bell Canada c. Bell Aliant Communications régionales*, 2009 CSC 40, [2009] 2 R.C.S. 764; *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12; *ATCO Gas and Pipelines Ltd. c. Alberta (Energy and Utilities Board)*, 2006 CSC 4, [2006] 1 R.C.S. 140; *State of Missouri ex rel. Southwestern Bell Telephone Co. c. Public Service Commission of Missouri*, 262 U.S. 276 (1923); *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989); *U.S. West Communications, Inc. c. Public Service Commission of Utah*, 901 P.2d 270 (1995); *British Columbia Electric Railway Co. c. Public Utilities Commission of British Columbia*, [1960]

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

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APPROVALS

Operational Policy 2016-7

Agricultural Operation Practices Act
January 26, 2016

Updated May 8, 2018

1. Introduction

The Natural Resources Conservation Board (NRCB) is responsible for regulating confined feeding operations in Alberta under the *Agricultural Operation Practices Act* (AOPA).

Chief among the NRCB's regulatory functions is deciding whether to issue and amend permits for confined feeding operations. (As used here, the term "permit" refers to all three types of permits established by AOPA: approvals, registrations, and authorizations, as well as amendments of each type of permit.)

The act and its regulations prescribe many aspects of the NRCB's permitting processes, but also afford discretion to NRCB approval officers. Operational Policy 2016-7: *Approvals* provides policies to guide approval officers' exercise of this discretion, and to clarify the intent of AOPA and the regulations where those laws are unclear. Many of the policies below address the merits or substance of approval officers' permitting decisions, while other policies address the processes for making those decisions. All of the policies are meant to promote consistent and efficient permitting decisions.

AOPA's overall purpose provides an overarching guide for approval officers' exercise of discretion, and for interpreting the act. AOPA does not have a purpose statement. However, in a 2006 memorandum of understanding, the NRCB and the ministers of Alberta Agriculture and Forestry and Environment and Parks agreed that the act's purpose is to

> ensure that the province's livestock industry can grow to meet the opportunities presented by local and world markets in an environmentally sustainable manner.

Approval officers are to exercise their discretion, and apply this policy and the requirements in the act, in the spirit of this legislative purpose. The directions provided by this policy are to be generally applied, but remain subordinate to the act and regulations. In addition, approval officers have discretion to modify this policy when its strict application would be manifestly unfair, or in other necessary and appropriate circumstances.

Operational Policy 2016-7 updates the policies covered in the 2008 *Approvals Policy*. It also includes many policies that the NRCB has adopted on a stand-alone basis since 2008. For convenience, these stand-alone policies have been included in the appendices. (Future stand-alone policies will be added as additional appendices.)

Some NRCB policies relate to both permitting and compliance functions and therefore may not be included in this document. This document also does not attempt to list all of the procedural or substantive policies that are expressed in AOPA itself or the regulations adopted under the act. For an overall guide to the permitting procedures and substantive requirements of the act and regulations, please refer to *NRCB application process*, available on the NRCB website.

This document uses the term *confined feeding operation*, or CFO, to refer to a confined feeding operation as defined in the act. For purposes of this document, and unless otherwise noted:

- *CFO* includes associated manure collection areas and storage facilities,
- *CFO owner* includes operators and permit holders as well as owners of confined feeding operations,
- *Permit* means an NRCB-issued or deemed approval, registration or authorization,

- where practicable, prioritizing regulatory actions on the basis of the relative risks posed by different operations

Consistent with this risk-based approach, the NRCB has adopted the environmental risk screening tool for assessing risks to surface water and groundwater from CFO facilities. That tool is explained in the guide *Environmental Risk Screening Tool for Manure Facilities at Confined Feeding Operations*.

Approval officers base their decisions, including which conditions will be attached to a permit, on AOPA standards and requirements, and the results of their assessment of potential risks to groundwater and surface water identified for the site.

2.2 Professional judgement and experience

Approval officers use their professional judgement and expertise to evaluate permit applications and public and agency responses to those applications. Where necessary and appropriate, approval officers also consult with other NRCB staff or other experts.

Where applicants or other parties rely on engineers or other experts, approval officers must review and independently assess the technical and professional validity of the parties' expert reports. However, approval officers generally do not independently conduct their own data gathering or testing to verify data collected and tested by applicants' experts, if sampling data provided by the experts appears to be adequate. In addition, approval officers generally accept applicants' stamped and signed engineering designs if they meet AOPA requirements, rather than develop and impose their own engineering approaches.

If the data is not considered to be adequate, approval officers can advise the applicant and request that they provide the deficient information.

2.3 Consistency

In exercising their discretion, approval officers are expected to promote consistent delivery of AOPA throughout the province. The internal review discussed in the introduction to part 2, above, and the policies in this document are meant to help promote consistency. However, consistent use of policies cannot ensure consistent *outcomes* among all permit applications, because of the regional and site-specific factors that must be considered by approval officers. These factors include the specific wording of municipal development plans (MDPs), site-specific soil characteristics, climatic constraints, distance to and number of neighbours, regional hydrology and hydrogeology, land use patterns, and water supplies and sources. Additionally, operators often propose specific or unique solutions to address their specific site conditions.

2.4 Public, agency and municipal participation

AOPA sets out the requirements for notice and for public and municipal input. Where the act or its regulations are unclear regarding the scope of public participation, NRCB approval officers will take an inclusive approach that is consistent with the policies expressed in this document.

3. Variance applications

Section 17 of AOPA allows an approval officer to grant a variance from a requirement in the regulations, under several circumstances and according to the tests set out in section 17.

8.3 Consistency with land use bylaws

Approval officers will deem an application to be consistent with a land use bylaw, when the bylaw is relevant, if the bylaw lists the proposed development as either a permitted or discretionary use. In some cases, other land use bylaw provisions (e.g. exclusion zones) may preclude a consistency finding. Ordinarily, if a type of proposed land use is not listed in a land use bylaw as either a permitted or discretionary use for a given zoning district, the municipality intended to preclude that land use in that zoning district. (Some land use bylaws state that an un-listed land use may still be permitted if it is similar in nature to a listed land use.) However, this approach may not apply to CFOs. In some or many land use bylaws in Alberta, municipal councils did not list CFOs as either permitted or discretionary land uses simply because of the NRCB's primary role—since AOPA took effect on January 1, 2002—for permitting "above threshold" CFOs. In other words, the councils felt that it was unnecessary to address CFOs in their land use bylaws given that the NRCB, rather than municipal councils, is responsible for permitting above threshold CFOs.

Some land use bylaws state that this is the reason why they do not address CFOs. However, not all land use bylaws make this intention clear.

For simplicity and consistency, approval officers will presume that a land use bylaw did not intend to preclude a proposed new or expanded CFO in a given zoning district, if the bylaw omits CFOs from its lists of permitted and discretionary land uses, *and* the bylaw does not otherwise expressly prohibit CFOs in that district.

8.4 Municipal permitting matters

Under section 20(1)(b)(i) of AOPA, when reviewing approval applications, approval officers must consider "matters that would *normally* be considered if a development permit were being issued" (emphasis added). Sections 22(1)(b) and (2)(b) of the act allow approval officers to include terms and conditions for registrations and authorizations "that a municipality could impose if the municipality were issuing a development permit" for the proposed development.

The NRCB interprets the word "normally" in section 20(1)(b)(i) to limit the scope of municipal permitting matters to those that a municipality could address under the *Municipal Government Act*, the municipality's own land use bylaw, and other permitting rules adopted by the municipal council. Sections 22(1)(b) and (2)(b) imply the same limitation.

Because consistency with the municipal land use provisions is directly addressed by AOPA, these sections of the act allow approval officers to consider other conditions that the municipality could reasonably require. Approval officers will consider the municipality`s response to the application and conditions the municipality indicates it would like to have included with the permit. Approval officers have discretion to decide which conditions it will include, but must justify their decision in the written reasons issued with their permit decision.

8.5 Increase in livestock numbers

Approval officers will only approve an increase in livestock numbers if there is enough permitted capacity to house the livestock numbers at the confined feeding operation.

In the Court of Appeal of Alberta

Citation: Altus Group Limited v Calgary (City), 2015 ABCA 86

Date: 20150227
Docket: 1301-0356-AC
Registry: Calgary

Between:

Altus Group Limited on behalf of Various Owners

Cross-Appellant on Cross-Appeal
(Respondent on Appeal)
(Applicant)

- and -

The City of Calgary

Cross-Respondent on Cross-Appeal
(Appellant on Appeal)
(Respondent)

- and -

The Assessment Review Board for City of Calgary

Cross-Respondent on Cross-Appeal
(Not a Party to the Appeal on Appeal)
(Respondent)

- and -

The Minister of Justice, Attorney General for Alberta

Not a Party to the Appeal
(Respondent)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice K.M. Eidsvik
Dated the 22nd day of October, 2013
Filed on the 28th day of November, 2013
(2013 ABQB 617, Docket: 1101-01047)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal and cross-appeal arise from a review of a Local Assessment Review Board (the "ARB decision"), which interpreted a municipal taxation bylaw and assessed business tax against the respondent, a group comprising landlords of commercial office space in the City of Calgary, for the lease of parking spaces to their tenants for the 2010 taxation year. The ARB held that the landlords were liable for business tax, as lease of the parking spaces constituted the use or operation of a "business in premises" within the meaning of s.4 of the City of Calgary Bylaw 1M2010 (the "Bylaw").

[2] An appeal to the Court of Queen's Bench of Alberta was allowed, and the ARB's decision to assess business tax liability against the respondent landlords was cancelled and referred back to the ARB for rehearing.

[3] The question of tax liability at issue in this case is not novel. This court addressed that same issue only two years ago in ***Calgary (City) v Alberta (Municipal Government Board)***, 2012 ABCA 13, 519 AR 259 (the "BTC Decision"). In that case, the Municipal Government Board interpreted the same Bylaw and found that the landlords of commercial space were *not* liable for business tax in connection with the lease of parking spaces to their tenants. On judicial review to the Court of Queen's Bench, a chambers judge found that the Board's decision was reasonable. An appeal to this court was dismissed. The court held that in the context of leased parking facilities, it was reasonable to require that the landlord be "operating a parking business" in the premises in order to assess tax under the Bylaw.

[4] The respondent landlords rely on the BTC Decision and say that the ARB unjustifiably refused to follow that reasoning. The appellant City argues that the BTC Decision is not binding and is inapplicable to assessing the reasonableness of the ARB's decision.

[5] The Bylaw in question provides:

> 4(1) Every person who operates a Business in Premises within the City shall be assessed by the Assessor for the purposes of imposing a Business tax.

II. Judicial History - *Altus Group Ltd v Calgary (City)*, 2013 ABQB 617

[6] On the appeal before the chambers judge, both parties agreed that the applicable standard of review was reasonableness – requiring review of the ARB's interpretation of the Bylaw for justifiability, transparency and intelligibility, and whether the result fell within a range of

[13] To the extent that there is conflict between the ARB's Decision in this case and the reasoning in the BTC Decision, the appellant maintains that judicial deference requires this court to allow the ARB to resolve that conflict without interference.

(b) Position of the Respondent

[14] The respondent argues that the chambers judge properly identified and applied the reasonableness standard of review in assessing the ARB's decision. In particular, the respondent explains that in referring to the governing law, the chambers judge was required to consider the divergence from the BTC Decision and whether the ARB's interpretation of the Bylaw was reasonable in that context. In this respect, according to the respondent, the reasonableness standard requires a review of both the ARB's decision-making process and the merits of its decision.

[15] The respondent concedes that an administrative tribunal is entitled to deference and may choose from any reasonable interpretation that its home legislation may bear. However, in the face of jurisprudence that has supported an alternative interpretation of the law, the respondent argues that it was incumbent on the ARB to explain why, on the same facts and legislative provisions, its opposite conclusion was also reasonable. In failing to complete this path of reasoning or otherwise supporting their conflicting interpretation of the law, the respondent submits that the ARB decision is unreasonable and cannot stand.

c) Analysis

***Stare Decisis* and the Standard of Reasonableness**

[16] Strictly speaking, an administrative tribunal is not bound by its previous decisions or the decisions of its predecessor: ***Irving Pulp & Paper Ltd v LEP, Local 30***, 2013 SCC 34, [2013] 2 SCR 458 at para 6; ***Halifax Employers Assn v International Longshoremen's Assn, Local 269***, 2004 NSCA 101, 243 DLR (4th) 101 at para 82, leave to appeal to SCC refused, [2004] 334 NR 197. Where numerous reasonable interpretations exist, the administrative tribunal may change its consensus or policy with respect to which one it will adopt. There is no rule of law that an administrative tribunal can never change its policies, nor change its interpretation of a particular policy, nor change the way that the policy will be applied to particular fact situations: ***Thompson Brothers (Construction) Ltd v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2012 ABCA 78, [2012] AWLD 2212 at para 39.

[17] Similarly, even where an appellate court has found one interpretation to be reasonable, that decision will not necessarily bind a future administrative tribunal considering the legislation afresh. Sara Blake summarizes this point in her text, *Administrative Law in Canada*, 5d ed (Markham: LexisNexis Canada Inc, 2011) at pages 140 – 141.

> If, in another case, a court determined the correct interpretation of a statutory provision, the tribunal must apply the court's interpretation. However, if a court has

> merely upheld an earlier tribunal interpretation of the provision as reasonable, the tribunal need not follow that interpretation if it prefers another interpretation that is also reasonable.

[18] Nevertheless, prior decisions provide important context to the analysis. In ***Irving Pulp & Paper***, the Supreme Court dealt with arbitral decisions of the Labour Board and the interpretation of a collective agreement. The majority referred to existing precedents as a "valuable benchmark against which to assess the arbitration board's decision" (at para 6). Rothstein and Moldaver JJ., (in dissent, with McLachlin C.J.C. concurring), went on to explain this point in agreement with the majority's comment (at paras 75, 78).

> The context of this case is informed in no small part by the wealth of arbitral jurisprudence concerning the unilateral exercise of management rights arising under a collective agreement in the interests of workplace safety. We will say more about the "balancing of interests" test that has emerged from that jurisprudence in a moment, but for now the salient point is that arbitral precedents *in previous cases* shape the contours of what qualifies as a reasonable decision *in this case*. In that regard, we agree with our colleague, Abella J., who describes this "remarkably consistent arbitral jurisprudence" as "a valuable benchmark against which to assess the arbitration board's decision in this case" (paras. 16 and 6).
>
> …
>
> Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 21 L.A.C. 332:
>
> > This board is not bound by any strict rule of *stare decisis* to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable. [Emphasis added; p. 344.]
>
> See, also D. J. M. Brown and D. M. Beatty, *Canadian Labour Arbitration* (4th ed. (loose-leaf)), at topic 1:3200 (including discussion of the "Presumption Resulting From Arbitral Consensus"); R. M. Snyder, *Collective Agreement Arbitration in Canada* (4th ed. 2009), at p. 51 (identifying Professor Weiler's view as "typical").

> … Reasonableness review includes the ability of courts to question for consistency where, in cases like this one, there is no apparent basis for implying a rationale for an inconsistency.

d) Addressing conflicting decisions

[19] Little direct authority exists for reviewing conflicting statutory interpretations by the same administrative body (See: L.J. Wihak, "Wither the Correctness Standard of Review? Dunsmuir, Six Years Later" (2014), 27 Can J Admin L & Prac 173 at 174).

[20] This issue was first addressed by the Supreme Court of Canada in ***Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)***, [1993] 2 SCR 756, a pre-**Dunsmuir** decision. In ***Domtar***, the question was whether divergent interpretations of the same legislation, albeit by two different administrative tribunals, could be raised as an independent basis for judicial review. The Supreme Court held that it could not. L'Heureux-Dubé J., writing for the Court, noted the importance of consistency in administrative decision making (at para 59):

> While the analysis of the standard of review applicable in the case at bar has made clear the significance of the decision-making autonomy of an administrative tribunal, the requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law. Professor MacLauchlan notes that administrative law is no exception to the rule in this regard:
>
> > Consistency is a desirable feature in administrative decision-making. It enables regulated parties to plan their [page785] affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense and good administration".
> >
> > (H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984), 8 Dalhousie L.J. 435, at p. 446.)

[21] ***Domtar*** was considered by the Supreme Court in ***Ellis Don Ltd v Ontario (Labour Relations Board)***, 2001 SCC 4 [2001] 1 SCR 221 at para 28, in the context of institutional consultation by an administrative body. Noting the importance of proper consultation to ensure consistency in decision making, the majority held (at para 28):

> Inconsistencies or conflicts between different decisions of the same tribunal 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).

[22] The same approach was endorsed in ***Thompson Brothers***, where this court considered the authority of the Workers' Compensation Appeals Commission to change its interpretation of existing policies: "The existence of allegedly conflicting decisions by a tribunal on a particular subject does not itself warrant judicial intervention, unless the particular decision under review is unreasonable" (at para 39, citing ***Ellis Don*** at para 28). Also see: ***I.A.F.F., Local 255 v Calgary (City)***, 2003 ABCA 136, 7 WWR 226 at para 27, leave to appeal to SCC refused, [2003] 328 NR 194; ***Hydro Ottawa Ltd v International Brotherhood of Electrical Workers, Local 636***, 2007 ONCA 292 at para 59, 281 DLR (4th) 443, leave to appeal to SCC refused, [2007] 385 NR 379; ***National Steel Car Ltd v United Steelworkers of America, Local 7135*** (2006), 278 DLR (4th) 345, 159 LAC (4th) 281 (Ont CA) at para 31, leave to appeal to SCC refused, [2007] 374 NR 389.

[23] Canadian courts and commentators have noted the difficulty in accepting two conflicting interpretations by the same administrative tribunal as reasonable. In the context of a public statute, the rule of law and the boundaries of administrative discretion arguably cannot be served in the face of arbitrary, opposite interpretations of the law.

[24] For example, in ***Novaquest Finishing Inc v Abdoulrab***, 2009 ONCA 491, 95 Admin LR (4th) 121 at para 48, while the decision did not turn on this issue, Juriansz J.A. observed:

> From a common sense perspective, it is difficult to accept that two truly contradictory interpretations of the same statutory provision can both be upheld as reasonable. If two interpretations of the same statutory provision are truly contradictory, it is difficult to envisage that they both would fall within the range of acceptable outcomes. More importantly, it seems incompatible with the rule of law that two contradictory interpretations of the same provision of a public statute, by which citizens order their lives, could both be accepted as reasonable.

[25] Similar concerns were raised by the Ontario Court of Appeal in ***Investment Dealers Association of Canada v Taub***, 2009 ONCA 628, 311 DLR (4th) 389 at para 67:

> I agree with Juriansz J.A. that it accords with the rule of law that a public statute that applies equally to all affected citizens should have a universally accepted interpretation. It follows that where a statutory tribunal has interpreted its home statute as a matter of law, the fact that on appeal or judicial review the standard of review is reasonableness does not change the precedential effect of the decision for

> the tribunal. Whether a court has had the opportunity to declare the decision to be correct according to judicially applicable principles should not affect its precedential status. As in *Abdoulrab,* it is not necessary to decide the issue in this case.

[26] These comments were endorsed by the Federal Court of Appeal in ***Canada (Attorney General) v Mowat***, 2009 FCA 309, 4 FCR 579 at paras 45-47, aff'd ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)***, 2011 SCC 53, [2011] 3 SCR 471. In that case, the court noted the diversity of opinions between the Federal Court and Human Rights Commissions regarding the authority to award legal costs to a successful complainant in determining the proper standard of review. The issue did not receive direct comment by the Supreme Court of Canada on appeal.

[27] While some statutory provisions may be amenable to different, yet reasonable interpretations, it is difficult to conceive of meaningful legislation that would allow diametrically opposed interpretations, both of which are reasonable, not to mention correct.

[28] Opposite interpretations of a legislative provision are also difficult to accept under the presumption of legislative coherence. An interpretation that is so broad that it fosters inconsistency or repugnancy should be avoided: ***Alberta Power Limited v Alberta Public Utilities Board***, 66 DLR (4^{th}) 286, 19 ACWS (3d) 763 at para 31, leave to appeal to SCC refused, [1990] 120 NR 80. In the context of the statutory interpretation of taxation powers, consistency is also particularly important. Tax legislation should be interpreted to achieve "consistency, predictability and fairness" to achieve equity and finality in taxation and allow taxpayers to manage their affairs (***Husky Energy Inc v Alberta***, 2011 ABQB 268, 11 WWR 282, at para 12 leave to appeal to SCC refused, [2012] 447 NR 400; ***Canada Trustco Mortgage Co v Canada***, 2005 SCC 54, [2005] 2 SCR 601 at para 12; ***Toronto (City) v Municipal Property Assessment Corporation***, 2013 ONSC 6137, 234 ACWS (3d) 267 at para 30. at para 30).

[29] Sara Blake also notes that, in many cases, only one interpretation of a statutory provision will be reasonable at page 211:

> When the reasonableness standard of review is applied, conflicting interpretations of a question of law may be upheld by the courts if both are reasonable, though an interpretation may be held to be unreasonable if it is inconsistent with the prevailing interpretation. However, when the test of correctness is applied, it is not likely that different interpretations of the law will be upheld, because there can be only one correct interpretation, while there can be several reasonable interpretations. Given that most statutes are not ambiguous and do not permit more than one reasonable interpretation, there will not often be different interpretations that may both be upheld as reasonable.

[30] In a comprehensive review of the case law, one commentator has called on appellate courts to review administrative decisions in a way that ensures consistency in the interpretation of public statutes (L.J. Wihak at pages 198-199):

> Public statutes apply equally to all citizens and they should have universal, consistent application. Citizens are entitled to advanced knowledge, certainty, and clarity regarding their respective entitlements or obligations under these public statutes….
>
> Not only do judges have greater expertise in the law relative to administrative decision-makers, they also have a constitutional responsibility to ensure that each person in Canada is subject to the same law and legal principles, and that tribunals are acting legally. As such, "appellate courts require a broad scope of review with respect to matters of law" [citing *Housen v Nikolaisen,* 2002 SCC 33, [2002] 2 SCR 235 at para 9].

Conclusions

[31] Assuming reasonableness applies as the standard of review of administrative tribunals in the interpretation of their home statute or closely connected legislation, while an administrative decision maker is unconstrained by the principles of *stare decisis* and is free to accept any reasonable interpretation of the applicable legislation, the reasonableness standard does not shield directly conflicting decisions from review by an appellate court. In assessing the reasonableness of statutory interpretation by the administrative tribunal, the appellate court should have regard to previous precedent supporting a conflicting interpretation and consider whether both interpretations can reasonably stand together under principles of statutory interpretation and the rule of law.

[32] In this case, the ARB adopted an interpretation of the Bylaw which found the respondent liable for business tax for the lease of parking spaces to tenants in connection with the lease of commercial office space. That result is opposite to the approach and outcome in the BTC Decision, which this court found to be reasonable. The apparent conflict between the ARB decision under appeal and the BTC Decision does not create an independent basis for judicial intervention. However, the BTC Decision provides a direct contextual comparison against which to judge the intelligibility, transparency and justifiability of the ARB's decision.

[33] The chambers judge appropriately referred to and relied on the analysis in the BTC Decision to inform her review of the ARB's decision on the appeal. In light of that context, the range of reasonable outcomes was significantly narrowed. Indeed, considering the importance of coherence in the interpretation of the Bylaw and its purpose in imposing a tax, it would be difficult to accept two opposite interpretations of the provision as reasonable.

SUPREME COURT OF CANADA

CITATION: Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65

APPEAL HEARD: December 4, 5, 6, 2018
JUDGMENT RENDERED: December 19, 2019
DOCKET: 37748

BETWEEN:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 197)	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.
JOINT CONCURRING REASONS: (paras. 198 to 343)	Abella and Karakatsanis JJ.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,

Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was

representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was

dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and **Moldaver**, **Gascon**, **Côté**, **Brown**, **Rowe** and **Martin** JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldly and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the

applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's

jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance

to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would

have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and

legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and

elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized

where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for

applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of

judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and

immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and

immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per **Abella** and **Karakatsanis** JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for

deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to

administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting

de novo review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional

circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling.

The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion

effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court

evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may

legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

Cases Cited

By Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

Considered: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52; *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC

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.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this

sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

Federal Court of Appeal | Cour d'appel fédérale

Date: 20111026

Dockets: A-376-10
A-374-10
A-375-10
A-377-10
A-378-10
A-382-10

Citation: 2011 FCA 299

CORAM: **NOËL J.A.**
TRUDEL J.A.
STRATAS J.A.

BETWEEN:

Docket: A-376-10

STEMIJON INVESTMENTS LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-374-10

BETWEEN:

CANWEST COMMUNICATIONS CORPORATION

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-375-10

BETWEEN:

CANWEST DIRECTION LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-377-10

BETWEEN:

LEONARD ASPER HOLDINGS INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-378-10

BETWEEN:

LENVEST ENTERPRISES INC.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: A-382-10

BETWEEN:

SENSIBLE SHOES LTD.

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on October 11, 2011.

Judgment delivered at Ottawa, Ontario, on October 26, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NOËL J.A.
TRUDEL J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR JUDGMENT

STRATAS J.A.

A. Introduction

[1] Before this Court are six appeals from six judgments of the Federal Court (*per* Justice Mandamin): 2010 FC 892, 2010 FC 893, 2010 FC 894, 2010 FC 895, 2010 FC 897, 2010 FC 898. In each, the Federal Court dismissed an application for judicial review brought by the taxpayer concerning a decision by the Minister of National Revenue. In each, for identical reasons, the Minister refused the taxpayer relief from penalties and interest under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

(6) The Federal Court's decision

[19] The Federal Court rejected the appellants' submissions. It found that the Minister had not fettered his discretion. Instead, he was aware of the full extent of his discretion and decided against granting relief. The Federal Court based this conclusion on the fact that the Minister had before him an array of material that went beyond the three scenarios set out in the Information Circular, such as the submissions of the appellant and a wide-ranging Taxpayer Relief Report. The Federal Court also found that the Minister fully addressed the appellants' requests for relief and reached a conclusion that passed muster under the standard of review of reasonableness.

C. Analysis

(1) The standard of review to be applied

[20] The Federal Court held that the standard of review of the Minister's decision is reasonableness. In this Court, the parties accept this. This Court can interfere only if the Minister reached an outcome that is indefensible and unacceptable on the facts and the law: *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraphs 24-28; *Canada Revenue Agency v. Slau Ltd.*, 2009 FCA 270 at paragraph 27; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 S.C.R. 190.

[21] The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.

[22] On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.

[23] This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General)*, 2011 FCA 19. But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.

[24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

[25] In the circumstances of this case, if the Minister did not draw upon the law that was the source of his authority, namely subsection 220(3.1) of the Act, and instead fettered his discretion by having regard only to the three specific scenarios set out in the Information Circular, his decisions cannot be regarded as reasonable under *Dunsmuir*.

(2) Subsection 220(3.1) of the Act

[26] Subsection 220(3.1) of the Act provides that if an application for relief is made in time, the Minister has discretion to grant relief against penalties and interest. Subsection 220(3.1) reads as follows:

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before	**220.** (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là,

under subsection 220(3.1) of the Act should show an awareness of the scope of the available discretion under the Act, offer brief reasons why relief could or could not be given in the particular circumstances, and meaningfully address the arguments made that have a chance of success. If the reasons do not deal with one or more of these matters – something that can happen through careless or unthinking use of a form letter or stock language – the decision may not pass muster under the standard of review of reasonableness.

- II -

[57] The foregoing comment and these reasons should not be taken to impose onerous new reasons-giving requirements upon the Minister. In this case, all that was required was perhaps a few additional lines in a letter that was just 33 lines long: *Vancouver International Airport Authority*, *supra* at paragraphs 16 and 17.

- III -

[58] Finally, these reasons should not be taken to cast any doubt on the ability of administrative decision-makers, such as the Minister, to use policy statements, such as the Information Circular in this case, as an aid or guide to their decision-making.

[59] Policy statements play a useful and important role in administration: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385. For

example, by encouraging the application of consistent principle in decisions, policy statements allow those subject to administrative decision-making to understand how discretions are likely to be exercised. With that understanding, they can better plan their affairs.

[60] However, as explained in paragraphs 20-25 above, decision-makers who have a broad discretion under a law cannot fetter the exercise of their discretion by relying exclusively on an administrative policy: *Thamotharem*, *supra* at paragraph 59; *Maple Lodge Farms*, *supra* at page 6; *Dunsmuir*, *supra* (as explained in paragraph 24 above). An administrative policy is not law. It cannot cut down the discretion that the law gives to a decision-maker. It cannot amend the legislator's law. A policy can aid or guide the exercise of discretion under a law, but it cannot dictate in a binding way how that discretion is to be exercised.

[61] In this case, the Minister ran afoul of these principles. Fortunately for him, however, he reached the only reasonable outcome on these facts.

NRCB | Natural Resources Conservation Board

BOARD DECISION

RFR 2021-07 / LA21018

In Consideration of a Request for Board Review filed under the *Agricultural Operation Practices Act*

JBC Cattle Inc.

October 13, 2021

The Board issues this decision document under the authority of the *Agricultural Operation Practices Act* (AOPA), following its consideration of a request for Board review of Decision Summary LA21018.

Background

On September 9, 2021, the Natural Resources Conservation Board (NRCB) approval officer issued Decision Summary LA21018 (Decision Summary) in relation to an application by JBC Cattle Inc. (JBC Cattle) to construct a new 30,000 beef finishers confined feeding operation (CFO) plus related facilities. The proposed CFO is located at SW 11-15-18 W4M in the Municipal District of Taber (M.D. of Taber). The approval officer approved the application by issuing Approval LA21018.

A request for Board review (RFR) of Approval LA21018 was filed by Jim Ragan, a directly affected party. The RFR met the filing deadline of September 30, 2021.

The directly affected parties, as established by the approval officer, were notified of the Board's intent to review this request and provided with a copy of the RFR. Parties that have an adverse interest to the matters raised in the RFR were given the opportunity to submit a rebuttal. One rebuttal from the operator was received by the filing deadline of October 5, 2021.

Under the authority of section 18(1) of the *Natural Resources Conservation Board Act*, a division of the Board consisting of Peter Woloshyn (panel chair), L. Page Stuart, and Daniel Heaney was established on September 30, 2021, to consider the RFR. The Board met on October 6, 2021 to deliberate on the filed RFR.

Jurisdiction

The Board's authority for granting a review of an approval officer's decision is found in section 25(1) of AOPA, which states:

> *25(1) The Board must, within 10 working days of receiving an application under section 20(5), 22(4) or 23(3) and within 10 working days of the Board's determination under section 20(8) that a person or organization is a directly affected party,*
>
> *(a) dismiss the application for review, if in the opinion of the Board, the issues raised in the application for review were adequately dealt with by the approval officer or the issues raised are of little merit, or*
>
> *(b) schedule a review.*

The Board considers that a party requesting a review has the onus of demonstrating that there are sufficient grounds to merit review of the approval officer's decision. Section 13(1) of the AOPA Administrative Procedures Regulation describes the information that must be included in each request for Board review.

Documents Considered

The Board considered the following information:

- Decision Summary LA21018, dated September 9, 2021
- Technical Document LA21018, dated September 9, 2021
- RFR filed by Jim Ragan, dated September 20, 2021
- AO public material, received September 30, 2021
- Rebuttal filed by JBC Cattle, dated October 1, 2021
- M.D. of Taber municipal development plan (MDP), dated August, 2019

Board Deliberations

The Board met on October 6, 2021, to deliberate on issues raised in the RFR filed by Mr. Ragan. Issues stated in the RFR included increased traffic, road deterioration, dust, odour, flies, impact of multiple feedlots in the area, and a drop in land values.

Increased Traffic and Road Deterioration

The Ragan RFR stated that both big truck and smaller vehicle traffic have increased substantially as a result of feedlot development close to the Ragan's home, and there is a suggestion that the current application will contribute to further increases in traffic and road deterioration.

In the Decision Summary, the approval officer addressed concerns similar to those submitted in the Ragan's August 12, 2021 statement of concern. The approval officer referenced section 18 of the *Municipal Government Act* giving counties "direction, control and management" of all roads within their borders, and stated that it is "impractical and inefficient" for road use to be managed through AOPA permits. The approval officer confirmed that the JBC Cattle CFO is consistent with the M.D. of Taber's land use bylaw and land use provisions in the MDP.

The Board agrees that impacts on shared roads are challenging to manage through AOPA permits. Generally, impacts on municipal infrastructure are assessed through an examination of the proposed operation's consistency with municipal land use planning considerations such as setbacks, environmentally sensitive areas, or identified CFO exclusion zones. Nonetheless, it is reasonable to expect that a CFO may fully meet these requirements, while also contributing to infrastructure impacts from increased agricultural activity.

The Board finds the approval officer appropriately determined that the proposed JBC Cattle CFO is consistent with the M.D. of Taber's land use provisions, and although exclusion zones do exist within the MDP, none apply to the site of the proposed CFO. The Board observes that Mr. Ragan referenced general impacts from other CFOs in the area; however, the RFR failed to provide a direct link between an increase of traffic from the proposed JBC Cattle CFO and impacts on the Ragans. Further, given the road layout and access to the proposed CFO outside of roads adjacent to the Ragan residence, the Board is unconvinced that the impacts of the JBC Cattle CFO on the Ragans would be beyond those reasonably expected in an agricultural area. The Board finds that, within the authority of AOPA, the approval officer adequately dealt with the issue of increased truck and smaller vehicle traffic and road deterioration.

Nuisance impacts from Dust, Odour and Flies

The Ragan RFR concerns included increased dust, odour and flies "making outdoor activities unpleasant."

The approval officer calculated the minimum distance separation (MDS) for the proposed CFO as 1,316 metres and confirmed that the Ragan residence is located "about 4 km northeast of the proposed CFO which is more than 3 times greater than the required MDS." The approval officer acknowledged that people residing beyond the MDS may experience nuisance impacts including odour, dust and flies from time to time. As well, the approval officer confirmed that there are no provisions in the M.D. of Taber's MDP that preclude construction of a CFO in the proposed location.

Nuisance effects, such as dust and odour, are managed through the application of minimum distance separations (MDS) that are established based on the type and size of a CFO operation, meaning that larger CFO operations are required to be sited at greater distances from existing neighbouring residences. The AOPA employs a prescriptive regulatory framework, using tools such as MDS, in order to achieve a consistent, province-wide approach for siting CFOs. Given that the CFO meets the MDS requirement, and that the Ragan RFR does not establish specific impacts outside of what would reasonably be expected on agriculturally-zoned land, the Board finds that the approval officer adequately dealt with the nuisance impacts from dust, odour and flies.

Land Values

The Ragan RFR included a concern that their land values will decrease if the CFO is built.

In the decision summary, the approval officer referenced previous Board decisions where the Board have stated that concerns regarding effects on land or property values are "not a subject for [the Board's] review under AOPA or for approval officers' consideration." The approval officer also confirmed that the application is consistent with the M.D. of Taber's land use provisions in the MDP.

The Board and approval officers have consistently stated that impact on property values is an issue that resides outside of AOPA legislation. Specifically, the Board agrees that impacts on property values are a land use issue, best dealt with by municipalities through land use provisions applied in municipal development plans and land use bylaws. The Board finds that the issue related to a drop in land values has no merit within the context of a review under AOPA.

Board Decision

As a result of the Board's deliberations, it has determined that the approval officer adequately considered all issues raised in the filed Request for Review, or they are without merit, and therefore does not direct any matter to a hearing. The RFR is denied.

DATED at EDMONTON, ALBERTA, this 13th day of October, 2021.

Original signed by:

_____ _____

Peter Woloshyn (chair) L. Page Stuart

_____

Daniel Heaney

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Copies of the *Agricultural Operation Practices Act* can be obtained from the Queen's Printer at www.qp.gov.ab.ca or through the NRCB website.