IN THE MATTER OF
The *Electric Power Control Act, 1994*, SNL 1994, Chapter E-5.1 (the "EPCA") and the *Public Utilities Act,* RSNL 1990, Chapter P-47 (the *"Act"*), as amended, and regulations thereunder; and

IN THE MATTER OF
A general rate application filed by Newfoundland and Labrador Hydro on July 30, 2013; and

IN THE MATTER OF
An amended general rate application filed by Newfoundland and Labrador Hydro on November 10, 2014; and

IN THE MATTER OF
prudence review relating to certain actions and costs of Newfoundland and Labrador Hydro.

To: The Board of Commissioners of Public Utilities (the "Board")

CONSUMER ADVOCATE'S FINAL WRITTEN SUBMISSIONS (PRUDENCE REVIEW)

December 23, 2015

Thomas Johnson, Q.C.
Consumer Advocate
O'Dea, Earle Law Offices
323 Duckworth Street
St. John's, NL A1C 5X4
Telephone: 726-3524
Facsimile: 726-9600
Email: tjohnson@odeaearle.ca

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A. BACKGROUND

As result of outage related issues that occurred during 2013 and 2014 the Board of Commissioners of the Public Utilities (the "Board") retained the Liberty Consulting Group ("Liberty") to provide expert assistance in determining the prudence of actions and decisions and/or inactions taken by Hydro during those two (2) years and to assess the associated costs that should or should not be recovered by Hydro from rate payers. The Terms of Reference for the retention of Liberty was to "review the decisions and actions (or inactions) taken by Hydro and associated costs related to certain capital projects and operating expenses. . ."

[Reference: Amended General Rate Application, Prudence Review, Terms of Reference, February 27, 2015, p. 1]

Specifically, Liberty was requested by the Board to review eleven (11) projects. These projects were:

1. Black start – Order No. P.U. 38 (2013);
2. New Combustion Turbine – Order No. P.U. 16 (2014);
3. Restoration of Holyrood Unit 1 Turbine Generator – Order No. P.U. 14 (2013);
4. Sunnyside Replacement Equipment – Order No. P.U. 29 (2014);
5. Western Avalon Terminal Station T5 Tap Changer Replacement – Order No. P.U. 32 (2014);
6. Capacity Related Supply Cost – Order No. P.U. 56 (2014);
7. Holyrood Unit 3 Forced Draft Fan Motor, Overhauls of Sunnyside B1L03 and Holyrood B1L17 230 KV Breakers – Order No. P.U. 23 (2014);
8. Restoration of Black Tickle Diesel Plant – Order No. P.U. 27 (2014);
9. Labrador City Terminal Station Over Budget Expenditures – Order No. P.U. 42 (2013);
10. $45.9 Million Revenue Deficiency in 2014 – Order No. P.U. 58 (2014);
11. Extraordinary Repairs.

[Reference: Amended General Rate Application, Prudence Review, Terms of Reference, February 25, 2015, Appendix A, p. 1]

Generally, each of the expenditures requested by Hydro in the above projects was approved by the Board subject to a determination of the recovery of the expenditure or the related cost at a

later time. As part of the Amended General Rate Application, the Board will determine whether or not each of the expenditures or series of costs outlined in these projects were prudently undertaken and those costs will form part of the amount passed on to customers.

B. LIBERTY'S EXPERTISE

It is clear from the evidence that the four (4) members of the Liberty team, John Antonuk, Richard Mazzini, Mark Lautenschlager and Randell Vickroy all have extensive experience in electric utility management and operational issues.

Mr. Antonuk is one of Liberty's three (3) founding members and has been President of Liberty for the last twenty (20) years. While with Liberty, he has managed several hundred projects which have focused on utility management and operations. He has testified in fifteen (15) US jurisdictions as well as the Province of Nova Scotia. More than twenty (20) engagements involving Mr. Antonuk have looked at the quality of utility management and operations involving generation, transmission, distribution and customer services as well as equipment and organizations.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 4-6]

Mr. Mazzini is an independent consultant working with Liberty for the last eight (8) years. He has been Project Manager and Lead Consultant on a number of Liberty projects. As regards Newfoundland and Labrador Hydro, Mr. Mazzini reviewed six (6) projects relating to the area of power supply generation and system planning. Mr. Mazzini has forty (40) years' experience in the utility industry with specialities in utility operation, generation, planning, transmission, distribution and construction. Mr. Mazzini has a Bachelor's and Master's Degree in Engineering and has testified before utility commissions in five (5) states on multiple occasions as well in the Province of Nova Scotia.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 7-9]

Mr. Lautenschlager is also an electrical engineer who has forty-six (46) years' experience in the electric power industry. Since 2000, he has been an independent consultant focusing on electrical testing, maintenance and power equipment failure analysis, designing and preventing maintenance programs, investigating electrical power equipment failures, commissioning sub-

stations and evaluating operations including maintenance and reliability programs as well as rates of completion for preventative maintenance and corrective maintenance work. Mr. Lautenschlager has testified on utility issues in New York and Texas regarding utility issues.

[Reference: Prudence Review Transcript, November 12, 2015, pp.10 - 12]

Mr. Vickroy provides consulting advice with Liberty in the area of utility industry treasury, financial, business, financial planning and rates. Mr. Vickroy worked in the utility industry for more than twenty (20) years and has been a management consultant in the electric, gas and telephone industries and while with Liberty, has been responsible for a wide range of issues in the area of financial planning and rate and utility business. Mr. Vickroy has given expert evidence in several states and in Nova Scotia.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 12-14]

The Consumer Advocate refers to the Executive Summary of the Liberty Report which states:

> *Liberty has extensive experience working with utility regulators on a full range of areas involving the provision of reliable, safe and cost effective utility service and has worked for regulators in some 40 North American jurisdictions, and has undertaken work for a similar number of North American energy utilities. Liberty has conducted a number of prudence reviews, most recently for the Nova Scotia Utility and Review Board.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. ES-1]

The Consumer Advocate submits that the expertise of the Liberty Group was not contested by any party at the hearing and the evidence provided in Liberty's reports and in their *viva voce* evidence should be given significant weight in the Board's considerations.

C. PRUDENCE REVIEW STANDARDS

C.1 Regulatory Framework

The *Public Utilities Act* establishes the Board as a regulatory body with authority of general supervision of all public utilities and provides the Board with the authority to make such examinations and inquiries as deemed necessary in an effort to fulfill its duties.

[Reference: *Public Utilities Act, RSNL 1990*, c. P-47, s. 16]

In assessing what a particular utility is to provide to customers, section 37 of the *Public Utilities Act* is of assistance. It states:

> *37. (1) A public utility shall provide service and facilities which are reasonably safe and adequate and just and reasonable.*

[Reference: *Public Utilities Act,* RSNL 1990, c. P-47, s. 37]

The *Electrical Power Control Act* outlines in detail the power policy of the Province. Sections 3 and 4 of the *Electrical Power Control Act* states as follows:

> *3. It is declared to be the policy of the Province that*
>
> ...
>
> *(a) the rates to be charged, either generally or under specific contracts, for the supply of power within the province*
>
> *(i) should be reasonable and not unjustly discriminatory,*
>
> ...
>
> *(b) all sources and facilities for the production, transmission and distribution of power in the Province should be managed and operated in a manner*
>
> *(i) that would result in the most efficient production, transmission and distribution of power,*
>
> *(iii) that would result in power being delivered to consumers in the Province at the lowest possible cost consistent with reliable service, . . .*

4. In carrying out its duties and exercising its powers under this Act or under the Public Utilities Act, the public utilities board shall implement the power Policy declared in section 3, and in doing so shall apply tests which are consistent with generally accepted sound public utility practice.

[Reference: *Electrical Power Control Act,* 1994 SNL 1994, c. 5.1, s. 3 and s. 4]

As regards the Board's ability to defer the determination of the prudence of the projects reviewed by Liberty, the authority of the Board to do so is clearly set out in section 27 of the *Electrical Power Control Act*, 1994. Section 27 states:

27. (1) The Public Utilities Board may

(b) set aside for future examination any issue that in its opinion requires a more prolonged examination; . . .

The above statutory framework sets the parameters within which the Board can review and assess the prudency of the projects and issues reviewed by Liberty.

C.2 Jurisprudence

Two (2) recent Supreme Court of Canada decisions have revisited the prudence debate. *Atco Gas and Pipeline Ltd.*, dealing within the legislative framework of the Province of Alberta, outlined a utility's attempt to recoup pension costs in the form of a cost of living allowance adjustment for which it requested an increase in the amount of 100% of the annual Consumer Price Index. The Alberta Utilities Commission ruled that the recovery of only 50% of the annual Consumer Price Index was reasonable. As regards a specific rate setting methodology with a determination of prudence, the Supreme Court of Canada found that based on the legislation applicable to the utilities considered, there was no requirement to make a determination on prudence using a no-hindsight approach to the costs that had been incurred. The Supreme Court of Canada found:

Thus, the commission is free to apply its expertise to determine whether costs are prudent (in the ordinary sense of whether they are reasonable), and it has the discretion to consider a variety of analytical tools and evidence in making that determination so long as the ultimate rates that it sets are just and reasonable to both consumers and the utility.

[Reference: *Atco Gas and Pipeline Ltd. v. Alberta (Utilities Commission)* 2015 SCC 45 at para. 47, Tab 1]

In *Atco Gas*, the Supreme Court of Canada also considered the burden of establishing prudence. After reviewing the *Electric Utilities Act* and the *Gas Utilities Act* of Alberta, the Supreme Court of Canada determined that there was no presumption of prudence in favour of the utility and the burden of establishing the prudence of the costs rested with the utility.

[Reference: *Atco Gas and Pipeline Ltd. v. Alberta (Utilities Commission)* 2015 SCC 45 at paras. 43 and 45, Tab 1]

In *Ontario Energy Board* v. *Ontario Power Generation Inc.* 2015 SCC 44 (released concurrently with *Atco Gas*), the Supreme Court of Canada again reviewed the issue of prudence. The issue that was before the Ontario Energy Board was a disallowance of $145 million in labour compensation costs related to utilities operations, those costs resulting from wage increases in existing collective agreements between the utility and its unions.

After reviewing the relevant American and Canadian jurisprudence, the Supreme Court of Canada found as follows:

> *(3) Conclusion Regarding the Prudent Investment Test*
>
> *[102] The Prudent Investment Test, or Prudence Review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exists different articulations of prudence review, Enbridge presents one expressed statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but Enbridge and Nova Scotia Power (both 2005 and 2012) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying prudence tests to operating costs.*
>
> *[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be required as a matter of law, under the Ontario Energy Board Act, 1998, to apply the prudence test as outlined in Enbridge such that the mere decision not to apply when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator's 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 utilities proposed payment amount. This*

is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

. . . [105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred; see British Columbia Electric Railway Co. Under such framework, the regulator's methodological discretion may be more constrained.

[Reference: *Ontario (Energy Board) v. Ontario Power Generation Inc.* 2015 SCC 44 at paras. 102-105, Tab 2]

C. 3. Summary of Review Standards

In outlining its prudence review standards, Liberty adopted the approach outlined in two (2) Canadian cases. The *Nova Scotia Utility and Review Board* case (2005 NSUARB 27), according to Liberty, outlined the following fundamental principles:

- *Were the utility's decisions reasonable in the context of information which was known or should have been known at the time?*
- *Did the utility act in a reasonable manner and use a reasonable standard of care in its decision making process?*
- *The imprudence test should relate to the circumstances at the time in question and not to hindsight.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 2]

Liberty also relied on the *Ontario Energy Board* case (2006 CANLII 10734:41) and the decision of the Ontario Court of Appeal. This case, known as the *Enbridge* case, in Liberty's view, establishes the course of a prudence review as follows:

- *Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.*
- *To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.*
- *Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may be legitimately be used to overcome the presumption of prudence.*
- *Prudence must be determined in a retrospective factual inquiry in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 3]

According to Liberty, the approach that they took in undertaking their prudence review was consistent with the decision of the *Nova Scotia Utility and Review Board* and the elements outlined in *Enbridge.*

The Consumer Advocate submits that in comparing the recent decisions of the Supreme Court of Canada and the methodology undertaken by Liberty in its assessment of the reviewed projects, the approach taken by Liberty is a less onerous standard than that which could have been applied had Liberty's assessments been based on the determinations made by the Supreme Court of Canada in *Atco Gas* and *Ontario (Energy Board)*.

If the tests outlined by the Supreme Court of Canada and those undertaken by Liberty through the use of the *Nova Scotia Utility and Review Board* case and the *Enbridge* case were placed on a spectrum from least onerous to most onerous, the test that has been used by Liberty in determining the prudence of the projects is less onerous to Hydro than that which could have been used in making that determination if the Supreme Court of Canada test had been used.

The Consumer Advocate submits that the legislative provisions under the *Public Utilities Act* and the *Electrical Power Control Act, 1994* for the Province of Newfoundland and Labrador, do not outline specific provisions under which a prudency review methodology is mandated nor is the onus of proof dictated to be the obligation of the utility. In such circumstances, a more stringent test is available to be used in determining prudency. The Consumer Advocate submits that as a result, the test employed by Liberty provides more forgiveness to Hydro than the test that could have been used.

D. PROJECTS FOUND BY LIBERTY TO BE IMPRUDENT

D.1 Sunnyside Replacement Equipment

D.1.1 Factual Overview

A brief summary of the events at Sunnyside in January of 2014 is expressed in the transcript of October 27, 2015. At that time, an exchange between Counsel for the Board and representatives of Hydro occurred as follows:

GREENE, QC:

Q. So again at a very high level, just to put this in perspective, on January 4th, we had a failure at the Sunnyside Terminal Station, and without getting too technical, Mr. Moore, could you explain to us what happened at Sunnyside that day?

MR. MOORE:

A. What happened on the morning of January 4th in Sunnyside, we knew in the days prior that there was a winter storm forecasted, and after having been involved with the period of generation shortages, we took active preparation to ensure that we had appropriate maintenance personnel stationed in some of our key terminal stations to prepare for the storm on the morning of January 4th, and what happened that morning we had a failure of a power transformer, Sunnyside T1. We had personnel stationed there. I think it was just shortly after 9 am on January 4th we had the transformer fail, and eventually to the point where the transformer caught fire, a catastrophic failure of that transformer. That's the events that happened. We had, like I say, personnel on site and then proceeded to safely isolate the burning transformer from the system and continue to work towards restoring customers.

GREENE, QC:

Q. So when the transformer failed early in the morning around 9 am, the breaker that was supposed to operate to isolate it from the system didn't work, did it?

MR. MOORE:

A. That's correct. There were five breakers required to safely isolate that transformer from the power system that morning. Four of the five operated correctly, but Sunnyside B1L03 failed to open to adequately clear the fault in time.

GREENE, Q.C.:

Q. Okay, and that was an air blast circuit breaker, is that correct?

MR. MOORE:

A. That's correct.

[Reference: Prudence Review Transcript, October 27, 2015, pp. 139-141]

As a result of the incidents in Sunnyside in early January, 2014, Hydro made application to the Board requesting approval of expenditures relating to the T1 Transformer and the B1L03 air blaster circuit breaker. By Order No. P.U. 29 (2014) the Board approved expenditures regarding the replacement and installation of a new transformer and related equipment at the Sunnyside Terminal Station, but deferred the consideration of cost recovery. In Board Order No. P.U. 23 (2014) authorization was granted to Hydro to overhaul the Sunnyside air blast circuit breaker B1L03 but consideration of the recovery of the cost related to that overhaul was also deferred.

D.1.2. Liberty's Basis for Finding of Imprudency

In 2013, Sunnyside Breaker B1L03 was 47 years old.

[Reference: Reply Evidence, Prudence Review of Newfoundland and Labrador Hydro, Decisions and Actions, The Liberty Consulting Group, September 17, 2015, p. 3]

In 2014, the T1 Transformer at Sunnyside was 36 years old.

[Reference: Prudence Review Transcript, October 27, 2015, p. 148]

At page 5 of Liberty's reply evidence, a summary of their basis for finding imprudency is found. Liberty states:

- *Utilities perform preventative maintenance according to established and planned scopes and schedules because maintenance reduces the risk of operational failures and equipment whose operation is critical to maintaining service.*

- *Old air blaster circuit breakers require that maintenance become more diligent, not more laxed.*

- *Hydro's deferral of maintenance remains even today unsupported by any discernible analysis of risks, cost benefits, alternatives, or other structured deliberation.*

- *Deferral was wide spread, and in the case of the breakers, it occurred even though Hydro had first made, but then abandoned, a plan to catch up on work already behind schedule in 2010.*

- *During the early 2014 events, not one, but multiple pieces of equipment late for preventative maintenance failed; some were far behind schedule. The equipment involved was operating well beyond its expected life, thus making even a short duration past generally applicable cycles a matter of concern.*

- *Hydro, which owns and operates the failed equipment cannot, after more than a year and a half and after study by external consultants, determine the cause of failure supported by more than speculation.*

- *With respect to the Sunnyside T1 Transformer, its bushing's problems are among the issues that scheduled preventative maintenance is designed to detect and prevent. The equipment past due for preventative maintenance and failing in January of 2014 caused extensive customer outages.*

[Reference: Reply Evidence, Prudence Review of Newfoundland and Labrador Hydro, Decisions and Actions, The Liberty Consulting Group, September 17, 2015, pp. 5-6]

The viva voce evidence of the Liberty Panel makes a number of things clear. An important element of asset management involves the use of preventative maintenance (PM) and corrective maintenance (CM) procedures. Preventative maintenance serves multiple purposes including regular servicing of the equipment and as well providing an alert to maintenance personnel for the need to perform corrective maintenance. As equipment ages, the necessity of increased preventative maintenance occurs, and with it, a reduction in regular schedule time periods within which PM is to be undertaken.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 36-38]

Liberty's evidence also is that in order for corrective maintenance to be identified, it is important to conduct preventative maintenance according to set schedules and any deferral of PM is risky and defeats their purposes as an untimely identification of the need for corrective maintenance can lead to equipment failure.

[Reference: Prudence Review Transcript, November 12, 2015, pp.40-41]

Prior to January 2015, the scheduled preventative maintenance for Hydro's transformers and air blast circuit breakers was a six-year cycle. The Liberty Panel expressed their opinion that as regards a six-year preventative maintenance schedule for transformers, this was consistent with good utility practice. As regards air blast circuit breakers, Liberty's opinion was that the use of a six-year preventative maintenance schedule should have been reduced from six years to four years as a result of the age of the breakers.

[Reference: Prudence Review Transcript, November 12, 2015, p. 43]

Liberty's opinion was that the failure of the Sunnyside Transformer T1 could have been detected under regular preventative maintenance in the event that the schedule for the maintenance on this transformer was maintained. In its direct evidence, Liberty expressed the opinion that the defect that occurred in the bushing of the T1 transformer could have been detected through the use of a double power factor test. In the event that the bushing had been defective and in need of repair, this test would have detected the degradation in the transformer such that the required corrective maintenance could have been performed on the transformer. Liberty's view is that the performance of that test in the required corrective maintenance period would have identified the defective bushing.

[Reference: Prudence Review Transcript, November 12, 2015, p. 44]

In PR-PUB-NLH-050, Hydro confirms that the power factor test is one of the tests used to assess the overall integrity of a bushing in the transformer. Also in PR-PUB-NLH-050, Hydro makes it clear that the last power factor test conducted on the Sunnyside T1 transformer occurred on August 16, 2007, more than six years before the failure of the transformer in January 2014.

In addition to the problem with the bushing in the Sunnyside T1 transformer, there was also an issue regarding an increased level of acetylene gas that had been observed in the oil of the transformer in September of 2013. The evidence of Liberty was that the level of acetylene had

increased from 7 parts per million in 2012 to 11 parts per million in September 2013. This increase in acetylene reached the highest level ever recorded on the transformer since the testing of dissolved gas had commenced in 1994.

[Reference: Prudence Review Transcript, November 12, page 45.]

The Liberty panel, in reference to the increased acetylene gas, testified that the tap changer seals and gaskets should have been replaced in the previous 20 years, a transformer oil resampling should have occurred within one week of receiving the report outlining the increase in the acetylene. As well, a test for the dissolved gas would have been simple and only required an employee to travel to Sunnyside to draw an oil sample from the transformer to be tested.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 46-47]

Although Liberty acknowledges that the specific cause of the failure of the air blast circuit breaker at Sunnyside has not been strictly shown, Liberty's position on the improvements of Hydro regarding its air blast circuit breaker maintenance is clear. As well, Liberty's view is that the failure to undertake the necessary preventative maintenance, in effect, prevented the opportunity to obtain the information necessary to prevent the failure of the air blast circuit breaker. Liberty's uncontested evidence is that the six-year time period for the preventative maintenance on the Sunnyside air blast circuit breaker BL103 had expired prior to its failure. The evidence of Liberty outlines that the systemic deferral of preventative maintenance is not good utility practice and that the deferral of PM as a result of resource limitations "is just not done" in the industry. Liberty makes its opinion clear that the attempts by Hydro to catch up on overdue air blast circuit breaker maintenance and transformer preventative PM was not successful. Liberty refers specifically to PR-PUB-NLH-167 and 169 in their evidence to confirm that more deferrals of preventative maintenance on the transformers and air blast circuit breakers had occurred at the end of 2013 than they had in 2010. Liberty's opinion was that Hydro should have identified the requirement to hire outside assistance years before they finally decided to undertake that effort in 2014.

[Reference: Prudence Review Transcript, November 12, 2015, pp. 50-52]

In cross examination, Counsel for Hydro attempted to elicit from the Liberty Panel that the real reason for the failure of the air blast circuit breaker was cold temperatures. While it was admitted on the record that the daily temperatures at all material time relating to the air blast circuit failure breaker were cold, Liberty's evidence remained unwavering. In response to questioning regarding the performance of air blast circuit breakers being negatively affected by the cold weather, the Liberty Panel stated:

> *Mr. Lautenschlager:*
>
> *A. I disagree. The breakers – it was a factor not necessarily – the breaker is designed to operate in that cold weather. Therefore, if the breaker doesn't operate in that cold weather, it's not because of the cold weather, it's just the condition that was occurring."*
> ...
>
> ...
>
> *A. Well, all I can say is the cold weather was a condition that was occurring. The breaker was designed to operate. If the cold weather affected the breaker, that was a malfunction of the breaker.*

The evidence of the panel on cross-examination was that Liberty did not agree that the failure of the air blast circuit breaker at Sunnyside was as a result of cold weather.

At page 175 of the November 12, 2015 evidence, the position of Liberty as regards the Sunnyside T1 transformer failure and the issues of the Sunnyside air blast circuit breaker, B1LO3, to be as follows:

> *Mr. Antonuk:*
>
> *A. There is a direct causal linkage between maintenance and performance.*

At page 28 of Liberty's initial report, the following is found:

> *Where causation is not determinable, despite good faith and capable effort, it is sufficient to make the categorical level connection, as exists here, between conducting maintenance and avoiding malfunction. To assign no consequence to imprudence under such circumstances, when adverse consequences have occurred, has the inevitable effect of lessening diligence and care in operating facilities required to serve the public and for which customers also bear cost responsibility.* (emphasis added)

D.1.3. Consumer Advocate's Assessment of Prudency

The Consumer Advocate submits that fundamentally there is consistency in the position of Liberty regarding the imprudence of Hydro with respect to the Sunnyside T1 transformer and the Sunnyside air blast circuit breaker, B1LO3. As regards the Sunnyside T1 transformer, the evidence provided by Darren Moore on behalf of Hydro was clear in its agreement that the acceptable timeframe for preventative maintenance for T1 transformers of the nature of the ones in Sunnyside would be a six-year cycle. Mr. Moore, on behalf of Hydro, agreed that the six-year cycle determined by Liberty was a prudent standard.

The Consumer Advocate submits that an exchange that occurred on October 27, 2015 between Counsel for the Board and Mr. Moore outlines the rationale and importance of preventative maintenance.

Green, Q.C.:

Q. Now I am going to ask you a question, it's a very basic question, why would you do preventative maintenance, what's the purpose of it?

Mr. Moore:

A. The purpose of preventative maintenance is to do an ongoing condition assessment of your assets to collect data and condition assessment data so that you can first of all look for any defects with the asset that may need to be corrected either in the near term or be planned for the longer term, and it's also that you gather condition data so that you can trend that asset over time to determine what you may need to address your long term asset management plan.

Green, Q.C.

Q. Would you agree that one of the reasons may be to prevent customer outages and failures, you detect a problem before it happens?

Mr. Moore:

A. Yes, our preventative maintenance program definitely is focused in on maintaining our assets in a suitable manner to provide that reliable service to our customers.

Green, Q.C.

Q. And it would also help identify the corrective maintenance required and to be able to do that in a cost effective way, is that correct?

Mr. Moores:

A. *That's correct, yes.*

This exchange shows the apparent appreciation by Hydro of the necessity for consistent preventative maintenance of its assets. The Consumer Advocate submits that it was only in 2010 that Hydro realized that a plan had to be implemented to attempt to address the backlog of outstanding preventative maintenance for transformers and air blast circuit breakers. At that time it was assessed that a six-year catch up plan would be implemented such that one-sixth of each of the backlogged transformers would be subject to preventative maintenance catch up each year. As can be seen in PR-PUB-NLH-169, this effort was unsuccessful. In 2011 and 2012, 17 terminal station transformers remained overdue as part of the six-year maintenance plan and in 2013 that number had increased to 27. In PR-PUB-NLH-166, Hydro indicated that the Sunnyside T1 transformer was in the system as a backlogged item that was to be undertaken in 2014. Hydro indicates in that RFI that the "annual work plan for 2014 was under development when T1 failed in January 2014 and as a result, six-year preventative maintenance for T1 would not have been documented in the 2014 annual work plan". The Consumer Advocate submits that the Board should place no weight on the intentions of Hydro as outlined in PR-PUB-NLH-166. To after the fact indicate that the Sunnyside T1 transformer would have been part of the 2014 work plan after the six-year preventative maintenance schedule had expired in no way confirms that the preventative maintenance of that transformer would have occurred. The Consumer Advocate states that the position of Hydro in PR-PUB-NLH-166 is inconsistent with the increase in the backlog of overdue terminal station transformers scheduled for maintenance as outlined in PR-PUB-NLH-169 where the backlog increased from 17 overdue transformers in 2012 to 27 overdue transformers in 2013.

As regards the Sunnyside air blast circuit breakers, the evidence provided by Liberty was that the six-year time period between preventative maintenance on the circuit breakers was too long. The evidence of the Liberty Panel was that as a result of the age of the air blast circuit breakers, preventative maintenance for this equipment should have been reduced from six years to four years. As a result, Liberty found that using a six-year preventative maintenance schedule for the circuit breakers was inappropriate.

[Reference: Prudence Review Transcript, November 12, 2015, p. 43]

Following the 2014 outage, Hydro changed its preventative maintenance cycle for air blast circuit breakers from six years to four years and commenced a program to replace all air blast circuit breakers by 2020.

[Reference: Prudence Review Transcript, October 28, 2015 at pp. 12-13]

The Consumer Advocate submits that similar to the preventative maintenance backlog that existed for transformers, the backlog for air blast circuit breakers was also imprudent. In PR-PUB-NLH-167, the table indicates that for the time period between 2010 to 2013, the number of air blast circuit breakers overdue for six-year maintenance at the end of each of those years increased from 11 in 2010 to 18 in 2013.

D.1.3.1. Causation

The Consumer Advocate submits that a brief overview of the law of causation is helpful in addressing any argument that deferral of preventative maintenance did not impact upon the outage related equipment failures.

The case of Snell v. Farrell states that, where the evidential burden is too great for a Plaintiff to prove causation according to the 'but for' test, an "inference of causation" may be established against the Defendant where there is no evidence to the contrary:

> *33 These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See: Cross, 6th ed., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.*
>
> *34 The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial Judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in Wilsher when he referred to a "robust and pragmatic approach to the ... facts" (at p. 881).* (emphasis added)

[Reference: *Snell v. Farrell* 1990 CarswellNB 82 (S.C.C.), Tab 3]

Hanke v. Resurfice Corp. reaffirms that the 'but for' test is the default test to establish causation and rebuts a belief that arose after Snell v. Farrell that it could be supplanted. Hanke articulates the circumstances where the material contribution test, as an exception to the rule of the 'but for' test, in Snell is to be employed:

> *23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": Snell v. Farrell, at p. 327, per Sopinka J.*
>
> *24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.*
>
> *25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.*

[Reference: *Hanke v. Resurfice Corp.* 2007 CarswellAlta 130 (S.C.C.), Tab 4]

In Gallant v. Brake-Patten, found a rearticulation of the test for causation by the Newfoundland and Labrador Court of Appeal re-articulated the test for causation:

> *13 An exception arises when a defendant breaches a duty of care owed to a plaintiff and thereby exposes that plaintiff to an unreasonable risk of injury which the plaintiff has actually sustained, and it is impossible for the plaintiff to prove causation on the "but for" test due to factors outside of his or her control but within the control of the defendant. In these exceptional circumstances, the law permits a plaintiff to use the "material contribution" test to prove causation, for the reason that it would offend basic notions of fairness and justice to deny liability. (Athey and Hanke.)*

14 *Determination of causation is "essentially a practical question of fact which can best be answered by ordinary common sense". (Snell at 328, citing Alphacell Ltd. v. Woodward, [1972] 2 All E.R. 475 (U.K. H.L.), at 490.) The plaintiff always has the burden of proving the necessary causal connection between his or her injury and the defendant's conduct. However, the law does not require that causation be established with certainty. Causation is established if a plaintiff proves, on the evidence, that it is more likely than not that the defendant caused the plaintiff's injury. (Snell at 328 - 330.)*

15 *A trial court can take a robust and pragmatic approach to the evidence, and may draw inferences of causation even if positive or scientific proof of causation has not been adduced. (Snell at 330; and Athey at paragraph 16.) Whether an inference is or is not drawn is a matter for a trial judge to decide upon considering and weighing the evidence. Where there is evidence supporting causation, and a defendant has not adduced contrary evidence, the defendant runs the risk of the court drawing an inference adverse to the defendant's position. (Snell, at 329-330.) A robust and pragmatic approach to the evidence is a way of considering the evidence. It is not to be confused with speculation and conjecture, which are concepts not based on evidence.*

[Reference: *Gallant v. Brake-Patton* 2012 CarswellNfld 135 at p. 7, Tab 5]

D.1.3.1.1. Analysis Applied

The first step in the Hanke application of the material contribution test is that it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. This step is satisfied in the prudence review because one cannot establish that, had Hydro completed its preventative maintenance on schedule, the equipment failures definitely would not have happened. However, the failure to carry out scheduled preventative maintenance exposed the equipment to an unreasonable risk of injury or failure.

This was confirmed by Mr. Lautenschlager on behalf of Liberty:

Q. *Okay, in its reply Hydro stated that there's no direct linkage between deferred maintenance and the issues that caused the January 2014 outages. They further state that the Board must find that the deferral of the preventative maintenance directly caused the equipment failures that are under review before there can be an imprudence finding. First I'd like to address the Sunnyside transformer failure and the role of PM in that failure. In your mind, is there a linkage for the failure of the Sunnyside transformer with the deferral of preventative maintenance?*

A. *Well, the January 4th outage was initiated by the transformer failure, and I believe that there is a direct linkage between deferred maintenance and the Sunnyside transformer failure. Hydro indicated that bushing failure caused T1 transformer failure. The double*

power factor test included in the six year maintenance should have been done in 2013, which would have detected a deteriorated bushing, in my opinion. Hydro had already identified since 2000, 14 other defective bushings using the test method, so we know that the test method is important to do on transformers. Those other 14 were repaired before any of those led up to a failure. Hydro's deferral PM directly would cause Hydro to miss the opportunity to identify the defective bushing. (emphasis added).

Q. Now let's talk about the two air blast circuit breakers that also failed on January 4th, the one at Sunnyside and the one at Western Avalon, where the cause of the misoperation of the breakers has not been able to be determined. Why, in your opinion, was Hydro imprudent with respect to these failures even if the cause of the misoperation cannot be determined?

A. Well, even though the cause of the malfunctions were not determined, I believe there are linkages between the malfunctions and the deferred PMs. Air blast breaker PMs are designed to verify that the breakers will operate properly, and include making adjustments to make sure that they operate properly. Had Hydro timely conducted the PMs, Hydro would have had the opportunity to identify or even correct any operational defects that caused the malfunctions, whatever they were, and Hydro missed this opportunity (emphasis added).

[Reference: Prudence Review Transcript, November 12, 2015, pp. 54-56]

It cannot be unequivocally established that non-deferred PMs would have prevented equipment failure. One may infer, however, as stated by Mr. Lautenschlager, that had Hydro conducted preventative maintenance in 2013, as was scheduled, it would have identified and had the opportunity to correct any malfunctioning or defective equipment. This is an adverse inference against Hydro that, in the absence of evidence to the contrary, as stated in Snell, is sufficient to establish causation.

These circumstances are exactly those as contemplated in the second stage of the test articulated in Hanke. Hydro breached a duty of care by deferring preventative maintenance and thereby created a foreseeable risk of equipment failure and the concomitant risk of injury to its customers. The equipment for which maintenance was deferred failed and Hydro's customers suffered exactly the type of injury that was within the ambit of the risk created by Hydro's deferral of preventative maintenance. While it is impossible to prove precisely and scientifically the cause of the equipment failure, unless Hydro can adduce evidence that non-deferred preventative maintenance would not have affected the outcome, on the balance of the evidence that is available, it is more likely than not that equipment failure would have been prevented by non-deferred preventative maintenance. This satisfies the material contribution test articulated

in Snell. As such, Hydro's deferral of preventative maintenance legally caused the injury suffered by its customers.

The Consumer Advocate submits that as stated by witnesses from Hydro, preventative maintenance is a "foundational tool" for customer reliability and being behind on preventative maintenance "is definitely not where you want to be".

[Reference: Prudence Review Transcript, October 29, 2015 at pp. 146 and 148]

Deferral of preventative maintenance by its nature exposes customers to increased risks to their reliable service. This risk is not diminished or terminated in any manner by Hydro deferring preventative maintenance to undertake other works deemed by Hydro to be a priority.

In the Consumer Advocate's view, the evidence of Hydro demonstrates that a key factor in the delay in preventative maintenance is a greater concern by Hydro managers for budget than for reliability.

One example of this Hydro mindset can be seen in the October 28, 2015 testimony:

Green, Q.C.

Q. And one of the guidelines you've already indicated in looking at this is what your approved budget is for the year and your existing resources, is that correct?

Mr. Moore:

A. That's correct, we were very committed to the balance between work execution, reliability, and least cost supply of our customers.

Green, Q.C.:

Q. And that was the prevailing factor versus the fact you weren't catching up on your preventative maintenance, was it?

Mr. Moore:

A. I wouldn't call it the prevailing factor I would call it a balance between managing to least cost – to our budgets to ensure least cost service for our customers versus our targets to achieve execution or preventative maintenance program. . .

[Reference: Prudence Review Transcript, October 28, 2015 at pp. 24-25]

The Consumer Advocate submits that Hydro managers while concerned with maintaining their budgetary requirements, failed to adequately deal with the lack of success in achieving the preventative maintenance schedule outlined in 2010.

The Consumer Advocate submits that the mindset of Hydro only changed as a result of the incidents that occurred in January of 2014 when the realization hit that preventative maintenance had to take a higher priority.

D.2. Black Start

D.2.1. Factual Overview

For decades Hydro had maintained an external generator on the Holyrood site which could provide black start capability in the event of a situation where the main power plant at Holyrood became detached from the transmission system. Over time, this external black start generation facility became so deteriorated that it could no longer be used.

A summary of the chronology of events regarding black start is as follows:

March 2010	*Stop Work Order on existing Holyrood Black Start Turbine;*
February 2011	*Holyrood Turbine approved for emergency use only;*
January 2012	*Amec Report precludes further operation of Holyrood Turbine;*
June 2012	*Decision to use Hardwoods for Black Start;*
January 2013	*Hardwoods option fails when needed;*
January 2013	*Public Utilities Board learns of the Amec Report and the shutdown of the Turbine;*
April 2013	*Newfoundland Power Mobile Turbine Units connected at Holyrood and disconnected shortly thereafter when found to be inadequate for Black Start capability;*
October 2013	*Public Utilities Board insists on immediate solution;*

July 2014	*1.825MW diesel generators put in place to provide Black Start capability at Holyrood;*
January 2015	*The new Combustion Turbine put in service in Holyrood.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015 at p. 51]

From the time period when a Stop Work Order was put in place in March of 2010 to the time of the implementation of the eight 2MW diesels, there was a passage of time of fifty-two months.

As a result of the capital expenditures of $1.124 million and the lease costs of $5.724 million to lease and install the eight 2MW diesel generators at Holyrood, Hydro made application to the Board authorizing the capital expenditure and deferral of the lease cost. By Order P.U. 38 (2013) the Board approved the proposed capital expenditures and the creation of the deferral account, however, deferred the consideration of the recovery of the associated costs.

D.2.2. Liberty's Basis for Finding of Imprudency

As found by Liberty, Hydro's imprudent failure to maintain black start capability at Holyrood resulted in the leased diesel generators having too short a used and useful period to justify the expenditures.

In Liberty's reply evidence they outline the basis of the imprudent nature of Hydro's handling of the black start issue. Liberty found:

> *Hydro first lost its capability for black start at the Holyrood Plant in 2010. At that point, Hydro became deficient in meeting a very critical system need. Hydro allowed that deficiency to continue until mid-2014, a period of 52 months. . . The conscious decision on the part of Hydro to forego black start at Holyrood for a prolonged period while it relied on the Hardwoods CT to provide black start service was not a reasonable alternative to have pursued. There is no evidence that Hydro conducted an accurate cost versus risk assessment in deciding to use the Hardwood CT for black start capability. . . The error in that reliance was exposed in January 2013 when black start from Hardwoods was unavailable when needed, but Hydro nevertheless continued to rely on Hardwoods. The initial decision and continuing to rely on the Hardwoods option after January 2013 was, in our view, clearly imprudent.*

[Reference: Reply Evidence, Prudence Review of Newfoundland and Labrador Hydro, Decisions and Actions, the Liberty Consulting Group, September 17, 2015, pp. 17, 20 and 21]

Under direct examination, Liberty witnesses confirmed their position on Hydro's imprudence as follows:

> *The use of Hardwoods as a black start alternative is a non-starter as it does not meet the basic criteria which is that the plant has to be able to restart on its own. The use of Hardwoods as a black start alternative is inconsistent with the definition of black start as relying on an external source is not within the definition of black start.*

[Reference: Prudence Review Transcript, November 12, 2015 at pp. 23–24]

Hardwoods is also an inappropriate black start option as its historical basis has shown it to be unavailable 26 percent of the time. As a result, it does not meet a standard of reliability to make it dependable for black start of the Holyrood plant.

[Reference: Prudence Review Transcript, November 12, 2015 at pp. 24-25]

There was not a thoughtful analysis completed by Hydro in determining that Hardwoods would be the best option for black start of the Holyrood plant.

[Reference: Prudence Review Transcript, November 12, 2015, p. 25]

The decisions made by Hydro regarding Holyrood black start over the 52 month period and the continued usage of Hardwoods even after that possible solution was proven not to be effective was imprudent.

[Reference: Prudence Review Transcript, November 12, 2015, p. 25]

In reference to the use of Hardwoods as the black start alternative for Holyrood, Mr. Mazzini, testifying on behalf of the Liberty Panel states:

We consider that there is a pretty high bar that must be passed in order to conclude imprudence and in my mind, it's passed rather easily in this particular case.

[Reference: Prudence Review Transcript, November 12, 2015, p. 25]

D.2.3. La Capra

The summary of the evidence of La Capra is found from the information provided in the *viva voce* evidence of the La Capra Panel on November 2, 2015. The witness from La Capra stated as follows:

. . . Hydro made the conscious decision to accept a lower level of reliability on an interim basis until they could produce the other new CT. . .

. . .

. . . You are not looking at it from a reliability only perspective. You are looking at the reliability benefit, you are looking at the cost and you are looking at the probability of that benefit actually accruing to the customers that are paying for this. . . of those three elements, only one is certain and that's the cost you are going to incur. Whether or not that reliability benefit ever actually accrues, it may, it may not. In this specific instance, we are dealing with an issue that had extremely low level of likelihood of occurring, and they made the call to accept some risk on an interim period until they could get the permanent long term solution. I mean, I think that embodies everything we are saying.

[Reference: Prudence Review Transcript, November 2, 2015, pp. 133-134]

The Consumer Advocate submits that the evidence provided indicates that La Capra was first retained on July 14, 2015 and filed their first report on August 7, 2015. The evidence of the La Capra Panel indicates that other than reviewing the documentation provided by Hydro, they had four or five teleconferences with representatives of Hydro. These representatives could not be identified by the La Capra Panel during their testimony. According to Undertaking 92, of the four or five teleconferences that were held between La Capra and Hydro personnel, only one of those teleconferences involved the then Manager of Thermal Generation, Terry LeDrew.

The evidence obtained during the cross-examination of the La Capra Panel also makes several other facts clear. These include:

- The La Capra Panel had no prior experience with the system (p. 114)
- The La Capra Panel did not visit Newfoundland and Labrador before producing their report (p. 114)
- The La Capra Panel was unable to identify the members of the Hydro team that they dealt with during the formulization of their report (p. 116)
- The La Capra Panel was unfamiliar with Hydro's generation expansion plans for the Island Interconnected System (p. 118)
- The Panel agreed that Hardwoods did not provide the same level of reliability or back up as the previous plan of on-site black start (p. 134)

[Reference: Prudence Review Transcript, November 2, 2015]

La Capra's view was that a three year period without a permanent black start solution was acceptable.

[Reference: Prudence Review Transcript, November 2, 2015, p. 146]

At p. 215 of the November 2, 2015 transcript, the La Capra witnesses agreed that Hydro had previously experienced the issue of the transmission lines being down in 1994 and that this indicated that the risk of an event requiring black start was more than just a hypothetical risk.

The Consumer Advocate submits that the evidence of the La Capra Panel indicated their opinion that for an extended period of time, long before 2010, Hydro had Hardwoods as an acceptable alternative to black start Holyrood. The Consumer Advocate submits that this is incorrect and is evident by the cross-examination of the Consumer Advocate that occurred on November 3, 2015. On that date, the following exchange occurred:

Johnson QC:

Q. . . . Now I take it, Mr. DiDomenico, that it was your understanding that Hardwoods had for some time been designated as secondary to restart Holyrood, would that be correct, when you testified yesterday?

Mr. DiDomenico:

A. It was part of the area restoration plan, yes.

Johnson QC:

Q. And you indicated there that it would be used to restart Holyrood, right?

Mr. DiDomenico:

A. Amongst other things, but, yes.

Johnson QC:

Q. Amongst other things, and I take it that you believe that that was Hardwoods role for some period of time?

Mr. DiDomenico:

A. I do.

Johnson QC:

Q. You do, okay, and are you aware of Mr. Henderson's testimony on the 27th of October in this proceeding where he testified that it was not until following January of 2012 that Hydro put operators through training so that its operators would be able to restart Holyrood?

Mr. DiDomenico:

A. I saw that, yes.

Johnson QC:

Q. That was new information to you that you learned at this hearing?

Mr. DiDomenico:

A. In terms of the operator training aspect, yes.

[Reference: Prudence Review Transcript, November 3, 2015, pp. 17-19]

The Consumer Advocate submits that this exchange is evidence of the incomplete understanding of the La Capra panel on some aspects of Hydro's black start plan.

D.2.4. Consumer Advocate's Assessment of Prudency

The Consumer Advocate submits that the findings of Liberty regarding black start are correct. The Board should consider the timeline of 52 months from March 3, 2010 to at least July, 2014 in determining that the actions taken by Hydro regarding black start for Holyrood generation was imprudent. The Consumer Advocate submits that it was clear during the cross-examination of the La Capra Panel that the criticality of Holyrood for black start was well known to Hydro even prior to 2010. During that cross-examination, counsel for the Industrial Customers took the La Capra Panel to Information 31. After outlining that the information contained excerpts from Hydro's 2011 Capital Budget Application, the following exchange occurred:

Mr. Coxworthy:

Q. Sure, and I'll take you to the particular section I wanted to speak to you about, page B-16, and this was a project justification that Hydro presented to this Board in 2010 for a 1.3 million dollar refurbishment project for this very gas turbine that's in subject, the one at Holyrood that was providing black start capability, and in the project justification, the Holyrood gas turbine is described as critical to the successful operation of the Island Interconnected System. They go on then to say in the project justification, and this is Hydro again, these are Hydro's words, "if the gas turbine failed to supply power to Holyrood during a black start, Holyrood would not be able to start until power was restored to the grid by alternate generation sources". So that "until power was restored to the grid by alternate generation sources", that's Hardwoods, isn't it?

Mr. DiDomenico:

A. It could be the offline system, but it's also Hardwoods.

Mr. Coxworthy:

Q. Somewhere from the transmission grid?

Mr. DiDomenico:

A. Agreed.

Mr. Coxworthy:

Q. Yeah, so what they are pointing out here is that until that happens, there's a problem, Holyrood would not be able to start, and they go on to explain what that problem would be, "this would cause an unnecessary delay in restoring full power to the grid. . .

[Reference: Prudence Review Transcript, November 3, 2015, pp. 43-44]

The Consumer Advocate further submits that as outlined in Information 31, Hydro identified the fact in 2010 that "there are no viable alternatives to repairing the gas turbine engine", i.e. no viable alternatives for black start capability.

[Reference: Information 31, Prudence Review at s. 4.10, p. 11]

The Consumer Advocate submits that the knowledge of Hydro of the integral nature of black start to the Holyrood plant is also evident in Information 32. The Consumer Advocate submits that in Information 32, which outlines submissions by Hydro related to the necessity of the project, the following is found:

> *The gas turbine is essential to black start the Holyrood plant. Without this gas turbine, the Holyrood plant would not be able to be started when there is a loss of transmission connection to the plant from off the Avalon Peninsula. A source with the capability of approximately 10 mw is necessary to start the Holyrood generating unit. Given the uncertainty of the repair time, it is prudent to secure a source of black start capability prior to the 2010/2011 winter.* (emphasis added)

[Reference: Information 32, Prudence Review, p. 1]

As well, in Information 32 the following is stated:

> *Otherwise, while the unit is out of service for repairs and assessment, the supply to the Avalon Peninsula area will be vulnerable to long outages caused by extended transmission outages. While such events are rare, the requirement for black starting has occurred in the past as a result of severe ice storms, the last one being in December, 1994.*

[Reference: Information 32 Prudence Review; Prudence Review Transcript, November 3, 2015, pp. 51-52]

The Holyrood gas turbine, subsequent to the Stop Work Order of March, 2010, was available for part of the 2011-2012 winter season to provide black start for Holyrood. As of January 18, 2012 the Holyrood Gas Turbine was no longer available and Hardwoods was viewed by Hydro as the appropriate black start option. The use of the Hardwoods Gas Turbine proved to be inadequate in the circumstances that occurred on January 11, 2013. Subsequent efforts to use the

Newfoundland Power mobile generation units to black start Holyrood also proved to be ineffective as they were not able to start the large boiler feed pump motors necessary to restart Holyrood in an outage situation. On November 18, 2013, the recommendation of Hydro was the pending usage of the new CT that was planned for Holyrood. In addition, for the period between November of 2013 and the installation of the new CT, Hydro recommended, as the least cost option, leasing generators to facilitate black start.

[Reference: PR-PUB-NLH-173, Attachment 6, p. 7]

The Consumer Advocate states that the reliance on Hardwoods to facilitate black start to Holyrood was shown to be inadequate. The continued reliance on Hardwoods to facilitate black start increased the risk of another incident as had occurred in early 2013. To rely on a source of black start that had a utilization forced outage probability (UFOP) which averaged 26 percent unavailability and to keep consumers at risk of failure to obtain power from Holyrood as a result of the inability to black start for a period of approximately 52 months is inconsistent with good utility practice and, the Consumer Advocate submits, is imprudent. The Consumer Advocate submits that any costs related to the leasing and installing of the eight 1.25MW diesel generators should be removed from any permitted 2014 revenue deficiency recovery and the 2015 test year. Otherwise, Hydro's imprudence will be without consequence to Hydro.

D.3. Holyrood Unit 1, Turbine Failure

By correspondence to the Board and the parties from Hydro's Senior Legal Counsel dated December 16, 2015, Hydro accepted full responsibility for any cost consequences attributable to the failure of the DC lube oil pumping system in January 2013. As a result, the costs related to this project are not proposed to be passed on to customers and therefore the Consumer Advocate makes no further submission under this section.

D.4. Holyrood Breaker B1L17

D.4.1. Factual Overview

In January 2013, there was a flashover in the insulators in breaker B1L17. As a result, that breaker was associated with a failure in the switch yard in Holyrood and a decision was made to

provide a room temperature vulcanizing (RTV) coating on that and other breakers. Unlike Breaker B1L03, Breaker B1L17 had its preventative maintenance completed within its six-year PM program. In order to apply the RTV coating, the breaker was disassembled and all columns and interrupting heads were removed and sent to Hydro's Whitbourne shop. The RTV coating was applied on Breaker B1L17 on the 26th of February, 2013. Between the 28th of February and the 23rd of March, when the columns and interrupting heads were installed, the breaker sat outside in the yard under what Hydro believed to be a waterproof covering. Subsequently, in January 2014, the breaker failed, and following an investigation, it was determined that the failure resulted from corrosion in one of the phases of the breaker which indicated that at some point moisture got into the air system in the breaker.

[Reference: Prudence Review Transcript, October 28, 2015, Pages 44-48; PR-PUB-NLH-66]

Post installation of the columns and interrupting heads, a set of tests were performed on the breaker. The intention of the tests was to determine the proper operation of the breaker once reinstated. These tests were not designed to detect the presence of water in the receiver tank.

[Reference: PR-PUB-NLH-068]

As confirmed in an exchange that occurred between Counsel for the Board and the Hydro Panel testifying in the prudence portion of the GRA, moisture was the cause of the failure of the breaker to operate properly.

Green, Q.C.:

Q. *And we don't know where the moisture came from, but we do know that that was the cause of the breaker failure?*

Mr. Moore:

A. *We do know – it was a fact that there was evidence of moisture in that phase of the breaker due to the – we found evidence of corrosion, and do know that there must have been freezing as well on that day when the breaker failed to operate, but we don't have any 100 per cent conclusive evidence as to the source of the moisture in that breaker."*

[Reference: Prudence Review Transcript, October 28, 2015, Page 51]

As a result of the failure of Breaker B1L17, Unit 1 at Holyrood was unavailable for the period January 5 to January 8, 2014.

On April 11, 2014, Hydro applied for $497,313.00 to repair two breakers, one of which was Holyrood B1L17 which had failed in January 2014. By Order No. PU23(2014), the Board approved the expenditure, with the recovery of that expenditure being addressed at a later date.

D.4.2 Liberty's Basis for Finding of Imprudency:

Liberty's basis for finding imprudence as regards Holyrood Breaker B1L17 is as follows:

- A poor maintenance procedure that permitted water to enter the breaker resulting in freezing caused the breaker to mechanically seize and malfunction on January 5, 2014.
- Hydro had reported that it had secured waterproof covers over the tank and dividing rod while it was sitting outside exposed to the elements for a period that was almost a month.
- Hydro did not take appropriate action to protect the equipment for this extended period of time but does acknowledge that water did somehow enter the tank while the temporary cover was installed.
- The ingress of water was the cause of the breaker malfunction on January 2014.
- Based on information available at that time, Hydro did not act reasonably in protecting the equipment;
- Liberty therefore found the actions that permitted water ingress imprudent.

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 36]

D.4.3 Consumer Advocate's Assessment of Prudency

The Consumer Advocate submits that the evidence is clear; water entered breaker B1L17, caused corrosion and froze which as a result caused a breaker malfunction on January 5, 2014. The Consumer Advocate further submits that it is also clear that the cover placed over the

breaker for approximately a one-month period and thought by Hydro to be waterproof or water tight, was not. The evidence of the Hydro panel under cross examination could not confirm the material of which this covering was made nor could they confirm how the covering was secured.

[Reference: Prudence Review Transcript, October 30, 2015, pp. 97-98]

The Consumer Advocate submits the temporary cover that was installed by Hydro staff and used to cover the breaker receiver tanks while the breaker was exposed to the elements from the period of 28th of February to the 23rd of March, 2013 did not carry out its function as intended by Hydro. The evidence shows that when the breaker failed in January of 2014, the investigation that followed determined that the most probable cause of the failure was moisture in the "A" phase receiver tank and that the moisture likely entered the tank during the period when the repairs were being completed on the breaker.

[Reference: PR-PUB-NLH-067]

In addition, the evidence of the Hydro panel was clear that when the breaker failed to operate, the root cause analysis found evidence of corrosion in one of the phases of the breaker which indicates that at some point in time moisture did get into that breaker. Furthermore, Hydro's view was that a combination of corrosion plus freezing of the moisture lead to the breaker failure.

[Reference: Prudence Review Transcript, October 28, 2015, pp. 47-48]

The Consumer Advocate submits that to put a valuable piece of equipment such as Breaker B1L17 in a situation where it is exposed to the elements such that moisture or water enters the breaker, in combination with, the completion of tests prior to putting the breaker back into service which were not designed to detect the presence of water in the receiver tank (PR-PUB-NLH-068), is imprudent. The Consumer Advocate submits that Hydro was unable to provide any other explanation for the water and ice found in the receiver tank following the failure of the breaker to operate properly and the evidence indicates the water entered the receiver tank during the repair period. The Consumer Advocate further submits that a summary of the imprudence of Hydro in relation to the Breaker B1L17, is found in Liberty's response to PR-NLH-PUB-004. Liberty's response states:

The receiver tanks became "exposed to weather" because of disassembly and the fact that the receiver tanks were not filled with dry air under high pressure (as exposed to their normal operating condition). The use of temporary waterproof covers does not provide adequate protection of receiver tank parts from exposure to weather. The air in the receiver could have been wet when they were covered, or the cover material or the sealing used could have allowed wet air or water to enter the receiver directly, by osmosis, or by exchange of air caused by temperature changes or by wind. Hydro did not take effective preventative measure, such as reducing the exposure time to a maximum of several days, inspecting the covers and cover sealing on a daily basis, applying a slight positive pressure of dry air into the receiver tanks, placing silica gel in the receivers to absorb moisture, heating the receiver tank air above freezing to evaporate free water and then conducting dew point tests, purging the receivers with dry air multiple times before reassembling, or a combination of such measures.

[Reference: PR- NLH-PUB-004]

The Consumer Advocate submits that it appears that the reality of the situation is that a tarp or covering was placed over the breaker in an ineffective manner and that as a result, water entered the receiver tank which lead to freezing and corrosion. The Consumer Advocate submits that the evidence supplied by Hydro clearly indicates a lack of prudent action when dealing with the breaker and its repair during approximately a one-month period between February and March 2013. As a result, the Consumer Advocate concurs with the findings of imprudence by Liberty relating to breaker B1L17.

D.5 Western Avalon Terminal T5 Tap Changer

D.5.1 Factual Overview

The factual basis related to this matter is outlined in the Transcript of October 28, 2015. In an exchange between Counsel for the Board and representatives of Hydro's panel, the following was stated:

Greene, Q.C.:

Q. So now if you move to the Western Avalon Transformer T5 Project, here as I understand it, that tap changer was changed. The tap changer for T5 was damaged on January 5 and it had to be rewound and the transformer windings had to be cleaned. As I understand it, the cause of that was a breaker, B1L37 which did not operate property. Is that correct, Mr. Moore:

Mr. Moore:

A. Yes, when we did the root cause analysis to determine why we had a failure of a tap changer on T5, and we explained a little bit yesterday about the tap changers versus the main compartment, I guess, with a transformer itself, what we determined is that a failure – I can go to the exact RFI number that does explain the failure, but one of the air blast circuit breakers in the Western Avalon Terminal Station at the time, it was determined when we did our root cause analysis that it closed at three times without one of the three phases of the breaker closing, and we've since following up with a consultant who actually prepared a report and did an investigation into that failure, and determined that, I'll say, voltage issues because of only two of the three phases of that breaker closing would have caused the – was the most probable cause of the tap changer failure that day.

Greene, Q.C.:

Q. So again, that breaker was B1L37 and it's another air blast circuit breaker. Is that correct?

Mr. Moore:

A. That's correct, B1L37 is an air blast circuit breaker.

[Reference: Prudence Review Transcript, October 28, 2015, pp. 35-36]

Breaker B1L37 was installed by Hydro in 1968 and was 46 years old in 2014. Furthermore, the last preventative maintenance completed on Breaker BL137 prior to the issues in 2014 occurred in 2005. Based on the maintenance records of Hydro in January of 2014, Breaker B1L37 was two and a half years beyond its preventative maintenance cycle at the times of its failure.

[Reference: Prudence Review Transcript, October 28, 2015, p. 39]

As a result of this incident, Hydro had to replace the damaged tap changer and clean the transformer windings. On June 19, 2014, Hydro applied for approval of capital expenditures of $1.452 million to replace the Western Avalon T5 tap changer and clean and dry the T5 transformer. By Board Order No. PU32(2014), the expenditures were approved by the Board with their recovery to be deferred to a later time.

D.5.2 Liberty's Basis for Finding of Imprudency

As regards Liberty's basis for the finding of imprudency, at page 33 of their report, they found that the failure of Breaker B1L37 to close on all of its three phases was the cause of the T5 tap changer failure. In reference to Hydro's maintenance practices, Liberty found that the B1L37 breaker was installed by Hydro in 1968 and overhauled in 2005. Breaker B1L37 was scheduled to be replaced by Hydro in 2018. On January 4, 2014, this breaker was about two and one-half years overdue for its previously scheduled preventative maintenance.

In summarizing Hydro's imprudence, Liberty, in its report, defers to its findings regarding the imprudent execution of practices regarding maintenance procedures that caused certain other equipment failures in January 2014 as outlined in other chapters of its report. As regards the T5 tap changer failure, Liberty states "that imprudence extends to Breaker B1L37 and its condition and operation on January 4, 2014."

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 3]

D.5.3 Consumer Advocate's Assessment of Prudency

The Consumer Advocate agrees with the position put forth by Liberty regarding the imprudent nature of the maintenance practices of the equipment that failed on January 4, 2014. The Consumer Advocate submits that its position on Hydro's imprudency is outlined in detail in its submissions relating to the Sunnyside replacement equipment in Section D.1 of this submission. The Consumer Advocate relies upon its submissions outlined therein and submits that they are equally applicable to the circumstances leading to the failure of the Western Avalon T5 tap changer as the basis for the failure results from the improper preventative maintenance of Breaker B1L37.

The Consumer Advocate further submits that the arguments outlined in Section D.1 regarding causation and the case law outlined therein is also equally applicable to the B1L37 breaker failure.

D.6 Extraordinary Transformer and Breaker Repairs

D.6.1 Factual Overview

This issue relates to Hydro's costs associated with catch up maintenance work on its air blast circuit breakers and its transformers to enable Hydro to have the required preventative maintenance schedules met during their planned six-year timeframe. In an effort to complete the projected maintenance on these air blast circuit breakers and transformers, extra amounts were expended by Hydro in order to meet the completion targets.

D.6.2 Liberty's Basis for Finding of Imprudence

Liberty based its finding of imprudence on the difference between the completion that would have been obtained based on normal work levels to complete the targeted maintenance schedules as compared to the costs associated with the acceleration of the work schedules in 2014 and 2015. Liberty's finding is that the failure to maintain the scheduled maintenance in earlier years led to increased costs in 2014 and 2015 in order to meet the targets. Costs that, but for imprudence, would not have been incurred. According to Liberty, Hydro is entitled to amounts that would have been incurred as a result of normal maintenance procedures on a per air blast circuit breaker and per transformer cost but costs above those amounts would have resulted from imprudence. A summary of Liberty's finding regarding the imprudence in this accelerated catch up is found at p. 40 of their report. Under the heading "Prudence Analysis", Liberty states:

> *Prudent management would have maintained a cycle conforming to the six years adopted by Hydro as its standard. Had Hydro acted prudently in executing this cycle, it would have needed no acceleration in 2014 and 2015. Thus, in the absence of imprudence, one would expect 2015 work to include only a normal amount of maintenance activity. Instead, Hydro plans work substantially above that normal yearly amount, and has included costs for such increased work in this GRA filing. Similarly, 2014 work above normal yearly levels caused Hydro to incur substantial costs in that year.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 40]

D.6.3 Consumer Advocate's Assessment on Prudence

The Consumer Advocate refers to earlier submissions regarding air blast circuit breaker and transformer maintenance as outlined in this submission. The Consumer Advocate agrees with the position of Liberty that the acceleration of planned maintenance on air blast circuit breakers and transformers resulted from the imprudence of Hydro in not following through on its planned annual preventative maintenance. The Consumer Advocate agrees that the calculation of the disallowance due to imprudence must reflect work that normally would have occurred in the particular year and the calculation of the imprudent amounts would be over and above those normally expected expenditures. To do otherwise would again be rewarding Hydro for its imprudence.

D.7 2014 Revenue Deficiency

D.7.1 Factual Background

On November 28, 2014 Hydro applied for approval for the deferral and recovery of the sum of $45.9 million forecasted as a pending revenue deficiency for 2014. The Board approved the creation of the deferral account and the segregation of $45.9 million in that account but did not approve recovery fully or in part.

An approximate $46 million deferred asset held by Hydro related to its proposed 2014 Revenue Requirements as filed in the GRA hearing will be influenced by the Board's determination of prudence in its review of Hydro's 2014 Capital and Operating expenditures.

[Reference: Amended General Rate Application, Prudence Review, Terms of Reference, February 27, 2015, p. 3]

The Consumer Advocate refers the Board to the 2013 Amended General Rate Application Submissions of the Consumer Advocate for a more detailed overview of Hydro's claim in respect of the 2014 Revenue Deficiency.

D.7.2 Liberty's Basis for Finding of Imprudencey

At Table 9.1 at page 44 of Liberty's final report, a summary of adjustments to the 2014 Revenue Requirements calculation is outlined. In its report, Liberty focused on three main headings under the umbrella of imprudent operating costs. These are summarized below.

D.7.2.1 Professional Services Costs

In Liberty's review, they identified 2014 professional services costs as a potentially significant source of expenditures linked to imprudence. Upon making this determination, Liberty requested additional information from Hydro including 2014 invoices for professional services invoiced to Hydro. Liberty identified about $2.55 million in professional fees falling into the "but for" imprudent category. These amounts, Liberty found, should be excluded as having resulted from Hydro's imprudence.

D.7.2.2 Overtime

Liberty's review determined that there was an approximate 81,000 overtime hours differential from the base line overtime hours for 2011-2013. Liberty used the overtime hours that had occurred in 2011 to 2013 as a comparable in determining the extra costs that Liberty determined were as a result of imprudent undertakings in 2014. Liberty acknowledges that based on the information available, it is difficult to be exact in its calculations and states:

> *Liberty's calculations of capital costs and other areas may already capture some of the 81,000 overtime hours calculated here. To the extent that Hydro has a method for determining the overlap, an adjustment would be in order.*

Although they were not able to provide an exact calculation, Liberty's position as regards 2014 overtime indicated significant overtime hours that would not have occurred but for Hydro's imprudence.

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015,, pp. 45-46]

D.7.2.3 Salary Transfers

When Nalcor Executives perform work for Hydro, the hours spent on this work is charged to Hydro for these utility matters. Following Liberty's request, Hydro provided Liberty with a listing of transfers of salary costs to Hydro by Nalcor Executive. Liberty found that salary transfers related to outage response of thirteen executive leadership members and finance employees in 2014. The total salary transfer for such activity was approximately $511,000.

[Reference: PR-PUB-NLH-92 and PR-PUB-NLH-94]

Liberty concluded that, "*the $511,000 in executive leadership and finance cost transfers would not have occurred in the absence of the outages.*"

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 46]

D.7.3 Consumer Advocate's Assessment of Prudency

The Consumer Advocate acknowledges that some adjustment may be necessary to offset such issues as double counting. In particular, the Consumer Advocate acknowledges under Sunnyside environmental remediation, the amount outlined by Liberty of $346,000.00 appears to have been accounted for elsewhere and therefore should be reduced from the amounts calculated for imprudence.

In principle however, the Consumer Advocate agrees with the position taken by Liberty as regards the operating costs portion of the 2014 Revenue Deficiency. The Consumer Advocate submits to the extent that the operating costs are associated with capital expenditures which Liberty has found to be imprudent, those operating costs must be determined to likewise be imprudent and be removed from the amounts that will be passed on to customers.

The Consumer Advocate supports Liberty's position that "but for" the imprudence of Hydro, these operating costs would not have occurred.

D.8 2014 Supply Costs

In addition to recovery of the $45.9 million as a 2014 revenue deficiency, Hydro is seeking recovery of $10 million in 2014 supply costs incurred in the first quarter of 2014.

Liberty found that Hydro acted prudently in calling upon its capacity assistance agreement with Corner Brook Pulp and paper to purchase approximately $6.2 million in electrical generation and in incurring an additional $5.5 million in additional costs for energy from its gas turbines and diesels. In total, the net 2014 costs incurred by Hydro were estimated to be $9,790,000.

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. 15]

However, while the decision to purchase the power was prudent, Liberty concluded that the imprudent actions by Hydro led to the four day outage of Holyrood Unit 1 necessitating the purchase of $2,189,110 in electrical power from Corner Brook Pulp and paper between January 5 and January 8.

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, pp. 15-20]

Hydro has questioned and challenged the assumptions on which Liberty's calculations are based and has argued that "*prudence related disallowances cannot and should not be based on rough estimates*".

[Reference: Newfoundland and Labrador Hydro, Prudence Review Reply Evidence, August 7, 2015, pp. 6-8]

However, the Consumer Advocate submits that Liberty has demonstrated that the assumptions it used are more reasonable than those suggested by Hydro.

[Reference: Reply Evidence, Prudence Review of Newfoundland and Labrador Hydro, Decisions and Actions, the Liberty Consulting Group, September 17, 2015, p. 27]

Further, as pointed out by Liberty in its reply, "*there are methods available for a more accurate assessment than Liberty's estimate in this case, but they require better information, which Hydro cannot produce.*"

[Reference: Reply Evidence, Prudence Review of Newfoundland and Labrador Hydro, Decisions and Actions, the Liberty Consulting Group, September 17, 2015, p. 26]

The Consumer Advocate submits that any recovery of 2014 supply costs should be limited to $7,600,890 ($9,650,000 - $2,189,110).

E. BETTERMENT

The Consumer Advocate states that if the Board makes a finding of imprudence as regards the Western Avalon assets and the Sunnyside assets, then no adjustment should be made for betterment. The Consumer Advocate submits that in determining what should be paid by rate payers as a result of the early retirement of an asset, the overriding principal should be that the rate payer should pay no more than he or she would have paid but for the imprudence of the utility. In effect, the customer should be in the same position as he or she would have been irrespective of the failure of the asset as a result of imprudence. In the circumstances regarding Western Avalon and Sunnyside, the Consumer Advocate submits that the expenditure on replacement of new assets would not have happened but for Hydro's imprudence. As a result, the assets that were in place would have continued to exist and carried out their functions until their normal end-of-service life. At that point in time, the replacement assets would then form part of the rate base and Hydro would earn based on those assets. As a result, the Consumer Advocate concurs with Liberty that betterment is an inappropriate consideration as regards the Sunnyside and Western Avalon projects.

As outlined by Liberty in its Reply evidence:

> *"In the absence of imprudence, the assets would have remained in service, and revenue requirements associated with them would have continued to be calculated in this rate proceeding on the basis of remaining investment as it continues to be depreciated. To the extent that Hydro would not have installed new equipment, it would not be asking in this proceeding for any changed costs associated with the replaced equipment. To the extent that Hydro's approach would increase customer costs, it ignores the results that customers would have experienced in the absence of imprudence. Moreover, while the system would likely have needed replacement of equipment at some point, customers would derive benefit from its installation. That benefit, in the*

absence of imprudence, only occurs following what would have been the end of the life of the replaced equipment."

[Reference: Reply Evidence, Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions, The Liberty Consulting Group, September 17, 2015, Page 13]

The Consumer Advocate submits that to do otherwise than ignore the betterment argument effectively rewards Hydro for its imprudence.

F. FINANCIAL CONSEQUENCES OF IMPRUDENCE

In determining the financial impact of Hydro's imprudence, Liberty notes that some of its review concerns "*earlier decisions and actions where the Board deferred recovery of the associated costs, pending further review*". Liberty's review identified the costs of decisions and actions that in its view were not prudently incurred "*according to accepted standards for examining the prudence of utility decisions and actions*".

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. ES-1]

Most of the projects or programs examined by Liberty:

...involved requests to the Board for approval of the underlying work or for deferral of certain costs. Hydro typically made those requests using estimates. Hydro reported to Liberty that actual costs (some offset by insurance recovery) have proven lower in some case.

Liberty concluded that Hydro acted imprudently in multiple projects or programs set for examination by the Board and identified adverse cost consequences in those projects or programs. In one specific project or program, Liberty concluded that Hydro acted prudently in making its decision, but "*some of the costs incurred were influenced by imprudent prior actions*". In another project or program, Liberty identified:

...2014 actual capital costs and operating expenses that could be attributed to imprudence. This identification lays a foundation for later efforts that seek to identify any such expenses that may form part of Hydro's estimation of a 2014 Revenue Deficiency of $45.9 million.

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. ES-2]

Liberty concluded:

> *...the costs that Hydro could have avoided in the absence of the instances of imprudence found by Liberty were:*
>
> - *Actual 2014 capital costs of $10.9 million (as reported by Hydro)*
> - *Actual 2014 operating expenses of $13.4 million.*
> - *Estimated 2015 operating expenses of $2.6 million.*

[Reference: Prudence Review, Newfoundland and Labrador Hydro, Decisions and Actions Final Report – The Liberty Consulting Group, July 6, 2015, p. ES-2]

Hydro submitted reply evidence to Liberty's report on August 7, 2015. Hydro concluded in its Reply at page 32:

> *Hydro appreciates the opportunity to provide this Reply Evidence. As noted above, Hydro does not believe its actions have been imprudent, but rather that it has acted in a responsible manner to provide least cost, safe and reliable electrical service to its customers. If the Board nevertheless determines any disallowances are required, Hydro has provided (or will provide in an ultimate compliance filing) the information required to ensure these amounts are accurately determined.* (emphasis added)

With respect to cost adjustments outlined in its Reply, Liberty does acknowledge for example, that an adjustment of $335,900 for Sunnyside Remediation is necessary to avoid double counting.

[Reference: Reply Evidence – Prudence Review of Newfoundland and Labrador Hydro Decisions and Actions, September 17, 2015 p.15]

For ease of reference and clarity, the Consumer Advocate, in PR-CA-NLH-014 (Revision 1, Oct 15-15) asked Hydro to provide:

> *...a table summarizing each cost item that Liberty has determined to be imprudent, the cost determined by Liberty to be imprudent, the amount of this cost that Hydro believes has been over-stated by Liberty (and the reasons; i.e., double counting, recovery not requested from ratepayers, etc.), and the revised cost and year charged to ratepayers assuming the Board determines that disallowances are required.*

The table included in Hydro's response is summarized below. Hydro noted that adjustments may be necessary as part of any compliance filings for the 2014 and 2015 test years.

Estimates of Imprudently Incurred Costs – Totals for 2014 and 2015 ($ millions)

	Liberty	***Hydro Adjustment***
Capital & Deferred Assets	17.8	15.3
Accumulated Amortization	2.4	3.7
Net Book Value of Capital & Deferred Assets	15.4	11.6
Operating Costs (excluding Amortization)	13.4	3.6
Total	***31.2***	***18.9***

The Consumer Advocate submits that the information contained in the table has not been adjusted to reflect the recent change in position of Hydro regarding its "...tak[ing] full responsibility for any cost consequences attributable to the failure of the DC lube oil pumping system in January 2013" as outlined in Hydro's December 16th, 2015 correspondence to the Board.

As can be seen however, there is a significant difference between the cost figures filed by Liberty and the figures following removal of costs owing to double counting, recovery not requested from ratepayers, etc. Although requested in PR-CA-NLH-014, Hydro did not break the costs down by year. It is difficult to slot costs determined to be imprudent to 2014 and 2015 because: 1) Liberty did not tie its estimate of imprudent costs to a test year revenue requirement calculation, only to a specific calendar year, 2) Liberty did not translate capital costs to annual costs as is done in a test year, and 3) on some occasions, Hydro has requested a deferral account to recover costs (so they are not included in either the 2014 or 2015 revenue requirement, but would be included in a future year if the Board allows cost recovery through a deferral account.

The Consumer Advocate notes that Liberty attributed only $2.6 million of imprudently incurred operating costs to 2015. However, as stated by Hydro in PR-CA-NLH-014 at page 2, "*There was no amortization noted in Liberty's report for 2015. However, for purposes of this exercise, it is assumed that in 2015 the amortization (totaling $2.4 M) would appropriately result in a reduction in Capital Assets from $17.8M to $15.4M*".

The Consumer Advocate therefore submits that the Board:

- Accept the projects or programs identified by Liberty as imprudent.
- Deny recovery of the $18.9 million of costs identified by Hydro in its response to PR-CA-NLH-014 (Revision 1, Oct 15-15)).
- Require Hydro to break down these costs by year to accommodate adjustments necessary as part of any compliance filings for the 2014 and 2015 test years.
- Once the Hydro breakdown by year is received, have the Board's financial consultant review the filing to ensure imprudently incurred costs are truly excluded from cost recovery.

In summary, Hydro should not be allowed recovery of costs in the 2014 and 2015 test years that have been identified as imprudently incurred.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23rd day of December, 2015.

Thomas Johnson, Q.C.
Consumer Advocate
O'Dea, Earle Law Offices
323 Duckworth Street
St. John's, NL A1C 5X4
Telephone: 726-3524
Facsimile: 726-9600
Email: tjohnson@odeaearle.ca

2015 SCC 45, 2015 CSC 45
Supreme Court of Canada

ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)

2015 CarswellAlta 1745, 2015 CarswellAlta 1746, 2015 SCC 45, 2015 CSC 45, [2015] A.W.L.D. 3680, [2015] A.W.L.D. 3682, 21 C.C.P.B. (2nd) 1, 257 A.C.W.S. (3d) 728, 388 D.L.R. (4th) 515, J.E. 2015-1511

ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd., Appellants and Alberta Utilities Commission and Office of the Utilities Consumer Advocate of Alberta, Respondents

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Gascon JJ.

Heard: December 3, 2014
Judgment: September 25, 2015
Docket: 35624

Proceedings: affirming *ATCO Utilities, Re* (2013), 7 C.C.P.B. (2nd) 171, 93 Alta. L.R. (5th) 234, (sub nom. *Atco Gas and Pipelines Ltd. v. Alberta Utilities Commission)* 584 W.A.C. 376, 556 A.R. 376, 2013 ABCA 310, 2013 CarswellAlta 1984, Frans Slatter J.A., Peter Costigan J.A., Peter Martin J.A. (Alta. C.A.); affirming *ATCO Utilities, Re* (2011), 2011 CarswellAlta 1646, Anne Michaud Chair, Bill Lyttle Member, Moin A. Yahya Member (Alta. U.C.)

Counsel: John N. Craig, Q.C., Loyola G. Keough, E. Bruce Mellett, for Appellants
Catherine M. Wall, Brian C. McNulty, for Respondent, Alberta Utilities Commission
Todd A. Shipley, C. Randall McCreary, Michael Sobkin, Breanne Schwanak, for Respondent, Office of the Utilities Consumer Advocate of Alberta

Subject: Corporate and Commercial; Public; Employment

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Public law — Public utilities — Regulatory boards — Miscellaneous

Regulated companies applied to include their full pension costs in their revenue requirements — Companies argued that their pension policies were **prudent**, made in good faith by third party, and consistent with industry standards, and that they should be allowed to include all of their pension costs in their rates — Utilities commission denied companies permission to include certain pension costs in their estimates of revenue requirements — Commission found that evidence did not support finding that awarding in every year annual cost of living adjustment (COLA) award of 100 per cent of consumer price index up to three per cent was acceptable standard practice — Companies appealed — Appeal was dismissed — Court of Appeal ruled that analytical framework selected by commission was not unreasonable — Two-stage analysis of determining if expenditures were **prudently** incurred and then setting of reasonable rates was not mandated — On record, it was open to commission to determine that only 50 per cent of COLA amounts should be included in rates — Reasons for decision explained adequately how commission came to that conclusion, and there was no basis for appellate intervention — Utility companies appealed — Appeal dismissed — Standard of review was reasonableness — Regulatory framework allowed commission to set just and reasonable tariffs for electric and gas utilities seeking recovery of their **prudent** costs and expenses but does not impose specific rate-setting methodology — Commission itself must decide upon specific test and methodology to employ — There is no obligation on commission to utilize particular **prudence** test methodology

when reviewing costs on forecast basis — Utility bears onus of proving that tariff it proposes is just and reasonable — Both methodology commission used, and application of that methodology, were reasonable given nature of costs.

Public law — Public utilities — Regulatory boards — Regulation of rates

Regulated companies applied to include their full pension costs in their revenue requirements — Companies argued that their pension policies were **prudent**, made in good faith by third party, and consistent with industry standards, and that they should be allowed to include all of their pension costs in their rates — Utilities commission denied companies permission to include certain pension costs in their estimates of revenue requirements — Commission found that evidence did not support finding that awarding in every year annual cost of living adjustment (COLA) award of 100 per cent of consumer price index up to three per cent was acceptable standard practice — Companies appealed — Appeal was dismissed — Court of Appeal ruled that analytical framework selected by commission was not unreasonable — Two-stage analysis of determining if expenditures were **prudently** incurred and then setting of reasonable rates was not mandated — On record, it was open to commission to determine that only 50 per cent of COLA amounts should be included in rates — Reasons for decision explained adequately how commission came to that conclusion, and there was no basis for appellate intervention — Utility companies appealed — Appeal dismissed — Regulatory framework allowed commission to set just and reasonable tariffs for electric and gas utilities seeking recovery of their **prudent** costs and expenses but does not impose specific rate-setting methodology — Commission itself must decide upon specific test and methodology to employ — There is no obligation on commission to utilize particular **prudence** test methodology when reviewing costs on forecast basis — There is no presumption of **prudence** — Utility bears onus of proving that tariff it proposes is just and reasonable — Both methodology commission used, and application of that methodology, were reasonable given nature of costs.

Droit autochtone — Divers

Compagnies réglementées ont demandé à ce que l'ensemble des coûts relatifs au régime de retraite soient inclus dans les exigences se rapportant à leur revenu — Compagnies ont fait valoir que les politiques applicables à leur régime de retraite étaient **prudentes**, établies de bonne foi par une tierce partie et conformes aux normes de l'industrie et qu'elles devraient être autorisées à inclure l'ensemble des coûts relatifs au régime de retraite dans leurs tarifs — Commission des services publics a refusé d'autoriser les compagnies à inclure certains coûts relatifs au régime de retraite dans leurs estimations des recettes nécessaires — Commission a conclu que la preuve ne permettait pas de conclure que le recouvrement à chaque année de l'ajustement annuel au coût de la vie (AACV) à raison de 100 p. cent de l'indice des prix à la consommation jusqu'à un maximum de 3 p. cent constituait une pratique courante reconnue — Compagnies ont interjeté appel — Appel a été rejeté — Cour d'appel a décidé que le cadre d'analyse utilisé par la Commission n'était pas déraisonnable — Analyse en deux volets visant à déterminer si les dépenses avaient été prudemment encourues puis à établir des taux raisonnables n'était pas obligatoire — Au vu du dossier, il était loisible à la Commission de conclure que seulement 50 p. cent des montants relatifs à l'AACV devrait être inclus dans les taux — Motifs de cette décision expliquaient adéquatement la manière dont la Commission en était venu à cette conclusion et la Cour d'appel n'était pas justifiée d'intervenir — Compagnies ont formé un pourvoi — Pourvoi rejeté — Norme de contrôle applicable était celle de la décision raisonnable — Cadre réglementaire permettait à la Commission d'établir des tarifs justes et raisonnables pour les fournisseurs d'électricité et de gaz qui voulaient obtenir le recouvrement de leurs coûts et dépenses encourus de manière **prudente**, mais il n'imposait pas de méthodologie particulière pour l'établissement des tarifs — Il appartenait à la Commission de choisir quel test et quelle méthodologie employer — Commission n'était pas obligée d'utiliser une méthodologie particulière pour le test visant à déterminer la **prudence** lorsqu'elle révisait la prévision des coûts — Il revenait aux fournisseurs de démontrer que le tarif qu'ils proposaient était juste et raisonnable — Méthodologie utilisée par la Commission et la manière dont elle l'a appliquée étaient raisonnables compte tenu de la nature des coûts.

Droit public — Services publics — Organismes de réglementation — Réglementation des tarifs

Compagnies réglementées ont demandé à ce que l'ensemble des coûts relatifs au régime de retraite soient inclus dans les exigences se rapportant à leur revenu — Compagnies ont fait valoir que les politiques applicables à leur régime de retraite étaient **prudentes**, établies de bonne foi par une tierce partie et conformes aux normes de l'industrie et qu'elles devraient être autorisées à inclure l'ensemble des coûts relatifs au régime de retraite dans leurs tarifs — Commission des services

publics a refusé d'autoriser les compagnies à inclure certains coûts relatifs au régime de retraite dans leurs estimations des recettes nécessaires — Commission a conclu que la preuve ne permettait pas de conclure que le recouvrement à chaque année de l'ajustement annuel au coût de la vie (AACV) à raison de 100 p. cent de l'indice des prix à la consommation jusqu'à un maximum de 3 p. cent constituait une pratique courante reconnue — Compagnies ont interjeté appel — Appel a été rejeté — Cour d'appel a décidé que le cadre d'analyse utilisé par la Commission n'était pas déraisonnable — Analyse en deux volets visant à déterminer si les dépenses avaient été prudemment encourues puis à établir des taux raisonnables n'était pas obligatoire — Au vu du dossier, il était loisible à la Commission de conclure que seulement 50 p. cent des montants relatifs à l'AACV devrait être inclus dans les taux — Motifs de cette décision expliquaient adéquatement la manière dont la Commission en était venu à cette conclusion et la Cour d'appel n'était pas justifiée d'intervenir — Compagnies ont formé un pourvoi — Pourvoi rejeté — Cadre réglementaire permettait à la Commission d'établir des tarifs justes et raisonnables pour les fournisseurs d'électricité et de gaz qui voulaient obtenir le recouvrement de leurs coûts et dépenses encourus de manière **prudente**, mais il n'imposait pas de méthodologie particulière pour l'établissement des tarifs — Il appartenait à la Commission de choisir quel test et quelle méthodologie employer — Commission n'était pas obligée d'utiliser une méthodologie particulière pour le test visant à déterminer la **prudence** lorsqu'elle révisait la prévision des coûts — Il revenait aux fournisseurs de démontrer que le tarif qu'ils proposaient était juste et raisonnable — Méthodologie utilisée par la Commission et la manière dont elle l'a appliquée étaient raisonnables compte tenu de la nature des coûts.

The Alberta Utilities Commission denied the request by a group of utility companies to recover through approved rates certain pension costs related to an annual cost of living adjustment (COLA). Instead of approving recovery for an adjustment of 100 per cent of annual consumer price index (CPI) up to a maximum COLA of 3 per cent, the Commission ruled that recovery of only 50 per cent of annual CPI was reasonable. The Alberta Court of Appeal dismissed the companies' appeal from the decision of the Commission and ruled that the analytical framework selected by the Commission was not unreasonable. A two-stage analysis of determining if expenditures were **prudently** incurred and then the setting of reasonable rates was not mandated and on the record, it was open to the Commission to determine that only 50 per cent of the COLA amounts should be included in the rates. The reasons for this decision explained adequately how the Commission came to that conclusion, and there was no basis for appellate intervention. The companies appealed.

Held: The appeal was dismissed.

Per Rothstein J. (McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis and Gascon JJ. concurring): The applicable standard of review is reasonableness. The Commission was applying its expertise to set rates and approve payment amounts in accordance with the Electric Utilities Act and the Gas Utilities Act. The matter related to rate-making which is at the heart of a regulator's expertise and was deserving of a high degree of deference. The matter also turned on the Commission's interpretation of its home statutes, and a standard of reasonableness presumptively applied.

The Alberta regulatory framework allows the Commission to set just and reasonable tariffs for electric and gas utilities seeking recovery of their **prudent** costs and expenses. It does not impose a specific rate-setting methodology on the Commission. It falls to the Commission to decide upon the specific test and methodology to employ. There is no obligation on the Commission to utilize a particular **prudence** test methodology when reviewing costs on a forecast basis. There was no need for the Commission to employ a two-step process of first examining whether the decisions to incur costs were **prudent**. There was no need to apply a presumption of **prudence** in favour of the utility. The legislation contained the specific use of the word "**prudent**" to qualify the costs and expenses that electric and gas utilities are entitled to recover, but that did not mandate the use of the **prudence** test. It is the utility that bears the onus of proving that the tariff it proposes is just and reasonable. The methodology the Commission used, and the way it applied its methodology, were reasonable given the nature of the costs.

The Commission's interpretation and exercise of its rate-setting authority was reasonable. The disallowed costs were forecast costs. The utilities were not entitled to a no-hindsight **prudence** review. Under the reasonableness standard of review, the Commission's interpretation of its home statute was entitled to deference. The Commission did not expressly

address the question of whether the statutory regime mandated a no-hindsight approach, but its decision to proceed without using a no-hindsight **prudence** test implied that it understood the relevant statutes not to mandate the utilities' desired methodology. A review of the relevant statutes showed that the Commission's approach was reasonable.

L'Alberta Utilities Commission a refusé la demande présentée par un groupe de compagnies oeuvrant dans le domaine du service public en vue de recouvrer, selon les taux approuvés, certaines charges de retraite correspondant à l'ajustement annuel au coût de la vie (AACV). Au lieu d'approuver ce recouvrement à raison de 100 p. cent de l'indice des prix à la consommation (IPC) de l'année (AACV d'au plus 3 p. cent), la Commission a jugé raisonnable le recouvrement de seulement 50 p. cent de l'IPC annuel. La Cour d'appel de l'Alberta a rejeté l'appel des compagnies interjeté à l'encontre de la décision de la Commission et a décidé que le cadre d'analyse utilisé par la Commission n'était pas déraisonnable. Une analyse en deux volets visant d'abord à déterminer si les dépenses avaient été prudemment encourues puis à établir des taux raisonnables n'était pas obligatoire et, au vu du dossier, il était loisible à la Commission de conclure que seulement 50 p. cent des montants relatifs à l'AACV devrait être inclus dans les taux. Les motifs de cette décision expliquaient adéquatement la manière dont la Commission en était venu à cette conclusion et la Cour d'appel n'était pas justifiée d'intervenir. Les compagnies ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Rothstein, J. (McLachlin, J.C.C., Abella, Cromwell, Moldaver, Karakatsanis, Gascon, JJ., souscrivant à son opinion) : La norme de contrôle applicable était celle de la décision raisonnable. La Commission se fiait à son expertise pour établir les taux et approuver les paiements en conformité avec l'Electric Utilities Act et la Gas Utilities Act. La question se rapportait à la décision de fixer le taux, ce qui se situait au coeur de l'expertise de l'organisme de réglementation et commandait un haut degré de déférence. La question se rapportait également à l'interprétation par la Commission de sa propre loi et il fallait présumer que la norme de la décision raisonnable s'appliquait.

Le cadre réglementaire de l'Alberta permettait à la Commission d'établir des tarifs justes et raisonnables pour les fournisseurs d'électricité et de gaz qui voulaient obtenir le recouvrement de leurs coûts et dépenses encourus de manière **prudente**. Il n'imposait pas à la Commission une méthodologie particulière pour l'établissement des tarifs. Il appartenait à la Commission de choisir quel test et quelle méthodologie employer. La Commission n'était pas obligée d'utiliser une méthodologie particulière pour le test visant à déterminer la **prudence** lorsqu'elle révisait la prévision des coûts. Il n'était pas nécessaire que la Commission emploie une analyse en deux volets visant, en premier lieu, à déterminer si les décisions d'encourir les coûts étaient **prudentes**. Il n'était pas nécessaire de recourir à une présomption de **prudence** favorisant les fournisseurs. Le mot « **prudent** » était utilisé dans la législation pour qualifier les coûts et dépenses qu'un fournisseur d'électricité et de gaz pouvait recouvrer, mais cela ne rendait pas obligatoire l'usage du critère de **prudence**. Il revenait aux fournisseurs de démontrer que le tarif qu'ils proposaient était juste et raisonnable. La méthodologie utilisée par la Commission et la manière dont elle l'a appliquée étaient raisonnables compte tenu de la nature des coûts.

L'interprétation faite par la Commission et l'exercice de son pouvoir d'établissement des tarifs étaient raisonnables. Les coûts qui n'avaient pas été autorisés étaient des coûts prévus. Les fournisseurs n'avaient pas droit à un contrôle de la **prudence** excluant le recul. En vertu de la norme de la décision raisonnable, l'interprétation par la Commission de sa propre loi commandait de la déférence. La Commission n'a pas traité spécifiquement de la question de savoir si le régime statutaire rendait obligatoire une approche excluant le recul, mais sa décision d'aller de l'avant sans recourir à un critère de **prudence** excluant le recul indiquait implicitement qu'elle comprenait que les lois applicables ne rendaient pas obligatoire l'application de la méthodologie prônée par les fournisseurs. Une revue des lois applicables démontrait que l'approche de la Commission était raisonnable.

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s. 122(1)(d) — considered

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s. 44(3) — considered

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s. 60(2)(b) — referred to

s. 60(3) — referred to

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Words and phrases considered:

just and reasonable rates

In Canadian law, "just and reasonable" rates or tariffs are those that are fair to both consumers and the utility: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93, per Lamont J. Under a cost of service model, rates must allow the utility the opportunity to recover, over the long run, its operating and capital costs. Recovering these costs ensures that the utility can continue to operate and can earn its cost of capital in order to attract and retain investment in the utility: [*Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 (S.C.C.) *OEB*], at para. 16. Consumers must pay what the Commission "expects it to cost to efficiently provide the services they receive" such that, "overall, they are paying no more than what is necessary for the service they receive": *OEB*, at para. 20.

prudence

Because, as will be discussed, the meaning of "**prudence**" is the focus of much of the debate in this case, it is helpful to start by examining the ordinary meaning of the word as a baseline for the subsequent analysis. Pertinent dictionary definitions give a range of meanings for "**prudent**", including "having or exercising sound judgement in practical affairs" (*The Oxford English Dictionary* (2nd ed. 1989), vol. XII, at p. 729), "acting with or showing care and thought for the future" (*Concise Oxford English Dictionary* (12th ed. 2011), at p. 1156), or "marked by wisdom or judiciousness [or] shrewd in the management of practical affairs" (*Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), at p. 1002). While these definitions may vary in their nuance, the ordinary sense of the word is such that a **prudent** cost is one which may be described as wise or sound.

However, these dictionary definitions are not so consistent and exhaustive as to provide a complete answer to the question of the meaning of "**prudent**" costs in the context of the Alberta utilities regulation statutes. As such, a contextual reading of the statutory provisions at issue provides further guidance. In the context of utilities regulation, I do not find any difference between the ordinary meaning of a "**prudent**" cost and a cost that could be said to be reasonable. It would not be imprudent to incur a reasonable cost, nor would it be **prudent** to incur an unreasonable cost.

revenue requirement

The . . . Utilities submit that the Commission is bound to first assess costs put forward by a utility for **prudence**, and that **prudently** incurred costs must be approved for inclusion in the utility's "revenue requirement". This term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p.521.

Termes et locutions cités:

Prudence

Nous verrons plus loin que le débat porte en grande partie sur la signification de la notion de « **prudence** », si bien qu'il est utile d'examiner d'abord le sens ordinaire de ce terme comme point de référence pour l'analyse qui suivra. Les dictionnaires offrent une gamme de définitions de l'adjectif « **prudent** », dont les suivantes : [TRADUCTION] « qui a ou qui exerce un bon jugement dans les affaires d'ordre pratique » (*The Oxford English Dictionary* (2e éd. 1989), vol. XII, p. 729), [TRADUCTION] « qui agit en se souciant du lendemain ou qui manifeste un tel souci » (*Concise Oxford English Dictionary* (12e éd. 2011), p. 1156), ou [TRADUCTION] « qui est empreint de sagesse ou de pertinence, [ou] qui est rompu à la gestion des affaires d'ordre pratique » (*Merriam-Webster's Collegiate Dictionary* (11e éd. 2003), p. 1002). Bien que ces définitions comportent des nuances, on peut en conclure, suivant le sens ordinaire de l'adjectif, qu'une dépense **prudente** est celle qui résulte d'une décision sage ou bonne.

Cependant, ces définitions ne sont pas suffisamment uniformes et exhaustives pour apporter une réponse définitive à la question de savoir ce qu'il faut entendre par des dépenses « **prudentes** » dans le contexte des lois qui réglementent les services publics en Alberta. Une interprétation contextuelle des dispositions législatives en cause offre donc un autre élément de réponse. Dans le contexte de la réglementation de services publics, je ne vois aucune différence entre des dépenses « **prudentes** » au sens ordinaire de ce terme et des dépenses que l'on pourrait qualifier de raisonnables. Ainsi, il ne serait pas imprudent de faire des dépenses raisonnables, pas plus qu'il ne serait **prudent** de faire des dépenses déraisonnables.

recette nécessaire

Les services publics ATCO soutiennent que la Commission doit d'abord se prononcer sur la **prudence** des dépenses invoquées par le service public et que les dépenses faites avec **prudence** doivent être approuvées aux fins de leur prise en

compte dans les « recettes nécessaires » de l'entreprise. Ce poste s'entend des [TRADUCTION] « recettes dont l'entreprise a besoin au total pour le paiement de toutes ses dépenses susceptibles d'approbation et, également, pour recouvrer tous les coûts liés aux capitaux investis » (L. Reid et J. Todd, « New Developments in Rate Design for Electricity Distributors » dans G. Kaiser et B. Heggie, dir., *Energy Law and Policy* (2011), 519, p. 521).

tarification juste et raisonnable

En droit canadien, la tarification « juste et raisonnable » est celle qui est équitable tant pour le consommateur que pour le service public (*Northwestern Utilities Ltd. c. City of Edmonton*, [1929] S.C.R. 186, p. 192-193 (juge Lamont)). Selon un modèle fondé sur le coût du service, la tarification doit permettre à l'entreprise de recouvrer, à long terme, ses dépenses d'exploitation et son coût en capital. Grâce au recouvrement de ceux-ci, le service public peut continuer d'exercer ses activités et obtenir l'équivalent du coût du capital de manière à susciter l'investissement et à le maintenir. ([*Ontario (Commission de l'énergie) c. Ontario Power Generation Inc.*, 2015 CSC 44, (CÉO)], par. 16). Le consommateur doit payer ce que la Commission « prévoit qu'il en coûtera pour la prestation efficace du service » de sorte que, « globalement, il ne paie pas plus que ce qui est nécessaire pour obtenir le service » (CÉO, par. 20)

APPEAL from judgment reported at *ATCO Utilities, Re* (2013), 2013 ABCA 310, 2013 CarswellAlta 1984, 556 A.R. 376, 584 W.A.C. 376, 93 Alta. L.R. (5th) 234, 7 C.C.P.B. (2nd) 171 (Alta. C.A.).

POURVOI formé à l'encontre d'un jugement publié à *ATCO Utilities, Re* (2013), 2013 ABCA 310, 2013 CarswellAlta 1984, 556 A.R. 376, 584 W.A.C. 376, 93 Alta. L.R. (5th) 234, 7 C.C.P.B. (2nd) 171 (Alta. C.A.).

Rothstein J. (McLachlin C.J.C, Abella, Cromwell, Moldaver, Karakatsanis, Gascon JJ. concurring):

1 In its decision of September 27, 2011, the Alberta Utilities Commission denied the request by ATCO Gas and Pipelines Ltd. and ATCO Electric Ltd. (collectively the "ATCO Utilities") to recover, in approved rates, certain pension costs related to an annual cost of living adjustment ("COLA") for 2012. Instead of approving recovery for an adjustment of 100 percent of the annual consumer price index ("CPI") (up to a maximum COLA of 3 percent), the Commission ruled that recovery of only 50 percent of annual CPI (up to a maximum COLA of 3 percent) was reasonable. The Alberta Court of Appeal dismissed the ATCO Utilities' appeal from the decision of the Commission. The ATCO Utilities now appeal to this Court.

2 This matter was heard together with *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 (S.C.C.) ("*OEB*"), which also concerns the review of a rate-setting decision by a utilities regulator. Although the facts of the cases are different, both involve issues of methodology, and, in particular, when — if ever — a regulator is required to apply a particular regulatory tool known as the "**prudent** investment test" in assessing a utility's costs.

3 The ATCO Utilities submit that the Commission is bound to first assess costs put forward by a utility for **prudence**, and that **prudently** incurred costs must be approved for inclusion in the utility's "revenue requirement". This term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p.521. The approved revenue requirement is then to be allocated to customers in the form of just and reasonable rates. The ATCO Utilities argue that the Commission failed to properly address the **prudence** of such costs. They say that in the absence of an explicit contrary finding, costs are presumed to be **prudent**. Further, the Utilities assert that **prudence** is to be established based on circumstances as of the date of the cost decision — not based on hindsight and the use of information not available to the utility when the decision to incur the cost was made.

4 The Office of the Utilities Consumer Advocate of Alberta argues that the Alberta regulatory framework does not impose a specific rate-setting methodology on the Commission; it falls to the Commission to decide upon the specific test and methodology to employ. Specifically, the Consumer Advocate argues that there is no obligation on the Commission to utilize a particular **prudence** test methodology when reviewing costs on a forecast basis. Nor is there a presumption of **prudence**. On the contrary, the onus is on the utility to demonstrate that the tariff it proposes is just and reasonable.

5 As in *OEB*, the relevant statutory framework does not impose upon the Commission the "**prudence**" methodology urged by the ATCO Utilities. Further, following the approach set out in *OEB*, the methodology adopted by the Commission and its application of this methodology were reasonable in view of the nature of the costs in question. I would dismiss the appeal.

I. Regulatory Framework

6 In Alberta, the Commission sets "just and reasonable" tariffs for electric and gas utilities seeking recovery of their **prudent** costs and expenses: s. 121(2)(a) of the *Electric Utilities Act*, S.A. 2003, c. E-5.1 ("*EUA*"); and s. 36(a) of the *Gas Utilities Act*, R.S.A. 2000, c. G-5 ("*GUA*").

7 In Canadian law, "just and reasonable" rates or tariffs are those that are fair to both consumers and the utility: *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.), at pp. 192-93, per Lamont J. Under a cost of service model, rates must allow the utility the opportunity to recover, over the long run, its operating and capital costs. Recovering these costs ensures that the utility can continue to operate and can earn its cost of capital in order to attract and retain investment in the utility: *OEB*, at para. 16. Consumers must pay what the Commission "expects it to cost to efficiently provide the services they receive" such that, "overall, they are paying no more than what is necessary for the service they receive": *OEB*, at para. 20.

II. Facts

A. The Pension Plan

8 Employees of the ATCO Utilities benefit from the Retirement Plan for Employees of Canadian Utilities Limited ("CUL", the parent company of the ATCO Utilities) and Participating Companies (the "Pension Plan"). The Pension Plan is administered by CUL, which is not itself regulated by the Commission. As the Pension Plan administrator, CUL acts in a fiduciary capacity in relation to Plan members and other Plan beneficiaries: s. 13(5) of the *Employment Pension Plans Act*, R.S.A. 2000, c. E-8. [1]

9 The Pension Plan includes a defined benefit plan (the "DB plan"), which was closed to new employees on January 1, 1997, and a defined contribution plan. The COLA applies only to the DB plan. The *Employment Pension Plans Act* requires that the DB plan be subject to actuarial calculations filed periodically with the Superintendent of Pensions for Alberta: ss. 13 and 14; [2] and ss. 9 and 10 of the *Employment Pension Plans Regulation*, Alta. Reg. 35/2000. [3] Actuarial calculations determine, *inter alia*, the contributions that an employer must make to cover a DB plan's liabilities.

10 The assets of the CUL Pension Plan are pooled between all CUL member companies, regardless of whether they are regulated utility companies (like the ATCO Utilities) or not. The required employer funding is determined on an aggregate basis. If special payments must be made to address unfunded liabilities, the aggregate funding requirement is apportioned among the member entities of the Pension Plan.

11 No employer contributions to the Pension Plan were required between 1996 and the end of 2009 because the Pension Plan was in surplus position, and thus the ATCO Utilities did not have to include such contributions in their revenue requirement applications to the Commission. In the wake of the 2008 financial crisis, the market value of the Pension Plan's assets dropped and a large unfunded liability resulted, forcing the employers participating in the Pension Plan, including the ATCO Utilities, to resume making employer contributions in 2010.

B. The Pension Plan Funding Obligations

12 Section 48(3) of the *Employment Pension Plans Act*, (2000) [4] requires that the Pension Plan be funded in accordance with actuarial valuation reports. The actuarial valuation report relevant to this appeal (the "2009 Actuarial Report") was filed with the Superintendent of Pensions for Alberta on June 29, 2010 by Mercer (Canada) Limited, the Pension Plan's actuary. The report indicated that two types of payments were required. First, it determined the estimated payments required to address the projected benefits owed to beneficiaries for 2010, 2011 and 2012. These are also called "current service costs". Second, it determined that the DB plan had an unfunded liability of $157.1 million across all CUL entities, requiring all the employers participating in

the Pension Plan, including the ATCO Utilities, to make minimum annual special payments in the aggregate amount of $16.4 million until December 31, 2024 to address the liability. The ATCO Utilities alone were liable for approximately $13.9 million of the annual aggregate special payment amount.

13 The cost of living adjustment issues in this case involve both the contributions that the ATCO Utilities must make into the DB plan and the benefits paid to retirees out of the plan. With regard to the ATCO Utilities' contributions into the plan, the 2009 Actuarial Report included a provision for "post retirement pension increases" that is based on the DB plan's COLA formula and the actuarial report's assumption for inflation. This provision affects the payments that the ATCO Utilities are required to make into the DB plan for the three-year period covered by the report. In this case, this increase was 2.25 percent per year for all three years.

14 With regard to the payment of benefits to retirees under the DB plan, the ATCO Utilities' parent company CUL sets the COLA annually. Sections 6.9(a) and 6.12(a) of the DB plan prescribe that CUL determines the COLA by taking into consideration annual percentage changes in the Consumer Price Index for Canada and any previous adjustments paid. These provisions cap the adjustment set by CUL at 3 percent per annum.

III. Decisions Below

A. Alberta Utilities Commission: ATCO Utilities, Re (2010), 84 C.C.P.B. 89 (Alta. U.C.) (the "Decision 2010-189")

15 On July 10, 2009, the ATCO Utilities filed an application with the Commission to determine, *inter alia*, the amount of employer pension contributions that would be included in their revenue requirements in 2010. The ATCO Utilities' proposed contributions reflected a COLA set at 100 percent of annual Canada CPI (up to a maximum of 3 percent), as CUL had used for a number of years. However, in the Commission's view, setting COLA at 100 percent of CPI year after year was not required by the wording of the Pension Plan. It concluded "that ratepayers should not bear any incremental pension funding costs" that arise from CUL's practice of setting COLA "where it [was] demonstrated that such incremental costs prove to be unreasonable or imprudent in the circumstances": para. 118.

16 However, the Commission did not find the evidence filed in this application to be sufficient to draw conclusions with respect to whether the COLA was **prudent**. As a result, it did not reduce the COLA of 100 percent of annual CPI (up to a maximum of 3 percent) for the ATCO Utilities' 2010 revenue requirements. Nonetheless, the Commission stated that it "would like to investigate the possibility of adjusting COLA as a mechanism in **prudently** managing utility pension expense" for the years 2011 onward: para. 123. It directed the ATCO Utilities to prepare a 2011 pension common matters application to address issues related to COLA and CUL's discretion in setting COLA.

B. Alberta Utilities Commission: 2011 CarswellAlta 1646 (Alta. U.C.) (WL Can.) (the "Decision 2011-391")

17 On December 15, 2010, the ATCO Utilities filed a pension common matters application pursuant to the Commission's direction in *Decision 2010-189*. The Commission published its *Decision 2011-391* on September 27, 2011. It is this decision that is the subject of appeal in this Court.

18 In reviewing the COLA included in the ATCO Utilities' revenue requirement application, the Commission wrote that the reasonableness of setting it at 100 percent of CPI had to be evaluated "in the circumstances applicable at the time that ATCO Utilities apply to include pension expense in revenue requirement": *Decision 2011-391*, at para. 87. The significant unfunded liability of the Pension Plan was such a circumstance. The Commission was of the view that the DB plan permitted CUL to exercise its discretion in setting the COLA, and that this discretion was "an available tool" for CUL to actively manage the DB plan unfunded liability as it carried out its fiduciary and contractual obligations: para. 83. "[T]he availability of that discretion and the exercise, or lack thereof, of that discretion [was] a relevant and material consideration" in determining whether the ATCO Utilities' pension expenses were reasonable and should be included in revenue requirements: para. 83.

19 The Commission found that the ATCO Utilities' practice of awarding an annual COLA of 100 percent of CPI every year was not "an acceptable standard practice", in light of benchmark evidence showing a wider range of COLA percentages used

by defined benefit pension plans among other entities in a comparator group: *Decision 2011-391*, at para 87. The majority of the entities set COLA between 50 percent and 75 percent of CPI. The Commission also found that a reduction in COLA would not undermine the Utilities' ability to attract new employees, nor would it encourage current employees to leave.

20 The Commission concluded that the COLA included in current service costs to be recovered through tariffs after January 1, 2012 and until the next actuarial valuation should be 50 percent of the annual Canada CPI, to a maximum of 3 percent. The ATCO Utilities' revenue requirements for 2012 were to be reduced accordingly.

21 However, with regard to the special payments addressing the unfunded liability for 2012, the Commission stated that it would not require that the ATCO Utilities file an updated actuarial report reflecting a lower COLA and that it would only begin disallowing a COLA of 100 percent with regard to special payment costs from 2013 onward. This decision resulted from the Commission's conclusion that filing a new actuarial report "would be costly, and consume an undue amount of company, intervener and Commission resources given the time remaining in 2011 to complete a new report and file it for approval with the Commission and subsequently with the Superintendent of Pensions", especially as a new report would be filed by January 1, 2013 as it stood: *Decision 2011-391*, at para. 99. The Commission did not reduce special payments to be recovered in 2012 because it was not "in the best interest of ATCO Utilities, ratepayers or pensioners to implement a change to the COLA calculation [at this time] given the uncertain pension funding impacts that may result from a new actuarial valuation and report": para. 100. Reductions in liability as a result of a reduction of COLA would be captured in ongoing special payments set for 2013 onward.

C. Alberta Utilities Commission: ATCO Utilities, Re (2012), 97 C.C.P.B. 298 (Alta. U.C.) (the "Decision 2012-077")

22 On November 2, 2011, the ATCO Utilities filed a review and variance application of *Decision 2011-391*. The ATCO Utilities requested that the Commission vacate its direction to reduce the amount of COLA to 50 percent of CPI for regulatory purposes.

23 The Commission found that the arguments raised by the ATCO Utilities did not give rise to a substantial doubt as to the correctness of *Decision 2011-391* and denied the ATCO Utilities' request for review and variance.

D. Alberta Court of Appeal: 2013 ABCA 310, 93 Alta. L.R. (5th) 234 (Alta. C.A.)

24 The Alberta Court of Appeal granted leave to appeal *Decision 2011-391*. Conducting a reasonableness review, the court held it was open to the Commission to reduce the ATCO Utilities' revenue requirements to reflect a COLA of 50 percent of CPI. The Court of Appeal dismissed the Utilities' appeal.

IV. Issues

25 This appeal raises three issues:

1. What is the standard of review?

2. Does the regulatory framework prescribe a certain methodology in assessing whether costs are **prudent**?

3. Was it reasonable for the Commission to refuse to incorporate 100 percent of CPI to a maximum of 3 percent into the ATCO Utilities' COLA revenue requirements?

V. Analysis

A. Standard of Review

26 The standard of review of the Commission's decision in applying its expertise to set rates and approve payment amounts in accordance with the *Electric Utilities Act* and the *Gas Utilities Act* is reasonableness: *OEB*, at para. 73; see *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paras. 53-54.

27 Nonetheless, the ATCO Utilities argue that the jurisprudence favours applying a standard of correctness. However, the cases they cite — *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.) ("*Stores Block*"), *AltaLink Management Ltd., Re*, 2012 ABCA 378, 539 A.R. 315 (Alta. C.A.), and *ATCO Gas & Pipelines Ltd. v. Alberta (Utilities Commission)*, 2009 ABCA 246, 464 A.R. 275 (Alta. C.A.) — are not analogous to the matter at hand. They each were said to involve "true questions of jurisdiction", where the regulator was called on to determine whether it had the statutory authority to decide a particular question. This Court's recent jurisprudence has emphasized that true questions of jurisdiction, if they exist as a category at all, an issue yet unresolved by the Court, are rare and exceptional: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 34. In any event, this case involves ratemaking. As Bastarache J. noted in *Stores Block*, ratemaking is at the heart of a regulator's expertise and is therefore deserving of a high degree of deference: para. 30.

28 To the extent that an appeal also turns on the Commission's interpretation of its home statutes, a standard of reasonableness also presumptively applies: *A.T.A.*, at para. 30. The presumption is not rebutted in this case.

B. Methodology for Determining Costs and Just and Reasonable Rates Under the Electric Utilities Act and the Gas Utilities Act

29 The application by the ATCO Utilities, one of which is an electric utility and the other a gas utility, involves both the *EUA* and the *GUA*. Both statutes direct the Commission to set just and reasonable rates. The *EUA* requires the Commission to "have regard for the principle that a tariff approved by it must provide the owner of an electric utility with a reasonable opportunity to recover" various "**prudent**" or "**prudently** incurred" costs: s. 122; see also s. 102. A gas utility, on the other hand, is "entitled to recover in its tariffs" costs that the Commission determines to be "**prudent**": s. 4(3) of the *Roles, Relationships and Responsibilities Regulation*, Alta. Reg. 186/2003 ("*RRR Regulation*"); see also s. 36 *GUA*.

30 The ATCO Utilities argue that the guarantee of a reasonable opportunity to recover their costs requires that the Commission must first examine whether the decisions to incur costs were **prudent** and must apply a presumption of **prudence** in favour of the utility. Unless these costs are found not to be **prudent**, they are to be included in the utility's revenue requirement. The ATCO Utilities say that in conducting its **prudence** inquiry, the Commission is required to use the **prudence** test as described by the Ontario Court of Appeal in *Hydro One Networks Inc., Re*, 2013 ONCA 359, 116 O.R. (3d) 793 (Ont. C.A.), which is the subject of the companion appeal to this case. In that case, the Ontario Court of Appeal relied on a formulation of **prudence** review set out in *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2006), 210 O.A.C. 4 (Ont. C.A.), at para. 10:

> • Decisions made by the utility's management should generally be presumed to be **prudent** unless challenged on reasonable grounds.
>
> • To be **prudent**, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
>
> • Hindsight should not be used in determining **prudence**, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of **prudence**.
>
> • **Prudence** must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para.16]

31 The ATCO Utilities argue that the statutes' express use of the word "**prudent**" to qualify the costs and expenses that electric and gas utilities are entitled to recover necessarily mandates the use of that **prudence** test. I will refer to it as the "**no-hindsight**" test.

32 The language of the relevant provisions of the *EUA* and *GUA* differs from the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, in the companion *OEB* appeal. While the *EUA* and the *GUA* contain specific references to "**prudence**",

the *Ontario Energy Board Act, 1998* does not. Further, regulations passed under the *Ontario Energy Board Act, 1998* expressly permit the Ontario Energy Board to establish a methodology to determine whether revenue requirements are just and reasonable. The *EUA* and *GUA* do not include a direct grant of methodological discretion. However, like the statutory scheme in *OEB*, neither the *EUA* nor the *GUA* impose a specific methodology [5] and, as will be explained, their references to "**prudence**" do not impose upon the Commission the specific methodology advanced by the ATCO Utilities.

*(1) **Prudence** Under the EUA*

33 The question before this Court is whether the Commission's interpretation and exercise of its rate-setting authority was reasonable. The ATCO Utilities argue that the statutory framework supports its assertion that it was entitled to a no-hindsight **prudence** review. Under the reasonableness standard of review, the Commission's interpretation of its home statute is entitled to deference. In this case, the Commission did not expressly address the question of whether the statutory regime mandated a no-hindsight approach. Rather, its decision to proceed without using a no-hindsight **prudence** test implies that it understood the relevant statutes not to mandate the ATCO Utilities' desired methodology. It is thus necessary to examine the terms of the relevant statutes to determine whether the Commission's approach was reasonable. In doing so, this Court may make use of the traditional tools of statutory interpretation with the goal of determining whether the Commission's approach was reasonable: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at paras. 37-41.

34 The words of a statute are to be interpreted "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Because, as will be discussed, the meaning of "**prudence**" is the focus of much of the debate in this case, it is helpful to start by examining the ordinary meaning of the word as a baseline for the subsequent analysis. Pertinent dictionary definitions give a range of meanings for "**prudent**", including "having or exercising sound judgement in practical affairs" (*The Oxford English Dictionary* (2nd ed. 1989), vol. XII, at p. 729), "acting with or showing care and thought for the future" (*Concise Oxford English Dictionary* (12th ed. 2011), at p. 1156), or "marked by wisdom or judiciousness [or] shrewd in the management of practical affairs" (*Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), at p. 1002). While these definitions may vary in their nuance, the ordinary sense of the word is such that a **prudent** cost is one which may be described as wise or sound.

35 However, these dictionary definitions are not so consistent and exhaustive as to provide a complete answer to the question of the meaning of "**prudent**" costs in the context of the Alberta utilities regulation statutes. As such, a contextual reading of the statutory provisions at issue provides further guidance. In the context of utilities regulation, I do not find any difference between the ordinary meaning of a "**prudent**" cost and a cost that could be said to be reasonable. It would not be imprudent to incur a reasonable cost, nor would it be **prudent** to incur an unreasonable cost.

36 The *EUA* provides that an "owner of an electric distribution system must prepare a distribution tariff for the purpose of recovering the ***prudent*** costs of providing electric distribution service by means of [its] electric distribution system": s. 102(1). To receive approval for the distribution tariff, the owner must apply to the Commission: s. 102(2) *EUA*. When considering a tariff application, the Commission must ensure, *inter alia*, that the tariff is "just and reasonable" (s. 121(2)(a) *EUA*), a requirement for which the burden of proof "is on the person seeking approval of the tariff" (s. 121(4) *EUA*).

37 Section 122 of the *EUA* provides that the Commission "must have regard for the principle that a tariff approved by it must provide the owner of an electric utility with a reasonable opportunity to recover" a series of eight types of costs and expenses:

> a) the costs and expenses associated with capital related to the owner's investment in the electric utility, ...
>
> . . . . .
>
> if the costs and expenses are ***prudent***...
>
> b) other ***prudent costs and expenses*** associated with isolated generating units, transmission, exchange or distribution of electricity ... if, in the Commission's opinion, they are applicable to the electric utility,

c) amounts that the owner is required to pay under this Act or the regulations,

d) the costs and expenses applicable to the electric utility that arise out of obligations incurred before the coming into force of this section and that were approved by the Public Utilities Board, the Alberta Energy and Utilities Board or other utilities' regulatory authorities if, in the Commission's opinion, the costs and expenses continue to be *reasonable and* ***prudently*** *incurred*,

e) its ***prudent*** *costs and expenses* of complying with the Commission rules respecting load settlement,

f) its **prudent** costs and expenses respecting the management of legal liability,

g) the costs and expenses associated with financial arrangements to manage financial risk associated with the pool price if the arrangements are, in the Commission's opinion, **prudently** made, and

h) any other **prudent** costs and expenses that the Commission considers appropriate, including a fair allocation of the owner's costs and expenses that relate to any or all of the owner's electric utilities.

38 Section 122 refers to **prudence** in two different ways. Most frequently, the adjective "**prudent**" qualifies the expression "costs and expenses", which indicates that a utility enjoys a reasonable opportunity to recover costs and expenses that are **prudent**. Absent a definition of the word "**prudent**" or a clear inference that it refers to a no-hindsight rule as described in *Enbridge*, this **prudence** requirement is to be understood in the sense of the ordinary meaning of the word: for the listed costs and expenses to warrant a reasonable opportunity of recovery, they must be wise or sound; in other words, they must be reasonable.

39 By contrast, certain provisions use the adverb "**prudently**" to qualify the utility's decision to incur costs: s. 122(1)(d) speaks of costs and expenses that are "reasonable and **prudently** incurred" and s. 122(1)(g) refers to costs and expenses associated with financial arrangements that were "**prudently** made". Though this case does not call upon this Court to evaluate the types of expenses covered by s. 122(1)(d) or (g), statutory language referring to "**prudently** incurred" costs appears to speak more directly to a utility's decision to incur costs at the time the decision was made. Such language may more directly implicate the no-hindsight approach urged by the ATCO Utilities in this case than language that merely speaks of "**prudent** costs". This issue is further complicated for costs arising under s. 122(1)(d), where costs must both "continue to be reasonable *and* **prudently** incurred". The proper interpretation of these provisions is a question best left for a case in which the issue arises.

40 In their submissions, the ATCO Utilities do not parse the different contexts in which the word "**prudent**" is used in s. 122. They argue more generally that the references to "**prudence**" imply that a no-hindsight test is required, and that a utility's costs must be presumed to be **prudent**.

41 However, the different uses of "**prudence**" in s. 122 are instructive. If the statute requires the Commission to approve "**prudently** incurred" expenses, it may be unreasonable for the Commission to fail to apply a no-hindsight methodology in reviewing such expenses. However, the costs at issue in this case do not fall within the categories of costs for which the statute grants recovery of "**prudently** incurred" costs. The use of the adjective "**prudent**" to qualify "costs and expenses" elsewhere in s. 122 does not itself imply a specific methodology. Nothing in the ordinary meaning of the word "**prudent**" or the use of this word in the statute as a stand-alone condition says anything about the time at which **prudence** must be evaluated.

42 Further, s. 121(4) of the *EUA* provides that the burden of establishing that the proposed tariffs are just and reasonable falls on the public utility. The requirement that tariffs be just and reasonable is a foundational requirement of the tariff-setting provisions of the *EUA*. Tariffs will not be just and reasonable if they do not comply with the statutory requirement of s. 122 that the costs and expenses be **prudent**. Thus, contrary to the ATCO Utilities' proposed methodology, the utilities' burden to establish that tariffs are just and reasonable necessarily imposes on the utilities the burden of establishing that costs are **prudent**.

43 In sum, neither the ordinary meaning of "**prudent**" nor the statutory language indicate that the Commission is bound by the *EUA* to apply a no-hindsight approach to the costs at issue, nor is a presumption of **prudence** statutorily imposed in these circumstances.

*(2) **Prudence** Under the GUA*

44 The *GUA* requires, *inter alia*, that on application by the owner of a gas utility, the Commission "fix just and reasonable" rates that "shall be imposed, observed and followed afterwards by the owner of the gas utility": s. 36(a). Section 44(1) provides that changes in rates must be approved by the Commission, and the "burden of proof to show that the increases, changes or alterations are just and reasonable is on the owner of the gas utility seeking to make them": s. 44(3). Further, s. 4(3) of the *RRR Regulation* provides that

> [a] gas distributor is entitled to recover in its tariffs the **prudent** costs as determined by the Commission that are incurred by the gas distributor ....

45 While the *RRR Regulation* makes a specific reference to the recovery of "**prudent**" costs, I do not read this **prudence** requirement as implying a presumption of **prudence** and application of a no-hindsight rule. Regarding the "no hindsight" element, the statutory provisions do not use "**prudent**" to describe the decision to incur the costs, but rather to describe the costs themselves. Although s. 4(3) of the *RRR Regulation* uses the term "incurred", it is used to indicate that the provision applies to costs incurred by the utility. No temporal inference can be drawn from the use of "incurred" in this context; it is not used in a manner that calls for examination of the **prudence** of the decision to incur certain costs. The inquiry under s. 4(3) of the *RRR Regulation* rather asks whether the costs themselves can be said to be "**prudent**". The *GUA* does not include a requirement that a no-hindsight rule must apply in assessing whether costs are **prudent**, nor does the text of the *GUA* or the *RRR Regulation* imply such a rule. Regarding a presumption of **prudence**, s. 44(3) of the *GUA* stipulates that the utility has the burden to establish that the rates are just and reasonable. Like the *EUA*, this in turn places the burden of establishing the **prudence** of costs on the utility.

(3) Conclusion With Respect to Statutory Requirements of the EUA and GUA

46 Though the statutes do contain language allowing for the recovery of "**prudent**" costs, the *EUA* and the *GUA* do not explicitly impose an obligation on the Commission to conduct its analysis using a particular methodology any time the word "**prudent**" is used. Further, reserving any opinion on whether the term "**prudently** incurred" might require a particular no-hindsight methodology, in this particular case the bare use of the word "**prudent**" does not, on its own, mandate a particular methodology.

47 It is thus apparent that the relevant statutes may reasonably be interpreted not to impose the ATCO Utilities' asserted **prudence** methodology on the Commission. The existence of a reasonable interpretation that supports the Commission's implied understanding of its discretion is enough for the Commission's decision to pass muster under reasonableness review: *McLean*, at paras. 40-41. Thus, the Commission is free to apply its expertise to determine whether costs are **prudent** (in the ordinary sense of whether they are reasonable), and it has the discretion to consider a variety of analytical tools and evidence in making that determination so long as the ultimate rates that it sets are just and reasonable to both consumers and the utility.

C. Characterization of the Costs at Issue: Forecast or Committed

48 As explained in *OEB*, understanding whether the costs are committed or forecast may be helpful in reviewing the reasonableness of a regulator's choice of methodology: see para. 83. Committed costs are those costs that a utility has already spent or that were committed as a result of a binding agreement or other legal obligation that leaves the utility with no discretion as to whether to make the payment in the future: para. 82. If the costs are forecast, there is no reason to apply a no-hindsight **prudence** test because the utility retains discretion whether to incur the costs: para. 83. By contrast, the no-hindsight **prudence** test may be appropriate when the regulator reviews utility costs that are committed: paras. 102-05.

49 Determining whether particular costs are committed or forecast turns on factual evidence relevant to those costs as well as on legal obligations that may govern them. Factual evidence may take the form of details regarding the structure of the utility's business, relevant conduct on the part of the utility, and the factual context in which the costs arise. Legal issues may relate to any contractual, fiduciary or regulatory obligations that grant or bar discretion on the part of the utility in incurring the costs at issue. Where the regulator has made an assessment of whether the costs are committed or forecast, that assessment is owed deference by this Court.

50 On the basis of the evidence and the arguments before it, the Commission found that the "COLA amount ha[d] not yet been awarded for 2012 because consideration of the COLA adjustment occurs towards the end of the calendar year": *Decision 2011-391*, at para. 93. The Commission concluded that there was enough time from the date *Decision 2011-391* was published on September 27, 2011 to the end of the calendar year for the ATCO Utilities and their parent CUL "to prospectively decide whether to separately fund any difference CUL may choose to pay beyond the COLA level approved for regulatory purposes for 2012 onwards": para. 93. This finding supports a characterization of the disallowed COLA costs as forecast because their disallowance left it open to CUL to reduce the COLA that would apply to the 2012 benefit payments to 50 percent of CPI or to incur the COLA of 100 percent of CPI regardless, knowing that the differential would ultimately be borne by the utilities: *OEB*, at para. 82.

51 However, the Commission did not disallow the use of a COLA of 100% of CPI (up to a maximum of 3 percent) with regard to the special payments intended to address the unfunded liability and fixed by the 2009 Actuarial Report for the year 2012. The Commission did so by reasoning that any consumer overpayment that resulted in 2012 would be compensated through reduced special payments once a new report was prepared for 2013 onward.

52 In their factum in this Court, the ATCO Utilities submitted that the COLA costs were committed in the same way as the costs fixed by binding collective agreements were in the companion *OEB* appeal. In oral argument, counsel for the ATCO Utilities explained that the pension actuary prepares an actuarial report at intervals of a maximum of three years and files it with the Superintendent of Pensions: see ss. 13 and 14 of the *Employment Pension Plans Act* (2000) [6] and ss. 9 and 10 of the *Employment Pension Plans Regulation*, (2000). [7]

53 In this case, the 2009 Actuarial Report applied for the years 2010, 2011 and 2012. The pension actuary determined the employer's required contribution to fund projected benefits owed to beneficiaries and to address any unfunded liability in the DB plan. For each of the three years covered by the report, the actuary assumed a post retirement pension increase of 2.25 percent per year to be included in required contributions [8] . It was argued by the ATCO Utilities that the employer is required by law to make such contributions: s. 48(3) of the *Employment Pension Plans Regulation* (2000) [9] . Accordingly, the ATCO Utilities submitted that once the actuarial report covering 2010, 2011 and 2012 had been filed, the amounts identified in that valuation, including a post retirement pension increase of 2.25 percent, should be understood as committed.

54 To address this argument, a distinction must be drawn between the COLA that is used to determine the post retirement pension increases applied to employer contributions paid into the DB plan, and the COLA applied to benefit payments paid out of the plan. While the ATCO Utilities were legally bound to make contributions including a post retirement pension increase of 2.25 percent into the plan for 2012, the actual COLA paid out to beneficiaries was set by CUL on an annual basis. The ATCO Utilities' information responses to the Commission in preparation for their 2011 pension common matters application show that the actual COLA set by CUL for 2010 was 0 percent and for 2011 was 1.7 percent.

55 The ATCO Utilities' argument that the costs are committed rests on the notion that if the Commission reduces the recoverable COLA to 50 percent of CPI (up to a maximum of 3 percent), they risk incurring a shortfall because the COLA recovered through rates will be less than the post retirement pension increases of 2.25 percent that they were legally obliged to contribute.

56 However, while both the employer contributions into the DB plan and the benefit payments made to beneficiaries are subject to cost of living adjustments, the portion of *Decision 2011-391* at issue in this appeal was concerned specifically with the reasonableness of the COLA to be set by CUL for the 2012 benefit payments. As such, the Commission's disallowance was with respect to the COLA benefits to be paid out to beneficiaries in 2012 — not to the employer contributions into the DB plan.

57 Contrary to the submissions of the ATCO Utilities, the facts of this case are different from those in *OEB*. In *OEB*, the utility was bound to pay certain costs by virtue of collective agreements with separate counterparties, the employee unions. In this case, the Commission found that the COLA applied to benefit payments from the DB plan was set by the ATCO Utilities' parent, CUL, and that CUL retained discretion over the setting of the COLA for the test period. DB plan members would ultimately receive benefits reflecting a COLA of 100 percent in 2012 only if CUL decided to set the COLA at that level.

58 CUL may have exercised that discretion in such a way as to avoid saddling its regulated subsidiary with costs it knew would not be recovered. Accordingly, while the ATCO Utilities were required to make contributions reflecting a post retirement pension increase of 2.25 percent into the DB plan pursuant to the 2009 Actuarial Report, the COLA applied to benefit payments for 2012 was not committed when the Commission issued its *Decision 2011-391*. This is so because at the time *Decision 2011-391* was published, CUL had yet to set COLA for 2012.

59 It was not unreasonable for the Commission to decide, without applying a no-hindsight analysis, that 50 percent of CPI (up to a maximum of 3 percent) "represent[ed] a reasonable level for setting the COLA amount for the purposes of determining the pension cost amounts for regulatory purposes" in 2012: *Decision 2011-391*, at para. 92.

D. Considering the Impact on Rates in Evaluating Costs

60 The ATCO Utilities argue that in considering the **prudence** of the COLA costs the Commission was preoccupied with the aim of reducing rates charged to customers.

61 As discussed above, a key principle in Canadian regulatory law is that a regulated utility must have the opportunity to recover its operating and capital costs through rates: *OEB*, at para. 16. This requirement is reflected in the *EUA* and *GUA*, as these statutes refer to a reasonable opportunity to recover costs and expenses so long as they are **prudent**. A regulator must determine whether a utility's costs warrant recovery on the basis of their reasonableness — or, under the *EUA* and *GUA*, their "**prudence**". Where costs are determined to be **prudent**, the regulator must allow the utility the opportunity to recover them through rates. The impact of increased rates on consumers cannot be used as a basis to disallow recovery of such costs. [10] This is not to say that the Commission is not required to consider consumer interests. These interests are accounted for in rate regulation by limiting a utility's recovery to what it reasonably or **prudently** costs to efficiently provide the utility service. In other words, the regulatory body ensures that consumers only pay for what is reasonably necessary: *OEB*, at para. 20.

62 In this case, the Commission did emphasize the effect that reducing the COLA would have on the ATCO Utilities' unfunded liability. It is also true that a lower unfunded liability based on an actuarial report using a 50 percent COLA instead of 100 percent would mean a lower revenue requirement, and thus lower rates passed on to consumers. However, I do not agree with the ATCO Utilities' submission that the Commission, in considering the effect of COLA on the utilities' unfunded pension liability, was basing its disallowance on concerns about rate hikes for consumers. Regulators may not justify a disallowance of **prudent** costs solely because they would lead to higher rates for consumers. But that does not mean a regulator cannot give any consideration to the magnitude of a particular cost in considering whether the amount of that cost is **prudent**.

63 Indeed, it seems axiomatic that any time a regulator disallows a cost, that decision will be based on a conclusion that the cost is greater than ought to be permitted, which leads to the inference that consumers would be paying too much if the cost were incorporated into rates. But that is not the same as disallowing a cost *solely* because it would increase rates for consumers. In this case, the Commission found it unreasonable for the ATCO Utilities to receive payments to cover a COLA of 100 percent while they carried a large unfunded liability on their books, in part because of evidence from comparator companies that COLA figures of less than 100 percent were common, and because of the Commission's finding that a COLA of 100 percent was

not necessary to ensure that the ATCO Utilities could attract and retain employees. While this conclusion carries with it the consequence that rates will be lower as a result, the Commission reasoned from the **prudence** of the costs themselves, not from a desire to keep rates down, to arrive at its conclusion to disallow costs. I find nothing unreasonable in the Commission's reasoning in this regard.

VI. Conclusion

64 The Commission was not statutorily bound to apply a particular methodology to the costs at issue in this case. The use of the word "**prudent**" in the *EUA* and *GUA* cannot by itself be read to impose upon the Commission the specific no-hindsight methodology urged by the ATCO Utilities.

65 While there are undoubtedly situations in which a failure to apply a no-hindsight methodology may result in unjust outcomes for utilities, and thus violate the statutory requirement that rates must strike a just and reasonable balance between consumer and utility interests, the Commission did not act unreasonably in this case. The disallowed costs were forecast costs. Accordingly, it was reasonable in this case for the Commission to evaluate the ATCO Utilities' proposed revenue requirement in light of all relevant circumstances. Further, because the Commission did not use impermissible methodology, it was not unreasonable for the Commission to direct the ATCO Utilities to reduce their pension costs incorporated into revenue requirements by restricting annual COLA to 50 percent of CPI (up to a maximum of 3 percent) for current service costs from 2012 onward and for special payments addressing the unfunded liability from 2013 onward.

66 For these reasons, I would dismiss the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 This provision has since been replaced by s. 35(2) of the *Employment Pension Plans Act*, S.A. 2012, c. E-8.1.

2 These provisions have since been replaced by s. 13 of the *Employment Pension Plans Act*, (2012).

3 These provisions have since been replaced by ss. 48 and 49 of the *Employment Pension Plans Regulation*, Alta. Reg. 154/2014.

4 This provision has since been replaced by s. 52(2)(b) of the *Employment Pension Plans Act* (2012).

5 The *GUA* does provide some methodological guidance to the Commission with regard to calculating a utility's return on its rate base by specifying what information may be considered in this process: "In fixing the fair return that an owner of a gas utility is entitled to earn on the rate base, the Commission shall give due consideration to all facts that in its opinion are relevant"; (s. 37(3)). However, it does not provide any further methodological guidance for assessing the recoverability of a utility's costs.

6 These provisions have since been replaced by s. 13 of the *Employment Pension Plans Act* (2012).

7 These provisions have since been replaced by ss. 48 and 49 of the *Employment Pension Plans Regulation* (2014).

8 For clarity, the 2009 Actuarial Report and the DB plan use two separate terms to describe annual pension benefit increases, though they are conceptually linked: the DB plan refers to cost of living adjustment (or COLA), while the 2009 Actuarial Report refers to "post retirement pension increases". The 2009 Actuarial Report's post retirement pension increase figure of 2.25 percent was based on the DB plan's formula for COLA and the actuarial report's assumption for inflation.

9 This provision has since been replaced by ss. 60(2)(b) and 60(3) of the *Employment Pension Plans Regulation* (2014).

10 Regulators may, however, take into account the impact of rates on consumers in deciding *how* a utility is to recover its costs. Sudden and significant increases in rates may, for example, justify a regulator in phasing in rate increases to avoid "rate shock", provided the

utility is compensated for the economic impact of deferring its recovery: *TransCanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149, 319 N.R. 171 (F.C.A.), at para. 43.

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Ontario (Energy Board) v. Ontario Power Generation Inc.

WL CANCLI

09/25/2015

SUPREME COURT OF CANADA

Citation: Ontario (Energy Board) *v.* Ontario Power Generation Inc., 2015 SCC 44

Date: 20150925

Docket: 35506

Between:

Ontario Energy Board

Appellant

Ontario Power Generation Inc., Power Workers' Union,

Canadian Union of Public Employees, Local 1000 and

Society of Energy Professionals

and

Respondents

Ontario Education Services

- and -

Corporation

Intervener

Coram: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

Reasons for Judgment:

(paras. 1 to 121)

Dissenting Reasons:

(paras. 122 to 161)

Rothstein J. (McLachlin C.J. and Cromwell, Moldaver, Karakatsanis and Gascon JJ. concurring)

Abella J.

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

ont. (energy board) *v.* ont. power generation

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*

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, 1998, S.O. 1998, c. 15, Sch. B, ss. 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 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.

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 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 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 payments 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 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. 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 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 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 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.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

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By Rothstein J.

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By Abella J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Blair JJ.A.), 2013 ONCA 359, 116 O.R. (3d) 793, 365 D.L.R. (4th) 247, 307 O.A.C. 109, [2013] O.J. No. 3917 (QL), 2013 CarswellOnt 9792 (WL Can.), setting aside a decision of the Divisional Court (Aitken, Swinton and Hoy JJ.), 2012 ONSC 729, 109 O.R. (3d) 576, 347 D.L.R. (4th) 355, [2012] O.J. No. 862 (QL), 2012 CarswellOnt 2710 (WL Can.), and setting aside a decision of the Ontario Energy Board, EB-2010-0008, March 10, 2011 (online: http://www.ontarioenergyboard.ca/oeb/_

Documents/Decisions/dec_reasons_OPG_Payment_20110310.pdf), 2011 LNONOEB 57 (QL), 2011 CarswellOnt 3723 (WL Can.). Appeal allowed, Abella J. dissenting.

Glenn Zacher, Patrick Duffy and *James Wilson,* for the appellant.

John B. Laskin, Crawford Smith, Myriam Seers and *Carlton Mathias,* for the respondent Ontario Power Generation Inc.

Richard P. Stephenson and *Emily Lawrence,* for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000.

Paul J. J. Cavalluzzo and *Amanda Darrach,* for the respondent the Society of Energy Professionals.

Mark Rubenstein, for the intervener.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.was delivered by

Rothstein J. -

[1] In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board ("Board") for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. This case concerns the decision of the Board to disallow certain payment amounts applied for by Ontario Power Generation Inc. ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry.

[2] OPG appealed the Board's decision to the Ontario Divisional Court. A majority of the court dismissed the appeal and upheld the decision of the Board. OPG then appealed that decision to the Ontario Court of Appeal, which set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons. The Board now appeals to this Court.

[3] OPG asserts that the Board's decision to disallow these labour compensation costs was unreasonable. The crux of OPG's argument is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decisions to incur or commit to costs at the time the decisions to incur or commit to the costs were made and that OPG ought to benefit from a presumption of prudence. Because the Board did not employ this prudence methodology, OPG argues that its decision was unreasonable.

[4] The Board argues that a particular "prudence test" methodology is not compelled by law, and that in any case the costs disallowed here were not "committed" nuclear compensation costs, but are better characterized as forecast costs.

[5] OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision. OPG argues that in this case, the Board's aggressive and adversarial defence of its original decision was improper, and that the Board attempted to use the appeal to "bootstrap" its original decision by making additional arguments on appeal.

[6] The Board asserts that the scope of its authority to argue on appeal was settled when it was granted full party rights in connection with the granting of leave by this Court. Alternatively, the Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decisions on appeal.

[7] In my opinion, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from

collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, I do not agree with OPG that the Board was bound to apply a particular prudence test in evaluating these costs. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B, and associated regulations give the Board broad latitude to determine the methodology it uses in assessing utility costs, subject to the Board's ultimate duty to ensure that payment amounts it orders be just and reasonable to both the utility and consumers.

[8] In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in disallowing the costs.

[9] Regarding the Board's role on appeal, I do not find that the Board acted improperly in arguing the merits of this case, nor do I find that the arguments raised on appeal amount to impermissible "bootstrapping".

[10] Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

I. Regulatory Framework

[11] The *Ontario Energy Board Act, 1998* establishes the Board as a regulatory body with authority to oversee, among other things, electricity generation in the province of Ontario. Section 1 sets out the objectives of the Board in regulating electricity, which include:

1. (1) . . .

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

Accordingly, the Board must ensure that it regulates with an eye to balancing both consumer interests and the efficiency and financial viability of the electricity industry. The Board's role has also been described as that of a "market proxy": 2012 ONSC 729, 109 O.R. (3d) 576, at para. 54; 2013 ONCA 359, 116 O.R. (3d) 793, at para. 38. In this sense, the Board's role is to emulate as best as possible the forces to which a utility would be subject in a competitive landscape: *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, 2010 ONCA 284, 99 O.R. (3d) 481, at para. 48.

[12] One of the Board's most powerful tools to achieve its objectives is its authority to fix the amount of payments utilities receive in exchange for the provision of service. Section 78.1(5) of the *Ontario Energy Board Act, 1998* provides in relevant part:

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; . . .

[13] Section 78.1(6) provides: ". . . the burden of proof is on the applicant in an application made under this section".

[14] As I read these provisions, the utility applies for payment amounts for a future period (called the "test period"). The Board will accept the payment amounts applied for unless the Board is not satisfied that amounts are just and reasonable. Where the Board is not satisfied, s. 78.1(5) empowers it to fix other payment amounts which it finds to be just and reasonable.

[15] This Court has had the occasion to consider the meaning of similar statutory language in *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186. In that case, the Court held that "fair and reasonable" rates were those "which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested" (pp. 192-93).

[16] This means that the utility must, over the long run, be given the opportunity to recover, through the rates it is permitted to charge, its operating and capital costs ("capital costs" in this sense refers to all costs associated with the utility's invested capital). This case is concerned primarily with operating costs. If recovery of operating costs is not permitted, the utility will not earn its cost of capital, which represents the amount investors require by way of a return on their investment in order to justify an investment in the utility. The required return is one that is equivalent to what they could earn from an investment of comparable risk. Over the long run, unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers: *TransCanada Pipelines Ltd. v. National Energy Board*, 2004 FCA 149, 319 N.R. 171.

[17] This of course does not mean that the Board must accept every cost that is submitted by the utility, nor does it mean that the rate of return to equity investors is guaranteed. In the short run, return on equity may vary, for example if electricity consumption by the utility's customers is higher or lower than predicted. Similarly, a disallowance of any operating costs to which the utility has committed itself will negatively impact the return to equity investors. I do not intend to enter into a detailed analysis of how the cost of equity capital should be treated by utility regulators, but merely to observe that any disallowance of costs to which a utility has committed itself has an effect on equity investor returns. This effect must be carefully considered in light of the long-run necessity that utilities be able to attract investors and retain earnings in order to survive and operate efficiently and effectively, in accordance with the statutory objectives of the Board in regulating electricity in Ontario.

[18] As noted above, the burden is on the utility to satisfy the Board that the payment amounts it applies for are just and reasonable. If it fails to do so, the Board may disallow the portion of the application that it finds is not for amounts that are just and reasonable.

[19] Where applied-for operating costs are disallowed, the utility, if it is able to do so, may forego the expenditure of such costs. Where the expenditure cannot be foregone, the shareholders of the utility will have to absorb the reduction in the form of receiving less than their anticipated rate of return on their investment, i.e. the utility's cost of equity capital. In such circumstances it will be the management of the utility that will be responsible in the future for bringing its costs into line with what the Board considers just and reasonable.

[20] In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

II. Facts

[21] OPG is Ontario's largest energy generator, and is subject to rate regulation by the Board. OPG came into being in 1999 as one of the successor corporations to Ontario Hydro. It operates Board-regulated nuclear and hydroelectric facilities that generate approximately half of Ontario's electricity. Its sole shareholder is the Province of Ontario.

[22] It employs approximately 10,000 people in connection with its regulated facilities, 95 percent of whom work in its nuclear business. Approximately 90 percent of its employees in its regulated businesses are unionized, with approximately two thirds of unionized employees represented by the Power Workers' Union, Canadian Union of Public Employees, Local 1000 ("PWU"), and one third represented by the Society of Energy Professionals ("Society").

[23] Since early in its existence as an independent utility, OPG has been aware of the importance of improving its corporate performance. As part of a general effort to improve its business, OPG undertook efforts to benchmark its nuclear performance against comparable power plants around the world. In a memorandum of agreement ("MOA") with the Province of Ontario dated August 17, 2005, OPG committed to the following:

OPG will seek continuous improvement in its nuclear generation business and internal services. OPG will benchmark its performance in these areas against CANDU nuclear plants worldwide as well as against the top quartile of private and publicly-owned nuclear electricity generators in North America. OPG's top operational priority will be to improve the operation of its existing nuclear fleet.

(A.R., vol. III, at p. 215)

[24] As part of OPG's first-ever rate application with the Board in 2007, for a test period covering the years 2008 and 2009, OPG sought approval for a $6.4 billion "revenue requirement"; this term refers to "the total revenue that is required by the company to pay all of its allowable expenses and also to recover all costs associated with its invested capital": L. Reid and J. Todd, "New Developments in Rate Design for Electricity Distributors", in G. Kaiser and B. Heggie, eds., *Energy Law and Policy* (2011), 519, at p. 521. This constituted an increase of $1 billion over the revenue requirement that it had sought and was granted under the regulatory scheme in place prior to the Board's assumption of regulatory authority over OPG: EB-2007-0905, Decision with Reasons, November 3, 2008 (the "Board 2008-2009 Decision") (online), at pp. 5-6).

[25] The Board found that OPG was not meeting the nuclear performance expectations of its sole shareholder and that it had done little to conduct benchmarking of its performance against that of its peers, despite its commitment to do so dating back to 2005. Indeed, the only evidence of benchmarking that OPG submitted as part of its rate application was a 2006 report from Navigant Consulting, Inc. (the "Navigant Report"), which found that OPG was overstaffed by 12 percent in comparison to its peers. The Board found that OPG had not acted on the recommendations of the Navigant Report and had not commissioned subsequent benchmarking studies to assess its performance (Board 2008-2009 Decision, at pp. 27 and 30). The Board also found that operating costs at OPG's Pickering nuclear facilities were "far above industry averages" (p. 29). The Board thus disallowed $35 million of OPG's proposed revenue requirement and directed OPG to prepare benchmarking studies for use in future applications (p. 31).

[26] In explaining the importance of benchmarking, the Board stated: "The reason why the MOA emphasized benchmarking was because such studies can and do shine a light on inefficiencies and lack of productivity improvement" (Board 2008-2009 Decision, at p. 30).

[27] On May 5, 2010, shortly before OPG was set to file its second rate application, which is the subject of this appeal, the Ontario Minister of Energy and Infrastructure wrote to the President and CEO of OPG to ensure that OPG would demonstrate in its upcoming rate application "concerted efforts to identify cost saving opportunities and focus [its] forthcoming rate application on those items that are essential to the safe and reliable operation of [its] existing assets and projects already under development" (A.R., vol. IV, at p. 38).

[28] On May 26, 2010, OPG filed its payment amounts application for the 2011-2012 test period. As part of its evidence before the Board, OPG submitted two reports by ScottMadden Inc., a general management consulting firm specializing in benchmarking and business planning for nuclear facilities. The Phase 1 report compared OPG's nuclear operational and financial performance against that of external peers using industry performance metrics. The Phase 2 final report discussed performance improvement targets with the intent of improving OPG's nuclear business. OPG collaborated with ScottMadden on the Phase 1 and 2 reports, which were released on July 2, 2009 and September 11, 2009, respectively.

[29] OPG's rate application pertained to a test period beginning on January 1, 2011 and ending on December 31, 2012. OPG sought approval of a $6.9 billion revenue requirement, which represented an increase of 6.2 percent over OPG's then-current revenue based on the preceding year's approved utility rates. Of the $6.9 billion revenue requirement sought by OPG, $2.8 billion pertained to compensation costs, of which approximately $2.4 billion concerned OPG's nuclear business.

[30] A substantial portion of OPG's wage and compensation expenses were fixed by OPG's collective agreements with the unions, PWU and the Society. At the time of its application, OPG was party to a collective agreement with PWU, effective from April 2009 through March 2012, while its collective agreement with the Society expired on December 31, 2010. These collective agreements provided annual wage increases between 2 percent and 3 percent. OPG forecast an additional 1 percent increase for step progressions and promotions of unionized staff. Following the Board's hearing in this case, an interest arbitrator ordered a new collective agreement between OPG and the Society, effective February 3, 2011. This collective agreement provided wage increases that varied between 1 percent and 3 percent.

III. Judicial History

A. Ontario Energy Board: EB-2010-0008, Decision With Reasons, March 10, 2011 (the "Board Decision") (Online)

[31] In its decision concerning OPG's rate application for the 2011-2012 test period, the Board stated that it enjoyed broad discretion pursuant to Ontario Regulation 53/05 (*Payments Under Section 78.1 of the Act*) and s. 78.1 of the *Ontario Energy Board Act, 1998* to "adopt the mechanisms it judges appropriate in setting just and reasonable rates" (p. 18). The Board recognized that different tests could apply depending on whether its analysis concerned the recovery of forecast costs or an after-the-fact review of costs already incurred. In this rate application, it was appropriate to take into consideration all evidence that the Board deemed relevant to assess the reasonableness of OPG's revenue requirement.

[32] The Board rejected OPG's proposed revenue requirement of $6.9 billion, reducing it by $145 million over the test period "to send a clear signal that OPG must take responsibility for improving its performance" (p. 86). Key to its disallowance was the Board's finding that OPG was overstaffed and that its compensation levels were excessive.

[33] Regarding the number of staff, the Board pointed out that a benchmarking study commissioned by OPG itself, the ScottMadden Phase 2 final report, suggested that certain staff positions could be reduced or eliminated altogether. The Board suggested that OPG could review its organizational structure and reassign or eliminate positions in the coming years, as 20 percent to 25 percent of its staff were set to retire between 2010 and 2014 and it was possible to make greater use of external contractors. Regarding compensation, the Board found that OPG had not submitted compelling evidence justifying the benchmarking of its salaries of non-management employees to the 75th percentile of a survey of industry salaries conducted by Towers Perrin. Instead, the Board considered the proper benchmark to be the 50th percentile, the same percentile against which OPG benchmarks management compensation. In determining the appropriate disallowance, the Board acknowledged that OPG may not have been able to achieve the full $145 million in savings for the test period through the reduction of compensation levels alone because of its collective agreements with the unions.

B. Ontario Superior Court of Justice, Divisional Court: 2012 ONSC 729, 109 O.R. (3d) 576

[34] OPG appealed the Board Decision on the basis that it was unreasonable and that the reasons provided were inadequate. OPG argued that the Board should have conducted a prudent investment test - that is, it should have restricted its review of compensation costs to a consideration of whether the collective agreements that prescribed the compensation costs were prudent at the time they were entered into. OPG also argued that the Board should have presumed that the costs were prudent.

[35] The panel of three Divisional Court judges was split. Justice Hoy (as she then was), for the majority, found the Board Decision reasonable because management had the ability to reduce total compensation costs in the future within the framework of the collective agreement. Applying a strict prudent investment test would not permit the Board to fulfill its statutory objective of promoting cost effectiveness in the generation of electricity. It was particularly important for the Board to exercise its authority to set just and reasonable rates given the "double monopoly" dynamic at play:

The collective agreements were concluded between a regulated monopoly, which passes costs on to consumers, not a competitive enterprise, and two unions which account for approximately 90 per cent of the employees and amount to a near, second monopoly, based on terms inherited from Ontario Hydro and in face of the reality that running a nuclear operation without the employees would be extremely difficult. [para. 54]

[36] Justice Aitken dissented, finding that,

to the extent that [nuclear compensation] costs were predetermined, in the sense that they were locked in as a result of collective agreements entered prior to the date of the application and the test period, OPG only had to prove their prudence or reasonableness based on the circumstances that were known or that reasonably could have been anticipated at the time the decision to enter those collective agreements was made. [para. 83]

She would have held that the Board's failure to undertake a separate and explicit prudence review for the committed portion of nuclear compensation costs, coupled with its consideration of hindsight factors in assessing the reasonableness of these costs, rendered the Board Decision unreasonable.

C. Ontario Court of Appeal: 2013 ONCA 359, 116 O.R. (3d) 793

[37] The Ontario Court of Appeal reversed the Divisional Court's decision and remitted the case to the Board. The court drew a distinction between forecast costs and committed costs, with committed costs being those that the utility "is committed to pay in [the test period]" and that "cannot be managed or reduced by the utility in that time frame, usually because of contractual obligations" (para. 29). Although costs may not require actual payment until the future, as in this case, costs that have been "contractually incurred to be paid over the time frame are nonetheless committed even though they have not yet been paid" (para. 29). When reviewing such costs, the court held that the Board must undertake a prudence review as described in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4 (paras. 15-16). By failing to follow this jurisprudence and by requiring that OPG "manage costs that, by law, it cannot manage", the Board acted unreasonably (para. 37).

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 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

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 Kaiser and 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 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 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 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 to 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 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.

[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 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. 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 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 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*:

hellip; 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 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 decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The other is statutory: the Board's rate-setting powers are to be used to ensure that, in its view, a just and reasonable balance is struck between utility and consumer interests. These reasons will attempt to keep the two uses of the term distinct.

C. Choice of Methodology Under the Ontario Energy Board Act, 1998

[75] The question of whether the Board's decision to disallow recovery of certain costs was reasonable turns on how that decision relates to the Board's statutory and regulatory powers to approve payments to utilities and to have these payments reflected in the rates paid by consumers. The Board's general rate- and payment-setting powers are described above under the "Regulatory Framework" heading.

[76] The just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less.

[77] The *Ontario Energy Board Act, 1998* does not, however, either in s. 78.1 or elsewhere, prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. Indeed, s. 6(1) of O. Reg. 53/05 expressly permits the Board, subject to certain exceptions set out in s. 6(2), to "establish the form, methodology, assumptions and calculations used in making an order that determines payment amounts

for the purpose of section 78.1 of the Act".

[78] As a contrasting example, s. 6(2) 4.1 of O. Reg. 53/05 establishes a specific methodology for use when the Board reviews "costs incurred and firm financial commitments made in the course of planning and preparation for the development of proposed new nuclear generation facilities". When reviewing such costs, the Board must be satisfied that "the costs were prudently incurred" and that "the financial commitments were prudently made": s. 6(2)4.1. The provision thus establishes a specific context in which the Board's analysis is focused on the prudence of the decision to incur or commit to certain costs. The absence of such language in the more general s. 6(1) provides further reason to read the regulation as providing broad methodological discretion to the Board in making orders for payment amounts where the specific provisions of s. 6(2) do not apply.

[79] Regarding whether a presumption of prudence must be applied to OPG's decisions to incur costs, neither the *Ontario Energy Board Act, 1998* nor O. Reg. 53/05 expressly establishes such a presumption. Indeed, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable: s. 78.1(6) and (7). It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent.

[80] Justice Abella concludes that the Board's review of OPG's costs should have consisted of "an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable": para. 150. Such an approach is contrary to the statutory scheme. While the Board has considerable methodological discretion, it does not have the freedom to displace the burden of proof established by s. 78.1(6) of the *Ontario Energy Board Act, 1998* ". . . the burden of proof is on the applicant in an application made under this section". Of course, this does not imply that the applicant must systematically prove that every single cost is just and reasonable. The Board has broad discretion to determine the methods it may use to examine costs - it just cannot shift the burden of proof contrary to the statutory scheme.

[81] In judicially reviewing a decision of the Board to allow or disallow payments to a utility, the court's role is to assess whether the Board reasonably determined that a certain payment amount was "just and reasonable" for both the utility and the consumers. Such an approach is consistent with this Court's rate-setting jurisprudence in other regulatory domains in which the regulator is given methodological discretion, where it has been observed that "[t]he obligation to act is a question of law, but the choice of the method to be adopted is a question of discretion with which, under the statute, no Court of law may interfere": *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at para. 40 (concerning telecommunication rate-setting), quoting *Re General Increase in Freight Rates* (1954), 76 C.R.T.C. 12 (S.C.C.), at p. 13 (concerning railway freight rates). Of course, today this statement must be understood to permit intervention by a court where the exercise of discretion rendered a decision unreasonable. Accordingly, it remains to determine whether the Board's analytical approach to disallowing the costs at issue in this case rendered the Board's decision unreasonable under the "just and reasonable" standard.

D. Characterization of Costs at Issue

[82] Forecast costs are costs which the utility has not yet paid, and over which the utility still retains discretion as to whether the disbursement will be made. A disallowance of such costs presents a utility with a choice: it may change its plans and avoid the disallowed costs, or it may incur the costs regardless of the disallowance with the knowledge that the costs will ultimately be borne by the utility's shareholders rather than its ratepayers. By contrast, committed costs are those for which, if a regulatory board disallows recovery of the costs in approved payments, the utility and its shareholders will have no choice but to bear the burden of those costs themselves. This result may occur because the utility has already spent the funds, or because the utility entered into a binding commitment or was subject to other legal obligations that leave it with no discretion as to whether to make the payment in the future.

[83] There is disagreement between the parties as to how the costs disallowed by the Board in this matter should be

characterized. The Board asserts that compensation costs for the test period are forecast insofar as they have not yet been disbursed, while OPG asserts that the costs should be characterized as committed, because OPG is under a contractual obligation to pay those amounts when they become due. This disagreement is important because a "no hind-sight" prudence review, which is discussed in detail below, has developed in the context of "committed" costs. Indeed, it makes no sense to apply such a test where a utility still retains discretion over whether the costs will ultimately be incurred; the decision to commit the utility to such costs has not yet been made. Accordingly, where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology.

[84] In this case, at least some of the compensation costs that the Board found to be excessive were driven by collective agreements to which OPG had committed before the application at issue, and which established compensation costs that were, in aggregate, above the 75th percentile for comparable positions at other utilities. The collective agreements left OPG with limited flexibility regarding overall compensation rates or staffing levels - OPG was required to abide by wage and staffing levels established by collective agreements, and retained flexibility only over terms outside the bounds of those agreements - and thus those portions of OPG's compensation rates and staffing levels that were dictated by the terms of the collective agreements were committed costs.

[85] However, the Board found that OPG's compensation costs for the test period were not entirely driven by the collective agreements, and thus were not entirely committed, because OPG retained some flexibility to manage total staffing levels in light of projected attrition of a mature workforce. The Board Decision did not, however, include detailed forecasts regarding exactly how much of the $145 million in disallowed compensation costs could be recovered through natural reduction in employee numbers or other adjustments, and how much would necessarily be borne by the utility and its shareholder. Accordingly, the disallowed costs at issue must be understood as being at least partially committed. It is unreasonable to characterize them as entirely forecast in view of the constraints placed on OPG by the collective agreements.

[86] Having established that the disallowed costs are at least partially committed, it is necessary to consider whether the Board acted reasonably in not applying a no-hindsight prudent investment test in assessing those costs. Accordingly, I now turn to the jurisprudential history and methodological details of the prudent investment test.

E. The Prudent Investment Test

[87] In order to assess whether the Board's methodology was reasonable in this case, it is necessary to provide some background on the prudent investment test (sometimes referred to as "prudence review" or the "prudence test") in order to identify its origins, place it in context, and explore how it has been understood by utilities, regulators, and legislators.

(1) American Jurisprudence

[88] American jurisprudence has played a significant role in the history of the prudent investment test in utilities regulation. In discussing this history, I would first reiterate this Court's observation that "[w]hile the American jurisprudence and texts in this area should be considered with caution given that Canada and the United States have very different political and constitutional-legal regimes, they do shed some light on the issue": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 54.

[89] The origins of the prudent investment test in the context of utilities regulation may be traced to Justice Brandeis of the Supreme Court of the United States, who wrote a concurring opinion in 1923 to observe that utilities should receive deference in seeking to recover "investments which, under ordinary circumstances, would be deemed reasonable": *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn.1.

[90] In the decades that followed, American utility regulators tasked with reviewing past-incurred utility costs generally employed one of two standards: the "used and useful" test or the "prudent investment" test (J. Kahn, "Keep *Hope* Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs" (2010), 22 *Fordham Envtl. L. Rev.* 43, at p. 49). These tests took different approaches to determining what costs could justly and reasonably be passed on to ratepayers. The used and useful test allowed utilities to earn returns only on those investments that were actually used and useful to the utility's operations, on the principle that ratepayers should not be compelled to pay for investments that do not benefit them.

[91] By contrast, the prudent investment test followed Justice Brandeis's preferred approach by allowing for recovery of costs provided they were not imprudent based on what was known at the time the investment or expense was incurred: Kahn, at pp. 49-50. Though it may seem problematic from the perspective of consumer interests to adopt the prudent investment test - a test that allows for payments related to investments that may not be used or useful - it gives regulators a tool to soften the potentially harsh effects of the used and useful test, which may place onerous burdens on utilities. Disallowing recovery of the cost of failed investments that appeared reasonable at the time, for example, may imperil the financial health of utilities, and may chill the incentive to make such investments in the first place. This effect may then have negative implications for consumers, whose long-run interests will be best served by a dynamically efficient and viable electricity industry. Thus, the prudent investment test may be employed by regulators to strike the appropriate balance between consumer and utility interests: see Kahn, at pp. 53-54.

[92] The states differed in their approaches to setting the statutory foundation for utility regulation. Regulators in some states were free to apply the prudent investment test, while other states enacted statutory provisions disallowing compensation in respect of capital investments that were not "used and useful in service to the public": *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), at p. 302. Notably, when asked in *Duquesne* to consider whether "just and reasonable" payments to utilities required, as a constitutional matter, that the prudent investment test be applied to past-incurred costs, the U.S. Supreme Court held that "[t]he designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors": p. 316.

[93] American courts have also recognized that there may exist some contexts in which certain features of the prudent investment test may be less justifiable. For example, the Supreme Court of Utah considered whether a presumption of reasonableness was justified when reviewing costs passed to a utility by an unregulated affiliate entity, and concluded that it was not appropriate:

. . . we do not think an affiliate expense should carry a presumption of reasonableness. While the pressures of a competitive market might allow us to assume, in the absence of a showing to the contrary, that nonaffiliate expenses are reasonable, the same cannot be said of affiliate expenses not incurred in an arm's length transaction.

(*U.S. West Communications, Inc. v. Public Service Commission of Utah,* 901 P.2d 270 (Utah 1995), p. 274)

[94] Treatment of the prudent investment test in American jurisprudence thus indicates that the test has been employed as a tool that may be useful in arriving at just and reasonable outcomes, rather than a mandatory feature of utilities regulation that must be applied regardless of whether there is statutory language to that effect.

(2) Canadian Jurisprudence

[95] Following its emergence in American jurisprudence, several Canadian utility regulators and courts have also considered the role of prudence review and, in some cases, applied a form of the prudent investment test. I provide a review of some of these cases here not in an attempt to exhaustively catalogue all uses of the test, but rather to set out the way in which the test has been invoked in various contexts.

[96] In *British Columbia Electric Railway Co. v. Public Utilities Commission of British Columbia*, [1960] S.C.R. 837, Martland J. observed that the statute at issue in that case directed that the regulator, in fixing rates,

(a) . . . shall consider all matters which it deems proper as affecting the rate: [and]

(b) . . . shall have due regard, among other things, to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the public utility; and to giving to the public utility a fair and reasonable return upon the appraised value of the property of the public utility used, or prudently and reasonably acquired, to enable the public utility to furnish the service. [p. 852]

(Quoting *Public Utilities Act*, R.S.B.C. 1948, s. 16(1)(*b*) (repealed S.B.C. 1973, c. 29, s. 187).)

The consequence of this statutory language, Martland J. held, was that the regulator, "when dealing with a rate case, has unlimited discretion as to the matters which it may consider as affecting the rate, but that it must, when actually setting the rate, meet the two requirements specifically mentioned in clause (*b*)": at p. 856. That is, the regulator, under this statute, must ensure that the public pays only fair and reasonable charges, and that the utility secures a fair and reasonable return upon its property used *or prudently and reasonably acquired*. This express statutory protection for the recovery of prudently made property acquisition costs thus provides an example of statutory language under which this Court found a non-discretionary obligation to provide a fair return to utilities for capital expenditures that were either used or prudently acquired.

[97] In 2005, the Nova Scotia Utility and Review Board ("NSUARB") considered and adopted a definition of the prudent investment test articulated by the Illinois Commerce Commission:

. . . prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. . . . Hindsight is not applied in assessing prudence. . . . A utility's decision is prudent if it was within the range of decisions reasonable persons might have made. . . . The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.

(*Nova Scotia Power Inc, Re*, 2005 NSUARB 27 ("*Nova Scotia Power 2005*"), at para. 84 (CanLII))

The NSUARB then wrote that "[f]ollowing a review of the cases, the Board finds that the definition of imprudence as set out by the Illinois Commerce Commission is a reasonable test to be applied in Nova Scotia": para. 90. The NSUARB then considered, among other things, whether the utility's recent fuel procurement strategy had been prudent, and found that it had not: para. 94. It did not, however, indicate that it believed itself to be compelled to apply the prudent investment test.

[98] The NSUARB reaffirmed its endorsement of the prudent investment test in 2012: *Re Nova Scotia Power Inc. (Re)*, 2012 NSUARB 227 ("*Nova Scotia Power 2012*"), at paras. 143-46 (CanLII). In that case, the utility whose submissions were under review "confirmed that from its perspective this is the test the Board should apply": para. 146. The NSUARB then applied the prudence test in evaluating whether several of the utility's operational decisions were prudent, and found that some were not: para. 188.

[99] In 2006, the Ontario Court of Appeal considered the meaning of the prudent investment test in *Enbridge*. This case is of particular interest for two reasons. First, the Ontario Court of Appeal endorsed in its reasons a specific formulation of the prudent investment test framework:

Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time. [para. 10]

[100] Second, the Court of Appeal in *Enbridge* made certain statements that suggest that the prudent investment test was a necessary approach to reviewing committed costs. Specifically, it noted that in deciding whether Enbridge's requested rate increase was just and reasonable,

the [Board] was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred. [para. 8]

The Court of Appeal also noted that the Board had applied the "proper test": para. 18. These statements tend to suggest that the Court of Appeal was of the opinion that prudence review is an inherent and necessary part of ensuring just and reasonable payments.

[101] However, the question of whether the prudence test was a required feature of just-and-reasonable analysis in this context was not squarely before the Court of Appeal in *Enbridge*. Rather, the parties in that case "were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision" (para. 10), and the question at issue was whether the Board had reasonably applied that agreed-upon approach. In this sense, *Enbridge* is similar to *Nova Scotia Power 2012*: both cases involved the application of prudence analysis in contexts where there was no dispute over whether an alternative methodology could reasonably have been applied.

(3) Conclusion Regarding the Prudent Investment Test

[102] The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. While there exists different articulations of prudence review, *Enbridge* presents one express statement of how a regulatory board might structure its review to assess the prudence of utility expenditures at the time they were incurred or committed. A no-hindsight prudence review has most frequently been applied in the context of capital costs, but *Enbridge* and *Nova Scotia Power* (both *2005* and *2012*) provide examples of its application to decisions regarding operating costs as well. I see no reason in principle why a regulatory board should be barred from applying the prudence test to operating costs.

[103] However, I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be *required* as a matter of law, under the *Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in *Enbridge* such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario,

the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts: O. Reg. 53/05, s. 6(1).

[104] To summarize, it is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. As noted above, applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost. I emphasize, however, that this decision should not be read to give regulators *carte blanche* to disallow a utility's committed costs at will. Prudence review of committed costs may in many cases be a sound way of ensuring that utilities are treated fairly and remain able to secure required levels of investment capital. As will be explained, particularly with regard to committed capital costs, prudence review will often provide a reasonable means of striking the balance of fairness between consumers and utilities.

[105] This conclusion regarding the Board's ability to select its methodology rests on the particulars of the statutory scheme under which the Board operates. There exist other statutory schemes in which regulators are expressly required to compensate utilities for certain costs prudently incurred: see *British Columbia Electric Railway Co*. Under such a framework, the regulator's methodological discretion may be more constrained.

(4) Application to the Board's Decision

[106] In this case, the Board disallowed a total of $145 million in compensation costs associated with OPG's nuclear operations, over two years. As discussed above, these costs are best understood as at least partly committed. In view of the nature of these particular costs and the circumstances in which they became committed, I do not find that the Board acted unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs.

[107] First, the costs at issue are operating costs, rather than capital costs. Capital costs, particularly those pertaining to areas such as capacity expansion or upgrades to existing facilities, often entail some amount of risk, and may not always be strictly necessary to the short-term ongoing production of the utility. Nevertheless, such costs may often be a wise investment in the utility's future health and viability. As such, prudence review, including a no-hindsight approach (with or without a presumption of prudence, depending on the applicable statutory context), may play a particularly important role in ensuring that utilities are not discouraged from making the optimal level of investment in the development of their facilities.

[108] Operating costs, like those at issue here, are different in kind from capital costs. There is little danger in this case that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. It is true that a decision such as the Board's in this case may have the effect of making OPG more hesitant about committing to relatively high compensation costs, but that was precisely the intended effect of the Board's decision.

[109] Second, the costs at issue arise in the context of an ongoing, "repeat-player" relationship between OPG and its employees. Prudence review has its origins in the examination of decisions to pursue particular investments, such as a decision to invest in capacity expansion; these are often one-time decisions made in view of a particular set of circumstances known or assumed at the time the decision was made.

[110] By contrast, OPG's committed compensation costs arise in the context of an ongoing relationship in which OPG will have to negotiate compensation costs with the same parties in the future. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. Prudence review is simply less relevant when the Board's

focus is not solely on compensating for past commitments, but on regulating costs to be incurred in the future as well. As will be discussed further, the Board's ultimate disallowance was not targeted exclusively at committed costs, but rather was made with respect to the total compensation costs it evaluated in aggregate. Though the Board acknowledged that OPG may not have had the discretion to reduce spending by the entire amount of the disallowance, the disallowance was animated by the Board's efforts to get OPG's ongoing compensation costs under control.

[111] Having already given OPG a warning that the Board found its operational costs to be of concern (see Board 2008-2009 Decision, at pp. 28-32), it was not unreasonable for the Board to be more forceful in considering compensation costs to ensure effective regulation of such costs going forward. The Board's statement that its disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86) shows that it had the ongoing effects of its disallowance squarely in mind in issuing its decision in this case.

[112] The reasonableness of the Board's decision to disallow $145 million in compensation costs is supported by the Board's recognition of the fact that OPG was bound to a certain extent by the collective agreements in making staffing decisions and setting compensation rates, and its consideration of this factor in setting the total disallowance: Board Decision, at p. 87. The Board's methodological flexibility ensures that its decision need not be "all or nothing". Where appropriate, to the extent that the utility was unable to reduce its costs, the total burden of such costs may be moderated or shared as between the utility's shareholders and the consumers. The Board's moderation in this case shows that, in choosing to disallow costs without applying a formal no-hindsight prudence review, it remained mindful of the need to ensure that any disallowance was not unfair to OPG and certainly did not impair the viability of the utility.

[113] Justice Abella, in her dissent, acknowledges that the Board has the power under prudence review to disallow committed costs in at least some circumstances: para. 152. However, she speculates that any such disallowance could "imperil the assurance of reliable electricity service": para. 156. A large or indiscriminate disallowance might create such peril, but it is also possible for the Board to do as it did here, and temper its disallowance to recognize the realities facing the utility.

[114] There is no dispute that collective agreements are "immutable" between employees and the utility. However, if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The existence both of collective bargaining for utility employees and of the Board's power to fix payment amounts covering compensation costs indicates neither regime can trump the other. The Board cannot interfere with the collective agreement by ordering that a utility break its obligations thereunder, but nor can the collective agreement supersede the Board's duty to ensure a just and reasonable balance between utility and consumer interests.

[115] Justice Abella says that the Board's review of committed costs using hindsight evidence appears to contradict statements made earlier in its decision. The Board wrote that it would use all relevant evidence in assessing forecast costs but that it would limit itself to a no-hindsight approach in reviewing costs that OPG could not "take action to reduce": Board Decision, at p. 19. In my view, these statements can be read as setting out a reasonable approach for analyzing costs that could reliably be fit into forecast or committed categories. However, not all costs are amenable to such clean categorization by the Board in assessing payment amounts for a test period.

[116] With regard to the compensation costs at issue here, the Board declined to split the total cost disallowance into forecast and committed components in conducting its analysis. As Hoy J. observed, "[g]iven the complexity of OPG's business, and respecting its management's autonomy, [the Board] did not try to quantify precisely the amount by which OPG could reduce its forecast compensation costs within the framework of the existing collective bargaining agreements": Div. Ct. reasons, at para. 53. That is, the Board did not split all compensation costs into either "forecast" or "committed", but analyzed the disallowance of compensation costs as a mix of forecast and committed expenditures over which management retained some, but not total, control.

[117] It was not unreasonable for the Board to proceed on the basis that predicting staff attrition rates is an inherently uncertain exercise, and that it is not equipped to micromanage business decisions within the purview of OPG management. These considerations mean that any attempt to predict the exact degree to which OPG would be able to reduce compensation costs (in other words, what share of the costs were forecast) would be fraught with uncertainty. Accordingly, it was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach is not inconsistent with the Board's discussion at pp. 18-19, but rather represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into the categories discussed in that passage.

[118] Justice Abella emphasizes throughout her reasons that the costs established by the collective agreements were not adjustable. I do not dispute this point. However, to the extent that she relies on the observation that the collective agreements "made it *illegal* for the utility to alter the compensation and staffing levels" of the unionized workforce (para. 149 (emphasis in original)), one might conclude that the Board was in some way trying to interfere with OPG's obligations under its collective agreements. It is important not to lose sight of the fact that the Board decision in no way purports to force OPG to break its contractual commitments to unionized employees.

[119] Finally, her observation that the Canadian Nuclear Safety Commission ("CNSC") "has . . . imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations" (para. 127) is irrelevant to the issues raised in this case. While the regime put in place by the CNSC surely imposes operational and staffing restraints on nuclear utilities (see OPG record, at pp. 43-46), there is nothing in the Board's reasons, and no argument presented before this Court, suggesting that the Board's disallowance will result in a violation of the provisions of the *Nuclear Safety and Control Act*, S.C. 1997, c. 9.

[120] I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended "to send a clear signal that OPG must take responsibility for improving its performance" (Board Decision, at p. 86). Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

VI. Conclusion

[121] I do not find that the Board acted improperly in pursuing this matter on appeal; nor do I find that it acted unreasonably in disallowing the compensation costs at issue. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal, and reinstate the decision of the Board.

The following are the reasons delivered by

Abella J. -

[122] The Ontario Energy Board was established in 1960 to set rates for the sale and storage of natural gas and to approve pipeline construction projects. Over time, its powers and responsibilities evolved. In 1973, the Board became responsible for reviewing and reporting to the Minister of Energy on electricity rates. During this period, Ontario's electricity market was lightly regulated, dominated by the government-owned Ontario Hydro, which owned power generation assets responsible for about 90 per cent of electricity production in the province: Ron W. Clark, Scott A. Stoll and Fred D. Cass, *Ontario Energy Law: Electricity* (2012), at p. 134; *2011 Annual Report* of the Office of the Auditor General of Ontario, at pp. 5 and 67.

[123] A series of legislative measures in the late 1990s were adopted to transform the electricity industry into a market-based one driven by competition. Ontario Hydro was unbundled into five entities. One of them was Ontario Power Generation Inc., which was given responsibility for controlling the power generation assets of the former Ontario Hydro. It was set up as a

commercial corporation with one shareholder - the Province of Ontario: Clark, Stoll and Cass, at pp. 5-7 and 134.

[124] As of April 1, 2008, the Board was given the authority by statute to set payments for the electricity generated by a prescribed list of assets held by Ontario Power Generation: *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B., s. 78.1(2); O. Reg. 53/05, *Payments Under Section 78.1 of the Act*, s. 3. Under the legislative scheme, Ontario Power Generation is required to apply to the Board for the approval of "just and reasonable" payment amounts: *Ontario Energy Board Act, 1998*, s. 78.1(5). The Board sets its own methodology to determine what "just and reasonable" payment amounts are, guided by the statutory objectives to maintain a "financially viable electricity industry" and to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service": O. Reg. 53/05, s. 6(1); *Ontario Energy Board Act, 1998*, ss. 1(1)1 and 1(1)2.

[125] Ontario Power Generation remains the province's largest electricity generator. It was unionized by the Ontario Hydro Employees' Union (the predecessor to the Power Workers' Union) in the 1950s, and by the Society of Energy Professionals in 1992: Richard P. Chaykowski, *An Assessment of the Industrial Relations Context and Outcomes at OPG* (2013) (online), at s. 6.2. Today, Ontario Power Generation employs approximately 10,000 people in its regulated businesses, 90 per cent of whom are unionized. Two thirds of these unionized employees are represented by the Power Workers' Union, and the rest by the Society of Energy Professionals.

[126] Both the Power Workers' Union and the Society of Energy Professionals had collective agreements with Ontario Hydro before Ontario Power Generation was established. As a successor company to Ontario Hydro, Ontario Power Generation inherited the full range of these labour relations obligations: Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s. 69. Ontario Power Generation's collective agreements with its unions prevent the utility from unilaterally reducing staffing or compensation levels.

[127] The Canadian Nuclear Safety Commission, an independent federal government agency responsible for ensuring compliance with the *Nuclear Safety and Control Act*, S.C. 1997, c. 9, has also imposed staffing levels on Ontario Power Generation to ensure safe and reliable operation of its nuclear stations.

[128] On May 26, 2010, Ontario Power Generation applied to the Board for a total revenue requirement of $6,909.6 million, including $2,783.9 million in compensation costs - wages, benefits, pension servicing, and annual incentives - to cover the period from January 1, 2011 to December 31, 2012: EB-2010-0008, at pp. 8, 49 and 80.

[129] In its decision, the Board explained that it would use "two types of examination" to assess the utility's expenditures. When evaluating forecast costs - costs that the utility has estimated for a future period and which can still be reduced or avoided - the Board said that Ontario Power Generation bears the burden of showing that these costs are reasonable. On the other hand, when the Board would be evaluating costs for which "[t]here is no opportunity for the company to take action to reduce", otherwise known as committed costs, it said that it would undertake "an after-the-fact prudence review . . . conducted in the manner which includes a presumption of prudence", that is, a presumption that the utility's expenditures are reasonable: p. 19.

[130] The Board made no distinction between those compensation costs that were reducible and those that were not. Instead, it subjected all compensation costs to the kind of assessment it uses for reducible, forecast costs and disallowed $145 million because it concluded that the utility's compensation rates and staffing levels were too high.

[131] On appeal, a majority of the Divisional Court upheld the Board's order. In dissenting reasons, Aitken J. concluded that the Board's decision was unreasonable because it did not apply the proper approach to the compensation costs which were, as a result of legally binding collective agreements, fixed and not adjustable. Instead, the Board "lumped" all compensation costs together and made no distinction between those that were the result of binding contractual obligations and those that were not. As she said:

First, I consider any limitation on [Ontario Power Generation's] ability to manage nuclear compensation costs on a go-forward basis, due to binding collective agreements in effect prior to the application and the test period, to be costs previously incurred and subject to an after-the-fact, two-step, prudence review. Second, I conclude that, in considering [Ontario Power Generation's] nuclear compensation costs, as set out in its application, the [Board] in its analysis (though not necessarily in its final number) was required to differentiate between such earlier incurred liabilities and other aspects of the nuclear compensation cost package that were truly projected and not predetermined. Third, in my view, the [Board] was required to undergo a prudence review in regard to those aspects of the nuclear compensation package that arose under binding contracts entered prior to the application and the test period. In regard to the balance of factors making up the nuclear compensation package, the [Board] was free to determine, based on all available evidence, whether such factors were reasonable. Fourth, had a prudence review been undertaken, there was evidence upon which the [Board] could reasonably have decided that the presumption of prudence had been rebutted in regard to those cost factors mandated in the collective agreements. Unfortunately, I cannot find anywhere in the Decision of the [Board] where such an analysis was undertaken. The [Board] lumped all nuclear compensation costs together. It dealt with them as if they all emanated from the same type of factors and none reflected contractual obligations to which the [Ontario Power Generation] was bound due to a collective agreement entered prior to the application and the test period. Finally, I conclude that, when the [Board] was considering the reasonableness of the nuclear compensation package, it erred in considering evidence that came into existence after the date on which the collective agreements were entered when it assessed the reasonableness of the rates of pay and other binding provisions in the collective agreements. [para. 75]

[132] The Court of Appeal unanimously agreed with Aitken J.'s conclusion, finding that "the compensation costs at issue before the [Board] were committed costs" which should therefore have been assessed using a presumption of prudence. As they both acknowledged, it was open to the Board to find that the presumption had been rebutted in connection with the binding contractual obligations, but the Board acted unreasonably in failing to take the immutable nature of the fixed costs into consideration.

[133] I agree. The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. Ontario Power Generation's compensation costs were therefore overwhelmingly predetermined and could not be adjusted by the utility during the relevant period. These are precisely the type of costs that the Board referred to in its decision as costs for which "[t]here is no opportunity for the company to take action to reduce" and which must be subjected to "a prudence review conducted in the manner which includes a presumption of prudence": p. 19.

[134] In my respectful view, failing to acknowledge the legally binding, non-reducible nature of the cost commitments reflected in the collective agreements and apply the review the Board itself said should apply to such costs, rendered its decision unreasonable.

Analysis

[135] Pursuant to s. 78.1(5) of the *Ontario Energy Board Act, 1998*, upon application from Ontario Power Generation, the Board is required to determine "just and reasonable" payment amounts to the utility. In the utility regulation context, the phrase "just and reasonable" reflects the aim of "navigating the straits" between overcharging a utility's customers and underpaying the utility for the public service it provides: *Verizon Communications Inc. v. Federal Communications Commission*, 535 U.S. 467 (2002), at p. 481; see also *Northwestern Utilities Ltd. v. City of Edmonton*, [1929] S.C.R. 186, at pp. 192-93.

[136] The methodology adopted by the Board to determine "just and reasonable" payments to Ontario Power Generation draws in part on the regulatory concept of "prudence". Prudence is "a legal basis for adjudging the meeting of utilities' public interest obligations, specifically in regard to rate proceedings": Robert E. Burns et al., *The Prudent Investment Test in the 1980s*, report NRRI-84-16, The National Regulatory Research Institute, April 1985, at p. 20. The concept emerged in the

early 20th century as a judicial response to the "mind-numbing complexity" of other approaches being used by regulators to determine "just and reasonable" amounts, and introduced a legal presumption that a regulated utility has acted reasonably: *Verizon Communications*, at p. 482. As Justice Brandeis famously explained in 1923:

The term prudent investment is not used in a critical sense. There should not be excluded from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown. [Emphasis added.]

(*State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923), at p. 289, fn. 1, per Brandeis J., dissenting).

[137] The presumption of prudence is the starting point for the type of examination the Board calls a "prudence review". In undertaking a prudence review, the Board applies a "well-established set of principles":

bull; Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

bull; To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

bull; Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

bull; Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

(*Enersource Hydro Mississauga Inc. (Re)*, 2012 LNONOEB 373 (QL), at para. 55, citing *Enbridge Gas Distribution (Re)*, 2002 LNONOEB 4 (QL), at para. 3.12.2).

[138] This form of prudence review, including a presumption of prudence and a ban on hindsight, was endorsed by the Board and by the Ontario Court of Appeal as an appropriate method to determine "just and reasonable" rates in *Enbridge Gas Distribution Inc. (Re)*, at paras. 3.12.1 to 3.12.5, aff'd *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 O.A.C. 4, at paras. 8 and 10-12.

[139] In the case before us, however, the Board decided not to submit all costs to a prudence review. Instead, it stated that it would use two kinds of review. The first would apply to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided. It explained in its reasons that it would review such costs using a wide range of evidence, and that the onus was on the utility to demonstrate that its forecast costs were reasonable:

When considering forecast costs, the onus is on the company to make its case and to support its claim that the forecast expenditures are reasonable. The company provides a wide spectrum of such evidence, including business cases, trend analysis, benchmarking data, etc. The test is not dishonesty, negligence, or wasteful loss; the test is reasonableness. And in assessing reasonableness, the Board is not constrained to consider only factors pertaining to [Ontario Power Generation]. The Board has the discretion to find forecast costs unreasonable based on the evidence - and that evidence may be related to the cost/benefit analysis, the impact on ratepayers, comparisons with other entities, or other considerations.

The benefit of a forward test period is that the company has the benefit of the Board's decision in advance regarding the recovery of forecast costs. To the extent costs are disallowed, for example, a forward test period provides the company with the opportunity to adjust its plans accordingly. In other words, there is not necessarily any cost borne by shareholders (unless the company decides to continue to spend at the higher level in any event). [p. 19]

[140] A different approach, the Board said, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it evaluates these costs using a "prudence review", which includes a presumption that the costs were prudently incurred:

Somewhat different considerations will come into play when undertaking an after-the-fact prudence review. In the case of an after-the-fact prudence review, if the Board disallows a cost, it is necessarily borne by the shareholder. There is no opportunity for the company to take action to reduce the cost at that point. For this reason, the Board concludes there is a difference between the two types of examination, with the after-the-fact review being a prudence review conducted in the manner which includes a presumption of prudence. [p. 19]

[141] In *Enersource Hydro Mississauga Inc. (Re)*, for example, the Board concluded that it had to conduct a prudence review when evaluating the costs that Enersource had already incurred:

This issue concerns expenditures which have largely already been incurred by the company. . . . Given that the issue concerns past expenditures which are now in dispute, the Board must conduct a prudence review. [para. 55]

[142] As the Board said in its reasons, the prudence review makes sense for committed costs because disallowing costs Ontario Power Generation cannot avoid, forces the utility to pay out of pocket for expenses it has already incurred. This could negatively affect Ontario Power Generation's ability to operate, leading the utility to restructure its relationships with the financial community and its service providers, or even lead to bankruptcy: see Burns et al., at pp. 129-65. These outcomes would "increase capital costs and utility rates above the levels that would exist with a limited prudence penalty", forcing Ontario consumers to pay higher electricity bills: Burns et al., at p. vi.

[143] The issue in this appeal therefore centres on the Board assessing *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which "[t]here is no opportunity for the company to take action to reduce". The Board did not actually call them forecast costs, but by saying that "collective agreements may make it difficult to eliminate positions quickly" and that "changes to union contracts . . . will take time" (pp. 85 and 87), the Board was clearly treating them as reducible in theory. Moreover, the fact that it failed to apply the prudence review it said it would apply to non-reducible costs confirms that it saw the collectively bargained commitments as adjustable.

[144] The Board did not explain why it considered compensation costs in collective agreements to be adjustable forecast costs, but the effect of its approach was to deprive Ontario Power Generation of the benefit of the Board's assessment methodology that treats committed costs differently. In my respectful view, the Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

[145] Ontario Power Generation was a party to binding collective agreements with the Power Workers' Union and the Society of Energy Professionals covering most of the relevant period. At the time of the application, it had already entered into a collective agreement with the Power Workers' Union for the period of April 1, 2009 to March 31, 2012.

[146] Its collective agreement with the Society of Energy Professionals, which required resolution by binding mediation-arbitration in the event of contract negotiations disputes, expired on December 31, 2010. As a result of a bargaining impasse, the terms of a new collective agreement for January 1, 2011 to December 31, 2012 were imposed by

legally binding arbitration: *Ontario Power Generation v. Society of Energy Professionals*, [2011] O.L.A.A. No. 117 (QL).

[147] The collective agreements with the Power Workers' Union and the Society of Energy Professionals prescribed the compensation rates for staff positions held by represented employees, strictly regulated staff levels at Ontario Power Generation's facilities, and limited the utility's ability to unilaterally reduce its compensation rates and staffing levels. The collective agreement with the Power Workers' Union, for example, stipulated that there would be no involuntary layoffs during the term of the agreement. Instead, Ontario Power Generation would be required either to relocate surplus staff or offer severance in accordance with rates set out in predetermined agreements between the utility and the union: "Collective Agreement between Ontario Power Generation Inc. and Power Workers' Union", April 1, 2009 to March 31, 2012, at art. 11.

[148] Similarly, Ontario Power Generation's collective agreement with the Society of Energy Professionals severely limited the utility's bargaining power and control over compensation levels. When the contract between Ontario Power Generation and the Society of Energy Professionals expired on December 31, 2010, the utility's bargaining position had been that its sole shareholder, the Province of Ontario, had directed that there be a zero net compensation increase over the next two-year term. The parties could not reach an agreement and the dispute was therefore referred to binding arbitration as required by previous negotiations. The resulting award by Kevin M. Burkett provided mandatory across-the-board wage increases of three per cent on January 1, 2011, two per cent on January 1, 2012, and a further one per cent on April 1, 2012: *Ontario Power Generation v. Society of Energy Professionals*, at paras. 1, 9, and 28.

[149] The obligations contained in these collective agreements were immutable and legally binding commitments: *Labour Relations Act, 1995*, s. 56. As a result, Ontario Power Generation was prohibited from unilaterally reducing the staffing levels, wages, or benefits of its unionized workforce. These agreements therefore did not just leave the utility "with limited flexibility regarding overall compensation rates or staffing levels", as the majority notes (at para. 84), they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

[150] Instead, the Board, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of its costs and concluded that it had failed to provide "compelling evidence" or "documentation or analysis" to justify compensation levels: p. 85. 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.

[151] Applying a prudence review to these compensation costs would hardly, as the majority suggests, "have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998*". To interpret the burden of proof in s. 78.1(6) of the *Ontario Energy Board Act* so strictly would essentially prevent the Board from ever conducting a prudence review, notwithstanding that it has comfortably done so in the past and stated, even in its reasons in this case, that it would review committed costs using an "after-the-fact prudence review" which "includes a presumption of prudence". Under the majority's logic, however, since a prudence review always involves a presumption of prudence, the Board would not only be limiting its methodological flexibility, it would be in breach of the Act.

[152] The application of a prudence review does not shield the utility's compensation costs from scrutiny. As the Court of Appeal observed, a prudence review

does not mean that the [Board] is powerless to review the compensation rates for [Ontario Power Generation]'s unionized staff positions or the number of those positions. In a prudence review, the evidence may show that the presumption of prudently incurred costs should be set aside, and that the committed compensation rates and staffing levels were not reasonable; however, the [Board] cannot resort to hindsight, and must consider what was known or ought to have been known at the time. A prudence review allows for such an outcome, and permits the [Board] both to fulfill its statutory mandate and to serve as a market proxy, while maintaining a fair balance between [Ontario Power Generation] and its

customers. [para. 38]

[153] The majority's suggestion (at para. 114) that "if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs", is puzzling. The legislature did not intend for *any* costs to be "inevitably" imposed on consumers. What it intended was to give the Board authority to determine just and reasonable payment amounts based on Ontario Power Generation's existing and proposed commitments. Neither collective agreements nor any other contractual obligations were intended to be "inevitably" imposed. They were intended to be inevitably considered in the balance. But it is precisely because of the unique nature of binding commitments that the Board said it would impose a different kind of review on these costs.

[154] It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. The Board made virtually no findings of fact regarding the extent to which the utility could reduce its collectively bargained compensation costs. On the contrary, the Board, as Aitken J. noted, "lumped" all compensation costs together, acknowledged that reducing those in the collective agreements would "take time" and "be difficult", and dealt with them as globally adjustable.

[155] Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect. To use the majority's words, these costs are "legal obligations that leave [the utility] with no discretion as to whether to make the payment in the future" (para. 82). According to the Board's own methodology, costs for which "[t]here is no opportunity for the company to take action to reduce" are entitled to "a presumption of prudence": p. 19.

[156] Disallowing costs that Ontario Power Generation is legally required to pay as a result of its collective agreements, would force the utility and the Province of Ontario, the sole shareholder, to make up the difference elsewhere. This includes the possibility that Ontario Power Generation would be forced to reduce investment in the development of capacity and facilities. And because Ontario Power Generation is Ontario's largest electricity generator, it may not only threaten the "financial viability" of the province's electricity industry, it could also imperil the assurance of reliable electricity service.

[157] The majority nonetheless assumes that the ongoing relationship between Ontario Power Generation and the unions should give the Board greater latitude in disallowing the collectively bargained compensation costs than it would have had if it applied a no-hindsight, presumption-of-prudence analysis. It also accepts the Board's conclusion that Ontario Power Generation's collectively bargained compensation costs may be "excessive", and therefore concludes that the Board was reasonable in choosing to avoid the "prudence" test in order to so find. This approach finds no support even in the methodology the Board set out for itself for evaluating just and reasonable payment amounts.

[158] In my respectful view, selecting a test which is more likely to confirm an assumption that collectively bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes, with respect, the appearance of an ideologically driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not.

[159] I recognize that the Board has wide discretion to fix payment amounts that are "just and reasonable" and, subject to certain limitations, to "establish the . . . methodology" used to determine such amounts: O. Reg. 53/05, s. 6, *Ontario Energy Board Act, 1998*, s. 78.1;. That said, once the Board establishes a methodology to determine what is just and reasonable, it is, at the very least, required to faithfully apply that approach: see *TransCanada Pipelines Ltd. v. National Energy Board* (2004),

319 N.R. 171 (F.C.A.), at paras. 30-32, per Rothstein J.A. This does not mean that collective agreements "supersede" or "trump" the Board's authority to fix payment amounts; it means that once the Board selects a methodology for itself for the exercise of its discretion, it is required to follow it. Absent methodological clarity and predictability, Ontario Power Generation would be left in the dark about how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets.

[160] In disallowing $145 million of the compensation costs sought by Ontario Power Generation on the grounds that the utility could reduce salary and staffing levels, the Board ignored the legally binding nature of the collective agreements and failed to distinguish between committed compensation costs and those that were reducible. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was, in my respectful view, unreasonable.

[161] I would accordingly dismiss the appeal, set aside the Board's decision, and, like the Court of Appeal, remit the matter to the Board for reconsideration in accordance with these reasons.

Appeal allowed, Abella J. *dissenting.*

Solicitors for the appellant: Stikeman Elliott, Toronto.

Solicitors for the respondent Ontario Power Generation Inc.: Torys, Toronto; Ontario Power Generation Inc., Toronto.

Solicitors for the respondent the Power Workers' Union, Canadian Union of Public Employees, Local 1000: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the respondent the Society of Energy Professionals: Cavalluzzo Shilton McIntyre Cornish, Toronto.

Solicitors for the intervener: Jay Shepherd Professional Corporation, Toronto.

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Supreme Court of Canada

Snell v. Farrell

1990 CarswellNB 218, 1990 CarswellNB 82, [1988] S.C.C.A. No. 705, [1990] 2 S.C.R. 311, [1990] R.R.A. 660, [1990] S.C.J. No. 73, 107 N.B.R. (2d) 94, 110 N.R. 200, 22 A.C.W.S. (3d) 493, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, 72 D.L.R. (4th) 289, J.E. 90-1175, EYB 1990-67315

Snell v. Farrell

Dickson C.J.C. *, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory and McLachlin JJ.

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Judgment: August 16, 1990
Docket: Doc. No. 20873

Counsel: *Brian A. Crane, Q.C.* and *Margaret A. Ross*, for appellant
E. Neil McKelvey, Q.C. and *Kenneth B. McCullogh*, for respondent

Subject: Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Table of Authorities

Cases considered

Alphacell Ltd. v. Woodward, [1972] A.C. 824, [1972] 2 All E.R. 475 (H.L.) — *considered*

Blatch v. Archer (1774), 1 Cowp. 63, 98 E.R. 969 — *considered*

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Cudney v. Clements Motor Sales Ltd., [1969] 2 O.R. 209, 5 D.L.R. (3d) 3 (C.A.) — *referred to*

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Diamond v. British Columbia Thoroughbred Breeders' Society (1965), 52 D.L.R. (2d) 146 (B.C. S.C.) — *referred to*

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Interlake Tissue Mills Co. v. Salmond, [1948] O.R. 950, [1949] 1 D.L.R. 207 (C.A.) — *referred to*

Jackson v. Millar (1972), [1973] 1 O.R. 399, 31 D.L.R. (3d) 263 (C.A.) — *referred to*

Kirk v. McLaughlin Coal & Supplies Ltd., [1968] 1 O.R. 311, 66 D.L.R. (2d) 321 (C.A.) — *referred to*

Kitchen v. McMullen (1989), 50 C.C.L.T. 213, 62 D.L.R. (4th) 481, 100 N.B.R. (2d) 91, 252 A.P.R. 91 (C.A.) — *referred to*

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Rendall v. Ewert, 38 B.C.L.R. (2d) 1, 36 C.P.C. (2d) 117, [1989] 6 W.W.R. 97, 60 D.L.R. (4th) 513 (C.A.), leave to appeal to S.C.C. refused, [1990] 1 W.W.R. lxxii (note) — *referred to*

Sentilles v. Inter-Caribbean Shipping Corp., 361 U. 107 (S.C., 1959) — *considered*

Sindell v. Abbot Laboratories, 607 P.2d 924 (Cal. S.C., 1980) — *considered*

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Wilsher v. Essex Area Health Authority, [1986] 3 All E.R. 801, [1987] 2 W.L.R. 425 (C.A.), rev'd [1988] 1 All E.R. 871, [1988] 2 W.L.R. 557 (H.L.) — *considered*

APPEAL from judgment of the New Brunswick Court of Appeal (1988), 84 N.B.R. (2d) 401, affirming judgment of Turnbull J. (1986), 40 C.C.L.T. 298 (N.B. Q.B.), finding defendant ophthalmologist liable in negligence

The judgment of the Court was delivered by *Sopinka J.*:

1 The issue of law in this case is whether the plaintiff in a malpractice suit must prove causation in accordance with traditional principles or whether recent developments in the law justify a finding of liability on the basis of some less onerous standard. The practical effect of a determination of this issue will be whether the appellant was liable for the loss by the respondent of the vision in her right eye.

Facts

2 The respondent, age 70 at the time of trial, consulted the appellant with respect to problems with her vision. The appellant is a medical doctor specializing in the field of ophthalmology. The respondent was "legally blind" in her right eye. She was advised that she had a cataract which should be surgically removed. After the appellant had explained the operation and the risks involved, the respondent consented. The accepted procedure for elderly patients consisted of local anaesthetization, to avoid risks associated with general anaesthetic, followed by removal of the cataract and implantation of a prosthetic lens into the anterior chamber of the eye behind the cornea.

3 The procedure is first to anaesthetize the eyelid to prevent blinking. Then a needle is inserted underneath the eyeball to inject anaesthetic into the retrobulbar muscles behind the eyeball to prevent movement and pain. These muscles control eye movement and surround the optic nerve. One complication, which occurs in one to three per cent of cases, is haemorrhage in the retrobulbar area caused by inserting the needle. There is no treatment for such haemorrhage but to let it be reabsorbed naturally. A common result of such haemorrhage is pressure behind the eyeball, which can cause the contents of the eye to be expelled when an incision is made in the cornea during the procedure to remove the cataract. Both experts testifying at trial stated that if retrobulbar haemorrhage occurs, the operation should not be continued. They also testified that an incision into the eye would remove the tamponade effect created by an intact eyeball, allowing a retrobulbar haemorrhage to flow more freely.

4 The classic symptoms of retrobulbar haemorrhage are redness of the eyelids where they touch the eyeball, and hardness of the eye. After injecting the anaesthetic into the retrobulbar area of the eye, Doctor Farrell noticed a small discolouration, 1 to 2 cm in diameter, at the puncture site below the eye on the surface of the skin. On discovery he stated that this was a very small retrobulbar bleed. He palpated the eye, finding that it was not hard, and there were no other signs of retrobulbar haemorrhage. After waiting 30 minutes he proceeded with the surgery. The operation went normally. The trial Judge accepted Mrs. Snell's evidence that Dr. Farrell told another doctor assisting him that he would have to hurry the operation.

5 Following the surgery, Mrs. Snell developed excruciating pain and was given pain killers. That evening Dr. Farrell removed the patch on Mrs. Snell's eye, finding more blood than at the time of surgery. A retrobulbar bleed had obviously occurred. Dr. Farrell found there to be pressure on the eye, although it was not too great, and he did not accurately measure it until a month later. There was blood in the anterior chamber, which cleared rapidly, and blood in the vitreous chamber, which took some 9 months to clear. When the vitreous chamber cleared Dr. Farrell was able to see for the first time that the optic nerve had atrophied, resulting in the loss of sight in Mrs. Snell's right eye.

6 Atrophy results from a loss of the optic nerve's blood supply. One possible cause is pressure due to retrobulbar haemorrhage. The plaintiff's expert, Dr. Samis, examined Mrs. Snell in 1985 (about 17 months after the operation) finding new blood vessel formation in the iris, which indicated that she had suffered a stroke in the back of the eye at some point. He could not identify what caused the stroke. He testified that a major cause of optic nerve atrophy is a stroke in the eye itself, which is most likely in a patient with cardiovascular disease, high blood pressure or diabetes. Mrs. Snell suffered from the latter two conditions, although only to the extent that they were controlled by diet rather than medication. Mrs. Snell also suffered from severe glaucoma, which over a long period can also cause optic nerve atrophy. The plaintiff's expert testified that it was unusual to have chronic glaucoma in just one eye, like Mrs. Snell, unless there has been an intervention of some type. The only intervention of which the expert was aware was the operation itself.

7 Neither expert was able to express with certainty an opinion as to what caused the atrophy in this case or when it occurred.

8 The respondent succeeded in an action against the appellant in the Court of Queen's Bench of New Brunswick, the trial Judge finding that the appellant was liable in negligence: (1986), 40 C.C.L.T. 298. The appellant's appeal to the Court of Appeal of New Brunswick was dismissed, (1988), 84 N.B.R. (2d) 401.

Judgments

Court of Queen's Bench (Turnbull J.)

9 The respondent sued claiming both in negligence and battery. Considering his conclusion with respect to negligence, the trial Judge did not make a finding with respect to battery.

10 The trial Judge accepted the appellant's evidence that the respondent did not develop the hardening of the eye ordinarily associated with a retrobulbar bleed. He concluded, however, that the appellant had thought that there was a small retrobulbar bleed and that he would have to work quickly before it exerted pressure on the content of the eye. He remarked that the appellant's decision "went beyond a judgment call" and he accepted the evidence of the expert Dr. Samis that, where there is bleeding other than the obvious pinprick of the needle, the operation should be aborted as it is impossible to determine the location of the bleeding.

11 Turnbull J. was of the opinion that once the appellant had made the decision to proceed with the operation the onus shifted to him under the doctrine of res ipsa loquitur. In so concluding, he relied upon the decision of the Supreme Court of Canada in *Finlay v. Auld*, [1975] 1 S.C.R. 338, 6 N.S.R. (2d) 261, 43 D.L.R. (3d) 216, 1 N.R. 1. However, as the defendant could provide an explanation of the occurrence equally consistent with there being no negligence, the plaintiff could not succeed under this doctrine.

12 Although neither of the expert witnesses called by the parties could say whether the operation had caused the injury, the trial Judge was satisfied that the facts of the case at Bar brought it "within an emerging branch of the law of causation" whereby the onus to disprove causation shifts to the defendant in certain circumstances. In this regard, he relied on the decision of the House of Lords in *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008, [1973] 1 W.L.R. 1. He concluded that the respondent had prima facie proved that the appellant's actions had caused her injury and that the appellant had not satisfied the onus that had shifted to him. Therefore causation, and negligence, was made out.

Court of Appeal (Hoyt J.A. for the Court)

13 In the opinion of the Court of Appeal, the evidence supported the trial Judge's conclusion that the appellant recognized a small retrobulbar haemorrhage following his administration of the anaes thetic. Hoyt J.A. considered *Wilsher v. Essex Area Health Authority*, [1986] 3 All E.R. 801, [1987] 2 W.L.R. 425 (C.A.), and approved of the analysis of *McGhee*, supra, by Mustill L.J. According to Mustill L.J., if it is established that conduct of a certain kind materially adds to the risk of injury, if the defendant engages in such conduct in breach of a common law duty, and if the injury is the kind to which the conduct related, then the defendant is taken to have caused the injury even though the existence and extent of the contribution made by the breach cannot be ascertained. The Court of Appeal found that Turnbull J. was correct in applying the decision of the House of Lords in *McGhee*. The conduct of the appellant, in not aborting the operation, made it more likely that the respondent, to whom the appellant owed a duty, would lose the sight in her right eye.

The Issues

14

1. Is the burden of proof of causation in a medical malpractice case on the plaintiff and if so, how is it satisfied?

2. If the burden of proof of causation is on the plaintiff, did the trial Judge infer causation in this case and if not, ought he to have done so?

Causation — Principles

15 Both the trial Judge and the Court of Appeal relied on *McGhee*, which (subject to its re-interpretation in the House of Lords in *Wilsher*, supra) purports to depart from traditional principles in the law of torts that the plaintiff must prove on a balance of probabilities that, but for the tortious conduct of the defendant, the plaintiff would not have sustained the injury complained of. In view of the fact that *McGhee* has been applied by a number of courts in Canada to reverse the ordinary burden of proof with respect to causation, it is important to examine recent developments in the law relating to causation and to determine whether a departure from well-established principles is necessary for the resolution of this appeal.

16 The traditional approach to causation has come under attack in a number of cases in which there is concern that due to the complexities of proof, the probable victim of tortious conduct will be deprived of relief. This concern is strongest in circumstances in which, on the basis of some percentage of statistical probability, the plaintiff is the likely victim of the combined tortious conduct of a number of defendants, but cannot prove causation against a specific defendant or defendants on the basis of particularized evidence in accordance with traditional principles. The challenge to the traditional approach has manifested itself in cases dealing with non-traumatic injuries such as man-made diseases resulting from the widespread diffusion of chemical products, including product liability cases in which a product which can cause injury is widely manufactured and marketed by a large number of corporations. The developments in this area are admirably surveyed by Professor John G. Fleming in "Probabilistic Causation in Tort Law" (1989), 68 Can. Bar Rev. 661. Except for the United States, this challenge has had little impact in the common law jurisdictions. Even in the United States, its effect has been sporadic. In the area referred to above, courts in some states have experimented with a theory of probability which requires proof on the basis of probability at less than 51 per cent, and apportionment of liability among defendant manufacturers of the product in question on the basis of market share. See: Fleming and *Sindell v. Abbott Laboratories*, 607 P.2d 924 (Cal. S.C. 1980).

17 Although, to date, these developments have had little impact in other common law countries, it has long been recognized that the allocation of the burden of proof is not immutable. The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 *Wigmore on Evidence*, 4th ed. (Boston: Little, Brown & Co., 1981), s. 2486, at p. 292. In a civil case, the two broad principles are:

1. that the onus is on the party who asserts a proposition, usually the plaintiff; and

2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

18 This Court has not hesitated to alter the incidence of the ultimate burden of proof when the underlying rationale for its allocation is absent in a particular case: see *National Trust Co. v. Wong Aviation Ltd.*, [1969] S.C.R. 481, 3 D.L.R. (3d) 55. This flexibility extends to the issue of causation. In *Cook v. Lewis*, [1951] S.C.R. 830, [1952] 1 D.L.R. 1, the plaintiff was struck by a bullet fired from the gun of one of his two companions. The evidence supported the theory that they fired simultaneously in the plaintiff's direction when they knew his location. The plaintiff could not prove which shot struck him and therefore on traditional rules, he would fail. The basic premises referred to above did not make good legal sense in this instance. Both defendants were negligent and each asserted that his negligence did not cause the injury. Since the plaintiff could establish that one of them caused the injury, why should not the defendants be required to exculpate themselves by proving their assertions, and failing that, be held equally liable? Applying the reasoning in *Summers v. Tice* (1948), 5 A.L.R. (2d) 91, this Court concluded that if it could not be determined which defendant fired the shot which struck the plaintiff, both defendants must be found liable.

19 Proof of causation in medical malpractice cases is often difficult for the patient. The physician is usually in a better position to know the cause of the injury than the patient. On the basis of the second basic principle referred to above, there is an argument that the burden of proof should be allocated to the defendant. In some jurisdictions, this has occurred to an extent by operation of the principle of res ipsa loquitur: *Cross on Evidence*, 6th ed. (London: Butterworths, 1985), at p. 138. In Canada,

the rule has been generally regarded as a piece of circumstantial evidence which does not shift the burden of proof: see *Interlake Tissue Mills Co. v. Salmon*, [1948] O.R. 950, [1949] 1 D.L.R. 207 (C.A.); *Cudney v. Clements Motor Sales Ltd.*, [1969] 2 O.R. 209, 5 D.L.R. (3d) 3 (C.A.); *Kirk v. McLaughlin Coal & Supplies Ltd.*, [1968] 1 O.R. 311, 66 D.L.R. (2d) 321 (C.A.); and *Jackson v. Millar* (1972), [1973] 1 O.R. 399, 31 D.L.R. (3d) 263 (C.A.). As the rule was properly held not to be applicable in this case and no argument was directed to this issue, I will refrain from commenting further upon it.

20 This brings me to the *McGhee* case and its influence on subsequent cases, particularly in the medical malpractice field. The appellant contracted dermatitis while employed as a labourer emptying pipe kilns. This work exposed him to clouds of abrasive dust. His employer provided no washing facilities with the result that the appellant would ride home on his bicycle caked with grime and sweat. He sued his employer, the respondent, for negligence. The medical evidence showed that the dermatitis was caused by the working conditions and that the longer the exposure to dust, the greater the chance of developing dermatitis. The medical evidence could not attribute the dermatitis to the additional exposure after work. The appellant's expert could not say that if washing facilities had been provided, the appellant would not have contracted the disease. A breach of duty was found with respect to the failure to provide washing facilities but not with respect to the conditions under which the kilns were operated. The Lord Ordinary dismissed the action on the ground that it had not been shown that the breach of duty caused or contributed to the injury. An appeal to the First Division of the Court of Session failed but an appeal was allowed by the House of Lords.

21 Of the five speeches in the House of Lords, only Lord Wilberforce advocated a reversal of the burden of proof. He did so in the following passage which has been the basis of decisions in a number of cases both in Canada and in Britain. He states [at p. 1012, All E.R.]:

> First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.

He added [at p. 1013]:

> And I must say that, at least in the present case, to bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make.

22 Two theories of causation emerge from an analysis of the speeches of the Lords in this case. The first, firmly espoused by Lord Wilberforce, is that the plaintiff need only prove that the defendant created a risk of harm and that the injury occurred within the area of the risk. The second is that in these circumstances, an inference of causation was warranted in that there is no practical difference between materially contributing to the risk of harm and materially contributing to the harm itself.

23 The speeches were subjected to a careful examination and interpretation in *Wilsher v. Essex Area Health Authority*, [1988] 1 All E.R. 871, [1988] 2 W.L.R. 557, by Lord Bridge when some 15 years later, the House of Lords revisited the issue. The plaintiff claimed damages from the defendant health authority for negligence in medical treatment which resulted in a condition of the eyes leading to blindness. A likely cause of the condition, but not a definite one in the opinion of medical experts, was too much oxygen. The plaintiff proved that for a period of time he was supersaturated with oxygen. A number of different factors other than excessive oxygen could have caused or contributed to the injury. The expert evidence was conflicting. The trial Judge applied *McGhee* and held the defendant liable since it had failed to prove that the plaintiff's condition had not resulted from its negligence. The Court of Appeal dismissed the appeal by a majority judgment with the Vice-Chancellor dissenting. The House of Lords allowed the appeal and directed a new trial. Lord Bridge, delivering the unanimous judgment of the Court, reaffirmed the principle that the burden of proving causation rested on the plaintiff. Since the trial Judge had not made the relevant finding of fact to sort out the conflicting evidence, a new trial was directed on this basis. Lord Bridge interpreted *McGhee* as espousing no new principle. Instead, *McGhee* was explained as promoting a robust and pragmatic approach to the facts to enable an inference of negligence to be drawn even though medical or scientific expertise cannot arrive at a definitive conclusion. In the course of his reasons, Lord Bridge stated [at pp. 881-882, All E.R.]:

> The conclusion I draw from these passages is that *McGhee v. National Coal Board* laid down no new principle of law whatever. On the contrary, it affirmed the principle that the onus of proving causation lies on the pursuer or plaintiff. Adopting a robust and pragmatic approach to the undisputed primary facts of the case, the majority concluded that it was a legitimate inference of fact that the defenders' negligence had materially contributed to the pursuer's injury. The decision, in my opinion, is of no greater significance than that and the attempt to extract from it some esoteric principle which in some way modifies, as a matter of law, the nature of the burden of proof of causation which a plaintiff or pursuer must discharge once he has established a relevant breach of duty is a fruitless one.

Earlier, he stated [at p. 880]:

> But where the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of common sense, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee's* case.

Lord Bridge concluded with a caution [at p. 883]:

> But, whether we like it or not, the law, which only Parliament can change, requires proof of fault causing damage as the basis of liability in tort. We should do society nothing but disservice if we made the forensic process still more unpredictable and hazardous by distorting the law to accommodate the exigencies of what may seem hard cases.

24 Canadian cases decided after *McGhee* but before *Wilsher* tended to follow *McGhee* by adopting either the reversal of onus or the inference interpretation. Which interpretation was adopted made no practical difference because even when the latter approach was applied, the creation of the risk by the defendant's breach of duty was deemed to have established a prima facie case, thus shifting the onus to the defendant. *Powell v. Guttman (No. 2)*, 6 C.C.L.T. 183, [1978] 5 W.W.R. 228, 89 D.L.R. (3d) 180, 2 L. Med. Q. 279 at 291 (Man. C.A.) and *Letnik v. Metropolitan Toronto (Municipality)*, [1988] 2 F.C. 399, 44 C.C.L.T. 69, 49 D.L.R. (4th) 707, 82 N.R. 261 (C.A.), applied the reversal of proof theory. In *Dalpe v. Edmundston* (1979), 25 N.B.R. (2d) 102, 51 A.P.R. 102, the New Brunswick Court of Appeal, in a flooding case in which negligence was alleged against a municipal authority, held that in circumstances in which a risk of the type of harm which in fact occurred had been created, causation *should* be inferred in the absence of evidence to the contrary on the part of the defendant. In *Nowsco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.* (1981), 16 C.C.L.T. 23, 7 Sask. R. 291, 122 D.L.R. (3d) 228, the Saskatchewan Court of Appeal applied *McGhee* on the basis that proof that the breach of duty which gave rise to the risk "is *prima facie* proof that the fire was caused by the escape of propane gas" (p. 248, D.L.R.).

25 Decisions in Canada after *Wilsher* accept its interpretation of *McGhee*. In the circumstances in which *McGhee* had been previously interpreted to support a reversal of the burden of proof, an inference was now permissible to find causation, notwithstanding that causation was not proved by positive evidence: see *Rendall v. Ewert*, 38 B.C.L.R. (2d) 1, 36 C.P.C. (2d) 117, [1989] 6 W.W.R. 97, 60 D.L.R. (4th) 513 (C.A.), leave to appeal to S.C.C. refused, [1990] 1 W.W.R. lxxii (note); *Kitchen v. McMullen* (1989), 50 C.C.L.T. 213, 62 D.L.R. (4th) 481, 100 N.B.R. (2d) 91, 252 A.R. 91 (C.A.); *Westco Storage Ltd. v. Inter-City Gas Utilities Ltd.*, [1989] 4 W.W.R. 289, 59 Man. R. (2d) 37 (C.A.), leave to appeal to S.C.C. refused, [1989] 6 W.W.R. lxviii (note), 102 N.R. 400 (note) (Man. C.A.); and *Haag v. Marshall* (1989), 1 C.C.L.T. (2d) 99, 39 B.C.L.R. (2d) 205, [1990] 1 W.W.R. 361, 61 D.L.R. (4th) 371 (C.A.).

26 The question that this Court must decide is whether the traditional approach to causation is no longer satisfactory in that plaintiffs in malpractice cases are being deprived of compensation because they cannot prove causation where it in fact exists.

27 Causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former. Is the requirement that the plaintiff prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury too onerous? Is some lesser relationship sufficient to justify compensation? I have examined the alternatives arising out of the *McGhee* case. They were that

the plaintiff simply prove that the defendant created a risk that the injury which occurred would occur. Or, what amounts to the same thing, that the defendant has the burden of disproving causation. If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives. In my opinion, however, properly applied, the principles relating to causation are adequate to the task. Adoption of either of the proposed alternatives would have the effect of compensating plaintiffs where a substantial connection between the injury and the defendant's conduct is absent. Reversing the burden of proof may be justified where two defendants negligently fire in the direction of the plaintiff and then by their tortious conduct destroy the means of proof at his disposal. In such a case it is clear that the injury was not caused by neutral conduct. It is quite a different matter to compensate a plaintiff by reversing the burden of proof for an injury that may very well be due to factors unconnected to the defendant and not the fault of anyone.

28 The experience in the United States tells us that liberalization of rules for recovery in malpractice suits contributed to the medical malpractice crisis of the 1970's: See Glen O. Robinson, "The Medical Malpractice Crisis of the 1970's: A Retrospective", (Spring 1986) 49 Law and Contemporary Problems 5 at 18. Insurance premiums in some states increased up to 500 per cent. Some major commercial insurers withdrew from the market entirely, creating serious problems of availability of insurance. See James R. Posner, "Trends in Medical Malpractice Insurance, 1970-85" (Spring 1986) 49 Law & Contemporary Problems 37 at 38.

29 In Britain, proposals to reverse the burden of proof in malpractice cases which gained momentum by virtue of the *McGhee* case were not adopted. In 1978, the Royal Commission on Civil Liability and Compensation for Personal Injury (*Pearson Report*, vol. 1) (London: H.M. Stationery Off., 1978) reported as follows [at p. 285]:

> Some witnesses suggested that, if the burden of proof were reversed, the patient's difficulties in obtaining and presenting his evidence would be largely overcome. It was said that doctors were in a better position to prove absence of negligence than patients were to establish liability. At the Council of Europe colloquy, however, although it was agreed that the patient was at a disadvantage when he sought to establish a claim, serious doubts were expressed on the desirability of making a radical change in the burden of proof. We share these doubts. We think that there might well be a large increase in claims, and although many would be groundless, each one would have to be investigated and answered. The result would almost certainly be an increase in defensive medicine.

The *Wilsher* decision in the House of Lords which followed ensured that the common law did not undermine this recommendation.

30 I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] A.C. 824, [1972] 2 All E.R. 475 at 490 (H.L.):

> essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

Furthermore, as I observed earlier, the allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts. In *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969 at 970, Lord Mansfield stated:

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

31 In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary. This has been expressed in terms of shifting the burden of proof. In *Cummings v. Vancouver* (1911), 16 B.C.R. 494, 1 W.W.R. 31 at 34 (C.A.), Irving J.A. stated:

> Stephens in his Digest (*Evidence Act, 1896*) says:

> In considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunities of knowledge with respect to the fact to be proved, which may be possessed by the parties respectively.

Hollis v. Young (1909) 1 K.B., 629, illustrates the rule that very little affirmative evidence will be sufficient where the facts lie almost entirely within the knowledge of the other side.

32 In *Re Dunlop Holdings Ltd.'s Application*, [1979] R.P.C. 523 at 544 (C.A.), Buckley L.J. affirmed this principle in the following terms:

> Where the relevant facts are peculiarly within the knowledge of one party, it is perhaps relevant to have in mind the rule as stated in Stephen's Digest, which is cited at page 86 of Cross on Evidence [3rd ed.]:
>
> > In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the facts to be proved which may be possessed by the parties respectively.
>
> '*This does not mean*', Sir Rupert continues, '*that the peculiar means of knowledge of one of the parties relieves the other of the burden of adducing some evidence with regard to the facts in question, although very slight evidence will often suffice*'.

[Emphasis added.] See also *Diamond v. British Columbia Thoroughbred Breeders' Society* (1965), 52 D.L.R. (2d) 146 at 158 (B.C. S.C.); *Pleet v. Canadian Northern Quebec Railway* (1921), 50 O.L.R. 223, 26 C.R.C. 227, 64 D.L.R. 316 at 319-320 (C.A.); and *Guaranty Trust Co. v. Mall Medical Group*, [1969] S.C.R. 541 at 545, 4 D.L.R. (3d)1.

33 These references speak of the shifting of the secondary or evidential burden of proof or the burden of adducing evidence. I find it preferable to explain the process without using the term secondary or evidential burden. It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden. See: Cross, 6th ed., at p. 129. In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

34 The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial Judge is entitled to take account of Lord Mansfield's famous precept. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the ... facts" (at p. 881).

35 It is not therefore essential that the medical experts provide a firm opinion supporting the plaintiff's theory of causation. Medical experts ordinarily determine causation in terms of certainties whereas a lesser standard is demanded by the law. As pointed out in David W. Louisell, *Medical Malpractice*, vol. 3 (New York: Matthew Bender, 1977-1990), the phrase "in your opinion with a reasonable degree of medical certainty," which is the standard form of question to a medical expert, is often misunderstood. The author explains that [at pp. 25-57]:

> Many doctors do not understand the phrase ... as they usually deal in 'certainties' that are 100% sure, whereas 'reasonable' certainties which the law requires need only be more probably so, i.e., 51%.

36 In David M. Harvey, *Medical Malpractice* (Indianapolis: A. Smith, 1973), the learned author states [at p. 169]:

> Some courts have assumed an unrealistic posture in requiring that the medical expert state conclusively that a certain act caused a given result. Medical testimony does not lend itself to precise conclusions because medicine is not an exact science.

37 The respective functions of the trier of fact and the expert witness are distinguished by Justice Brennan of the United States Supreme Court in the following passage in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 at 109-110 (1959):

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony, into consideration.

With respect, it was the failure to appreciate this distinction which led Lord Wilberforce in *McGhee* to suggest bridging the evidential gap by reversing the burden of proof. He writes [at p. 1013]:

> [T]o bridge the evidential gap by inference seems to me something of a fiction, since it was precisely this inference which the medical expert declined to make.

38 In *Wilsher*, Lord Bridge gave effect to this difference when he explained *McGhee* [at p. 880]:

> [W]here the layman is told by the doctors that the longer the brick dust remains on the body, the greater the risk of dermatitis, although the doctors cannot identify the process of causation scientifically, there seems to be nothing irrational in drawing the inference, as a matter of *common sense*, that the consecutive periods when brick dust remained on the body probably contributed cumulatively to the causation of the dermatitis. I believe that a process of inferential reasoning on these general lines underlies the decision of the majority in *McGhee's* case.

[Emphasis added.]

39 The issue, then, in this case is whether the trial Judge drew an inference that the appellant's negligence caused or contributed to the respondent's injury, or whether, applying the above principles, he would or ought to have drawn such an inference.

Causation in this Case

40 The trial Judge found that the appellant was negligent in continuing with the operation when retrobulbar bleeding occurred. This finding is not contested and is fully supported by the evidence. An opinion expressed by both the appellant and his assistant, Dr. Quinn, that what occurred was a "lid bleed" was rejected by the trial Judge. It was common ground that the respondent's blindness occurred due to atrophy or death of the optic nerve which was occasioned by a stroke. A stroke is the destruction of a blood vessel due to an interruption of the blood supply. There were two possible causes of the stroke, one of which was natural and the other due to continuing the operation. Dr. Regan, the appellant's expert, testified as follows on cross-examination:

> Q. But it's not the only thing. As you indicated earlier in your testimony a retrobulbar haemorrhage can also place pressure on the optic nerve.
>
> A. Yes.
>
> Q. And if it becomes aggravated for whatever reason or in whatever fashion it can eventually harm the optic nerve, even cause stoke?
>
> A. Could.
>
> Q. Well the stroke could occur due to some systemic disease of the patient as well, couldn't it?
>
> A. By stroke you're talking about destruction of a vessel?

Q. Yes.

A. Yes.

Q. That could happen either as a result of a retrobulbar bleed which continued or got aggravated, or naturally. It could occur naturally without any traumatic interference.

A. That's correct.

Earlier in chief, Dr. Regan gave the following answer:

Q. Is it possible to tell what cased the atrophy of the optic nerve in your opinion?

A. I would think probably the base cause is the retrobulbar haemorrhage, the fact that there was enough pressure behind the eye at some point that caused all this bleeding, that this may have been sufficient to compromise the blood supply to the optic nerve and result in the optic damage, but I can't tell you this for sure, it's just a ... in reading the charts this may well be what it is. Certainly there are people that have retrobulbar haemorrhages who do not have any compromise of the vascular supply and do not end up with nerve damage.

The appellant testified in cross-examination as follows:

Q. Right. But we're on common ground that the most likely cause of blindness in Mrs. Snell's case was an ocular occlusion or an occlusion, a stroke, affecting the blood supply to the optic nerve.

A. Yes.

Q. The most reasonable explanation.

In re-examination he gave the following answer:

Q. The question, doctor, is that there's no evidence, is there, that anything other than the operation, the whole operation, was a factor in causing the stroke which Mrs. Snell suffered. There's no evidence of anything external to the operation that caused that stroke, is there?

A. Well, it's partially semantics here but there's a very ... in medical terms there's a very distinct definition or distinction between the operation and the anesthetic so that if you're including the anesthetic in your general term operation, then fine, I can agree, but in particular, there's no evidence that the operation per se, other than the anesthetic, involved or caused a problem with the stroke. There are the other systemic problems that Mrs. Snell has that may possibly have caused the stroke *but there's no indication that they did.*

[Emphasis added.]

41 The anaesthetic, of course, was the needle which caused the retrobulbar bleeding. The trial Judge found that it should have been recognized as such and the operation terminated. If it had, the bleeding would have been stanched. Continuing with the operation permitted the bleeding to continue undetected because the eye was occluded by blood and patched. Palpation of the eye to test for hardness apparently failed to disclose the haemorrhaging. A crucial finding of the trial Judge was the following [at p. 303]:

Neither Dr. Samis nor Dr. Regan could give an opinion as to what caused the atrophy to the optic nerve. Neither doctor could state when the atrophy occurred since it was some eight months before Dr. Farrell could see the optic nerve because of the blood in the anterior chamber. It was atrophied when he first saw it in August 1984. Neither doctor was able to express an opinion that the operation contributed to the atrophy *except to the extent that the retrobulbar haemorrhage which may have been stanched may have been reopened by the operation.* Perhaps what eventually did happen was going

> to happen once the injection was completed. The retrobulbar bleeding commenced at that time. It may have been a slow haemorrhage that had not stopped and was not going to stop. *The haemorrhage would have been allowed to flow more freely with the removal of the tamponade effect of opening the cornea.* I cannot go beyond this since neither doctor did and I should not speculate in matters of medical opinion. Both doctors agree that the atrophy resulted from a loss of its own blood supply. *This may have been as a result of natural causes although I am not inclined to this view. The operation would assist bleeding while the cornea remained open.*

[Emphasis added.]

42 It is significant that this finding virtually rules out natural causes as did the appellant. The trial Judge then continued [at pp. 312-313]:

> Dr. Farrell greatly increased the risk of injury to Mrs. Snell's eye by operating when he knew she had a retrobulbar bleed. *Bleeding in the retrobulbar area was facilitated during the operation.* No one can say what happened or with certainty when it happened, because the bleeding from the cataract removal prohibited the doctors from seeing the optic nerve. I am of the opinion that the defendant was 'asking for trouble' by operating when he knew his patient had a retrobulbar bleed and that the increased risk was followed by injury in the same area of risk.
>
> *I am of the opinion that the plaintiff has prima facie proved that the defendant's actions caused the plaintiff's injury* and that the defendant has not satisfied the onus that shifted to him.

[Emphasis added.]

43 The finding in the last paragraph can be read as a finding of causation inferred from the circumstances and in the absence of evidence to the contrary in satisfaction of the evidential burden cast upon the defendant. Or it could be interpreted as accepting Lord Wilberforce's formulation in *McGhee* which reverses the ultimate burden upon finding that a risk was created and an injury occurred within the area of the risk. If the former was intended, I am of the opinion that such an inference was fully warranted on the evidence. On the other hand, if the latter is the interpretation to be placed on that statement, and I am inclined to think that it is, then I am satisfied that had the trial Judge applied the principles referred to above he would have drawn an inference of causation between the appellant's negligence and the injury to the respondent.

44 The appellant was present during the operation and was in a better position to observe what occurred. Furthermore, he was able to interpret from a medical standpoint what he saw. In addition, by continuing the operation which has been found to constitute negligence, he made it impossible for the respondent or anyone else to detect the bleeding which is alleged to have caused the injury. In these circumstances, it was open to the trial Judge to draw the inference that the injury was caused by the retrobulbar bleeding. There was no evidence to rebut this inference. The fact that testing the eye for hardness did not disclose bleeding is insufficient for this purpose. If there was any rebutting evidence it was weak, and it was open to the trial Judge to find causation, applying the principles to which I have referred.

45 I am confident that had the trial Judge not stated that "I cannot go beyond this since neither doctor did and I should not speculate", he would have drawn the necessary inference. In stating the above, he failed to appreciate that it is not essential to have a positive medical opinion to support a finding of causation. Furthermore, it is not speculation but the application of common sense to draw such an inference where, as here, the circumstances, other than a positive medical opinion, permit.

46 While this Court does not ordinarily make findings of fact, this course is fully justified in this case. First, I am of the opinion that the trial Judge either made the necessary finding or would have but for error of law. Second, it would be a disservice to all to send this case back for a new trial when the evidence is not essentially in conflict. I note that in *Wilsher*, the House of Lords refrained from deciding the case only because the evidence of the experts was seriously in conflict. That is not the case here.

47 In the result, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

* Chief Justice at the time of hearing

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2007 SCC 7
Supreme Court of Canada

Hanke v. Resurfice Corp.

2007 CarswellAlta 130, 2007 CarswellAlta 131, 2007 SCC 7, [2007] 1 S.C.R. 333, [2007] 4 W.W.R. 1, [2007] R.R.A. 1, [2007] A.W.L.D. 504, [2007] A.W.L.D. 506, [2007] S.C.J. No. 7, 153 A.C.W.S. (3d) 1012, 278 D.L.R. (4th) 643, 357 N.R. 175, 394 W.A.C. 333, 404 A.R. 333, 45 C.C.L.T. (3d) 1, 69 Alta. L.R. (4th) 1, J.E. 2007-333

Resurfice Corp. (Appellant) and Ralph Robert Hanke (Respondent)

LeClair Equipment Ltd. (Appellant) and Ralph Robert Hanke (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: December 12, 2006
Judgment: February 8, 2007
Docket: 31271

Proceedings: reversing *Hanke v. Resurfice Corp.* (2005), 53 Alta. L.R. (4th) 219, 380 A.R. 216, 363 W.A.C. 216, 2005 ABCA 383, 2005 CarswellAlta 1600 (Alta. C.A.); reversing *Hanke v. Resurfice Corp.* (2003), 2003 CarswellAlta 1059, 2003 ABQB 616, 333 A.R. 371 (Alta. Q.B.)

Counsel: Daniel W. Hagg, Q.C., Jeffrey R. Sermet, for Appellant, Resurfice Corp.
David J. Cichy, Q.C., E. Jane Sidnell, for Appellant, LeClair Equipment Ltd.
Jonathan P. Rossall, Q.C., David D. Risling, for Respondent

Subject: Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Torts --- Negligence — Causation — Foreseeability and remoteness

Plaintiff operator of ice-surfacing machine placed water hose into gasoline tank of machine — Hot water overfilled gasoline tank, releasing vaporized gasoline into air which then ignited causing explosion and fire — Plaintiff was badly burned as result — Plaintiff brought action for damages against manufacturer and distributor of machine — Plaintiff alleged gasoline and water tanks were similar in appearance and placed together on machine, making it easy to confuse two — Trial judge dismissed plaintiff's action — Court of Appeal set aside trial judgment and ordered new trial — Defendants appealed — Appeal allowed; trial judgment restored — No error of law or palpable and overriding error of fact or mixed fact and law was established in trial's judge's approach or conclusion on foreseeability — There was evidence supporting trial judge's conclusion that plaintiff was not confused by two tanks — Seriousness of plaintiff's injury and relative financial position of parties were not relevant to foreseeability — Trial judge did not need to engage in contributory negligence analysis as he found not only that plaintiff's carelessness was responsible for injuries, but also that alleged design defects were not responsible for those injuries — Court of Appeal erred in applying "material contribution" test — Basic test for causation remains "but for" test.

Torts — Negligence — Strict liability (rule in Rylands v. Fletcher) — Product liability — Duty to warn (product labelling)

Plaintiff operator of ice-surfacing machine placed water hose into gasoline tank of machine — Hot water overfilled gasoline tank, releasing vaporized gasoline into air which then ignited causing explosion and fire — Plaintiff was badly burned as result — Plaintiff brought action for damages against manufacturer and distributor of machine — Plaintiff alleged gasoline and water tanks were similar in appearance and placed together on machine, making it easy to confuse two — Trial judge dismissed plaintiff's action — Court of Appeal set aside trial judgment and ordered new trial — Defendants appealed — Appeal allowed; trial judgment restored — No error of law or palpable and overriding error of fact or mixed fact and law was established in trial's judge's approach or conclusion on foreseeability — There was evidence supporting trial judge's conclusion that plaintiff was not confused by two tanks — Seriousness of plaintiff's injury and relative financial position of parties were not relevant to foreseeability — Trial judge did not need to engage in contributory negligence analysis as he found not only that plaintiff's carelessness was responsible for injuries, but also that alleged design defects were not responsible for those injuries — Court of Appeal erred in applying "material contribution" test — Basic test for causation remains "but for" test.

Délits civils — Négligence — Lien de causalité — Prévisibilité et éloignement

Demandeur, l'opérateur d'une surfaceuse à glace, a placé un boyau d'arrosage dans le réservoir à essence de la machine — Eau chaude a fait déborder le réservoir à essence, ce qui a répandu de la vapeur d'essence dans l'air; la vapeur s'est par la suite enflammée et a causé une explosion et un incendie — Demandeur a été grièvement brûlé — Demandeur a intenté une action en dommages-intérêts contre le fabricant et le distributeur de la machine — Demandeur soutenait qu'il était facile de confondre les réservoirs d'essence et d'eau chaude en raison de leur ressemblance et de leur proximité — Premier juge a rejeté l'action du demandeur — Cour d'appel a infirmé le jugement de première instance et a ordonné la tenue d'un nouveau procès — Défenderesses ont interjeté appel — Pourvoi accueilli; jugement de première instance rétabli — Premier juge n'a pas commis d'erreur de droit, d'erreur de fait manifeste et dominante ou d'erreur mixte de fait et de droit dans sa démarche ou dans sa conclusion sur la prévisibilité — Conclusion du juge que le demandeur ne pouvait confondre les deux réservoirs trouvait un appui dans la preuve — Gravité du préjudice causé au demandeur et situation financière relative des parties n'étaient pas pertinentes en matière de prévisibilité — Premier juge n'avait pas à examiner la question de la négligence contributive étant donné sa conclusion que le demandeur était responsable de ses blessures en raison de son imprudence et que ces blessures n'étaient pas attribuables aux vices de conception allégués — Cour d'appel a commis une erreur en appliquant le critère de la « contribution appréciable » — Critère de base en matière de lien de causalité demeure celui du « facteur déterminant ».

Délits civils — Négligence — Responsabilité stricte (règle de Rylands v. Fletcher) — Responsabilité du fait du produit — Obligation de prévenir (étiquetage du produit)

Demandeur, l'opérateur d'une surfaceuse à glace, a placé un boyau d'arrosage dans le réservoir à essence de la machine — Eau chaude a fait déborder le réservoir à essence, ce qui a répandu de la vapeur d'essence dans l'air; la vapeur s'est par la suite enflammée et a causé une explosion et un incendie — Demandeur a été grièvement brûlé — Demandeur a intenté une action en dommages-intérêts contre le fabricant et le distributeur de la machine — Demandeur soutenait qu'il était facile de confondre les réservoirs d'essence et d'eau chaude en raison de leur ressemblance et de leur proximité — Premier juge a rejeté l'action du demandeur — Cour d'appel a infirmé le jugement de première instance et a ordonné la tenue d'un nouveau procès — Défenderesses ont interjeté appel — Pourvoi accueilli; jugement de première instance rétabli — Premier juge n'a pas commis d'erreur de droit, d'erreur de fait manifeste et dominante ou d'erreur mixte de fait et de droit dans sa démarche ou dans sa conclusion sur la prévisibilité — Conclusion du juge que le demandeur ne pouvait confondre les deux réservoirs trouvait un appui dans la preuve — Gravité du préjudice causé au demandeur et situation financière relative des parties n'étaient pas pertinentes en matière de prévisibilité — Premier juge n'avait pas à examiner la question de la négligence contributive étant donné sa conclusion que le demandeur était responsable de ses blessures en raison de son imprudence et que ces blessures n'étaient pas attribuables aux vices de conception allégués — Cour d'appel a commis

une erreur en appliquant le critère de la « contribution appréciable » — Critère de base en matière de lien de causalité demeure celui du « facteur déterminant ».

The plaintiff, operator of an ice-surfacing machine, placed a water hose into the gasoline tank of the machine. When hot water overfilled the gasoline tank, vaporized gasoline was released into the air which was then ignited by an overhead heater, causing an explosion and fire. The plaintiff was badly burned as a result. The plaintiff brought an action against the manufacturer and distributor of the machine for damages, alleging design defects. The plaintiff contended that the gasoline and water tanks were similar in appearance and placed close together on the machine, making it easy to confuse the two. The trial judge dismissed the action. He found that the plaintiff had not established that the accident was caused by the negligence of the manufacturer or distributor. The Court of Appeal set aside the trial judgment and ordered a new trial. The Court of Appeal concluded that the trial judge erred in both his foreseeability and causation analyses. The defendants appealed.

Held: The appeal was allowed and the trial judgment was restored.

While the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law was established in the trial judge's approach or conclusion. There was evidence supporting the trial judge's finding that the plaintiff was not confused by the two tanks, notably his own admission. Further, the seriousness of the plaintiff's injury and the relative financial position of the parties were not relevant to foreseeability.

With respect to causation, the trial judge did not need to engage in a contributory negligence analysis because he found not only that the plaintiff's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for those injuries. The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. The Court of Appeal erred in applying the "material contribution" test and in failing to recognize that the basic test for causation remains the "but for" test. The "material contribution" test only applies in special circumstances where factors outside the plaintiff's control make it impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. Further, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach of a duty of care.

Le demandeur, l'opérateur d'une surfaceuse à glace, a placé un boyau d'arrosage dans le réservoir à essence de la machine. L'eau chaude a fait déborder le réservoir à essence, ce qui a répandu de la vapeur d'essence dans l'air; la vapeur s'est par la suite enflammée en raison d'un radiateur suspendu et a causé une explosion et un incendie. Le demandeur a été grièvement brûlé. Il a intenté une action en dommages-intérêts contre le fabricant et le distributeur de la machine, alléguant des vices de conception. Il a soutenu qu'il était facile de confondre les réservoirs à essence et à eau de la machine parce qu'ils se ressemblaient et étaient à proximité l'un de l'autre. Le premier juge a rejeté l'action. Il a conclu que le demandeur n'avait pas démontré que l'accident avait été causé par la négligence du fabricant ou par celle du distributeur. La Cour d'appel a infirmé le jugement de première instance et a ordonné la tenue d'un nouveau procès. Elle a conclu que le premier juge s'était trompé tant dans son analyse de la prévisibilité que dans celle du lien de causalité. Les défenderesses ont interjeté appel.

Arrêt: Le pourvoi a été accueilli et le jugement de première instance a été rétabli.

Même si la Cour d'appel aurait privilégié une démarche différente en matière de prévisibilité, il demeure que le juge n'a pas commis dans sa démarche ou dans ses conclusions d'erreur de droit, d'erreur de fait manifeste et dominante ou d'erreur mixte de fait et de droit. La conclusion du premier juge que le demandeur ne pouvait confondre les deux réservoirs trouvait appui dans la preuve, notamment son propre aveu. De plus, la gravité du préjudice subi par le demandeur et la situation financière relative des parties n'étaient pas pertinentes en matière de prévisibilité.

En ce qui concernait le lien de causalité, le premier juge n'avait pas à examiner la question de la négligence contributive étant donné sa conclusion que le demandeur était responsable de ses blessures en raison de son imprudence et que ces blessures n'étaient pas attribuables aux vices de conception allégués. La Cour d'appel a erré en énonçant qu'il fallait utiliser le test de la « contribution appréciable » lorsque le préjudice pouvait possiblement avoir plusieurs causes. Elle a commis une erreur en appliquant le test de la « contribution appréciable » et en omettant de reconnaître que le test de base en matière de lien de causalité demeurait celui du « facteur déterminant ». Le test de la « contribution appréciable » ne s'applique que dans des circonstances particulière où le demandeur, en raison de facteurs qui échappent à son contrôle, est incapable de prouver à l'aide du test du « facteur déterminant » que la négligence du défendeur a causé le préjudice. De plus, le préjudice subi par le demandeur doit découler du risque créé par le manquement du défendeur à son devoir de diligence.

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Stewart v. Pettie (1995), 8 M.V.R. (3d) 1, 121 D.L.R. (4th) 222, 162 A.R. 241, 83 W.A.C. 241, 1995 CarswellAlta 406, 1995 CarswellAlta 1, 23 C.C.L.T. (2d) 89, 25 Alta. L.R. (3d) 297, [1995] 3 W.W.R. 1, [1995] 1 S.C.R. 131, 177 N.R. 297 (S.C.C.) — considered

Walker Estate v. York-Finch General Hospital (2001), 2001 SCC 23, 2001 CarswellOnt 1209, 2001 CarswellOnt 1210, 6 C.C.L.T. (3d) 1, 5 C.P.C. (5th) 1, 268 N.R. 68, 145 O.A.C. 302, [2001] 1 S.C.R. 647, 198 D.L.R. (4th) 193 (S.C.C.) — considered

APPEAL by defendants from judgment reported at *Hanke v. Resurfice Corp.* (2005), 53 Alta. L.R. (4th) 219, 380 A.R. 216, 363 W.A.C. 216, 2005 ABCA 383, 2005 CarswellAlta 1600 (Alta. C.A.), allowing appeal by plaintiff from judgment dismissing action for damages.

POURVOI des défenderesses à l'encontre de l'arrêt publié à *Hanke v. Resurfice Corp.* (2005), 53 Alta. L.R. (4th) 219, 380 A.R. 216, 363 W.A.C. 216, 2005 ABCA 383, 2005 CarswellAlta 1600 (Alta. C.A.), qui a accueilli le pourvoi du demandeur à l'encontre du jugement qui avait rejeté son action en dommages-intérêts.

***McLachlin C.J.C.*:**

1 This case involves a tragic injury that befell a young man, Mr. Hanke, when a water hose was placed into the gasoline tank of an ice-resurfacing machine rather than the water tank. When hot water overfilled the gasoline tank, vaporized gasoline was released into the air. It was ignited by an overhead heater, causing an explosion and fire. Mr. Hanke, who was employed by the City of Edmonton to run the ice-resurfacing machine and look after the ice-rink, was badly burned.

2 Mr. Hanke sued the manufacturer and distributor of the ice-resurfacing machine for damages, alleging design defects. He contended that the gasoline tank and the water tank were similar in appearance and placed close together on the machine, making it easy to confuse the two.

3 After a lengthy trial, the trial judge dismissed Mr. Hanke's action ((2003), 333 A.R. 371, 2003 ABQB 616 (Alta. Q.B.)). He found that Mr. Hanke had not discharged the plaintiff's burden of establishing that the accident was caused by the negligence of the manufacturer or distributor. First, he had not established that it was reasonably foreseeable that an operator of the ice-resurfacing machine would mistake the gas tank and the hot water tank. Second, he had not shown that the defendants caused the accident. The trial judge concluded that the accident had been caused by Mr. Hanke's decision to turn the water on when he knew, or should have known, that the water hose was in the gasoline tank, knowing full well, by his own admission, the difference between the two tanks. He found as a fact that Mr. Hanke was not confused by the placement and character of the tanks, and consequently that this had not caused the accident.

4 On appeal, the judgment was set aside and a new trial ordered ((2005), 53 Alta. L.R. (4th) 219, 2005 ABCA 383 (Alta. C.A.)). The Court of Appeal concluded that the trial judge had erred in both his foreseeability and causation analyses. The trial judge's conclusion on foreseeability, the court found, was vitiated by a number of errors, namely: failure to give "adequate analytical emphasis" to certain evidence concerning the placement and marking of the tanks and other workers who had made the same mistake (para. 20); and failure to consider policy factors in determining foreseeability (para. 21). On causation, the Court of Appeal held that the trial judge had erred by failing to consider the "comparative blameworthiness" of the plaintiff and the defendants (paras. 15-16), and in applying a "but for" test instead of a material contribution test (paras. 12-14).

5 The two issues that divided the Alberta courts — foreseeability and causation — dominate the appeal before us. I will deal with each in turn.

A. Foreseeability

6 Liability for negligence requires breach of a duty of care arising from a reasonably foreseeable risk of harm to one person, created by the act or omission of another: *Menow v. Honsberger* (1973), [1974] S.C.R. 239 (S.C.C.), at p. 247, *per* Laskin J. (as he then was). By enforcing reasonable standards of conduct, so as to prevent the creation of reasonably foreseeable risks of harm, tort law serves as a disincentive to risk-creating behaviour: *Stewart v. Pettie*, [1995] 1 S.C.R. 131 (S.C.C.), at para. 50, *per* Major J. The major elements of a tort action — duty, breach causing injury and cause — reflect "the principle of moral

wrongdoing which is the basis of the negligence law": L. Klar, "Downsizing Torts", in N. J. Mullany and A. M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (1998), 305, at p. 307.

7 The trial judge found that it was not reasonably foreseeable that an operator of the ice-resurfacing machine at issue would mistake the gas tank and the hot water tank, and thus place (or allow to remain) a water hose in the gas tank, thereby generating vapourized gasoline that might be ignited by an open flame, leading to an explosion and fire. The trial judge based this conclusion on the evidence, including the different size of the two tanks (one was much taller than the other), and on the fact (as found by him) that the gas tank had a label on it that said "Gasoline Only". He emphasized Mr. Hanke's admission that he knew the difference between the two tanks, and found that he was not confused between them.

8 The Court of Appeal's first criticism on the foreseeability issue was that the trial judge failed to give sufficient "analytical emphasis" to various aspects of the plaintiff's evidence. It is true that, having found that the accident was due to operator error, the trial judge stated, "[t]hus, in this case I do not get to the point of reviewing alleged design error or failure to warn" (para. 65). However, he went on immediately to review all the design errors alleged by the plaintiff and to state why he rejected the allegations (para. 65). He dealt with the allegation of the similar caps, the location of the hot water tank adjacent to the gas tank, the alleged similarity between the two tanks and the issue of warning signs, disposing of each one in turn.

9 The plaintiff submits that the trial judge discounted the evidence of expert witnesses called by the plaintiff on the design of gas delivery systems and the behaviour of workers. It is true that the trial judge placed no reliance on these witnesses. However, a trial judge is not obliged to consider the opinions of expert witnesses if he can arrive at the necessary conclusions on issues of fact and responsibility without doing so: *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), at pp. 23-24.

10 The plaintiff also submits that the trial judge should have placed more weight on the evidence of two other workers who said they had made similar mistakes in the past, while operating similarly configured machines. The trial judge discounted this evidence on the basis of his finding that in this case there had been no confusion. It is said that this was wrong because the evidence on the absence of confusion was far from conclusive. However, a trial judge is not obliged to accept all of the evidence. What is essential is that there be evidence to support the findings of fact he or she makes. The Court of Appeal can interfere with findings of fact only if the trial judge has made a palpable and overriding error with respect to them: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.), at para. 10. There was evidence that supported the trial judge's finding that Mr. Hanke was not confused, notably his own admission. The trial judge's finding of no confusion therefore cannot be displaced.

11 The Court of Appeal's second criticism of the trial judge's rejection of reasonable foreseeability was that the trial judge failed to consider policy matters, namely the seriousness of the injury and the relative financial positions of the parties. The Court of Appeal erred in suggesting that these matters are relevant to foreseeability. Foreseeability depends on what a reasonable person would anticipate, not on the seriousness of the plaintiff's injuries (as in this case) or the depth of the defendant's pockets: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 (S.C.C.), at para. 55.

12 I conclude that, while the Court of Appeal would have preferred a different approach to foreseeability, no error of law or palpable and overriding error of fact or mixed fact and law has been established in the trial judge's approach or conclusion. The Court of Appeal erred in interfering on this ground.

B. Causation

13 The trial judge stated that "[t]he onus is on the Plaintiff to establish that the damage was caused by the negligence of one or both of the Defendants to some degree" (para. 10). He also said: "I must find causation against these defendants before considering contribution" (para. 46). He went on to conclude: "The Plaintiff has failed to establish that the injuries were caused by negligent design ... That being the case, it is not necessary for this Court to consider the apportionment of fault under the rules of contribution ..." (para. 58).

14 The trial judge based these conclusions on the evidence. He emphasized Mr. Hanke's admission that "when he looked at the unit from behind he knew precisely which was the water tank and which was the gasoline tank" (para. 41), as well as his admission that "he was fully familiar with the fact that hot water should not be introduced into the gasoline tank" (para. 42).

He noted that the caps on the two tanks as designed and delivered had been different, and had been replaced by similar caps by the City. He also noted the absence of evidence from Mr. Binette, who had prepped the machine before Mr. Hanke's arrival. Although he stated that he did not get to the point of "reviewing alleged design error or failure to warn", as noted above (para. 8), he also went on to consider the alleged design errors, disposing of each in turn (para. 65). He concluded that "there is no evidence that would show to the balance of probabilities that this event was caused by the defendants" (para. 54).

15 The Court of Appeal stated that the trial judge had erred in failing to conduct a proper contributory negligence analysis and thus in not considering the comparative blameworthiness of the plaintiff and the defendants (paras. 15-16). The Court of Appeal also found that the trial judge erred in applying a "but for" test for causation instead of a material contribution test (paras. 12-14).

1. Comparative Blameworthiness

16 The appellants argue that the Court of Appeal erred in suggesting that "comparative blameworthiness" is a necessary component of the causation analysis. The suggestion attributed to the Court of Appeal is that a court must approach causation not simply by asking whether the defendant's negligent act caused the loss, but by looking globally at all possible causes.

17 It is true that the trial judgment contains some passages that suggest that the carelessness of Mr. Hanke automatically absolves the respondent manufacturer and distributor of liability. That is not the case. An example, put to us in oral argument, illustrates the point. If it is industry standard to design an iron with an automatic shut off switch, and an iron is manufactured without such a switch, the manufacturer of the iron is not absolved of liability merely because the plaintiff was careless in leaving the iron on, resulting in a fire and injuries to the plaintiff. However, I am satisfied that the trial judge found not only that Mr. Hanke's carelessness was responsible for his injuries, but also that the alleged design defects were not responsible for Mr. Hanke's injuries. For example, the trial judge noted that "the accident was caused by operator error and had nothing to do with the design or manufacture of the machine" (para. 56). In light of this finding there was no need for the trial judge to engage in a contributory negligence analysis.

2. The Test for Causation

18 The Court of Appeal found, correctly, that the trial judge had applied a "but for" test in determining causation, stating, "the thrust of the reasoning is that 'but for' the Appellant putting or leaving the hose in the gasoline tank, the explosion would not have occurred" (para. 12). Referring to the observation in *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.), at para. 15, that the "but for" test "is unworkable in some circumstances", the Court of Appeal concluded that this was such a case and that the trial judge should have used a "material contribution" test instead of the "but for" test (para. 14).

19 The Court of Appeal erred in suggesting that, where there is more than one potential cause of an injury, the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence. If the Court of Appeal's reasons in this regard are endorsed, the only conclusion that could be drawn is that the default test for cause-in-fact is now the material contribution test. This is inconsistent with this Court's judgments in *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), *Athey v. Leonati*, at para. 14, *Walker Estate v. York-Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23 (S.C.C.), at paras. 87-88, and *Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58 (S.C.C.), at para. 78.

20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.

21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in *Athey v. Leonati*, at para. 14, *per* Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test,

which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in *Blackwater v. Plint*, at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."

23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell v. Farrell*, at p. 327, *per* Sopinka J.

24 However, in special circumstances, the law has recognized exceptions to the basic "but for" test, and applied a "material contribution" test. Broadly speaking, the cases in which the "material contribution" test is properly applied involve two requirements.

25 First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff's control; for example, current limits of scientific knowledge. Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. In other words, the plaintiff's injury must fall within the ambit of the risk created by the defendant's breach. In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the "but for" test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a "but for" approach.

26 These two requirements are helpful in defining the situations in which an exception to the "but for" approach ought to be permitted. Without dealing exhaustively with the jurisprudence, a few examples may assist in demonstrating the twin principles just asserted.

27 One situation requiring an exception to the "but for" test is the situation where it is impossible to say which of two tortious sources caused the injury, as where two shots are carelessly fired at the victim, but it is impossible to say which shot injured him: *Lewis v. Cook*, [1951] S.C.R. 830 (S.C.C.). Provided that it is established that each of the defendants carelessly or negligently created an unreasonable risk of that type of injury that the plaintiff in fact suffered (i.e. carelessly or negligently fired a shot that could have caused the injury), a material contribution test may be appropriately applied.

28 A second situation requiring an exception to the "but for" test may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission, thus breaking the "but for" chain of causation. For example, although there was no need to rely on the "material contribution" test in *Walker Estate v. York-Finch General Hospital*, this Court indicated that it could be used where it was impossible to prove that the donor whose tainted blood infected the plaintiff would not have given blood if the defendant had properly warned him against donating blood. Once again, the impossibility of establishing causation and the element of injury-related risk created by the defendant are central.

29 In this case, the Court of Appeal erred in failing to recognize that the basic test for causation remains the "but for" test. It further erred in applying the material contribution test in circumstances where its use was neither necessary nor justified.

C. Conclusion

30 I would allow the appeal, set aside the order of the Court of Appeal and restore the trial judgment, with costs throughout.

Appeal allowed.

Pourvoi accueilli.

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2012 NLCA 23
Newfoundland and Labrador Court of Appeal

Gallant v. Brake-Patten

2012 CarswellNfld 135, 2012 NLCA 23, [2012] N.J. No. 132, 215 A.C.W.S. (3d) 760, 321 Nfld. & P.E.I.R. 77, 95 C.C.L.T. (3d) 46, 996 A.P.R. 77

Debbie Brake-Patten, Appellant and Abraham Gallant, Respondent

J.D. Green C.J.N.L., C.W. White, L.R. Hoegg JJ.A.

Heard: April 4, 11, 2011
Judgment: April 9, 2012 *
Docket: 10/11

Proceedings: affirming *Gallant v. Brake-Patten* (2010), 2010 CarswellNfld 6, 2010 NLTD 1, 902 A.P.R. 279, 292 Nfld. & P.E.I.R. 279 (N.L. T.D.)

Counsel: David Hurley Q.C., Andrew A. Fitzgerald, for Appellant
Valerie A. Hynes, John Drover, for Respondent

Subject: Public; Torts; Evidence; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Health law --- Malpractice — Negligence — Causation

Defendant chiropractor performed cervical spine manipulation on plaintiff — After procedure, plaintiff was diagnosed with permanent balance impairment, hearing loss and tinnitus — Diagnosis led to plaintiff's retirement — Plaintiff brought successful action against chiropractor for damages — Trial judge held chiropractor was negligent in discharge of her duty of disclosure and held that person in position of plaintiff would not have consented to cervical manipulation by chiropractor if properly informed of risks and consequences — Chiropractor appealed — Appeal dismissed — Trial judge did not err in finding that chiropractor's cervical manipulation caused plaintiff's injury — Preponderance of evidence demonstrated that trial judge's decision on causation was supportable despite two factual errors in trial judge's reasoning — It could not be said that these two factual errors materially influenced trial judge's finding on causation — While errors might be palpable in that they were obvious, they were not overriding — There was ample other evidence to support trial judge's finding that plaintiff's injury was caused by cervical manipulation.

Health law --- Malpractice — Consent — Informed — Miscellaneous

Defendant chiropractor performed cervical spine manipulation on plaintiff — After procedure, plaintiff was diagnosed with permanent balance impairment, hearing loss and tinnitus — Diagnosis led plaintiff to retire from employment — Plaintiff brought successful action against chiropractor for damages — Trial judge held chiropractor was negligent in discharge of her duty of disclosure and held that person in position of plaintiff would not have consented to cervical manipulation by chiropractor if properly informed of risks and consequences — Chiropractor appealed — Appeal dismissed — Trial judge considered what reasonable patient in plaintiff's position would have done and reasoned that because plaintiff's work and lifestyle were dependant on his ability to perform physical work, and because he was not in desperate condition determined to acquire immediate relief for his symptoms, he would have elected to forego cervical manipulation had he been properly informed of its risks, despite fact that his previous experiences with chiropractor were positive — Trial judge correctly

stated law applicable to issue and made no error in applying it to facts — Chiropractor failed to demonstrate that trial judge made factual errors or erred in his appreciation of evidence on this point — Record disclosed sufficient evidence on which trial judge could rely to conclude that plaintiff would not have consented to cervical manipulation had he been properly advised of its risks — Accordingly, trial judge's finding in this regard was not in error.

Evidence — Opinion — Experts — Admissibility — Miscellaneous

Defendant chiropractor performed cervical spine manipulation on plaintiff — After procedure, plaintiff was diagnosed with permanent balance impairment, hearing loss and tinnitus — Plaintiff retired from employment due to diagnosis — Plaintiff brought successful action against chiropractor for damages — Neurologist Dr. S gave expert opinion evidence on behalf of plaintiff with respect to relationship between plaintiff's hearing loss and manipulation of his cervical spine — Dr. S did not approve of chiropractic neck manipulation and disparaged chiropractic profession's response to warnings about complications arising from procedure — Trial judge admitted and assessed Dr. S's evidence and relied on it and other evidence to support conclusion that chiropractor's manipulation of plaintiff's cervical spine caused his injury — Chiropractor appealed, alleging that trial judge erred in admitting and relying on Dr. S's evidence due to his alleged bias — Appeal dismissed — Trial judge did not err in admitting Dr. S's evidence — Bias or partiality in expert evidence which is based on expert having connection with party or issue or possible predisposition or approach in case is reliability issue which is best determined when whole of expert evidence is considered in context of all trial evidence — As such, issue is one of weight and not admissibility — Challenge to Dr. S's evidence was based on his alleged personal biased views on chiropractic neck manipulations — Effect of such allegation on Dr. S's evidence could not be determined unless and until evidence was assessed in its entirety and within context of all of other trial evidence — This required Dr. S's evidence to be admitted.

Evidence — Opinion — Experts — Weight of evidence — Miscellaneous

Defendant chiropractor performed cervical spine manipulation on plaintiff — After procedure, plaintiff was diagnosed with permanent balance impairment, hearing loss and tinnitus — Plaintiff retired from employment due to diagnosis — Plaintiff brought successful action against chiropractor for damages — Neurologist Dr. S gave expert opinion evidence on behalf of plaintiff with respect to relationship between plaintiff's hearing loss and manipulation of his cervical spine — Dr. S did not approve of chiropractic neck manipulation and disparaged chiropractic profession's response to warnings about complications arising from procedure — Trial judge admitted and assessed Dr. S's evidence and relied on it and other evidence to support conclusion that chiropractor's manipulation of plaintiff's cervical spine caused his injury — Chiropractor appealed, alleging that trial judge erred in admitting and relying on Dr. S's evidence due to his alleged bias — Appeal dismissed — Chiropractor failed to demonstrate any palpable and overriding error in trial judge's appreciation of Dr. S's evidence — Chiropractor did not identify any aspects of Dr. S's neurological evidence that were tainted by his bias or that were otherwise wrong, nor did she identify any way in which Dr. S's neurological opinion was unscientific or untrue to discipline of neurology — It was clear from trial judge's analysis that he carefully considered Dr. S's evidence against his known, strongly held opinions on dangers of chiropractic manipulation and nevertheless found his evidence to be of value and worthy of reliance — This he was entitled to do.

Civil practice and procedure — Trials — Conduct of trial — Powers and duties of trial judge — Giving reasons for judgment

Defendant chiropractor performed cervical spine manipulation on plaintiff — After procedure, plaintiff had symptoms of dizziness, tinnitus, nausea and loss of balance — Plaintiff was diagnosed with permanent balance impairment, hearing loss and tinnitus — Diagnosis had serious consequences for plaintiff's employment and he was required to retire on long-term disability pension — Plaintiff brought successful action against chiropractor for damages — Trial judge held chiropractor was negligent in discharge of her duty of disclosure and held that person in position of plaintiff would not have consented to cervical manipulation by chiropractor if properly informed of risks and consequences — Chiropractor appealed, alleging that trial judge's reasoning was deficient — Appeal dismissed — Trial judge provided supportive contextual analysis for his acceptance of expert opinion evidence from Doctors C, S and B and his rejection of idiopathic sensorineural hearing loss theory of defence — Applying "functional need to know" test to judgment as whole, basis for trial judge's decision

was capable of being made out — There was "logical connection" between decision and evidence and live issues argued at trial — To extent that there might be lack of clarity in trial judge's decision, it did not overcome logical connection between evidence and result and intelligibility of decision — Court's intervention was not justified — Trial judge's decision revealed how he reached his conclusion that causation was established.

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R. v. Abbey (2009), 68 C.R. (6th) 201, 2009 ONCA 624, 2009 CarswellOnt 5008, 254 O.A.C. 9, 97 O.R. (3d) 330, 246 C.C.C. (3d) 301 (Ont. C.A.) — considered

R. v. B. (H.S.) (2008), [2008] 11 W.W.R. 404, 83 B.C.L.R. (4th) 34, [2008] 3 S.C.R. 32, 2008 CarswellBC 2039, 2008 CarswellBC 2040, 2008 SCC 52, 235 C.C.C. (3d) 312, 60 C.R. (6th) 21, 297 D.L.R. (4th) 600, 380 N.R. 130, 260 B.C.A.C. 122, 439 W.A.C. 122 (S.C.C.) — followed

R. v. Braich (2002), 50 C.R. (5th) 92, 210 D.L.R. (4th) 635, 164 B.C.A.C. 1, 268 W.A.C. 1, 2002 SCC 27, 2002 CarswellBC 551, 2002 CarswellBC 552, 162 C.C.C. (3d) 324, 285 N.R. 162, [2002] 1 S.C.R. 903 (S.C.C.) — followed

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R. c. J. (J.-L.) (2000), 2000 SCC 51, 2000 CarswellQue 2310, 2000 CarswellQue 2311, 261 N.R. 111, 37 C.R. (5th) 203, (sub nom. *R. v. J. (J-L.))* 192 D.L.R. (4th) 416, (sub nom. *R. v. J. (J-L.))* 148 C.C.C. (3d) 487, [2000] 2 S.C.R. 600 (S.C.C.) — followed

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R. v. M. (R.E.) (2008), [2008] 11 W.W.R. 383, 83 B.C.L.R. (4th) 44, [2008] 3 S.C.R. 3, 2008 CarswellBC 2037, 2008 CarswellBC 2038, 2008 SCC 51, 235 C.C.C. (3d) 290, 60 C.R. (6th) 1, 297 D.L.R. (4th) 577, 380 N.R. 47, 439 W.A.C. 40, 260 B.C.A.C. 40 (S.C.C.) — followed

R. v. Melaragni (1992), 73 C.C.C. (3d) 348, 1992 CarswellOnt 3347 (Ont. Gen. Div.) — considered

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

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R. v. Sheppard (2002), 50 C.R. (5th) 68, 211 Nfld. & P.E.I.R. 50, 633 A.P.R. 50, 210 D.L.R. (4th) 608, 284 N.R. 342, [2002] 1 S.C.R. 869, 2002 SCC 26, 2002 CarswellNfld 74, 2002 CarswellNfld 75, 162 C.C.C. (3d) 298 (S.C.C.) — followed

R. v. Walker (2008), [2008] 6 W.W.R. 1, 2008 SCC 34, 2008 CarswellSask 347, 2008 CarswellSask 348, 375 N.R. 228, 57 C.R. (6th) 212, [2008] 2 S.C.R. 245, 310 Sask. R. 305, 423 W.A.C. 305, 294 D.L.R. (4th) 106, 231 C.C.C. (3d) 289 (S.C.C.) — followed

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Ross Estate v. Hiscock (2007), 2007 NLCA 2, 2007 CarswellNfld 9, 262 Nfld. & P.E.I.R. 343, 794 A.P.R. 343 (N.L. C.A.) — referred to

Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd. (2009), 72 C.C.L.I. (4th) 193, [2009] I.L.R. I-4839, 2009 ONCA 388, 2009 CarswellOnt 2440, 249 O.A.C. 234 (Ont. C.A.) — considered

Sentilles v. Inter-Caribbean Shipping Corp. (1959), 361 U.S. 107 (U.S. Fla.) — considered

Snell v. Farrell (1990), 110 N.R. 200, 1990 CarswellNB 218, 1990 CarswellNB 82, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289, 107 N.B.R. (2d) 94, 267 A.P.R. 94, 4 C.C.L.T. (2d) 229, (sub nom. *Farrell c. Snell*) [1990] R.R.A. 660 (S.C.C.) — followed

"Ikarian Reefer" (The) (1995), [1995] 1 Lloyd's Rep. 455 (Eng. C.A.) — referred to

Rules considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D
R. 46.07 — referred to

APPEAL by defendant chiropractor from judgment, reported at *Gallant v. Brake-Patten* (2010), 2010 CarswellNfld 6, 2010 NLTD 1, 902 A.P.R. 279, 292 Nfld. & P.E.I.R. 279 (N.L. T.D.), awarding damages to plaintiff for injuries suffered after chiropractic treatment.

***L.R. Hoegg J.A.*:**

1 This appeal concerns whether the appellant chiropractor, Dr. Debbie Brake-Patten, is liable for injuries the respondent Mr. Abraham Gallant suffered following chiropractic treatment he received from her.

Background

2 Shortly after 3 p.m. on Monday, December 10, 2001, Mr. Gallant attended on Dr. Brake-Patten at the Bay St. George Chiropractic Clinic in Stephenville, NL, with a complaint of shoulder and neck pain he believed resulted from hanging outdoor Christmas lights.

3 To relieve Mr. Gallant's discomfort, Dr. Brake-Patten performed cervical manipulation, which is a high velocity low amplitude thrust to a specific area of the cervical spine. Mr. Gallant experienced pain directly afterwards, for which Dr. Brake-Patten gave him an ice pack. Mr. Gallant had consulted with Dr. Brake-Patten on a sporadic basis for minor back and neck complaints in the previous six or seven years. It was not unusual for him to have neck pain following chiropractic treatment.

4 Mr. Gallant went directly home after the consultation. He developed lightheadedness and a feeling that something was not right, and he was unable to eat supper. His condition worsened, in that his hearing was muffled, he was dizzy and off-balance, and he staggered when he walked. He sought medical attention around 9:30 that evening at the Sir Thomas Roddick Hospital in Stephenville. After assessment, he was advised to go home and rest and to return later in the week to have his ears syringed. Upon leaving the hospital he began to vomit. This continued until the following evening. His off-balance feeling, and the ringing and hearing reduction in his right ear persisted.

5 At the time of trial, Mr. Gallant was still suffering profound hearing loss and tinnitus in his right ear which have been diagnosed as permanent. Although improved, his balance remained compromised. He was disabled from his supervisory job at the newsprint mill.

6 Mr. Gallant filed suit against Dr. Brake-Patten, alleging that she had failed to inform him of the risks of cervical manipulation which caused his injury and that she was liable to him for his ensuing damages. Mr. Gallant did not allege that Dr. Brake-Patten manipulated his cervical spine in a negligent manner. Rather, his position was that the procedure itself, even when properly performed, is risky, and did in fact cause his injury. He maintains that if Dr. Brake-Patten had properly informed him of its risks, he would not have had the cervical manipulation. The twelve-day trial concerned liability only. In addition to the testimony of the plaintiff and defendant, the court heard from the plaintiff's wife and expert medical and chiropractic witnesses.

7 In his written judgment, *Gallant v. Brake-Patten*, 2010 NLTD 1, 292 Nfld. & P.E.I.R. 279 (N.L. T.D.), the trial judge found that Mr. Gallant's injuries were caused by the cervical manipulation, and that Dr. Brake-Patten was negligent because she had not properly informed him of the risks of the procedure and that if she had, he would not have consented to it.

Issues on Appeal

8 Dr. Brake-Patten appeals the trial judge's finding that the cervical manipulation caused Mr. Gallant's injury, and that he would not have consented to the treatment had he been properly informed of its risks. She also argues that the trial judge committed legal errors by admitting biased evidence on the causation issue and by not providing reasons for this part of his decision.

9 Dr. Brake-Patten has not appealed the trial judge's finding that she was negligent by failing to obtain Mr. Gallant's informed consent to her treatment.

10 A medical professional may be held liable in tort when that professional is negligent in his or her duty to provide the information necessary for the patient to give his or her informed consent to a medical procedure and the medical procedure actually caused the injury. These cases are referred to as informed consent cases.

11 Every professional negligence case involves proving that the defendant has breached a duty of care owed to the plaintiff and that the plaintiff has suffered damage which was caused by the defendant's breach. In this case, Mr. Gallant's causation burden involved: 1) proving that Dr. Brake-Patten's manipulation of his cervical spine was the mechanism which actually caused his injury; and 2) proving that he would not have consented to the cervical manipulation if he had been properly informed of its risks.

Causation: Did the cervical manipulation cause Mr. Gallant's injury?

The Law

12 Causation in law is an expression of the relationship that must be found to exist between the tortious act of the defendant and the injury to the plaintiff in order to justify the defendant compensating the plaintiff. It is established when a plaintiff proves, on a balance of probabilities, that his or her injury was caused or contributed to by the defendant. (*Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.), at 326-327, and *Courtney v. Cleary*, 2010 NLCA 46 (N.L. C.A.).) In most cases, a plaintiff proves causation by establishing that "but for" the tortious conduct of the defendant, the plaintiff's injury would not have occurred. (*Snell*; *Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.); *Hanke v. Resurfice Corp.*, 2007 SCC 7, [2007] 1 S.C.R. 333 (S.C.C.); and *Cleary*.)

13 An exception arises when a defendant breaches a duty of care owed to a plaintiff and thereby exposes that plaintiff to an unreasonable risk of injury which the plaintiff has actually sustained, *and* it is impossible for the plaintiff to prove causation on the "but for" test due to factors outside of his or her control but within the control of the defendant. In these exceptional circumstances, the law permits a plaintiff to use the "material contribution" test to prove causation, for the reason that it would offend basic notions of fairness and justice to deny liability. (*Athey* and *Hanke*.)

14 Determination of causation is "essentially a practical question of fact which can best be answered by ordinary common sense". (*Snell* at 328, citing *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475 (U.K. H.L.), at 490.) The plaintiff always has the burden of proving the necessary causal connection between his or her injury and the defendant's conduct. However, the law does not require that causation be established with certainty. Causation is established if a plaintiff proves, on the evidence, that it is more likely than not that the defendant caused the plaintiff's injury. (*Snell* at 328 - 330.)

15 A trial court can take a robust and pragmatic approach to the evidence, and may draw inferences of causation even if positive or scientific proof of causation has not been adduced. (*Snell* at 330; and *Athey* at paragraph 16.) Whether an inference is or is not drawn is a matter for a trial judge to decide upon considering and weighing the evidence. Where there is evidence supporting causation, and a defendant has not adduced contrary evidence, the defendant runs the risk of the court drawing an inference adverse to the defendant's position. (*Snell*, at 329-330.) A robust and pragmatic approach to the evidence is a way of considering the evidence. It is not to be confused with speculation and conjecture, which are concepts not based on evidence.

Analysis

16 Dr. Brake-Patten argues that the trial judge erred in concluding that her manipulation of Mr. Gallant's cervical spine caused his injury. She says that the trial judge relied on speculation and conjecture in reaching his conclusion and also that he committed numerous factual errors and/or misdirected himself as to the evidence to support his conclusion.

17 To succeed in her appeal on this issue, Dr. Brake-Patten must demonstrate that the trial judge either misstated the law, or made palpable and overriding errors in his appreciation of the evidence or his application of the law to the facts supporting his finding that the manipulation of Mr. Gallant's cervical spine caused his injury.

18 Dr. Brake-Patten argues that the trial judge misapprehended the evidence respecting whether a viral-initiated hearing loss would have been conductive in nature. At paragraph 120 of his decision, the trial judge stated that Doctors Cron and Batten had opined that a viral-initiated hearing loss should have been a conductive hearing loss.

19 The uncontroverted expert evidence was that viral labyrinthitis causes sensorineural, not conductive, hearing loss. Therefore, the trial judge's statement is incorrect. Mr. Gallant concedes this mistake.

20 The appellant also argues that the trial judge's statement at paragraph 110 that the expert evidence was that Mr. Gallant's hearing loss should have manifested bilaterally if its cause were viral is factually wrong and unsupported by the evidence. I do not agree. Dr. Stewart's report of September 15, 2008, reads: "Patients with inflammation-related sensorineural hearing loss complain of a slowly progressive hearing loss which is bilateral in about 80% of cases." This evidence was confirmed by the doctor in his trial testimony, and is supportive of the trial judge's statement that a viral-initiated hearing loss should have manifested bilaterally because the probabilities of hearing loss manifesting bilaterally favour this conclusion. Accordingly, the trial judge cannot be said to have erred in this respect.

21 Dr. Brake-Patten also alleges that the trial judge misapprehended the extent to which people who suffer from viral labyrinthitis recover their hearing after treatment with steroidal medication. Counsel refers to the trial judge's comments at paragraph 110 to the effect that if the cause of Mr. Gallant's hearing loss were viral it should have been subsiding and responding to medication by the time he consulted with Dr. Swannie on January 10, 2002.

22 The expert evidence established that of patients who suffer sudden sensorineural deafness, one third will recover, one third will regain usable hearing and one third will have no hearing recovery. This evidence supports the probability that Mr. Gallant's hearing loss would be recovering had he been prescribed steroidal medication on a timely basis. It would still be possible that Mr. Gallant could have been in the group of one-third which does not recover at all, in which case he would not have been recovering at the time of Dr. Swannie's consult, but the probability is that he would have been recovering. Consequently, it was open to the trial judge to find it was more likely than not that Mr. Gallant's hearing ought to have been improving by the time he consulted Dr. Swannie if Mr. Gallant had been prescribed steroidal medication. It was a factor that the trial judge was entitled to consider and rely on in his reasoning process. However, his finding that Mr. Gallant's condition ought to have been responding to the prescribed medication by the time he consulted with Dr. Swannie cannot be supported by the evidence because Mr. Gallant was not prescribed steroidal medication. Mr. Gallant was prescribed antibiotics, which the evidence establishes have no effect on recovery of viral labyrinthitis. Accordingly, although the trial judge's characterization of the effect of evidence respecting the steroid medication was correct, he erred in his assessment of the effect of the antibiotic medication on Mr. Gallant's situation.

23 Dr. Brake-Patten also argues that the trial judge did not give sufficient consideration to certain questions raised by Dr. King. Dr. King initially provided expert opinion that the cause of Mr. Gallant's injury was "not an ischematic event involving his vestibular apparatus" and that the chiropractic manipulation did not cause his illness. He supported this view on the bases that Mr. Gallant did not suffer acute pain at the time of the manipulations and that there was no radiographical evidence of vertebral dissection. Dr. King did not express an opinion that the cause was viral. Rather, he stated he believed Mr. Gallant had an idiopathic sudden sensory neural hearing loss, and suggested that a viral cause was equally as plausible an explanation for Mr. Gallant's injury as a vascular cause. Dr. King conceded in his second report and in his trial evidence that chiropractic manipulation could have caused Mr. Gallant's injury. However, he continued to dispute the conclusiveness of the plaintiff's

vascular theory for the reason that there was no radiological evidence supporting it, and maintained that Mr. Gallant could not prove on a balance of probabilities that the cause of his injury was vascular. In addition to the lack of radiological proof that Mr. Gallant suffered a vascular event, Dr. King also expressed the opinion that the delay between Mr. Gallant's chiropractic treatment and the onset of his symptoms was too long to support Mr. Gallant's causation theory. Dr. King asserted throughout that a virus could be equally causative of Mr. Gallant's hearing loss, and that theory was Dr. Brake-Patten's focus in the conduct of her defence.

24 Medical conditions which "just happen" are always caused by something. Although a cause may not be known, established or even suspected, there is a cause. The word "idiopathic", as in idiopathic sensorineural hearing loss, simply means that the cause is unknown or undetermined. Both cervical manipulation, known to cause vascular events, and a virus, also known to cause hearing damage, could be causative of Mr. Gallant's hearing loss. It is for the court to determine, on the evidence available, if possible, the probable cause of an injury. This does not mean that a legal decision must be 100% scientifically correct. If a court determines causation, it simply means that on the evidence presented, which was tested adversarially, the court was convinced on a balance of probabilities of the likely cause.

25 In this case the trial judge rejected Dr. King's position that Mr. Gallant could not prove that he suffered a vascular event as a result of the chiropractic manipulation. On the evidence, it was open to him to do so. It is important to note that there is no evidence which supported the cause of Mr. Gallant's injury being viral to the exclusion of a vascular cause, although all experts agree that viruses are known to cause hearing damage. Neither is there any evidence that the cause of his injury was more likely viral than vascular. Mr. Gallant had no viral symptoms at the time of his injury. His lack of viral symptoms, although not conclusive proof that his loss was not caused by a virus, is relevant and supportive of his not having a virus at the time. Also supportive of Mr. Gallant's vascular theory is that the course of his hearing damage was not slow to progress, as is the case with viral-induced hearing loss.

26 Dr. King maintained that Mr. Gallant ought to have been able to prove by radiography that he suffered a vascular event. The evidence was that Mr. Gallant had his first MRI on September 12, 2002, some ten months after the date of injury. Doctors Batten, Stewart and Cron all testified that radiography at that time would not have shown evidence of a vascular event because the blood would have been re-absorbed during the long delay since the manipulation. The same three expert witnesses said that given the hair-like diameter of the labyrinthine artery to which they say the clot from the dissection was thrown and which in their opinions caused the ischematic event leading to Mr. Gallant's deafness and tinnitus, it was unlikely that radiological equipment would have detected anything even if radiographs had been taken shortly after the cervical manipulation. Even Dr. King conceded that MRI investigation would only *possibly* have disclosed Mr. Gallant's dissection. Dr. King testified that a more definitive investigative tool, Magnetic Imaging Angiography (MRA), which in his view Dr. Batten ought to have ordered for Mr. Gallant when he saw him in May 2002, could have provided radiological evidence. Aside from issues respecting the availability of MRA to Mr. Gallant, Dr. Batten was retained by Mr. Gallant's disability insurer for the specific purpose of determining whether Mr. Gallant's injuries prevented him from performing his supervisory job at the mill. Dr. Batten was not retained to determine the cause of Mr. Gallant's injury by proving it with angiography, which may or may not have provided any evidence of a vascular event. In any event, the availability of early radiographic evidence was outside of Mr. Gallant's control. The fact that his physicians did not order radiological testing forthwith upon Mr. Gallant's complaint of symptoms does not prevent him from making and/or succeeding in a claim that could possibly have been conclusively proved by those tests.

27 Dr. King also based his opinion on the length of the delay between the time of the cervical manipulation and the onset of Mr. Gallant's symptoms, reasoning that if Mr. Gallant was injured by the cervical manipulation, he would have suffered a stroke, with serious pain and other consequences, directly afterwards. Dr. King says that the two to three hour delay between the cervical manipulation and the onset of Mr. Gallant's balance and hearing symptoms is too long a time lapse for the cervical manipulation to be causative.

28 Temporality was an issue at trial, and it figured significantly in the trial judge's causation analysis (see paragraphs 120-124 and 131 of the decision). Drs. Cron, Batten and Stewart explained that they did not regard the vascular event they say Mr. Gallant suffered as a full vertebral artery dissection or stroke. Both Dr. Cron and Dr. Batten, who are ENT specialists, would not characterize Mr. Gallant's injury as a stroke because it did not involve the brain. Dr. Stewart, after hearing during the trial about

the nature and severity of Mr. Gallant's balance issues on the night of December 10, 2001, felt the injury was more serious than he initially believed. Accordingly, Dr. Stewart, a neurologist, felt that Mr. Gallant's serious balance problems which manifested in the hours following the chiropractic manipulation treatment demonstrated possible brain involvement.

29 The opinion evidence of Doctors Stewart, Batten and Cron was that Mr. Gallant's symptoms, which developed within two or three hours of chiropractic treatment and escalated thereafter, manifested within a reasonable time for the type of injury he suffered. They each explained that Mr. Gallant did not suffer a full dissection of his vertebral artery. Rather, he suffered a tearing of the intima (the inner layer of the vertebral artery) which threw a clot to the labyrinthine artery (which is about the size of the diameter of a hair) which in turn blocked the blood supply to the cochlea long enough to cause permanent hearing damage. These doctors explained that the dissection of the innermost of three layers of the vertebral artery would cause blood to seep out in such a manner as to cause the progression of symptoms as Mr. Gallant suffered them, and not as Dr. King suggested. A full dissection of the vertebral artery, as opposed to a tear in the intima, may well have caused Mr. Gallant to suffer significant and immediate symptoms, but Mr. Gallant did not suffer a full dissection.

30 The record and decision indicate that the trial judge appreciated and considered the questions raised by Dr. King. But it was entirely open to him to accept the explanatory and well-reasoned evidence of Doctors Batten, Cron and Stewart, proffered separately, as answering Dr. King's concerns about proof, especially given the absence of evidence supporting a viral cause. The trial judge's acceptance of the evidence of Doctors Batten, Cron and Stewart is neither speculation nor conjecture.

31 Dr. Brake-Patten also emphasises what she asserts is a change in Dr. Stewart's opinion as to the nature of Mr. Gallant's vascular event. She argues that Dr. Stewart's evidence is at variance with that of Doctors Cron and Batten, and that Dr. Stewart changed his opinion during his cross-examination at trial from that expressed in his report.

32 I do not agree that Dr. Stewart resiled from his original opinion. He did, however, expand upon it after learning additional information about the balance problems Mr. Gallant experienced on the evening of December 10, 2001. Dr. Stewart testified that the dissection of the intima may have also thrown a bit of clot to Mr. Gallant's cerebellum which would explain his severe leaning to the right on his way into the hospital on December 10, 2001. Dr. Stewart's evidence on this point was:

> The interesting thing is a dissection gives rise to a clot that often goes in a spray. You don't just — you know, you may not just get one clot. You can have a series of clots. That's why most — there is what we call classical brainstem syndromes. They are rare. They are typically patchy. So you get a little bit of an embolus going to one side, a little bit of an embolus going to the other side. And again, that's, you know, potentially explained by, you know, if he threw a little clot to the right side of his cerebellum and a little clot to his ear maybe that's what was going on. The fact that he was stumbling to the right is something that just can't be overlooked. That's the first time I'd heard of it.

33 Dr. Brake-Patten argues that the evidence about Mr. Gallant's balance problems came anecdotally from the plaintiff's wife during the trial which was seven years post incident. The plaintiff testified that his balance problems began a couple of hours after his treatment, and the hospital record of the same date references Mr. Gallant's dizziness and feeling off balance. Moreover, the reports of Doctors Swannie, O'Shea, Batten, McComiskey, Cron, Stewart and King are replete with references to Mr. Gallant's balance issues. It was the nature and degree of the balance problems, specifically that Mr. Gallant was leaning heavily to the right and requiring his wife's assistance to walk into the hospital on the night of December 10, 2001, which Dr. Stewart was either unaware of or did not fully appreciate before trial, which informed his expanded opinion.

34 It is therefore not accurate to say that Dr. Stewart changed his opinion at trial by testifying that Mr. Gallant suffered a stroke in the brain stem. Dr. Stewart was simply expanding on the same theory as he, Dr. Cron and Dr. Batten had held all along concerning the etiology of Mr. Gallant's hearing loss, that being that a clot thrown from the dissection of the intima of his vertebral artery into his labyrinthine artery caused an ischemic event in the cochlea resulting in Mr. Gallant's hearing damage. With the new information, Dr. Stewart was merely explaining that at the time of the dissection another bit of clot could have been thrown in a different direction which could explain Mr. Gallant's balance issues. This is not a new causation theory, nor is Dr. Stewart's evidence in this regard inconsistent with that of Dr. Cron and Dr. Batten. It is an expansion of Dr. Stewart's

original opinion based on information new to him, which had likely been obscured by the concentration of medical attention on the more serious issue of Mr. Gallant's loss of hearing.

35 Trials involving complicated medical issues sometimes result in experts modifying or expanding their opinions at trial beyond the four corners of their written reports. While the circumstances of each case must be evaluated so as to prevent prejudice to a party who has relied on written reports in preparing for trial, (See *Ross Estate v. Hiscock*, 2007 NLCA 2, 262 Nfld. & P.E.I.R. 343 (N.L. C.A.)) in this case there is no reason to disallow the evidence. Dr. Brake-Patten has not demonstrated that she has been prejudiced by this evidence. The trial judge had the discretion to admit it and it was properly before the court. In any event, the trial judge's decision does not indicate undue or exclusive reliance on this aspect of Dr. Stewart's testimony.

Effect of identified errors

36 Dr. Brake-Patten has shown that the trial judge made two factual errors in the reasoning leading to his decision that Mr. Gallant's injury was caused by the cervical manipulation. However, for Dr. Brake-Patten to succeed in her appeal, she must demonstrate that these factual errors are palpable and overriding. In other words, were they so material to the trial judge's conclusion on causation that the finding cannot stand in their absence?

37 In my view, the preponderance of evidence demonstrates that the trial judge's decision on causation is supportable despite these errors. Doctors Cron, Batten and Stewart testified that it was highly probable that Mr. Gallant's injury was caused by the cervical manipulation. They explained the mechanism and progression of Mr. Gallant's symptoms. Their evidence is not novel, given that the chiropractic profession itself acknowledges the risk of vascular damage associated with cervical manipulation (see paragraphs 5, 19 and 20 of the trial judge's decision) and medical literature has long recognized risks of impaired vision, sudden sensorineural hearing loss, loss of balance and death as a result of cervical manipulation (see paragraph 48). On the evidence, it was open to the trial judge to accept the evidence of Doctors Cron, Batten and Stewart as satisfactorily answering the questions raised by Dr. King's evidence and to eliminate a viral cause.

38 It is clear from the trial judgment that the trial judge's decision on causation was heavily influenced by temporality, in that Mr. Gallant suffered symptoms of injury very soon after the cervical manipulation. This temporality factor, which enjoyed the support of Doctors Cron, Batten and Stewart, was significant to the trial judge's finding of causation, as shown from his reliance on the following excerpt from *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (U.S. Fla. 1959), at 109-110:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration.

39 Upon consideration of all of the evidence and the trial judge's decision, it cannot be said that his two factual errors materially influenced his finding on causation. While they may be palpable in that they are obvious, they are not overriding. As already explained, there was ample other evidence to support the trial judge's finding that Mr. Gallant's injury was caused by the cervical manipulation.

40 Accordingly, the trial judge did not err in finding that Dr. Brake-Patten's cervical manipulation caused Mr. Gallant's injury.

Causation: Would Mr. Gallant have consented to cervical manipulation if he had been properly informed of its risks?

41 The trial judge found that Mr. Gallant would have declined cervical manipulation if Dr. Brake-Batten had properly informed him of its risks. Dr. Brake-Patten challenges that finding, arguing that the trial judge made a palpable and overriding error in reaching that conclusion.

The Law

42 In *Arndt v. Smith*, [1997] 2 S.C.R. 539 (S.C.C.), the Supreme Court of Canada set out the law governing determinations of whether a patient would have consented to treatment despite knowing its risks. At paragraphs 6 and 9 of *Arndt*, Cory J. discussed the tension between a purely objective test and a purely subjective test from the perspective of fairness to both parties, and ultimately confirmed the use of the modified objective test as adopted by Laskin C.J. in *Reibl v. Hughes*, [1980] 2 S.C.R. 880 (S.C.C.).

43 The modified objective test favours a high standard of disclosure which recognizes a patient's right to be given the information necessary to make informed choices from his or her treatment providers. The test and its rationale were described by Cory J. at paragraph 16 of *Arndt v. Smith*:

> The *Reibl* test has had the desired effect of ensuring that patients have all the requisite information to make an informed decision regarding the medical procedure they are contemplating. Members of the medical and legal professions are familiar with its requirements. It strikes a reasonable balance, which cannot be obtained through either a purely objective or a purely subjective approach. A purely subjective test could serve as an incitement for a disappointed patient to bring an action. The plaintiff will invariably state with all the confidence of hindsight and with all the enthusiasm of one contemplating an award of damages that consent would never have been given if the disclosure required by an idiosyncratic belief had been made. This would create an unfairness that cannot be accepted. It would bring inequitable and unnecessary pressure to bear upon the overburdened medical profession. On the other hand, a purely objective test which would set the standard by a reasonable person without the reasonable fears, concerns and circumstances of the particular plaintiff would unduly favour the medical profession.

44 Dr. Brake-Patten relies on the Alberta decisions *Olsen v. Jones*, 2009 ABQB 371, 11 Alta. L.R. (5th) 203 (Alta. Q.B.), and *Dickson v. Pinder*, 2010 ABQB 269 (Alta. Q.B.) to support her position on this ground of appeal.

45 In *Olsen*, the court found that the plaintiff, Mr. Olsen, had provided his informed consent to treatment by the defendant chiropractor. Mr. Olsen was a knowledgeable and veteran patient of several different chiropractors, and had executed an Informed Consent form, which he said in his testimony he had read and understood. Additionally, the court questioned the reliability of much of Mr. Olsen's evidence, especially in relation to his evidence concerning the symptoms he alleged were caused by the chiropractor given that he suffered similar symptoms from the pre-existing condition he had prior to the impugned treatment and also afterwards due to a subsequent injury.

46 In *Dickson*, the plaintiff suffered a stroke after chiropractic treatment. The court found that the defendant chiropractor had advised Ms. Dickson of the risk of stroke, but had failed to discharge his duty to inform her of reasonable alternative therapies. The court found that even if the defendant had emphasized the risks of stroke to Ms. Dickson and discussed with her alternatives to chiropractic treatment, she would have consented to his treatment. The evidence showed that Ms. Dickson had already investigated other sources of pain relief and that she was very determined to get chiropractic treatment. The fact that she had knowingly assumed an increased risk of stroke by continuing to smoke also influenced the court. In short, the court found that because Ms. Dickson was an experienced patient used to deciding treatment options who demonstrated a cavalier attitude to risk, she would likely have had the chiropractic treatment regardless of the defendant's failure to properly inform her.

Analysis

47 The facts of the *Olson* and *Dickson* cases are distinguishable from Mr. Gallant's case. Unlike the plaintiffs in those cases, Mr. Gallant was not a perennial chiropractic patient who had signed a written consent to treatment. He did not have a chronic neck condition, nor was he in dire need of immediate relief. He chose to seek this treatment. He was not losing time from work as a result of his condition. At the time of injury, he was 46 years old. He was physically active and enjoyed outdoor activities. His supervisory job at the mill required physical agility and he was pursuing further training to enhance his work opportunities. He and his wife had invested in a personal care home business for which he did the maintenance, which also required him to be physically able. As well, other treatment options without serious risks were available and not discussed with

Mr. Gallant, and could possibly have helped him with his sore neck. The trial judge considered what the reasonable patient in Mr. Gallant's position would have done and reasoned that because Mr. Gallant's work and lifestyle were dependant on his ability to perform physical work, and because he was not in a desperate condition determined to acquire immediate relief for his symptoms, he would have elected to forego the cervical manipulation had he been properly informed of its risks despite the fact that his previous experiences with Dr. Brake-Patten were positive.

48 The trial judge correctly stated the law applicable to this issue, and he made no error in applying it to the facts. Dr. Brake-Patten has not demonstrated that the trial judge made factual errors or erred in his appreciation of the evidence on this point. The record discloses that there was sufficient evidence on which the trial judge could rely to conclude that Mr. Gallant would not have consented to cervical manipulation had he been properly advised of its risks. Accordingly, the trial judge's finding in this regard is not in error.

Expert Opinion Evidence: Did the Trial Judge Err by Admitting and Relying on Dr. Stewart's evidence?

Background

49 Dr. Brake-Patten argues that Dr. Bradley Stewart's evidence is biased and that the trial judge erred by admitting and relying on it.

50 Dr. Stewart is a neurologist. He was proffered by Mr. Gallant to provide neurological opinion on the relationship between Mr. Gallant's hearing loss and the manipulation of his cervical spine. Dr. Stewart's expert evidence was to include "the diagnosis and treatment of disease or trauma involving the central, peripheral and autonomical nervous systems including their coverings, blood vessels and effector tissue such as muscles and also including opinion evidence on strokes and vertebral artery dissections." (See paragraph 83 of the trial decision.)

51 Dr. Brake-Patten objected to Dr. Stewart's proposed evidence. Her objection is described at paragraphs 84 and 85 of the trial judgment:

> [84] Without any challenge to Dr. Stewart's academic or clinical credentials, the defence sought disqualification on the basis of bias. The bias issue was based on the allegation that Dr. Stewart had made critical comments about the chiropractic profession in his second report in which he suggested, among other things, that the chiropractic community was in denial with regard to the risk of serious injury to patients arising from manipulation therapy of the neck. Dr. Stewart attributed this state of affairs to what he believed was inadequate training of chiropractors in neurology. He was also critical of the quality of research by the chiropractic community with regard to the potential adverse consequences from cervical manipulation.
>
> [85] The defence specifically directed the Court's attention to a book published in 2000 entitled *"Spin Doctors: The Chiropractic Industry Under Examination"*, (The Dundurn Group: Toronto, 2002), the foreword of which was authored by Dr. Stewart. The foreword contained criticism by Dr. Stewart of the chiropractic profession similar to those discussed in his rebuttal to Dr. King's second report.

These comments made by the trial judge were in relation to the following specific comments Dr. Stewart made in the foreword to *Spin Doctors: The Chiropractic Industry Under Examination*: "[m]uch like the tobacco industry of the 1960's, the chiropractic community appears to feel that if they continue to deny virtually all complications arising from their treatment the public will not listen to the warnings of all medical doctors" and "[t]here is a straw that breaks the camel's back — perhaps this book will be it".

52 A voir dire was held. In considering admissibility, the trial judge directed himself to the principles established by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), and *R. c. J. (J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.). He determined that Dr. Stewart's evidence concerning vascular events associated with injury was both relevant and beyond the ordinary knowledge of the court and therefore it was necessary to his consideration of causation:

> [92] Applying the criteria to Dr. Stewart, the Court is satisfied that the evidence of Dr. Stewart is clearly relevant given the neurological perspective on the question of causation given by Dr. King in an area where the risks to the vertebral artery from manipulation of the cervical spine are documented but are alleged to be rare in their occurrence.
>
> [93] Dr. Stewart's evidence is also relevant and necessary in assisting the Court with regard to the fact finding process. Dr. Stewart has demonstrated that he has academic and clinical knowledge as a neurologist to give opinion evidence regarding strokes resulting from injury to the vertebral artery....

53 The trial judge determined that critical commentary found in Dr. Stewart's second report did not "detract from the value of the analysis and commentary made from a medical view-point in response to Dr. King's opinion." The trial judge ultimately admitted Dr. Stewart's reports and permitted him to testify, although he excised "three strident and inappropriate" comments from Dr. Stewart's second report:

> [97] Notwithstanding Dr. Stewart's criticism of the chiropractic community and the issues surrounding the manner of his retention, the Court has determined that he was able to give useful testimony with regard to the probabilities surrounding whether Mr. Gallant's symptoms occurred as the result of a vascular event or a viral condition. The criteria outlined in **Mohan** [have] been met for the purpose of consideration of his testimony. In reaching this conclusion, I have considered the core material of both of Dr. Stewart's reports as well as his trial testimony, both on direct and cross-examination. I am satisfied that Dr. Stewart was sufficiently neutral and objective in explaining and defending his opinion that the admissibility of his evidence is justified.

54 It is clear from the decision that the trial judge assessed Dr. Stewart's evidence in his overall consideration of the evidence, and that he relied on it, although by no means exclusively, to support his conclusion that Dr. Brake-Patten's manipulation of Mr. Gallant's cervical spine caused his injury.

The Appeal

55 Dr. Brake-Patten asserts that Dr. Stewart's criticism of the chiropractic profession and his avowed desire to eradicate chiropractic neck manipulations shows that he is neither independent nor objective, and that he is effectively an advocate for Mr. Gallant. She maintains the doctor's views constitute a bias against the chiropractic profession so as to render his evidence inadmissible. Alternatively, she maintains that if Dr. Stewart's evidence is admissible, it is, for the same reasons, unreliable and therefore worthy of little or no weight.

Issue

56 It is clear that Dr. Stewart does not approve of chiropractic neck manipulation and that he is disparaging of what he says is the chiropractic profession's response to warnings about complications arising from the procedure. The issue, however, is whether his open and unapologetic position affects his neurological opinion evidence such that it ought not to be admitted, or alternatively, if admitted, relied upon.

Standard of Review

57 To succeed in her argument that the trial judge erred in admitting Dr. Stewart's evidence, Dr. Brake-Patten must demonstrate that the trial judge made a legal error by misstating, misinterpreting or misapplying the law in admitting Dr. Stewart's evidence. To succeed in her argument that the trial judge ought not to have relied on Dr. Stewart's evidence, Dr. Brake-Patten must establish that the trial judge made a palpable and overriding error in his appreciation of Dr. Stewart's evidence. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.).)

The Law

58 The receipt of evidence by trial courts is governed by rules and principles which have developed over time for the purpose of increasing the likelihood that the evidence received is relevant and accurate. Relevant and accurate evidence is what

trial courts need in their pursuit of truth, which is their ultimate objective (*R. v. Nikolovski*, [1996] 3 S.C.R. 1197 (S.C.C.) at paragraph 13 and *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (S.C.C.), at 483). [1]

59 Generally speaking, opinion evidence is not admissible because it usurps the role of the fact-finding court. Expert evidence, sophisticated though it may be, is opinion evidence. However, the law recognizes that courts must sometimes decide issues which require specialized knowledge not within the common understanding of judges and juries, so it permits the reception of expert evidence to assist courts with these decisions. This rationale was explained in *Mohan*, and succinctly put by MacDonald J. in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.), an oft-quoted case which addresses the role of an expert in civil trials:

> Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court... ... an expert's report "cannot be advocacy dressed up as expert opinion." ...

60 In civil cases, the starting point for deciding whether expert opinion evidence is admissible is rule 46.07 of the *Rules of the Supreme Court, 1986*. Subject to the overriding discretion of the trial judge, the rule provides for notice of the proposed expert evidence to an opposite party as a condition of admissibility. It does not address, of course, the substantive principles relating to admissibility.

61 Admissibility of expert opinion evidence is governed by the criteria set out by the Supreme Court of Canada in *Mohan*. The four criteria are:

> 1) the expert must be properly qualified;
>
> 2) the proffered evidence must be relevant;
>
> 3) the proffered evidence must be necessary to assist the trier of fact; and
>
> 4) there must be no rule excluding the proffered evidence.

62 The reliability of Dr. Stewart's evidence is central to Dr. Brake-Patten's appeal arguments respecting both admissibility and reliance. Reliability of proffered expert evidence is addressed in *Mohan* under the relevance criterion. Sopinka J., speaking for the Court, determined that reliability of evidence ought to be considered in relation to its probative value, and admitted or excluded accordingly:

> Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as [a] question of law. Although *prima facie* admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *Morris v. The Queen* [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.
>
> (Emphasis added.)

63 In *J. (J.-L.)*, the Supreme Court concluded that parties should be afforded the opportunity to put forward the most complete evidentiary record consistent with the rules of evidence. However, Binnie J. emphasized that a trial court should take its role of gatekeeper seriously:

> ... The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

A trial court's gatekeeper function is especially important in criminal cases where juries are involved, for prejudice resulting from the admission of unreliable evidence in a jury trial is more difficult to remedy than in civil or judge-alone cases.

64 Reliability of proffered expert evidence was considered as an admissibility criterion in *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.), where the court applied a threshold test of reliability to novel scientific knowledge and techniques, and made determinations based on balancing the assessed value and reliability of the proffered evidence with its prejudicial effect.

65 In *R. v. Abbey*, 2009 ONCA 624, 246 C.C.C. (3d) 301 (Ont. C.A.) the Court considered whether expert sociological evidence on the tattoo culture of urban street gangs was admissible in a jury trial. Doherty J.A., writing for the Court, distinguished threshold reliability from ultimate reliability, at paragraph 142 of the judgment:

> In performing the "gatekeeper" function, a trial judge of necessity engages in an evaluation that shares some of the features with the evaluation ultimately performed by the jury if the evidence is admitted. The trial judge is, however, charged only with the responsibility to decide whether the evidence is sufficiently reliable to merit its consideration by the jury. The integrity of the trial process requires that the trial judge not overstep this function and encroach onto the jury's territory. In assessing threshold reliability, I think trial judges should be concerned with factors that are fundamental to the reliability of the opinion offered and responsive to the specific dangers posed by expert opinion evidence. Trial judges, in assessing threshold reliability, should not be concerned with those factors which, while relevant to the ultimate reliability of the evidence, are common with those relevant to the evaluation of evidence provided by witnesses other than experts. For example, I would not think that inconsistencies in an expert's testimony, save perhaps in extreme cases, would ever justify keeping the expert's opinion from the jury. Juries are perfectly able to consider the impact of inconsistencies on the reliability of a witness's testimony.
>
> (Emphasis added.)

66 The *Abbey* Court ultimately determined that the expert evidence was admissible because it met the test for threshold reliability, and that its ultimate reliability, including the reliability of the information used by the expert to inform his opinion evidence, was properly a matter of weight for the fact-finding jury.

67 The criteria for admissibility of expert evidence as set out in *Mohan* have been held to apply to civil cases. As principles of law, these criteria are equally applicable to civil and criminal cases.

68 An allegation of bias on the part of an expert witness can potentially engage both threshold and ultimate reliability considerations.

69 In *McNamara Construction Co. v. Newfoundland Transshipment Ltd.*, 2000 CarswellNfld 402 (Nfld. T.D.), a breach of contract case related to the construction of a crude oil shipping terminal, the defendant argued that an expert's report demonstrated that she was not objective and independent. In the course of his analysis, Orsborn J., as he was then, remarked at paragraph 4:

> [4] ... I do believe that when reporting as an expert, the expert and the report, if it's to be of assistance, do require a demonstration of a measure of objectivity and independence, and that is an objectivity and independence which flows from being true to the particular discipline involved....
>
> (Emphasis added.)

70 Justice Orsborn went on to find that the expert report contained pejorative language, legal analyses and legal conclusions in favour of the plaintiff. He ultimately concluded the report was inadmissible due to its partiality to the plaintiff, saying it was not a report of assistance to the court within the proper and limited sphere of expert, technical and scientific assistance.

71 An expert's report was also ruled inadmissible in *Day v. Karagianis*, 2005 NLTD 21 (N.L. T.D.). There, the plaintiff had sought to introduce a medico-legal report which the trial judge found: a) lacked independence and objectivity; b) contained pejorative and judgmental language; c) made legal interpretations and conclusions; d) was an instrument of advocacy and argument on behalf of the Plaintiff; and e) failed to confine itself to the appropriate area of expertise. Although the court ruled the report inadmissible, the expert was permitted to give *viva voce* evidence subject to guidelines set by the court.

72 The result in *Day* — that the reports were inadmissible but the expert was permitted to testify — is an illustration of a court purging inappropriate material from an expert's evidence so as to enable otherwise valuable evidence to be put before the court. The result of this ruling enabled the party proffering the expert to be heard, provided the expert confined her evidence to assisting the court with matters within her area of expertise.

73 In *Corner Brook Pulp & Paper Ltd. v. Geocon*, 2000 CarswellNfld 412 (N.L. T.D.), the court ruled an expert's report inadmissible on the basis that it contained legal analyses and conclusions and pejorative language, and that it did not provide necessary evidence on matters that were beyond the ken of the court. The objecting party had argued that the expert's report ought not to be admitted on grounds of partiality, one example of which was that the proffered expert had been a former president of the defendant company at a time relevant to the litigation. On that specific issue, Orsborn J. was not persuaded that independence of an expert was a necessary pre-condition to the reception of his or her opinion evidence. He held that where the expert is otherwise properly qualified, the evidence of a partial expert is admissible and that type of partiality is a factor which would influence assessment of the reliability of the evidence, which is an issue going to weight. (See *Geocon* at paras. 13 and 14.)

74 In *Loblaws Inc. v. United Dominion Industries Ltd.*, 2007 NLTD 45 (N.L. T.D.), the defendant sought to introduce an expert report and testimony from a welder which related to the construction of a collapsed roof. The court admitted the expert evidence, but ultimately gave it little weight because the witness' general approach was "to assign legal responsibility for the defects away from the defendant" causing the court to find the expert lacked the objectivity required of expert witnesses.

75 In *Perry v. St. John's Transportation Commission*, 2010 NLTD(G) 154 (N.L. T.D.), the court considered the admissibility and reliability of an expert report and *viva voce* evidence from a family doctor who testified on behalf of his injured patient. After reviewing the law, Dunn J. admitted the doctor's expert report and opinion evidence, but ultimately accorded it little weight because the witness lacked "the level of objectivity and independence [which] the plaintiff, his patient, required of him."

76 In *Performance Factory Inc. v. Atlantic Insurance Co.*, 2010 NLTD 40 (N.L. T.D.) (presently under appeal to this Court but not on this issue), the defendant proffered expert evidence on the cause of a fire. The court admitted the evidence but gave it little weight, finding that the expert, who was retained several years after the fire, had set out to support the defendant's theory of arson which was demonstrated by the lack of supporting physical evidence for the expert's opinion and his dismissive attitude to other causation theories.

77 In *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Eng. Comm. Ct.), an English civil case commonly referred to as "*Ikarian Reefer*," after the name of the vessel involved, Cresswell J. listed seven duties and responsibilities of testifying experts. This list was endorsed by the English Court of Appeal ([*"Ikarian Reefer" (The)*] [1995] 1 Lloyd's Rep. 455 (Eng. C.A.)) with one small qualification immaterial to this matter. *Ikarian Reefer* figures prominently in Canadian jurisprudence concerning testifying experts, and was cited in all of the above-referenced cases. Items 1 and 2 from Justice Cresswell's list are relevant:

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

> 2. An expert should provide independent assistance to the court by objective unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume a role of advocate.

78 There is no suggestion in *Ikarian Reefer* that the duties and responsibilities listed are meant to be used as admissibility criteria, or that the expert evidence which was received in that case ought not to have been admitted.

79 Dr. Brake-Patten relies on *Kern v. Forest*, 2010 BCSC 938 (B.C. S.C.) to support her position. In *Kern*, Dr. Stewart testified as an expert witness for the plaintiff. The *Kern* court admitted Dr. Stewart's evidence, but chose not to rely on it, saying it was unhelpful because the doctor was glib and flippant while testifying, his opinions of chiropractic treatment "demonstrated a pre-disposition to be critical of care by chiropractors" and he "crossed the line separating an expert witness from an advocate". There is no suggestion in *Kern* that admissibility of Dr. Stewart's evidence was a concern. Although the *Kern* court chose not to rely on Dr. Stewart's evidence, the decision does not explain how the doctor's views on chiropractic affected the reliability of his expert neurological opinion.

80 The appellant also relies on *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722 (Ont. S.C.J.), *Carmen Alfano Family Trust v. Piersanti*, [2009] O.J. No. 1224 (Ont. S.C.J.) and *Bank of Montreal v. Citak* (2001), 104 A.C.W.S. (3d) 110 (Ont. S.C.J. [Commercial List]) [2001 CarswellOnt 944 (Ont. S.C.J. [Commercial List])] to support her position respecting Dr. Stewart's evidence.

81 In *Eastern Power*, the central issue was the calculation of power rates in a breach of contract case. The plaintiff proffered a consultant in the areas of energy and public utility regulation to opine on the rate calculations made by the defendants. Bellamy J. specifically adopted the list of duties and responsibilities of expert witnesses from *Ikarian Reefer*, admitted the expert evidence and assessed it for its weight in the context of the whole of the evidence. She found that some of the expert's evidence was quite helpful, but in the final analysis, she could not accept his opinions on the rate calculations because: 1) it was evident during the expert's testimony that he had a deep distrust of public utilities; 2) the expert came to conclusions which were either without foundation or erroneous; and 3) when deficiencies in the expert's calculations were revealed through cross-examination, he would only reluctantly and after extensive cross-examination concede the errors. Justice Bellamy concluded that the expert was far too influenced by the exigencies of litigation and that he had become an advocate for his client. There is no suggestion in *Eastern Power* that the expert evidence was inadmissible.

82 In *Alfano*, the court disqualified a proposed expert witness because he was an advocate for the party proffering him. The court found that the witness had not independently verified key foundational facts in his reports, and that he had based his analysis on the defence position, all of which was obvious from a series of emails between him and the defendant.

83 In *Bank of Montreal*, the defendant proffered an expert to give opinion evidence on receivership matters. In a pre-trial application, his evidence was challenged for its lack of neutrality and objectivity. The court ruled his evidence inadmissible, saying that although sincere, the proffered witness was not an expert in receivership matters (which the witness had admitted), and that the basis for his evidence was unverified financial information provided by the client. The court also noted the proffered witness' candid admission that he always took the position of advocate for his client, and that his fee was dependant on the outcome of the matter.

84 John D. MacIsaac, Q.C. underscores the importance of objectivity and independence in expert evidence in his article entitled "The Role of the Expert in the Courtroom: Objective Expert or Team Member?" (2001) 9 C.L.R. (3d) 84, at page 4, and suggests that these issues affect the weight a fact-finding body gives to the expert's evidence:

> To be the neutral observer who assists the court in interpreting complicated factual matters, an expert witness must retain an air of objectivity and a semblance of independence from the hiring party. Objectivity can be attained if the lawyer hiring the expert understands that the expert owes a degree of neutrality to the court. The lawyer who refrains from drawing his or her own expert into the role of the "hired gun" will be rewarded in the long run because the court will be more inclined to give greater weight to expert testimony not tainted by advocacy. In the case of *Huerto v. College of Physicians & Surgeons (Saskatchewan)* Smith J., in quoting from the discipline committee, agreed that weight should be given to the

expert witness's testimony "because of his qualifications and experience but less than might have been given if it were not for the bias that he brought to the proceedings."

. . . . .

85 The importance of objectivity in an expert's evidence was also addressed by Thomas S. Woods in his article "Impartial Expert or "Hired Gun"? Recent Developments at Home and Abroad", (Mar. 2002) 60 Advocate (Van.) 205-209. At page 205, Mr. Woods reviews the reason why experts are permitted to give opinion evidence, and then cautions that partiality is likely to affect the weight such evidence is given:

> ...While not conclusive, evidence of a history on the expert's part of alignment with particular interests in litigation will generally affect credibility and weight in a negative way. The opinion of an expert who is too eager to please, too keen to produce a report that is helpful, will almost always unravel on the stand...
>
> (Emphasis added.)

Analysis

Admissibility

86 When expert evidence is challenged on the basis that it is biased or partial, it is important to identify the nature of the alleged bias or partiality. Legal advocacy, containing legal analyses and argument, legal interpretations and conclusions, which masquerades as expert evidence is distinctly different from expert evidence which is alleged to be biased or partial on the basis of the expert witness having a connection to a party or an issue in the case.

87 The law reviewed in paragraphs 58 to 85 above indicates that when there is an allegation that a witness is biased or partial because the witness has a connection with a party or a matter in issue, the courts have treated the issue as one which goes to weight rather than admissibility. (See *Loblaws Inc.*, *Perry*, *Performance Factory Inc.*, *Ikarian Reefer*, *Eastern Power*.) In the cases where allegedly biased or partial expert evidence was not admitted, the rationale for its exclusion rested primarily on findings that the evidence was legal advocacy, in that it contained legal analyses and drew legal conclusions in support of the party which retained the expert. (See *McNamara*, *Geocon* , *Bank of Montreal*.) In *Geocon*, although the expert evidence was not admitted, the court specifically stated that the proposed expert's close connection with one of the parties would not render the expert's evidence inadmissible. It is not the role of an expert witness to argue, interpret or opine on questions of law. Legal advocacy disguised as expert evidence is, in principle, not admissible evidence, because it does not meet the admissibility criteria set out in *Mohan*; specifically, it is not necessary to assist the court. In principle, therefore, it is properly exigible from proffered expert evidence.

88 On a practical level however, there will be cases where the expression of an opinion by an expert may, depending on the subject matter, inevitably have to stray into the area of legal commentary. The fact that an expert's report may incidentally do so, should not necessarily so taint the report as to render it inadmissible in totality. It is only where the approach taken is so comprehensive and blatant that the court concludes that the reliability or utility of the opinion as a whole is seriously compromised - ie. so tainted as a whole as not to have a modicum of objectivity — that the report as a whole should be rejected as inadmissible. In other cases, the court should consider redacting offending portions and admitting the rest. In still other cases where the offending passages are minor or incidental, the report could be admitted with the issue being dealt with as one of weight.

89 When a challenge to expert evidence is based on the expert witness having a connection to a party or an issue in the case or a possible predetermined position on the case, the essence of the challenge is that the evidence is not reliable because the expert has tailored his evidence to suit the position of the particular party or the expert's personal views. This kind of reliability is not an admissibility issue; it is not a threshold consideration of the kind identified in *Abbey*, or a gatekeeper issue as described in *J. (J.-L.)* Nor is it an issue which requires a cost-benefit analysis or a probity versus prejudice assessment of the kind Sopinka J. describes in *Mohan*. Rather, it is an ultimate reliability issue, the determination of which calls for an overall assessment of the

evidence, carried out in the usual way a court assesses evidence, and involving a review of consistencies and inconsistencies, determinations of credibility and judging whether the evidence helps to establish points in issue and whether it makes sense.

90 The assessment of ultimate reliability cannot take place at the admissibility stage. To attempt to decide the ultimate reliability of expert evidence at the admissibility stage would be akin to making a final decision before knowing all of the facts.

91 Although expert evidence is initially tendered in the form of a written report, an expert's *viva voce* testimony given in chief explains the support for the opinion contained in the report by describing how the tenets of the expert's discipline, applied to the facts of the case, enable him or her to reach his or her conclusion. Much more information respecting these and other issues is usually revealed in cross-examination. A court needs to hear the whole of this evidence from the expert in order to fairly evaluate its reliability.

92 Moreover, the ultimate reliability of the expert evidence cannot be fully and fairly determined if it is considered in isolation from the other trial evidence. It is only when the court considers and measures the impugned evidence in relation to the other trial evidence that its pertinence to the points in issue can be decided and its overall worth to the court can be ascertained and appreciated. This contextual approach to determining the ultimate reliability of the evidence is the fairest way to evaluate it and the best way to get the truth of the issues before the court.

93 In summary, in civil cases, if expert evidence meets the *Mohan* criteria for admissibility, it is admissible. Bias or partiality in expert evidence which is based on the expert having a connection with a party or issue or a possible pre-disposition or approach in the case is a reliability issue which is best determined when the whole of the expert evidence is considered in the context of all of the trial evidence. As such, the issue is one of weight and not admissibility.

94 In this case, there was no challenge to Dr. Stewart's qualifications as an expert witness. The trial judge determined that Dr. Stewart's evidence was relevant and necessary, and there was no exclusionary rule prohibiting its admission. Thus, the doctor's evidence met the *Mohan* criteria for admissibility. The nature of the challenge to Dr. Stewart's evidence was based on his alleged personal biased views on chiropractic neck manipulations, the inference being that his expert neurological evidence was tailored to accord with his personal biased views. The effect of such an allegation on Dr. Stewart's evidence could not be determined unless and until the evidence was assessed in its entirety and within the context of all of the other trial evidence. This required Dr. Stewart's evidence to be admitted. Accordingly, the trial judge did not err in admitting Dr. Stewart's evidence.

Reliability

95 Dr. Brake-Patten argues that the trial judge ought not to have relied on Dr. Stewart's evidence, presumably because it was not reliable. In order to succeed in this argument, the appellant has the heavy burden of having to show that the trial judge made a palpable and overriding error in his appreciation of Dr. Stewart's evidence.

96 Dr. Brake-Patten does not identify any aspects of Dr. Stewart's neurological evidence that are tainted by his bias or that are otherwise wrong, nor does she identify any way in which the doctor's neurological opinion is unscientific or untrue to the discipline of neurology. She simply asserts that Dr. Stewart's evidence in unreliable because he is opposed to chiropractic neck manipulation.

97 A trial judge can choose not to rely on evidence for any number of reasons. Usually when a trial judge chooses not to rely on evidence, difficulties with the evidence itself have been identified. For instance, the impugned evidence has been shown to have no factual support or to be in conflict with other more reliable evidence, or to be untrue to the principles of the particular discipline involved. Sometimes the impugned evidence is shown to be illogical or plainly wrong, or that the expert is inappropriately intransigent and argumentative in the face of being shown the error of his or her ways. Such deficiencies relate to the quality or content of the evidence itself.

98 Expert evidence cannot be dismissed out of hand on grounds that the proffered expert holds certain views, or because he or she has made statements in the past which touch on the issues before the court. These sorts of allegations do not go to the quality and content of the expert's evidence. Rather, they concentrate on the expert witness personally. It is, however, the

weight to be given to the "expert evidence [as] the independent product of the expert uninfluenced as to form or content by the exigencies of litigation" which is the issue (*Ikarian Reefer* (Q.B.) at 81).

99 A testifying expert can be adverse to a procedure which he or she believes to be unsafe in any circumstance, as long as he or she provides professional or scientific support for his or her opinion that the procedure caused the injury in the circumstance before the court. An expert can hold an intransigent personal view about the legitimacy of a certain procedure, medical or otherwise, and still give an objective opinion provided that he or she supports his or her specific opinion by objectively considering the facts in the case and by properly applying the science of his discipline to those facts. The evidence of expert witnesses who hold particular or strong points of view at odds with the views of an adverse party is not automatically unreliable simply because the expert holds strong views (provided they have some rational basis) on one side or the other on an issue in the case, particularly if the issue is a matter of public or scientific controversy. The qualities of neutrality and objectivity in expert evidence flow from a neutral evaluation of the presenting problem and an objective application of the expert's discipline to it, explained in *Ikarian Reefer* (Q.B.) at page 81 as "objective unbiased opinion in relation to matters within his or her expertise". Neutrality and objectivity in the context of expert evidence do not mean that the witnesses themselves have to be neutral people or that they cannot hold personal opinions about matters relating to the litigation.

100 This is not to say that a witness' personal views cannot improperly inform his expert opinion so as to make his or her evidence biased; it is entirely possible that this could be so. In such cases, though, the bias would usually be demonstrated during the examination of the expert witness, and especially during cross examination, when inconsistencies, contradictions, errors, intransigent positions in the face of obvious difficulty and other problems affecting the quality and content of the evidence have been revealed. This is when the witness could well "unravel on the stand" as Thomas Woods put it in his article referred to in paragraph 85 above. This is also what happened in both *Eastern Power* and *Bank of Montreal* where full examination of the expert witness revealed problems with the quality and content of the expert evidence causing the trial judges to decide they could not rely on it. Even when an expert has not unraveled on the stand, or the evidence has not been shown to be defective, the expert evidence may still be rejected by a trial judge because he or she favours other, more convincing expert evidence, or is simply unconvinced by it.

101 A party challenging an expert witness' evidence on the basis of a connection with a party or an issue is generally expected to do more than simply assert that the expert witness' past statements or personal opinions make his or her evidence unreliable. The challenging party ought to be able to show how the expert evidence has been improperly affected by matters extraneous to the litigation, in this case bias, and if such improper effect is shown, also that the trial judge failed to appreciate and account for it in making his or her decision.

102 The appellant's objection to Dr. Stewart's evidence rests on the allegation of bias arising from his personal connection to a live issue in the case. The trial judge considered Dr. Stewart's reports, heard his examination-in-chief, and heard his cross-examination by competent counsel. He evaluated the doctor's evidence on the basis of how the doctor interpreted the facts and circumstances of Mr. Gallant's injury and applied his discipline of neurological medicine to it. The trial judge considered Dr. Stewart's evidence in the context of all of the trial evidence, including Dr. King's neurological evidence and the expert evidence given by two ENT physicians. The trial judge was well aware of Dr. Stewart's personal views of chiropractic neck manipulation when conducting his overall assessment of the evidence, and he addressed this issue in his reasons. Dr. Brake-Patten has made no suggestion that the doctor's evidence was untrue to the tenets of his discipline of neurology, or that the assumptions for his opinion or his opinion itself were wrong.

103 Dr. Brake-Patten does not argue that the trial judge misapprehended Dr. Stewart's evidence. Moreover, Dr. Stewart's evidence did not materially differ from the evidence of Doctors Cron and Batten, whose evidence the trial judge found reliable. The trial judge ultimately found Dr. Stewart's evidence reliable for the reasons he stated.

104 The fact that the court in *Kern* did not find Dr. Stewart's evidence reliable, in the context of that case, does not mean that Dr. Stewart's evidence must always be so regarded. It is clear from the trial judge's analysis in the instant case, that he carefully considered Dr. Stewart's evidence against his known, strongly-held opinions on the dangers of chiropractic manipulation and nevertheless found his evidence to be of value and worthy of reliance. This he was entitled to do.

105 In the result, Dr. Brake-Patten has not demonstrated any palpable and overriding error in the trial judge's appreciation of Dr. Stewart's evidence. Accordingly, this ground of appeal fails.

Reasons: Did the trial judge err in not providing sufficient reasons for his decision that cervical manipulation caused Mr. Gallant's injury?

106 Dr. Brake-Patten argues that the trial judge erred by failing to explain how the evidence permitted Mr. Gallant to satisfy the causation test set out in *Snell*. She says that the trial judge's reasons for decision found at paragraph 133 are insufficient in that they do not address questions raised by Dr. Swannie's report or Dr. King's evidence, nor do they explain why the evidence of Doctors Cron, Batten and Stewart was accepted. Consequently, she says she does not know why she lost and that her ability to seek meaningful appellate review is compromised.

107 Paragraph 133 of the trial decision reads:

> Notwithstanding questions raised by Dr. Swannie's report and Dr. King's report and testimony as to whether the proper diagnosis was idiopathic in nature, the opinions of Doctors Cron, Batten and Stewart have enabled Mr. Gallant to meet the causation test set out in **Snell** that a vascular event resulted from the cervical manipulation.

108 Mr. Gallant's position is that the trial judge's careful and well-reasoned assessments of the evidence are found at various points in his judgment, and that they properly informed and explained his conclusions. Mr. Gallant further submits that if there are any deficiencies in the trial judge's decision, they do not preclude meaningful review, of which the appellant has availed by virtue of this appeal.

The Law

109 The proper functioning of the judiciary within our constitutional framework requires judges to provide rational justifications for their decisions. Decisions devoid of reasons undermine respect for the law and for our system of government. (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869 (S.C.C.).) In *Sheppard*, the Supreme Court of Canada explained in detail why parties must not be left in the dark as to why matters of legal importance to them were decided as they were. The case provides an itemized list of principles to guide appellate review on the ground of deficient reasons for decision.

110 In several subsequent cases, the high court expanded on the duty to give reasons and what constitutes their sufficiency. (See: *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903 (S.C.C.); *R. c. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621 (S.C.C.); *R. c. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 (S.C.C.); *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 (S.C.C.); *R. v. B. (H.S.)*, 2008 SCC 52, [2008] 3 S.C.R. 32 (S.C.C.); and *R. v. M. (R.E.)*, 2008 SCC 51, [2008] 3 S.C.R. 3 (S.C.C.).) The most recent and comprehensive treatment of these issues is found in *M. (R.E.)*. At paragraph 11 of that case, Chief Justice McLachlin summarized the three main purposes of reasons:

> (1) reasons tell the parties why the decision was made, proving that the court heard and considered the evidence and has not taken account of extraneous matters;
>
> (2) reasons provide public accountability so that justice is seen to be done; and
>
> (3) reasons permit effective appellate review.

She further noted that reasons help ensure fair and accurate decision-making by focusing the judge's attention on the salient issues, and that reasons help to develop the law in accordance with the principle of *stare decisis* (paragraph 12).

111 At paragraph 35 of *M. (R.E.)*, the Chief Justice summarized the test for sufficiency of reasons:

(1) Appellate courts are to take a functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered (see *Sheppard*, at paras. 46 and 50; *Morrissey*, at p. 524).

(2) The basis for the trial judge's verdict must be "intelligible", or capable of being made out. In other words, a logical connection between the verdict and the basis for the verdict must be apparent. A detailed description of the judge's process in arriving at the verdict is unnecessary.

(3) In determining whether the logical connection between the verdict and the basis for the verdict is established, one looks to the evidence, the submissions of counsel and the history of the trial to determine the "live" issues as they emerged during the trial.

112 The Supreme Court of Canada has applied these principles, which were developed in the context of criminal law, to civil cases. In this regard, there is no principled reason to differentiate between civil and criminal cases given the effort and resources, both private and public, expended on civil cases and their importance to the parties involved. (See *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.); and *C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.).)

113 *Hill* is a civil case wherein the plaintiff alleged negligent investigation and malicious prosecution against the defendant police force. Mr. Hill lost at trial, and appealed to the Court of Appeal and then to the Supreme Court of Canada on several grounds, of which one was that the trial judge's reasons for decision were inadequate. The Supreme Court of Canada dismissed Mr. Hill's appeal on the basis that he was unable to establish negligence, but the court also decided that the trial judge's reasons were sufficient. In her reasoning on that issue, Chief Justice McLachlin relied on *Sheppard*, and stated the following:

> [100] The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: *R. v. Sheppard* [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.
>
> [101] In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*, at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

114 *McDougall* involved a civil suit for damages for sexual abuse. The plaintiff had won at trial, but lost in the Court of Appeal where the defendant challenged the sufficiency of the trial judge's reasons. In restoring the trial judge's decision, the Supreme Court of Canada observed reasons are not inadequate because in hindsight it may be possible to say that they were not as clear and comprehensive as they might have been.

115 Several other civil cases have been decided in like manner by Canadian appellate courts. (See *Gibson v. Insurance Corp. of British Columbia*, 2008 BCCA 217, 80 B.C.L.R. (4th) 232 (B.C. C.A.); and *Macdonald v. Mineral Springs Hospital*, 2008 ABCA 273, 295 D.L.R. (4th) 609 (Alta. C.A.).)

116 The appellant relies on *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388, [2009] I.L.R. I-4839 (Ont. C.A.). In *Sagl*, the plaintiff sued her insurance company for loss due to a fire. She succeeded at trial despite many challenges to her credibility. The Court of Appeal overturned the trial decision because the trial judge did not address any of the plaintiff's inconsistencies, former lies under oath, documentary discrepancies or general credibility issues in choosing to believe her evidence.

Analysis

117 In this case, Dr. Brake-Patten alleges that the trial judge's reasoning, as found in paragraph 133, was deficient in that it failed to address the questions raised by Dr. Swannie's report and Dr. King's reports and evidence, and it failed to explain why the opinions of Doctors Cron, Batten, and Stewart were accepted and how these doctors' evidence enabled Mr. Gallant to meet the causation test set out in *Snell*.

118 By way of preliminary observation, the trial judge's reasoning is not confined to paragraph 133. He addressed the strengths and weaknesses of all of the expert opinions and other evidence, as well as the arguments of the parties, at several places throughout his decision. As well, this case is supported by a comprehensive evidentiary record which discloses what is required to permit appellate review. As Chief Justice McLachlin stated in *Hill*, a comprehensive evidentiary record "means that less detailed reasons may be acceptable".

119 Dr. Swannie did not testify. He provided three reports. In the first one, dated March 25, 2002, he stated that Mr. Gallant suffered sudden hearing loss of uncertain etiology. In his second report, dated March 25, 2002, he said Mr. Gallant suffered:

> a viral labyrinthitis and has now compensated for it. The significance of his neck manipulation is unknown — no other neurologic complaints were noted.

In his third report, dated September 25, 2002, he wrote:

> the diagnosis was that of sudden right hearing loss and loss of right vestibular function due to possible viral labyrinthitis. The significance of his neck manipulation is unknown and may not be a factor ...

120 It is apparent that Dr. Swannie's reports were equivocal as to the cause of Mr. Gallant's injury, as the trial judge accurately noted. Moreover, the issue raised in Dr. Swannie's reports, specifically whether the chiropractic manipulation was causative, was the very issue that was addressed by all of the expert witnesses throughout the trial and by the trial judge in his consideration and ultimate acceptance of the evidence of Doctors Cron, Batten and Stewart. In these circumstances, it cannot reasonably be argued that Dr. Swannie's report raised serious questions which the trial judge did not address.

121 The appellant argues that the trial judge failed to address the questions raised by Dr. King's evidence. The trial judge referenced Dr. King's evidence specifically at paragraphs 115 to 120, 125 and 126 of his judgment. He accurately noted that although Dr. King did not opine that a virus caused Mr. Gallant's hearing damage, Dr. King maintained that a viral cause of Mr. Gallant's injury was equally as plausible as a vascular cause, and also that Dr. King's challenge to the expert opinion evidence of Doctors Batten, Cron and Stewart was based on there being no radiological evidence of vascular damage and what Dr. King considered to be a delayed onset of Mr. Gallant's symptoms.

122 As noted in the previous discussion on causation, the trial judge accepted the separate but same explanations of Doctors Stewart, Batten and Cron that Mr. Gallant did not sustain a full dissection of the vertebral artery, but rather a tearing of the intima, which threw a small clot to the hair-size labyrinthine artery which would have dissolved quickly and would not likely have been detectable by timely imaging studies even if done forthwith.

123 The trial judge discussed the parties' competing theories of causation in his review of the evidence from paragraphs 98 to 133. This review shows that he considered Dr. King's evidence throughout, but he ultimately found the opinion evidence given by Doctors Cron, Batten and Stewart to be persuasive, and the likelihood of Mr. Gallant's hearing loss being viral or idiopathic unconvincing. It is clear from the judgment that the trial judge found that the questions raised by Dr. King's evidence were answered by the strong opinion evidence of Drs. Batten, Stewart and Cron. The trial judge addressed causation throughout his decision and emphasized temporality as a significant factor supporting causation as per *Snell*.

124 The trial judge provided a supportive contextual analysis for his acceptance of the expert opinion evidence from Doctors Cron, Stewart and Batten and his rejection of the idiopathic sensorineural hearing loss theory of the defence. A trial judge does not have to address every land-mark along his reasoning route or provide a detailed description of his reasoning process

(*M. (R.E.)*), and less than perfect reasons do not provide a free-standing right of appeal (*Walker*, per Binnie J. at paragraph 20). There was no need for him to give more detailed explanations when the deficiencies of the defendant's arguments were so apparent. The trial judge's reasoning was adequate for appellate review, especially given the complete evidentiary record. Moreover, the comprehensive factum and able submissions of Dr. Brake-Patten's counsel indicate that she was not constrained in her right to seek meaningful appellate review. Applying the "functional need to know" test to the judgment as a whole, the basis for the trial judge's decision is "capable of being made out". There is a "logical connection" between the decision and the evidence and live issues argued at trial. (*M. (R.E.)* at paragraph 34.)

125 To the extent that there might be a lack of clarity identified in the trial judge's decision, it does not overcome the logical connection between the evidence and the result, and the intelligibility of the decision. In these circumstances, this Court's intervention with the result would not be justified. (See *Hill* at paragraph 101.)

126 Overall, the trial judge's decision reveals how he reached his conclusion that causation was established. The test set out in *M. (R.E.)* has been met.

127 Accordingly, this ground of appeal fails.

128 In summary, none of Dr. Brake-Patten's grounds of appeal succeeds. In the result, her appeal should be dismissed. Mr. Gallant should have his party and party costs on the appeal.

***J.D. Green C.J.N.L.*:**

I concur.

***C.W. White J.A.*:**

I concur.

Appeal dismissed.

Footnotes

* Leave to appeal refused at *Gallant v. Brake-Patten* (2012), 2012 CarswellNfld 390, 2012 CarswellNfld 391 (S.C.C.).

1 That the pursuit of truth is the ultimate objective of a trial is somewhat qualified by trial efficiency concerns and the exigencies of the trial process itself, as well as the possibility that relevant and probative evidence will be excluded under section 24(2) of the *Canadian Charter of Rights and Freedoms*, due to *Charter* violations.